

Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights^{*}

M. Cherif BASSIOUNI^{}**

Professor of law and President of the International Human Rights Law Institute, de Paul University College of Law ; President, International Association of Penal Law ; President, International Institute of Higher Studies in Criminal Sciences.

Truth Is Seldom Pure and Rarely Simple

I. Introduction

International civil society has expressed a growing discontent for the practice of granting impunity, particularly for the leaders who ordered the commission of atrocities and the senior commanders who executed these unlawful orders. This discontent is illustrated by the indictment of leaders such as Augusto Pinochet¹ of Chile, Slobodan Milosevic² of Serbia, and Radovan Karadzic³ of the former Republika Srpska in Bosnia.

The demands of international civil society for the respect of human rights and for accountability for their violation also influenced the creation of several *ad hoc* international institutions dedicated to these ends, such as the International Military Tribunal, the International Military Tribunal for the Far East, the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda. These institutions benefitted from the support of governments motivated by universal humanistic values and recognize the importance of international criminal accountability mechanisms as a means to maintain world order and restore peace.

These developments reflect the emergence of accountability and justice as internationally recognized values that are necessary for the maintenance of world order and for the restoration and maintenance of peace. However, the pursuit of international criminal justice on an *ad hoc* basis is less than satisfying. For example, while tribunals were established in the wake of World War II, armed conflict in the Balkans, and the Rwandan genocide, similar international action was not taken in the aftermath of the atrocities committed in Sierra Leone⁴ or Cambodia.⁵ To avoid the pitfalls of *ad hoc* justice, international norms and standards for accountability need to be clearly established and consistently applied in order to achieve predictability and ultimately deterrence. An important first step in providing this consistency and predictability comes in the form of the recent establishment of a permanent international criminal court.

This article addresses legal issues that should help overcome the political and other barriers to accountability by removing impunity as an option in the wake of violations of international humanitarian law and human rights law norms. If restrictions are placed on the permissible parameters of arrangements for addressing abuses, negotiators would be precluded from opting for impunity as an expediency.

Also, this article explores state and individual responsibility for violations of international humanitarian law and human rights law norms, specifically in the context of victim reparation.

II. The Historical Context

Since World War II, the number of conflicts of a non-international character and the abuses of repressive regimes have dramatically increased in number and intensity.⁶ This is in sharp contrast to the decline of conflicts of an international character during the same period.⁷ The resulting violations of international humanitarian and human rights law that have occurred, and continue to occur, during these purely internal conflicts include genocide, crimes against humanity and war crimes, along with, *inter alia*, extra-judicial executions, torture, and arbitrary arrest and detention.⁸ During the course of the twentieth century, it is estimated that conflicts of a non-international character and the abuses by repressive regimes have resulted in over 170 million deaths.⁹

This is compared with an estimated 33 million military casualties over the same period of time.¹⁰ Since World War II alone, it is estimated that more than 250 conflicts of a purely internal character have occurred.

These post-World War II situations, which include conflicts of a non-international character and the abuses by repressive regimes, have resulted in an estimated 86 million casualties.¹¹

Notwithstanding this high level of victimization, few national or international prosecutions have occurred. In fact, since the international tribunals at Nuremberg and Tokyo following World War II, there have been only two internationally established *ad hoc* investigatory commissions and two *ad hoc* tribunals, which were for Yugoslavia and Rwanda respectively.¹² Furthermore, there has been only one international truth commission, which was for El Salvador.¹³ This commission, however, did not generate prosecutions. A special body was created in South Africa called 'The Truth and Reconciliation Commission'¹⁴ from which some prosecutions may result. In addition, there have only been two national prosecution systems established, in Ethiopia and Rwanda, in the aftermath of conflicts. Select national prosecutions have also occurred in Argentina¹⁵ and Chile,¹⁶ where a national inquiry commission was also established.

Furthermore, in some Eastern and Central European countries, "lustration" laws have been passed to remove persons of the past regime from office, but only a few prosecutions have taken place.¹⁷ For all practical purposes, very little else has occurred, and even these existing accountability mechanisms have produced few tangible results. Few of the perpetrators of the crimes described above have ever faced justice, including those who committed *jus cogens* crimes such as genocide, crimes against humanity, war crimes and torture, for which there is a duty to prosecute and punish. Furthermore, even the basic truths of what happened in these conflicts, such as how and why they evolved and who bears responsibility for the atrocities that occurred have only seldom been exposed by governmental or international bodies. That task, with all its understandable limitations, has been undertaken primarily by non-governmental organizations, journalists, and researchers.

III. The Failure to Provide Accountability

Why have so few efforts been undertaken, either through prosecutions or other accountability mechanisms to enforce violations of international humanitarian and human rights law? The answer is that justice is all too frequently bartered away for political settlements. Whether in international or purely internal conflicts, the practice of impunity has become the political price paid to secure an end to the ongoing violence and repression.¹⁸

In these bartered settlements, accountability to the victims and the world community becomes the object of political trade-offs, and justice itself becomes the victim of *realpolitik*.¹⁹

Bartering away justice for political results, albeit in the pursuit of peace, has been the traditional method of settlement used by political leaders who seek to end conflicts or facilitate respect for human rights in repressive regimes. The grim reality is that in order to obtain peace, negotiations must be held with the very leaders who frequently are the ones who committed, ordered, or allowed atrocious crimes to be committed. For example, Serbian President Slobodan Milosovic, the architect of the atrocities committed in Bosnia between 1991 and 1994, was seemingly granted *de facto* immunity from prosecution by the Yugoslav Tribunal in exchange for his signature on the Dayton Peace Accords that ended that conflict. Thus, the choice presented to negotiators is whether to have peace or justice. Sometimes this dichotomy is presented along more sophisticated lines: peace now, and justice some other time.²⁰ The choice is, however, frequently fallacious and the dichotomy may be tragically deceptive. Surely, no one can argue that peace is unnecessary and not preferable to a state of violence. But the attainment of peace is not necessarily to the exclusion of justice, because, frequently, justice is necessary to attain peace.

As Pope Pius XII stated in his address on the subject of international criminal justice:

“A peaceful and ordered social life, whether within a national community or in the society of nations, is only possible if the juridical norms which regulate the living and working together of the members of the society are observed”.²¹

The question thus arises as to the meaning of the word "peace" -- namely, its scope, goals, and duration. Indeed, the word "peace" is used freely in the context of ending conflicts or ensuring transition from repressive regimes to those that ensure respect for human rights. But, this word is used without being defined, or more particularly, without any identification of what the goal of the peace is or how long the purported peace is designed to last. There is, therefore, a wide range of meanings of the term. In the political discourse of ending conflicts, it ranges from the cessation or absence of hostilities to popular reconciliation and forgiveness between social groups previously in conflict with one another. It also includes the removal of a repressive regime or leader and the effectuation of a regime change.

The processes of attaining peace, whatever the intended outcome, vary in accordance with the type of conflict, its participants, the number and type of violations of international humanitarian or human rights law, other violative conduct by opposing groups, and the popular perceptions of events, as well as the future expectations of popular reconciliation between or co-existence amongst opposing groups. Peace, therefore, encompasses a wide range of policy options, some of which can be combined to attain that end. But, in a world order based on the rule of law and not on the rule of might, the attainment of peace to end conflicts cannot be totally severed from the pursuit of justice whenever justice may be required in the aftermath of violence. Granted, peace and justice are ideals founded upon certain values whose meaning varies epistemologically and according to group and individual beliefs.

Yet, however relative these ideals and their outcomes may be, they are nonetheless subject to the world community's norms and standards which represent the threshold of international legality. If peace is not intended to be a brief interlude between conflicts, it must, in order to avoid future conflict, encompass what justice is intended to accomplish: prevention, deterrence, rehabilitation, and reconciliation.

There is no doubt that every conflict has its own peculiarities and can even be labeled *sui generis*.

That reality, in itself, however, does not and cannot exclude the application of existing international legal norms such as those relative to the regulation of international and non-international armed conflicts, as well as those relative to times of war and of peace, namely crimes against humanity, genocide and torture. The application or even the attempted application of these norms against authors of violations of international humanitarian and human rights law is a fundamental deterrent to future violations by others and shatters the veil of impunity that obscures accountability.²²

IV. The Normative Framework

The normative framework that applies to armed conflicts, whether of an international or non-international character and to the abuses of repressive regimes, contains certain weaknesses and gaps. While conflicts of an international character are adequately covered by the four Geneva Conventions of 1949²³ and Protocol I of 1977,²⁴ conflicts of a non-international character are less adequately covered by common article 3 of the four Geneva Conventions of 1949 and Protocol II of 1977.²⁵ Furthermore, pure abuses committed by repressive regimes are not covered by these and other aspects of the regulation of armed conflicts, including the customary law of armed conflicts.²⁶

Notwithstanding the above weaknesses, crimes against humanity,²⁷ genocide,²⁸ and torture²⁹ apply in all these contexts, irrespective of legal characterization or the nature of the conflict. Still, crimes against humanity have yet to be embodied in a specialized convention which would eliminate certain ambiguities relative to its earlier formulation in Article 6(c) of the International Military Tribunal's Statute.³⁰ In addition, both genocide and crimes against humanity contain certain normative weaknesses. As to genocide, certain groups are not included in the convention's protective scheme, and the requirement of a specific intent required by the convention is a high threshold, frequently difficult to prove. Lastly, there is also an obvious overlap between genocide and crimes against humanity, as well as between these two crimes and war crimes. These overlaps need to be clarified.

Notwithstanding the weaknesses and gaps in the normative framework of the three major categories of international crimes (i.e. genocide, crimes against humanity, and war crimes), there is also a significant weakness in the practice of states with respect to fair enforcement.

The enforcement of their proscriptions consists of two duties, namely, the duty to prosecute or extradite and the duty of states to cooperate with other states in the investigation, prosecution, and adjudication of those charged with such crimes, and the punishment of those who are convicted of such crimes.³¹

Although the duty to prosecute or extradite exists in the Genocide Convention,³² the Geneva Conventions of 1949,³³ and Protocol I of 1977,³⁴ it does not exist in conventional law with respect to crimes against humanity. The gap is due to the fact that there is no specialized convention for this category of crimes.³⁵ Nor do these obligations explicitly exist with respect to common article 3 of the four Geneva Conventions of 1949 and Protocol II of 1977,³⁶ applicable to conflicts of a non-international character. It should be noted, however, that in 1971 the United Nations General Assembly adopted a resolution on war criminals,³⁷ affirming that a state's refusal "to cooperate in the arrest, extradition, trial and punishment" of persons accused or convicted of war crimes and crimes against humanity is "contrary to the United Nations Charter and to generally recognized norms of international law."³⁸ Further, in 1973, a resolution was adopted by the United Nations General Assembly entitled the Principles of International Co-operation in the Detention, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity.³⁹ No specialized international convention, however, has been passed on these subjects, and therefore, the duty to prosecute or extradite, while advocated by scholars, needs, nonetheless, to be established as a part of customary international law in the absence of a specific convention embodying such an obligation.⁴⁰ Of course, the duty to prosecute or extradite could not be effective if statutes of limitations applied.

Thus, in 1968, the United Nations adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity,⁴¹ and similarly, in 1974, the Council of Europe adopted the European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes (Inter-European).⁴²

It is disturbing, however, that the United Nations convention has been ratified by only 54 states,⁴³ and the European convention by only one,⁴⁴ thus indicating a marked reluctance on the part of the 188 member states of the United Nations to support the proposition that no time prescriptions should apply to these crimes, and thereby making their prosecution more difficult.

There exists yet another impediment to the national enforcement of genocide, crimes against humanity, and in some respects, war crimes. This comes in the form of the limited recognition and application of the theory of universal jurisdiction to such crimes.⁴⁵ Few states recognize the application of the theory of universality.⁴⁶ Surely, if more states would recognize and apply this theory of jurisdiction, national criminal justice systems would have the competence to exercise their jurisdiction for such crimes.⁴⁷ Furthermore, few countries have enacted national legislation needed to prosecute genocide and crimes against humanity.⁴⁸

V. International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*

International crimes that rise to the level of *jus cogens* constitute *obligatio erga omnes* which are non-derogable. Legal obligations which arise from the higher status of such crimes include the duty to prosecute or extradite, the non-applicability of statutes of limitations for such crimes, the non-applicability of any immunities up to and including heads of state, the non-applicability of the defense of "obedience to superior orders" (save as mitigation of sentence), the universal application of these obligations whether in time of peace or war, their non-derogation under "states of emergency", and universal jurisdiction over the perpetrators of such crimes.

A. Jus Cogens as a Binding Source of Legal Obligation in International Criminal Law

Jus cogens refers to the legal status that certain international crimes reach, and *obligatio erga omnes* pertains to the legal implications arising out of a certain crime's characterization as *jus cogens*.

Thus, these two concepts are different from each other.

International law has long recognized and employed with both concepts, but mostly in contexts that do not include international criminal law ("ICL").⁴⁹ The national criminal law of the world's major legal systems and ICL doctrine have, however scantily, dealt with these concepts.⁵⁰

Furthermore, the positions of publicists and penalists on this question diverge significantly. The main divisions concern the manner in which a given international crime achieves the status of *jus cogens* and the manner in which such crimes satisfy the requirements of the "principles of legality."⁵¹

With respect to the consequences of recognizing an international crime as *jus cogens*, the threshold question is whether such a status places *obligatio erga omnes* upon states, or merely gives them certain rights to proceed against perpetrators of such crimes. Whether *obligatio erga omnes* carries with it the full implications of the Latin word *obligatio*, meaning "to bind" or whether it is denatured in international law to signify only the existence of a right rather than a binding legal obligation, has neither been resolved in international law nor addressed by ICL doctrine.

It is submitted here that the implications of *jus cogens* are those of a duty and not of optional rights; otherwise, *jus cogens* would not constitute a peremptory norm of international law. Consequently, these obligations are non-derogable in times of war as well as peace.⁵²

Thus, recognizing certain international crimes as *jus cogens* carries with it the duty to prosecute or extradite,⁵³ the non-applicability of statutes of limitation for such crimes,⁵⁴ and universality of jurisdiction⁵⁵ over such crimes irrespective of where they were committed, by whom (including heads of state), against what category of victims, and irrespective of the context of their occurrence (peace or war). Above all, the characterization of certain crimes as *jus cogens* places upon states the *obligatio erga omnes* not to grant impunity to the perpetrators of such crimes.⁵⁶

Positive ICL does not contain such an explicit norm as to the effect of characterizing certain crime as part of *jus cogens*. Furthermore, the practice of states does not conform to the scholarly writings that espouse these views. The practice of states demonstrates that, more often than not, impunity has been allowed for *jus cogens* crimes, the theory of universality has been far from universally recognized and applied, and the duty to prosecute or extradite is more inchoate than established, except when it arises from specific treaty obligations.

There is also much debate as to whether the duty to prosecute or extradite is in the disjunctive or in the conjunctive,⁵⁷ which of the two has priority over the other and under what circumstances, and, finally, whether implicit conditions of effectiveness and fairness exist with respect to the duty to prosecute and with respect to extradition leading to prosecution.⁵⁸

The gap between legal expectations and legal reality is, therefore, quite wide. It may be bridged somewhat by certain international pronouncements⁵⁹ and scholarly writings,⁶⁰ but the question remains whether such a bridge can be solid enough to allow for the passage of these concepts from a *desideratum* to enforceable legal obligations under ICL and creating state responsibility in case of noncompliance.⁶¹

B. Jus Cogens Crimes

The term "*jus cogens*" means "the compelling law" and, as such, a *jus cogens* norm holds the highest hierarchical position among all other norms and principles.⁶² By virtue of this status, *jus cogens* norms are deemed to be "peremptory" and non-derogable.⁶³

Scholars, however, disagree as to what constitutes a peremptory norm and how a given norm rises to that level. Disagreement arises over sources, content (the positive or norm-creating elements), evidentiary elements (such as whether universality is appropriate, or less will suffice), and value-oriented goals (for example, preservation of world order and safeguarding of fundamental human rights). Furthermore, there is no scholarly consensus on the methods by which to ascertain the existence of a peremptory norm, nor to assess its significance or determine its content.

Scholars also disagree as to the means to identify the elements of a peremptory norm, to determine its priority over other competing or conflicting norms or principles, to assess the significance and outcomes of prior application, and to gauge its future applicability in light of the value-oriented goals sought to be achieved.⁶⁴

Some scholars see *jus cogens* sources and customary international law as the same,⁶⁵ others distinguish between them,⁶⁶ while still others question whether *jus cogens* is simply not another semantic way of describing certain "general principles."⁶⁷

This controversy adds to the level of uncertainty as to whether *jus cogens* is a source of ICL.

