

# **FACING STATE VIOLENCE**

## **Truth, Justice and Healing**

Reader compiled in conjunction with an  
interdisciplinary conference  
Held at Pacific School of Religion, Berkeley, CA  
November 17, 2007

American Friends Service Committee, PMR  
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## Introduction

This reader was compiled in connection with an interdisciplinary conference, **FACING STATE VIOLENCE: TRUTH, JUSTICE AND HEALING**, held at Pacific School of Religion on Saturday November 17, 2007.

The main goals for the conference were to understand and challenge state-organized systems of violence, and to explore ways for victims to heal. For the purposes of this one-day conference we adopted a somewhat limited definition of state violence that focuses on the acts of governments and government agents. This definition does not include violence arising from structural factors such as racism, sexism, or poverty, or from state policies that keep these systemic inequalities in place.

The conference was organized around two major questions: What is state violence? and What is needed to heal from trauma caused by it? It took place in a context of ongoing warfare in Iraq and Afghanistan by US and British forces, and the general acceptance of torture as an instrument of US policy by many professionals and lay people. Hence, torture was an important theme.

Professionals in many fields are developing expertise in countering the impacts of state violence. The conference was organized to strengthen bridges between disciplines and areas of concern, so that people may work more effectively together in bringing perpetrators of state violence to justice and supporting the healing at individual, community, and national levels. We sought the participation of activists, students, practitioners, and educators, especially in the fields of history, human rights law, journalism, law, medicine, psychology and social work.

This reader provides key background materials on these vast topics that amplify themes addressed by conference participants. These selections were chosen for their perspectives, timeliness, and accessibility to multidisciplinary readers. As organizers of this conference, we hope to develop a curriculum group to create university courses that address this material. Please contact us if you want to join it.



## Acknowledgements

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# CONVENTION AGAINST TORTURE and Other Cruel, Inhuman or Degrading Treatment or Punishment

The States Parties to this Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that those rights derive from the inherent dignity of the human person,

Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975 (resolution 3452 (XXX)),

Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,

Have agreed as follows:

## Part I

### Article 1

1. For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

### Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

### Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

### Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

### Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
  1. When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
  2. When the alleged offender is a national of that State;
  3. When the victim was a national of that State if that State considers it appropriate.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in Paragraph 1 of this article.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

### Article 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present, shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.
2. Such State shall immediately make a preliminary inquiry into the facts.
3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating

immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, to the representative of the State where he usually resides.

4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said State and shall indicate whether it intends to exercise jurisdiction.

#### Article 7

1. The State Party in territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found, shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.
2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.
3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

#### Article 8

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.
3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested state.
4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

#### Article 9

1. States Parties shall afford one another the greatest measure of assistance in connection with civil proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.
2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

#### Article 10

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such persons.

#### Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

#### Article 12

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

#### Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to and to have his case promptly and impartially examined by its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

#### Article 14

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.
2. Nothing in this article shall affect any right of the victim or other person to compensation which may exist under national law.

#### Article 15

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

#### Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment.
2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibit cruel, inhuman or degrading treatment or

punishment or which relate to extradition or expulsion.

#### Article 17

1. There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of 10 experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.
2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals. States Parties shall bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee established under the International Covenant on Civil and Political Rights and are willing to serve on the Committee against Torture.
3. Elections of the members of the Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
4. The initial election shall be held no later than six months after the date of the entry into force of this Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.
5. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 3.
6. If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties, the State Party which nominated him shall appoint another expert from among its nationals to serve for the remainder of his term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.
7. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

#### Article 18

1. The Committee shall elect its officers for a term of two years. They may be re-elected.
2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that
  1. Six members shall constitute a quorum;
  2. Decisions of the Committee shall be made by a majority vote of the members present.
3. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this Convention.
4. The Secretary-General of the United Nations shall convene the initial meeting of the Committee. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of

procedure.

5. The State Parties shall be responsible for expenses incurred in connection with the holding of meetings of the States Parties and of the Committee, including reimbursement of the United Nations for any expenses, such as the cost of staff and facilities, incurred by the United Nations pursuant to paragraph 3 above.

#### Article 19

1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of this Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken, and such other reports as the Committee may request.
2. The Secretary-General shall transmit the reports to all States Parties.
3. [Each report shall be considered by the Committee which may make such comments or suggestions on the report as it considers appropriate, and shall forward these to the State Party concerned. That State Party may respond with any observations it chooses to the Committee.
4. The Committee may, at its discretion, decide to include any comments or suggestions made by it in accordance with paragraph 3, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with article 24. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph 1.]

#### Article 20

1. If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.
2. Taking into account any observations which may have been submitted by the State Party concerned as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently.
3. If an inquiry is made in accordance with paragraph 2, the Committee shall seek the co-operation of the State Party concerned. In agreement with that State Party, such an inquiry may include a visit to its territory.
4. After examining the findings of its member or members submitted in accordance with paragraph 2, the Committee shall transmit these findings to the State Party concerned together with any comments or suggestions which seem appropriate in view of the situation.
5. All the proceedings of the Committee referred to in paragraphs 1 to 4 of this article shall be confidential, and at all stages of the proceedings the co-operation of the State Party shall be sought. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report made in accordance with article 24.

#### Article 21

1. A State Party to this Convention may at any time declare under this article 3 that it recognizes the competence of the Committee to receive and consider communications to the effect that a State

Party claims that another State Party is not fulfilling its obligations under this Convention. Such communications may be received and considered according to the procedures laid down in this article only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be dealt with by the Committee under this article if it concerns a State Party which has not made such a declaration.

Communications received under this article shall be dealt with in accordance with the following procedure:

1. If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, references to domestic procedures and remedies taken, pending, or available in the matter.
2. If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee by notice given to the Committee and to the other State.
3. The Committee shall deal with a matter referred to it under this article only after it has ascertained that all domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention.
4. The Committee shall hold closed meetings when examining communications under this article.
5. Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for the obligations provided for in the present Convention. For this purpose, the Committee may, when appropriate, set up an ad hoc conciliation commission.
6. In any matter referred to it under this article, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information.
7. The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing.
8. The Committee shall, within 12 months after the date of receipt of notice under subparagraph (b), submit a report:
  1. If a solution within the terms of subparagraph (c) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached.
  2. If a solution within the terms of subparagraph (c) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party

concerned has made a new declaration.

#### Article 22

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party to the Convention which has not made such a declaration.
2. The Committee shall consider inadmissible any communication under this article which is anonymous, or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of this Convention.
3. Subject to the provisions of paragraph 2, the Committee shall bring any communication submitted to it under this article to the attention of the State Party to this Convention which has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.
4. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned.
5. The Committee shall not consider any communication from an individual under this article unless it has ascertained that:
  1. The same matter has not been, and is not being examined under another procedure of international investigation or settlement;
  2. The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention.
6. The Committee shall hold closed meetings when examining communications under this article.
7. The Committee shall forward its views to the State Party concerned and to the individual.
8. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit parties thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

#### Article 23

The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under article 21, paragraph 1 (e), shall be entitled to the facilities, privileges and immunities of experts on missions for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

#### Article 24

The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.

## Part III

### Article 25

1. This Convention is open for signature by all States.
2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

### Article 26

This Convention is open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

### Article 27

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying this Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

### Article 28

1. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognize the competence of the Committee provided for in article 20.
2. Any State Party having made a reservation in accordance with paragraph 1 of this article may, at any time, withdraw this reservation by notification to the Secretary-General of the United Nations.

### Article 29

1. Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to this Convention with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the State Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.
2. An amendment adopted in accordance with paragraph 1 shall enter into force when two thirds of the States Parties to this Convention have notified the Secretary-General of the United Nations that they have accepted it in accordance with their respective constitutional processes.
3. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendments which they have accepted.

### Article 30

1. Any dispute between two or more States Parties concerning the interpretation or application of

this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State may at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other States Parties shall not be bound by the preceding paragraph with respect to any State Party having made such a reservation.
3. Any State Party having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the Secretary-General of the United Nations.

### Article 31

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.
2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under this Convention in regard to any act or omission which occurs prior to the date at which the denunciation becomes effective. Nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.
3. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.

### Article 32

The Secretary-General of the United Nations shall inform all members of the United Nations and all States which have signed this Convention or acceded to it, or the following particulars:

1. Signatures, ratifications and accessions under articles 25 and 26;
2. The date of entry into force of this Convention under article 27, and the date of the entry into force of any amendments under article 29;
3. Denunciations under article 31.

### Article 33

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States.

On February 4, 1985, the Convention was opened for signature at United Nations Headquarters in New York. At that time, representatives of the following countries signed it: Afghanistan, Argentina, Belgium, Bolivia, Costa Rica, Denmark, Dominican Republic, Finland, France, Greece, Iceland, Italy, Netherlands, Norway, Portugal, Senegal, Spain, Sweden, Switzerland and Uruguay. Subsequently, signatures were received from Venezuela on February 15, from Luxembourg and Panama on February 22, from Austria on March 14, and from the United Kingdom on March 15, 1985.



State Violence:  
Historical, Moral and Legal Frameworks





Counterpunch,  
May 25, 2004

1.

## The Geneva Conventions & Moral Authority

### A Question of Human Dignity

By Col. DAN SMITH

"There are always going to be differences of views....The test is what has been decided and what is issued, and then is it adhered to."

That was Secretary of Defense Donald Rumsfeld this past May 13 en route to Iraq. The day prior, Rumsfeld and Chairman of the Joint Chiefs General (GEN) Richard Myers told Congress that, Abu Ghraib prison notwithstanding, the Geneva Conventions did apply to Iraqi detainees and were being followed by U.S. troops in Iraq (*New York Times*). Moreover, both men emphasized that interrogation procedures being used in Iraq, Afghanistan, and Guantanamo had been reviewed by Pentagon and White House lawyers, who declared the techniques conformed to the Conventions.

Back in Washington, as Rumsfeld flew to Iraq, Senator Jack Reed (RI) did what no other member of Congress had done since the Iraq prison abuses caught the public's attention: he hypothetically inverted the circumstances. Reed's question to Marine GEN Peter Pace, Vice-Chairman of the Joint Chiefs, was straight-forward: "If you were shown a video of a United States Marine or an American citizen in the control of a foreign power, in a cell-block, naked, with a bag over their [sic] head, squatting with their [sic] arms uplifted for 45 minutes, would you describe that as a good interrogation technique or a violation of the Geneva Convention?" To which GEN Pace responded: "I would describe it as a violation, sir."

Two days before, on May 12, the "Interrogation Rules of Engagement" (IROE) issued last year over the signature of Lieutenant General (LGEN) Ricardo Sanchez, Combined Joint Task Force-7 (CJTF-7) commander in Iraq, appeared in the *Washington Post*. Incredibly, both GEN Pace and Deputy Secretary of Defense Paul Wolfowitz, who also was testifying that day before Congress, told lawmakers they only saw the IROE just before their appearance. Unlike GEN Pace, Wolfowitz seemed

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to have trouble categorizing Senator Reed's examples ("crouching naked for 45 minutes" and having "a bag over your head for 72 hours") as inhumane.

Wolfowitz's hesitancy is quite understandable, especially in view of what came to light in the following week:

- In May and again in October, as many as eight senior Judge Advocate General (JAG) officers privately met with the chair of the New York City Bar Association's International Human Rights Committee to express their deep forebodings that the legal ambiguity created by the Bush Administration concerning the classification and handling of prisoners vis-à-vis the Geneva Conventions was a "disaster waiting to happen" (*Salon.com*, May 15, 2004). JAG officers had not been included in the process of defining safeguards, in discussions about the use and role of civilian contractors as interrogators, or in oversight of prison operations.

The directing role of military intelligence (MI) at Abu Ghraib, long suspected, began to come into focus. Buried in the 6,000 page Army investigation report by Major General (MG) Antonio Taguba is an acknowledgement by the ranking intelligence officer, Colonel (COL) Thomas Pappas, that MPs designated to "support" interrogators were instructed by MI personnel to force prisoners to strip and to shackle them prior to questioning. Pappas further acknowledged that his unit had "no formal system in place" to ensure the guards understood what they had been told and what restrictions applied to their actions (*New York Times*, May 18, 2004). In the words of a senior International Committee of the Red Cross (ICRC) official, there was such "physical and psychological coercion [that it] in some cases was tantamount to torture."

- The use of extremely secret "Special Access Program" (SAP) regulations to disguise or hide legally questionable interrogation techniques and practices employed on "high value" prisoners was revised. The Army's 1998 regulations (AR 380-381) permitted creation of SAPs "to prevent significant damage to national security or the reputation or interests of the United States" (*National Security Archives*, May 18, 2004). But safeguarding the "reputation of the U.S." is not sufficient justification for classifying any governmental activity, and most assuredly not the use of a SAP. With the furor over the Abu Ghraib scandal, the regulations were rewritten in April with the "reputation" reference dropped.

- In a reversal of policy with regard to the prisoners held at Guantanamo Bay, the Defense Department established three-person military boards to review, on an annual basis, the status of prisoners and ascertain whether they remain a threat to the United States. Prisoners are to be provided military "representation"--but not legal counsel--and can make oral presentations. Boards will accept written communications from families and the governments of detainees and, after due consideration, recommend to a "high-level Defense Department official" whether the prisoner should be detained longer or be released. At first glance, creation of the boards seems to bring the U.S. closer to conformity with the Geneva Conventions. However, all captured individuals are supposed to be immediately processed by a board to determine combatant status, a procedure that apparently is not followed in the drive to extract "actionable" intelligence. Moreover, the directive does not provide information about the standards the board will use to evaluate the continuing "danger" a prisoner may pose.

- A British newspaper revealed that U.S. forces in Afghanistan had distributed a flyer warning Afghans that humanitarian aid could be cut off unless they provided information on the Taliban and al Qaeda (*Guardian*, May 6, 2004). While the threat to end aid or to condition it on the basis of compelling non-combatants to take sides in a war does not seem to violate the Geneva Conventions per se, it does--as one senior international aid official noted--seriously assault the spirit of international laws regarding care of non-combatants.

- The Taguba report also detailed one instance in which the CJTF-7 commander, LGEN Sanchez, authorized the use of "harsh" interrogation measures approved by Defense Department and White House lawyers (*USA Today*, March 19, 2004). However, in testimony before the Senate Armed Services Committee on May 19, LGEN Sanchez said he could remember approving only some two dozen requests for extensive (more than 30 days) solitary confinement. Reflecting the uproar over the "harsh" measures, many of which contravene the Geneva Conventions, Sanchez later banned all aggressive interrogation techniques in April 2004.

- During the same May 19 Senate Armed Services Committee hearing, MGEN Geoffrey Miller, who ran the Guantanamo prison compound and went to Iraq to "advise" CJTF-7 on interrogation techniques, denied that his recommendations in any way contributed to the violations of the Geneva Conventions by MPs in Iraq. Miller said he encouraged only passive activities (e.g., watching prisoners, noting who they talk to). However, MGEN Taguba noted that Miller's recommendations in September 2003 included: "It is essential that the guard force be actively engaged in setting the conditions for successful exploitation of the internees." Miller attributed the abuses to a failure of leadership at the prison rather than a misinterpretation of his recommendations. GEN John Abizaid, Central Command commander, along with LGEN Sanchez, concurred. Abizaid also said there was no climate of abuse in Central Command. Rather, the military's system for monitoring detention and interrogation activities was disjointed.

To the contrary, the record of events suggests that more than the military's system was awry. There was a climate of abuse--one that, within the military, spread from Central Command but originated in higher-level policy circles.

The poisonous atmosphere in which the abuses flourished was set in January 2002 when the Administration unilaterally declared that the Geneva Conventions did not apply to Taliban or al Qaeda prisoners. White House counsel Alberto Gonzales, in a January 25, 2002, memorandum that primarily dealt with possible future domestic prosecutions of officials under the 1996 U.S. War Crimes statute, urged the President to "stay the course," claiming that many terms in the Conventions were "undefined." Gonzales asserted that "Your determination [that the Conventions did not apply] would create a reasonable basis in law that [the statute] does not apply which would provide a solid defense to any future prosecution" (*Newsweek*, May 17, 2004).

Gonzales then expanded the scope of his opinion to the whole "war on terror": "The nature of the new war places a high premium on other factors [than the Geneva Conventions], such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities." Gonzales conceded that prisoners could be treated in accordance with the Conventions, but he opined that such treatment would have nothing to do with the strictures of international law

as the option to treat prisoners humanely could be claimed to be conditioned **"to the extent appropriate and consistent with military necessity"** (emphasis added).

An earlier (January 9, 2002) Justice Department draft memorandum first proposed this point of view, claiming that in Afghanistan the laws of war did not apply either to orders from the President or to actions by U.S. personnel on the ground. This same theme emerged in Iraq where MGEN Miller, just before returning to the U.S. for the Senate committee hearing, told reporters that he always insisted that Geneva Convention standards were to be observed **"except where military necessity dictates"** (*Los Angeles Times*, May 19, 2004) (emphasis added).

Apparently, some in CJTF-7 must have reasoned that "military necessity dictated" that the Conventions could be ignored by either refusing access to prisoners by the ICRC or requiring the ICRC to request inspection access. As a matter of fact, the ICRC formally raised objections to prison and interrogation regimens observed by inspectors as early as March 2003, a few days after the war started. Instances of physical abuse, prisoner deaths caused by overreaction by guards, and other mistreatment were noted in a series of "working reports" of visits and interviews conducted throughout the spring and summer months of 2003. In general, abuses were corrected at the various facilities visited. But, except for an "informal" visit in July, Abu Ghraib did not receive an in-depth inspection until October 2003 (*Wall Street Journal*, May 21, 2004).

CJTF-7 response to the ICRC's November 6 report covering the October inspection was signed December 24, three weeks before the scandal was first mentioned by the U.S. command. Significantly, the senior legal officer in CJTF-7 knew of the ICRC report in November. He drafted the reply, but there is no indication he informed LGEN Sanchez, leaving the latter "in the dark" until mid-January. Moreover, the reply strongly suggested that not all detainees in Iraq were covered by the Geneva Conventions, a position that directly contradicted White House statements (*New York Times*, May 23, 2004).

Throughout this period, misgivings and objections by military officers to the fundamental thrust of the whole policy surfaced. In a lengthy memorandum dated in February 2003, "senior military lawyers" reportedly cautioned that plans to use severe interrogation methods for a particular "high-interest" al Qaeda detainee in Guantanamo would violate the Geneva Conventions. (Some of the proposed "techniques" had been employed at Guantanamo in late 2002 and early 2003.) In response to the lawyers' memo, in April 2003 Secretary of Defense Rumsfeld approved a list of "aggressive" techniques from an array of "nondoctrinal" methods presented by MGEN Miller, who was then in charge of the Guantanamo facility. Tellingly, Miller's predecessor disclosed that he had been under unrelenting pressure to "bend" the Conventions (*Los Angeles Times* and *USA Today*, May 21, 2004).

But Guantanamo was not the only influence on how prisoners were treated in Iraq. Personnel from the 519th Military Intelligence Battalion who had interrogated detainees in the more permissive (according to the U.S.) atmosphere of Bagram air base and Kandahar in Afghanistan were among those working at Abu Ghraib. And from numerous detainee accounts, the more aggressive interrogation tactics were transferred along with the interrogators. Reportedly, investigators looking into the abuses at Abu Ghraib have found conflicting IROE issued by the MI unit operations officer and by LGEN Sanchez. As it was, Sanchez at first (September 14) approved

interrogation policies that, if not violating the Conventions, straddled the line very closely, finally deciding in mid-October to require his direct approval of the questionable practices on a case-by-case basis. Nonetheless, this October 12 instruction authorized the MI-MP interaction to "manipulate internees' emotions and weaknesses" that contributed to the poisonous atmosphere in which abuses occurred (*New York Times*, May 21, 2004).

It is quite obvious that many officials, civilian and military, have been uncomfortable during their appearances before congressional committees. Their discomfiture ranges across not only descriptions of what actually happened at Abu Ghraib but also the basis for the development of highly questionable, unilateralist policies regarding treatment of prisoners that clearly violated international law and the law of land warfare. The prohibitions against physical and psychological coercion in the Geneva Conventions explicitly forbid both, and as a signatory to the Conventions, the strictures of the Conventions are part of U.S. law and cannot be abrogated by executive fiat.

While highly-placed U.S. civilian officials have thus far publicly escaped legal consequences or even censure (unless one counts Bush's discussion with Rumsfeld in mid-May) in connection with these breaches of international law, the uniformed military has been forced to act. Specialist Jeremy Sivits, one of the MPs accused of abuse at Abu Ghraib, has pled guilty in a "special court-martial" proceeding as part of a plea-bargain agreement with military prosecutors. Although the proceedings and sentence have yet to be reviewed, Sivits received the maximum sentence the military judge could impose (which is less than the others who have been charged could receive as they are to face general, rather than special, courts-martial).

In an ironic twist, the military has convicted a Florida National Guardsman with desertion for refusing to return to his unit in Iraq. The soldier, who has filed for conscientious objector (CO) status, said one reason for refusing to go back involved the "great cruelty" inflicted on Iraqi detainees at the U.S.-controlled al-Assad air base. Significantly, the Guardsman's statements and application for CO status were submitted to military authorities on March 16, 2004, well before the scandal broke into the mainstream press. His description of techniques that troops were instructed to use to aid the interrogators included some that violated international law (*Associated Press*, May 19 and May 22, 2004).

Self-serving interpretations such as those from the Justice Department and the Gonzales opinions cannot be said by any objective person to be law or the basis for law. This realization underlies and informs a crucial statement from testimony by Deputy Secretary of State Richard Armitage before the Senate Foreign Relations Committee on May 18: "Americans are human beings; we are not above injustice and sin. But because we are American, we can also say that we are not above the law--no one is above the law."

In the end, it is law and the rule of law--which includes recognition of and respect for individual human dignity--that translates moral principle into ethical action. The United States has a choice: it can reaffirm its historical principles by following the rule of law or surrender its claim to moral leadership by defying the law. Without question, in less arrogant times, history and principle would triumph.



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The Shame of Abu Ghraib

Col. Dan Smith

"Our scientific power has outrun our spiritual power.

We have guided missiles and misguided men.

Martin Luther King, Jr. (1963)

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The warning signs were clearly evident well before Combined Joint Task Force 7 (CJTF-7), under the command of LtGen Ricardo Sanchez, issued its January 16 press statement announcing the enquiry into allegations of abuse at Abu Ghraib.

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Throughout Iraq, temporary incarceration pens were established to confine Iraqis picked up in raids or "arrested" at checkpoints. Often they would be sent to more "permanent" facilities without relatives being informed where they were going (or even that they had been detained), with no legal counsel, and without knowing the charges.

In fact, in October 2003, the coalition did not know how many prisoners it had. The number most often cited was about 5,000; in reality, it was more than double that total.

Thus, contrary to the Administration's protestations, Abu Ghraib is far from being a special case or an exception. In fact, the Army and Marine Corps opened more than 35 criminal enquiries into actions deemed to contravene international law, including 25 Iraqi deaths. Moreover, in late April, investigators expanded their scope beyond military police units to military intelligence units and civilian contractors, and the Central Intelligence Agency said it is looking at its operations (*New York Times*, May 5, 2004). Newspapers on May 6 disclosed that the Justice Department was opening a criminal probe of CIA and private contractors hired as interrogators in Iraq.

(Only military personnel are subject to the Uniform Code of Military Justice for violations of the Geneva Conventions and for criminal offenses. CIA operatives can be prosecuted in federal courts for criminal actions outside the U.S. as agents of the government. But a Coalition Provisional Authority (CPA) rule promulgated last year exempts contract personnel from Iraqi law, leaving only a Bosnia-era law – the Military Extraterritorial Jurisdiction Act – that became law November 22, 2000, as a possible legal recourse against contractors.)

The generals and Administration notables trying to control the public relations devastation from the photos of severe prisoner abuse at Abu Ghraib are correct when they say that those involved in all these despicable acts are a very tiny fraction of the total U.S. military deployed to Iraq. But that misses the point that steady streams of detainees released from U.S. custody were telling western media representatives of mistreatment. The persistent nature of the reports of severe abuse and negligence in many locations

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points to a systemic, command-level failure both to anticipate the problem and to take early action to investigate the charges. The stock answer seemed to be that "conditions are in line with provisions of the Geneva Conventions."

What is alleged and known of the actions and statements of U.S. officials with regard to prison administration and interrogation methods in Iraq is troubling.

In late summer 2003, a 30-member team from the U.S. prison camp at Guantanamo Bay, headed by MGen Geoffrey Miller, arrived in Iraq to impart lessons learned from the 18 months of operations at Camp X-ray (opened January 11, 2002) and its successor, Camp Delta. Although the reason for the visit has not been disclosed, CPA officials were undoubtedly unhappy that anti-coalition networks remained quite active. The "logic" in play was that the techniques used to get information from "terrorists" confined in Guantanamo would work in Iraq.

Reported recommendations of the visitors included collapsing the normal division of responsibility for prison activities between two chains-of-command corresponding to the military specialties in the prisons: military police (MP) who ran the facilities and military intelligence (MI) who ran interrogations. Another recommendation was to employ MPs in the "pre-interrogation" phase so that detainees would be more "amenable" to answering questions posed by interrogators. Unfortunately, this left no one clearly in charge of prison administration, a situation compounded by the presence of CIA, Iraq Survey Group (those searching for weapon of mass destruction in Iraq), and civilian contract personnel.

In this context, it appears that "invisible" (non-physical) but still illegal techniques such as sleep deprivation and forcing prisoners to assume and maintain physically unnatural and stressful positions were employed to break down prisoners. Much worse was the psychological assault against religious taboos and individual dignity perpetrated at Abu Ghraib. One can only wonder how the lower-ranking MPs at Abu Ghraib learned that, for Muslims, nudity before others is deeply humiliating.

In November, which until April 2004 had been the bloodiest month since President Bush declared major combat had ended, MGen Donald Ryder, a Military Policeman and the Army's Provost Marshal General, took exception to the misuse of MPs by intentionally involving them in intelligence activities for which they had no training. In this, Ryder was supported by the findings of MGen Antonio Taguba whose two-month internal review of MP and MI activities was completed in March.

Taguba's report finally prompted the Army to send a mobile training team of experts in military prison administration to Iraq to improve prison conditions. But in an unsettling move, MGen Miller is now in charge of all military prisons in Iraq.

The context in which the Taguba enquiry began is interesting in itself. On January 7, CPA head L. Paul Bremer announced an amnesty for 500 Iraqi detainees who had "no blood on their hands", who renounced violence, and who could find a "guarantor" for

their continued good behavior. No list of who would be released was provided: indeed, detainees were often not identified except by numbers, and unless a prospective visitor knew the number assigned to a detainee, gaining entry to the prison was impossible, as members of the International Occupation Watch Center discovered.

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Coalition authorities state that orders have been given to “strictly follow” the rules for conducting interrogations. Others at the MP and MI schools insist that their training courses do not condone any violations of the Geneva Conventions.

All this is fine. But what is missing in the flurry over “damage control” is serious consideration of the overarching ethical and moral issues involved and the failure to learn from the past.

Ironically, back in May and June 2003, the U.S. was engaged in a major effort to compel other countries to sign bilateral agreements exempting U.S. citizens, whether military or civilians, from the potential jurisdiction of the new International Criminal Court (ICC) in Rome. Under strict criteria in the ICC charter, its jurisdiction is limited to genocide, crimes against humanity, and war crimes – the very class of major ethical violations represented by these abuses.

Like most everything in the military, the combatant-noncombatant dichotomy and the consequences that flow from noncombatant status need to be taught and reinforced through serious and periodic refresher training. It is simply foolhardy to expect that common sense or the “golden rule” will be sufficient to keep all soldiers safe from the poisonous atmosphere of violence that is at the heart of warfare.

The necessity for training and retraining was clearly signaled during the last long war the U.S. fought – Vietnam. Declassified pre-graduation surveys from Army Officer Candidate School that addressed the efficacy of training about treating prisoners in accord with the Geneva Conventions showed how inadequate it was. Fully 22 percent of a 1967 class of 179 potential new junior officers replied that they would mistreat prisoners to gain information. In another class during the same era, 50 percent said they would torture prisoners if necessary to obtain intelligence.

As disturbing as this view is, the temptation is to write it off as from another, less professional, pre-all volunteer era. Yet well into the volunteer era – 1987 to 1991 – the School of the Americas was using training manuals that seemed to condone (some say advocated) blackmail, false imprisonment, torture, and suppressing democratic anti-government movements.

Then there is the question of “outsourcing” interrogations of prisoners and detainees to civilian contractors. Interrogation is an integral aspect of the intelligence collection and analysis cycle, a core military function. Because interrogation involves a denial of freedom, it can rightfully only be a governmental function, one which only government employees, civilian and military, should have authority to conduct. Moreover, only governments are held accountable for acts committed or omitted under international law. A plea of being short-handed is insufficient, both for outsourcing this function and for proper supervision of any and all individuals associated with interrogation.

Interrogation, done properly, is not a haphazard undertaking. Whether in full-scale war or insurgency, there are specific questions, based on the current and anticipated combat situations, which commanders need to be answered. On the basis of when, where, and under what conditions a person was detained, together with initial personal data, a set of questions are developed to elicit useful information. The process or methodology for the interrogation – that is, how many will be participating and in what role – is also decided. A good plan will include options to pursue a line of enquiry if a detainee reveals knowledge about a particular subject. The plan normally is reviewed and approved by a supervisor, after which it is implemented. Based on the outcome of the first interrogation, the detainee’s status should be re-evaluated and a decision made to continue detention and interrogation, institute formal charges, send the detainee to a higher echelon, or release the prisoner. But at all times during the process of detention and interrogation, those detained for questioning retain rights under international law that are inviolable.

That is the law. Yet emerging from Afghanistan, from Iraq, and from the “war on terror” in general is a sense of *deja vu Vietnam* – that when the Hague Regulations and Geneva Conventions (as well as other international laws and treaties) are inconvenient, they will be sidestepped. This trend includes the strategic “Bush doctrine” of preventive war, which violates the UN Charter, and the “creation” of new categories for captured personnel that negates their legal rights and protections by ostensibly placing them outside the Geneva Conventions. Making an individual a legal nonentity also makes that person somehow “less” than others. And when that mentality takes hold, which is quite possible when a person has unchecked power over another, authority enters onto the slippery slope leading to systemic denial of civil liberties, human rights, and human dignity. That pictures and a video were made of the abuses at Abu Ghraib is *prima facie* evidence that the MPs involved thought they would not be discovered or were, in fact, encouraged or directed to violate prisoners’ rights by their superiors. This, of course, cannot justify or be a defense for what they did, but it might explain why they physically and psychologically attacked detainees.

Finally, the CPA, the Pentagon, the Bush Administration, and the country must acknowledge a fundamental and inexcusable failure: forgetting that war by its very nature reduces societal inhibitions against violence. War is NOT about good and evil; it is about the SANCTIONED killing of people and destruction of things. (And for this reason, in democracies, militaries are focused against external enemies.) But once adversaries stop fighting (or never fight at all), their status changes and the sanctions are reversed.

Adversaries cease to be “legitimate” targets of violence and have certain rights (and obligations) under international law which the winning side must respect.

At least one MP at Abu Ghraib (not one of the abusers) knew something was wrong when he observed: “The injustice that we inflict as Americans is that we can arrest these people and never charge them.” What he didn’t know was just how deep the injustice really ran. Apparently, there are even more revelations to come, with repercussions that, for the most part, can only be imagined.

There is one quantified repercussion that has already occurred. The highly critical country-by-country annual U.S. Human Rights report was to have been released May 5. The State Department decided to delay its publication by a week in light of the international furor over Abu Ghraib and the very obvious hypocrisy the release would entail. Moreover, even the delayed release will not avoid the greater hypocrisy of an occupation (and the abuses it invites) by a foreign power for the purpose of imposing democracy.

Of all the reasons the Bush Administration gave for invading Iraq, the only one that had not been thoroughly discredited in the first 12 post-war months was that tyranny was gone, democracy was nigh, and the Iraqi people would at last be able to make and be responsible for their own decisions. What Abu Ghraib suggests, however, is that the form of state governance is, at root, less important than the principles of personal governance: respect for the human rights, dignity, and the “Light within” every individual.

And therein are two potential lessons.

For Iraqis who lived under tyranny for decades, the humbling of the Bush Administration and the United States illustrates an observation of U.S. philosopher and educator John Dewey: “Any doctrine that weakens personal responsibility for judgment and for action helps create the attitudes that welcome and support the totalitarian state.”

What the Administration and the country as a whole need to re-imagine is the meaning of democracy – something akin to New England Transcendentalist Theodore Parker’s dictum that “Democracy means not ‘I am as good as you are’ but ‘You are as good as I am’.”



# Detention and Torture in Guantanamo

Rita Maran

Guantanamo has become a symbol of American policy. The idea that the United States would arbitrarily hold a large number of people in a legal black hole for a period of years with no access to attorneys, no access to families, and no charges, was beyond anything that anyone could have expected.... Britain has had the IRA, Spain has had the ETA, India has had terrorism related to Kashmir, Israel has had suicide bombing.... None... did anything that is comparable to Guantanamo in the manner that they dealt with terrorism. There were delays..but Guantanamo exceeded what any other democratic government has done in dealing with those persons it accused of terrorism (Neier, 2005: 140).

## Introduction

THIS ARTICLE OFFERS AN OVERVIEW OF GUANTANAMO BAY, CUBA, AND OF ISSUES THAT have come into the public discourse because of it, in the over five years since detention began in January 2002. The United States government has held as many as 770 men from over 45 countries in the U.S. military camp at Guantanamo Bay (Guantanamo) in a situation of indefinite and arbitrary detention. The detained persons have not been formally charged or had access to legal advice. The conditions of detention have ranged from substandard to grossly violative. Those being detained, some possibly terrorists, others titled "enemy combatants" by the U.S. government, were taken into custody outside the U.S. and kept outside the U.S. while being transported to a base in Cuba for an indeterminate stay. To accomplish this, the Bush administration has had to cut corners on the rule of law, whether with respect to detainees' rights or U.S. citizens' rights. Each day's headlines tell of another shift of balance in the U.S. tripartite system, and highlight the need for a return to observance of the rule of law. Human rights treaty obligations demand that policy and practice inhabit more strictly the boundaries of rule of law.

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One of the foundational human rights principles at the core of virtually all bodies of law is the protection against torture. International human rights law is the lens through which Guantanamo and torture are discussed. This article surveys several outstanding areas of concern that have surfaced because of Guantanamo, including its legal status, the issues of human rights law raised in connection with torture, how such matters have been addressed in the context of the United Nations system, and some notable U.S. government executive and judicial actions in relation to rule of law.

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## U.S. Law and Lawyers

### *Department of Justice—Office of Legal Counsel*

After September 11, 2001, the Department of Defense (DoD) began making preparations to receive the alien detainees that would be brought to Guantanamo. To clear the decks for the interrogations due to be carried out there, the Central Intelligence Agency (CIA) requested a memorandum from Alberto Gonzales, Department of Justice (DoJ) Office of Legal Counsel. The CIA did so because its operatives were using aggressive interrogation methods on alleged al Qaeda members, and wanted to be certain that they would not be subject to prosecution at a later time.

Prosecutors cannot use information obtained under torture; however, any information obtained by the CIA appeared to be admissible, because DoJ legal opinions held that “none of the harsh techniques amounted to torture” (Greenberg and Dratel, 2005: 172, 173). According to the 45-page DoJ memo from Assistant Attorney General Jay S. Bybee:

any attempt by Congress to regulate the interrogation of combatants or any attempt to prosecute U.S. officials for torturing combatants ‘would represent an unconstitutional infringement of the President’s authority to conduct war’ (Wilson, 2006: 17; also, Greenberg and Dratel, 2005: 173).

A separate government front opened after September 11, when the Department of Defense asked the Department of Justice for a legal opinion concerning *habeas* questions in Guantanamo (Greenberg and Dratel, 2005: 29). On December 28, 2001, Patrick Philbin and John Yoo, two of the deputy assistant attorneys general in the Office of Legal Counsel, accordingly wrote a document to William J. Haynes, II, general counsel of the Department of Defense, entitled “Memo 3: Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba (GBC).” Thus, preparations were well underway by the “elite” (Luban, 2007: 37) Office of Legal Counsel before the first detainees were moved to Guantanamo in 2002 (Greenberg and Dratel, 2005: 29). Yoo and Philbin considered it more than likely that the “federal courts lack jurisdiction,” but they included in their careful memo the possibility that “a district court might reach the opposite result” (*Ibid.*).

The now-infamous “Torture Memo” followed. “Memo 14: Memorandum for Alberto R. Gonzales Counsel to the President Re: Standards of Conduct for Inter-



rogation under 18 U.S.C. sections 2340–2340A,” August 1, 2002 (*Ibid.*: 172–217), written by Assistant Attorney General Jay Bybee, defines the act of torture as an:

Act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.

“Memo 14” is best read in conjunction with Yoo’s memo to Gonzales of the same date:

August 1, 2002, *Memo 15* (no title), “concerning the legality, under international law, of interrogation methods to be used during the current war on terrorism.” Yoo’s memo points out that “For an act to be ‘torture,’” there must be evidence of “specific intention to inflict severe pain or suffering”—in other words, “the infliction of such pain must be the defendant’s precise objective” (*Ibid.*: 219).

In another example of this reasoning, as Secretary of State Rice was leaving on her European trip in the fall of 2006, the press asked her at Andrews Air Force Base about possibly secret CIA torture prisons in Europe. Rice answered that “the United States does not permit, tolerate, or condone torture under any circumstances,” and further, that “the United States does not transport, and has not transported, detainees from one country to another for the purpose of interrogation using torture.” The practice is called “rendition.” Her semantic evasion put the U.S. government on safe—if grossly immoral and barbaric—ground. True, rendition is not “for the purpose of interrogation using torture”; its *purpose* is to extract information.

Two years later, a significant turnaround occurred. On December 30, 2004, Daniel Levin, acting assistant attorney general in the DoJ Office of Legal Counsel, wrote to Deputy Attorney General James B. Comey under the title “Memorandum: Legal Standards Applicable under 18 U.S.C. Sec. 2340–2340A” (the latter being the original “Torture Memo”). The 2004 memo “supersedes the August 2002 Memorandum in its entirety,” and “modifies in some important respects our analysis” of the earlier memo. The Comey memo encapsulates the Senate’s views when it voted to ratify the Torture Treaty; the 2004 memo overrides the earlier broad and permissive interpretations of torture, modifying it in a way that brings it closer in line to the “object and purpose” of the Torture Treaty (Greenberg, 2006: 361–376).

Those communications constitute further semantic links in a chain of legal memos whose language enabled and, in time, justified the permissible use of torture. The early “torture memos” from the Office of Legal Counsel were not atypical of that office’s tendency toward “an overzealous piece of judicial activism...[that] was both dead wrong and deeply unwise.” So said Boalt Hall Law Professor David

Caron, C. William Maxeiner Distinguished Professor of Law, in a timely critique of the Office of Legal Counsel (*Ibid.*: 214–222).

*Alberto Gonzales, Jay S. Bybee, and John Yoo*

Looking at the Torture Treaty, Yoo quoted the truism from the Vienna Convention (see the section above) that “a nation is not bound without its consent.” Further, Yoo said that the “Bush administration’s understanding (concerning requirements for an act to be torture) created a valid and effective reservation to the Torture Convention” (Greenberg and Dratel, 2005: 220). A “reservation” does not have the same legal meaning as an “understanding.” The U.S. government did submit “Reservations, Understandings, and Declarations” with its ratification of the Torture Treaty, and the government defined each term. The conclusion then reached by Yoo that the U.S. government’s understanding (an explanatory phrase on the part of the ratifying state that is not meant to alter any of the binding terms of the treaty) created a reservation (a legally binding qualification) might arguably be challenged. Further, in case the administration’s understanding did not create “a valid and effective reservation to the Torture Convention” sufficient to loosen the reins on the CIA’s interrogation methods, Yoo added for good measure: “there is no international court to review the conduct of the United States under the Convention.”

It is true that no international court is connected to the Convention. However, an expert concerned with expanding—or at least maintaining—ways to implement and enforce human rights obligations rather than evade their consequences might have made an informed commentary at that juncture. A learned law practitioner’s legal opinion generally would mention ancillary facts as points of information; in this case, a commentary about the monitoring, review, and recommendatory if not judicial functions of the Committee Against Torture would have been helpful. The additional information might have included a nod in the direction of the work of the Special Rapporteur on Torture, of other studies and procedures of the Human Rights Council, and, indeed, of the International Criminal Court. Such a digression would not be inappropriate, since the U.S. is an active presence in the U.N., and despite its refusal to seek election to the Human Rights Council in 2006 and 2007, the U.S. maintains a strong observer role.

Both Yoo and Philbin believed that it was more than likely that the federal courts would lack jurisdiction over Guantanamo. Nevertheless, they were careful to note that a district court “might reach the opposite result” and “entertain such an application” (*Ibid.*: 37). On January 9, 2002, John Yoo, together with special counsel Robert Delabunty, wrote a 50-page memo to General Counsel Haynes on the “Application of Treaties and Laws to al Qaeda and Taliban Detainees.” In that memo, Yoo and Delabunty stated their understanding that the Defense Department was envisaging a facility at Guantanamo for long-term detention of those who had come under U.S. control, “either through capture by our military or transfer from our allies in Afghanistan” (*Ibid.*: 38). For the two attorneys advising Haynes, “the

President, as Commander-in-Chief, has the constitutional authority to impose the customary laws of war on both the al Qaeda and Taliban groups and the U.S. Armed Forces" (*Ibid.*: 79). The chain of legal memos, of which these are exemplary, led link by link to an eventual reconstruction of the permissibility of torture in such a way that torture and other similar acts would not be found in breach of the law.

*Three Supreme Court Cases Concerning Guantanamo: Excerpts from Rulings*

*No. 1: Rasul v. Bush*, 542 U.S. 466 (2004): In 1995, the U.S. government argued unsuccessfully that U.S. courts lacked jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo (see *Cuban American Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412 (11th Cir. 1995)). On June 28, 2004, the Supreme Court rejected this argument in *Rasul v. Bush*. The case was brought by the Center for Constitutional Rights (CCR), a human rights nongovernmental organization in New York. The Supreme Court upheld the principle that "the prisoners held in Guantanamo have the right to challenge the legal and factual basis for their detention in U.S. courts" (CCR, 2006b: 1). It said the Guantanamo prison is not "beyond the reach of American Courts and that prisoners there had some minimal rights." The court rejected the ideas that Guantanamo detainees have "no right to be heard in American courts, and that an American citizen designated an enemy combatant can be held indefinitely without being brought before a judge" (*New York Times*, June 30, 2006). According to the Court, "the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing" (*Rasul v. Bush*).

*No. 2: Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004): Afghanistan war detainees were beginning to challenge the lawfulness of their continued incarceration at Guantanamo. The Supreme Court ruled on June 28, 2004, that the government cannot detain U.S. citizens without due process of law. The court held that "illegal combatants," such as those held in Guantanamo, can challenge detentions, but they can also be held without charges or trial.

A letter from approximately 100 professors of law from around the U.S. to their senators (a copy from Professor Judith Resnik of Yale Law School is in the writer's file) was sent on November 14, 2005, expressing strong opposition to Senator Lindsey Graham's amendment to the DoD Authorization Act (S.1042). The law professors wrote: "the Due Process Clause applies to and provides standards to gauge the adequacy of the process by which individuals (in that case a U.S. citizen not detained at Guantanamo) are designated as 'enemy combatants.'" The writers voiced concern about the possible elimination of "habeas corpus jurisdiction," with a resulting "harm to the Constitution and to the rule of law."

*No. 3: Hamdan v. Rumsfeld*, 548 U.S. \_\_ (2006): The Supreme Court handed down a five-to-three decision on June 29, 2006, ruling that "the military commission con-

vened to try Hamdan lacks power to proceed because its structure and procedures violate both the Uniform Code of Military Justice and the Geneva Conventions." The case hung on whether Congress may pass legislation preventing the Supreme Court from hearing the case of an accused combatant before his military commission, established by executive order, takes place, whether the special military commissions that had been set up violated federal law (including the Uniform Code of Military Justice and treaty obligations), and whether courts can enforce the Articles of the 1949 Geneva Conventions.

The ruling also disagreed with the administration's view that the laws and customs of war did not apply to the U.S. armed conflict with al Qaeda fighters during the 2001 U.S. invasion of Taliban-controlled Afghanistan, stating that Article 3 common to all the Geneva Conventions applied in such a situation, which, among other things, requires fair trials for prisoners. As a result, on July 7, 2006, the Department of Defense issued an internal memo stating that prisoners would in the future be entitled to protection under the Geneva Conventions.<sup>30</sup>

#### *Hamdan v. Rumsfeld—Other Opinions*

Justice John Paul Stevens wrote:

Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones.... But requirements they are nonetheless.... The commission that the president has convened to try Hamdan does not meet those requirements... in undertaking to try Hamdan and subject him to criminal punishment, the executive is bound to comply with the rule of law that prevails in this jurisdiction (*Hamdan v. Rumsfeld*).

The June 30, 2006, *New York Times* editorial, "A Victory for the Rule of Law," recommended: "Rather than continue having his policies struck down, President Bush should find a way to prosecute the war on terror within the bounds of the law."

Neal Katyal, the Georgetown University Law School professor who successfully brought *Hamdan v. Rumsfeld* before the Supreme Court, testified on July 19, 2006, before the Senate Armed Services Committee. Katyal said:

On Nov. 28, 2001, I testified before the full Senate Judiciary Committee.... I warned that committee that Congress, not the President, must set up the commissions—and that if Congress did not, the result would be no criminal convictions and a Supreme Court decision striking these makeshift tribunals down.... My academic work extols the idea of a strong President in a time of crisis, adopting the "unitary executive" theory of the Presidency.... But, despite the fact that I think courts should defer to the President overwhelmingly, I felt the decision to adopt military commissions by executive decree encroached on the constitutional prerogatives of

this body, the Congress of the United States.... I believe that the *Hamdan* decision—which invalidated the President's system of military commissions—represents a historic victory for our constitutional process, and, in particular, the role of the United States Congress and federal judiciary in our tripartite system of government.

*The Military Commissions Act*<sup>31</sup>

The Supreme Court held military commissions to be illegal in *Hamdan v. Rumsfeld* because they lacked the same “protections for the accused as do the military’s own justice system and court-martial proceedings.” In addition, the court ruled that the commissions violate a part of the Geneva Conventions that provides for what it said was a “minimum standard of due process in a civilized society” (*Hamdan v. Rumsfeld*).

After the *Hamdan* decision was announced, President Bush stated at a press conference (September 15, 2006) that he would have to take the matter to Congress, for new law. True to his word, on October 17, 2006, President Bush signed the Military Commissions Act (MCA) into law as a countermeasure to *Hamdan*. The MCA establishes military commissions and procedures for trials of terror suspects; it makes possible the permanent detention and torture even of legal U.S. residents, so long as they are classified as “enemy combatants” to whom the Geneva Conventions do not apply (Luban, 2007: 39, *fn.* 14). The legislation amends the War Crimes Act so that those who violate the prohibition against humiliating and degrading treatment under the Geneva Conventions cannot be held accountable. It also entitles the prosecutor to suppress an inquiry into uncovering any coercive interrogation techniques, up to and including torture, that may have been used in the process of obtaining admissible evidence.

On the University of Pennsylvania Law School web site, an interactive debate was conducted under the title “*Hamdan* and the Military Commissions Act.” On one side were Glenn Sulmasy (an associate professor of law at the U.S. Coast Guard Academy, who is on sabbatical for the winter 2006–2007 semester at Boalt Hall School of Law in Berkeley) and John Yoo (professor of law, University of California at Berkeley, a visiting scholar at the American Enterprise Institute, and author of *War by Other Means* [2006]). On the other side of the debate was Martin Flaherty, co-director of the Crowley Program in International Human Rights at Fordham Law School in New York, the Leitner Family Professor of Law, and an adjunct professor at the Woodrow Wilson School of Public and International Affairs at Princeton University.<sup>32</sup>

According to Sulmasy and Yoo,

The enemy we now fight does not abide by the laws of war. Any incentive to follow the rules of civilized warfare is removed if that enemy receives the same rights as those who scrupulously obey the Geneva Conventions. In

applying Common Article 3 to al Qaeda, we now equate illegal combatants with ordinary armed forces. By affording Geneva Convention protections to al Qaeda, we would be legitimizing its form of warfare.

In their view, the Supreme Court made a number of "missteps" in its decision in *Hamdan v. Rumsfeld*. The Court's decision thereby "created the potential to straitjacket our armed forces well beyond the narrow issue of war crimes trials.... Thankfully, many of these errors have been remedied through the bipartisan passage of the Military Commissions Act of 2006 (MCA)."

They saw in the MCA a timely palliative for the errors in *Hamdan*, which in their view misapplied common Article 3 of the Geneva Conventions to the "War on Terror" conducted by the United States. In a further defense of the Act, they said: "the MCA provides a laundry list of rights that often go well beyond the procedures and protections of other nations' systems."<sup>33</sup>

By contrast, Flaherty believes that the MCA "would for the first time in our history result in the United States deliberately violating the very laws of war that this nation pioneered." As for *Hamdan* itself, Flaherty saw it less as an errant decision than an instance in which "the Court has again stood up for first principles against a White House whose misunderstandings of our fundamental constitutional principles are matched only by its miscalculations in foreign policy."

Writing on *Hamdan* from London, Geoffrey Robertson, Q.C. (2006: 174–176), who served in landmark trials and human rights appeals in Britain and Europe, and currently serves as an appeal judge on the U.N. War Crimes Court in Sierra Leone, set the record straight. Robertson raised questions about the fundamental idea of having a military commission at Guantanamo. Looking back at the history of international criminal courts for terrorist offenses dating from the League of Nations initiative in 1937 through the currently operative International Criminal Court, Robertson makes clear that terrorist offenses are not a new phenomenon. He quotes Vice President Cheney's statement regarding combatants captured in Afghanistan: "They don't deserve to be treated as prisoners of war.... If convicted, 'They deserve to be executed in relatively rapid order...by a special military commission.'" Since none of the international tribunals established by the U.N. can hand down a death sentence, and the military commissions can, Cheney's preference for military commissions has held the day—for now.

If the U.S. government wished to have a military panel it could control, rather than an independent court in which some of the detainees might be acquitted for lack of evidence, then this boded ill, Robertson said, for the rule of law:

Although the procedures of the special military commission have been much improved since that original executive order of November 2001, the basic objection remains—it is not a court, it is a panel of five military officers, employees of the same authority that detains and prosecutes the defendants.... These commissioners may lack the *appearance* of

impartiality, but more importantly they lack independence. The appointing authority is a department of the Defense Department, which is responsible for selecting the prosecution charges and is supervised by the Defense Secretary.

Robertson would favor an independent tribunal.

### Conclusion

The problematic issues surrounding the legal, military, and political future of Guantanamo remain in limbo to date, and doubtless for some time to come. The Bush administration could announce the dismantling of the camp and the safe transportation elsewhere of the hundreds of individuals still held there. However, since the president will not consider sending them to an unsafe location, and since that would entail lengthy and complex arrangements, that outcome seems unlikely. However, there are some indications that changes may happen more quickly than can be imagined.

One unknown element may prove to be public reaction to apparently provable grave errors by the civilian and military leadership in the U.S. government. That set of issues is a major topic of the news media and, hence, of public discussion. For instance, *The NewsHour with Jim Lehrer* on PBS devoted a large part of its program of March 26, 2007, to a debate between Professors Katyal and Yoo. Katyal called Guantanamo an "albatross around the neck of the United States," a statement with which few would quibble. The two law professors tended to lock horns about whether and which laws apply in Guantanamo. Katyal said Cuban laws do not apply, and neither do U.S. laws. Yoo disagreed, saying that law does indeed apply there. No quick resolution of these problematic issues is likely. Turning eyes again toward Guantanamo is the fact of the first military court trial to take place since detainees were moved into Guantanamo five years ago. The military commission started on March 27, 2007, and David Hicks pleaded guilty the day after, but the issues involved promise no quick and easy answers (*New York Times*, March 28, 2007: A15).

A second example is the locally generated *Resolution Against Torture: Resolution urging the United States Government to comply with international law regarding the use of torture* (0505259), adopted February 22, 2005, for the City and County of San Francisco (see Appendix). Supervisors Chris Daly, Ross Mirkarimi, and Aaron Peskin of the San Francisco Board of Supervisors spearheaded this resolution, which calls upon the U.S. government "to establish an independent, bipartisan commission with subpoena power" to prepare a full report on U.S. compliance with the ICCPR, the Torture Treaty, the Geneva Conventions, and "related customary international law."

In a final example, Charles D. Stimson, Deputy Assistant Secretary of Defense for Detainee Affairs, caused public outrage on January 12, 2007. Stimson stated

his “shock” that lawyers at many of the nation’s top firms were representing prisoners at Guantanamo. He recommended first that the firms’ corporate clients be notified, and second, that the clients consider ending their business ties. Less than a month later, however, Stimson resigned, stating that he had *not* been asked to leave by Defense Secretary Robert Gates (*San Francisco Chronicle*, February 3, 2007; Digest).

Somewhere in the interface between this nation’s domestic and foreign affairs since September 11, 2001, a little piece of land on a small island a few hundred miles away in the Caribbean—Guantanamo—emerged as a symbol of the Bush administration’s drive to chisel away at our historic laws and statutes, to rebalance this country’s tripartite system of governing, and to commit military aggression against populations abroad. Guantanamo has come to stand for the depths to which a democratic government could and did sink in the course of skirting—and outright flouting—its national and multilateral legal and moral responsibilities. Guantanamo is a focal point around which a considerable number of issues of rule of law will be tested.

For societies like the U.S., whose genesis was in a raggle-taggle revolutionary war, there is great significance in the fact that the fledgling government immediately turned toward embedding the rule of law as the foundation of this democratic republic. Administrations since then have carved their own ways, always—if frequently unevenly—maintaining a stated commitment to fairness and equality, and trusting always that the people’s aspirations would be more fully achievable through the rule of law. The wisely molded Constitution has stood the test of time, strengthening over these last decades through the embrace of international human rights law.

Yet in 2007, it still must be said, because it continues to happen. Torture is morally wrong. Torture is legally a crime. For five years now, despite the torture and related violations in Guantanamo, not to mention other prison camps symbolized by Guantanamo, the U.S. public has been slow to rouse. When asked to permit and turn a blind eye to barbaric practices long since rejected by all societies no matter their systems of law, we have been slow to rise up and insist: No. No Torture. Never Means Never. There is a creeping risk to rule of law if a practice long-since forbidden can be gotten around, in direct contradiction of oaths sworn to uphold the law. Justice is long overdue. International human rights law offers the means to come through the other side of this ugly time with honor and dignity, to never again be complicit or silent when this or any government legally and morally stoops far below human rights standards.

Now, when the United States faces armed and violent opponents who scorn rule of law and follow the rule of no-rules-but-mine, the U.S. urgently needs to lead. We of the U.S. need to reject sound-byte retaliatory modes of governing that are little better than kangaroo court-type law. Guantanamo is not a good model; it needs to become the marker for future historians, of the moment in time when the



U.S. government returned to its founding principles, actively seeking once again to strengthen human rights and the rule of law for the benefit of people here and everywhere.

### NOTES

1. See M.E. Murphy's (1953) *The History of Guantanamo Bay 1494-1964*. See, also: *The Agreement Between the United States of America and the Republic of Cuba (Lease Agreement)*, finalized on February 16-23, 1903. The U.S. Treasury sends a check each year for \$4,085; Cuba has not cashed the checks since 1958. See, also, Franklin (n.d.) and Greenberg and Dratel (2005: 31).

2. Harold Koh, when assistant secretary of state under President Clinton, wrote of "rights-free zones" in "Guantanamo...when Haitian and Cuban asylum-seekers were held [in Guantanamo] and denied access to U.S. courts." "America's Offshore Refugee Camps," 29 *Richmond L. Rev.* 139 (1994: 140-141), and as noted in Fitzpatrick (2003: 242, fn. 1).

3. *Convention on the Rights of the Child*, adopted 1989, in force 1990: Article 37c states, "Every child deprived of liberty shall be separated from adults...." Also: *The Standard Minimum Rules for the Treatment of Prisoners*, approved by United Nations Economic and Social Council Resolutions 663 C (XXIV) of July 31, 1957, and 2076 (LXI) of May 13, 1977; Section 8: "The different categories of prisoners shall be kept in separate institutes...taking account of their sex, age...."

4. President Bush's Press Conference of September 6, 2006. Bush cited the data; see [www.whitehouse.gov/news/releases/2006/09/20060906-3.html](http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html).

5. *Geneva Convention III Relative to the Treatment of Prisoners of War* of August 12, 1949 (International Committee of the Red Cross, 1986).

6. "White House Fact Sheet: Status of Detainees at Guantanamo" (February 7, 2002), at [www.whitehouse.gov/news/releases/2002/02/](http://www.whitehouse.gov/news/releases/2002/02/).

7. *In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443 (D.D.C. 2005).

8. For the origins, usage, and analysis of U.S. government policy on mental torture, see McCoy (2006).

9. Fitzpatrick (1990-2003) was Brotman Professor of Law at the University of Washington.

10. "09/02/2004. Title: GTMO Counterterrorism Division (CTD) Inspection Special Inquiry Attn: DD Bruce J. Gebhardt Case ID#: 297-HQ-13276669-A. Synopsis: Request approval to designate captioned matter as an Inspection Division (INSD) Special Inquiry." At <http://foia.fbi.gov/guantanamodetainees.pdf>. See, also, *New York Times* (May 13 2004: A1).

11. "Memorandum for Inspector General, Department of the Navy. Statement for the record: Office of General Counsel on interrogation issues" (July 7, 2005).

12. According to the U.S. Constitution, Article 6's "supremacy clause" applies to all ratified treaties: "This Constitution...and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land...."

13. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by United Nations General Assembly Resolution 39/46 of December 1984; entered into force on June 26, 1987. Article 2(2) states: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

14. *Vienna Convention on the Law of Treaties*. May 23, 1969, 1155 U.N. T.S. 331, in force January 27, 1980; see Article 18 and Article 26.

15. *International Covenant on Civil and Political Rights*. Entered into force on March 23, 1976. The U.S. ratified it in 1992. Article 4(1) states: "In time of public emergency which threatens the

life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations...." Article 4(2) states: "No derogation from article...7...may be made under this provision." Article 7 states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

16. (1) *The European Convention* does not include the term "cruel"; thus, Article 3 reads: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." (2) *ICCPR*: Article 4(1), Article 4(2), and Article 4(3), entered into force 1976. (3) "Torture Treaty" entered into force in 1987; ratified by the U.S. in 1994. Article 2(2) states: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

17. *Tyrer v. U.K.* held that "degrading punishment [fell] within the meaning of Article 3 of the Convention." Council of Europe, Strasbourg, April 25, 1978.

18. Center for Constitutional Rights report on torture (July 2006: 50, fn. 243).

19. U.N. Committee Against Torture: CAT/C/USA/CO/2 of May 18, 2006.

20. *ICCPR*, Article 28: "There shall be established a Human Rights Committee...." See the U.N. web site, generally: [www.un.org](http://www.un.org).

21. Human Rights Committee, *CCPR/C/USA/CO/3/Rev.1* of December 18, 2006, "Concluding Observations of the Human Rights Committee: United States of America."

22. See the strong report of the U.N. Commission on Human Rights: E/CN.4/2006/120 of February 15, 2006: *Situation of Detainees at Guantánamo Bay*. The Rapporteurs are respectively: Leila Zerrougui, Leandro Despouy, Manfred Nowak, Asma Jahangir, and Paul Hunt.

23. Ban Ki-moon took office on January 1, 2007, following Kofi Annan's two five-year terms as U.N. Secretary-General, which ended on December 31, 2006. See, also, the *New York Times* (January 12, 2007: A16).

24. BBC, U.K. International Version. Interview of the President by Sabine Christiansen of ARD German Television (May 4, 2006). At [www.whitehouse.gov/news/releases/2006/05/20060507-3.html](http://www.whitehouse.gov/news/releases/2006/05/20060507-3.html); also: "New to Pentagon, Gates Argued for Closing Guantanamo Prison," *New York Times* (March 23, 2007).

25. The four Geneva Conventions (GC) are: (1) GC I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; (2) GC II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Arms Forces at Sea; (3) GC III Relative to the Treatment of Prisoners of War; (4) GC IV Relative to the Protection of Civilian Persons in Time of War. *The Geneva Conventions of August 12 1949* (International Committee of the Red Cross, 1986).

26. "See *Gonzales* (2005: 118-1210).

27. University of Pennsylvania Law School web site. PENnumbra-- *University of Pennsylvania Law Review*. At [www.pennumbra.com/debates/debate.php?did=4](http://www.pennumbra.com/debates/debate.php?did=4).

28. See, among other sources, *Aljazeera Magazine* (2003).

29. *In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443 (D.D.C. 2005). See, also, Amnesty International (2007).

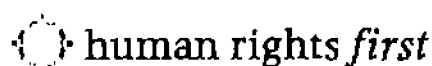
30. See [www.humanrightsfirst.org/hus\\_lawletmlprinciplepolicy.asp](http://www.humanrightsfirst.org/hus_lawletmlprinciplepolicy.asp).

31. See Diane Marie Amann (2006), Professor of Law, University of California, Davis, for a comprehensive analysis of military commissions.

32. PENnumbra, 155 *University of Pennsylvania Law Review* 74 (2006); see note 27 above.

33. For the "list," see MCA Section 949D(F)(2)(B). Also: "What a Deep Shame That the U.S. Government Is Working So Hard to Justify Abusive Interrogation Practices." Doug Johnson, Executive Director, The Center for Victims of Torture, [www.cvt.org](http://www.cvt.org).





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### **Those Who Authorize and Use CIA 'Enhanced' Interrogation Tactics Risk Criminal Prosecution**

**Landmark Report: Techniques Previously Authorized for CIA Use —  
Not Ruled Out by President's CIA Executive Order — Likely Violate  
U.S. Law**

A landmark report released today by two leading human rights groups concludes that U.S. officials who authorize or use "enhanced" interrogation techniques risk violating U.S. law and could face criminal prosecution. The CIA had suspended its interrogation program in 2005 out of reported concern about its legality. On July 20, President Bush issued an Executive Order that he claimed would allow that program to resume.

The unprecedented analysis by Human Rights First and Physicians for Human Rights combines medical and legal expertise to comprehensively examine ten techniques widely reported to have been authorized for use in the CIA's secret interrogation program, including sleep deprivation, simulated drowning, stress positions, beating, and induced hypothermia. The Report — "Leave No Marks: 'Enhanced' Interrogation Techniques and the Risk of Criminality" — demonstrates the mental and physical consequences of the use of these techniques, and its title refers to the techniques' intended design, which is to inflict psychological trauma and pain without leaving physical scars. U.S. law requires an assessment of the physical and mental impact of an interrogation method to determine its legality. The report concludes that each of the ten tactics is likely to violate U.S. laws, including the War Crimes Act, the U.S. Torture Act, and the Detainee Treatment Act of 2005.

"These 'enhanced' interrogation techniques can cause severe and often irreversible harm to their victims," said Dr. Scott Allen, who co-authored the report, and is an Advisor for Physicians for Human Rights (PHR) and Co-Director of the Center for Prisoner Health and Human Rights at Brown University. "The report's full and independent review of the medical literature and case studies concludes that these methods are likely to cause significant physical and mental harm to detainees, and they should be immediately and explicitly prohibited by the Bush Administration and by Congress," he added.

Defenders of the use of severely coercive treatment in interrogations have argued that "enhanced" interrogation techniques are "aggressive" and "tough," but not particularly harmful. But the report reviews an extensive body of medical and psychological literature and applies the experience of experts who have treated victims of torture and abuse to show that although "enhanced" interrogation techniques may not result in visible scars, they often cause severe and long-lasting physical and mental harm. The use of such methods can and does frequently result in posttraumatic stress disorders, depressive disorders and psychosis. The common use of physical and emotional abuse in combination with one another "compounds their devastating psychological impact," the report finds.

In conducting the medical analysis, Physicians for Human Rights drew upon experts in the physical and psychological effects of torture. Human Rights First's legal analysis applied its expertise with the relevant statutes, treaties, case law, and legal history. The report's conclusions are based on extensive research in both fields and have been reviewed by widely respected medical experts.

"Administration lawyers may try to convince interrogators that the secret interrogation techniques authorized by the President are lawful because they cause no 'permanent damage.' But interrogators shouldn't buy it," said Elisa Massimino, Washington Director of Human Rights First. "Stress positions, prolonged isolation, sensory bombardment, mock-drowning and other such abuses can cause serious physical and mental pain. They need not inflict permanent damage in order to violate the law and potentially result in very serious criminal sanctions."

Massimino added: "Authorizing such abuses as consistent with the Geneva Conventions has profound -- and dangerous -- consequences for our own military, now and in future wars. The administration's argument that doctors will oversee the program to ensure that interrogators don't go too far gives new meaning to the term 'calculated cruelty.'"