The legal literature discloses that the following international crimes are *jus cogens*: aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture. Sufficient legal basis exists to warrant the conclusion that all these crimes are part of *jus cogens*.⁶⁸ This legal basis 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;⁶⁹ (2) language in preambles or other provisions of treaties applicable to these crimes which indicates these crimes' higher status in international law;⁷⁰ (3) the large number of states which have ratified treaties related to these crimes;⁷¹ and (4) the *ad hoc* international investigations and prosecutions of perpetrators of these crimes.⁷²

If a certain rigor is to apply, however, this legal basis cannot be examined merely in an aggregate manner. Instead, each of these crimes must be examined separately to determine whether it has risen to a level above that stemming from specific treaty obligations, so that it can therefore be deemed part of general international law applicable to all states irrespective of specific treaty provisions.⁷³ To pursue the approach suggested, it is also necessary to invoke a doctrinal basis for determining what constitutes an international crime and when in the historical legal evolution of a given crime it can be said to have achieved the status of *jus cogens*.⁷⁴

As discussed below, certain 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.⁷⁵ If both elements are present in a given crime, it can be concluded that it is part of *jus cogens*. The argument is less compelling, though still sufficiently strong, if only one of these elements is present.⁷⁶ Implicit in the first, and sometimes in the second element, is the fact that the conduct in question is the product of state-action or state-favoring policy. Thus, essentially, a *jus cogens* crime is characterized explicitly or implicitly by state policy or conduct, irrespective of whether it is manifested by commission or omission. The derivation of *jus cogens* crimes from state policy or action fundamentally distinguishes such crimes from other international crimes.

Additionally, crimes which are not the product of state action or state-favoring policy often lack the two essential factors noted above which establish the *jus cogens* status of a particular crime, namely a threat to the peace and security of mankind and conduct or consequences which are shocking to the conscience of humanity.

Each of these *jus cogens* crimes, however, does not necessarily reflect the co-existence of all the elements. Aggression is, on its face, a threat to the peace and security of mankind, but not all acts of aggression actually threaten the peace and security of humankind. While genocide and crimes against humanity shock mankind's conscience, specific instances of such actions may not threaten peace and security. Similarly, slavery and slave-related practices and torture also shock the conscience of humanity, although they rarely threaten the peace and security. Piracy, almost nonexistent nowadays,⁷⁷ neither threatens peace and security nor shocks the conscience of humanity, although it may have at one time.⁷⁸ War crimes may threaten peace and security; however, their commission is only an aggravating circumstance of an already existing condition of disruption of peace and security precisely because they occur during an armed conflict, whether of an international or non-international character. Furthermore, the extent to which war crimes shock the conscience of humanity may depend on the context of their occurrence and the quantitative and qualitative nature of crimes committed.⁷⁹

Three additional considerations must be taken into account in determining whether a given international crime has reached the status of *jus cogens*.

The first pertains to the historical legal evolution of the crime. Clearly, the more legal instruments that exist to evidence the condemnation and prohibition of a particular crime, the better founded the proposition that the crime has risen to the level of *jus cogens*.⁸⁰

The second consideration is the number of states that have incorporated the given proscription into their national laws.⁸¹

The third consideration is the number of international and national prosecutions for the given crime and how they have been characterized.⁸² Additional supporting sources that can be relied upon in determining whether a particular crime is a part of *jus cogens* is other evidence of "general principles of law"⁸³ and the writings of the most distinguished publicists.⁸⁴

The jurisprudence of the Permanent Court of International Justice ("PCIJ") and the International Court of Justice ("ICJ") is also instructive in determining the nature of a particular crime. The ICJ, in its opinion in *Nicaragua v. United States: Military and Paramilitary Activities in and Against Nicaragua*,⁸⁵ relied on *jus cogens* as a fundamental principle of international law. However, that case also demonstrates the tenuous basis of using legal principles to resolve matters involving ideological or political issues or calling for other value judgments.⁸⁶ In an earlier opinion, the ICJ held that the prohibition against genocide is a *jus cogens* norm that cannot be reserved or derogated from.⁸⁷

Nevertheless, *jus cogens* leaves open differences of value, philosophy, goals, and strategies among those who claim the existence of the norm in a given situation and its applicability to a given legal issue.⁸⁸ Thus, *jus cogens* poses two essential problems for ICL; one relates to legal certainty and the other to a norm's conformity to the requirements of the "principles of legality." The problem of normative positivism become evident in the case of a void in positive law in the face of an obvious and palpable injustice, such as with respect to crimes against humanity, as enunciated in the Statute of the International Military Tribunal ("IMT") in the London Charter of August 8, 1945.⁸⁹ The specific crimes defined in Article 6(c) of the London Charter fall into the category of crimes which were not previously addressed by positive law, but depended on other sources of law to support implicitly the formulation of an antecedent crime.⁹⁰ In this context, proponents of natural law advocate that *jus cogens* is based on a higher legal value to be observed by prosecuting offenders, while proponents of legal positivism argue that another principle should prevail, namely the "principle of legality" - *nullum crimen sine lege*, whose values and goals are of that same dignity, at least in principle.⁹¹ Since a value-neutral approach to the reconciliation of these theories seems impossible, the only practical solution is the codification of ICL.⁹²

C. *Obligatio Erga Omnes*

The *erga omnes* and *jus cogens* concepts are often presented as two sides of the same coin. The term *erga omnes* means "flowing to all," and so obligations deriving from *jus cogens* are presumably *erga omnes*.⁹³ Indeed, legal logic supports the proposition that what is "compelling law" must necessarily engender an obligation "flowing to all."

The problem with such a simplistic formulation is that it is circular. What "flows to all" is "compelling," and if what is "compelling" "flows to all," it is difficult to distinguish between what constitutes a "general principle" creating an obligation so self-evident as to be "compelling" and so "compelling" as to be "flowing to all," that is, binding on all states.⁹⁴

In the *Barcelona Traction* case, the ICJ stated:

"[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."⁹⁵

Thus, the first criterion of an obligation rising to the level of *erga omnes* is, in the words of the ICJ, "the obligations of a state towards the international community as a whole."⁹⁶ While the ICJ goes on to give examples of such obligations in *Barcelona Traction*,⁹⁷ it does not define precisely what meaning it attaches to the phrase "obligations of a state towards the international community as a whole."⁹⁸

The relationship between *jus cogens* and *obligatio erga omnes* has never clearly been articulated by the PCIJ or the ICJ, nor has the jurisprudence of either court ever explicitly articulated how a given norm becomes *jus cogens*, or why and when it becomes *erga omnes* and what consequences derive from this. Obviously, a *jus cogens* norm rises to that level when the principle it embodies has been universally accepted, as demonstrated through consistent state practice accompanied by the necessary *opinio juris*, by most states.⁹⁹ Thus, for example, the principle of territorial sovereignty has risen to the level of a "peremptory norm" because all states have consented to the right of states to exercise exclusive territorial jurisdiction.¹⁰⁰

Erga omnes, as stated above, however, is a consequence of a given international crime having risen to the level of *jus cogens*.¹⁰¹ It is not, therefore, a cause of or a condition for a crime's inclusion in the category of *jus cogens*.

The contemporary genesis of the concept *obligatio erga omnes* for *jus cogens* crimes is found in the ICJ's advisory opinion on *Reservations to the Convention on the Prevention and Punishment of Genocide*.¹⁰²

The concept also finds support both in the ICJ's *South West Africa* cases¹⁰³ as well as from the *Barcelona Traction*¹⁰⁴ case. However, it should be noted that the *South West Africa* cases dealt, *inter alia*, with human rights violations and not with international crimes *stricto sensu*¹⁰⁵ and that the *Barcelona Traction* case concerned an issue of civil law.

It is still uncertain in ICL whether the inclusion of a crime in the category of *jus cogens* creates rights or, as stated above, non-derogable duties *erga omnes*. The establishment of a permanent international criminal court having inherent jurisdiction over these crimes is convincing evidence for the proposition that crimes such as genocide, crimes against humanity, war crimes and torture are part of *jus cogens* and that obligations *erga omnes* to prosecute or extradite flow from them.¹⁰⁶

D. Conclusion

Crimes against humanity, genocide, war crimes, and torture are international crimes which have risen to the level of *jus cogens*.¹⁰⁷ As a consequence, the following duties arise: the obligation to prosecute or extradite, the obligation to provide legal assistance, the obligation to eliminate statutes of limitations, and the obligation to eliminate immunities of superiors up to and including heads of states. Under international law, these obligations are to be considered as *obligatio erga omnes*, the consequence of which is that impunity cannot be granted.¹⁰⁸ These crimes establish non-derogable protections and the mandatory duty to prosecute or extradite accused perpetrators, and to punish those found guilty, irrespective of locus, since universal jurisdiction presumably also applies. Neither can there be statutory limitations for these crimes. What is needed, therefore, is the uniform application of these norms to the same types of victimization irrespective of the contexts in which they occur and regardless of how they are legally characterized.

The protections afforded victims and the responsibility befalling perpetrators and their superiors should not be bound by the legal characterization of the nature of a given conflict, nor should they be limited by the expectations of political settlements and peace arrangements.

Even though the weaknesses and gaps in the normative scheme, discussed above, must be resolved, this does not mean that existing norms are insufficient to apply to the crimes in question.¹⁰⁹ There are, indeed, sufficient norms. What is lacking is the political will to enforce them. The International Criminal Court will certainly contribute to the enhancement of international enforcement.¹¹⁰ But, even when the International Criminal Court is in place and functioning, it will have to be considered as being on the same continuum as national criminal courts. In order to achieve effective deterrence, all these legal systems will have to work in a complementary way to reinforce one another.

VI. Accountability Mechanisms

International and national prosecutions are not the only methods of accountability. There are other options that must be examined, though in the opinion of this writer, there exists a duty to prosecute, whether at the international or national level, for genocide, crimes against humanity, war crimes, and torture.¹¹¹

Accountability measures fall into three categories: truth, justice, and redress.¹¹² Accountability must be recognized as an indispensable component of peace and eventual reconciliation. Accountability measures which achieve justice range from the prosecution of all potential violators to the establishment of the truth.

Accountability is the antithesis of impunity, which occurs either *de jure* through the granting of amnesties or *de facto* through the failure of a state to enforce legal norms either willingly or as a result of an insufficient legal infrastructure.

Amnesties are essentially a form of forgiveness,¹¹³ granted by governments, for crimes committed against a public interest. While amnesty is a deliberate positive action, impunity is an act of exemption -- an exemption from punishment, or from injury or loss.¹¹⁴ Amnesty can occur after a person or a group of persons have been convicted, not beforehand. The recurrence of pre-prosecution amnesty is, therefore, an anomalous phenomenon developed as part of a policy of impunity.

Impunity can also result from *de facto* conduct, often occurring under color of law when, for example, measures are taken by a government to curtail or prevent prosecutions. As a *de facto* act, it can be the product of either the failure to act or the product of more deliberate procedural and practical impediments, which can preclude prosecution.¹¹⁵ It is also possible to achieve impunity through other practical impediments.¹¹⁶ In the context of accountability, the attainment of truth, justice, and redress raises a host of issues addressed by other studies.¹¹⁷

The accountability options include: (a) international prosecutions; (b) international and national investigatory commissions; (c) truth commissions; (d) national prosecutions; (e) national lustration mechanisms; (f) civil remedies; and (g) mechanisms for the reparation of victims.

A. International Prosecutions

International prosecutions currently include prosecutions before the future International Criminal Court and the existing *ad hoc* international criminal tribunals for Yugoslavia and Rwanda. As a matter of policy, international prosecutions should be limited to leaders, policy-makers and senior executors.¹¹⁸ This policy, however, does not and should not preclude prosecutions of other persons at the national level which can be necessary to achieve particular goals.¹¹⁹ There must be prosecution for at least the four *jus cogens* crimes of genocide, crimes against humanity, war crimes and torture. Prosecution at the international level is important because it is likely the only way to reach the leaders, senior executors, and policy makers, who may otherwise be *de facto* beyond the reach of local law.¹²⁰

B. International and National Criminal Investigatory Commissions

International and national criminal investigatory commissions include internationally established commissions, or designated individuals, assigned to collect evidence of criminality, in addition to other fact finding information of a more general nature.¹²¹ They are important in providing the basis for future, and to be sure, timely, national and international prosecutions and in documenting violations of international humanitarian and human rights law.

C. International and National Truth Commissions

This accountability option centers on the acknowledgment of the facts through mechanisms such as truth commissions and fact-finding investigative bodies. These commissions, which can be established internationally, regionally, or nationally, have the mandate to discover the entirety of the truth, or a portion thereof. Truth commissions, however, should not be deemed as a sole substitute for prosecution of the four *jus cogens* crimes of genocide, crimes against humanity, war crimes, and torture. These commissions may run in conjunction with prosecutions, but still, their role is to establish a record of what has happened, and to disseminate this information widely at both the national and the international level.¹²² Essentially, their goals are to serve the end of peace and reconciliation, and may sometimes be less relevant to criminal justice, though by no means less important to that purpose. The advantage of these commissions is that they establish the broader context of a given conflict, thus eliminating the need at national and international prosecutions to provide that broader context or to use a given trial as a means of establishing a historical context¹²³ that could, in some cases, be deleterious to the case under prosecution or the due process quality of the trial. Trials are generally ill-suited to deal with the task of providing a complete history of past violations. This is specifically a result of their adversary nature where the duty of the prosecutor is to focus on limited facts relevant to the guilt of the individual before the court, and the duty of the defense is to challenge the admissibility of the essential information.¹²⁴ It is to be noted that an international or national truth commission is not necessarily a reconciliation commission. Some of these commissions can also be of a hybrid nature, taking on investigative features.¹²⁵

D. National Prosecution

National prosecutions should include all persons who have committed criminal acts, subject, however, to reasonable and justified prosecutorial discretion. This includes persons who have committed the four *jus cogens* crimes of genocide, crimes against humanity, war crimes, and torture.¹²⁶ Furthermore, there should be a principle of no general amnesty for these four crimes.

For crimes other than the four mentioned above, the national system may develop criteria for selectivity or symbolic prosecution consistent with their laws, provided these criteria are not fundamentally unfair to the accused. This does not preclude prosecutorial discretion when the evidence is weak or the criminality tenuous, or when a plea bargain can lead to the prosecution of more culpable offenders. Such prosecutions must be subject to standards whereby the exercise of discretion against prosecution, unless legally or factually justifiable, should result in remanding the individual to another accountability mechanism. For example, persons may receive sentences other than the deprivation of liberty, including: the personal payment of reparations or compensation to the victims; the undertaking of some form of community service; or the making of a public apology. Other options could include the serving of limited sentences, or the serving of only partial sentences, followed by an amnesty or pardon, provided there are no *a priori* blanket amnesties or pardons that fail to take into account the criminality of the act and the consequences applicable to each individual receiving such an amnesty or pardon. It is also suggested that victims be allowed to participate as *partie civile* in those legal systems that recognize this action so as to accord them the right to claim compensatory damages in an appropriate legal forum.

E. National Lustration Mechanisms

National lustration is a purging process whereby individuals who supported or participated in violations committed by a prior regime may be removed from their positions and/or barred from holding positions of authority in the future. Though punitive in nature, these mechanisms are used essentially as a political sanction which carries moral, social, political, and economic consequences. The danger with such mechanisms is that they tend to deal with classes or categories of people without regard to individual criminal responsibility, and thus, lustration may tend to produce injustice in any number of individual cases. Furthermore, when lustration laws result in the loss of any type of earning capacity, dependents of those individuals who fall within the ambit of the lustration legislation suffer when they may not have had any connection with the prior violations. Lastly, these laws tend to have a stigmatizing effect that carries beyond those who may have deserved such stigmatization and can fall onto innocent third parties or family members.¹²⁷

F. National Civil Remedies

National civil remedies are the development, within civil legislation, of the right to bring suit by victims and their heirs, which enable them to obtain certain civil remedies. For example, individuals should be able to institute legal actions to obtain compensatory damages or to receive some form or injunctive relief, such as to compel the inclusion of a person in national criminal prosecution or in the category of those subject to lustration laws.¹²⁸ Moreover, persons having certain rights under civil law should also be allowed to join in national prosecutions as *partie civile* in criminal proceedings.

Civil remedies should not be available to the victim exclusively in the jurisdiction where the violation occurred. However, while some states have opened their courts to victims of violations that occurred outside of their borders, this type of remedy is not without difficulties. As a general rule, the “courts of one country will not sit in judgment on the acts of the government of another done within its own territory.”¹²⁹

Thus, with few exceptions,¹³⁰ this renders a foreign state immune for its conduct within another state’s domestic legal system, regardless of whether the action attributed to the state violates international law. For example, in *Siderman de Blake v. Argentina*, the court held that Argentina was immune for its alleged *jus cogens* violations of international law.¹³¹ Notwithstanding, while states have been unwilling to pass judgment on the foreign sovereign, this rule has not prohibited them from sitting in judgment of the acts of the foreign state’s citizens, both state and non-state actors.¹³² Thus, if the domestic legal system has an adequate basis to assert jurisdiction over the person, then the state of nationality may permit either a civil claim against the violator or a *partie civile* to complement its own criminal prosecution.

Under the Torture Victim Protection Act,¹³³ the United States provides jurisdictional grounds for its nationals to sue an individual for an official act of torture. However, this cause of action is limited by both the claimant’s ability to gain *in personam* jurisdiction over the defendant and her exhaustion of local remedies in the foreign jurisdiction.

A requirement of personal jurisdiction over the offender constitutes a serious limitation with respect to the victim's pursuit of a remedy, whether civil or criminal. Unless the offender happens to be in the jurisdiction by chance, this remedy is often meaningless. However, the national's state could request extradition based on a protective interest theory. Nevertheless, if the victim was unable to obtain a remedy in the foreign state, it is doubtful that the state would either extradite the individual or enforce the foreign civil or penal judgment.

A state has limited ability to provide a remedy to non-national victims who were not injured in that state's territory. Notwithstanding, a limited number of national systems provide access to a remedy for alien victims. However, the exercise of these domestic remedies are quite limited as a result of both strict jurisdictional requirements and the reality of enforcing the judgment. The United States experience with the Alien Tort Claims Act¹³⁴ ("ATCA") is illustrative of these limitations.

The ATCA states that "the district court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."¹³⁵ Over the past twenty years, claims have been filed under the ATCA by alien plaintiffs for genocide,¹³⁶ war crimes,¹³⁷ slavery,¹³⁸ torture,¹³⁹ forced disappearance,¹⁴⁰ arbitrary detention,¹⁴¹ summary execution,¹⁴² cruel, unusual, and degrading treatment,¹⁴³ and environmental damage.¹⁴⁴ Under the ATCA, only violators in their individual capacity can be named as defendants, and as such a violator foreign state is immune.¹⁴⁵ Furthermore, the court must be able to exercise *in personam* jurisdiction over the individual defendant, which requires the defendant to be present in the United States at least for service of process. This requirement presents a unique challenge and severely limits the ability of a plaintiff to pursue a claim, as personal jurisdiction is often achieved only by chance. For example, in one case, a victim of torture in Ethiopia who was living in exile in the United States stumbled across her former torturer in a hotel in Atlanta where they both happened to work.¹⁴⁶

Moreover, while the potential monetary judgments in ATCA cases are substantial, the actual likelihood of attaining full satisfaction from the defendant is minimal. For example, in *Mushikiwabo v. Barayagwiza*, over \$100 million was awarded to five plaintiffs against a single defendant arising out of the genocide in Rwanda.¹⁴⁷

Clearly, unless the defendant has significant assets in the jurisdiction or his state of nationality is willing to enforce the judgment, the victim will likely receive virtually no compensation. Thus, as the ATCA illustrates, the domestic remedy in a third state is a less than satisfactory remedy. However, it does serve the purposes of documenting the violations and providing at the very least the victim with a public forum to expose and denounce the perpetrator.

G. Mechanisms for the Reparation of Victims

The provision of a remedy and reparations for victims of these violations is a fundamental component of the process of restorative justice.¹⁴⁸ To this end, states and their national legal systems serve as the primary vehicle for the enforcement of human rights and international humanitarian law. Accordingly, the existence of a state's duties to provide a remedy and reparations forms a cornerstone of establishing accountability for violations and achieving justice for victims. While monetary compensation may certainly be central to this process, often victims or their survivors desire solely that their suffering be acknowledged as wrongful, their violators be condemned, and their dignity be restored through some form of public remembrance.¹⁴⁹ Thus, perhaps the most important goals of this process are the "re-humanization"¹⁵⁰ of the victims and their restoration as functioning members of society. Achieving these restorative goals is certainly fundamental to both the peace and security of any state since it eliminates the potential of future revenge and any secondary victimization that may result from the initial violation.¹⁵¹

Notwithstanding the widespread abuses of recent history, few efforts have been undertaken to provide redress to either the victims or their families. This often results from the reality that the provision of remedies and reparations are undertaken by either the violator regime or a successor government that has treated post-conflict justice as a bargaining chip, rather than an affirmative duty. However, the international community has become increasingly concerned with providing a legal framework that ensures the redress of violations of human rights and international humanitarian law norms. The 1985 *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*¹⁵² ("*Basic Principles of Justice*") is perhaps the first expression of this desire.

The Sub-Commission on the Prevention of Discrimination and the Protection of Minorities continued the efforts to create a legal framework for the redress of victims by producing a Draft Guidelines on Victim Redress.¹⁵³

Moreover, the inclusion of provisions addressing the compensation of victims in the Rome Statute of the International Criminal Court¹⁵⁴ ("ICC Statute") is further evidence of the growing interest in furnishing a remedy to these individuals. Most notably, the latest manifestation of this concern is evident in the 1998 resolution¹⁵⁵ of the United Nations Commission on Human Rights that expressed the importance of addressing the question of redress for these victims in a systematic and thorough manner at the national and international level. Pursuant to this mandate, this author has submitted to the Commission on Human Rights the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*.¹⁵⁶

Victim reparation is essential to the process of restorative justice. Mechanisms for victim reparation include the above mentioned accountability mechanisms. For example, compensation can be achieved through the execution of a civil judgment against a culpable individual or state. However, individuals or states are often either unable or unwilling to ensure either full or partial reparation. In such cases, other mechanisms should be considered such as state or international trust funds for the purposes of compensating victims or providing them with essential social services. The *Basic Principles of Justice*¹⁵⁷ encourages states to establish such funds. This call was heeded at the last Preparatory Committee meeting on the Establishment of an International Criminal Court held before the 1998 Rome Conference when Egypt proposed including a connection between victim compensation and the establishment of criminal liability.¹⁵⁸

Monetary compensation should not, however, be deemed the only available remedy. Non-monetary forms of compensation should also be developed, particularly in societies where the economy is unable to absorb the loss of large monetary sums. The various modalities of reparation do not exclusively involve some form of valuable consideration or social service to redress a past harm. Rather, reparation could also include an accurate historical record of the wrongful acts and a public acknowledgment of the violations.

These more intangible forms of reparation are achieved through investigatory and truth commissions and domestic or international prosecutions. Also, guarantees against repeated violations are contemplated which result from either criminal sanctions against the violator as a result of prosecutions, removal from power as a result of lustration laws, or changes in a state practice pursuant to injunctive relief.

VII. Policy Considerations

Which of these accountability measures or what combination thereof is appropriate in light of the circumstances of a given conflict, the expectations of the parties to the conflict, and the anticipated outcomes, will depend on a variety of factors which must be considered in the aggregate. This is obviously not an easy task and is one that is both challenging and fraught with dangers affecting the lives and well-being of many. But it is a task that must be guided by legal, moral, and ethical considerations. Accountability is among these considerations. The accountability mechanisms described above are not mutually exclusive; they are complementary. Each mechanism need not be taken as a whole. Rather, a portion of one or more may be used and combined with others. No single formula can apply to all types of conflicts, nor can it achieve all desired outcomes. Just as there is a range in the types of conflict and types of peace outcomes, there is a corresponding range of accountability mechanisms. In the final analysis, whichever mechanism or combination is chosen, it is designed to achieve a particular outcome which is, in part traditional justice, and wherever possible, reconciliation, and ultimately, peace. In this respect, we must not look at each mechanism exclusively from the perspective of a crime control model, but also as an instrument of social policy which is designed to achieve a particular set of outcomes which are not exclusively justice-based.

So far, however, there exist no set of international guidelines by which to match the type of conflicts, expected peace outcomes, and eventual accountability mechanisms. Such guidelines are needed in order to create common bases for the application of these mechanisms and to avoid abuses and denial of justice. What should be achieved is not only a sense of justice, but the elimination of a sense of injustice.

In choosing from among the various procedures, it must be remembered that among the goals are to educate and prevent and to shake people from a sense of complacency, one that bureaucracies, including military and police bureaucracies, tend to foster in a climate of silent conspiracy -- the *omerta* of these bureaucracies must be eliminated.¹⁵⁹

Accountability mechanisms, if they are to have a salutary effect on the future and contribute to peace and reconciliation, must be credible, fair, and as exhaustive of the truth as possible. The fundamental principles of accountability must, therefore, take into account:

1. cessation of the conflict and thereby the ending of the process of victimization;
2. prevention and deterrence of future conflict (particularly conflicts which may be initiated directly after the cessation of the conflict being addressed);
3. rehabilitation of the society as a whole and of the victims as a group; and,
4. reconciliation between the different peoples and groups within the society.

At a minimum, the establishment of truth, as relative as it may be, must be established in order to provide a historical record, so as to mitigate the simmering effects of the hardships and hardened feelings which result from violent conflicts that produce victimization, to dampen the spirits of revenge and renewed conflict, to educate people and, ultimately, to prevent future victimization.¹⁶⁰ Truth is, therefore, an imperative, not an option to be displaced by political convenience because, in the final analysis, there truly cannot be peace (meaning reconciliation and the prevention of future conflict stemming from previous conflict) without justice (meaning at the very least, a comprehensive exposé of what happened, how, why, and what the sources of responsibility are). Forgiveness can most readily follow from the satisfaction of all parties, particularly those who have been victimized, after that truth has been established.

It should be noted, however, that in this context, there is a difference between the qualities of mercy and the qualities of forgiveness.

Whereas forgiveness is a change of heart towards a wrongdoer that arises out of a decision by the victimized person, and is therefore wholly subjective, mercy, on the other hand, is the suspension or mitigation of a punishment that would otherwise be described as retribution, and is an objective action which can be taken not only by the victim but by those entrusted with government and the administration of justice.¹⁶¹ Forgiveness is not a legal action, but rather, primarily a relationship between persons. The arena of resentment and forgiveness is individual and personal in a way that legal guilt and responsibility are not.¹⁶² Institutions, states, and systems of justice cannot forgive; they can pardon and show mercy.¹⁶³ The act of mercy may arise out of feelings of compassion or pity for the wrongdoer; however, these feelings are to be distinguished from those of forgiveness, which belong to the victim.

VIII. Selecting the Appropriate Accountability Mechanism

Selecting the appropriate accountability mechanism in a post-conflict environment for violations of international humanitarian and human rights law norms requires the balancing of numerous factors. While accountability should never be bartered in a *realpolitik* fashion in order to arrive at political expediency at the expense of both the dictates of international law and the interests of the victims, that does not necessarily mean that every individual violator must be prosecuted in order to assure accountability.

These factors, which should be balanced in deciding the most appropriate accountability mechanism include, but are not limited to:

1. The gravity of the violation: for example is it a *jus cogens* violation (genocide, crimes against humanity, war crimes);
2. The extent and severity of the victimization;
3. The number of the accused;
4. Those who are the accused, i.e. the senior architect, low-level executor, bureaucrat;
5. “Tu Quoque”: the extent to which both sides are equally committed to international criminal standards;¹⁶⁴
6. The current government: is the violator regime still in power either *de jure* or *de facto*;

7. The competence and independence of the domestic judiciary;
8. The evidentiary issues;
9. The extent to which the conflict or violations have subsided;
10. cultural concerns or “the will” of the community;
11. nature of the conflict: international or internal armed conflict, or repressive regime.

None of the above listed factors should be exclusive in determining the appropriate accountability mechanism that should be employed in a post-conflict situation or a transition from a repressive regime. Each of the factors must be evaluated individually and collectively in conjunction with the above listed policy considerations (§ VII). Ultimately, the selection of a given mechanism must be made in good faith in order to achieve a just result and should be transparent and justifiable. Moreover, the selection must be acceptable to the victims, interested states, and international civil society in light of applicable legal norms.

As a general rule, violations of *jus cogens* crimes should always be subject to prosecution. However, in deciding whether to prosecute at the international or domestic level, other considerations should be weighed. For example, if the government in power is the violator regime, an independent international prosecution might be favored. If, however, the domestic judiciary retains its independence and competence, then there might be little need to invoke international accountability procedures. In contrast, even if there is a commitment to prosecute, a significant breakdown in the local judicial infrastructure might necessitate international prosecutions, or at least an international investigative commission to collect and preserve evidence for later adjudication when the judiciary is again functioning.

Furthermore, large-scale victimization over a period of time would tend to suggest the need for some form of a truth commission in conjunction with prosecution in order to accurately chronicle the violations. Whereas, an accurate chronicle of a limited number of violations might be sufficiently made by the record at trial.

In addition, not every conflict situation requires the prosecution of every possible accused. Indeed, South Africa opted for a truth commission to provide accountability for past human rights violations.

This decision was made not to allow *de facto* impunity for the prior regime, but rather based on the people's determination that this was the best manner in which to put its past behind it. Secretary-General Kofi Annan, speaking on the International Criminal Court in the context of the South African experience, stated:

"No one should imagine that [the clause which allows the Court to intervene where the state is unwilling or unable to exercise jurisdiction] would apply in a case like South Africa's, where the regime and the conflict which caused the crimes have come to an end, and the victims have inherited power. It is inconceivable that, in such a case, the Court would seek to substitute its judgment for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future".¹⁶⁵

The above factors should serve as a guide in selecting the most appropriate accountability mechanism for international humanitarian and human rights law violations. They should not, however, be manipulated in order to provide the international community and the victims with "Potemkin justice," which is *de facto* impunity. While speaking with respect to penalties for crimes, the following words of Pope Pius XII are also applicable with respect to the task of selecting an appropriate accountability mechanism:

"It is possible to punish in a way that would hold the penal law up to ridicule In the case where human life is made the object of a criminal gamble, where hundreds and thousands are reduced to extreme want and driven to distress, a mere privation of civil rights would be an insult to justice".¹⁶⁶

Thus, in the context of a mass campaign of genocide, it would be an "insult to justice" to preclude any form of prosecution in favor of only publishing an accurate chronicle of the abuses.

IX. The Right to a Remedy and Reparation for Victims

A. The Duty to Provide a Remedy

The state's duty to provide a domestic legal remedy to a victim of violations of human rights and international humanitarian law norms committed in its territory is well grounded in international law.

Provisions of numerous international instruments either explicitly or implicitly require this of states. Furthermore, a survey of contemporary domestic legislation and practice reveals that states endeavor to provide remedies for victims injured within their borders.

The existence of a state's duty to provide a remedy is grounded in several international and regional conventions. With respect to violations of International Humanitarian Law, the following conventions implicitly recognize the right to a remedy since they impose a duty on the violating party to provide compensation for their violation: (1) The Hague Convention Regarding the Laws and Customs of Land Warfare; (2) the Geneva Convention Relative to the Treatment of Prisoners of War; (3) the Geneva Convention Relative to the Protection of Civilian Persons in Time of War; and (4) Protocol I Additional to the Geneva Convention.

With respect to violations of human rights norms, the ICCPR is perhaps illustrative. The ICCPR declares that each state party to the convention undertake:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.¹⁶⁷

While the ICCPR does not mandate a state party to pursue a specific course of action to remedy the violation of protected rights, the language of this provision clearly envisions that remedy be effective, of a legal nature, and enforceable. Significantly, the ICCPR renders the "act of state" defense inapplicable by ensuring the duty to provide a remedy regardless of whether the violations were committed by persons acting in an official capacity.

This limitation is fundamental in ensuring that human rights and international humanitarian law violations are remedied since these acts are often committed only by states.

The International Convention on the Elimination of All Forms of Racial Discrimination¹⁶⁸ also exemplifies an explicit requirement that states provide a remedy.

This convention requires states parties to:

“assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination”.¹⁶⁹

Similar to the ICCPR, the International Convention on the Elimination of All Forms of Racial Discrimination envisions that the remedy be effective and carried out by competent tribunals and official.

Other conventions also explicitly require that a state provide a remedy for human rights violations. For example, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families contains language identical to the above quoted provision of the ICCPR.¹⁷⁰ The following instruments all contain provisions regarding the right to some form of reparation, which implies the right to a remedy: (1) Convention Concerning Indigenous and Tribal Peoples in Independent Countries;¹⁷¹ (2) Convention Relating to the Status of Stateless Persons;¹⁷² (3) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;¹⁷³ (4) Convention on the Rights of the Child;¹⁷⁴ (5) American Convention on Human Rights;¹⁷⁵ (6) European Convention for the Protection of Human Rights and Fundamental Freedoms;¹⁷⁶ and (7) African Charter on Human and People's Rights.¹⁷⁷

In addition to the conventional law, which creates a binding obligation on the part of state parties, numerous international declarations reaffirm the principle that a state has a duty to provide a remedy to victims of human rights abuses and international humanitarian law. Perhaps, the most comprehensive treatment of this duty is found in the Basic Principles of Justice.

In addition, a survey of contemporary state practice as evidenced in the substantive laws and procedures functioning in their domestic legal systems confirms the duty to provide a remedy to victims of these violations.