The report urges the US government to "refrain from repeating the mistake of allowing the euphemistic descriptions of interrogation techniques to blur the line between permissible and impermissible treatment." It calls on the government to instead adopt the recommendations it sets forth as necessary steps to creating "a single standard of humane treatment."

***The report calls on the executive branch to:***

- Prohibit the "enhanced" interrogation techniques, in order to protect U.S. officials and personnel from potential criminal liability and to ensure that all U.S. personnel adhere to U.S. law.
- Prohibit the use of any other method that, alone or in combination with other interrogation methods, presents a significant risk of causing serious or severe physical and/or mental pain or suffering.
- Instruct all U.S. interrogators in effective, legal, non-harmful methods of interrogation.

- Declassify and release all documents, from all relevant U.S. agencies, which contain information on U.S. interrogation policy and practice, including but not limited to the "enhanced" interrogation methods.

***The report urges the U.S. Congress to:***

- Clarify existing language in the MCA, which under a reasonable interpretation currently prohibits the use of the "enhanced" techniques, by explicitly listing the techniques, forbidding them, and making clear that they remain criminal.
- Establish a single standard for detainee treatment and interrogation practices to be followed by all U.S. personnel, including CIA personnel.

The Administration's CIA Executive Order, issued on July 20, undermines the attempts of the McCain Amendment and the Pentagon's revised Army Field Manual governing interrogations, issued in September 2006, to establish a single standard of humane treatment for detainees. By refusing to clearly identify abusive techniques and to take them off the table for use by the CIA, the Executive Order effectively leaves the decision of when, how and upon whom to use these tactics to the discretion of the CIA Director.

[Read Executive Summary](#)

[Read Full report \(PDF\)](#)

The report was reviewed by:

- Vincent Iacopino, MD, PhD, Senior Medical Advisor to PHR and lead author of the UN's Istanbul Protocol for Assessing Victims of Torture;
- Uwe Jacob, PhD, Director, Survivors International;
- Allen Keller, MD, Program Director of the Bellevue/NYU Program for Survivors of Torture;
- Christian Pross, MD, Center for the Treatment of Torture Victims, Berlin, Germany;
- Stephen Xenakis, MD, Brigadier General (Ret), U.S. Army;
- Farnoosh Hashemian, MPH, Research Associate, PHR;
- Justice Richard Goldstone, Justice of the South African Constitutional Court, Retired;
- Leonard Rubenstein, JD, President, PHR;
- John Bradshaw, JD, Director of Public Policy, PHR;
- Hina Shamsi, JD, Deputy Director and Senior Counsel to HRF's Law and Security Program;
- Devon Chaffee, JD, Kroll Family Human Rights Fellow in HRF's Washington office; and
- Elisa Massimino, JD, Washington Director, HRF.

*Physicians for Human Rights (PHR) mobilizes the health professions to advance the health and dignity of all people by protecting human rights. As a founding member of the International Campaign to Ban Landmines, PHR shared the 1997 Nobel Peace Prize.*



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## Comment: Attitudes and Types of Reaction Toward Past War Crimes and Human Rights Abuses

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### SUMMARY:

... I. The Choice: To Forget or To Establish the Truth, To Pardon or To Punish ... The ad hoc International Criminal Tribunal for Rwanda (ICTR) in Arusha has only been able to deal with a few dozen cases, leaving some 125,000 detainees to be processed by the weak national judicial system. ... (1) Amnesty - to forget and to pardon; ... On the other hand, financial compensation likely fails to vindicate the victims' claims as completely as individual prosecutions and punishment might (although the degree of victim satisfaction could depend on the nature of the abuses committed or the circumstances of the particular victim). ... Conditional and individual amnesty with retention of the possibility to prosecute the gravest crimes - as was employed in South Africa - is more fully compatible with both truth commissions and proceedings based on individual or collective responsibility. ... In addition, truth commission findings can provide a powerful source of information on crimes that are not covered by the amnesty. ... Increases in the number of proceedings based on individual or collective responsibility provide empirical evidence of the increasing importance attached to the establishment of truth and to the punishment of the perpetrators. ...

### TEXT:

[\*343]

#### I. The Choice: To Forget or To Establish the Truth, To Pardon or To Punish

The importance of a reliable justice system and the rule of law is universally accepted. Nonetheless, controversy still surrounds the extent to which seeking justice for past war crimes and grave human rights abuses represents a precondition for - or an impediment to - the overall stability of post-conflict and transitional societies. Human rights advocates tend to regard the implementation of judicial norms and institutions as an omnipotent cure against war crimes and human rights abuses; diplomats and other peacemakers are far more skeptical, sometimes regarding justice as mere window-dressing or, worse, as a direct impediment to peace. n1 Actual experience does not provide straightforward answers. Different societies have taken different paths to confront post-conflict and transition challenges - and have met with both success and shortcomings. Moreover "simple" transitions from a repressive regime to democracy (such as in Argentina, Chile, or El Salvador) should be distinguished from transitions following patterns of atrocity that had racial, [\*344] religious, or ethnic underpinnings (such as in South Africa, Rwanda, Guatemala, or Bosnia and Herzegovina). n2 This variety, however, should not discourage the international community from trying to identify possible patterns; to the contrary, richness of experience, if systemized, can illustrate more clearly the current state of international justice and, possibly, where it is going. n3

This Comment will first attempt to catalogue the various attitudes of post-conflict societies and their corresponding types of reaction to past war crimes and human rights abuses. The objective is to identify trends in an attempt to learn from experience. The underlying framework will be slightly simplified in order to illustrate the trends more clearly.

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References to experience will also serve as reminders of the real world complexity and the inherent difficulties in formulating any general conclusions.

This Comment portrays both attitudes and reactions toward past war crimes and human rights abuses as choices between the following options: forgetting or establishing the truth, and pardoning or punishing the perpetrators. These options can be presented graphically, with each as the endpoint of a continuum. Every experience of a society that has dealt with past war crimes and human rights abuses can be located somewhere within such a framework and compared against other experiences.

Figure 1. Attitudes and Reactions Toward Past War Crimes and Human Rights Abuses: Choices

[see org] [\*345]

## II. Attitudes Toward Past War Crimes and Human Rights Abuses

The analysis begins with attitudes. Attitudes cannot be directly observed; rather, they can be identified only on the basis of various indicators. Individuals, societies, and various international actors can - and usually do - have different attitudes toward past war crimes and human rights abuses. Of course, the most interesting are the prevailing attitudes - the ones that are supported by the dominant political forces within the post-conflict or transitional society itself. Four basic attitudes correspond to the different possible combinations of responses to the choices just described - to forget or to establish truth; to punish or to pardon: n4

- (1) "Willful ignorance" - to forget and to pardon;
- (2) "Historical record" - to establish the truth, but to pardon;
- (3) "Pragmatic retribution" - to forget, but still punish; and
- (4) "No peace without justice" - to establish the truth and to punish the perpetrators.

The relationship between choices and attitudes is clear when presented graphically.

Figure 2. Attitudes Toward Past War Crimes and Human Rights Abuses

[see org] Each of the attitudes can be traced back to certain identifiable motives, as illustrated by some historical examples. The desire for "willful ignorance" [\*346] derives from a perception that past experience is so controversial, divisive, and painful as to merit being forgotten - being cast into oblivion. This may also be the opportunistic position taken by a politically important group seeking to hide its responsibility for past events. In either case, this attitude reflects an attempt to cut off the divisive past in a single instant, looking only to the future. A typical moral justification for such an attitude is the idea that any solution that prevents human suffering and can bring about an immediate peace is a good one.

The July 1999 Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Lomé Peace Agreement), designed to stop the civil war in Sierra Leone, provides a recent example of the "willful ignorance" approach. n5 In an attempt to end the hostilities and brutalities that had characterized the conflict, the agreement brought representatives of rebel forces, the Revolutionary United Front (RUF) led by Foday Sankoh, into the national government. It provided for a postwar power-sharing arrangement and a sweeping general amnesty. n6

By contrast, the search to establish the "historical record" is motivated by the belief that in spite of the desire to facilitate reconciliation by pardoning the perpetrators of abuse, knowing and recording the events that have taken place is essential to avoid their repetition. Some also contend that revealing the truth provides symbolic satisfaction to the victims. This attitude may be honestly held and well-intentioned, but it may also represent a compromise between former abusers and their victims, who settle for the limited satisfaction of truth, rather than receive actual redress through punishment.

Post-apartheid South Africa, which granted amnesty in exchange for testimony regarding major crimes of the apartheid era, represents the "historical record" attitude. Instead of a blanket amnesty, a conditional amnesty was offered. The Truth and Reconciliation Commission received more than 7,000 amnesty applications, and the program is considered to have succeeded in establishing a complete, year-to-year record and analysis of the abuses committed under apartheid. n7

"Pragmatic retribution" is motivated by the will to get rid of the abusers fast, but without raising controversial issues from the past. From this perspective, pragmatism is more important than justice. It is considered essential to eliminate the perpetrators of abuses from political life by either taking administrative measures to exclude them or by punishing them for crimes that are not directly tied to war crimes and abuses, and, therefore, not politically divisive.

[\*347] In general, the Central and Eastern European transitions from communist rule in the late 1980s and early 1990s were not accompanied by a large number of prosecutions. n8 There were virtually no criminal proceedings, although states often took some administrative measures to limit the political participation of alleged former abusers. Even the rare criminal proceedings tended to be limited to non-controversial issues. For example, when the Federal Republic of Yugoslavia n9 indicted former President Slobodan Milošević, the prosecution was to be for corruption and arranging the murder of a political opponent, not for the Serbian genocide or war crimes against Croats, Muslims, and Albanians. n10

Finally, those who take the "no peace without justice" approach are motivated by the belief that only legal proceedings against the perpetrators of war crimes and human rights abuses can: (1) provide the truth and punishment necessary to satisfy the victims; (2) prevent individual retaliation for past injustices; and (3) prevent history from repeating itself. Victims and human rights nongovernmental organizations (NGOs) typically adopt this position, but it can also become the dominant attitude of a post-conflict society, or even of the international community in particular situations. For example, the new government of Rwanda took a strong position that the genocide of up to one million people in 1994 required punishment through criminal justice. In fact, however, justice has proven very difficult to achieve. The ad hoc International Criminal Tribunal for Rwanda (ICTR) in Arusha has only been able to deal with a few dozen cases, leaving some 125,000 detainees to be processed by the weak national judicial system. This inundation has forced the government of Rwanda to adopt new practical solutions - such as local community courts - for some detainees who confess to their involvement in the atrocities. n11

### III. Types of Reaction Toward Past War Crimes and Human Rights Abuses

Interpreting the attitudes of different post-conflict and transition societies is an inexact science that requires the identification of various [\*348] indicators. Reactions, however, usually take some kind of legal form and can be more easily identified. A typology of four basic forms of reaction toward past war crimes and human rights abuses corresponds to the set of societal choices identified above - to forget or establish the truth; to pardon or punish the guilty: n12

- (1) Amnesty - to forget and to pardon;
- (2) Truth commissions - to establish the truth, but to pardon;
- (3) Lustration or substitute criminal charges - to forget and to punish;
- (4) Individual or collective criminal justice proceedings - to establish the truth and to punish.

The relationship between the different choices and reaction forms can also be presented graphically.

Figure 3. Types of Reaction Toward Past War Crimes and Human Rights Abuses

[see org] Amnesty reflects the highest level of commitment to the "willful ignorance" response. It can be a blanket amnesty - anonymous, en masse, with no conditions and no questions asked. Blanket amnesties were routinely accepted during the transitions in Latin America, with the exception of Argentina. n13 Alternatively, a conditional or individual amnesty can be [\*349] established, covering the majority of crimes in exchange for cooperation in establishing full truth about the past (as offered in South Africa). A typical means of proclaiming an amnesty is to pass an amnesty law with retroactive effect.

Truth commissions reflect a high level of commitment to establishing the truth, but also a willingness to pardon the offenders. Establishing a reliable historical record can be important because past abuses can be systematically hidden (as in the case of disappeared persons in Latin America), or because different sides to the conflict may offer competing and conflicting versions of the "truth" about past events. In any case, truth commissions offer at least the possibility of symbolic satisfaction for the victims and can help mitigate the risks of future conflict.

Lustration or the use of substitute criminal charges reflects the desire to simultaneously and avoid the risks related to establishing the truth to punish the perpetrators in some way. During the communist era, many people in Eastern Europe were, in one way or another, involved in human rights abuses (e.g., as political police informants), but it was

considered deeply problematic to put them all on trial after the regimes fell. Instead, through the process of lustration they were excluded from active political life and prohibited from participating in public administration (especially positions with the military or police). Decisions were made based on the review of secret police records and followed by the elimination of former collaborators. These techniques were not limited to the former communist countries. For example, the review conduct by an ad hoc commission established in El Salvador has recommended that one hundred senior military officers be retired on the basis of their involvement in past human rights abuses. n14

As for substitute criminal charges, take the case of Slobodan Milošević, the former President of Serbia and the Federal Republic of Yugoslavia. The government of Serbia indicted and had intended to arrest Milošević on corruption and political assassination charges - not for his involvement in genocide and war crimes. In cases of both lustration and the use of substitute criminal charges, the establishment of truth is avoided for political reasons. Substitute criminal charges impose a higher degree of punishment than lustration; they not only place restrictions on participation in public life or administration, but they also involve actual imprisonment of the convicted person. Lustration requires some legal determination of the scope of persons affected and the extent of consequences for those individuals; legal institutions are designated to perform the process. Substitute criminal charges do not require any changes to the legal system; existing rules and institutions are used to punish and remove the accused individuals from public life.

Finally, reaction can take the form of any number of complex proceedings based on the pursuit of individual or collective responsibility. These trial-based proceedings combine a strong demand for establishing the truth with a desire to mete out either collective or individual punishment against the perpetrators. Proceedings focused on collective responsibility [\*350] represent a form of reaction targeting a collective body considered responsible for the abuse of victims who are entitled to compensation. For example, some companies have recently paid reparations to individuals who worked as forced laborers during the Second World War. These claims are somewhat similar to claims for war reparations, such as those brought by Bosnia and Herzegovina as well as Croatia against Serbia and Montenegro for alleged genocide; the claims are currently pending before the International Court of Justice (ICJ). n15 Collective responsibility can be regulated through various legal institutions, but its basis is the awarding of compensation.

Proceedings focused on individual criminal responsibility represent a form of reaction oriented toward both establishing the truth and punishing the individual criminal perpetrators. Responsibility can be established through national proceedings; through courts in third countries that exercise universal jurisdiction; through proceedings before ad hoc tribunals, such as those for the former Yugoslavia and for Rwanda; through hybrid tribunals involving a mix of national and international judges and prosecutors, such as those in Sierra Leone, East Timor, and Kosovo; or before the International Criminal Court (ICC). The laws regulating individual criminal responsibility are contained in national criminal codes, international criminal law, and the statutes of ad hoc tribunals or the ICC.

#### IV. Correspondence Between Attitudes and Types of Reaction

Each of the four basic attitudes to past war crimes and human rights abuses described in Part II corresponds to a certain form of reaction described in Part III:

- (1) "Willful ignorance" corresponds to amnesty;
- (2) "Historical record" corresponds to truth commissions;
- (3) "Pragmatic retribution" corresponds to lustration or substitute criminal charges; and
- (4) "No peace without justice" corresponds to proceedings based on individual or collective responsibility.

These relationships between attitudes and their corresponding types of reaction can also be presented graphically.

[\*351]

Figure 4. Attitudes and Types of Reaction Toward Past War Crimes and Human Rights Abuses

[see org] If the attitude toward past war crimes and human rights abuses is "willful ignorance," then the suitable form of reaction is amnesty. A willingness to forget and to pardon is reflected in amnesty's grant of immunity from prosecution. The past is buried, for better or worse, and perpetrators of at least some crimes and human rights abuses get a legal waiver from prosecution. Amnesty can increase stability by eliminating the uncertainty surrounding the potential prosecutions - or their potential misuse. Its shortcoming is the potential frustration of the victims - possibly providing the

motivation to seek individual revenge. Furthermore, crimes or abuses might reoccur because they were neither symbolically condemned nor individually or collectively punished.

If the attitude is "historical record," truth commissions represent a suitable form of reaction. This instrument enables the establishment of the truth - often with far reaching political impact - but without punishing the perpetrators (or at least certain categories of the perpetrators), thus meeting the two goals of those who prioritize the historical record. The benefits provided by truth commissions include the opportunity to face the past, to identify both the victims and the perpetrators, and, in this way, to provide some level of protection against similar events in the future. Victims receive some level of symbolic satisfaction, but without pushing perpetrators too hard [\*352] and risking the reemergence of conflict. The shortcoming of this approach is that victims who know the truth - but who are also aware that the perpetrators have not been punished - might be motivated to seek individual revenge.

If the attitude is "pragmatic retribution," then the suitable type of reaction is lustration or substitute criminal proceedings. The willingness to eliminate the perpetrators from political life is reflected in their exclusion from participation in certain sectors of public life - or in the imposition of individual punishment through criminal proceedings for some measure of their crimes, which also removes them from the political scene (at least temporarily). These proceedings, however, avoid reliving certain controversies from the past. Instead, war criminals and human rights abusers are treated as mere common criminals (which, quite often, they also are). This approach serves to rid society of the most dangerous people without risking widespread social or political instability. The difficulty is that war crimes or abuses may reoccur because they were never properly confronted and condemned in the first instance. Substitute criminal proceedings, however, can be a good way to prepare the society psychologically for future prosecutions of more serious and politically sensitive crimes; when it has been established that a former leader has been engaged in corruption or murder, it is easier to accept that he or she was a war criminal as well.

If the attitude is "no peace without justice," the appropriate reaction is proceedings seeking collective or individual responsibility. The willingness to establish the truth and to punish the perpetrators can be satisfied through a plethora of legal instruments - primarily courts or tribunals - that can provide satisfaction to the victims. Society faces the past when perpetrators are punished on a collective or individual basis. Of course, different proceedings provide a variety of forms of relief to the victims and pose a variety of threats to the former abusers. In general, proceedings based on theories of collective responsibility are less threatening to former abusers precisely because they are not targeted at any single individual, and because findings of criminal responsibility give rise to obligations that are most clearly financial, not moral. On the other hand, financial compensation likely fails to vindicate the victims' claims as completely as individual prosecutions and punishment might (although the degree of victim satisfaction could depend on the nature of the abuses committed or the circumstances of the particular victim). Proceedings based on individual responsibility provide that benefit, and the resultant catharsis can help the victims forgive past suffering. Major drawbacks include the possibility that proceedings against the accused individuals can take a long period of time (in some cases years), that they might be misused against political enemies, and that if people who maintain considerable influence are pushed into a corner, they will fight until the bitter end.

## V. Evolution of Attitudes and Experiences With Types of Reaction

Having catalogued the various possible attitudes and types of reaction toward past war crimes and human rights abuses on continua between [\*353] forgetting the past and establishing the truth, and between pardoning and punishing the perpetrators, it becomes possible to identify trends indicating the possible evolution of attitudes in this context and to analyze a sampling of the experiences that various types of reaction have produced.

An evolution in attitudes toward past atrocities is clearly connected to the recognized, more general trend toward greater international pressure to protect human rights. n16 That trend, starting after the Second World War, has been pushed by the fast development of international human rights law and the related protection mechanisms and has, in turn, contributed to the development of national human rights law and protection mechanisms. n17 Establishing the truth has come to be seen as an important contributing factor to achieving sustainable peace and preventing new abuses. In a world with global media coverage and very active international NGOs, the attitude favoring "willful ignorance" is becoming increasingly hard to manage or accept. Instead, there seems to be a clear tendency toward the "no peace without justice" attitude.

Political developments during the last quarter of a century have further facilitated the trend. The end of the Cold War reduced the need for tolerating the "friendly tyrants" whose abuses were previously ignored because of their importance as allies in a bipolar world. Now that the chances of global, state-to-state conflict are diminished - and the major-

ity of conflicts take place locally, within individual states - tolerating war crimes or other grave human rights abuses has a predominately destabilizing effect on international security. n18

Political immunity - including head-of-state or government immunity - is also becoming a relic of the past. The prosecution of former Chilean dictator Augusto Pinochet and indictments by the ad hoc tribunals for Rwanda and the former Yugoslavia of some government leaders have important implications for future interpretations of international law. n19 Provisions of the Rome Statute of the ICC, following the same principle that there is no immunity for war criminals, regardless of their position, will hopefully have an important preventive effect. n20

[\*354] The shifting attitude toward truth and punishment has also contributed to a change in the reaction to past atrocities. Countries have been learning from each other's experiences. Different types of reaction enable states to establish the truth without risking destabilization or engaging in individual prosecutions, to remove perpetrators from public life without raising sensitive issues, and to hold various proceedings to determine individual or collective responsibility. However, the widespread inclination toward "no peace without justice" reflects the ever-increasing emphasis on proceedings based on individual or collective responsibility. Indeed, it is the diversification and more frequent use of such proceedings that provide the empirical evidence of the increasing commitment to pursuing both truth and punishment.

Amnesty seems to be a very useful tool in peace negotiations and post-conflict peace building and reconciliation, but they should not be utilized to cover the gravest abuses and war crimes. International humanitarian and human rights law puts certain limits on the use of amnesties to obtain peace: states have an international legal obligation to prosecute certain crimes that they cannot avoid through either political or pragmatic arguments. n21 The International Committee of the Red Cross (ICRC) interprets the Geneva Conventions accordingly. n22 and, importantly, the United Nations also has finally taken a firm stand on this matter. n23 It might be easier to negotiate a peace agreement by including an unlimited amnesty, but the resulting peace [\*355] would likely be unsustainable. n24 Conditional and individual amnesty with retention of the possibility to prosecute the gravest crimes - as was employed in South Africa - is more fully compatible with both truth commissions and proceedings based on individual or collective responsibility.

Truth commissions have proven to be powerful instruments in developing a reliable record of past human rights abuses, but they are also a means of initiating necessary institutional changes to prevent abuses from reoccurring. Some evidence indicates that the evolution of truth commissions has been one of the most important developments in confronting legacies of past abuses, and that truth commissions have benefited the most from the process of transnational learning. Burden-sharing reports, established methodologies, the experiences of staff veterans, and computerized information from predecessors facilitate the establishment and the work of each new commission considerably. The various truth commissions (starting with the first widely known commission, the Argentinean "National Commission on the Disappeared" in the early 1980s) have had different prerogatives, roles, composition, and features. Granting an amnesty for confession (as done by the South African Truth and Reconciliation Commission) appears to be a powerful tool for the establishment of a reliable historical record. In addition, truth commission findings can provide a powerful source of information on crimes that are not covered by the amnesty. The inclusion of foreigners in truth commissions, however, has proven to be a mixed blessing. In situations rife with strong social and political divisions - as was the case in El Salvador - appointing only foreigners to a truth commission provided a way to ensure objectivity. However, commissions of this type invariably produce a historical record that is viewed with some skepticism by the local population. n25 Hybrid commissions that have included both foreigners and nationals, such as the United Nations Truth Commission in Guatemala, have represented an attempt to find compromise solutions. Establishing truth commissions usually requires domestic legislative intervention to ensure access to evidence and witnesses, and in some cases to enable commissions to pardon those who are willing to confess to certain crimes. Truth commissions, with less formal work methods than courts, can more easily process a large volume of cases, hear more victims, and involve civil society more deeply. In this way, commissions can help establish patterns of abuse, analyze the root causes of such abuses, and suggest institutional reforms to their repetition. n26 Even in cases where they do not have a direct mandate, truth commissions have tended to issue such recommendations. [su'27'] Lustration and substitute criminal charges provide fast [\*356] and pragmatic solutions to remove war criminals and abusers from public life. The advantages of lustration are speed and the ability to process a large number of cases. On the other hand, lustration proceedings have only modest procedural guarantees of due process of law. Nobody goes to jail, but people can easily get hurt because of error or political or personal revenge. Like truth commissions and amnesties, lustration is most useful when combined with compensation payments to the victims and criminal prosecution of the most directly responsible perpetrators, conditions permitting. Substitute criminal charges have practical value if there is a need to move public opinion slowly toward accepting the personal failings of former high officials. For the sake of establishing truth and bringing justice to victims, however,

substitute criminal charges should be followed by trials for war crimes and abuses when the conditions would allow for such trials.

Proceedings based on individual and collective responsibility are rapidly growing in number and importance and therefore require special attention. Proceedings based on collective responsibility can make financial compensation available to victims who will often face very difficult economic circumstances. This approach provides faster relief for the victims than does the process of identifying and prosecuting the abusers one by one. n27 The practical use of collective responsibility measures is limited, however, because post-conflict and transition societies are usually poor, scarce resources have to be used strategically to enable recovery, and compensating the victims is simply not realistic. n28 Besides fast compensation for the victims, proceedings based on collective responsibility can be used for the establishment of truth and the symbolic satisfaction of the victims, even many years after the abuses have taken place. n29

Although the reactions to past war crimes and human rights abuses discussed in this Comment have all been developing over several decades, none has risen to prominence as quickly as proceedings based on individual criminal responsibility. In post-conflict and transition societies, it is often very difficult to (re)establish the rule of law - and especially to start that process with national proceedings for past war crimes and human rights abuses. In some cases the political will is lacking, while in other cases the justice system itself has been involved in oppression, infrastructure has been destroyed, or qualified personnel have been killed or have left the country. n30 Whether the [\*357] problem is political will, institutional capacity, or both, international assistance or even more direct involvement is sometimes a precondition to dealing successfully with the past. n31 Foreigners can contribute their skills, experience, and objectivity, and they can play an important role in achieving national stability. International involvement also has its costs, however; international actors use resources that could have been used locally, and there is the danger of developing of a "culture of dependency" that could threaten the sustainability of the rule of law when foreign assistance ends.

International processing of war crimes and human rights abuses has been developing rapidly as well. n32 Several hundred years passed between the first international criminal trial against Peter von Hagenbach in 1474 and the Nuremberg and Tokyo proceedings in the mid-twentieth century, without much progress in the intervening period. In the last decade, by contrast, this area of the law has witnessed revolutionary change: the use of universal jurisdiction has advanced; the U.N. Security Council has established tribunals for the former Yugoslavia and Rwanda; n33 and the international community has provided expert assistance through hybrid national and international courts to deal with crimes committed in Sierra Leone, East Timor, and Kosovo. Finally, the ICC has been established and saw its first generation of judges elected in February 2003. n34

Proceedings based on universal jurisdiction represent a powerful tool against impunity. Ultimately, war criminals and human rights abusers cannot feel safe, even if their national justice system protects them, or if they have managed to escape its reach. In recent years, a growing number of national courts have acted on the basis of universal jurisdiction over crimes such as genocide, crimes against humanity, war crimes, and torture to prosecute foreign perpetrators. n35 However, these proceedings can also create serious problems if ambitious prosecutors and judges intervene in affairs that they do not fully understand - with potentially far-reaching political consequences. n36 [\*358] Hypothetically, universal jurisdiction can also be deliberately misused to hurt political opponents and to at least temporarily prevent them from traveling abroad.

The establishment of ad hoc international tribunals expressed the commitment of the international community to establish the truth and to punish the perpetrators of war crimes and abuses. They have been relatively successful in helping to establish a reliable historical record through their proceedings, but sometimes they have had serious difficulties securing the cooperation of states within their mandate regarding document production, and especially in bringing high-profile perpetrators to justice. Their work has also progressed quite slowly, undermining the principle of rapid dispensation of justice. The work is also extremely expensive, raising doubts about its cost-effectiveness. n37 The need for translation, foreign judges, complicated logistics, and highly sophisticated procedural rules (sometimes quite different from local standards) are objective problems which require time and resources. But perhaps most worrying is the insufficient impact of the tribunals on the population of the countries they oversee. Removing proceedings from the country where the crimes have been committed, and the use of foreign language and unfamiliar legal rules seems to have contributed to psychological distance and diminished local media coverage. n38 It is shocking that in spite of all the international efforts, indicted war criminals in the Tribunal's custody - such as Milošević and Vojislav Štanić - have remained the leaders of successful political parties in Serbia and Montenegro. n39 National courts in general have a greater impact on society and its values than international tribunals. It is typically through national proceedings that societies confront their own problems and mistakes, and hopefully learn from them. n40 In the Republic of Croatia, national proceedings launched against the [\*359] young and popular general Mirko Norac - who had substan-

remains crucial for wounded societies to strengthen their own national justice systems in order to ensure sustainable peace and the rule of law. n46

#### FOOTNOTES:

n1. See, e.g., Paul R. Williams & Michael P. Scharf, *Peace with Justice? War Crimes and Accountability in the Former Yugoslavia*, xiii (2002).

n2. On the types of different experiences of societies facing past war crimes and human rights abuses, see Neil J. Kritz, *Where We Are and How We Got Here: An Overview of Developments in the Search for Justice and Reconciliation, in The Legacy of Abuse - Confronting the Past, Facing the Future* 21 (Alice H. Henkin ed., 2002), <http://www.ciaonet.org/wps/vap02/> [hereinafter *The Legacy of Abuse*].

n3. The increased interest in transitional justice is encouraging in this respect. From 1970 to 1989, approximately 150 books, chapters, and articles were published on this topic, while the 1990s alone produced more than 1,000 such publications. *Id.* at 22.

n4. These four attitudes represent extremes, or perfect types. Any number of additional attitudes might exist along each continuum. Analyzing the myriad of attitudes that represent a combination of these four basic elements is beyond the scope of this comment.

n5. Letter Dated 12 July 1999 from the Charge d'Affaires Ad Interim of the Permanent Mission of Togo to the United Nations Addressed to the President of the Security Council, Annex: Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, U.N. Doc. S/1999/777 (1999), Error! Bookmark not defined. [hereinafter *Lome Peace Agreement*].

n6. *Lome Peace Agreement*, supra note 5, art. IX. See also *infra* notes 22-23.

n7. For a more detailed account of the South African Truth and Reconciliation Commission, see Brandon Hamber, *Dealing with the Past: Rights and Reasons: Challenges for Truth Recovery in South Africa and Northern Ireland*, 26 *Fordham Int'l L.J.* 1074, 1075-87 (2003).

n8. The trials of border guards in the former East Germany were exceptions. See Kritz, supra note 2, at 26.

n9. On February 4, 2003, the Federal Republic of Yugoslavia formally changed its name to Serbia and Montenegro. See Daniel Simpson, *Yugoslavia Is Again Reinvented, in Name and Structure*, N.Y. Times, Feb. 5, 2003, at A3.

n10. Milosevic is being prosecuted for those crimes, however, by the International Criminal Tribunal for the Former Yugoslavia in The Hague. On the trial against Milosevic, see, generally, Michael P. Scharf & William A. Schabas, *Slobodan Milosevic on Trial: A Companion* (2002).

n11. Because it would have taken many decades for the ICTR or national courts to process the high number of cases, it became necessary to adopt a pragmatic approach. Confessions have been encouraged in exchange for reduced sentences, and lesser offenders have been moved to a new, village-based community justice system called gacaca, which has loose roots in an indigenous model of traditional justice. See *Rwanda: Genocide Suspects Who Confess To Go Free*, N.Y. Times, Feb. 17, 2004, at A9. On the role of gacaca in adapting a new approach to reaching a legal settlement for the genocide, see Norwegian Helsinki Committee, *Prosecuting Genocide in Rwanda: The Gacaca System and the International Criminal Tribunal for Rwanda* 18-23, 32-33 (2002), <http://www.nhc.no/land/rwanda/Rwanda.pdf>. This approach may not satisfy the highest international standards, but there is probably no realistic alternative. See Kritz, supra note 2, at 31.

n12. Just as is the case with attitudes, many different types of reaction - perhaps combining the forms identified here - exist in the real world. This Comment seeks only to address these four basic reactions.

n13. Argentina initially undertook prosecutions of those responsible for human rights abuses during the preceding military dictatorship, but after a year it gave up under military pressure. See Kritz, supra note 2, at 25, 32-33. Argentina's experience influenced subsequent Latin American political transitions, which predominantly featured blanket amnesties and the absence of criminal proceedings.

n14. *Id.* at 36.

n15. See Error! Bookmark not defined. I.C.J. (Mar. 20, 1993) para. 135(r), <http://212.153.43.18/icjwww/idoctet/ibhy/ibhyframe/htm>; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb. & Mont.) I.C.J. (July 2, 1999), para. 36(b), [http://212.153.43.18/icjwww/idoctet/icry/icry\\_orders/icry\\_japplication\\_1990702.pdf](http://212.153.43.18/icjwww/idoctet/icry/icry_orders/icry_japplication_1990702.pdf). If the claimants are successful in these proceedings, the Federal Republic of Yugoslavia will (among other sanctions) be obliged to pay compensation related to the genocide. The author of this Comment is the Agent for the Republic of Croatia in the ICJ proceedings.