Several declarations of international and regional organizations reflect the principle that a state has the duty to provide a remedy. For example, the Universal Declaration of Human Rights plainly articulates that “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”¹⁷⁸ The United Nations Declaration on the Elimination of All Forms of Racial Discrimination further reflects the concept that everyone shall have the right to an effective remedy and protection against any discrimination . . . through independent national tribunals competent to deal with such matters.”¹⁷⁹

In addition, the Declaration on the Protection of All Persons from Enforced Disappearance envisions a duty to provide “an effective remedy” as a means of determining the status of such disappeared individuals.¹⁸⁰ Furthermore, the declaration requires “adequate compensation” for the victims.¹⁸¹ The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires that the victim of official torture be “afforded redress and compensation in accordance with national law.”¹⁸² The American Declaration on the Rights and Duties of Man provides that “every person may resort to the courts to ensure respect for his legal rights.”¹⁸³ The Muslim Universal Declaration on Human Rights issued by the Islamic Council states that “every person has not only the right but also the obligation to protest against injustice; to recourse and to remedies provided by the Law in respect to any unwarranted personal injury or loss. . . .”¹⁸⁴

The Basic Principles of Justice sets forth perhaps the most comprehensive details concerning a state’s duty to provide a remedy to individual victims.¹⁸⁵ Primarily, the Basic Principles of Justice states that victims are entitled to redress and recommends that states establish judicial and administrative mechanisms for victims to obtain prompt redress.¹⁸⁶ However, it should be noted that since the Basic Principles is primarily concerned with victims of domestic crime, it is only applicable in the event that the domestic criminal law of a given state has incorporated the applicable human rights or international humanitarian norm.¹⁸⁷

The contemporary state practice evident in a survey of various domestic legal frameworks reinforces the hortatory statements contained in the above declarations as a norm of customary international law.¹⁸⁸ Many states have extensive human rights protections within their national constitutions and provisions that create a remedy in cases of their violation. For example, in states such as Peru, Malta, Romania, Uruguay, and the United States, the constitution contains either explicitly or implicitly an extensive list of human rights guarantees and provides a remedy for their violation.¹⁸⁹ Other states perhaps lack specific legislation with respect to human rights violations; however, their legal systems contain other general remedies which encompass specific violations. For example, under Swedish and United Kingdom law, domestic tort law provides a remedy for the compensation of gross violations of human rights.¹⁹⁰ In China the recently enacted State Compensation Act and Administrative Proceedings Act allows its citizens to receive compensation when they have been denied their civic rights.¹⁹¹ Still other states, such as Cyprus and Nepal, noted that they were in the process of enacting legislation with respect to redressing individual victims.¹⁹²

While the conventional and customary law do not impose an explicit duty to create special procedures, the language of the international instruments, noted above, contemplates that the remedy be “effective” and administered by “competent” tribunals and personal in order to provide “just” and “adequate” reparations. Thus, to the extent that a state’s existing legal framework is inadequate to handle the claim, it would seem that the state is implicitly in violation of the requirements of the conventional law. For example, Togo noted that during a period of internal strife, “*l’Etat avait perdu certaines de ses prérogatives: le gouvernement était impuissant à faire réprimer les actes délictuels ou criminels qui émaillaient cette période et la justice était loin de disposer des moyens d’agir.*”¹⁹³ In response, to the failings of its judicial system to respond to the needs of victims during this period, Togo noted that it “*a entrepris une série d’actions visant à prendre en considération la question du droit à restitution, à indemnisation et à réadaptation.*”¹⁹⁴ Specifically, Togo planned to create a ministry of human rights, adopt legislative measures aimed at compensating victims of socio-political problems, and ensure the independence of the judiciary and equal protection for all citizens.¹⁹⁵

Furthermore, even in instances where the judicial system has not collapsed, a state may find it advantageous to establish special procedures with respect to situations involving numerous claimants, or with respect to the settlement and distribution of the proceeds of lump sum agreements between states.¹⁹⁶

The conventional and customary law reflects the principle that both a state's nationals and aliens will equally have the right to a remedy for violations committed within the state's territory. This is evident in the conventional law by the use of language such as "any persons"¹⁹⁷ and "everyone within their jurisdiction"¹⁹⁸ when referring to whom the state shall provide a remedy. Furthermore, state practice also reveals that aliens are generally accorded national treatment.¹⁹⁹ Moreover, it should be noted that failing to provide an alien an effective remedy amounts to a denial of justice, which subsequently gives rise to an international claim by the alien's state of nationality. Thus, clearly a state must afford national treatment to aliens in the provision of remedies for violations committed within its territory.

B. Duty to Provide Reparation

A state's duty to make reparations for its acts or omissions is fairly well established in the conventional and customary law. For example, the Permanent Court of International Justice affirmed this proposition in *The Chorzów Factory Case* when it stated:

"It is a principle of international law that the breach of an engagement involves an obligation to make reparations in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself".²⁰⁰

Notwithstanding this general proposition, specific language in international instruments specifically articulates the duty to provide reparations. With respect to violations of international humanitarian law, the major conventions which regulate armed conflict contain provisions both vesting individuals with the right to claim compensation against the state parties and requiring states to provide reparation for their breaches. For example, the Hague Convention Regarding the Laws and Customs of Land Warfare provides for the duty of a state to pay indemnity in case of violations of its regulations.²⁰¹

Furthermore, the Four Geneva Conventions of 12 August 1949 contain similar provisions with respect to the grave breaches of the convention.²⁰²

In addition, Protocol I provides that a state party shall be liable “to pay compensation” for violations of the convention.²⁰³

With respect to human rights abuses, both the conventions and declarations provide that their violations shall be remedied with some modality of reparations. Clearly, if the state is the author of the violation, the duty to make reparations can fall to no other. Furthermore, state practice reflects both the legal framework and practice of providing reparations to victims. For example, the United States government has provided redress to American citizens and permanent resident aliens of Japanese ancestry who were forcibly evacuated, relocated, and interned by the government during World War II.²⁰⁴ In addition, Chile, in an effort to account for its human rights abuses of past decades, has created a national commission whose goal is to provide compensation to victims’ families.²⁰⁵ Reparations include monthly pensions, fixed sum payments, and health and educational benefits.

Thus, it is perhaps well grounded in the conventional and customary law that a state is under a duty to provide reparations for its violations of human rights and international humanitarian law.

Certainly a non-state actor who authors a human rights and international humanitarian law violation is liable to make reparations to the victims based on the conventional and customary law. However, the Draft Guidelines for Victim Redress speak only in terms of the state duty to provide reparations. While certainly a laudable aspiration, this principle with respect to violations not attributable to the state is perhaps tenuous with respect to all states. However, with respect to Europe, the European Convention on the Compensation of Victims of Violent Crimes²⁰⁶ (“European Compensation Convention”) mandates this principle in instances when the applicable human rights or international humanitarian law norms are incorporated within the domestic criminal law. Further, with respect to other states, the strongest support for this principle is similar provisions found in the Basic Principles of Justice.

The European Compensation Convention was established by the states of the Council of Europe to introduce or develop schemes for the compensation of victims of violent crime by the state in whose territory such crimes were committed, in particular when the offender has not been identified or is without resources.²⁰⁷

This convention does not mandate any particular compensation scheme; rather, its focus is to establish minimum provisions in this field.²⁰⁸ As a result, there are several significant limitations that may be placed on the extent of the state's duty to provide compensation.

At a minimum, the European Compensation Convention mandates that compensation be paid to either victims who have sustained serious bodily injury directly attributable to an intentional violent crime, or to dependants of persons who have died as a result of such crime when compensation is not fully available from other sources.²⁰⁹ In these instances, compensation is to be awarded irrespective of whether the offender is prosecuted or punished.²¹⁰ However, as noted, a state may impose several limitations on its duty to provide compensation. For example, article 3 provides that:

"Compensation shall be paid by the State on whose territory the crime was committed:

- (a) to nationals of the States party to the convention;
- (b) to nationals of all member States of the Council of Europe who are permanent residents in the State on whose territory the crime was committed".

Thus, a state party can seemingly deny compensation to a victim who is either a non-resident or a citizen of a state which is not a member of the Council of Europe. Furthermore, the states may limit compensation in situations where a minimum threshold of damages is not met²¹¹ or based on the applicant's financial situation.²¹²

Moreover, compensation can be reduced or refused: (1) on account of the victims' conduct before, during, or after the crime; (2) on account of the victims' involvement in organized crime; or (3) if a full award is contrary to a sense of justice or public policy.²¹³

With respect to countries that are not states party to the European Compensation Convention, the Basic Principles of Justice provides the strongest legal foundation for asserting that a state has a duty to provide a victim with reparations. The Basic Principles of Justice states that :

“when compensation is not fully available from the offender or other sources, States should endeavor to provide financial compensation to:

- (a) victims who have sustained significant bodily injury or impairment of physical or mental health as a result of a serious crime;
- (b) the family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization”.²¹⁴

While this recommendation envisions reparations to crime victims, it certainly would be applicable in cases where the applicable international violations had been incorporated into the domestic criminal law. A survey of national systems reflects this principle in the growing state practice of providing reparations to crime victims and their families when the perpetrator is unable.

In 1996, the United Nations surveyed state practices with respect to the implementation of the Draft Basic Principle and received responses from 44 states.²¹⁵ In Cuba, Denmark, Finland, France, Mexico, Jordan, Romania, and Sweden, the state’s financial compensation was 100% of the reparations that the victim could claim from the offender.²¹⁶ Furthermore, 18 states reported that state funds for compensation to victims had been established pursuant to recommendations in the Basic Principles of Justice.²¹⁷ The concept of providing reparations from sources other than the violator has also been recognized at the international level in the ICC Statute.²¹⁸

While the European Compensation Convention and the Basic Principles of Justice set an important precedent for establishing a duty of a state to provide reparations for the conduct of non-state actors, it should be noted that this duty is neither a universal norm nor without significant reservations. However, the principle is certainly being put into practice as evinced by efforts of individual states and the world community (through the trust fund contemplated by the ICC Statute). Thus, the groundwork is certainly being laid for establishing collective responsibility that seeks to make victims whole again.

X. Philosophical Considerations

History reveals that crimes committed in the course of conflict typically occur after a breakdown in social controls. Some ascribe it to cultural factors and argue that some cultures have a tendency to be more cruel or violent than others.²¹⁹ It is difficult to say, however, whether these cultural factors are endemic, or whether they are produced by social and economic conditions and by the absence of effective legal and social controls. Accountability mechanisms are, therefore, important because they tend to shore up legal and social controls which are preventive, and they tend to support the hypothesis of deterrence.

Human nature also has its darker side, and while evil can emerge on its own without external inducement, it no doubt tends to emerge more harmfully when external controls are reduced and inducements offered. Impunity is certainly one of these inducements, as is the prospect of indifference and the expectation that the worst deeds may be characterized as justified, reasonable, acceptable or normal.

Victimization frequently involves the dehumanization of the prospective victims, frequently after a stage of psychological preparation by the perpetrators. Anyone "less than human" can, therefore, be dealt with as an animal or an object to which anything can be done without fear or risk of legal or moral consequence. Another approach is for the perpetrators to characterize the victims as perceived threats, thus providing rationalization for the ensuing victimization.

Such characterization can even rise to the level of self-defense against individuals, or a group, portrayed or perceived as constituting a threat or danger of some degree of plausibility and immediacy. Thus, the victims can be perceived and portrayed as being responsible for the victimization inflicted upon them, as if they had done something to justify it, or had called for it by their conduct, or for that matter, as in the case of the Holocaust, their very being.²²⁰ This rationalization can even reach the point where the perpetrators can perceive themselves as forced to inflict the victimization. That reasoning can reach the absurd: the perpetrators become the victims by being "forced" by the actual victims to engage in victimizing conduct.

Such distorted intellectual processes may be the product of inherent evil. But, they are most frequently the product of evil manipulation by the few of the many. From the days of Goebbels' and Streicher's propaganda to the 1994 Rwanda Hutu incitements to kill the Tutsis, the use of propaganda has been the main incitement to group violence. Obviously, the less educated or the more gullible a society is, the more likely it is to be induced into such false beliefs. But, there are many other factors which influence the effectiveness of such techniques and which use the accumulation of uncontradicted falsehood over time to produce their deleterious effect. It is during that time that the international community should mobilize on the basis of certain early warning signals that group victimization is about to occur. Thus, the prevention of such forms of victimization must be developed.

Accountability mechanisms appear to focus on events after-the-fact and may appear to be solely punitive, but they are also designed to be preventive through enhancing commonly shared values and through deterrence. Accountability, therefore, has a necessary punitive aspect. However, it is also integrally linked to prevention and deterrence. The weakness in the accountability argument is that it is after-the-fact, but its strength is that it has a crucial role to play in the formation and strengthening of values and the future prevention of victimization within society.

As stated above, impunity is the antithesis of accountability. To foster or condone impunity is as illegal as it is immoral. Frequently, impunity is also counterproductive to the ultimate goal of peace. Indeed, large-scale victimization arising out of international crimes is never safely hidden away in the limbo of the past. It remains fixed in time in an on-going present that frequently calls for vengeance, and longs for redress. Victims need to have their victimization acknowledged, the wrongs committed against them decried, the criminal perpetrators, or at least their leaders, punished, and compensation provided to the survivors.

A more outcome-determinative consideration of the processes of peace and the prospects of justice is to limit the discretion of leaders who are involved in political settlement processes that are intended to bring an end to conflicts.

These leaders' values, expectations, personal ambitions, positioning of power, the degree of public support they possess, and, above all, their responsibilities in connection with the initiation of the conflict and the conduct of the hostilities, particularly when international humanitarian law violations have occurred, affect the outcome of political settlements and bear the most on the subsequent pursuit and integrity of justice processes.

Leaders involved in conflict situations are those who negotiate political settlements, usually through the mediation efforts of other leaders. Without the involvement of leaders in conflict situations, there can be no cessation of hostilities, and that is why they are essential to the pursuit of peace. But, conversely, they may also be opposed to the pursuit of justice. That is the essence of the mediator's dilemma--how to bring about peace without sacrificing justice. In most conflicts, that dilemma has been resolved at the expense of justice. To avoid this dilemma in the future, the peace negotiators, acting in good faith in the pursuit of peace, must be immune from the pressures of having to barter away justice for political settlements. That card must not be left for them to play in the course of negotiating political settlements. Impunity must, therefore, be removed from the "tool box"²²¹ of political negotiators.

XI. The Internationalization of Criminal Justice

The process of "internationalization" of criminal justice principles, once considered to be limited by national boundaries, brought with it the need to strengthen the pursuit of traditional United Nations goals in crime prevention and criminal justice. Recent developments in international criminal law need to be supported by initiatives aimed at the reduction of criminality, an effective law enforcement and fair administration of justice, respect for human rights and fundamental freedoms and the promotion of high standards of fairness, humanity and professional conduct. In this respect, the Vienna Declaration points out that the challenges posed by crime and justice in the future are at the very core of economic and social development and human security. Continued and improved coordination and cooperation in the administration of justice and crime prevention, particularly judicial assistance between countries, are crucial in today's global society.

It appears a natural corollary that the "internationalization" of criminal justice and increased inter-state cooperation should extend to restorative justice, particularly those measures aimed at providing redress for victims and other healing mechanisms. The establishment of victims and witnesses units in the Yugoslavia and Rwanda Tribunals was a positive development, as it was positive that the Rome Statute of the International Criminal Court broadened the concept and obliged the Court "to establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation".

Victim compensation, when it is in the nature of a national or international program, which allocates a certain amount to compensation, must provide for a fair administrative method to determine actual damages, as opposed to punitive damages. Monetary compensation should not be deemed the only outcome, while non-monetary compensation should also be developed, particularly in societies where the economy is unable to sustain large monetary sums.

XII. Conclusion

Impunity for international crimes and for systematic and widespread violations of fundamental human rights is a betrayal of our human solidarity with the victims of conflicts to whom we owe a duty of justice, remembrance, and compensation.

Accountability and victim redress are also fundamental to post-conflict justice, as the re-establishment of a fair and functioning criminal justice system in the aftermath of conflicts is the only means to avoid impunity and ensure a lasting peace, which only a viable criminal justice system can protect and guarantee.

To remember and to bring perpetrators to justice is a duty we also owe to our own humanity and to the prevention of future violations of international humanitarian and human rights law.²²² To paraphrase George Santayana, if we cannot learn from the lessons of the past and stop the practice of impunity, we are condemned to repeat the same mistakes and to suffer their consequences.

The reason for our commitment to this goal can be found in the eloquent words of John Donne:

“No man is an island, entire of itself; every man is a piece of the continent, a part of the main . . .

Any man's death diminishes me because I am involved in mankind, and therefore never send to know for whom the bell tolls; it tolls for thee. . . .²²³”

NOTES

* Portions of this article are based on *Searching for Peace and Achieving Accountability*, 59 LAW AND CONTEMPORARY PROBLEMS 9 (1996) and *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW AND CONTEMPORARY PROBLEMS 63 (1996).

** Professor of law and President of the International Human Rights Law Institute, DePaul University College of Law; President, International Association of Penal Law; President, International Institute of Higher Studies in Criminal Sciences.

¹See Warren Hoge, *British Court Rules Pinochet Extraditable for Trial in Spain*, N.Y. TIMES, Oct. 8, 1999.

²See Indictment of Slobodan Milosevic, No. IT-99-93-I (24 May 99) for violations of the laws and customs of war and crimes against humanity.

³See Indictments of Radovan Karadzic, Nos. IT-95-18-1-I (25 Jul. 95); IT-9505-I (16 Nov. 95)(Srebrenica) for grave breaches of the 1949 Geneva Conventions, violations of the laws and customs of war, genocide, and crimes against humanity.

⁴Norimitsu Onishi, *Survivors Sadly Say, Yes, Reward the Tormentors*, N.Y. TIMES, Aug. 30, 1999, at A4.

⁵THE UNITED NATIONS AND CAMBODIA 1991-1995 (1995); GENOCIDE AND DEMOCRACY IN CAMBODIA: THE KHMER ROUGE, THE UNITED NATIONS, AND THE INTERNATIONAL COMMUNITY (Ben Kiernan ed., 1993).

⁶See DANIEL CHIROT, MODERN TYRANTS: THE POWER AND PREVALENCE OF EVIL IN OUR AGE (1994). PIERRE HASSNER, VIOLENCE AND PEACE: FROM THE ATOMIC BOMB TO ETHNIC CLEANSING (1995); RUDOLPH J. RUMMEL, DEATH BY GOVERNMENT (1994). See also ERIK HOBBSBAWM, THE AGE OF EXTREMES: A HISTORY OF THE WORD, 1914-1991 (1995). A figure used in Mr. Hobsbawm's book is 187 million "people killed or allowed to die by human decision" for the "short century" that he examines. Hobsbawm notes that this accounts for about 10 percent of the global population in the year 1900. The category "by human decision" includes non-wartime politically caused deaths such as those in the Soviet Union (the 1930's Ukrainian starvation and the "Gulag") and in China between 1949 and 1975 (the massive starvation of the "Great Leap Forward" and various "repression campaigns"). However, deaths in those two countries for political government-decided reasons are likely on the order of 35 million and 45 million respectively, or 80 million, for a total of around 205 million, rather than Hobsbawm's figure of 187 million.

⁷*Id.*

⁸For the applicable norms, see THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989). See also RICHARD B. LILICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE (1991); FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS (1990); HENRY J. STEINER, INTERNATIONAL HUMAN RIGHTS LAW IN CONTEXT: LAW, POLITICS, MORALS, TEXT AND MATERIALS (1996).

⁹See RUMMEL, *supra* note 6, at 3, 9 (reports a total of 72.521 million casualties).

¹⁰*Id.*

¹¹See SIPRI YEARBOOKS 1975-1996. There were two reported studies in the PIOOM Newsletter and Progress Report in 1994 and 1995: A.J. Jongman & A.P. Schmid, *Contemporary Conflicts: A Global Survey of High and Lower Intensity Conflict and Serious Disputes*, 7 PIOOM NEWSLETTER AND PROGRESS REPORT 14 (Winter 1995) (Interdisciplinary Research Program on Causes of Human Rights

Violations, Leiden, The Netherlands); and *Study*, 6 PIOOM NEWSLETTER 17 (1994); Alex P. Schmid, *Early Warning of Violent Conflicts: Casual Approaches*, in VIOLENT CRIME & CONFLICTS 47 (ISPAC 1997); *PIOOM World Conflict Map 1994-1995*, 7 PIOOM NEWSLETTER, *supra*. See also *supra* note 6.

¹²M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11 (1997).

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

¹⁴See Lynn Berat & Yossi Shain, *Retribution or Truth-telling in South Africa? Legacies of the Transitional Phase*, 20 L. & SOC. INQUIRY 1, 163 (1995); Ziyad Motala, *The Promotion of National Unity and Reconciliation Act, the Constitution and International Law*, 28 COMP. & INT. L. J. S. AFRICA 338 (1995).

¹⁵See NUNCA MÁS, INFORME DE LA COMISION SOBRE LA DESAPARICION DE PERSONAS (1985); CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL (1996).

¹⁶See REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION (Philip E. Berryman trans., 1993); Edward C. Snyder, *The Dirty Legal War: Human Rights and the Rule of Law in Chile*, 2 TULSA J. COMP. & INT. L. 253, 279 (1995).

¹⁷See generally III TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., 1995); Maria Loñ, *Lustration Land Truth Claims: Unfinished Revolutions in Central Europe*, 20 L. & SOC. INQUIRY 1, 117 (1995); Adrienne M. Quill, *To Prosecute or Not to Prosecute: Problems Encountered in the Prosecution of Former Communist Officials in Germany, Czechoslovakia, and the Czech Republic*, 7 IND. INT'L & COMP. L. REV. 1, 165, 188-91 (1996).

¹⁸See *Progress Report on the Question of Impunity of Perpetrators of Human Rights Violations*, prepared by Mr. Guissé and Mr. Joinet, pursuant to Sub-commission resolution 1992/23, Sub-Commission on Prevention and Protection of all Minorities, 45th Sess., Item 10(a), (19 July 1993) E/CN.4/Sub.2/1993/6; *Preliminary Report on Opposition to the Impunity of Perpetrators of Human Rights Violations (economic, social and cultural rights)*, prepared by Mr. Guissé and Mr. Joinet, pursuant to Sub-Commission resolution 1993/37, Sub-Commission on Prevention and Protection of all Minorities, 46th Sess., Item 10(a), (22 June 1994) E/CN.4/Sub.2/1994/11; *Progress Report on the Question of the Impunity of Perpetrators of Violations of Human Rights (civil and political rights)*, prepared by Mr. Joinet, pursuant to Sub-Commission resolution 1994/34; Sub-Commission on Prevention and Protection of all Minorities, 47th Sess., Item 10, (28 June 1995) E/CN.4/Sub.2/1995/18; *Question of the Impunity of Perpetrators of Violations of Human Rights (civil and political rights)*, Final Report prepared by Mr. L. Joinet, pursuant to Sub-Commission resolution 1995/35; Sub-Commission on Prevention of Discrimination and Protection of Minorities, 48th Sess., Item 10, (29 June 1996) E/CN.4/Sub.2/1996/18; NAOMI ROHT-ARRIAZA, IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 14 (1995); Stephen P. Marks, *Forgetting the Policies and Practices of the Past: Impunity in Cambodia*, THE FLETCHER F. 17(1994); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991); Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?* 31 TEX INT'L L.J. 1 (1996); Robert O. Weiner, *Trying to Make Ends Meet: Reconciling the Law and Practice of Human Rights Amnesties*, 26 ST.

MARY'S L.J. 857, 867 (1995).

¹⁹M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409 (2000). For a discussion of the historical antecedents of *realpolitik*, see HENRY KISSINGER, DIPLOMACY 137-167 (1994).

²⁰For a critical appraisal of that practice, see Luc Huyse, *Justice After Transition: On the Choices Successor Elites Make in Dealing with the Past*, 20 L. & SOC. INQUIRY 1, 51, 77-78 (1995).

²¹See His Holiness Pope Pius XII, *International Criminal Justice*, Address to the Sixth International Congress of Penal Law, *reprinted in* 14 NOUVELLES ÉTUDES PÉNALES 13 (1998).

²²This is illustrated by the case of Spain's attempt to extradite former Chilean leader Augusto Pinochet:

Britain's decision Tuesday that former Chilean dictator Augusto Pinochet is unfit to stand trial because of ill health is not nearly so disappointing or anticlimactic as some human-rights activists claim. Though the 84-year-old Pinochet won't be extradited and tried in Spain--and will probably never serve a day in prison--his house arrest in London for the past 15 months shattered the veil of impunity that effectively had shielded him and others of his ilk from being held accountable for their crimes. Whether it be Uganda's Idi Amin, Haiti's Raoul Cedras or Paraguay's Alfredo Stroessner, former dictators today cannot sleep quite as restfully as they used to. Even in Chile--where Pinochet dreamed of placid sunsets as a senator for life--there are now about 50 lawsuits awaiting his return, for murders, tortures and disappearances during his 17-year rule. The attempt to prosecute Pinochet for the torture of Spanish citizens during his dictatorship was based on the international convention on torture, which Britain did not actually sign until 1988. A fortuitous combination of factors fueled the Pinochet prosecution: a tireless and aggressive human rights movement in Chile, a crusading judge in Spain and a favorably disposed Labor government in Britain. It's doubtful that a Tory government led by Margaret Thatcher would have pursued the case against Pinochet quite as forcefully, if at all. Indeed, Lady Thatcher argued in Pinochet's favor. Once Pinochet was arrested, however, other prosecutions suddenly became possible. France and Belgium also filed charges against him, and Spain since has sued for the extradition of Argentine military officers accused of human-rights abuses. Similar high-profile prosecutions won't be as surprising any more. The old general's unexpected sojourn in London also emboldened Chile's judiciary to reopen scores of old murders and atrocities, and even led to the filing of charges against Pinochet himself. If, as expected, Pinochet returns home within the next few weeks, he will face a far more hostile country than he left. Even the right-wing political parties, in the middle of a hotly contested runoff presidential election, have learned to put some distance between themselves and the disgraced former dictator. It's an ironic denouement to what Pinochet must have thought was a glorious career: His chief legacy is likely to be the wholesome precedent that even thugs as arrogant and powerful as he was must inevitably face the accusing fingers of their victims.

Pinochet's Unexpected Legacy, CHI. TRIB. Jan. 13, 2000, at 22 (editorial).

²³See the Four Geneva Conventions of Aug. 12, 1949: Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field (Geneva Convention I), Aug. 12, 1949, 75 U.N.T.S. 31, 6 U.S.T. 3114, T.I.A.S. No. 3362; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II), Aug. 12, 1949, 75 U.N.T.S. 85, 6 U.S.T. 3217 T.I.A.S. No. 3363; Convention

Relative to the Treatment of Prisoners of War (Geneva Convention III), Aug. 12, 1949, 75 U.N.T.S. 135, 6 U.S.T. 3316, T.I.A.S. No. 3364; Convention Relative to the Protection of Civilian Persons in Times of War (Geneva Convention IV), Aug. 12, 1949, 75 U.N.T.S. 28, 6 U.S.T. 3516, T.I.A.S. No. 3365. For "grave breaches" see articles 49 (I), 129 (III), 146 (IV), and for conflicts of a non-international character, see common article 3.

²⁴Protocol I Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, Annex I, *reprinted in* 16 I.L.M. 1391, Schindler/Toman 551 [hereinafter 1977 Protocol I]. *See especially* articles 11, 85, 86.

²⁵Protocol II Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature*, Dec. 12, 1977, U.N. Doc. A/32/144, Annex II, *reprinted in* 16 I.L.M. 1391, Schindler/Toman 619 [hereinafter 1977 Protocol II].

²⁶*See* Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 3 Martens (3d) 461, 36 Stat. 2277, T.S. No. 539, 3 Martens Nouveau Recueil (ser.3) 462, *reprinted in* 2 AM. J. INT'L L. 90 (1908)(Supp.), 1 FRIEDMAN 308, 1 BEVANS 631 [hereinafter 1907 Hague Convention]; the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict. *See also* certain weapons conventions such as: Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 17 June 1925, 26 U.S.T. 571, 94 L.N.T.S. 65, 14 I.L.M. 49; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163, 11 I.L.M. 309; Convention on Prohibitions and Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects, Oct. 10, 1980, U.N. Doc. A/CONF.95/15, 1342 U.N.T.S. 7, 19 I.L.M. 1523; including Protocol on Non-Detectable Fragments to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (Protocol I), Oct. 10, 1980, U.N. Doc. A/CONF.95/15 (1980), 19 I.L.M. 1529; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, Appendix C, (Protocol II), Oct. 10, 1980, U.N. Doc. A/CONF.95/15 (1980), 19 I.L.M. 1529; and Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (Protocol III), Oct. 10, 1980, U.N. Doc. A/CONF.95/15 (1980), 19 I.L.M. 1534, *entered into force* with provisions; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, S. TREATY DOC. No. 103-21, 32 I.L.M. 800.

²⁷*See* Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis [London Charter], Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, 3 Bevans 1238, *entered into force* Aug. 8, 1945; Control Council Law No. 10 (Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity), Dec. 20, 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, Jan. 31, 1946, *reprinted in* 1 BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE 488 (2 vols.1980); International Military Tribunal for the Far East, Jan. 19, 1946 and amended Apr. 26, 1946, T.I.A.S. No. 1589, 4 Bevans 20; Affirmation of the Principles of International Law

Recognized by the Charter of the Nuremberg Tribunal (United Nations General Assembly Resolution), Dec. 11, 1946, U.N.G.A. Res. 95(I), U.N.Doc.A/64/Add.1 (1946); Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, July 29, 1950, U.N. GAOR Supp. (No. 12), at 11, U.N. Doc. A/1316 (1950), 44 AM. J. INT'L L. 126 (1950); Code of Crimes Against the Peace and Security of Mankind: Titles and texts of articles on the Draft Code of Crimes Against the Peace and Security of Mankind adopted by the International Law Commission at its forty-eighth session (1996), U.N. GAOR Int. Law Comm., 48th Sess., U.N. Doc. A/CN.4/L.532 (1996), July 15, 1996, *revised by* U.N. Doc. A/CN.4/L.532/corr. 1, U.N. Doc. A/CN.4/L.532/corr.3; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *opened for signature*, Nov. 26, 1968, G.A. Res. 2391, U.N. GAOR, 23d Sess., Supp. No. 18, at 40, U.N. Doc. A/RES/2391 (1968), 754 U.N.T.S. 73, 8 I.L.M. 68, *entered into force* Nov. 1970; European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes (Inter-European), Jan. 25, 1974, Europ. T.S. No. 82, 13 I.L.M. 540, *not yet entered into force*; Statute of the International Criminal Tribunal for the Former Yugoslavia [hereinafter ICTY Statute], May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 1-2, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1159; Statute of the International Criminal Tribunal for Rwanda [hereinafter ICTR Statute], S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598.

²⁸See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 1 U.N. GAOR Res. 96 (Dec. 11, 1946), 78 U.N.T.S. 277; *see also* ICTR Statute, *supra* note 27; and ICTY Statute, *supra* note 27.

²⁹See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. G.A. Res. 39/46, Feb. 4, 1985, 23 I.L.M. 1027. *See also* United Nations Standard Minimum Rules for the Treatment of Prisoners (ECOSOC Resolution), 1955, ECOSOC Res. 663C (XXIV), July 31, 1957, and 2076 (XXII), May 13, 1977, U.N. Doc. A/CONF.6/1, Annex I.A; Treaty of European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Inter-European), Nov. 26, 1987, Eur. T.S. No. 126, 27 I.L.M. 1152; Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, AG/Res. 783 (XV-0/85), O.A.S. General Assembly, 15th Sess. IEA/Ser.P. AG/Doc. 22023/85 rev. 1 at 46-54 (1986), O.A.S. Treaty Series, No. 67, 25 I.L.M. 519.

³⁰The 1945 International Military Tribunal to Prosecute the Major War Criminals of the European Theatre 59 Stat. 1544, 1546, 82 U.N.T.S. 279, 284[hereinafter IMT].

³¹M. Cherif Bassiouni, *Modalities of Inter-State Cooperation in Penal Matters*, in INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni ed., 2d rev., 1999). *See also* EUROPEAN INTER-STATE CO-OPERATION IN CRIMINAL MATTERS (Ekkehart Müller-Rappard & M. Cherif Bassiouni eds., 1993).

³²*Supra* note 28

³³*Supra* note 23

³⁴*Supra* note 24

³⁵*See generally* M. Cherif Bassiouni, "Crimes against Humanity:" *The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457-94 (1994).

³⁶*See supra* note 25.

³⁷G.A. Res. 2840, (XXVI) 26 U.N. GAOR Supp. (No. 29), at 88, U.N. Doc. A/8429 (1971).

³⁸*See* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW 499-527 (1992).

³⁹*Principles of International Co-operation in the Detention, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, G.A. Res. 3074 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 78, U.N. Doc. A/9030, Dec. 3, 1973.

⁴⁰See M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE, AUT JUDICARE* (1995).

⁴¹Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, G.A. Res. 2391, U.N. GAOR, 23d Sess., Supp. No. 18, at 40, U.N. Doc. A/RES/2391 (1968), 754 U.N.T.S. 73, 8 I.L.M. 68, entered into force Nov. 1970.