n16. On the impact of this trend on state sovereignty, see Ivan <hac S>imonovic, *State Sovereignty and Globalization: Are Some States More Equal?*, 28 Ga. J. Int'l & Comp. L. 3, 381, 384-89, 395-98 (2000).

n17. See, e.g., Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 Ga. J. Int'l & Comp. L. 1, 1-30 (1995-96); Anthony D'Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, 25 Ga. J. Int'l & Comp. L. 47, 79-80 (1995-96).

n18. Since the end of the Cold War, casualties in intrastate conflicts outnumber those in interstate conflicts. These "new wars" are nevertheless integrated into global and regional economic networks. See Charles Cater, *The Political Economy of War and Peace* 4 (2002), [http://www.ipacademy.org/Publications/Reports/PublRepInde\\_body.htm](http://www.ipacademy.org/Publications/Reports/PublRepInde_body.htm). It is estimated that approximately 220,000 people died in external conflicts during the 1990s, compared to 3.6 million killed in internal conflicts. U.N. Development Programme, *Human Development Report 2002: Deepening Democracy in a Fragmented World* 2 (2002).

n19. On political and legal aspects of the Pinochet case and its impact, see Jose Zalaquett, *The Pinochet Case: International and Domestic Repercussions*, in *The Legacy of Abuse*, supra note 2, at 47.

n20. Article 27 of the Rome Statute, for example, is clear that official capacity cannot provide impunity, explicitly mentioning, among others, heads of states and governments. See Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, art. 27, U.N. Doc. A/CONF.183/9, <http://www.un.org/law/icc/statute/romefra.htm>.

n21. If amnesty is granted in a manner that contravenes the relevant international legal prohibitions on amnesty for certain crimes, perpetrators may still be prosecuted in a third country on the basis of universal jurisdiction.

n22. The ICRC encourages amnesties at the end of hostilities "for those detained or punished for the mere fact of having participated in hostilities." See Ian Martin, *Justice and Reconciliation: Responsibilities and Dilemmas of Peace-makers and Peace-builders*, in *The Legacy of Abuse*, supra note 2, at 81-82. However, taking a firm stand on the necessity of prosecuting war crimes becomes problematic in messy situations like wartime prisoner exchanges. The ICRC, represented at the meeting between delegations of the Republic of Croatia and the Federal Republic of Yugoslavia in Budapest on August 8, 1992 by its president, Cornelio Sommaruga, refused to become a co-signatory of the "all for all" exchange of prisoners agreement, because war crimes trials had already begun and some Croatians included in the exchange had been sentenced - in some cases to death. The ICRC was aware that those sentences were the product of large show trials, but it nevertheless did not want to get involved in potentially sensitive legal issues.

n23. As late as 1993-94, the United Nations was involved in encouraging and even drafting a very broad amnesty agreement for Haiti - covering the war crimes of the military leaders who seized power in 1991. See id. at 81-82. See also Ian Martin, *Haiti: International Force or National Compromise?*, 31 J. Latin Am. Stud. 711, 733-34 (1999). The turning point in the U.N. position probably came at the peace agreement for Sierra Leone signed in Lome in 1999. See Lome Peace Agreement, supra note 5. Foday Sankoh's Revolutionary United Front conditioned its signature upon the grant of the broadest amnesty provisions, which provided "absolute and free pardon to all combatants and collaborators in respect of anything done by them in pursuit of their objectives." Kritz, supra note 2, at 33. At the last moment, the U.N. Secretary General's special envoy appended to his signature a disclaimer to the effect that the amnesty provisions should not apply to international crimes of genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law. See Martin, supra note 22, at 81-82. In practice, such decisions are often not easy. The head of the U.N. Transitional Administration for Eastern Slavonia (part of Croatia occupied during the war and slowly reintegrated back into the country U.N. support), Jacques Klein, demanded that Croatian authorities limit the number of proceedings for war crimes against Serbs from that region in order to prevent them from fleeing.

n24. The Lome Peace Agreement and the impunity that it provided ultimately did not bring lasting peace to Sierra Leone. One hopes the Truth and Reconciliation Commission and a special court will provide for a more sustainable solution.



n25. The "outsider quality" of the Commission in El Salvador was the reason for the rejection of some of its work, even though its report was regarded as generally accurate. See Kritz, *supra* note 2, at 39.

n26. See Paul van Zyl & Mark Freeman, *The Legacy of Abuse: Conference Report*, in *The Legacy of Abuse*, *supra* note 2, at 3, 6.

n27. See Martin, *supra* note 22, at 88-89.

n28. See Martin, *supra* note 22, at 88; Kritz, *supra* note 2, at 44. Success with compensation paid to the victims of abuses in Chile can be attributed to a relatively small class of eligible victims and a good domestic economic situation, and it is therefore difficult to repeat. *Id.*

n29. The German government and German industry have agreed to pay compensation for slave and forced labor during the Second World War to 900,000 surviving victims. See van Zyl & Freeman, *supra* note 26, at 10.

n30. See Ivan <hac S>imonovic, *Post-Conflict Peace Building: The New Trends*, 31 *Int'l J. Legal Info.* 251, 260-62 (2003). For the rule of law to become a reality, it is necessary to undertake "a comprehensive approach to building capacity, developing effective safeguards to ensure public accountability, and forging an enduring partnership between local institutions and the international community" - a process that includes developing the complete spectrum of necessary components, including the legal code, judiciary, police, and penal system. See United States Institute for Peace, *Lawless Rule vs. Rule of Law in Balkans* (2002), <http://www.usip.org/pubs/specialreports/sr97.html>.

n31. Levels of foreign involvement may vary "from the light footprint in Afghanistan, through the ambiguous sovereignty in Kosovo to benevolent despotism in East Timor." Simon Chesterman, *Justice Under International Administration: Kosovo, East Timor and Afghanistan* 13 (2002), [http://www.ipacadmeny.org/Publications/Reports/PublRepoInde\\_body.htm](http://www.ipacadmeny.org/Publications/Reports/PublRepoInde_body.htm).

n32. For a general overview of the development and contemporary status of international criminal law, see Antonio Cassese, *International Criminal Law* (2003) (exploring the rules that characterize certain conduct as international crimes and describing the international proceedings for their prosecution and punishment).

n33. For comparison between the ad hoc tribunals for the Former Yugoslavia and Rwanda, see Catherine Cisse, *The International Tribunals for the Former Yugoslavia and Rwanda: Some Elements of Comparison*, 7 *Transnat'l L. & Contemp. Probs.* 103 (1997).

n34. For the development of international criminal adjudication, see Timothy L.H. McCormack, *Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law*, 60 *Alb. L. Rev.* 681 (1997); Ivan <hac S>imonovic, *The Role of the ICTY in the Development of International Criminal Adjudication*, 23 *Fordham Int'l L.J.* 440 (1999).

n35. See Kritz, *supra* note 2, at 29 (noting "criminal cases in Belgium, Germany, Switzerland, Austria, Spain, Italy, Denmark, France, the United Kingdom, the Netherlands and Senegal against foreign nationals alleged to be responsible for crimes against humanity, war crimes, genocide, torture, disappearances or terrorism in their home countries").

n36. Philippe Sands has questioned the wisdom of promoting "an international legal system in which a judge in one state can issue an indictment against a current minister or leader of another state that effectively prevents him or her from foreign travel or engaging in other activities associated with his or her job description." See van Zyl & Freeman, *supra* note 26, at 8 (describing Sands' position).

n37. The yearly allocation for the ICTY and the ICTR for 2002 was about \$ 200 million. Taking into account the foreseeable duration of the Tribunals (by Security Council Resolution 1503 of August 28, 2003, investigations should be finished by 2004, trials of first instance by 2008, and appeals by 2010), the overall expense will be substantial. See S.C. Res. 1503, U.N. SCOR, 4817th mtg., at 3, U.N. Doc. S/RES/1503 (2003). It is interesting to note that a number of states clearly consider the costs of these tribunals too high. The issue was informally raised on a number of occasions. It has been noted that the United Nations and the international community continue to pour hundreds of millions of dollars into ad hoc tribunals, while failing to invest meaningfully in rebuilding domestic judicial systems. Less than 30% of member states have paid in full their 2002 Tribunal Assessments. This low number is particularly striking when compared to regular budget payments, covered in full by 56% of member states. The fact that a substantial number of states

have given priority to the regular budget over the Tribunals is a strong indicator of their position on the best use of their resources.

n38. The ICTR's decision to conduct some of its proceedings in Kigali (Rwanda) instead of Arusha (Tanzania), where it has its seat, should therefore be welcomed, in spite of numerous logistical difficulties.

n39. Slobodan Milosevic is the former president of Serbia (1989-97) and the Federal Republic of Yugoslavia (1997-2000). Vojislav Seselj is the former deputy prime minister of Serbia and still leads the Radical Party in Yugoslavia. In spite of the fact that both have been indicted and are being held in custody at the International Tribunal for the Former Yugoslavia, they headed their parties' ballot lists on the Serbian elections held in 2003. Seselj's party won the most seats in the Parliament. For a breakdown of the 2003 election results, see *Elections in Serbia and Montenegro* (Mar. 22, 2004), <http://www.electionworld.org/election/serbiamentenegro.htm>.

n40. It has been argued, for example, that national proceedings had a much stronger psychological and moral impact on the population and contributed more to the de-Nazification of Germany than did Nuremberg or other international trials. See van Zyl & Freeman, *supra* note 26, at 5.

n41. General Mirko Norac has been prosecuted and sentenced for his personal involvement in war crimes. Indictments based exclusively on command responsibility, as the ICTY's indictments often are, cannot have the same psychological impact as evidence of direct involvement in war crimes. On the legal problems of command responsibility, see Mirjan Damaška, *The Shadow Side of Command Responsibility*, 49 *Am. J. Comp. L.* 455 (2001).

n42. In line with U.N. Security Council Resolution 1244 (1999) and under strong Russian pressure, the first regulation issued by the U.N. Interim Administration in Kosovo (UNMIK) provided that applicable law would be the law in force on March 24, 1999 when NATO's air campaign started. The predominantly Albanian judiciary put in place by UNMIK insisted, however, on applying the Kosovo Criminal Code and other provincial laws that had been in effect in March 1989, before being illegally revoked by Belgrade. Under strong pressure, UNMIK finally reversed its decision and passed a regulation accepting Albanian demands. See Chesterman, *supra* note 31, at 5.

n43. According to a *Financial Times* report, when international judges sat on a bench with a majority of Kosovar colleagues, they were always outvoted, because Serbs were automatically regarded as guilty, while Albanians were rarely condemned. This trend has led to a push for a majority of internationals. See John Lloyd, *We Came Here To Build a State, That's All*, *Financial Times*, Dec. 31, 2002, at 3.

n44. Sometimes there will simply have to be trade-offs in terms of higher formal qualifications of foreigners and a higher level of sustainability provided by early inclusion of locals. For example, none of the East Timorese has ever served as a judge or a prosecutor under the United Nations Transitional Administration in East Timor (UNTAET).

n45. Although transitional justice is unavoidably somewhat messy, to ignore past war crimes and human rights abuses does not seem to be an option anymore. Facing the truth about the past, satisfying victims, and visiting appropriate consequences upon perpetrators can take various forms, and each of them and their timing have to be adjusted to each specific situation.

n46. This conclusion fully supports the recommendation of the U.N. Executive Committee on Peace and Security Task Force for Development of Comprehensive Rule of Law Strategies for Peace Operations (ECPS Task Force) that "the goal of all UN personnel working in the rule of law area should be to reinforce the capacities of, and not replace, local actors whenever possible." See ECPS Task Force, *Final Report* 4 (2002).

tial military merits for the Croatian side during the liberation war - for previously unpublicized crimes, have had a much more sobering effect, and have done much more for the reestablishment of the rule of law in Croatia than any of the International Tribunal's proceedings against its citizens. n41

Hybrid tribunals, involving both national and international judges and prosecutors (as in Sierra Leone, East Timor, and Kosovo) are an attempt at compromise. The inclusion of local judges makes the work of the court faster (because they do not face a language barrier and have a stronger understanding of local laws), and also brings into the proceedings the values, including political values, of the local judges. In the context of Kosovo, the "mutiny" of local Albanian judges (and the eventual success of the movement) in choosing which laws to implement is a striking example. n42 In hybrid courts, it can be decisive whether local or international judges form a majority. n43 For this very reason, after some experimenting, the U.N. Administrator in Kosovo decided that there should be a majority of international judges in trials for more serious crimes.

A convincing argument in favor of hybrid courts (or in favor of just financially strengthening national courts and helping them through mentorship by foreign legal experts) is the impact of courts established immediately following the conflict on the sustainability of the justice system in the country in question. n44 Sooner or later, internationals have to leave and locals have to take over. Therefore, investment in strengthening the national system seems critical if long term sustainability is taken into account.

Experiences of the ad hoc tribunals are only a modest contribution in preparing for the challenges of the International Criminal Court. It will certainly feature an international composition of judges and prosecutors, its proceedings will include multiple languages requiring translation, and proceedings will usually take place far away from the site of the crimes and abuses. However, the ICC's global character will ensure attention and media [\*360] coverage of its proceedings. The fact that it has global jurisdiction, that it has been established for future crimes, that its rules have been adopted consensually and in advance, and that it will assume jurisdiction only when national justice systems are either unable or unwilling to effectively prosecute, will certainly contribute to its legitimacy. This legitimacy might facilitate the International Court's cooperation with national justice systems, but the lack of full cooperation with ad hoc tribunals for the former Yugoslavia and Rwanda (established and backed by the power of the U.N. Security Council) and the reluctance of some countries to accept the ICC's jurisdiction are cause for concern.

## VI. Conclusion

Understanding attitudes and types of reaction toward past war crimes and human rights abuses as basic choices - between whether to forget the past or to establish the truth, between whether to pardon or punish the perpetrators - allows us to identify trends which are helpful in creating an abstract systematization of practical experiences. Increases in the number of proceedings based on individual or collective responsibility provide empirical evidence of the increasing importance attached to the establishment of truth and to the punishment of the perpetrators.

Although there seems to be a shift in attitude toward the establishment of truth and punishment, there is no set of reaction types toward past war crimes and human rights abuses, however, that can be generally regarded as optimal. Approaches to past war crimes and human rights abuses should be holistic, taking into account various social, legal, political, and moral dimensions, and the most suitable reaction should take into account questions of appropriate timing and other specific circumstances. n45 Differentiation of various types of reaction, knowledge of their strengths and weaknesses, and flexibility in combining them makes such fine-tuning easier. Practical experience is being generated all over the world, and it is important to learn from that experience.

Flexibility in combining various types of reaction can ensure that the response chosen is prompt and pragmatic, and that justice is finally satisfied. At least the gravest crimes must be met with criminal proceedings (*certus an, incertus quando*). Amnesties, for example, are more and more often reduced to cover only minor crimes, sometimes conditioning amnesty on cooperation with truth commissions. Besides establishing the historical record, truth commissions can help to gather evidence for criminal proceedings. Lustration or substitute criminal charges can help to remove criminals and abusers from public life quickly, which does not preclude their criminal prosecution for war crimes and human rights abuses when the conditions are ready. Proceedings based on collective responsibility can sometimes provide for the fast [\*361] compensation of the victims, while individual criminal prosecutions of abusers cannot proceed until the criminals are apprehended and the evidentiary cases well-developed.

Considering the impact of globalization, and especially the development of the international protection of human rights, international support for confronting past injustice in post-conflict and transitional societies is increasing. Although international involvement in dealing with past war crimes and abuses is important to guarantee justice for all, it



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## Special Report

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### Trauma and Transitional Justice in Divided Societies

Judy Barsalou

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#### Summary

- Truth telling, justice seeking, and reconciliation are inherently political processes heavily influenced by conflicting interests and access to resources. The process of seeking justice through legal procedures can be more important in building respect for the rule of law than in the meting out of summary justice.
- Countries emerging from long-term violent conflict are troubled societies that may develop destructive social and political patterns. In such cases, fundamental psychological adjustments in individual and group identity—aided by reconstruction processes—are essential to reconciliation.
- The tasks of promoting justice, psychological relief, and reconciliation are hugely challenging and costly, and they may take decades to achieve. Yet interventions with these goals in mind are usually constrained by time and inadequate resources. The end goal of achieving reconciliation is likely to require multiple interventions.
- There is often ambiguity about who the beneficiaries of any particular transitional justice intervention are meant to be. Moreover, interventions may impact individuals and broader social groups differently with respect to psychological rehabilitation and reconciliation. Therefore, the needs of individual victims must be balanced against the society's larger short- and long-term goals.
- In transitional justice processes, "complex truths" may be hard to find in individual survivors' stories. Historical narratives are a crucial part of getting to the truth, but the telling of history reflects the perspective of the teller and can be the basis for continuing conflict. Truth commissions and war crimes tribunals can provide an essential service by presenting concrete evidence about terrible crimes.
- Societies emerging from conflict are culturally diverse. When designing transitional justice mechanisms, it is essential to identify and draw upon local cultural traditions and strengths to the extent possible and to consult the population that the interventions are meant to help.
- "Third-party" outsiders can play essential roles by introducing new perspectives about the conflict, by providing needed expertise, and/or by mediating among parties to the conflict. But outside interventions can also inhibit social rebuilding and psychological healing if not handled properly or sensitively.
- Memorials can play a role in recovery from trauma and the shaping of historical memory. But the commercialization of memorial sites may have both positive and negative effects on society. Depending on the narratives they convey—and their timing—memorials can promote reconciliation or stimulate further conflict.
- Defining success, even in a single geographical context, is a complicated process. It is extremely difficult to evaluate the overall effectiveness of transitional justice mechanisms given the differing perspectives of victims and perpetrators. Little effort has been made to assess the impact of transitional justice on trauma relief programs.

- There is sometimes the unstated presumption that successful transitional justice mechanisms contribute to the establishment of democracy in countries emerging from authoritarian government. Clearly, this political outcome does not always occur. But effective transitional justice mechanisms can help victims regain a sense of dignity and self-worth—feelings essential to citizenship in a democratic polity.

## Defining the Issues

The international community now recognizes that accounting for what happened during the conflict, seeking justice for those who were wronged, and promoting peaceful reconciliation among combatants and their broader societies are among the most important needs of countries emerging from violent conflict. While much has been written about posttraumatic stress disorder (PTSD)—the psychological distress that individuals may develop following exposure to an upsetting event outside the range of normal human experience—the role that trauma plays in these processes on the broader societal level is less well understood.

To explore these issues, the Institute convened a conference in March 2004 that focused on the following questions:

- What are the implications of seeking and achieving justice and reconciliation in both legal and psychological terms? How can transitional justice mechanisms and processes be designed that are sensitive to the psychological needs of individuals and societies in order to dampen the desire for revenge and end cycles of violence?
- How does trauma express itself at the societal level, and what impact does it have on the formulation and/or operation of transitional justice mechanisms and processes? Under what circumstances do transitional justice mechanisms address, exacerbate, or relieve trauma experienced by individuals or broader social groups?
- Has concern about the role and impact of societal trauma been explicit in the design and operation of transitional justice mechanisms? Do some transitional justice mechanisms aspire to address the needs of traumatized individuals or do they generally aim at addressing the psychological needs of larger groups or whole societies? When not designed with societal trauma in mind, have transitional justice mechanisms nonetheless had an impact—for good or for ill—on individual or societal trauma?
- How do transitional justice mechanisms that are not based on legal processes—such as public apologies, memorials, and museums—relate to societal trauma? What impact have these and other initiatives had on national reconciliation processes?
- What is the relationship between transitional justice mechanisms and processes that work at the national level or the international level, on the one hand, and at the community level, on the other?
- How do societies assess the impact of transitional justice mechanisms and their ability to promote or contribute to reconciliation at the individual or broader social level?

## Recurrent Themes

In the course of the conference, a number of central themes emerged in relation to these questions. The remainder of this report is devoted to an exploration of those themes.

### Influences on Transitional Justice

*Truth telling, justice seeking, and reconciliation are inherently political processes, heavily influenced by the nature of the societies emerging from conflict, contending interests, and access to resources. The process of seeking justice through legal procedures can be more important in building respect for the rule of law than the meting out of summary justice.*

Transitional justice processes are profoundly influenced by a number of political and resource-based factors.

They include:

- *How those in power define their interests.* When well-known human rights abusers and war criminals continue to hold high office, they are unlikely to permit the development of processes that will hold them and others accountable.
- *Restoration of basic security.* When security is absent, witnesses and judges may be intimidated, either requiring that transitional justice processes (such as war crimes tribunals) be held out of the country or preventing the operation of those processes in the first place.
- *The institutional, professional, financial, and cultural resources at the disposal of the affected country.* Some conflict-affected countries have well-developed legal systems, as well as large legal and mental health professional communities, but others may be almost entirely bereft of such resources. Likewise, some countries have more financial resources than others to spend on transitional justice and trauma relief, or they may have well-developed cultural practices, such as ritual purification ceremonies, that help promote reconciliation and trauma relief.
- *The extent to which the international community is interested and involved.* In such settings as East Timor, the former Yugoslavia, and Rwanda, the international community has committed substantial financial and professional resources to develop transitional justice institutions and programs, while other countries, such as the Democratic Republic of Congo, have received little attention and support. Even in countries where truth commissions and other transitional justice mechanisms are relatively well financed, their work tends to be of fairly short duration, and they are chronically underfunded, understaffed, and "over-mandated."

One of the clearest cases of a transitional justice mechanism compromised by politics was the Chilean Truth Commission. Although its work was still of great value, its mandate was limited in three important respects: It could investigate only deaths and disappearances, not cases of torture or other human rights violations; all of its hearings were held in private; and it was forbidden to name perpetrators.

The design of the South African Truth and Reconciliation Commission (TRC) also was the product of a series of political compromises. Initially, the National Party demanded a blanket amnesty as a condition of a political transition, whereas the African National Congress wanted to prosecute those responsible for serious human rights abuses. The establishment of a truth commission with the mandate to extend amnesty for political crimes in exchange for full disclosure offered a middle ground. But the creation of the TRC by parliament was delayed at least a year by South African president Nelson Mandela, who understood that the top leadership of the army and police needed to be changed first so that the new government would be fully in control of those institutions.

On another continent, the creation of the International Criminal Tribunal for the former Yugoslavia in part reflected the fact that, when the Balkans wars ended, local war criminals were heroes among their ethnic groups and unlikely to be immediately tried by local courts. The international community recognized that if justice was to be done the court would have to be located outside of the region in a place where judges and witnesses would be secure against attacks and where a tribunal would be, and would be perceived to be, impartial.

It is one thing to recognize the inherently political nature of transitional justice processes and another thing to prevent political considerations from dominating. Discussants observed that often a society or new government in power may seek to firm up its political support through the summary execution of high-level party officials who committed terrible crimes. However, the society will be better served if those officials are given legal counsel and due process is observed in their trials. In short, the process of seeking justice through legal and truth-telling procedures can be more important in building respect for the rule of law than the meting out of summary justice for specific perpetrators without proper respect for due process.

### **Psychological Elements of Transitional Justice**

*Countries emerging from long-term violent conflict are troubled societies that may develop destructive social and political patterns. In such cases, fundamental psychological adjustments in individual and group identity—aided by reconstruction processes—are essential to reconciliation.*

Some individuals who participate in or are exposed to violence may suffer from psychological disturbances (such as flashbacks and sleep, learning, and physical disorders), as well as more fundamental identity and spiritual problems. Indeed, there are clinical definitions of individual trauma and healing, although the conceptualization and treatment of individual trauma remains an active subject of debate among scholars and practitioners.

On the broader level, societies caught up in long-term violent conflict can also undergo serious changes as a result of long-term exposure to violence. New social patterns may emerge, such as widespread prostitution, rape, and domestic violence. Violence experienced by specific social and ethnic groups can reinforce a sense of group identity and victimization, and can encourage the emergence of markers of group identity, expressed through dress, language, and social practices. Specific traumatic events, so-called chosen traumas, may become transformed or glorified in the retelling to subsequent generations and may be used to incite revenge and justify efforts to restore the honor or dignity of the victimized group. Societies transformed in these ways by long-term conflict can become engaged in highly (self-)destructive political dynamics in which they become locked in unending conflict with their hated enemies. In such cases, reconciliation will not be achieved through the signing of a peace treaty alone but will also require adjustments at a more fundamental psychological level.

There is disagreement over whether medical approaches to diagnosing and treating posttraumatic stress disorder in individuals are relevant for transitional justice and reconstruction processes at the community and national levels. While we often use medical terms to describe "wounded" societies and their "recovery," some believe that we should not psychopathologize the process of social reconstruction but instead should identify and strengthen the sources of resilience within societies.

The processes of closure and healing—psychological and medical concepts that are used most often in reference to individuals rather than communities—are poorly understood when they are used to describe social dynamics in societies emerging from violent conflict. It is difficult to define these processes in practical or quantifiable terms and problematic to apply them to widely different cultures. The term "reconciliation" is often used to describe processes through which societies recover from trauma, mete out justice, and engage in social reconstruction, but defining exactly what reconciliation means and how it is achieved remains a challenge.

While it is clear that societies exposed to long-term violence undergo profound psychological changes that affect the behavior of those societies and particular groups within them, there is disagreement about how to address the resulting dysfunctions. What priority should be given to different strategies, ranging from medical interventions to constitutional reconstruction, judicial restructuring, economic revitalization, and educational system reorganization? Even when medical approaches seem appropriate, many societies emerging from conflict have limited medical communities and no means to provide psychological counseling to thousands, let alone millions, of citizens.

Those who argue against "medicalizing" the focus of trauma relief suggest that reliance on terms such as "trauma" and "healing" divert attention away from the basic issue of how societies rebuild themselves after massive violence. From this perspective, the success or failure of those efforts depends primarily on establishing (or reestablishing) the rule of law and viable political institutions, security from violence, freedom of movement, access to unbiased information, economic and physical reconstruction, and the development of a quality educational system. All of these factors are likely to play a role in the restoration of individuals' sense that they have control over their lives. Yet, arguably, while reconstruction along these lines is necessary to achieving stabilization and accountable government, fundamental psychological adjustments in individual and group identity—aided by reconstruction processes—are essential to reconciliation.

### **Time and Resource Constraints**

*The tasks of promoting justice, accountability, psychological relief, and reconciliation are hugely challenging and costly, and they may take decades or more to achieve. Yet interventions with these goals in mind are usually constrained by time deadlines and inadequate financial resources. Single-shot approaches or quick one-time fixes usually fall short of expected goals and often raise unrealistic expectations. The end goal of achieving reconciliation is likely to require multiple interventions.*

Resource constraints and mandate limits are inevitable features of transitional justice mechanisms and trauma













































































































































































*mantiene unido al mundo  
no lo deja caerse..."*

*keeps the world united  
it does not allow it to fall..."*

"Poesía Vertical/ Vertical Poetry", Roberto Juarroz.

I am an artist. My art is born from memory and loss.  
I design and facilitate art in community projects in locations where there has been an armed conflict transiting into the postwar period.  
My art lives in the intersection of art and war.

Four kilometers away from the massacre place at El Mozote, in a small community called Perquin, in 2005, in collaboration and partnership with the community, I created the School of Art and Open Studio of Perquin serving children, youth, adults and the elderly. It is a community based project that uses the strategies of art to re build a torn apart region where the legacy of the Salvadoran civil war, 1980-1992, is being followed by social, institutional and economic collapse in the postwar period.

The School of Art and Open Studio of Perquin welcomes everyone and all members of the community regardless their political or religious affiliation. The curricula and public art projects are debated upon and designed by the community. The most popular public art interventions have taken the form of murals that narrate, as open history books, the life and memories of the people of the North of Morazan.

It is not easy to achieve collegiality among people who have been pulled apart by local politics, by the damaging legacy of the war and by the recent and unprecedented poverty that has been imposed as result of the erosion of agriculture and the destruction of national industry. While the Salvadoran currency is the US dollar since 2001, the every day reality shows that an average of 450 Salvadorans become exiles resigned to undergo unimaginable personal and legal risks in order to find work in foreign lands, mostly in the US.

The School of Art and Open Studio of Perquin is affected by the poverty and the limitation of the region. We intend and, so far we have succeeded, in utilizing the skills of artmaking to build and reconstruct community liaisons. It would be imprudent to think that art can remedy tragedies. It would be untrue to suggest that art can amend conflicts, but art as "*a net of gazing eyes*" may prove to be a pivotal tool to exercise and re establish trust.

"Art" and "Genocide" belong to fundamental opposite paradigms. Genocide (*geno*, Greek : origin; *cide*, Latin: destruction) is the purposeful and effective praxis of destruction, annihilation in its most successful form. Art means generating from nothingness. Art exists through the conviction, praxis and determination of the maker. Art is a tender caress of remembrance, fatigues, losses, pain and hope, finding in the proposition of beauty its vindication. Art may

not mean, necessarily, an improvement but art will assist in the recapitulation of the suffering endured, transformed and rebirthed as a communal proposition.

Endurable peace will never be achieved if the past is not remembered with a sense of communal responsibility that can only occur through the practice of justice. Art adds to the effort in the difficult journey of recovering memory while rebuilding a community like El Mozote where no one survived the massacre.

One of the community leaders in El Mozote, Don Florentin, told me:

*"Aquí nos han matado la tierra. Les agradecemos a los artistas por ayudarnos a que la tierra viva otra vez"*

*"Here they have killed us the land. We are thankful to the artists for helping make the earth be alive again"*

We painted a mural at El Mozote on the church adjacent to The Convent where more than 136 children perished in 1981. The community shared dozens of meetings, diplomatic negotiations from which it emerged the collegial idea for the theme of the mural. They agreed that the carnage of the massacre would not be depicted. That was not the message to be preserved in this unique history book. The mural would represent the hamlet of El Mozote as it once was: a prosperous community of civilians who planted and harvested coffee, maguey and corn. They made drawing of the original church and convent of a community that had lived in harmony as far as people remembered. They had been poor, as most rural campesinos are, but they had not known what devastation meant until they were attacked and killed by the US trained Atlacatl Battalion.

In El Mozote, there are people who want to remember what happened and many who would rather forget. (As if one could!). But they all seemed to agree that the names of the massacred children were to be preserved together with their ages. There were over 400 children identified as victims. The names of the victim children and their ages, starting at three days old until twelve years of age, were etched on ceramic tiles that crown the south wall mural of the church.

On December 9, 2006, during the celebration of the 25<sup>th</sup> anniversary of the massacre at El Mozote the children alive today chose a name to recite, to name and never forget, to bring from the anonymity of death into the realm of the present.

Most people in Morazan are survivors of massacres or relatives of the victims. They would like to forget but they know they can. They know they mustn't.

Quique was a combatant during the war. He is small and silent. He lost relatives during the war including his son, age 18, two months before the Peace Accords were signed. Quique was one of the FMLN combatants who entered El Mozote to bury "pieces of people", there were halves of bodies decomposing, it was

impossible to calculate how many. Children he did not see. The ones he saw were hanging from trees, with slit throats. There were others chopped. The slaughter was brutal and the collecting of the remaining parts scattered all over the hamlet, an indescribable task.

Quique has become a textile artist since the art school opened in 2005.

In a recent conversation, with caution as he always exercises, he told me:

*"I once changed the "cuma" for an M16. Now I am changing a rifle for a loom."*

(\* "cuma": machete used for agriculture in El Salvador

The sadness of the past will never be forgotten. No one can. No one will. No one wants to do that.

There is no amendment for genocide.

Genocide needs to be stopped at all cost.

To count dead civilians in the aftermath of massacres conforms a moral, legal, political and spiritual catastrophe.

## VI. *Epilogue*

The soul of the world, ephemeral and resilient, is a tender tapestry in which each thread is a voice, a hand, a song and a memory of someone who has the right to live in dignity. On this fabric, communally, we may deposit the breath of hope.

No one deserves poverty and isolation.

No one should be unassisted when in need.

No one should be a lonely beholder of a tragic memory.

No one should carry sorrows as a wing of stone.

If we are alert enough as to detect how to contribute, even in a small way, to remedy someone's misery and it is in our power to do it, we ought to try.

We simply ought to try.

Claudia Bemardi  
Buenos Aires, February 2007.