⁴²See European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes (Inter-European), opened for signature at Strasbourg Jan. 25, 1974, Europ. T.S. No. 82, 13 I.L.M. 540, not yet entered into force. See also Christine Van den Wyngaert, *War Crimes, Genocide and Crimes Against Humanity: Are States Taking National Prosecutions Seriously?*, in 1 INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni ed., 2d rev. ed., 1999); and the special issue of 37 REVUE INTERNATIONALE DROIT PÉNAL (1966), especially the reports of J. Graven, J. Dautricourt, S. Glaser, J.B. Herzog and H.H. Jescheck.

⁴³M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW CONVENTIONS AND THEIR PENAL PROVISIONS, 451-54 (1997).

⁴⁴EUROPEAN INTER-STATE CO-OPERATION IN CRIMINAL MATTERS, *supra* note 31.

⁴⁵M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 356-66 (3d ed. 1996).

⁴⁶See Kenneth Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 834 (1988); Luc Reydam, *Universal Jurisdiction over Atrocities in Rwanda: Theory and Practice*, 1 EUR. J. CRIME. L. CRIM. JUST. 18 (1996).

⁴⁷In such cases, however, national legal systems would have to adopt substantive national legislation to prosecute persons accused of genocide, crimes against humanity, and war crimes, as well as torture.

⁴⁸Germany and Italy have included genocide as part of their criminal codes. France, Canada, the United Kingdom and Australia have developed specialized legislation, which includes retrospective application to World War II events, although Australia has not been successful in any prosecutions. (There have been three cases, all of which resulted in acquittal before trial: *DPP v. Polyukhovich*; *Malone v. Berezowsky*; *Heinrich Wagner*). See THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES 130-34 (Timothy L.H. McCormack & Gerry J. Simpson, eds., 1997). The United Kingdom is in the process of prosecuting one case (Szymon Serafinowicz) under the United Kingdom War Crimes Act 1991, France has prosecuted three with one pending, and one case (*R. v. Finta*) has been prosecuted in Canada under the Canadian Criminal Law Amendment Act 1985 S.C., 1985, c.19 which amends the Canadian criminal code. See DICK DE MILD, IN THE NAME OF THE PEOPLE: PERPETRATORS OF GENOCIDE IN THE REFLECTION OF THEIR POST-WAR PROSECUTION IN WEST GERMANY (1996); Leila Sadat-Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289 (1994).

⁴⁹See, e.g., Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, U.N. Doc. A/CONF.39/27. See also G.C. ROZANKIS, THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES (1976); DE HOOGH, OBLIGATIONS ERGA OMNES AND INTERNATIONAL CRIMES (1996) (embodying the author's doctoral dissertation, which is rich in public international law material and mostly based on the work of

the ILC, but poor on ICL).

⁵⁰See M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (1987) [hereinafter BASSIOUNI, DRAFT CODE]; M. Cherif Bassiouni, *An Appraisal of the Growth and Developing Trends of International Criminal Law*, 45 REVUE INTERNATIONALE DE DROIT PÉNAL 405 (1974); see, e.g., I, II, AND III INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni ed. 1986, 2d. rev. ed. forthcoming 1999); LYAL S. SUNGA, THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW (1997); INTERNATIONAL CRIMINAL LAW: A COLLECTION OF INTERNATIONAL AND EUROPEAN DOCUMENTS (Christine Van den Wyngaert ed., 1996); JOHN DUGARD & CHRISTINE VAN DEN WYNGAERT, INTERNATIONAL CRIMINAL LAW AND PROCEDURE (1996); INTERNATIONAL CRIMINAL LAW: A COLLECTION OF INTERNATIONAL AND EUROPEAN INSTRUMENTS (1996); NDIVA KOFELE-KALE, INTERNATIONAL LAW OF RESPONSIBILITY FOR ECONOMIC CRIMES (1995); FARHAD MALEKIAN, THE CONCEPT OF ISLAMIC INTERNATIONAL CRIMINAL LAW (1994); ANDRE HUET & RENEE KOERING-JOULIN, DROIT PÉNAL INTERNATIONAL (1994); BASSIOUNI, *supra* note 31; HAIDONG LI, DIE PRINZIPIEN DES INTERNATIONALEN STRAFRECHTS (1991); M. CHERIF BASSIOUNI, INTERNATIONAL CRIMES DIGEST/INDEX (1985); CLAUDE LOMBOIS, DROIT PÉNAL INTERNATIONAL (2d. rev. ed. 1979); MOHAMMED HASSANEIN EBEID, AL-JARIMA AL-DAWLIA (1979); STEFAN GLASER, DROIT INTERNATIONAL PÉNAL CONVENTIONNEL (Vol. 1 1971 & Vol. 2 1978); GUILLERMO J. FIERRO, LA LEY PÉNAL Y EL DERECHO INTERNACIONAL (1977); BART DESCHUTTER, LA BELGIQUE ET LE DROIT INTERNATIONAL PÉNAL (1975); 1 & 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni & Ved P. Nanda eds., 1973) [hereinafter 1 TREATISE]; DIETRICH OEHLER, INTERNATIONALES STRAFRECHT (1973); A.H.J. SWART, INTERNATIONAAL STRAFRECHT (1973); STANISLAW PLAWSKI, ÉTUDE DES PRINCIPES FONDAMENTAUX DU DROIT INTERNATIONAL PÉNAL (1972); AKTUELLE PROBLEME DES INTERNATIONALEN STRAFRECHTS (Dietrich Oehler & Paul G. Potz eds., 1970); OTTO TRIFFTERER, DOGMATISCHE UNTERSUCHUNGEN ZUR ENTWICKLUNG DES MATERIELLEN VÖLKERSTRAFRECHTS SEIT NURNBERG (1966); INTERNATIONAL CRIMINAL LAW (G.O.W. Mueller & Edward M. Wise eds., 1965); ANTONIO QUINTANO-RIPOLES, TRATADO DE DERECHO PÉNAL INTERNACIONAL Y PÉNAL INTERNACIONAL (1957); STEFAN GLASER, INFRACTIONS INTERNATIONALES (1957); GEORGE DAHM, ZU R PROBLEMTIK DES VÖLKERSTRAFRECHTS (1956); STEFAN GLASER, INTRODUCTION A L'ÉTUDE DU DROIT INTERNATIONAL PÉNAL (1954); HANS-HEINRICH JESCHECK, DIE VERANTWORTLICHKEIT DER STAATSORGANE NACH VOLKERSTRAFRECHTS (1952); JOSEPH B. KEENAN & BRENDAN F. BROWN, CRIMES AGAINST INTERNATIONAL LAW (1950); NINO LEVI, DIRITTO PENALE INTERNAZIONALE (1949); ALBERT DE LA PRADELLE, UNE REVOLUTION DANS LE D ROIT PÉNAL INTERNATIONAL (1946); ROLANDO QUADRI, DIRITTO PENALE INTERNAZIONALE (1944); FRANCESCO COSENTINI, ESSAI D'UN CODE PÉNAL INTERNATIONAL DRESSÉ SUR LA BASE COMPARATIVE DES PROJETS & TEXTES RECENTS DES CODES PÉNAUX (1937); HELLMUTH VON WEBER, INTERNATIONALE STRAFGERICHTSBARKEIT (1934); CARLOS ALCORTA, PRINCIPIOS DE DERECHO PÉNAL INTERNACIONAL (1931); EMIL S. RAPPAPORT, LE PROBLÈME DU DROIT PÉNAL INTER ÉTATIQUE (1930); HENRI DONNEDIEU DE VABRES, LES PRINCIPES MODERNES DU DROIT PÉNAL INTERNATIONAL (1928); VESPASIAN V. PELLA, LA CRIMINALITÉ COLLECTIVE DES ÉTATS ET LE DROIT PÉNAL DE L'AVENIR (1925); HENRI F. DONNEDIEU DE VABRES, INTRODUCTION A L'ÉTUDE DU DROIT PÉNAL INTERNATIONAL (1922); MAURICE TRAVERS, LE DROIT PÉNAL INTERNATIONAL ET SA MISE EN OEUVRE EN TEMPS DE PAIX ET EN TEMPS DE GUERRE (1922); JOSEF KOHLER, INTERNATIONALES STRAFRECHT (1917); SALVATORE ADINOLFI, DIRITTO

INTERNAZIONALE PENALE (1913); FRIEDRICH MEILI, *LEHRBUCH DES INTERNATIONALEN STRAFRECHTS UND STRAFPROZESSRECHTS* (1910); *see also, e.g.,* M. Cherif Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, 15 CASE W. RES. J. INT'L L. 27 (1983); Robert Friedlander, *The Foundations of International Criminal Law: A Present Day Inquiry*, 15 CASE W. RES. J. INT'L L. 13 (1983); Leslie C. Green, *Is There an International Criminal Law?*, 21 ALBERTA L. REV. 251 (1983); Farooq Hassan, *The Theoretical Basis of Punishment in International Criminal Law*, 15 CASE W. RES. J. INT'L L. 39 (1983); G.O.W. Mueller, *International Criminal Law: Civitas Maxima*, 15 CASE W. RES. J. INT'L L. 1 (1983); M. Cherif Bassiouni, *The Proscribing Function of International Criminal Law in the Process of International Protection of Human Rights*, 8 YALE J. WORLD PUB. ORD. 193 (1982); Leslie C. Green, *New Trends in International Criminal Law*, 11 ISR. Y.B. H.R. 9 (1981); Hans-Heirich Jescheck, *Development, Present State and Future Prospects of International Criminal Law*, 52 REVUE INTERNATIONALE DE DROIT PÉNAL 337 (1981); Leslie C. Green, *International Crime and the Legal Process*, 29 INT'L & COMP. L.Q. 567 (1980); Leslie C. Green, *An International Criminal Code Now?*, 3 DALHOUSIE L.J. 560 (1976); Yoram Dinstein, *International Criminal Law*, 5 ISR. Y.B. H.R. 55 (1975); Quincy Wright, *The Scope of International Criminal Law: A Conceptual Framework*, 15 VA. J. INT'L L. 561 (1975); Robert Legros, *Droit Pénal International* 1967, 48 REVUE DE DROIT PÉNAL ET DE CRIMINOLOGIE 259 (1968); Hans-Heinrich Jescheck, *État Actuel et Perspectives d'Avenir des Projets dans le Domaine du Droit International Pénal*, 35 REVUE INTERNATIONALE DE DROIT PÉNAL 83 (1964); W.J. Ganshof van der Meersch, *Justice et Droit International Pénal*, 42 REVUE DE DROIT PÉNAL ET DE CRIMINOLOGIE 3 (1961); Leslie C. Green, *New Approach to International Criminal Law*, 28 SOLIC. 106 (1961); Jean Y. Dautricourt, *Le Droit International Pénal*, 37 REVUE DE DROIT PÉNAL ET DE CRIMINOLOGIE 243 (1957); Jacques Verhaegen, *Les Impasses du Droit International Pénal*, 38 REVUE DE DROIT PÉNAL ET DE CRIMINOLOGIE 3 (1957); Stefan Glaser, *Element Moral de l'Infraction Internationale*, 59 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 537 (1955); A.D. Belinfante, *Les Principes de Droit Pénal International et les Conventions Internationales*, 2 NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 243 (1955); Giuliano Vassalli, *In tema di Diritto Internazionale Penale*, 56 GIUSTIZIA PENALE 257 (1951); Stefan Glaser, *Les Infractions Internationales et Leurs Sanctions*, 29 REVUE DE DROIT PÉNAL ET DE CRIMINOLOGIE 811 (1949); Henri F. Donnedieu de Vabres, *La Codification du Droit Pénal International*, 19 REVUE INTERNATIONALE DE DROIT PÉNAL 21 (1948); Stefan Glaser, *Le Principe de la Legalité des Délits et des Peines et les Procès des Criminels de Guerre*, 28 REVUE DE DROIT PÉNAL ET DE CRIMINOLOGIE 230 (1948); Henri F. Donnedieu de Vabres, *Le Procès de Nuremberg et le Principe de la Legalité et des Peines*, 26 REVUE DE DROIT PÉNAL ET DE CRIMINOLOGIE 813 (1947); Henri F. Donnedieu de Vabres, *Le Procès de Nuremberg Devant Les Principes Modernes du Droit Pénal International*, 7 RECUEIL DES COURS 481 (1947); Albert de La Pradelle, *Une Revolution Dans le Droit Pénal International*, 13 NOUVELLE REVUE DE DROIT INTERNATIONAL PRIVÉ 360 (1946); Max Radin, *International Crimes*, 32 IOWA L. REV. 33 (1946); Gerald Abrahams, *Retribution: An Inquiry into the Possibility of an International Criminal Law*, 92 LAW J. 38, 45, 53 (1942); Roberto Ago, *Le Delit International*, 68 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE 419 (1939); Henri F. Donnedieu de Vabres, *La Repression Internationale des Délits du Droit des Gens*, 2 NOUVELLE REVUE DE DROIT INTERNATIONAL PRIVÉ 7 (1935); Vespasian P. Vella, *Plan d'un Code Répressif Mondial*, 12 REVUE INTERNATIONALE DU DROIT PÉNAL 348 (1935); Carlos

Alcorta, *La Doctrina del Derecho Pénal Internacional*, 2 REVISTA ARGENTINA DE DERECHO INTERNACIONAL 271 (1931); Giuseppe Sagone, *Pour un Droit Pénal International*, 5 REVUE INTERNATIONALE DE DROIT PÉNAL 363 (1928); Quintiliano Saldana, *Projet de Code Pénal International*, 1 CONGRÈS INTERNATIONAL DE DROIT PÉNAL (1926); G. Glover Alexander, *International Criminal Law*, 5 J. COMP. LEGIS. & INT'L L. 90 (1923); G. Glover Alexander, *International Criminal Law*, 3 J. COMP. LEGIS. & INT'L L. 237 (1921).

⁵¹BASSIOUNI, *supra* note 38, at 87.

⁵²See, e.g., M. Cherif Bassiouni, *States of Emergency and States of Exception: Human Rights Abuses and Impunity under Color of Law*, in NON-DEROGABLE RIGHTS AND STATES OF EMERGENCY 125 (Daniel Prémont ed., 1996).

⁵³See BASSIOUNI & WISE, *supra* note 40.

⁵⁴See Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *supra* note 27.

⁵⁵See generally Randall, *supra* note 46; and Reydamas, *supra* note 46.

⁵⁶See *supra* note 12; see also RUMMEL, *supra* note 6; TRANSITIONAL JUSTICE, *supra* note 17; Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463 (1995); Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Human Rights Violations in International Law*, 78 CAL. L. REV. 449 (1990).

⁵⁷See BASSIOUNI, *supra* note 45, at Ch.1.

⁵⁸See BASSIOUNI & WISE, *supra* note 40, at 8.

⁵⁹See, e.g., *Question of the Punishment of War Criminals and of Persons Who have Committed Crimes Against Humanity*, G.A. Res. 2840, U.N. GAOR 3d Comm., 26th Sess., Supp. No. 29 at 88, U.N. Doc. A/8429 (1971); *Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, G.A. Res. 3074, U.N. GAOR, 28th Sess., Supp. No. 30 at 78, U.N. Doc. A/9030 (1973).

⁶⁰See, e.g., MERON, *supra* note 8; see also Claudia Annacker, *The Legal Regime of "Erga Omnes" Obligations and International Law*, 46 AUSTRIAN J. PUB. INT'L L. 131 (1994); Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1 (1986).

⁶¹See IAN BROWNLIE, *STATE RESPONSIBILITY: SYSTEM OF THE LAW OF NATIONS* (1983).

⁶²See M. Cherif Bassiouni, *A Functional Approach to "General Principles of International Law"*, 11 MICH. J. INT'L L. 768, 801-09 (1990).

⁶³See, e.g., LAURI HANNIKAINEN, *PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW* (1988).

⁶⁴See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 512-15 (3d ed. 1979); 1 HERSH LAUTERPACHT, *INTERNATIONAL LAW* 113 (Elihu Lauterpacht ed., 1970); GEORGE SCHWARZENBERGER, *INTERNATIONAL LAW AND ORDER* 5 (1971); Gordeon A. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA J. INT'L L. 585 (1988); Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411 (1990). Other commentators have also noted that the function of peremptory norms in the context of international law has not been adequately addressed:

Peremptory norms of international law (*jus cogens*) have been the subject of much recent interest. In light of their extensive and quite unprecedented treatment by the International Law Commission and the Vienna Conference on the Law of Treaties, it may be surprising that attention has not been greater. At the same time, inquiry

into the relationship between peremptory norms and the sources and functions of international law have been virtually non-existent. This is indeed surprising, given the recent substantial interest in these areas as part of a larger "theoretical explosion" in international legal studies.

N.G. Onuf & Richard K. Birney, *Peremptory Norms of International Law: Their Source, Function and Future*, 4 DENVER J. INT'L L. & POLICY 187 (1973).

⁶⁵See ANTHONY D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 132 (1971).

⁶⁶See Christenson, *supra* note 40; cf. Mark Janis, *Jus Cogens: An Artful Not a Scientific Reality*, 3 CONN. J. INT'L L. 370 (1988).