## FROM INDIFFERENCE TO ENGAGEMENT: BYSTANDERS AND INTERNATIONAL CRIMINAL JUSTICE

Laurel E. Fletcher

### I. INTRODUCTION

One of the asserted goals of the International Criminal Tribunal for the Former Yugoslavia (ICTY) is to promote peace in the region and reconciliation within the countries torn apart by the violence and bloodshed.<sup>1</sup> International criminal trials—trials conducted by a tribunal established through the exercise of UN authority and applying international standards of justice—inaugurate a process of acknowledgment and confrontation of mass violence.<sup>2</sup> The Security Council's vote in 1993 to

1. S.C. Res. 827, U.N. SCOR, 48th Sess., annex, U.N. Doc. S/RES/827 (1993) [hereinafter ICTY Statute]. Punishment of offenders, deterrence of violations, and promotion of peace are the goals enshrined in the preamble to the Statute, which states in relevant part that "prosecution of persons responsible for serious violations of international humanitarian law would enable [the aims of cessation of violations and bringing violators to justice] to be achieved and would contribute to the restoration and maintenance of peace . . ." *Id.* The term "reconciliation" does not appear as a stated goal but is implied in context. The statute for the International Criminal Tribunal for Rwanda, adopted a year and a half after the ICTY Statute, explicitly links prosecutions to reconciliation. S.C. Res. 955, U.N. SCOR, 49th Sess., preamble, U.N. Doc. S/RES/955 (1994), amended by S.C. Res. 1165, U.N. SCOR, 53d Sess., U.N. Doc. S/RES/1165 (1998) ("Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would . . . contribute to the process of national reconciliation and to the restoration and maintenance of peace . . ."). The Special Court for Sierra Leone, a hybrid tribunal created by the UN and the government of Sierra Leone, also links prosecutions to reconciliation. The preamble to this statute notes that "a credible system of justice and accountability for the very serious crimes committed . . . [in Sierra Leone] would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace." S.C. Res. 1315, U.N. SCOR, 55th Sess., U.N. Doc. S/RES/1315 (2000). The preamble to the statute for the International Criminal Court states that the most serious crimes shock the "conscience of humanity" and justifies the new institution as a means to end impunity for these atrocities and deter their commission; like the ICTY statute, the link between prosecution and reconciliation is implied. Rome Statute of the International Criminal Court, July 17, 1998, A/CONF.183/9.

2. The Special Court for Sierra Leone has articulated criteria for determining whether an adjudicative mechanism is an international court. Prosecutor Against Charles Ghankay Taylor, Case No. SCSL-2003-01-I, Appeals Chamber (May 31, 2004). It held that international courts may be established through a variety of mechanisms including Security Council resolutions adopted pursuant to its Chapter VII powers of the UN Charter, as well as agreements between the UN and national governments, like Sierra Leone. *Id.* ¶ 37. The Special Court held that the Security Council may act pursuant to articles 39 (enabling determinations



create the ICTY ushered in a new stage in the development of international legalism. With the establishment of the International Criminal Court (ICC), the international community has created a permanent tribunal poised to displace the cynical presumption of impunity for mass atrocities with the legal demand for accountability. One assumption that undergirds these institutions is that there is a connection between holding individual perpetrators of violence criminally liable for their actions and the willingness of members of communities pitted against each other to reconcile—a term used here to refer to the willingness of those formerly divided to leave off violent struggle and to embrace a collective future.<sup>3</sup> For some, trials may engender a willingness to reunite with their enemies. However, the processes of international justice are not in and of themselves sufficient to secure these ambitious goals. Under particular circumstances, studies have found that international criminal trials contribute to individual willingness to reconcile.<sup>4</sup> Yet this Article argues that international criminal trials are encumbered by juridical entailments that work counter to the project of reconciliation.

International criminal adjudication applies the normative rules established by the particular tribunal within the accepted conventions of legal due process. A bedrock principle of this legal framework is punishing *individuals* who have violated specific *behavioral norms* of a magnitude that warrants punishment and loss of liberty. Consequently, international criminal justice mechanisms take up as subjects those

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of threats to peace) and 41 (empowering the Security Council to decide measures to give effect to its decisions) of the Charter to establish a court. *Id.* ¶ 38. The court observed that the Special Court was created by the Security Council acting on behalf of the international community to "fulfill an international mandate and is part of the machinery of international justice." *Id.* ¶ 39.

3. The term "reconciliation" is used variously by those writing about mass violence but commonly connotes forgiveness of past abuses and crimes coupled with renewed cooperation or reunion at the individual and group levels. See Harvey M. Weinstein & Eric Stover, *Introduction: Conflict, Justice and Reclamation*, in *MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY* 4–5, 13 (Eric Stover et al. eds., 2004) [hereinafter *MY NEIGHBOR, MY ENEMY*]; Miklos Biro et al., *Attitudes Toward Justice and Social Reconstruction in Bosnia and Herzegovina and Croatia*, in *MY NEIGHBOR, MY ENEMY*, *supra* at 195 [hereinafter *Attitudes Toward Justice and Social Reconstruction*] (research in South Africa finding that the word "reconciliation" is most frequently associated with "forgiveness").

4. In a survey conducted in three war-torn cities in Croatia and Bosnia and Herzegovina—Vukovar, Mostar, and Prijedor—researchers found that for those who had prior interethnic relationships, believed in war crimes trials, and had a positive opinion of the ICTY, trials contributed to their readiness to reconcile. *Attitudes Toward Justice and Social Reconstruction*, *supra* note 3, at 198; see also Timothy Longman et al., *Connecting Justice to Human Experience: Attitudes Toward Accountability and Reconstruction in Rwanda*, in *MY NEIGHBOR, MY ENEMY*, *supra* note 3, at 219–24 (finding more positive than negative attitudes toward trials, but only a limited relationship between attitudes toward trials and willingness to reconcile) [hereinafter *Connecting Justice to Human Experience*].

accused of responsibility for grave violations of international law. And individual accountability serves to organize discussion of the past—and plans for the future—around the legal (as opposed to moral) concepts of guilt and innocence. Left outside of the legal definition of international crimes are bystanders to these egregious acts: the vast majority of individuals who are members of communities impacted by war but who are neither victims nor perpetrators of crimes. Yet bystanders are a critical segment that must engage in the social and political processes of reclaiming and rebuilding communities after the bloodshed and as such are one of the audiences to which the enterprise of international justice is directed. International humanitarian law cannot and should not criminalize the conduct of bystanders. Neither subjects nor objects of criminal trials, bystanders illustrate a challenge to law as a vehicle to establish the roles (victim/perpetrator) in and responsibilities (guilt/innocence) for serious violations of international criminal law.

A prior examination of the contribution of international accountability to promoting reconciliation, conducted by myself and Harvey Weinstein,<sup>5</sup> led us to conclude that trials are only one component of an appropriate and necessary response to mass violence. We proposed a model of the components needed at multiple levels of society to achieve social reconstruction—a term that refers to “a process that reaffirms and develops a society and its institutions based on shared values and human rights”<sup>6</sup>—and this framework was further elaborated and informed by

5. This work began with a study of the attitudes of legal professionals in Bosnia and Herzegovina toward the ICTY Human Rights Center, International Human Rights Law Clinic, and Center for Human Rights, *Justice, Accountability, and Social Reconstruction: An Interview Study of Judges and Prosecutors*, 18 BERK. J. INT'L L. 102 (2002) [hereinafter *Judges Study*]. Drawing on the empirical data, we developed a model to explain the relationship of criminal trials to other programs and activities necessary to rebuild communities after mass violence. Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573 (2002) [hereinafter *Violence and Social Repair*]. We also examined the relationship between the political and social dimensions of the ICTY and the ability of its work to contribute to reconciliation and its relationship to the prosecution of war criminals in the national judicial system. Laurel E. Fletcher and Harvey M. Weinstein, *A World Unto Itself? The Application of International Justice in the former Yugoslavia*, in MY NEIGHBOR, MY ENEMY, *supra* note 3, at 29–48 [hereinafter *A World Unto Itself?*].

6. Weinstein & Stover, *Introduction*, in MY NEIGHBOR, MY ENEMY, *supra* note 3, at 5. Critically, social reconstruction does not require that individuals forgive those who have wronged them for peace and social stability to be restored. The author subscribes to the conceptual framework developed by researchers engaged in the study undertaken by U.C. Berkeley's Human Rights Center that emphasizes an expanded list of activities beyond justice (largely defined as trials or truth commissions) that may promote social adhesion after ethnic conflict: “[Social reconstruction] is a process that includes a broad range of programmatic interventions, such as security, freedom of movement, access to accurate and unbiased information, the rule of law, justice, education for democracy, economic development, cross-ethnic

additional empirical studies in the former Yugoslavia and Rwanda.<sup>7</sup> This Article extends our previous analysis of the role international tribunals play to help communities reckon with a violent period in order to scrutinize how law and courts relate to bystanders. This Article contributes to the scholarship on transitional justice by examining how the legal architecture and operation of international criminal law constricts bystanders as subjects of jurisprudence, considering the effects of this limitation on the ability of international tribunals to promote their social and political goals, and proposing institutional reforms needed to address this limitation.

Part II of this Article provides the theoretic and analytic framework for examining the legal relationship of bystanders to mass atrocity. It begins by explaining why, given the ambitions for international justice, bystanders pose a problem for legal institutions that attribute guilt and mete out punishment for mass atrocities. Conventional legal approaches of the international community to address mass violence are also reviewed. In establishing the context for this inquiry, this section discusses why the charge of crimes against humanity provides an appropriate framework for examining the bystander problem in law. Part III is a case analysis of *Prosecutor v. Simić et al.*,<sup>8</sup> the trial of one of the highest-ranking civilians convicted of crimes against humanity committed during the conflict in Bosnia and Herzegovina. This section explores how and to what extent international criminal trials produce a record that frames the role of bystanders in a way that promotes social reconstruction among this group. It concludes that liberal law principles structure trials so as to render these proceedings equivocal interventions, capable of assisting certain types of bystanders (the silent bystanders who turned away or who morally opposed the criminal leadership but did not act) and not

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engagement, that work together and at multiple levels of society—the individual, neighborhood, community, and state—to address the factors that led to the conflict.” *Id.*

7. Urusaro Alice Karekezi et al., *Localizing Justice: Gacaca Courts in Post-Genocide Rwanda*, in *MY NEIGHBOR, MY ENEMY*, *supra* note 3, at 69–84; Eric Stover, *Witnesses and the Promise of Justice in The Hague*, in *MY NEIGHBOR, MY ENEMY*, *supra* note 3, at 104–120; Dinka Corkalo et al., *Neighbors Again? Intercommunity Relations After Ethnic Cleansing*, in *MY NEIGHBOR, MY ENEMY*, *supra* note 3, at 143–61; Timothy Longman & Théoneste Rutagengwa, *Memory, Identity, and Community in Rwanda*, in *MY NEIGHBOR, MY ENEMY*, *supra* note 3, at 162–82; *Attitudes Toward Justice and Social Reconstruction*, *supra* note 3, at 183–205; *Connecting Justice to Human Experience*, *supra* note 4, at 206–25; Sarah Warshauer Freedman et al., *Public Education and Social Reconstruction in Bosnia and Herzegovina and Croatia*, in *MY NEIGHBOR, MY ENEMY*, *supra* note 3, at 226–47; Sarah Warshauer Freedman et al., *Confronting the Past in Rwandan Schools*, in *MY NEIGHBOR, MY ENEMY*, *supra* note 3, at 248–66; Dean Ajdukovic & Dinka Corkalo, *Trust and Betrayal in War*, in *MY NEIGHBOR, MY ENEMY*, *supra* note 3, at 287–302.

8. *Prosecutor v. Simić et al.*, Case No. IT-95-9-T [hereinafter *Simić*]. The case was before Judge Florence Ndepele Mwachande Mumba, Presiding, Judge Sharon A. Williams, and Judge Per-Johan Lindholm.

others (the complicit bystanders who passively supported the leaders now in the dock). Part IV proposes that international justice mechanisms implement a model of operating as a judicial body while simultaneously attending to the social impact of their work. By adopting "institutional dualism," tribunals may address their negative impacts on social reconstruction. Two specific reforms should be considered. First, tribunal judges should draft their opinions in a manner that explicitly leaves open the question of bystander contribution to atrocities. Second, tribunals should act outside the courtroom—through outreach programs and in conjunction with other institutions—to engage bystanders directly as a target audience. International tribunals currently are under-connected to other initiatives to promote social reconstruction. To maximize their impact, tribunals must attend to the social and political impacts with which legalism's response to mass atrocity is freighted.

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### 3. Bystanders

The protagonists of international criminal trials are the accused and victims. Punishment and justice acknowledge the relationship of perpetrators and victims to the processes that lead to mass violence. Yet in the case of mass violence, there is another category implicated in the events, even if it is not an explicit focus of proceedings: bystanders. Mass violence relies on a social apparatus to execute its bloody aims. Political leaders count on a measure of popular support to achieve power (and even military dictatorships depend on a degree of cooperation from segments of civil society). Once mass killing starts, one scholar reviewing the literature on bystanders has concluded, "the majority will either willingly join the violence, or they will comply, submit, and remain passive when faced with brutality."<sup>33</sup> In other words, those who orchestrate mass violence are aided by the failure of spectators to intervene. In this con-

33. For example, special measures to promote community-level reconciliation are part of the Commission for Reception, Truth and Reconciliation in East Timor. Sections 22–23, United Nations Transitional Administration in East Timor, Regulation No. 20001/10, UNTAET/Reg/2001/10 (July 13, 2001). Wrongdoers of non-serious crimes may submit a statement of their acts and will be required to perform "community reconciliation acts". *Id.* For a discussion of this program, see Fausto Belo Ximenes, *The Unique Contribution of the Community-Based Reconciliation Process in East Timor*, May 28, 2004, at <http://www.easttimor-reconciliation.org/jsmpReport-prk-summary.html>.

34. Commission on Human Rights, *Promotion and Protection of Human Rights: Impunity, Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, Diane Orentlicher, 61st Sess., Agenda Item 17, ¶ 6, U.N. Doc. E/CN.4/2005/102 (2005) ("recent developments have strongly affirmed a central premise of the Principles—the need for a comprehensive approach towards combating impunity"); Commission on Human Rights, *Promotion and Protection of Human Rights: Impunity*, 60th Sess., Agenda Item 17, para. 10, U.N. Doc. E/CN.4/2004/88 (Feb. 27, 2004) ("An effective [anti-impunity] policy requires a multifaceted strategy, with each component playing a necessary but only partial role."); *A Common Objective, A Universe of Alternatives*, *supra* note 22, at 335. See Drumbl, *supra* note 14; Patricia M. Wald, *supra* note 17; Diane Amann, *Assessing International Criminal Adjudication of Human Rights Atrocities*, *THIRD WORLD LEGAL STUD.* 169 (2000–2003); Akhavan, *The International Criminal Court in Context*, *supra* note 14, at 721. Researchers have not yet developed a method to measure the various components of social reconstruction that we have identified (justice, democracy, economic prosperity, and transformation). Further research in this area is needed to define these components sufficiently so that they may be measured and their relative contributions assessed.

35. STEVEN JAMES BARTLETT, *THE PATHOLOGY OF MAN: A STUDY OF HUMAN EVIL* 177 (2003).

text, "doing nothing" is "doing something"—bystanders are thus an integral part of the killing apparatus.

The Oxford English Dictionary defines a bystander as "a person who is present at an event or incident but does not take part."<sup>36</sup> In the context of mass violence, bystanders are those who did not participate in crimes but nonetheless did not intervene to stop the carnage. They may have been silent supporters or opponents of the political and military forces that waged the war, but their role in the events is defined by their *inaction* and *passivity*.<sup>37</sup> As their country and community became engulfed in war, regardless of their private opinions about the political fissures, they remained onlookers, quiescent or acquiescent witnesses to the social breakdown of their communities. And when the political battles turned violent, they remained spectators who, by virtue of living in the country during the war, played a role in the terror and have a stake in their country's future.<sup>38</sup>

Bystanders play a role in the descent of their communities into violence. And they will inform the way their children, friends, and colleagues perceive the past. The choices bystanders make about how to remember what happened will shape the future of their communities. Bystanders can become guardians against a return to violence or they can throw their support behind efforts to destabilize peace. Bystanders are therefore a critical target of efforts to promote social reconstruction. Their relationship to trials—along with their engagement with the other components of social reconstruction—will facilitate or obstruct the goal of restoring social stability. Thus, a goal of rebuilding communities after conflict should be to promote bystanders as active participants in reforming social, economic, and political networks that support human rights and the rule of law.

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36. OXFORD ENGLISH DICTIONARY.

37. Bartlett summarized the bystander phenomenon as follows:

There exist two distinct and complementary ways in which most human beings react to mass killing once it starts: to join in the fray, or turn their heads the other way. Relatively few . . . resist mass killing. The majority will either willingly join in the violence, or they will comply, submit, and remain passive when faced by brutality. . . . It is often difficult to distinguish between simple passivity and silent complicity, since the behavioral manifestations of both attitudes are the same: inaction and absence of protest.

BARTLETT, *supra* note 35, at 177.

38. The primary distinction between bystanders defined for this article and narrower, and perhaps more ambiguous categories of marginal participants who might be thought of as "bystanders" under tort law (i.e., those who are present when another is in distress)—war profiteers, low level public servants, informants—is that bystanders to mass violence did not play an active role in enabling or profiting from the violence and, equally important, did not oppose the wrongdoers.

#### 4. Bystanders and Trials

The ICTY experience illustrates how an international tribunal, the first president of which understood that part of its work was to advance broader social goals, developed mechanisms and utilized rhetoric to meet these objectives. The history of the Tribunal also alerts us to the potential pitfalls of such efforts. The international community has adapted international accountability mechanisms to address some of these pitfalls, which have emerged as these institutions seek to make their work relevant in the countries where the violence occurred. The development of hybrid tribunals in Cambodia, Sierra Leone, and East Timor addresses the perceptions of those in the former Yugoslavia and Rwanda that the tribunals located in The Hague and Arusha have little relevance to their struggle to rebuild communities.<sup>39</sup> And the new International Criminal Court provides for greater involvement by victims and witnesses to address popular perceptions that international tribunals have failed to prioritize the needs of these groups in the pursuit of justice. While these innovations are important and history will judge their success, less attention has been paid to how trials of international crimes respond to the relationship of bystanders to mass violence and how such trials can promote social reconstruction among this critical group.

Weinstein and I have argued that international criminal trials address the dimensions of an individual's relation to social breakdown. Violators are punished for their actions and those harmed receive acknowledgment of their loss and status as victims.<sup>40</sup> Trials may remove criminal leaders from power, thus enabling communities to reestablish control.<sup>41</sup> International criminal trials are powerful symbols that convey moral, social, as well as legal approbation of the guilty and the political objec-

39. The Human Rights Center surveys in Bosnia and Herzegovina and Rwanda indicated that residents in those countries supported the idea of justice, but held negative views of the ad hoc tribunals. *Attitudes Toward Justice and Social Reconstruction*, *supra* note 3, at 193 (Serb and Croat respondents felt that the ICTY was biased against their national group); *Connecting Justice to Human Experience*, *supra* note 4, at 213 (showing 87% of those surveyed were not informed of the work of the tribunal). However, both ad hoc tribunals were created when security conditions in each country were thought to prevent safe operation of the tribunals and therefore required a location outside the region. For an assessment of the hybrid tribunals in Cambodia, Sierra Leone, and East Timor, see Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIM. L. FORUM 185 (2001).

40. *Violence and Social Repair*, *supra* note 5, at 628.

41. *Id.* Akhavan reviews the effect of the arrest of indicted Croatian and Serbian war criminals on domestic politics and cautiously concludes that general public acceptance of the arrests supports the proposition that international trials are contributing to shifting cultural norms toward respect for rule of law. Akhavan, *Beyond Impunity*, *supra* note 16, at 13-22.

tives that drove them to commit their misdeeds.<sup>42</sup> These accountability mechanisms produce a record about the past that can generate acknowledgement among victims, perpetrators, and bystanders about their respective relationships to the violence. For bystanders, such self-reflection may be the first step toward reaching out to victims and apologizing privately or publicly for the harm survivors suffered. Bystander acknowledgment may also generate support for collective forms of acknowledgment, such as public apologies, and buttress political will for systemic reforms that strengthen human rights protections and the rule of law. Yet this last assertion—that trials enable bystander acknowledgment—deserves closer investigation. Certainly the nature of the conflict will determine the number of bystanders and their relationship to the violence.<sup>43</sup> Taking into consideration the particular context of the violations and understanding that international accountability plays a limited role in achieving social reconstruction, this analysis focuses on how trials can enable bystander acknowledgment of their role in mass violence and how we can maximize their efficacy in this regard. Unfortunately, the law itself may unintentionally interfere with realizing this ambition. Why?

International criminal trials constrict the subject of the law's focus such as to render bystanders virtually invisible. The absence of bystanders as legal subjects has particular consequences for the impact of trials. One consequence is that trials create a paradox: trials of individuals are justified as debunking popular calls for collective accountability.<sup>44</sup> Yet the absence of bystanders in the jurisprudence may mean that individuals identify with the member of their national group who is a legal subject of the court—either victim or perpetrator. Where that person is the convicted wrongdoer, bystanders may understand perpetrators as the symbolic placeholder for "their" member group. Thus, trials may inadvertently promote group thinking rather than reduce it.<sup>45</sup> If one aim of social reconstruction is to encourage bystanders to acknowledge their

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42. Legal scholar Diane Amann has argued that the expressive function of the law—to articulate societal values—justifies a preference for international over domestic prosecution of crimes against humanity and genocide. Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2 INT'L CRIM. L. REV. 93, 117–24 (2002).

43. Organized interethnic conflict in an integrated community produces a different dynamic than conflict between segregated populations. For example, the war in Bosnia and Herzegovina generated bystanders who watched or silently bore witness to the suffering of members of the targeted group living in their midst. In contrast, the Darfur conflict is prosecuted by Arab Janjaweed militia which attack African villages. In this situation, the entire village is under attack and the distinction between victim and bystander more likely is due to accident than inclination.

44. Cassese, *supra* note 13, at 6; Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia?*, *supra* note 18, at 741–42; Bass, *supra* note 9, at 297–301.

45. See *Judges Study*, *supra* note 5, at 149.



relationship to mass violence, how do trials help or hurt this process? Or, better stated, how do trials help *and* hurt? Because trials are an important component of a comprehensive response to mass violence, their limitations—in particular their potential to impede social reconstruction—should be identified so these questions may be addressed. The following section lays out the limits of law in addressing bystanders in order to frame further discussion of the symbolic implications of the enforcement of international criminal law.

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#### D. *The Crime Against Humanity as a Framework for Adjudicating the Role of the Bystanders*

Crimes against humanity, as the name implies, purport to reflect universal norms sanctioning severe forms of abuse. While the concept predated World War II, allied drafters of the Nuremberg Charter included crimes of humanity as a substantive offense in the document and Nazi leaders were the first ever to stand trial for this offense.<sup>99</sup> As legal philosopher David Luban writes, crimes against humanity reflect two distinct normative claims.

First, the phrase "crimes against humanity" suggests offenses that aggrieve not only the victims and their own communities but all human beings, regardless of their community. Second, the phrase suggests that these offenses cut deep, violating the core humanity that we all share and that distinguishes us from other natural beings.<sup>100</sup>

99. Crimes against humanity were first codified in Article (c) of the Nuremberg Charter as:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country were perpetrated.

Nuremberg Trial Proceedings, Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. See generally BASSIOUNI, *supra* note 90.

100. Luban, *supra* note 91, at 86. "[T]he acts constituting crimes against humanity will generally be those characterized by the directness and gravity of their assault upon the human person, both corporeal and spiritual." STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNT-

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In addition to the universal value enshrined in the norm, the legal elements of the crime—notably the requirement that the violations be of a widespread or systematic nature—infuse a collective dimension to the offense which makes it suitable for an examination of the potential for trials to address bystanders.<sup>101</sup>

As the case study in the next section is drawn from the ICTY, the definition of crimes against humanity provided in that statute serves as the basis for this discussion. Article 5 of the ICTY Statute defines crimes against humanity and establishes that the Tribunal will have the power to prosecute:

persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.<sup>102</sup>

The general requirements, or *chapeau* elements, of the crime are: (1) an "attack," (2) which is linked to the acts of the accused, (3) directed

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ABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 69 (2001).

101. Genocide, defined as the commission of particular act(s) "with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such," is also an international crime that addresses collective violence. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. II, 78 U.N.T.S. 277. The offense has been referred to as "the crime of crimes." Diane Marie Amann, *Identification*, in *ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY* 483 (Dinah L. Shelton ed., 2005). However its legal requirements render it less favorable to engage bystanders regarding their relationship to the violence than crimes against humanity. To convict an accused of genocide, the acts must be capable of destroying a collective in whole or in part, while destruction of a group is not required for acts to constitute crimes against humanity. Thus, for purposes of exploring the relationship of bystanders to mass violence, crimes against humanity encompasses more types of criminal behavior and, coupled with the wide or systematic element, presents relatively greater opportunities for international judges to address the role of bystanders.

102. ICTY Statute, *supra* note 1, art. 5.

against a civilian population, (4) widespread or systematic, (5) and which the accused committed with the requisite intent.<sup>103</sup> In addition to satisfying the general requirements, the acts must fit into one of the specific crimes listed in article 5(a-i).<sup>104</sup>

Thus, crimes against humanity implicate collectives in ways that are important for bystanders. The general requirements demand that the acts be directed toward a *civilian population*. For this offense, a population is defined by common social or other characteristics that render it a target.<sup>105</sup> Further, the criminal behavior must be part of a "*widespread or systematic*" attack. Widespread connotes the scale of the crime and may mean a perpetrator acted against a large number of victims in a single incident, or the attack was widespread because of the cumulative effects of a number of incidents.<sup>106</sup> The systematic nature of the attack refers to an attack that occurs as part of an organized plan to commit violence on a collective. As one international lawyer has commented, the "widespread" and "systematic" aspects of crimes against humanity overlap: "A widespread attack targeting a large number of victims generally reflects patterns of similar abuses and often relies on some form of planning or organization. A systematic attack frequently has the potential, purpose, or effect of reaching many people."<sup>107</sup>

This element therefore captures the descriptive similarity and violent distinctions between perpetrators, bystanders, and victims. Bystanders

103. For a fuller discussion of the elements of crimes against humanity of the ad hoc tribunals and their development, see METTRAUX, *supra* note 72.

104. There is a rich literature on international crimes and crimes against humanity that will not be plumbed here. See BASSIOUNI, *supra* note 90; GEOFFREY ROBERTSON Q.C., CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE (1999) (A comprehensive survey of the development of crimes against humanity); Luban, *supra* note 91 (explaining that crimes against humanity represent an affront to humans as political animals who need to live in groups); James Bohman, *Punishment as a Political Obligation: Crimes Against Humanity and the Enforceable Right to Membership*, 5 BUFF. CRIM. L. REV. 551 (2002) (describing how enforcing crimes against humanity establishes the political basis for citizens to influence political terms of cooperation and redress wrongs); Darryl Robinson, *Developments in International Criminal Law: Defining "Crimes Against Humanity" at the Rome Conference*, 93 AM. J. INT'L L. 43 (1999) (arguing that the policy element be added to the definition of crime against humanity in Article 7 of the ICC Statute); Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT'L L. 787 (1999) (tracing the evolution of crimes against humanity with particular focus on the war nexus requirement).

105. Prosecutor v. Kunarac, Case No. IT-96-23, Judgment, ¶ 423; see also METTRAUX, *supra* note 72, at 166. A small group that is attacked may be considered a "population" if the particular incident is related to the widespread or systematic nature of the overall attack. For example, where the inmates of a detention center are targeted for abuse as part of a larger campaign, they may be considered a "population." See Prosecutor v. Kunarac.

106. Prosecutor v. Blaskic, Case No. IT-95-14, Judgment, ¶ 206; see METTRAUX, *supra* note 72, at 171.

107. METTRAUX, *supra* note 72, at 171 (citations omitted).

and victims are both "innocent" civilians legally protected from abuse and but for the criminal attack would be—juridically speaking—part of a collective. An attack by perpetrators cleaves this collective into bystanders and victims.<sup>108</sup> Attacks of perpetrators, widespread or systematic, are of a severe nature against a targeted collective. Wrongdoers select their victims based on shared characteristics rather than on any unique attributes; conversely, perpetrators spare bystanders because they do not share the characteristic that marks victims. Particularly when the substantive offense is persecution, crimes against humanity legally instantiate the division of the community along the ethnic, political, or national group lines defined by the perpetrators' criminal motives.<sup>109</sup>

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108. The distinction between bystanders and victims may have greater relevance for social reconstruction depending on the local conditions of the attack. For example bystanders and victims may not necessarily reside in the same community for purposes of a legal analysis. Where an entire village is targeted, all residents may be considered victims. Nevertheless, within the larger collective—a region or nation—the differentiation may hold true and thus efforts at social reconstruction should be directed toward engaging bystanders, even where the bystanders did not live in a targeted community. And perhaps under these conditions such engagement will be more important since residents may have fewer ties to the victim group, yet their ability to empathize with those who suffered will be critical to their support for new social arrangements to promote tolerance and respect for human rights. See generally Jodi Halpern & Harvey M. Weinstein, *Empathy & Rehumanization After Mass Violence*, in *MY NEIGHBOR, MY ENEMY* *supra* note 3, 303, at 303–22.

109. The legal distinction between targeted groups and those who were "safe" may distort the reality. In an ethnically integrated community, attacks singling out a particular ethnic group may affect entire families formed through mixed marriages. Similarly, a member of the same ethnic group as the perpetrators may be singled out for attack where that person is suspected of protecting the targeted group. METTRAUX, *supra* note 72, at 167.

110. Prosecutor v. Kupreskic et al., Case No. IT-95-16, Judgment, ¶ 621. Persecutory acts may take many forms and include not only physical deprivations, but economic or judicial deprivations that violate an individual's fundamental human rights. Prosecutor v. Tadić, Case No. IT-94-I, Opinion and Judgment, ¶ 710 (May 7, 1997).

111. Simić, *supra* note 8, ¶ 48.

## V. CONCLUSION

We have imbued the concept of international criminal justice for mass atrocities with exceedingly high expectations. Criminal trials are to go beyond exacting punishment from the wrongdoer; they are to help communities wracked by bloody conflict forgo violence and embrace a new, collective future. Drawing on empirical data and a model for social reconstruction that emerged from a recent study from U.C. Berkeley's Human Rights Center, this Article examines how the ICTY operates to further this social goal of international justice. In particular, the Article considers how the application of international criminal law contributes to and detracts from the potential willingness of bystanders to the violence to reconcile with victims and perpetrators.

Early supporters of international justice for war crimes committed in the former Yugoslavia argued that justice would promote peace. Criminal accountability of high-ranking officials is instrumental as a way to re-

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296. Participants engaged in discussions on a range of topics: "perceptions of justice as presented by the Special Court; the perceptions of justice and accountability in Sierra Leone; the perceived legacy of the Special Court and the Truth and Reconciliation Commission; and how communities and civil society actors . . . can complement the work" of those transitional justice institutions. *Id.*

move criminal leadership from power and as a powerful symbol to repudiate the wrongdoers and their political platforms. With criminal leaders removed from power, the prediction was that victims and "innocent bystanders" in whose name the crimes were committed would be able to reconcile.

Over the last decade, we have seen an increase in the number and configuration of accountability mechanisms that enforce international criminal law. The experience and track record of these institutions have led to a more tempered understanding of the contribution of trials to social reconstruction. New thinking and research is emerging within these tribunals, as well as academic circles, that understands justice as only one (albeit critical) component needed to secure democracy, rule of law, and respect for human rights in countries emerging from mass violence. While it is important to reconceptualize trials as part of a larger panoply of interventions, attention must be paid to the ways that trials may make it more difficult for some to reconcile.

Harvey Weinstein and I have argued based on prior research that interventions to promote social reconstruction should stimulate individual acknowledgement of one's relationship to the breakdown of society. Trials produce an ambiguous record from the perspective of how judgments may frame understanding and discussion among bystanders about their role in conflict. The research data and the case study of *Prosecutor v. Simić et al.* raise doubts about the prediction that individual accountability debunks the myth of collective guilt and allows the "innocent" bystanders and victims to reconcile.

Some who watched their communities descend into violence silently approved of the violence, while others may have condemned what transpired but remained passive and did not speak out. The submissiveness of bystanders enables mass violence, but trials are not well-suited to confront bystanders with the consequences of their behavior. For those who turned away, individual trials may confirm their sense of powerlessness—a criminal leader and not they are responsible—but the record does not challenge them to consider the harm of their inaction. Trials pose additional challenges for bystanders who supported the perpetrators. The research in divided communities in the former Yugoslavia indicates that residents view those standing trial in The Hague as representing "their" national group. Thus a conviction of an individual is interpreted as an affront to group identity, engendering criticism of the ICTY rather than stigmatizing the war criminal. These unintended consequences of enforcing international criminal law deserve close and careful consideration.



## The Psychology of Torture

By Sam Vaknin

There is one place in which one's privacy, intimacy, integrity and inviolability are guaranteed - one's body, a unique temple and a familiar territory of sense and personal history. The torturer invades, defiles and desecrates this shrine. He does so publicly, deliberately, repeatedly and, often, sadistically and sexually, with undisguised pleasure. Hence the all-pervasive, long-lasting, and, frequently, irreversible effects and outcomes of torture.

In a way, the torture victim's own body is rendered his worse enemy. It is corporeal agony that compels the sufferer to mutate, his identity to fragment, his ideals and principles to crumble. The body becomes an accomplice of the tormentor, an unintermittent channel of communication, a treasonous, poisoned territory.

It fosters a humiliating dependency of the abused on the perpetrator. Bodily needs denied - sleep, toilet, food, water - are wrongly perceived by the victim as the direct causes of his degradation and dehumanization. As he sees it, he is rendered bestial not by the sadistic bullies around him but by his own flesh.

The concept of "body" can easily be extended to "family", or "home". Torture is often applied to kin and kith, compatriots, or colleagues. This intends to disrupt the continuity of "surroundings, habits, appearance, relations with others", as the CIA put it in one of its manuals. A sense of cohesive self-identity depends crucially on the familiar and the



continuous. By attacking both one's biological body and one's "social body", the victim's psyche is strained to the point of dissociation.

Beatrice Patsalides describes this transmogrification thus in "Ethics of the unspeakable: Torture survivors in psychoanalytic treatment":

"As the gap between the 'I' and the 'me' deepens, dissociation and alienation increase. The subject that, under torture, was forced into the position of pure object has lost his or her sense of interiority, intimacy, and privacy. Time is experienced now, in the present only, and perspective - that which allows for a sense of relativity - is foreclosed. Thoughts and dreams attack the mind and invade the body as if the protective skin that normally contains our thoughts, gives us space to breathe in between the thought and the thing being thought about, and separates between inside and outside, past and present, me and you, was lost."

Torture robs the victim of the most basic modes of relating to reality and, thus, is the equivalent of cognitive death. Space and time are warped by sleep deprivation. The self ("I") is shattered. The tortured have nothing familiar to hold on to: family, home, personal belongings, loved ones, language, name. Gradually, they lose their mental resilience and sense of freedom. They feel alien - unable to communicate, relate, attach, or empathize with others.

Torture splinters early childhood grandiose narcissistic fantasies of uniqueness, omnipotence, invulnerability, and impenetrability. But it enhances the fantasy of merger with an idealized and omnipotent (though not benign) other - the inflicter of agony. The twin processes of individuation and separation are reversed.

Torture is the ultimate act of perverted intimacy. The torturer invades the victim's body, pervades his psyche, and possesses his mind. Deprived of contact with others and starved for human interactions, the prey bonds with the predator. "Traumatic bonding", akin to the Stockholm syndrome, is about hope and the search for meaning in the brutal and indifferent and nightmarish universe of the torture cell.

The abuser becomes the black hole at the center of the victim's surrealistic galaxy, sucking in the sufferer's universal need for solace. The victim tries to "control" his tormentor by becoming one with him (introjecting him) and by appealing to the monster's presumably dormant humanity and empathy.

This bonding is especially strong when the torturer and the tortured

form a dyad and "collaborate" in the rituals and acts of torture (for instance, when the victim is coerced into selecting the torture implements and the types of torment to be inflicted, or to choose between two evils).

The psychologist Shirley Spitz offers this powerful overview of the contradictory nature of torture in a seminar titled "The Psychology of Torture" (1989):

"Torture is an obscenity in that it joins what is most private with what is most public. Torture entails all the isolation and extreme solitude of privacy with none of the usual security embodied therein ... Torture entails at the same time all the self exposure of the utterly public with none of its possibilities for camaraderie or shared experience. (The presence of an all powerful other with whom to merge, without the security of the other's benign intentions.)

A further obscenity of torture is the inversion it makes of intimate human relationships. The interrogation is a form of social encounter in which the normal rules of communicating, of relating, of intimacy are manipulated. Dependency needs are elicited by the interrogator, but not so they may be met as in close relationships, but to weaken and confuse. Independence that is offered in return for 'betrayal' is a lie. Silence is intentionally misinterpreted either as confirmation of information or as guilt for 'complicity'.

Torture combines complete humiliating exposure with utter devastating isolation. The final products and outcome of torture are a scarred and often shattered victim and an empty display of the fiction of power."

Obsessed by endless ruminations, demented by pain and a continuum of sleeplessness - the victim regresses, shedding all but the most primitive defense mechanisms: splitting, narcissism, dissociation, projective identification, introjection, and cognitive dissonance. The victim constructs an alternative world, often suffering from depersonalization and derealization, hallucinations, ideas of reference, delusions, and psychotic episodes.

Sometimes the victim comes to crave pain - very much as self-mutilators do - because it is a proof and a reminder of his individuated existence otherwise blurred by the incessant torture. Pain shields the sufferer from disintegration and capitulation. It preserves the veracity of his unthinkable and unspeakable experiences.

This dual process of the victim's alienation and addiction to anguish complements the perpetrator's view of his quarry as "inhuman", or

"subhuman". The torturer assumes the position of the sole authority, the exclusive fount of meaning and interpretation, the source of both evil and good.

Torture is about reprogramming the victim to succumb to an alternative exegesis of the world, proffered by the abuser. It is an act of deep, indelible, traumatic indoctrination. The abused also swallows whole and assimilates the torturer's negative view of him and often, as a result, is rendered suicidal, self-destructive, or self-defeating.

Thus, torture has no cut-off date. The sounds, the voices, the smells, the sensations reverberate long after the episode has ended - both in nightmares and in waking moments. The victim's ability to trust other people - i.e., to assume that their motives are at least rational, if not necessarily benign - has been irrevocably undermined. Social institutions are perceived as precariously poised on the verge of an ominous, Kafkaesque mutation. Nothing is either safe, or credible anymore.

Victims typically react by undulating between emotional numbing and increased arousal: insomnia, irritability, restlessness, and attention deficits. Recollections of the traumatic events intrude in the form of dreams, night terrors, flashbacks, and distressing associations.

The tortured develop compulsive rituals to fend off obsessive thoughts. Other psychological sequelae reported include cognitive impairment, reduced capacity to learn, memory disorders, sexual dysfunction, social withdrawal, inability to maintain long-term relationships, or even mere intimacy, phobias, ideas of reference and superstitions, delusions, hallucinations, psychotic microepisodes, and emotional flatness.

Depression and anxiety are very common. These are forms and manifestations of self-directed aggression. The sufferer rages at his own victimhood and resulting multiple dysfunction. He feels shamed by his new disabilities and responsible, or even guilty, somehow, for his predicament and the dire consequences borne by his nearest and dearest. His sense of self-worth and self-esteem are crippled.

In a nutshell, torture victims suffer from a post-traumatic stress disorder (PTSD). Their strong feelings of anxiety, guilt, and shame are also typical of victims of childhood abuse, domestic violence, and rape. They feel anxious because the perpetrator's behavior is seemingly arbitrary and unpredictable - or mechanically and inhumanly regular.

They feel guilty and disgraced because, to restore a semblance of order to their shattered world and a modicum of dominion over their chaotic life, they need to transform themselves into the cause of their own

degradation and the accomplices of their tormentors.

The CIA, in its "Human Resource Exploitation Training Manual - 1983" (reprinted in the April 1997 issue of Harper's Magazine), summed up the theory of coercion thus:

"The purpose of all coercive techniques is to induce psychological regression in the subject by bringing a superior outside force to bear on his will to resist. Regression is basically a loss of autonomy, a reversion to an earlier behavioral level. As the subject regresses, his learned personality traits fall away in reverse chronological order. He begins to lose the capacity to carry out the highest creative activities, to deal with complex situations, or to cope with stressful interpersonal relationships or repeated frustrations."

Inevitably, in the aftermath of torture, its victims feel helpless and powerless. This loss of control over one's life and body is manifested physically in impotence, attention deficits, and insomnia. This is often exacerbated by the disbelief many torture victims encounter, especially if they are unable to produce scars, or other "objective" proof of their ordeal. Language cannot communicate such an intensely private experience as pain.

Spitz makes the following observation:

"Pain is also unsharable in that it is resistant to language ... All our interior states of consciousness: emotional, perceptual, cognitive and somatic can be described as having an object in the external world ... This affirms our capacity to move beyond the boundaries of our body into the external, sharable world. This is the space in which we interact and communicate with our environment. But when we explore the interior state of physical pain we find that there is no object 'out there' - no external, referential content. Pain is not of, or for, anything. Pain is. And it draws us away from the space of interaction, the sharable world, inwards. It draws us into the boundaries of our body."

Bystanders resent the tortured because they make them feel guilty and ashamed for having done nothing to prevent the atrocity. The victims threaten their sense of security and their much-needed belief in predictability, justice, and rule of law. The victims, on their part, do not believe that it is possible to effectively communicate to "outsiders" what they have been through. The torture chambers are "another galaxy". This is how Auschwitz was described by the author K. Zetnik in his testimony in the Eichmann trial in Jerusalem in 1961.

Kenneth Pope in "Torture", a chapter he wrote for the "Encyclopedia of Women and Gender: Sex Similarities and Differences and the Impact of

## The Psychology of Torture - Mental Health

Society on Gender", quotes Harvard psychiatrist Judith Herman:

"It is very tempting to take the side of the perpetrator. All the perpetrator asks is that the bystander do nothing. He appeals to the universal desire to see, hear, and speak no evil. The victim, on the contrary, asks the bystander to share the burden of pain. The victim demands action, engagement, and remembering."

But, more often, continued attempts to repress fearful memories result in psychosomatic illnesses (conversion). The victim wishes to forget the torture, to avoid re-experiencing the often life threatening abuse and to shield his human environment from the horrors. In conjunction with the victim's pervasive distrust, this is frequently interpreted as hypervigilance, or even paranoia. It seems that the victims can't win. Torture is forever.

First published on [Narcissistic Personality Disorder Topic on Suite101](#)

## Torture and Other Secrets

John Calvi

There are things we don't talk about much, secrets, because they are difficult. They are difficult because we don't have ways of thinking about them. We may not have ways to talk about them. We don't have much information on them. And, most importantly, they are ugly and scary. Each culture has a list of these secrets. The list changes as information escapes into conversation and ways of learning become possible around something previously obscure. In my own life time the list of American secrets has changed considerably so that what was unknowable and untalkable before has now become topics of study and common knowledge- such as cancer, homosexuality, lynching, post-traumatic stress disorder in soldiers, incest, addiction, rape, and the holocaust.

A secret on this list moves slowly upward towards light as more people come to understand that something has parts and pieces and even logic and is not just a huge horror. The above list is of the movers and shakers on this list as culture changes and progresses. What is still on the bottom of this list is torture. It is a great American secret still holding all the requisite conditions of huge and horrible, ugly and scary, unknowable from so little information available, and very present in all our generations and especially today.

Like the car wreck we saw on the way home, we try not to see it again in our minds though each image lingers with some part of us wanting to understand it's meaning in our lives. The push to not see what is so ugly and the wonder to sort out what it is push against each other. The battle is joined by American popular culture with its bias for bright shiny things for sale, fast and shallow content giving only glimpses, and above all the distracting noise of who's winning something or is a danger. Thus, torture stays on the list of things we don't see or know and therefore can't change. It will always be true that only a certain amount of people will choose to be with something as challenging as death or rape as works to be undertaken for the washing and healing of the culture and individuals. But the level of knowing why something is can include many more people who will just have to listen, think, and wonder a bit to learn what torture is and what it means for a society either as providers or receivers.

The spiritual consequences of secrets are well known- sudden potholes in integrity, surprise areas where knowledge is lacking, the panic of cover-ups, and the confusing combination of the previous three to create a response for which there seems to be no logic. Most obvious is the extraordinary effort to keep a

secret hidden rather than open to wonder, wonder being the most basic posture of spiritual life.

The spiritual consequences of torture are also quite specific. Either you are moved to act against or you stifle and smolder. For each of us who have paid for torture through our taxes, the dilemma is a strong cultural watershed. We have the cultural myth of the independent force of the individual making change and doing good. But often this myth meets with a fierce don't-rock-the-boat mentality at home, at work, and in public spaces. Choosing to act in any form has the light of integrity in being one with our deepest feelings of justice, always good for mental and spiritual health. It will also make for some disappointment, loneliness, and the need to explain yourself.

The other choice of not acting is the more common response. It's common because life is already full, what might one do anyway, and aren't I in enough trouble already. These are the overt reasons to stuff and numb oneself. The more quiet reasons are that it hurts to see and know what is. It's disturbing and we could let this one go by and forget. How much awareness do I need to keep up with anyway? The monster is too big for me to address. Both acting and not acting are work that requires energy and effort. Only one has a payoff.

To have torture as part of the heritage we've provided the world in the last several years (think of the American wars in Southeast Asia and Central America), is to carry the loss of integrity, the ignorance, and panic of discovery in each of our hearts whether or not we approve of torture. Torture has always been easy to justify but it's never rested within the human awareness to be comfortably carried. As a burden, it resembles the addicts stash or the unwashed bruise hidden under clothing- maybe known by others, unable to be laid down, and always a greater pain than is understood.

To have our leadership participate, deny, spin, and wink over the use of torture in our current American wars abroad, lingers within us like glimpsing the car wreck, the neighbor's or family member's bruise, the addicts stash. We can't bear to know its scary ugliness and we can't get it out of our minds. There is no moral force in leadership to say what we all know - that torture injures all who know any aspect of it from any distance, that it shames all other good works done over hundreds of years, and that to do anything other than admit and stop is to participate. This is how a list of secrets is kept as heritage and burdens our children.

*Peacework*, November 2005, p. 4.

John Calvi is a Quaker healer who has worked with tortured refugees since 1998. See: [www.johncalvi.com](http://www.johncalvi.com)

## Gender and Violence





Chapter Seven

Surfacing Gender  
*Reconceptualizing Crimes against Women  
 in Time of War*

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Historically, the rape of women in war has drawn occasional and short-lived international attention. Most of the time rape has been invisible or comes to light as part of the competing diplomacies of war, illustrating the viciousness of the conqueror or the innocence of the conquered. When war is done, it is comfortably cabined as a mere, inevitable "by-product of war," a matter of indiscipline, of soldiers revved up by war, needy, and briefly, "out of control."

Military histories rarely refer to rape, and military tribunals rarely either charge or sanction it. This is true even where rape and forced prostitution are mass or systematic, as with the rape of women in both theaters of the Second World War; it is even true where the open, mass, and systematic rape has been thought to shock the conscience of the world, such as in the "rape of Nanking"<sup>1</sup> or the rape of an estimated 200,000 Bengali women during theaters of independence from Pakistan (Brownmiller, 1975).<sup>2</sup> Though discussed in the judgment of the International Military Tribunal in Tokyo, rape was not separately charged against the Japanese commander as a crime. In Bangladesh, amnesty was quietly traded for independence.

The question today is whether the terrible rape of women in the war in the former Yugoslavia will likewise disappear into history, or at best will survive as an exceptional case. The apparent uniqueness of the rape of women in Bosnia-Herzegovina, directed overwhelmingly against Bosnian-Muslim women, is a product of the invisibility of the rape of women through history as well as in the present. Geopolitical factors—that this is occurring in Europe, is perpetrated by white men against white, albeit largely Muslim women, and contains the seeds of a new world war—cannot be ignored in explaining the visibility of these rapes. By contrast, the rape of 50 percent of the women of the indigenous Yuracruz people in Ecuador by

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mercenaries of an agribusiness company seeking to "cleanse" the land is invisible, just as the routine rape of women in the civil wars in Peru, Liberia, and Burma, for example, has gone largely unreported.<sup>3</sup>

Moreover, just as historically the condemnation of rape in war has rarely been about the abuse of women as a crime of gender, so the mass rape in Bosnia has captured world attention and remains there largely because of its association with "ethnic cleansing," or genocide. In one week a midday women's talk show opened with the script, "In Bosnia, they are raping the enemy's women," and a leading Croatian-American scholar blithely distinguished "genocidal" rape from "normal" rape. Our ad hoc Women's Coalition against Crimes against Women in the Former Yugoslavia spoke of rape as a weapon of war whether used to dilute ethnic identity, destabilize the civilian population, or reward soldiers. But the public was nodding yes, when rape is a vehicle of genocide.

The elision of genocide and rape in the focus on "genocidal rape" as a means of emphasizing the heinousness of the rape of Muslim women in Bosnia is thus dangerous. Rape and genocide are separate atrocities. Genocide—the effort to destroy a people—based on its identity as a people evokes the deepest horror and warrants the severest condemnation. Rape is sexualized violence that seeks to humiliate, terrorize, and destroy a woman based on her identity as a woman. Both are based on total contempt for and dehumanization of the victim, and both give rise to unspeakable brutalities. Their intersection in the Serbian and, to a lesser extent, the Croatian aggressions in Bosnia defines an ineffable living hell for women. From the standpoint of these women, they are inseparable.

But to emphasize as unparalleled the horror of genocidal rape is factually dubious and risks rendering rape invisible once again. Even in war, rape is not fully recognized as an atrocity. When the ethnic war ceases or is forced back into the bottle, will the crimes against women, the voices of women, and their struggles to survive be vindicated? Or will condemnation be limited to this seemingly exceptional case? Will the women who are brutally raped for domination, terror, booty, or revenge—in Bosnia and elsewhere—be heard?

Whether the rape, forced prostitution, and forced impregnation of women will be effectively prosecuted before the recently created United Nations ad hoc International Tribunal,<sup>4</sup> whether the survivors will obtain redress, or whether impunity will again be the agreed-upon or de facto cost of "peace" is up for grabs. The pressure of survivors and their advocates, together with the global women's human rights movement, will make the difference. The situation presents a historic opportunity as well as an imperative to insist on justice for the women of Bosnia as well as to press for a feminist reconceptualization of the role and legal understanding of rape in war.

To do this, we must surface gender in the midst of genocide at the same time as we avoid dualistic thinking. We must critically examine the claim that rape as a tool of "ethnic cleansing" is unique, worse than or not comparable to other forms of rape in war or in peace, at the same time as we recognize that rape together with genocide inflicts multiple, intersectional harms.<sup>5</sup> This combination of the particular

and the general is critical if the horrors experienced by women in Bosnia are to be appreciated and if that experience is to have meaning for women brutalized in less-known theaters of war or in the byways of daily life.

This chapter examines the evolving legal status of rape in war with attention given to both the particular and the general, as well as to the tension between them. The opening section focuses on the two central questions of conceptualization. The first is whether these gender crimes are fully recognized as war crimes under the Geneva Conventions, the cornerstone of what is called "humanitarian" law—that is, the prohibitions that have made war itself permissible. The second is whether international law does or should distinguish between "genocidal rape" and mass rape for other purposes. In this regard it examines the limitations and the potential in the concept of "crimes against humanity," as well as the relation between gender and nationality/ethnicity in the crimes committed against women in Bosnia. The second section looks at the viability of the ad hoc International Tribunal as well as the gender issues presented.

### *Reconceptualizing Rape, Forced Prostitution, and Forced Pregnancy in War*

#### *Is Rape a War Crime?*

Although news of the mass rapes of women in Bosnia had an electrifying effect and became a significant factor in the demand for the creation of an international war crimes tribunal, the leading question for a time was whether rape and other forms of sexual abuse are "war crimes" within the meaning of the Geneva Conventions and the internationally agreed-upon norms that bind all nations whether or not they have signed the conventions. The answer is not unequivocal.

The question is not whether rape is technically a crime or prohibited in war. Rape has long been viewed as a criminal offense under national and international rules of war (Khushalini 1982). The 1949 Geneva Conventions as well as the 1977 protocols regarding the protection of civilians in war explicitly prohibit rape, enforced prostitution, and any form of indecent assault and call for special protection of women, including separate quarters with supervision and searches by women only.<sup>6</sup> Yet it is significant that where rape and other forms of sexual assault are explicitly mentioned, they are categorized as an outrage upon personal dignity, or as crimes against honor.<sup>7</sup> Crimes of violence, including murder, mutilation, cruel treatment, and torture, are treated separately.

The concept of rape as a crime against dignity and honor as opposed to a crime of violence is a core problem. Formal sanctions against rape range from minimal to extreme. Where rape has been treated as a grave crime, it is because it violates the honor of the man and his exclusive right to sexual possession of his woman as property. Thus, in the United States the death penalty against rape was prevalent in Southern states as a result of a combination of racism and sexism.<sup>8</sup> Similarly, the

media often refer to the mass rape in Bosnia as the rape of "the enemy's women"—the enemy in this formulation being the male combatant and the seemingly all-male nation, religious, or ethnic group.

Under the Geneva Conventions, the concept of honor is somewhat more enlightened: rape is a crime against the honor and dignity of women (Khushalani 1982). But this too is problematic. Where rape is treated as a crime against honor, the honor of women is called into question and virginity or chastity is often a precondition.<sup>9</sup> Honor implies the loss of station or respect; it reinforces the social view, internalized by women, that the raped woman is dishonorable. And while the concept of dignity potentially embraces more profound concerns, standing alone it obfuscates the fact that rape is fundamentally violence against women—violence against a woman's body, autonomy, integrity, selfhood, security, and self-esteem as well as her standing in the community. This failure to recognize rape as violence is critical to the traditionally lesser or ambiguous status of rape in humanitarian law.

The issue then is not whether rape is a war crime, but whether it is a crime of the gravest dimension. Under the Geneva Conventions, the term is "grave breach." The significance of a war crime being a "grave breach" is threefold. On the level of discourse, it calls attention to the egregiousness of the assault. On the practical level, it is not necessary that rape be mass or systematic: one act of rape is punishable. Finally, only crimes that are grave breaches give rise to universal jurisdiction under the Geneva Conventions. Universal jurisdiction means that every nation has an obligation to bring the perpetrators to justice through investigating, arresting, and prosecuting offenders in its own courts or extraditing them to more appropriate forums. The existence of universal jurisdiction also provides a legal rationale for trying such crimes before an international tribunal and for the obligation of states to cooperate. If rape were not a "grave breach" of the Geneva Conventions, some international jurists would argue that it can be redressed only by the state to which the wrongdoer belonged or in which the wrong occurred, and not by an international tribunal.<sup>10</sup>

The relevant portions of the Geneva Conventions do not specifically mention rape in the list of crimes considered "grave breaches." Included are "willful killing, torture, or inhumane treatment" and "willfully causing great suffering or serious injury to body or health."<sup>11</sup> Clearly these categories are broad and generic enough to encompass rape and sexual abuse (Khushalani 1982). But in addition to qualifying as "willfully causing great suffering or serious injury to body or health" or as "inhumane treatment," it is important that rape be recognized as a form of torture.

When the Geneva Conventions were drafted, the view that torture was a method of extracting information was dominant. Today, however, this distinction has been largely abandoned, although it endures in popular thinking. The historian Edward Peters writes: "It is not primarily the victim's information, but the victim, that torture needs to win—or reduce to powerlessness" (Peters 1985: 164). Recent treaties define torture as the willful infliction of severe physical or mental pain or suffering not only to elicit information, but also to punish, intimidate, or discriminate, to obliterate the victim's personality or diminish her personal capacities (*U.N. Convention against Torture* 1988). Thus torture is now commensurate with will-

fully causing great suffering or injury. Moreover, it is not simply or necessarily the infliction of terrible physical pain; it is also the use of pain, sensory deprivation, isolation, and humiliation as a pathway to the mind. Indeed, in the contemporary understanding of torture, degradation is both vehicle and goal (Amnesty International 1974).

Although largely ignored until recently by human rights advocates, the testimonies and studies of women tortured by dictatorial regimes and military occupations make it clear that rape is one of the most common, terrible, and effective forms of torture used against women.<sup>12</sup> Rape attacks the integrity of the woman as a person as well as her identity as a woman. It renders her, in the words of Lepa Mladjenovic, a psychotherapist and Serbian feminist antiwar activist, "homeless in her own body."<sup>13</sup> It strikes at a woman's power; it seeks to degrade and destroy her; its goal is domination and dehumanization.

Likewise, the testimonies of raped women, whether they were attacked once or forced into prostitution, make it clear that rape is both a profound physical attack and a particularly egregious form of psychological torture. They document the intersection of contempt for and conquest of women based on their sex as well as on their national, religious, or cultural identity. They demonstrate the significance of the threat, fear, or reality of pregnancy as well as of the fact that in Bosnia the rapists are in many cases former colleagues, neighbors, or even friends.

Indeed, torturers know well the power of the intimate in the process of breaking down their victim.<sup>14</sup> Because rape is a transposition of the intimate into violence, rape by acquaintances, by those one has trusted, is particularly world shattering and thus a particularly effective tool of ethnic cleansing. It is no wonder that local Bosnian Serbs are being incited and, in some cases, recruited to rape. Their stories, notwithstanding their self-justificatory quality, reflect the common methods of training torturers—exposure to and engagement in increasingly unthinkable violence and humiliations.<sup>15</sup>

Despite the fact that rape in Bosnia has drawn substantial international condemnation, the United Nations' position on the status of rape as a grave breach of humanitarian law is not clear. The U.N. Human Rights Commission condemned "the abhorrent practice of rape and abuse of women and children in the former Yugoslavia which, in the circumstances, constitutes a war crime," and urged all nations to "exert every effort to bring to justice . . . all those individuals directly or indirectly involved" (U.N. Commission on Human Rights 1993: 122). While this implies that rape is a "grave breach," the limitation to the particular "circumstances" could be read as a limitation to the context of ethnic cleansing. The declaration of the 1993 World Conference of Human Rights in Vienna, though strongly worded, is limited to "systematic" rape and abuse.<sup>16</sup>

Most significantly, the report subsequently adopted by the Security Council that constitutes the statute establishing the jurisdiction of the international tribunal largely tracks the Geneva Conventions' definition of grave breach and does not explicitly list rape as a grave breach or describe it as implicit in the recognized categories.<sup>17</sup> But if, as a consequence of women's pressure, it is prosecuted as such and the various bodies of the United Nations begin to refer to rape as a grave

breach, then this practice will effectively amend or expand the meaning of grave breach in the conventions and protocols. This emphasizes the importance, from a practical as well as a moral perspective, of insisting that all rape be subject to punishment, not only mass or genocidal rape. It should be noted that under the Geneva Conventions, responsibility is imputed to commanders where they knew, or should have known, of the likelihood of rape and failed to take all measures within their power to prevent or suppress it.<sup>18</sup>

It is also important to point out the importance of the Vienna Declaration's explicit inclusion of forced pregnancy in its condemnation of the mass atrocities in the former Yugoslavia. This is clearly a product of the intensive women's mobilization that preceded the World Conference on Human Rights. Forced pregnancy must be seen as a separate offense: the expressed intention to make women pregnant is an additional form of psychological torture; the goal of impregnation leads to imprisoning women and raping them until they are pregnant; the fact of pregnancy, whether aborted or not, continues the initial torture in a most intimate and invasive form; and bearing the child of rape, whether placed for adoption or not, has a potentially lifelong impact on the woman and her place in the community (Goldstein 1993).

#### *Genocidal Rape versus "Normal" Rape: When Is Mass Rape a Crime against Humanity?*

"Crimes against humanity" were first formally recognized in the Charter and Judgment of the Nuremberg Tribunal; they do not depend on adherence to a treaty, and they too give rise to universal jurisdiction. Since crimes against humanity can be committed in any war, it is irrelevant whether the war in the former Yugoslavia is international or internal.

Rape has been separately listed, and forced prostitution acknowledged, as a "crime against humanity" in the report establishing the statute of the International Tribunal.<sup>19</sup> This is not without precedent. After the Second World War, Local Council Law No. 10, which provided the foundation for the trials of lesser Nazis by the Allied forces, also listed rape as a crime against humanity, although no one was prosecuted (Khushalani 1982). Nonetheless, the Security Council's reaffirmation that rape is a "crime against humanity," and therefore among the most egregious breaches of civilization, is profoundly important. But the meaning of this designation and its import for other contexts in which women are subjected to mass rape apart from ethnic cleansing are not clear. The danger, as always, is that extreme examples produce narrow principles.

The commentary on this aspect of the jurisdiction of the current tribunal signals this danger. It explains crimes against humanity as "inhumane acts of a very serious nature, such as willful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds."<sup>20</sup> Several aspects of this definition deserve comment.

First, on the positive side, the statute correctly encompasses violations that are

widespread but not necessarily systematic. The law wisely does not require massive numbers but specifies patterns of abuse. Particularly with rape, numbers are unprovable: a small percentage of women will ultimately come forward, and the significance of rape threatens to become drowned in statistical claims. Moreover, the statute does not require that rape be ordered or centrally organized. Commanders can be held responsible where widespread violence is known.<sup>21</sup> In Bosnia, rape is clearly a conscious tool of war and ethnic cleansing. It is politically and ethically important for the tribunal to investigate and prove the chain of command, but it is likewise important that leaders can be held legally responsible without proof that rape was systematic or committed under orders.

Second, the commentary on the statute does rank rape with torture, at least where it is widespread or systematic. But it undercuts this by appearing to conflate what were originally understood as two separate and independent criteria of crimes against humanity: gross acts of violence and persecution-based offenses. Under the original concept, rape should qualify as a gross act of violence and accordingly, if widespread or systematic, would independently qualify as a crime against humanity. By merging the criterion of gross violence with persecution-based offenses, the commentary could limit prosecution to rape that is undertaken as a method of persecution on the specified grounds. Since the statute of the tribunal lists rape and persecution separately, it is not clear, until put in practice, whether the broader understanding will prevail.

The narrow view is quite prevalent, however. The international and popular condemnation of the rapes in Bosnia tends to be either explicitly or implicitly based on the fact that rape is being used as a tactic of ethnic cleansing. Genocidal rape is widely seen not as a modality of rape but as unique. The distinction commonly drawn between genocidal rape and "normal" rape in war or in peace is proffered not as a typology, but rather as a hierarchy. But to exaggerate the distinctiveness of genocidal rape obscures the atrocity of common rape.

Genocidal rape often involves gang rapes, is outrageously brutal, and is done in public or in front of children or partners. It involves imprisoning women in rape "camps" or raping them repetitively. These are also characteristics of the most common rape in war—rape for booty or to boost the morale of soldiers; and they are common characteristics of the use of rape as a form of torture and terror by dictatorial regimes.<sup>22</sup>

The notion that genocidal rape is uniquely a weapon of war is also problematic. The rape of women is a weapon of war where it is used to spread political terror, as in the civil war in Peru. It is a weapon of war where, as in Bosnia and elsewhere, it is used against women to destabilize the society and force families to flee, because in time of war women are the mainstay of the civilian population, even more than in peacetime.<sup>23</sup>

The rape of women, where permitted or systematized as "booty" of war, is likewise an engine of war: it maintains the morale of soldiers, feeds their hatred and sense of superiority, and keeps them fighting. The Japanese military industrialized the sexual slavery of women in the Second World War: 200,000 to 400,000 mostly Korean, but also Philippine, Chinese, and Dutch women from Indonesia, were de-



ceived or disappeared into "comfort stations," raped repeatedly, and moved from battlefield to battlefield to motivate as well as reward the Japanese soldiers. Genocide was not a goal, but it is believed that 70 to 90 percent of these women died in captivity, and among the known survivors, none were subsequently able to bear children.<sup>24</sup> For similar reasons, the U.S. military in Vietnam raped Vietnamese women and established brothels, relying on dire economic necessity rather than kidnapping to fill them (Brownmiller 1975). Indeed, the testimonies of the Bosnian Serbian rapists reveal an admixture of all these goals.

At the same time, genocidal or ethnic-cleansing rape as practiced in Bosnia does have some aspects that are particularly tailored to its goals of driving women from their homes or destroying their possibility of reproducing within and "for" their community. As the preceding testimonies suggest, that women are raped by men familiar to them exacerbates their trauma and the impulse to flee the community because trust and safety are no longer possible. This is particular to the Bosnian situation, where war and propaganda have made enemies out of neighbors.

The second and more generally distinctive feature of genocidal rape is the focus on women as reproductive vessels. The explicit and common threat to make Muslim women bear "Serbian babies" (as if the child were the product of sperm only) justifies repetitive rape and aggravates her terror and potential unacceptability to her community. Bengali women were raped to lighten their race and produce a class of outcast mothers and children. Enslaved African women in the southern United States were raped as property to produce babies bartered, sold, and used as property (Davis 1983). While intentional impregnation is properly treated as a separate offense, it should also be noted that pregnancy is a common consequence of rape. In situations where women are raped repeatedly, most fertile women will become pregnant at some point. When the U.S. Navy took over Saipan, for example, one observer reports that virtually all the women who had been enslaved as comfort women for the Japanese army were pregnant.<sup>25</sup>

These distinctive characteristics do not place genocidal rape in a class by itself; nor do they reflect the full range of atrocities, losses, and suffering that the combination of rape and ethnic cleansing inflicts. The women victims and survivors in Bosnia are being subjected to crimes against humanity based on ethnicity and religion, and based on gender. It is critical to recognize both and to acknowledge that the intersection of ethnic and gender violence has its own particular characteristics.