⁶⁷See BASSIOUNI, *supra* note 62.

⁶⁸The ICTY Statute and the ICTR Statute, *supra* note 27, address genocide, crimes against humanity, and war crimes. The 1996 Code of Crimes includes these three crimes plus Aggression. See *Draft Code of Crimes Against Peace and Security of Mankind: Titles and Articles on the Draft Code of Crimes Against Peace and Security of Mankind adopted by the International Law Commission on its Forty-Eighth Session*, U.N. GAOR, 51st Sess., U.N. Doc. A/CN.4L.532 (1996), revised by U.N. Doc. A/CN.4L.532/Corr.1 and U.N. Doc. A/CN.4L.532/Corr.3; *Crimes Against U.N. Personnel*, in BASSIOUNI, *supra* note 43.

⁶⁹See Michael Ackehurst, *Custom as a Source of International Law*, 1974 BRIT. Y.B. INT'L. L. 1.

⁷⁰See BASSIOUNI, *supra* note 43.

⁷¹See *id.*

⁷²See Bassiouni, *supra* note 19.

⁷³For the proposition that some violations of the *Geneva Conventions* are *jus cogens* see MERON, *supra* note 8, at 9. See also *Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14, 95 (June 27) (concerning the applicability of the *Vienna Convention on the Law of Treaties*); BASSIOUNI, *supra* note 43, at 341-46. The *Vienna Convention on the Law of Treaties* with annex, 23 May 1969, U.N. A/Conf. 39/27, specifies in Article 53 that a treaty provision contrary to *jus cogens* is null and void. Article 71, paragraph 1(a) makes it clear, however, that the entire treaty is not null and void if the parties do not give effect to the provision in question. The I.C.J. has also considered the question. In *U.S. Diplomatic and Consular Staff in Teheran* (U.S. v. Iran), 1980 I.C.J. 3 (May 24), the Court held that some treaty obligations can also be "obligations under general international law," and in its advisory opinion on reservations to the Convention on Genocide 1951 I.C.J. 15 (May 28) it held that the *Genocide Convention* is part of customary law.

⁷⁴In a tongue-in-cheek way, Professor Anthony D'Amato reflected upon the loose manner in which *jus cogens* is regarded in international law in the title of his short essay *It's a Bird, it's a Plane, it's Jus Cogens!*, 6 CONN. J. INT'L L. 1 (1990).

⁷⁵Threats to peace and security are essentially political judgments, and the U.N. Charter gives that function under Chapter VII to its primary political organ, the Security Council. Thus it is difficult to assess in objective legal terms what constitutes aggression. See, among the many writers on the subject, YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* (1988). As to what is (or what is not) shocking to the conscience of humanity, that too may be a subjective factor. For example, a single killing, coupled with the required intent to "destroy in whole or in part" required in Article II of the Genocide Convention, is sufficient for that single act to be called genocide. But the killing of an estimated 2 million Cambodians is not considered genocide because it is not by one ethnic, religious, or national group against another, but by the same national, religious, and ethnic

group against its own members, and for political reasons. Since political and social groups are excluded from the protected groups in the Genocide Convention, such massive killing is not deemed to be genocide, unless it can be factually shown that there is a diversity between the perpetrator and victim groups. Thus, one killing would be genocide and consequently *jus cogens*, while 2 million killings would not. Such mass killings do, however, fall under crimes against humanity and war crimes, and are therefore *jus cogens* crimes under other criminal labels. See BASSIOUNI, *supra* note 38.

⁷⁶ICL doctrine has not however sufficiently dealt with the doctrinal bases of international crimes, elements of international criminalization, and the criteria for their application to each and every international crime. This is evident in the writings of most ICL scholars. See M. Cherif Bassiouni, *The Sources and Content of International Criminal Law: A Theoretical Framework*, in 1 INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni ed., 3d ed. forthcoming 1999); M. Cherif Bassiouni, *Characteristics of International Criminal Law Conventions and International Criminal Law and Human Rights*, in 1 INTERNATIONAL CRIMINAL LAW: CRIMES 1 & 15 (M. Cherif Bassiouni ed., 1986); Daniel Derby, *A Framework for International Criminal Law*, in 1 INTERNATIONAL CRIMINAL LAW: CRIMES 33 (M. Cherif Bassiouni ed., 1986).

⁷⁷Except for the notable problem in the South Asia Seas. See G.O.W. MUELLER & FRED A. ADLER, *OUTLAWS OF THE OCEAN: THE COMPLETE BOOK OF CONTEMPORARY CRIME ON THE HIGH SEAS* (1985).

⁷⁸See Jacob Sundberg, *The Crime of Piracy*, in 1 INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni ed., 3d ed. forthcoming 1999).

⁷⁹See Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554 (1995) (arguing that artificial legal distinctions between conflicts of an international and non-international character should be eliminated, a position strongly supported by this writer; see M. CHERIF BASSIOUNI (IN COLLABORATION WITH PETER MANIKAS), *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1995)). See also HOWARD LEVIE, *TERRORISM IN WAR CRIMES: THE LAW OF WAR CRIMES* (1993).

⁸⁰See BASSIOUNI, *supra* note 43.

⁸¹This is particularly true with respect to the military laws of 188 states that embody the normative proscriptions and prescriptions of the Geneva Conventions of August 12, 1949; 147 states for Additional Protocol 2 and 139 for Additional Protocol II. See BASSIOUNI, *supra* note 43, at 252.

⁸²See Bassiouni, *supra* note 12.

⁸³See BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* (George W. Keeton & Georg Schwarzenberger eds., 1953); BASSIOUNI, *supra* note 38.

⁸⁴II HUGO GROTIUS, *DE JURE BELLI AC PACIS*, ch. XXI, " III, IV, in *CLASSICS OF INTERNATIONAL LAW* 526-29 (James B. Scott ed. & F. Kelsey trans., 1925); II EMMERICK DE VATTTEL, *THE LAW OF NATIONS*, in *CLASSICS OF INTERNATIONAL LAW* (Charles G. Fenwick trans., 1916).

⁸⁵1986 I.C.J. 14. See generally Appraisals of the ICJ's Decision: *Nicaragua v. United States* (Merits), 81 AM J. INT'L L. 77 (1987).

⁸⁶See LAW AND FORCE IN THE NEW INTERNATIONAL ORDER (Lori Fisler Damrosch & David Scheffer eds., 1991).

⁸⁷See Advisory Opinion of the International Court of Justice on Reservations to the Convention on the Prevention and the Punishment of the Crime of Genocide, 1951 I.C.J. 1, 15 (May 28); Convention on the Prevention and the Punishment of the

Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

⁸⁸One example in ICL is the nonapplicability of the "defense of obedience to superior orders" to a patently illegal order. But when is such order deemed illegal on its face and on what normative basis? See YORAM DINSTEIN, THE DEFENSE OF "OBEDIENCE TO SUPERIOR ORDERS" IN INTERNATIONAL LAW (1965); LESLIE GREEN, SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW (1976); NICO KEIJZER, MILITARY OBEDIENCE (1978); EKKHART MULLER-RAPPARD, L'ORDRE SUPERIEUR MILITAIRE ET LA RESPONSABILITE PENALE DU SUBORDONNE (1965); Leslie Green, *Superior Orders and Command Responsibility*, 1989 CAN. Y.B. INT'L L. 167.

⁸⁹London Charter, *supra* note 27.

⁹⁰See BASSIOUNI, *supra* note 38; M. Cherif Bassiouni, *International Law and the Holocaust*, 9 CAL. W. INT'L L.J. 201, 208-14 (1979).

⁹¹See BASSIOUNI, *supra* note 38, Ch. 2. For a natural law perspective, see JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 206-210 (1986).

⁹²See BASSIOUNI, DRAFT CODE, *supra* note 50; see also *Draft Code of Crimes*, *supra* note 68; M. Cherif Bassiouni, *The History of the Draft Code of Crimes Against the Peace and Security of Mankind*, in 1 INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni ed., 2d ed., 1999).

⁹³See Randall, *supra* note 46, at 829-30 (1988); Reydams, *supra* note 46.

⁹⁴In an important study bearing on the *erga omnes* and *jus cogens* relationship, Professor Randall notes that "traditionally international law functionally has distinguished the *erga omnes* and *jus cogens* doctrines." Randall, *supra* note 46, at 830. However, he, too, seems to accept the *sine qua non* relatively:

Jus cogens means compelling law. [The *jus cogens* concept refers to] peremptory principles or norms from which no derogation is permitted, and which may therefore operate to invalidate a treaty or agreement between States to the extent of the inconsistency with any such principles or norms. *Id.*

While authoritative lists of obligations *erga omnes* and *jus cogens* norms do not exist, any such list likely would include the norms against hijacking, hostage taking, crimes against internationally protected persons, *apartheid*, and torture. Traditionally, international law functionally has distinguished the *erga omnes* and *jus cogens* doctrines, the latter of which addresses violations of individual responsibility. Writing in conjunction, these doctrines nevertheless, may subsidiarily support the right of all states to exercise universal jurisdiction over the individual offenders. One might then argue that "when committed by individuals," violations of *erga omnes* obligations and peremptory norms "may be punishable by any State under the universality principle." *Id.*

⁹⁵*Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 32.

⁹⁶*Id.*

⁹⁷*Id.* The court further stated in the ensuing paragraph:

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, at 23); others are conferred by international instruments of a universal or quasi-universal character.

⁹⁸*Barcelona Traction*, 1970 I.C.J. at 32.

⁹⁹In *Right of Passage Over Indian Territory (Portugal v. India)*, 1960 I.C.J. 123, 135 (Apr. 12) (Fernandes, J. dissenting), Judge Fernandes states:

It is true that in principle special rules will prevail over general rules, but to take it as established that in the present case the particular rule is different from the general rule is to beg the question. Moreover, there are exceptions to this principle. Several rules *cogestes* prevail over any special rules. And the general principles to which I shall refer later constitute true rule of *jus cogens* over which no special practice can prevail.

See also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, 1971 I.C.J. 66 (June 21) (Fernandes, J., dissenting).

¹⁰⁰See S.S. "Lotus" (*France v. Turk.*), 1927 P.C.I.J. (ser. A) No. 10.

¹⁰¹MERON, *supra* note 8, at 188-97.

¹⁰²1951 ICJ REP. 15 (May 28); see Gordon Christenson, *The World Court and Jus Cogens*, 81 AM. J. INT'L L. 93 (1987).

¹⁰³(Preliminary Objections) (*Ethiopia v. South Africa; Liberia v. South Africa*), 1963 ICJ REP. 319 (Dec. 21); see Christenson, *supra* note 102.

¹⁰⁴Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5); see Christenson, *supra* note 102.

¹⁰⁵Lech Gardocki, *Report, Les Crimes Internationaux et le Droit Pénal Interne*, 60 REVUE INTERNATIONALE DE DROIT PÉNAL 91 (1989); Otto Triffterer, *Report, Les Crimes Internationaux et le Droit Pénal Interne*, 60 REVUE INTERNATIONALE DE DROIT PÉNAL 31 (1989).

¹⁰⁶On the establishment of the permanent international criminal court, see *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR 51st Sess., Supp. No. 22, U.N. Doc A/51/22 (1996); *The International Criminal Court: Observations and Issues Before the 1997-98 Preparatory Committee; and Administrative and Financial Implications*, 13 NOUVELLES ÉTUDES PÉNALES (M. Cherif Bassiouni ed. 1997).

¹⁰⁷See BASSIOUNI & WISE, *supra* note 40. See also BASSIOUNI, *supra* note 40, at 489-99; LAURI HANNIKAINEN, PEREMPTORY NORMS (*JUS COGENS*) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS (1988); Gordon A. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585 (1988); Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 429-35 (1989).

¹⁰⁸See ANDRE DE HOOGH, OBLIGATIONS *ERGA OMNES* AND INTERNATIONAL CRIMES 45-46 (1996). For different perspectives on government obligations, see Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Human Rights Violations in International Law*, 78 CAL. L. REV. 449 (1990), whose author strongly supports such a duty, and José Zalaquett, *Confronting Human Rights Violations Committed by Previous Covenants*, 13 HAMLINE L. REV. 623 (1990), whose position is more flexible with respect to such a duty.

¹⁰⁹See M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 199 (1998).

¹¹⁰See *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Vol. I, U.N. GAOR, 51st Sess., Supp. No. 22, & 212-93, U.N. Doc. A/51/22 (1996) [hereinafter *Preparatory Committee Report*]; M. Cherif Bassiouni, *Draft Statute of the International Criminal Tribunal*, 9 NOUVELLES ÉTUDES PÉNALES (1993).

¹¹¹Whether such cases should be prosecuted before an international or national body is essentially relevant to the issue of primacy of competence and to the issue

of effectiveness and fairness of national prosecution. Another relevant question arises as to the prosecution of decision-makers, senior executors and perpetrators of particularly heinous crimes and other violators. A policy could be established to prosecute the former before an international criminal court as a first priority, leaving lesser violators to be prosecuted by national bodies. In addition, the question arises as to the possibility of lesser sentences or alternatives to traditional criminal sentences for lesser offenders and for national bodies to resort to various forms of conditional release, pardons or amnesties after conviction of lesser offenders. These measures would not be contrary to the principle of non-derogation to the duty to prosecute.

¹¹²For a survey of various accountability measures from a criminological perspective, see Stanley Cohen, *State Crimes of Previous Regimes: Knowledge, Accountability and the Policing of the Past*, 20 L. & SOC. INQUIRY 7 (1995).

¹¹³*Forgiveness, Forgetfulness, or Intentional Overlooking*, THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 67 (Lesley Brown ed., 1993).

¹¹⁴*Id.*

¹¹⁵For example, a short-term statute of limitation can preclude prosecution.

¹¹⁶For example, in the situation involving rape in the former Yugoslavia, prosecutions are taking place in the Netherlands while victims may be refugees in different countries. If the victims are required to travel to the Netherlands without speaking the language, without proper support (familial, social, psychological, medical, emotional), and are to be cross-examined there, then they may elect not to testify, the result being impunity for the crimes committed. M. Cherif Bassiouni & Marcia McCormick, *Sexual Violence: An Invisible Weapon of War in the Former Yugoslavia* (Occasional Paper # 1, 1996, International Human Rights Law Institute, DePaul University). This is the case in the *Tadic* case before the ICTY, where the defendant was acquitted of charges of rape because the victims were fearful of testifying. *Prosecutor v. Tadic*, Case No. IT-94-1-T (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia Since 1991, May 7, 1997) (McDonald, J., dissenting).

¹¹⁷See *Accountability For International Crimes and Serious Violations of Fundamental Human Rights*, 59 LAW & CONTEMP. PROBS. (1996); *Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference 17-21 September 1997*, 14 NOUVELLES ÉTUDES PÉNALES (Christopher C. Joyner Special Ed. & M. Cherif Bassiouni General Ed. 1998); TRANSITIONAL JUSTICE, *supra* note 17. These issues include: Can the need for redress always be found through traditional monetary or prosecutorial mechanisms? What level of compensation should be given, and to whom? Can it not, particularly in financially poorer countries, be achieved in a non-monetary form? Many of the crimes involve the potential accountability of many people, maybe large sectors of a society. How many people do you prosecute to attain justice? How can the interest and support of the general population be maintained? For an account of these and other such problems that arose from the human rights trials in the wake of the restoration of democracy in Argentina, see generally CARLOS SANTIAGO NINO, *RADICAL EVIL ON TRIAL* (1996).

¹¹⁸See M. Cherif Bassiouni, *Policy Perspectives Favoring the Establishment of the International Criminal Court*, COLUMBIA J. INT'L AFF. 795 (1999).

¹¹⁹It may be important, for example, to prosecute lower level actors in order to generate information regarding the actions and identities of higher level officials.

¹²⁰Victims should also be allowed to participate as *partie civile*, which is provided for in civilist legal systems in order to have the right to claim compensatory damages. See *infra* notes 148-58 and accompanying text.

¹²¹Such as the Commission of Experts for the Former-Yugoslavia. See *The Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), U.N. SCOR, 49th Sess., Annex, U.N. Doc. S/1994/674 (1994); Annexes to the *Final Report*, U.N. SCOR, 49th Sess., U.N. Doc. S/1994/674/Add.2 (1994). See also M. Cherif Bassiouni, *The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), 88 AM. J. INT'L L. 784-805 (1994); M. Cherif Bassiouni, *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, 5 CRIM. L. F. 279-340 (1994). The Commission on Human Rights and the Sub-Committee on the Prevention of Discrimination and Protection of Minorities established, respectively, Rapporteurs and Special Rapporteurs whose work and contribution over the years has proven invaluable.

¹²²See Priscilla B. Hayner, *Fifteen Truth Commissions - 1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 607 (1994).

¹²³GIDEON HAUSNER, JUSTICE IN JERUSALEM 3, 4 (1966) (commenting on the *Eichmann* case).