This brings me to the third concern: the complete failure of the United Nations and the international community in general to recognize that persecution based on gender must be recognized as its own category of crimes against humanity. The crystallization of the concept of crimes against humanity in the wake of the Holocaust has meant that "it" is popularly associated with religious and ethnic genocide. But the concept is a broader one, and the categories of persecution are explicitly open-ended, capable of expanding to embrace new understandings of persecution.

With respect to women, the need is to acknowledge that gender has historically

not been viewed as a relevant category of victimization. The frequency of mass rape and the absence of sanction are sufficient evidence. In the Holocaust, the gender persecutions—the rape and forced prostitution of women as well as the extermination of gay people—were obscured.<sup>26</sup> The absence of gender as a basis for persecution is not peculiar to the concept of crimes against humanity. A parallel problem exists in the international standards for political asylum, which require a well-founded fear of persecution but do not explicitly recognize gender as a source of persecution.<sup>27</sup> The expansion of the concept of crimes against humanity to include gender is thus part of the broader movement to end the historical invisibility of gender violence as a humanitarian and human rights violation.

Moreover, the particular goals and defining aspects of genocidal rape do not detract from but rather elucidate the nature of rape as a crime of gender as well as ethnicity. Women are targets not simply because they “belong to” the enemy but precisely because they keep the civilian population functioning and are essential to its continuity. They are targets because they too *are* the enemy, because of their power as well as vulnerability as women, including their sexual and reproductive power. They are targets because of *hatred* of their power as women; because of endemic objectification of women; because rape embodies male domination and female subordination.

The crime of forced impregnation—central as it is to genocidal rape—also elucidates the gender component. Since under patriarchy, women are little more than vessels for childbearing, involuntary pregnancy is commonly viewed as natural—divinely ordained, perhaps—or simply an unquestioned fact of life. As a result, the risk of pregnancy in all rape is treated not as an offense, but as a sequela. Forced pregnancy has drawn condemnation only when it reflects an intent to harm the victimized race. In Bosnia, the taunt that Muslim women will bear Serbian babies is not simply an ethnic harm, particularly in light of the prevalence of ethnically mixed families. When examined through a feminist lens, forced pregnancy appears as an assault on the reproductive self-determination of women; it expresses the desire to mark the rape and rapist upon the woman’s body and upon the woman’s life.

Finally, that the rape of women is also designed to humiliate the men or destroy “the enemy” itself reflects the fundamental objectification of women. Women are the target of abuse at the same time as their subjectivity is completely denied. The persistent failure to acknowledge the gender dimension of rape and sexual persecution is thus a most effective means of perpetuating it.

In sum, the international attention focused on Bosnia challenges the world to squarely recognize sexual violence against women in war as torture. Moreover, it is not enough for rape to be viewed as a crime against humanity when it is the vehicle of some other form of persecution; it must also be recognized as a crime against humanity because it is invariably a persecution based on gender. This is essential if the women of Bosnia are to be understood as full subjects as well as objects in this terrible victimization and if the international attention focused on Bosnia is to have meaning for women subjected to rape in other parts of the world.

*Seeking Gender Justice*

The history of atrocities and oppression and of festering hatreds among the peoples of the former Yugoslavia underscores the necessity of the demand, articulated by feminist critics of the war, for "justice, not revenge."<sup>28</sup> It is troubling as well as significant that the United Nations has taken steps to establish an International Tribunal to try the perpetrators of war crimes and crimes against humanity in the former Yugoslavia. On the negative side, the choice of an ad hoc tribunal rather than a permanent international criminal court reveals the shallowness of the international commitment to justice and opens the process to excessive politicization. At the same time, the creation of this tribunal lessens the possibility that legal amnesty will be the price of peace. But it is no guarantee against de facto impunity; nor does it guarantee that the suffering of the women will be vindicated. This section outlines some of the problems with the tribunal as it is at present envisaged and suggests some alternative routes.

*The International Tribunal*

The potential efficacy of the new International Tribunal is riddled with doubt. Unless there is a radical change in the military context, this tribunal, unlike those at Nuremberg and Tokyo, will not sit in judgment of conquered aggressors, but will be called upon primarily to judge the victors—the Bosnian Serbs and the Serbian leaders. Since the tribunal cannot compel the presence of the indicted criminals, it must count on their being arrested if they move beyond their own countries or those that protect them. Thus the rejection of the option of trials in absentia is likely to reduce the tribunal to publishing detailed, formal indictments—an international "wanted list"—as a historical record and a constraint on the movement of the accused.

Beyond its formal powers, the United Nations has utterly failed to provide the tribunal with the resources necessary to do the extensive and careful fact finding required. The U.N. Commission of Experts that laid the foundation for the tribunal operated on a shoestring at a time when the survivors of atrocities were most accessible. To prosecute the leaders, the issues of command responsibility and Serbian complicity require an investigation, and yet the United Nations relies on the investigations of a grossly underfinanced Special Rapporteur and independent human rights missions. Moreover, the tribunal, modeled after Nuremberg, is likely to consider only thirty cases. There is no mechanism for trying the thousands of direct perpetrators and low-level commanders. The United Nations seems to have forgotten that most of the Nazis were tried under the Local Council Law, which established the lesser war crimes tribunals. Moreover, the statute creating the tribunal makes no provision for compensation or rehabilitation of the survivors.

Beyond these general defects are the gender defects. In addition to the ambiguous status of gender crimes in the statute that defines the substantive power of the tribunal, there are substantial process concerns as well. Will women come forward?

And how will they be treated if they do? It is a given that women are terrified and, at best, reluctant to come forward to charge rape. Admitting rape in a sexist society is a public dishonoring and has consequences for the ability to continue or build relationships with one's community and with male partners. Most women are silent about it.<sup>29</sup> To charge rape is to risk retaliation and death, a risk heightened by war and by knowing and being known to the rapist. To charge rape usually is to risk being raped again—figuratively, at least—by the law enforcers. The callous, humiliating, and debilitating treatment of women refugees by some members of the press and some human rights missions in this war only confirms the expectation of abuse by official investigatory bodies.

The designers of the tribunal have done nothing to mitigate these fears. Ensuring sensitive and empowering gender justice ought to have been a central concern in the creation of the tribunal.<sup>30</sup> This would include, at a minimum, gender sensitivity training of all personnel as well as the establishment of a special sex crimes unit staffed primarily by women experienced in eliciting evidence in an empowering as opposed to a traumatizing way. In respect to indictments and trials, survivors should not be publicly identified without their consent; certain proceedings should be held in camera with safeguards to prevent abuse; victims should be able to testify without face-to-face confrontation with the perpetrators while preserving the accused's rights through video and one-way observation; rules of evidence should forbid reference to a woman's prior sexual conduct, restrict the consent defense, and control cross-examination to prevent abuse as well as distortion; expert testimony on trauma should be permitted but not required; and victims should be entitled to the assistance of their own counsel and counselors. But these concerns have been effectively ignored. The statute creating the tribunal recognizes the need to protect victims and witnesses from retaliation and to design rules of procedure and evidence that take into account the protection of victims in cases of rape and sexual assault. But beyond calling for protection of the victim's identity, the statute leaves to the tribunal the responsibility to develop the rules.

As part of a broader demand for participation at all diplomatic and international levels, and in light of the particular salience of gender to the tribunal process, women have also called for gender parity in staffing the tribunal at every level. It is likely, however, that women's participation will be token.<sup>31</sup> This alone attests to the lack of concern for encouraging the participation of women survivors. Moreover, that it will devolve upon the tribunal to design the rules under which rape and sexual abuse will be prosecuted highlights the disregard of this effort for the rights of women. Without continuing pressure, it is likely that the integrity of this tribunal as well as its receptivity to women will be sacrificed.

### *Alternative Routes*

At the same time, it is essential that women create their own strategies for vindication and redress. Women have, of course, the possibility of establishing independent

tribunals to symbolically try the perpetrators in Bosnia and other contexts. Beyond that, international law provides some other tools.

The concept of universal jurisdiction, which applies to grave breaches, torture, genocide, and crimes against humanity, confers upon the separate nations both the power and obligation to try violators when they enter their territory. The nations of the world, and particularly of Europe, where the perpetrators are most likely to travel, might have a significant effect if they simply announced that they would vigorously search out, investigate, arrest, and prosecute or extradite those who crossed their borders. The tribunal cannot function without this, and given its meager resources, national courts are an essential alternative. The absence of such declarations to date underscores the questions raised about the political will to try the offenders.

There is also the possibility of a more women-controlled legal remedy—the filing of private civil lawsuits for compensatory and punitive damages against the perpetrators when they enter their countries. In the United States a line of cases, instigated largely by victims of torture by military or dictatorial governments, has established the right of aliens to sue for human rights violations occurring anywhere in the world so long as the alleged perpetrator can be physically sued in the United States. The possibility of such suits in other countries that either follow the principles of Anglo-American jurisprudence or incorporate international law in their domestic law is being explored.<sup>32</sup>

Two such lawsuits have been filed against the Bosnian-Serbian leader Radovan Karadzic on behalf of Bosnian Muslim and Croatian women, women's organizations, and unnamed victims of atrocities committed under his command.<sup>33</sup> Karadzic was sued during successive stays in New York City in connection with U.N.-sponsored peace negotiations. If the court rejects his initial contention that he is entitled to immunity from suit because he was here on U.N. business, the case is likely to reach the issue of his responsibility for gross violations of human rights and humanitarian law. At this stage it is common for human rights violators to refuse to appear before the court, which then results, after a factual hearing, in a judgment for the plaintiffs by default.

These lawsuits cannot stop all atrocities or guarantee concrete relief, but they have a profound symbolic value. They provide an official forum for examining atrocities and the responsibilities of individuals for them, and they usually result in a judgment of wrongdoing and an award of substantial money damages, usually millions of dollars. Only in rare cases where the wrongdoer has substantial assets that can be discovered will the survivors actually recover the money. But these cases are not brought primarily for money. They are pursued as a wedge against impunity and an opportunity for survivors to tell the story and obtain vindication. They also make the perpetrators a little less secure: they cannot travel without risking the revelation of their crimes and the compromise of their political standing, personal reputations, families, property, or wealth.

Such lawsuits require international coordination, for which the growth of the global women's movement provides the foundation. The leaders responsible should be arrested, not feted, in the countries to which they travel, and the actual rapists

should not enjoy vacations or carry out international business without sanction. The cost of their atrocities, if it is not prison, should at the least be confinement to their own countries. Women can build the capacity to do this. We can publicize the violators' identities, track their peregrinations, and mobilize the legal and political resources to pressure countries to arrest and prosecute them and find lawyers to bring private suits. We can do it for the raped women in the former Yugoslavia, and we can do it wherever women's human rights are violated.

### *Conclusion*

Given the formidable pressure being brought to bear by women survivors and the women's movement globally, it may well be that some few men will be indicted and even tried before the International Tribunal or national courts, at least if impunity is not again the price of peace. This would be precedent setting in international law and offer symbolic vindication to the untold numbers of women this war has rendered homeless in so many senses. Unless the gender dimension of rape in war is recognized, however, it will mean little for women where rape is not also a tool of genocide.

Emphasis on the gender dimension of rape in war is critical not only to surfacing women as full subjects of sexual violence in war, but also to recognizing the atrocity of rape in the time called peace. When women charge rape in war they are more likely to be believed, because their status as enemy, or at least "the enemy's" women, is recognized and because rape in war is seen as a product of exceptional circumstances. When women charge rape in everyday life, however, they are disbelieved largely because the ubiquitous war against women is denied.

From a feminist human rights perspective, gender violence has escaped sanction because it has not been viewed as violence and because the public/private dichotomy has shielded such violence in its most common and private forms.<sup>34</sup> The recognition of rape as a war crime is thus a critical step toward understanding rape as violence. The next is to recognize that rape that acquires the imprimatur of the state is not necessarily more brutal, relentless, or dehumanizing than the private rapes of everyday life.

This is not to say that rape is identical in the two contexts. There are differences here, just as there are differences between rape for the purpose of genocide and rape for the purpose of booty. War tends to intensify the brutality, repetitiveness, public spectacle, and likelihood of rape. War diminishes sensitivity to human suffering and intensifies men's sense of entitlement, superiority, avidity, and social license to rape. But the line is not so sharp. Gang rape in civilian life shares the repetitive, gleeful, and public character of rape in war. Marital rape, the most private of all, shares some of the particular characteristics of genocidal rape in Bosnia: it is repetitive, brutal, and exacerbated by betrayal; it assaults a woman's reproductive autonomy, may force her to flee her home and community, and is widely treated as legitimate in law and custom. Violation by a state official or enemy soldier is not necessarily more devastating than violation by an intimate.<sup>35</sup>

Every rape is a grave violation of physical and mental integrity. Every rape has the potential to profoundly debilitate, to render the woman homeless in her own body and destroy her sense of security in the world. Every rape is an expression of male domination and misogyny, a vehicle of terrorizing and subordinating women. Like torture, rape takes many forms, occurs in many contexts, and has different repercussions for different victims. Every rape is multidimensional, but not incomparable.

The rape of women in the former Yugoslavia challenges the world to refuse impunity to atrocity as well as to resist the powerful forces that would make the mass rape of Muslim women in Bosnia exceptional and thereby restrict its meaning for women raped in different contexts. It thus demands recognition of situational differences without losing sight of the commonalities. To fail to make distinctions flattens reality; and to rank the egregious demeans it.<sup>36</sup>

## NOTES

1. The "rape of Nanking" refers to the brutal taking of Nanking by Japanese soldiers, which involved mass and open killing, looting, and rape that went on for several months. It is estimated that twenty thousand women were raped in the first month. See Leon Friedman, *The Law of War: A Documentary/History*, vol. 2 (New York: Random House, 1972), p. 46.

2. Susan Brownmiller, *Against Our Will* (New York: Simon and Schuster, 1975), pp. 78-86. Among the motives for these rapes was a genocidal one—to destroy the racial distinctiveness of the Bengali people.

3. Presentation of Guadelupe Leon, Panel on Military Violence and Sexual Slavery, 1993 U.N. Conference on Human Rights, NGO Parallel Activities, June 1993; America's Watch and Women's Rights Project, *Untold Terror: Violence against Women in Peru's Armed Conflict* (New York: Human Rights Watch, 1992); Asia Watch and Women's Rights Project, *Burma: Rape, Forced Labor, and Religious Persecution in the Northern Arakan* (New York: Asia Watch, 1992); Shana Swiss, *Liberia: Women and Children Gravely Mistreated* (Boston, 1991). For other examples, see Shana Swiss and Joan E. Giller, "Rape as a Crime of War," *JAMA* 270 (August 4, 1993): 612.

4. The full title is International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. See Report of the Secretary General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), S/25704 (May 3, 1993), para. 25, p. 8.

5. On the concept of the significance of the intersection of categories of oppression, see Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory, and Antiracist Politics," *University of Chicago Legal Forum*, 1989, pp. 139-67.

6. *Geneva Conventions Relative to the Protection of Civilian Persons in Time of War*, common art. 3, I(a) and (c); arts. 27 and 76, 97 (hereafter, *Geneva Convention IV*); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, art. 76, and *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, art. 4, reprinted in Center for Human Rights, *Human Rights: A Compilation of International Instruments*, vol. 1, part 2 (1993), pp. 799-939.





































































# HROC's Philosophy

Healing and Rebuilding our Communities (HROC) is based on an underlying philosophy and a set of key principles listed below:

**Principle #1:** In every person, there is something that is good.

**Principle #2:** Each person and society has the inner capacity to heal, and an inherent intuition of how to recover from trauma. Sometimes the wounds are so profound that people or communities need support to reencounter that inner capacity.

**Principle #3:** Both victims and perpetrators of violence can experience trauma and its after-effects.

**Principle #4:** Healing from trauma requires that a person's inner good and wisdom is sought and shared with others. It is through this effort that trust can begin to be restored.

**Principle #5:** When violence has been experienced at both a personal level, and a community level, efforts to heal and rebuild the country must also happen at both the individual and community level.

**Principle #6:** Individuals healing from trauma and building peace between groups is deeply connected. It is not possible to do one without the other. Therefore, trauma recovery and peace building efforts must happen simultaneously.

HROC's approach to learning grows directly from these six underlying principles. HROC workshops rely on participants' own experiences of violence, trauma, and healing to provide the backbone of curriculum content. Rather than provide multiple didactic lectures, HROC facilitators invite participants to discover their own existing knowledge and their own inner wisdom about how to heal and how to help others. This approach builds a strong sense of community among group members, instills a new confidence in a wounded self, and ensures that the lessons learned are steeped in the context of the particular conflict and the post-conflict recovery process. The fact that the program relies on eliciting actual experiences enhances its adaptability to varying contexts and cultures.

# Perils of Practicing HROC's Lessons

After attending a HROC workshop in the summer of 2006, several participants encountered perilous resistance from locals in their villages. Filled with new ideas, fresh hope, and a desire to see reconciliation, others in the community who hadn't attended the workshop did not understand the changes and felt threatened by it. There were stories of people who denounced others and then found their houses burned down or their food poisoned or were even killed. Some participants were harassed and ridiculed when they were seen with participants who were supposed to be enemies. Mukayiranga Béatrice's fellow survivors told her she was foolish and stupid for forgiving the released prisoners. She now lives with government-supplied guards watching her house at night. Similarly, Komezuse Samuel was threatened with death after encouraging other released prisoners to tell the truth and inevitably implicate others. Their testimonies are below. The participants of the HROC workshop in Cyangugu changed so much that it created a great rift between those who wanted to tell the truth at gacaca and those who would not. Pasteur Nyirukindi Theophile said that it took two or three days of negotiating between people before the fighting in the community dissipated. While it is to be expected that not everyone will understand or welcome the new mind-set of the participants, it is clear that additional support would be helpful to many participants in the months following the workshop.

## Mukayiranga Béatrice

Tutsi survivor, 43 years-old

*Life before the war was good; there was enough food; I had friends, my family, and good neighbors. My father was a veterinarian, and my husband showed people how to cultivate. I had a rich family. I got married in 1984, and had my first child a year later. My whole family lived near me.*

*When Habyarimana who was the president died, they announced that no one could go out, and they started burning houses. Me and my husband and kids fled to the [Shangi] parish church and the killers came with guns and grenades and killed people. We stayed with the bodies of dead people for over one month in the church. The women were collecting stones and giving them to their husbands to hit those who came to kill us. So then the killers called for help from other killers, because we were many. The Sous Préfet came with officers and a priest, and they asked the people of the place to give them a list of Tutsis in the church who were educated and rich, and they took them to Cyangugu to kill them. My husband went in the team that went to Cyangugu. They came and killed every day, but they couldn't finish because we were so many. So they sent for Yusuf, who was the one who was intervening where others failed to kill. They had three cars filled with guns,*

*traditional weapons, and killed all the people who were outside the church. [They] shot up the church doors and killed many people.*

*I looked around at all the kids in the church. One of my children was already dead. I don't know how my other three children survived. I felt I had to run, but I knew I could only take one of my children with me. I didn't know whom to choose to save. My heart told me to take my son. I will never know what kind of death my other children had; if they called out for me when they were dying. Sometimes, I ask God why He chose my son.*

*[When Beatrice and her 5 year-old son tried to leave the church,] the killers blocked the door. Then, I was raped...I was violated in the presence of my child. I can't know how many they were. I counted until five, after that I lost my conscience. Later I met my husband while the war was still happening. Somehow he had survived, but had been made handicap. And I told him what happened to me and I told him, "Please, I don't want to have sexual relations with you, so that I don't contaminate you if I have HIV because there were many men." So he told me that HIV kills after many years, and he was not even sure that*

we would reach tomorrow, so we stayed together, and after the war I gave birth to two more children. I kept telling my husband to go for an HIV test, but he refused. Finally I convinced him and we went for a test and found out that we were both contaminated, and eventually my husband died from it. We have no choice that it happened, and we didn't wish it to happen.

I am now taking drugs, I have more other sicknesses like asthma. Sometimes I am allergic to the drugs; my legs get swollen, and my belly gets swollen. I try my best to get food and clothing, but we eat only once a day. I try to grow some crops, because I know I will leave my children behind. When you are sick you should be taken care of by your family, but I have no family left. Before [the genocide], my family was many. But my four children, my father, my mother, six brothers, and two sisters, uncles, aunts, and many others in my family died.

Before the workshop we [the survivors] couldn't talk with them [the released prisoners]. I used to have a continuous headache, and deep sorrow. I was angry when I saw people who were happy, I wet the bed, I always felt grief. But then I was with the people who hurt my family in the workshop. I can't remember all of them but they were many at the workshop. They killed people, and many of them asked for forgiveness, and we forgave them and now they are our friends. I personally forgave those who killed my people... [Since the workshop] my anger has calmed down. My trauma symptoms are not finished, but they are not as strong. I thought I would seek revenge if I ever

got the chance, but my sorrow has lessened. I can now sleep and the fears that they were coming to kill me are all finished... I have accepted myself and accepted living with the killers. Other survivors who have not attended the workshop condemn us. People cannot understand how you can live with someone who killed your people; they say we are fools; they ask what the killers have given us to be forgiven.

Now we are one; the survivors and the killers who have asked for forgiveness are together. The people who hate us do not differentiate. I am not angry with these people, but I am afraid of these people, because they want to kill those who may denounce them to keep the truth hidden. There is still much hatred from those who do not accept what they have done. Those who denounce others have been killed or their houses have been burned or they've been poisoned or threatened with death. I have been threatened, but the government has people guard my house at night.

Now I help others in trauma. Many of them come to me. Some even come to stay at my house when they are in bad situation. They get traumatized saying that they are seeing people killing them. I help them to be back in the normal mood, and if I fail I call for help and take them to the hospital. We also have an association, URUMURI RW'AMAHORO [Light of Peace]. We encourage people to accept their sins and ask for forgiveness. They are many who have confessed and asked for forgiveness because of our teachings. So now we have inner peace. We all feel free towards others.

Continued on page 20

*Now we are one; the survivors and the killers who have asked for forgiveness are together. The people who hate us do not differentiate.*



### **Komezusense Samuel**

Hutu released prisoner, 37 years-old

*In the war, the killings broke out. In fact it started in my cell. The first person to die was killed by my family members. I went to the government leaders and denounced the killings, but they told me it would continue. Many people were involved in it, and I withheld myself, but later they told me that I had to help. And because it was my family telling me that, I joined them, and many people died when I was there.*

*After we stole the dead people's belongings, burned their houses and divided everything. Those who remained fled to the Shangi Parish. I went there one day when the Interahamwe ["those who stand/fight together"—the Hutu-extremist youth militia and main force behind the genocide] attacked, and they said that those who were still alive must be killed. More than 1,000 people died, and I was watching so that no one would escape.*

*I fled to Congo in August 1994, and came back in May 1996. I was with my wife and two kids at this time. I got imprisoned after exile in 1996 and spent six years and three months in prison. In prison life was difficult, because food was not enough; there were many diseases, not enough space to sleep. Life was hard there. Some died of those diseases, and even myself I fell sick many times. I had severe stomachaches and had toothaches. I have few teeth in my mouth and am still poor because of my long imprisonment.*

*After examining my testimony, I was provisionally released in 2003. My family hated me because I mentioned what they had done. They poisoned my child, and he died in 1999. They killed him when I was still in prison, because they had heard what I had testified. They wanted to kill me with my wife, and they even threw stones through my windows. Once I was released, I had to move around a lot to escape from being killed. I had to move to Nyamasheke, where I am now. Now I don't talk to my family, because I fear that they will kill me. It is the survivors who helped me to find a new place to live. Those I live together with now and the genocide survivors love me very much.*

*But many also hate me because of what I am doing. When I am together with other released prisoners I try to show them that peace of heart is so important, but they say that I am the one who caused them to be arrested, so they don't love me. You always hear on the radio that people who give testimonies of Shangi have many problems. Many times people who tell the truth are violated, and I am among them. The government has given me people to protect my house at night, because there are many who want to hurt me, and I fear for my life.*

*I was trained [in HROC] for the first time in August 2006. I think I was invited because by that time I was a leader of those who accepted their sins. I was so impressed by these workshops. In fact I made a decision to seek the people I sinned against and ask forgiveness and help the survivors because I had caused their pain.*

*[Before HROC] I could not sleep. I could not eat and feel happy because I was always upset. I always had stomachaches, headaches, and after FPH trained us I realized that I was traumatized. I had heard about trauma before through the government workshops, but this was the first time I understood. I was free to ask anything I didn't understand, and the facilitators were compassionate. Since then, the trauma is reduced. I can't say that it is finished, but I am not lonely. I have some people I can go to and tell them my problems, and I don't have the same headaches because I no longer spend sleepless nights, and I don't fear those I offended because Friends Peace House united me with them.*

*Now, if someone has a problem I can help him. If someone is asking for forgiveness I try to help him. In the church when I preach and in meetings, I tell people about what I learned. Each day I apply what I learned. The workshop has awakened me to teach others. I love genocide survivors and want to help those traumatized as I can. I put myself in the place of the survivors and look inside at my participation in what happened, so now I can be close to them and see their problems as my own. I have peace within myself and talk and have no fear. Now, I am human.*

# "Violence and Social Repair: Rethinking the Contribution of Justice to reconciliation" (excerpt)

Laurel E. Fletcher & Harvey M. Weinstein.

## 203. Responding to the Needs of Victims

Supporters of a legal response to war crimes and gross human right violations almost ritualistically justify international criminal trials as necessary to meet the needs of victims for the truth, acknowledgment of suffering,

63. Scholars criticize criminal trials for selective prosecutions and/or retroactive application of legal norms. See, e.g., MINOW, *supra* note 2, at 30-47; Teitel, *Bringing the Messiah Through the Law*, *supra* note 19, at 187-88. However, we suspect that the curative effect of trials on victims and communities is less than expected and thus we argue that attention should be paid to developing other mechanisms to achieve these same goals.

64. See Interview Study, *supra* note 20, at 151.

65. *Id.* at 115.

66. *Id.* at 147.

67. This is particularly problematic since many bystanders likely could have acted to save victimized individuals. See DAVID H. JONIS, *Moral Responsibility in the Holocaust: A Study in the Ethics of Character* 216 (1999) (concluding that many bystanders in Europe during World War II had the opportunity to assist Jews at little personal risk and thus are blameworthy for their inaction). Therefore the normative approbation of international criminal trials should be absorbed by this group of bystanders if accountability is to achieve its aspiration of deterrence.

justice, and healing.<sup>68</sup> Many transitional justice scholars find support for criminal trials in the literature on treatment of trauma survivors as well as anecdotal evidence.<sup>69</sup> The trauma literature cited suggests that victims who are able to recount the events of their victimization in the context of acknowledgment and support may be able to receive the benefits of closure.<sup>70</sup> By analogy, some legal scholars cite this to support their arguments that criminal trials that elucidate the facts will serve the same healing function for survivors.<sup>71</sup> This catharsis comes in the context of public acknowledgment that links suffering of survivors to the stigmatization of the perpetrators and further removes public claims or private suspicions that the victims were in any way responsible for their fates. Thus the actions of the state or international community can restore dignity to those wrongfully injured and help to heal their wounds.

The principal limitation of this view lies in the hypothesized "therapeutic" nature of criminal trials for victims of mass violence. This hypothesis is based upon a profoundly simplistic view of how psychotherapy works. It long has been known in the psychological literature that while catharsis may have short-term benefit for some, healing is a long-term process that

68. Frequently, advocates for criminal trials argue that the needs of victims will be addressed by accountability and thus transform private thirst for vengeance into public procedures of legal accountability. See *infra* note 87 and accompanying text. However, other scholars emphasize the need for trials explicitly to acknowledge and honor the injuries of victims. Professor Catharine A. MacKinnon, Address at Amnesty International, U.S.A., Legal Support Network Annual Meeting (17 Sept. 2000); Mertus, *supra* note 32; see also Kritz, *supra* note 32, at 128; Bassiouni, *supra* note 38, at 23-24. Some of these needs, like the need to know what happened to family members, public acknowledgment of the harms they endured, and condemnation of the perpetrators overlap with some of the other societal aspirations for international criminal trials, yet assume a distinct character in regard to individual victims.

69. Roht-Arriaza, *supra* note 53, at 19-21. Commentators draw upon the writings of Judith Herman, a psychiatrist who has worked with victims of trauma and torture to substantiate the link between public testimony and individual healing. JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* 133, 155, 183 (1992). See Ilene Cohn, *The Protection of Children in Peacemaking and Peacekeeping Processes*, 12 HARV. HUM. RTS. J. 129, 179; Jamie L. Wacks, *A Proposal for Community-Based Racial Reconciliation in the United States Through Personal Stories*, 7 VA. J. SOC. POL'Y & L. 195, 205-07 (2000).

70. Roht-Arriaza, *supra* note 53, at 21; see David A. Crocker, *Reckoning with Past Wrongs: a Normative Framework*, 13 ETHICS & INT'L AFF. 43, 52 (1999) (transitional governments should enable public testimony by victims to receive respect and sympathy which will enable empowerment of victims); MINOW, *supra* note 2, at 66-74 (the author accepts that victims may be assisted through the opportunity to testify about their experience, but favors truth commissions over trials as a more therapeutically appropriate forum for this purpose).

71. MINOW, *supra* note 2, at 88-89; see also MacKinnon, *supra* note 68; Mertus, *supra* note 32, at 232-34 (noting the salutary effects of testimony may not be shared by all victims and that not all dimensions of injury will be aired in court).

involves significantly more than emotional abreaction.<sup>72</sup> For some, the performative aspects of courtroom testimony may not be therapeutically in their best interests.<sup>73</sup> For others, individual criminal accountability may not be most significant for healing.<sup>74</sup> Complicating this perspective is the

72. Psychiatrist Judith Herman in her book, *Trauma and Recovery*, notes as well:

Patients at times insist upon plunging into graphic, detailed descriptions of their traumatic experiences, in the belief that simply pouring out the story will solve all their problems. At the root of this belief is the fantasy of a violent, cathartic cure which will get rid of the trauma once and for all . . . [this] is fueled by images of early, cathartic treatments of traumatic syndromes which by now pervade popular culture, as well as by the much older religious metaphor of exorcism.

HERMAN, *supra* note 69, at 172. The classical literature of psychotherapy practice suggests that it may be helpful for someone attempting to deal with untoward events in her life to unburden herself in the context of a trusted listener. See C. PETER ROSENBAUM & JOHN E. BEEBE, *PSYCHIATRIC TREATMENT: CRISIS, CLINIC, CONSULTATION* 259 (1975). However, Rosenbaum and Beebe note the danger of "injudicious catharsis" where opening up these memories and associated feelings may have negative effects. Further, they caution against premature catharsis and indicate that the context must be established where overwhelming memories can be contained and explored over time. Anne Bernstein and Gloria Marmar Warner, in *An Introduction to Contemporary Psychoanalysis*, describe how Freud reported that verbalization in a non-judgmental environment could produce a catharsis that led to relief of symptoms. ANNE BERNSTEIN & GLORIA MARMAR WARNER, *AN INTRODUCTION TO CONTEMPORARY PSYCHOANALYSIS* (1981). However, the clear importance of a supportive trusting relationship and the development of insight over time is emphasized. For more recent work that grows out of evidence-based studies, see Edna B. Foa & E.A. Meadows, *Psychosocial Treatments for Post-traumatic Stress Disorder: a Critical Review*, 48 ANN. R. PSYCHOL. 449-80 (1997); Edna B. Foa, *Psychosocial Treatment of Post-traumatic Stress Disorder*, 61 J. CLIN. PSYCHIATRY (Suppl. 5), 43-47 (2000); *The Expert Consensus Guideline Series, Treatment of Posttraumatic Stress Disorder*, 60 J. CLIN. PSYCHIATRY (Suppl. 16) (Edna B. Foa et al. eds. for series, 1999). These papers suggest that, while experimental studies indicate that a variety of modalities of treatment such as exposure therapy, cognitive therapy, stress inoculation training, and medication may be useful, long-term studies and further research are essential. Foa notes, in her article on psychosocial treatment of post-traumatic stress disorder (PTSD) that "for treatment to be maximally beneficial, therapists should promote patients' trust and cooperation." Foa, *Psychosocial Treatment of Post-traumatic Stress Disorder*, *supra* at 47. See Wendy Orr, *Reparation Delayed is Healing Retarded*, in LOOKING BACK REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA 239, 240 (2000) (the author argues healing must be understood as a process rather than as an event and that many factors contribute to this process such as reparations and public acknowledgment); see also Derek Summerfield, *Addressing Human Response to War and Atrocity: Major Challenges in Research and Practices and the Limitations of Western Psychiatric Models*, in BEYOND TRAUMA: CULTURAL AND SOCIETAL DYNAMICS 17, 22-24 (Rolf J. Kleber et al. eds., 1995). In sum, our reading of the literature suggests that "healing" is a long-term process that requires far more than testimony in a courtroom or truth commission setting.