¹²⁴Charles Villa-Vicencio, *Why Perpetrators Should Not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*. (on file with author).

¹²⁵See, e.g., Berat & Shain, *supra* note 14, at 186.

¹²⁶See *supra* note 48 regarding national prosecutions.

¹²⁷See *supra* note 48.

¹²⁸But see *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) where the Court held that "in American Jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another."

¹²⁹See *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

¹³⁰See Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611. The Foreign Sovereign Immunities Act provides the sole basis for obtaining jurisdiction over a foreign state in United States courts. This Statute provides for only commercial suits against a state. See *Nelson v. Saudi Arabia*, 508 U.S. 349 (1993)(alleged acts of torture were not within the commercial exception to sovereign immunity).

¹³¹See *Siderman de Blake v. Argentina*, 965 F.2d 699, 719 (9th Cir. 1992); see also *Hirsch v. Israel*, 962 F. Supp. 377, 385 (S.D.N.Y. 1997); *Von Dardel v. Union of Soviet Socialist Republics*, 736 F. Supp. 1 (DC 1990). The reasoning in *Siderman de Blake* was also adopted in the English case of *Al Adsani v. Kuwait*, [QBD] 15 Mar. 1995, 103 ILR 420.

¹³²See Malcolm D. Evans, *International Wrongs and National Jurisdiction*, in REMEDIES IN INTERNATIONAL LAW 173, 175, 182 - 189 (1998). Evans is of the opinion that the new emphasis in international law on individual responsibility obfuscates the need to hold states accountable for their failure to comply with their international obligations.

¹³³Torture Victim Protection Act, Pub. L. 102-256, Mar. 12, 1992, *codified at* 28 U.S.C. § 1350.

¹³⁴Alien Tort Claims Act, 28 U.S.C. § 1350.

¹³⁵*Id.*

¹³⁶*Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995).

¹³⁷*Id.* at 242 - 243; *Doe I v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (DC 1998).

¹³⁸*Doe I v. Unocal*, 963 F. Supp. 880, 892 (C.D. Cal. 1997).

¹³⁹*Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)

¹⁴⁰*Forti v. Suarez-Mason*, 694 F. Supp. 707 (N. D. Cal. 1988)

¹⁴¹*Martinez v. City of Los Angeles*, 141 F.3d 1373 (9th Cir. 1998); *Eastman Kodak v. Kavlin*, 978 F. Supp. 1078, 1092 (S.D. Fla. 1997)

¹⁴²*Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995).

¹⁴³*Id.* at 887.

¹⁴⁴*Aguinda v. Texaco, Inc.*, 1994 WL 142006 at *1 (No. 93 Civ. 7527)(S.D.N.Y. April 11, 1994).

¹⁴⁵See Foreign Sovereign Immunities Act, *supra* note 130.

¹⁴⁶See *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996).

¹⁴⁷*Mushikiwabo v. Barayagwiza*, 1996 WL 164496 at *3 (94 Civ. 3627)(S.D.N.Y. April 9, 1998)(not reported in F. Supp.). Other similar awards include an award of several million dollars per plaintiff against a single individual defendant in *Xuncax*, *supra* note 142, at 197 - 202, and a judgment of \$10 million against a defendant police inspector in *Filartiga*, 577 F. Supp. 860, 867 (E.D.N.Y.).

¹⁴⁸See generally M. Cherif Bassiouni, *Searching for Peace Achieving Justice: The Need for Accountability*, 14 NOUVELLES ÉTUDES PÉNALES 45 (1998); Yael Danieli, *Justice and Reparations: Steps in the Healing Process*, 14 NOUVELLES ÉTUDES PÉNALES 303 (1998); Theo van Boven, *Accountability for International Crimes: The Victims Perspective*, 14 NOUVELLES ÉTUDES PÉNALES 349 (1998); Yves Sandoz, *Reflection on Impunity and the Need for Accountability*, 14 NOUVELLES ÉTUDES PÉNALES 381 (1998) Iris Almeida, *Compensation and Reparations for Gross Violations of Human Rights*, 14 NOUVELLES ÉTUDES PÉNALES 399 (1998); Peter Baehr, *How to Deal with the Past*, 14 NOUVELLES ÉTUDES PÉNALES 415 (1998).

¹⁴⁹See also Danieli, *supra* note 148, at 308-312. With respect to refusing compensation out of principal, Danieli quotes on Israeli idealist who had previously fought against taking money from the Germans after WWII: "I refused. Today, I am sorry, because I concluded that I did not change anything by refusing. There are aging survivors who don't have extended family. The steady sum enables them to go on. The fact that I gave up only left the money in the hands of the Germans. We were wrong." See *id.* at 308. For further discussion of the forms of non-monetary victim reparation, see generally MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS (1999).

¹⁵⁰Prospective victims often are "dehumanized" in order to psychologically prepare violators to treat them as animals and inflict harm with little remorse. See *infra* text at notes 222-223.

¹⁵¹For example, the victims may be forced into flee their homelands or deprived of a manner in which to provide for themselves or their families, which subsequently leaves them vulnerable to future victimization, including starvation, discrimination, and slave-like working conditions. See *Victims of Crimes: Working Paper Prepared by the Secretariat*, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, A/Conf.121/6 (1 Aug.1985), in Symposium, *International Protection of Victims*, 7 NOUVELLES ÉTUDES PÉNALES 241 (1988).

¹⁵²The 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34 (29 Nov. 1985)[hereinafter Basic Principles of Justice].

¹⁵³For the latest version of these guidelines, see U.N. Doc. E/CN.4/1997/104 (16 Jan. 1997)[hereinafter Draft Guidelines for Victim Redress]. For earlier versions of these guidelines see U.N. Doc. E/CN.4/Sub.2/1996/17 (24 May 1996); U.N. Doc.

E/CN.4/Sub.2/1993/8 (2 July 1993).

¹⁵⁴Rome Statute for the Creation of the International Criminal Court, U.N. Doc. A/Conf.183/9 (17 July 1998)[hereinafter ICC Statute].

¹⁵⁵Resolution 1998/43.

¹⁵⁶See U.N. Doc. E/NN.4/2000/62 (18 Jan. 2000)(Annex).

¹⁵⁷See also Security Council Resolution 808 establishing the ICTY: S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., at 1, U.N. Doc. S/RES/808 Feb. 22, 1993). Resolution 808 stated that the Security Council "[d]ecides that an international criminal tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."

¹⁵⁸See ICC Statute, *supra* note 154, at Art. 75. This provision is based on a proposal submitted by Egypt to the last Preparatory Commission prior to the Rome Diplomatic Conference. See *Preparatory Committee Report, ILC Draft*, Art. 43 (c) ("The judgement of the Court shall also include a determination of the scope and extent of the victimization in order to allow victims to rely on that judgement for the pursuit of civil remedies, including compensation, either in national courts or through their Governments, in accordance with international law.").

¹⁵⁹See HANNAH ARENDT, EICHMANN IN JERUSALEM; A REPORT ON THE BANALITY OF EVIL 14, 15 (1963).

¹⁶⁰See Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 493 (1995).

¹⁶¹See JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 33-34, 162-86 (1988).

¹⁶²See *id.* at 33.

¹⁶³See KATHLEEN DEAN MOORE, PARDONS, JUSTICE, MERCY, AND THE PUBLIC INTEREST 181-97 (1989); see especially *id.* at 193.

¹⁶⁴The fact that there are violations on both sides should not operate to preclude accountability. Rather, the fact that there are violations on both sides of a conflict should influence the selection of an appropriate mechanism that will deal fairly with all violations in an impartial manner. M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY 504-505 (2d rev. ed. 1999)(discussing the inapplicability of the Tu Quoque defense to crimes against humanity). See also Nino, *supra* note 116.

¹⁶⁵See Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted*, *supra* note 124, quoting Kofi Annan in a speech delivered at Witwatersrand University Graduation Ceremony, 1 September 1998.

¹⁶⁶See Pope Pius, *supra* note 21, at 18.

¹⁶⁷International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, *entered into force* 23 Mar. 1976, 999 U.N.T.S. 171 at art. 3(2).

¹⁶⁸The International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res.2106A (XX), 21 Dec. 1965, *entered into force* 4 Jan. 1969, 660 U.N.T.S. 195 (1969).

¹⁶⁹*Id.* at art. 6.

¹⁷⁰See International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *reprinted in* HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS, U.N. Doc. ST/HR/1/Rev.4 (1993), at art. 83. Furthermore, the convention articulates an "enforceable right to compensation" with respect to unlawful detention or arrest. *Id.* at art. 16(9). It requests states parties to provide assistance to the migrant workers or their families for the prompt settlement of claims relating to death. *Id.* at 71(2). Also, the convention provides the right to "fair and adequate" compensation for the

expropriation of the migrant's assets by the state. *Id.* at art. 15.

¹⁷¹Convention Concerning Indigenous and Tribal Peoples in Independent Countries, *reprinted in* HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS, U.N. Doc. ST/HR/1/Rev.4 (1993), at arts 15 - 16.

¹⁷²Convention on Relating to the Status of Stateless Persons, *adopted* 28 Sept. 1954, *entered into force* 11 Aug. 1958, 360 U.N.T.S. 65, at art. 24.

¹⁷³Torture Convention, *supra* note 29, at art. 14

¹⁷⁴Convention on the Rights of the Child, G.A. Res. 44/25, 20 Nov. 1989, 44 U.N. GAOR Supp. (No. 49) 166, U.N. Doc. A/44/736, at art. 39.

¹⁷⁵American Convention on Human Rights, 22 Nov. 1969, O.A.S.T.S. No. 36, p.1, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, doc. 21, rev. 6, at arts. 63(1), 68.

¹⁷⁶European Convention for the Protection of Human Rights and Fundamental Freedoms, *adopted* 4 Nov. 1950, *entered into force* 3 Sept. 1953, 213 U.N.T.S. 221, 222, at art. 5(5).

¹⁷⁷African Charter on Human and People's Rights, *adopted* 27 June 1981, *entered into force* 21 Oct. 1986, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, at art. 21(2).

¹⁷⁸Universal Declaration of Human Rights, *supra* note 24. For the Declarations status as a source of customary law, *see generally* Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 316 - 351 (1996).

¹⁷⁹United Nations Declaration on the Elimination of All Forms of Racial Discrimination, G.A. Res. 1904, U.N. GAOR, 18th Sess., Supp. No. 15, at art. 7(2).

¹⁸⁰Declaration on the Protection of All Persons from Enforced Disappearances, G.A. Res. 47/133, 18 Dec. 1992, 47 U.N. GAOR Supp. (No. 49) 207, U.N. Doc. A/Res/47/133, at art. 9.

¹⁸¹*Id.* at art. 19.

¹⁸²The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/10034 (1976), at art. 11.

¹⁸³American Declaration on the Rights and Duties of Man, *reprinted in* HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS, U.N. Doc. ST/HR/1/Rev.5 (1997), at art. 18.

¹⁸⁴*See* Muslim Universal Declaration on Human Rights, art. IV(b), *reprinted in* JUSTICE AND HUMAN RIGHTS IN ISLAM 14 (Gerald E. Lampe ed., 1997).

¹⁸⁵For background on the Basic Principles of Justice, *see supra* note 152. *See generally* Symposium, *International Protection of Victims*, 7 NOUVELLES ÉTUDES PÉNALES (1988); *Guide for Policy Makers on the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, U.N. Doc. E/CN.15/1998/CRP.4 (17 April 1998).

¹⁸⁶*Id.* at principles 4 -5 .

¹⁸⁷*Id.* at principles 18 - 19.

¹⁸⁸The survey of national law provisions and practices is found in the responses of states, which were made available in several U.N. documents, pursuant to a request of the Commission on Human Rights to provide information to the Secretary-General about legislation already adopted, or in the process of being adopted. The comments of the following governments with respect to their national legislation and procedures was considered: For Romania, Togo, the United Kingdom, *see* U.N. Doc. E/CN.4/1996/29/Add.3; Cyprus, Kuwait, *see* U.N. Doc. E/CN.4/1997/Add.1; Argentina, the Czech Republic, Chile, China, Colombia, Ghana, Mauritius, Namibia, Nepal, the Philippines, the Sudan, Sweden, *see* U.N.

Doc. E/CN.4/1996/29; Peru, *see* U.N. Doc. E/CN.4/sub.2/1995/17/Add.1; China, Malta, Mexico, Uruguay, Yugoslavia, *see* U.N. Doc. E/CN.4/sub.2/1995/17/Add.2; Belarus, Netherlands, *see* U.N. Doc. E/CN.4/sub.2/1995/17; United States, *see* U.N. Doc. E/CN.4/1996/29/Add.2 [hereinafter Comments of (state name)]

¹⁸⁸ *See supra* note 189.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *See* Comments of Togo, *supra* note 189.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *See generally* RICHARD B. LILlich, INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS (1962); RICHARD B. LILlich, INTERNATIONAL CLAIMS: POSTWAR BRITISH PRACTICE (1967); INTERNATIONAL CLAIMS: CONTEMPORARY EUROPEAN PRACTICE (Richard B. Lillich and Bruce H. Weston eds., 1982).

¹⁹⁷ *See* ICCPR, *supra* note 167, at art. 2(3)(a)-(b).

¹⁹⁸ *See* International Covenant on the Elimination of All Forms of Racial Discrimination, *supra* note 37, at art. 6.

¹⁹⁹ *See generally* INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS (Richard B. Lillich ed., 1983); INDIVIDUAL RIGHTS AND THE STATE OF FOREIGN AFFAIRS: AN INTERNATIONAL COMPENDIUM (Elihu Lauterpact & John G. Collier eds., 1972).

²⁰⁰ *See The Chorzów Factory Case*, (Claim for Indemnity)(Jurisdiction), 1927 P.C.I.J. (Ser. A) No. 8 p. 4, 21.

²⁰¹ *See* Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 (1907), T.S. No. 539, 3 Martens Nouveau Recueil (ser. 3) 461 reprinted in 2 AM. J. INT'L L. 90 (1908), 1 FRIEDMAN 308, 1 BEVANS 631, at art. 3.

²⁰² *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 Aug. 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 12 Aug. 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, 12 Aug. 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, at art. 68; Geneva Convention Relative to Protection of Civilian Persons in Time of War, 12 Aug. 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, at art. 55.

²⁰³ *See* Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict of 8 June 1977, *opened for signature* 12 Dec. 1977, U.N. Doc. A/32/144 (1977) Annex I, reprinted in 16 I.L.M. 1391, at art. 91.

²⁰⁴ *See* Comments of United States, *supra* note 189.

²⁰⁵ *See* Report of the Commission on Crime Prevention and Criminal Justice, E/CN.15/1996/16/Add.3, at 55.

²⁰⁶ European Convention on the Compensation of Victims of Violent Crimes, E.T.S. No. 116 (1983) [hereinafter "European Compensation Convention"].

²⁰⁷ *See id.* (preamble).

²⁰⁸ *Id.*

²⁰⁹ *Id.* at art. 1.

²¹⁰ *Id.*

²¹¹ *Id.* at art. 5.

²¹² *Id.* at art. 6.

²¹³ *Id.* at art. 8

²¹⁴See Basic Principles of Justice, *supra* note 152, at principle 12.

²¹⁵See Report of the Commission on Crime Prevention and Criminal Justice, *supra* note 206.

²¹⁶*Id.* at par. 38.

²¹⁷The following are representative: Australia, Belgium, Canada, Cuba, Finland, France, Jordan, Luxembourg, Mexico, Netherlands, Oman, Peru, Philippines, Qatar, Republic of Korea, Romania, Spain, and Sweden. See *id.* at par. 41.

²¹⁸See ICC Statute, *supra* note 154, at art. 79.

²¹⁹See, e.g., GEOFFREY BEST, WAR AND LAW SINCE 1945 (1994); JOHN KEEGAN, A HISTORY OF WARFARE (1993).

²²⁰See RAUL HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS (3 Vols. 1985).

²²¹W. Michael Reisman, *Institutions and Practices for Restoring and Maintaining Public Order*, 6 DUKE J. COMP. & INT'L L. 175 (1995). Reisman notes that [t]here is no general institution that can be applied as a paradigm for all circumstances. In each context, an institution appropriate to the protection and re-establishment of public order in the unique circumstances that prevail must be fashioned such that it provides the greatest return on all the relevant goals of public order." *Id.* at 185. The question is to what extent accountability mechanisms are deemed a part of "public order?" *Id.* at 185. Where do such mechanisms rank, what is their value?

²²²In the classic and profoundly insightful characterization of George Orwell, "Who controls the past, controls the future. Who controls the present, controls the past." Thus, to record the truth, educate the public, preserve the memory, and try the accused, it is possible to prevent abuses in the future. See Cohen, *supra* note 112, at 49.

²²³JOHN DONNE, DEVOTIONS UPON EMERGENT OCCASIONS XVII (1624).