73. Nomfundo Walaza, South African psychologist and Director of the Center for Survivors of Violence and Torture, has worked with victims who testified before the South African Truth and Reconciliation Commission ("TRC"). She has observed that "revealing is not healing" and that many witnesses did not experience "closure" as a result of their appearance before the TRC. Nomfundo Walaza, *Trauma Counseling in the South African Context* (Nov. 2001) (available from Walaza at Center for Survivors of Violence and Torture, Cape Town, South Africa).
74. In the interviews with over ninety-five key informants in Croatia and Bosnia the question of forgetting versus remembering is open to ongoing debate. While virtually all

influence of culture in determining beliefs about the causes and meaning of catastrophic events, which in turn establishes the framework for individual and collective interpretations of the past.<sup>75</sup> One shortcoming with the approach of traditional legal theorists is that they do not take into account other cultural modes of interpreting the aftermath of untoward events and their consequences. More study is needed to understand the meaning of legal actions, like trials, in particular cultural contexts.

respondents accept the premise that war criminals should be prosecuted, many express concern that trials open old wounds and do not lead to social repair. Further, for many economic revitalization and jobs would be more salient contributions toward their "healing." See also Interview Study, *supra* note 20, at 150.

75. Summerfield, *supra* note 72, at 24-25; ARTHUR KLEINMAN, *WRITING AT THE MARGIN: DISCOURSE BETWEEN ANTHROPOLOGY AND MEDICINE* 173-89 (1995); Laurence J. Kirmayer, *Cultural Variations in the Response to Psychiatric Disorders and Emotional Distress*, 29 Soc. Sci. Med. 327 (1989).
76. Malmud-Goti, *supra* note 58, at 51-58 (arguing that criminal trials of military officers responsible for gross human rights abuses conveys to the public governmental disapproval of prior practices and underlines the discontinuity between the previous regime and the transitional government); Osiel, *supra* note 2, at 28-29 (criminal trials by transitional regimes can consolidate public consensus and public rejection of the violence perpetrated and affirm shared values of respect for human rights); Hesse & Post, *supra* note 3, at 15 (the authors observe that "successful transitions require new democratic regimes to distinguish themselves from the practices and culture of their predecessors" and conclude that the consensus among scholars is that past crimes should be prosecuted, "if at all feasible"); Orentlicher, *supra* note 2, at 2543 ("By demonstrating that no sector is above the law, prosecutions of state crimes can foster respect for democratic institutions and thereby deepen a society's democratic culture.");
77. See Orentlicher, *supra* note 2; Krütz, *supra* note 32, at 132-33; Akhavan, *Justice in The Hague*, *supra* note 25, at 749 (international tribunals by stigmatizing behavior can change culture and thus contribute to "habitual lawfulness" within countries); Ruti G. Teitel, *TRANSITIONAL JUSTICE* 28-30, 66-67 (2000) (criminal trials in transitional periods promote rule of law not simply by enforcing existing norms, but critically by instantiating a normative shift in society to reject the persecutory policies of the prior regime); cf. Feher, *supra* note 38, at 330 (the author emphasized that the goal of transitional regimes is to "repudiate the agenda of the former rulers" that trials will not necessarily guarantee this result and more germane are political debates about the nature of the transitional process itself).

## 2. The Bystander Phenomenon

We turn now to another critical question. We have reviewed the literature regarding how people may be influenced to commit aggressive acts by several unconscious processes. But when do they turn away? Under what conditions do people observing violence fail to intervene to save the victims of an attack? Our concern arises from our attempt to understand how mass violence can erupt in neighborhoods where longstanding relationships give way to persecution and murder. We assume that in most episodes of mass violence only a fraction of the population commits criminal acts. Another fraction risks its personal security to speak out against the evil or actively intervenes. In the midst of these two extremes lies large numbers of individuals who do "nothing." In this section, we look to the laboratories of social psychologists to inform our understanding of the bystander phenomenon. In section III we will examine how attention to this problem must be incorporated into efforts at social repair.

Driven by the lack of response of thirty-eight witnesses to the brutal attack on Kitty Genovese in Queens, New York, in 1964, two social psychologists, Bibb Latané and John Darley, conducted an extensive series of experiments to analyze the process of active intervention.<sup>139</sup> These studies led to a surprising set of conclusions. Latané and Darley found that societal norms of altruistic behavior rarely come into play in urgent situations in which active intervention is warranted. In fact, they conclude that the presence of others will usually stifle the impulse to help. If the situation is ambiguous, the uncertainty may make the individual more vulnerable to inaction and more susceptible to social influence. They conclude that people are more constrained in public because of a fear of making a mistake, appearing inept, or being seen as over-emotional. Finally, they note:

As each person in an ambiguous and potentially dangerous situation looks to others to gauge their reactions, each may be falsely led to believe that others are not concerned, and consequently to be less concerned himself. This state of pluralistic ignorance may make each member of the group less likely to act. . . .<sup>140</sup>

139. BIBB LATANÉ & JOHN DARLEY, *THE UNRESPONSIVE BYSTANDER: WHY DOESN'T HE HELP?* (1970). The victim, Kitty Genovese, was attacked at 3:00 a.m. as she came home from work. Although the attack lasted over a half an hour and thirty-eight of her neighbors heard her cries, not one came to her aid; no one even called the police. These studies suggest that greater numbers of people involved in an activity inhibit any single individual from taking moral responsibility. Groups thus can deter individual action especially if others are passive.

140. *Id.* at 42.

Consequently, fear inhibits action and produces conformity. Further, if others are in the area, there is a diffusion of responsibility for taking action.<sup>141</sup>

As a result of these experiments, Latané and Darley concluded that a series of steps must occur for someone to intervene actively in an emergent situation: the individual must notice that something is happening, interpret it as an emergency, and finally, take personal responsibility for alleviating the situation. These steps may be varied by factors that mediate between thought and behavior, such as confusion, time for decision-making, and ambivalence to action. However, the presence of others clearly modifies this process. Latané and Darley's work suggests that over and above personal responsibility, groups as a collective deter action, especially if the others present remain passive. In all these cases, individuals stated that they were *unaware* that social situations modified their behavior. These findings are supported by the work of psychologist Ervin Staub. He has differentiated the bystander phenomenon into two principal groups: (1) those who remain passive in the face of individual mistreatment, and (2) those who respond passively in the midst of societal persecution.<sup>142</sup> Primarily derived from Holocaust studies, he believes that most bystanders remain passive due to the influence of societal and cultural factors. However, ultimately, we are better at describing and theorizing than achieving a full understanding of this phenomenon.<sup>143</sup>

141. *Id.*

142. Ervin Staub, *Transforming the Bystanders: Altruism, Caring, and Social Responsibility*, in GENOCIDE WATCH 162 (Helen Fein ed., 1992). In this chapter, Staub examines the roots of altruistic behavior and the barriers to action that may be reflected in the passivity of bystanders.

143. There is a third group of actors in situations of mass violence—those who act to protect, hide, or otherwise assist members of the group that have been targeted for murder, expulsion, or other forms of violence. Svetlana Broz has written about those in ex-Yugoslavia who often spontaneously reached out to help their neighbors or even strangers. SVETLANA BROZ, *GOOD PEOPLE IN EVIL TIMES* (1999). The concept of "righteous gentile" emerged from the ashes of the Holocaust to describe those who assisted the Jews. We assume that actions such as these derive from individual motivation and may be less a product of group behavior. What distinguishes people who act out of courage is not readily apparent. Ervin Staub discusses three motives for altruistic behavior—a prosocial value orientation, i.e., a motivation to assist others and to be concerned about their welfare; second, a moral-rule orientation, acting in accordance with rules of morality that define how to behave towards others; and finally, empathy, the ability to place oneself in the shoes of others. Staub, *supra* note 142, at 164. While this research has gathered data from helping situations, whether these conclusions apply in a time of genocide or ethnic cleansing is unclear. Of course, this third group raises important questions about individual accountability since not all succumb to violence or sink into quiescence. This rescuer phenomenon introduces an additional complexity to an understanding of individual behavior in group contexts.

### 3. Implications from Social Psychology for Understanding Collective Violence

These experiments graphically illustrate the power of the collective to influence behavior. They indicate that people may engage in aggressive behavior under the influence of social settings and that this behavior may differ from that which they usually would demonstrate. Further, the data raise questions about the role of perceived authority, social support or abandonment, perception of others as less than human, and the contribution of conformity to action. Although this work is carried out in laboratory situations, and the role of state authority may differ, these experiments raise critical questions about how crowds act and react and about the power of social processes to influence individuals to action or inaction at levels of awareness that may be beyond the conscious state.

In addition, these experiments indicate that social settings influence the motivation of individuals to take personal responsibility for their actions. The lack of awareness of social cues may contribute to their denial of the opportunity to intervene. Another consequence of this lack of awareness is that bystanders may identify as victims rather than acknowledge complicity in the adverse events, allowing bystanders to rationalize their passivity. We observed this phenomenon of victimhood in our study of Bosnian judges and prosecutors.<sup>144</sup> This process also raises a critical question—if individuals are influenced by others not to act, even if they are unaware of this influence, should they be relieved of responsibility for their inactivity? We argue that by individualizing guilt in criminal trials, the legal paradigm reinforces the use of denial as a psychological defense mechanism within the population at large and supports the bystanders' claim that they did nothing wrong, that is collective innocence.<sup>145</sup>

We believe that this issue must be addressed outside a court of law if social repair is to become a reality. Since they "did nothing wrong," bystanders have no criminal liability. But as we have seen, doing "nothing" is doing "something." Thus, addressing the bystander issue becomes an additional critical element in the process of social reconstruction.

144. Interview Study, *supra* note 20, at 147.

145. The Western legal approach of individual accountability may be even more problematic in those societies where collective responsibility is the norm and mass action may be expected in those situations where families or groups perceive threat.

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As our summary of the social science literature indicates, social forces are critical in determining aggressive behavior and hesitancy to intervene. Furthermore, trials, with their emphasis on individual accountability, offer bystanders the opportunity to rationalize inaction in preventing atrocities like ethnic cleansing or genocide. The traditional lack of attention to the issue of collective responsibility—if not accountability—is a vulnerability that may lead to future violence. This vulnerability should be addressed through specific intervention(s) that challenge bystander denial, rationalization, and feigned ignorance that explain away inaction.

As Useem notes: "Individuals inevitably offer a moral justification whenever their actions, however destructive and self-interested, violate a moral principle."<sup>208</sup> In addition, Albert Bandura writes about "self-exonerating practices" and notes that: "What was morally unacceptable becomes, through cognitive restructuring [reframing one's thinking], a source of self-pride."<sup>209</sup> Unless these rationalizations are addressed at a community level, the myth of collective innocence is perpetuated and social reconstruction itself becomes a process built upon false premises.

208. Useem, *supra* note 156, at 232, citing James Q. Wilson, *THE MORAL SENSE* (1993). It is striking that those in whose name aggression was committed in Bosnia-Herzegovina evoke two justifications for the violence. The first is a belief in the "higher principle" of maintaining a unified state—either Yugoslavia or a nationalist entity. The second is a glorification of the history and tradition of the Serb people—Christians who must maintain the border of Europe against the "Muslim onslaught." MICHAEL A. SELLS, *THE BRIDGE BETRAYED: REUNION AND GENOCIDE IN BOSNIA* 27–28, 29–52 (1996); LAURA SILBER & ALAN LITTLE, *YUGOSLAVIA: DEATH OF A NATION* (1995); DAVID RIEFF, *SLAUGHTERHOUSE: BOSNIA AND THE FAILURE OF THE WEST* (1995). Rieff's angry indictment of nationalism and Western passivity illustrates how "higher" principles may result in sacrifice of innocent people.

209. Bandura et al., *supra* note 118, at 254.

Therefore, for any society to reconstitute in a peaceful fashion, alternative interventions must be considered in synergy with war crimes trials. We are not proposing to eliminate criminal accountability as an option. However the international responses to those countries which have lived through mass violence are piecemeal. Generally interventions follow a progression from humanitarian intervention to rule of law and democratization followed by long-term economic development and perhaps, criminal trials. The multiplicity of agencies makes a coherent vision of social reconstruction difficult to achieve. Often overlooked are the voices and articulated needs of families and communities. Further, these voices, often influenced by stereotypes, propaganda, ethnic/nationalist media, and self-serving politicians, lose their ability to articulate memories of a different time when "the other" was once their neighbor. For social reconstruction to occur, the institutional actors and agencies involved must incorporate an ecological understanding of the constituent elements of social repair. Without an appreciation that any single intervention has consequences throughout the web of social arrangements, programs will operate in isolation. Thus any synergies among interventions will be happenstance rather than intended.

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Ultimately, a comprehensive community-based approach that includes the opinions and ideas of those whose lives have been most directly affected is critical. Building consensus among all stakeholders is necessary to effect the structural changes that will ensure social reconstruction. Interventions

may encompass trials or truth commissions—if the affected communities so desire—but also may include economic empowerment, early rebuilding of cultural institutions, changes in government structure (including personnel),<sup>213</sup> reparations to communities and individuals, as well as neighborhood-based inter-group reconstruction activities. Further we suggest that international interventions should be implemented in the context of an ecological understanding of social repair.

Societal violence is a totalizing experience. Yet Jaspers observes that it is the intimate and personal nature of one's experience of mass violence that informs one's perceptions about what should happen next.<sup>214</sup> To date, truth and justice have been the rallying cries for efforts to assist communities in (re)building in the aftermath of mass atrocities. These employ a paradigm that focuses on individuals who have been wronged (victims) and those who inflicted their wounds (perpetrators). Missing is an appreciation for the damage mass violence causes at the level of communities. Totalizing experiences necessitate totalizing responses. We return to our earlier metaphor of a stone cast in a lake. It is not enough to cast the stone; over time, we must still the ripples. With an ecological framework, we can begin to see the lake.

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213. For example, Inga Markovits has chronicled the transition in the East German judiciary at the time of reunification. Inga Markovits, *Last Days*, 80 Cal. L.R. 55 (1992).
214. Jaspers takes up the question of the relation of the individual to National Socialism and the crimes of the state through his examination of moral guilt. Jaspers, *supra* note 1, at 63–73.



## Descriptions of War and Healing by Karen refugees on the Thai-Burmese border. Al B. Fuertes

... In their discussion about interdisciplinary perspectives on violence and trauma, Suarez-Orozco and Robben (2000: 1) contend that large scale violence takes place in complex and over-determined socio-cultural contexts which intertwine psychic, social, political, economic, and cultural dimensions. In this context, violence, according to the authors, cannot be reduced to a single level of analysis because it targets the body, the psyche, as well as the socio-cultural order. Its consequences, which may take the form of massive trauma, afflict not only individuals but also social groups and cultural formations.

From the perspective of this article, the violence that Robben and Suarez-Orozco are referring to is an armed conflict between groups in the same country, particularly between the government military and armed opposition groups. The war has been frequently played out against a backdrop of subsistence economies, where people's ways of life are targeted and social and cultural infrastructures are destroyed. Many of the civilians in these war-affected communities are forced to settle in evacuation centers as internally displaced persons or in camps outside of their home country as refugees for fear of getting killed. Worldwide, there are millions of war survivors, and many have either become refugees or are internally displaced, needing to get through their trauma so they can recover and start rebuilding their lives and community (Fuertes, 2004: 491).

The definition of *refugee* is set forth in Article I of the United Nations (UN) Convention relating to the Status of Refugees (modified by Article I of the Protocol relating to the Status of Refugees) as *any person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside of the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."* According to the *Training Manual on Human Rights Monitoring* by the Office of the High Commissioner



for Human Rights (2001: 204), this definition of refugee has been expanded, particularly by the Organization of African Unity (OAU) Convention on Refugees and the Cartagena Declaration, to include persons fleeing generalized violence: international war, internal armed conflict, foreign aggression or occupation, severe disruption of public order, or massive violations of human rights, in the whole or part of the country of nationality.

In this article, I will explore briefly the phenomenological realities of war, trauma and healing among Karen refugees who are situated along the border between Thailand and Burma. I will use the term, *war pictures*, to refer to people's descriptions or ways people make sense of their war trauma, which I believe are profoundly shaped by the socio-cultural and historical setting they inhabit. War pictures, in this context, are my way of presenting and discussing the trauma of war and displacement from an interdisciplinary perspective. There are, at least, five general categories of war pictures that participants in the workshops that I facilitated identify, namely: 1) Physical or material; 2) Cognitive-emotional; 3) Behavioral; 4) Socio-cultural and relational; and 5) Religio-spiritual categories, respectively.

Simply put, the physical or material category refers to the effects on how people feel about their bodies and on their material resources, properties, including public infrastructures. The Cognitive-emotional category refers to the effects on what people know and how people think and feel about the whole war experience, which has led to their displacement. The Behavioral category refers to the effects on how people act and react as individuals and as a community in light of the experience. The Socio-cultural and relational category refers to the effects on people's social bonds, their sense of communality, and sources of support. The Religio-spiritual category refers to the effects on people's beliefs, including their meaning-making. I would like to emphasize at this point, that all

categories of war pictures are very much interrelated in terms of their effects or influence on people. As shown under the Results section of the article, these war pictures are very much interconnected. They are very much embedded in people's stories or narratives. What I am saying is that people never compartmentalize war pictures, but rather present them as parts of their respective stories.

The Burmese government army offensive against its minority opposition groups has caused massive displacement of the civil population. In the case of the *Karen refugees*, one of the ethnic groups in Burma, constituting 6.2% of the 47 million population, as of July 2006 survey (CIA, 2007), together with the Burman (69%), Shan (8.5%), Rakhine (4.5%), Mon (2.4%), Chin (2.2%), Karrenni (0.4%) and many other ethnic minorities (Dundas, 2005). Most of them have been displaced as a result of intensified efforts by the military rulers since the late 1980s. According to the Global IDP Database (2002: 43), it is estimated that there were between 600,000 and one million internally displaced peoples in Burma by the end of 2001, of which close to 170,000 had resettled as refugees in Thailand alone by 2005. Of those registered refugees with the Ministry of Interior (MOI) of Thailand, Karen comprise 65% of the refugee population, followed by Karenni (18%), Tenasserim (10%), Mon (3%) and 4 % representing other ethnic groups such as Kachin, Irrawaddy, Magwe, Mandalay, Pegu, Rakhine, Rangoos, Sagaing and Shan (TBBC, 2005).

The input in this paper is based on the trauma healing workshops that I facilitated at five different campsites inside a Karen refugee camp. The first series of workshops took place in February and March 2003 with more or less fifty participants. The workshops were sponsored and organized by the Shanti Volunteer Association (SVA), a non-government organization (NGO) based in Tokyo, through the American Friends Service Committee (AFSC) in San

Francisco, California. The SVA has been working with Karen refugees for many years now. The second series of workshops were held between January and April 2005 with more than sixty participants. This time, I was conducting a community study for my doctoral dissertation with the help of SVA and the Karen Women's Organization (KWO). Those attending the workshops were mostly librarians, primary school teachers, community leaders, and health workers who committed themselves to facilitating local-based trauma healing workshops for their colleagues and their own people. The majority are women and mothers. They wanted to start integrating trauma healing into their community programs and activities inside the camp (Fuentes, 2004).

### Workshop Description and Objectives

During my first visit to the Karen refugee camp in 2003, I was interested to know what the refugees' conception and articulation of their war experience was and what their coping and healing mechanisms were. One major question that I found myself being confronted with was, "How are we able to address and process people's collective traumas so that they may continue to find meaning and purpose in life?" As mentioned in my other article (Fuentes, 2004: 494), I was very much aware of the intensity of violence that Karen refugees have gone through and the dynamics of the massive trauma which characterizes their collective experience as a people. Such awareness of violence and trauma was very important because it helped me design the trauma healing workshops in a way that would reflect their sense of reality and elicit a local-based conception and expression of war experiences, including the coping and healing mechanisms of Karen refugees.

During the workshops in 2003 and 2005, all participants explored

community-based warviews and coping mechanisms within their respective socio-historical and cultural contexts in an attempt to better understand their social reality as a traumatized community. They told stories and experiences of war and how it made them become displaced. Images and memories of war, which include attacks on their villages by the Burmese army, the destruction of property and farmland, including the loss of their sense of safety and security, among others, and the emotions that go with them, were shared. For the participants, the experience of telling and retelling their stories and listening to what the others have to say, and in the process finding commonalities in terms of shared experiences is freeing and validating. "By listening to others tell their stories, we are able to understand better our own personal stories," they said. Participants also felt a strong support network among themselves. Their stories connected them to one another. This is what they would like to sustain and nurture even after the workshop, that is, to be able to continue sharing their stories in whatever way possible. In the workshops, they also highlighted individual and societal resiliency, which will be explained at the end of the article.

As mentioned above, I use an *elicitive approach* in gathering information about people's warviews and resiliency that is contextual, where the refugees themselves and their knowledge are seen as "the primary source for the study" – whether or not they initially see themselves as such (Lederach, 1995: 56). What is meant by knowledge-as-resource is the implicit but rich understanding people have about their setting, which includes their knowledge about how war emerges, how it develops and affects them as a community, and how they try to handle and manage its effects.

## Workshop Framework

The workshops that I facilitated on both occasions involved, at least, four phases. Phase One deals with community-building processes that involved the welcoming of all participants, the sharing of expectations and setting up of community guidelines. The goals, the objectives as well as the schedule of activities were also presented during this phase. Phase Two involves the presentation of the general picture of war and trauma as experienced by the participants through sharing their personal and collective narratives and by locating where they were in the stories. This process is designed to enable participants to understand the socio-psychodynamics of trauma as they experience it. Some of the issues discussed during this phase involved the actual war, the attacks on their villages, the experience of being displaced, the cycle of violence and victimization, frustration-aggression, and collective identity. Perceptions, feelings and behavior that surround the issues were also dealt with.

Themes and topics on resiliency, coping and healing comprise the third phase of the workshops. Here participants were asked how they saw and understood the process of recovery and healing. The subject of societal resilience was also highlighted as well as other forms of community-based coping mechanisms. The whole theme of peace as that which characterizes the quality of life, not just the absence of war came out to be the most common dream that participants wanted to experience in their lifetime. The fourth phase involves short range planning in terms of what to do after the workshop and how it can be integrated into their daily work responsibilities within the camp. Participants also dealt with the issue of what it means to be trauma healing

facilitators particularly in the role of wounded healers.

Other methods used during the workshops, in addition to storytelling, include individual and group sharing/discussions, personal and group reflections and presentations, intra and interpersonal relationship-related activities, scenario-building exercises, group games and singing; and group planning. There were a total of five interpreters and translators whom SVA and KWO hired to help me in facilitating the workshops since I do not speak the Karen language.

## Results

### *Trauma for the Karen*

The phases I have mentioned helped in realizing one of the objectives during the workshop, which was to come up with working definitions of *trauma* and *healing* from the perspective of the Karen refugees. Part of the result shows that for Karen refugees, trauma is described as *tatubakawba erkawmelaw*, which is written as one word in Karen. Translated into English this means *Scar of Suffering*. When I asked them why *scar* – why not *wound of suffering* instead – they said that using the word, *wound* for what they have gone through as refugees does not capture the intensity of their experience. *Wound* to them does not give justice to their overall experience, they said. There are times, argued one participant, when a wound will be gone. *Scar of suffering* will always remind them of the experience that they have gone through at one point in their lives and that they are dealing with in one way or another. A scar to them also implies *remembering* their suffering, something that they can never forget. Phu Ta Moo, an 85 year old man whom I interviewed in 2003 said that *scar of*

*suffering per se* does not mean anything at all. It has to be presented and explained within a particular context, that is, the experience of the Karen as a people, which, according to Phu, goes back to their being persecuted under the Burmese Kings and also during the British regime and today under the current Burmese military regime.

War pictures for many Karen refugees reflect the multiple traumas that they are going through, which make life even more difficult. The fact they have been uprooted from their homeland as a community is something that many of them are still having great difficulty comprehending. On the basis of my conversations with workshop participants in different campsites both during my 2003 and 2005 visits and with the help of the interpreters, I gathered some of the information presented here. They remember grim images of heavy militarization and looting of their household belongings. Those who have witnessed the burning of their houses and the destruction of farmland are still shaken by the horror of the event. The disintegration of family ties and the disappearance of loved ones and relatives, continue to cause them terrible pain, deep sadness and anger. Many continue to grieve over the destruction of public places and symbolic infrastructure and the pain of being deprived of public assembly and other forms of social gathering even within the camp.

Indeed, their traumas did not end when they arrived in the camp because many were suffering from various forms of illness, hunger, and extreme poverty. There was no promise of employment. Since the 1980s, they have relied on rations that international organizations extend to them. This dependence has contributed to low self esteem, feelings of withdrawal and resignation. Some committed suicide while others feel they want to avenge what has been done to them. While most are desperate to go back to their homeland and be reunited with their families, relatives and friends, yet some continue to ask the most

fundamental question: Why us? Such powerful and intense articulations of people's trauma are what constitute their war pictures.

The majority of Karen refugees are Christians, and so many continue to hope and have faith in God in the midst of adversities. They pray that someday they will be able to go back to Burma and rebuild their Karen community and live in peace. Being able to hope against the backdrop of displacement is part of Karen's societal resiliency.

### *Healing for Karen*

During the workshops, I also discovered what healing means to them. For the Karen, healing is *tamablagay*. "Trauma healing," therefore, in Karen is *tamablagay tatu bakawba erkawmeilaw*.

*Healing*, according to Karen participants connotes social, economic and political implications. In fact they use terms such as rebuilding, reconstruction, the absence of war and transforming the negative impact of conflict into something beneficial, for healing. If translated into concrete terms, this would mean having food on the table, jobs for everyone so families will have income, education for children, dialogue between government leaders and representatives of various opposition groups in Burma, good and effective governance and being able to go back to their homeland, to name a few. These new emerging concepts and expressions of healing imply that collective and individual healing is not only a medical concept but also embrace peacebuilding mechanisms and frameworks (Fuentes, 2006).

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# PSYCHODYNAMIC APPROACHES IN THE TREATMENT OF TORTURE SURVIVORS

*Enrique Bustos*

*The psychotherapy of the torture survivor is in its infancy*

RICHARD MOLLIKA

## THE TREATMENT OF TORTURE SURVIVORS

Despite the efforts of the UN to get its members to act according to the Article 5 of the United Nations Universal Declaration of Human Rights (United Nations, 1948) and the Convention against Torture (United Nations, 1984), individuals are still being subjected to torture in many countries (Amnesty International, 1991). Torture is characterized as an intentional, planned activity which is often systematically executed. It is a fierce attack on the individual's integrity with the aim of humiliating and depriving the person of his/her identity, willpower, and commitment and leads to physical damage and pain. The goal is to break down and destroy the individual's personality. Ultimately, it serves to terrorize the entire population and end any opposition to the regime.

In the last ten years a number of institutions working with survivors of torture have emerged (see, e.g. Chester, 1990; Gruschow & Hannibal, 1990; Sirett, 1985 for a selected directory). The rehabilitation of torture survivors has become a new field and communication between teams of professionals has opened the way for discussions about their treatment orientation. The search for an effective treatment approach still continues.

A careful medical and psychiatric examination is necessary not only for obtaining information about the atrocities suffered by the survivor but also for planning psychotherapy in accordance with the range and severity of the physical and psychological symptoms (Goldfeld *et al.* 1988; Jensen *et al.* 1989). The psychotherapeutic intervention is often the most significant aspect of the treatment. The restoration of basic trust during psychotherapy enables the individual to develop a working alliance with the therapist, which in turn facilitates a partial

or total resolution of the past trauma and the restoration of personal dignity and the ability to find effective solutions to new problems.

Most of the existing psychiatric and psychological literature on torture survivors concerns phenomenological descriptions of the methods of torture and its short- and long-term effects. A few authors have provided guidelines for a therapeutic intervention and a discussion of its theoretical framework (e.g. Agger & Jensen, 1990; Allodi, 1982; Bustos, 1990b; COLAT, 1983; Foighel & Jørgensen, 1990; Lira, Becker & Castillo, 1990; Lunde, Boysen & Ortmann, 1987; Mollica, 1987; Santini, 1989; Schlapobersky & Bamber, 1988; van der Veer, 1990; Vieytes & Barudy, 1985; see also Başoğlu, this volume). Some of these authors, particularly those from Argentina, Chile, The Netherlands, Scandinavia, and the United Kingdom use a psychodynamic approach in the treatment of torture survivors.

### THE PSYCHODYNAMIC VIEW ON EXTREME TRAUMATIZATION

The concept of psychic trauma since Freud's first formulations in 1895 (Freud & Breuer, 1895) has had a considerable, yet varying, importance within psychoanalytic theory. In the original theory of trauma, the focus was on the external event. Freud, however, turned the focus away from the field of human interaction towards the intrapsychic problem. In the intrapsychic view, the objects of reality were transformed into mental representations, and the conflict was reduced to inner conflicts between the different parts of an individual's mental apparatus. Metapsychologically the trauma was now described, in terms of the drive theory, as the intensity of the libidinous strivings and defensive battle of the ego against these conflicts. More recently, cases of extreme traumatization have helped dramatically in further theoretical elaborations of the concept (e.g. Bettelheim, 1979; Furst, 1967; Horowitz, 1976; Kardiner, 1941; Kelman, 1945; Krystal, 1968, 1971, 1978, 1988; Krystal & Niederland, 1970; Ulman & Brothers, 1988). The authors cited above are some of the psychoanalysts who have developed this concept in relation to extreme traumatization in children and adults. Bettelheim showed the disintegrating effects on personality of being imprisoned without previous support systems and being subjected to torture and degradation (Bettelheim, 1943, 1979). Horowitz has focused attention on the role of intrusive and repetitive thoughts in traumatized individuals and considered such thoughts as the mind's effort to process new information. He has developed the theory of stored, split-off traumatic memories which set off an intrusion-

denial cycle in which the organism tends to seek equilibrium. Krystal has made a critical analysis of how this view has been used in theoretical and clinical work with traumatized people. According to Krystal (1988, p. 142) the trauma causes 'a paralyzed, overwhelmed state, with immobilization, withdrawal, possible depersonalization, and evidence of disorganization'.

As noted earlier, extreme traumatic situations in adults have often been reported in the psychoanalytic literature in terms of external, behavioural and after-effect-related data. Krystal has developed a theory in which traumatization is a process that starts with a virtually complete blocking of the ability to feel emotions and pain and progresses to a major inhibition of other mental functions.

### THE THERAPEUTIC MODEL

The psychopathology in torture survivors varies in nature and severity. The characteristics of psychodynamic psychotherapy with survivors of torture will be determined by the nature of the problems facing the patient and the dynamic interaction between the after-effects of the trauma and other traumas the patient may have experienced in the earlier years. As Fanon (1983) made clear in his analysis of torture in Algeria, traditional psychiatry gives more importance to the event than to the biological, psychological, and emotional background of the individual. Therefore, in a psychodynamic diagnosis of a survivor of torture, the following variables are of major importance:

- degree of motivation
- psychological and physical after-effects of torture
- type of trauma
- degree of psychopathology
- personality structure
- repertoire of defensive manoeuvres
- family dynamics
- social network
- degree of political awareness
- presence of other traumatic experiences in the past
- if the treatment takes place in exile, the different phases of the adaptation process and the importance of a future reparation.

The core of the psychodynamic approach is the intrapsychic processing of the trauma. The aim is 'to enable our patients to be masters of

themselves and of their emotions' (Amati, 1976). Through a psychotherapeutic process, it is possible for a survivor of torture to undergo a psychic recuperation, regaining the emotional strength to recover from broken expectations of life. Lira and her colleagues (Lira, Weinstein & Kovalskys 1987) describe the psychotherapy as a process of obtaining insight into the past trauma. Schlapobersky (1990) views the goal of rehabilitation as being 'centered on the purpose of freeing victims rather than "curing them"'. They all point to the importance of working through the trauma and the obstacles that hinder a healthy psychological functioning. The importance of the working through the trauma should be seen in relation to the individual's emotional responses to unbearable stimuli and overwhelming affects. These responses usually produce a disorganization of all psychic functions. Therefore, the psychodynamics of the trauma in the survivor of torture (or other traumatized individuals) are seen as being directly related to the individual's capacity to organize and integrate the intrapsychic processes in relation to the outer traumatic event (Krystal, 1971).

Regression is an important aspect of human response to trauma and crucial in understanding the intrapsychic recovery processes of the individual. The relationship that is established between the torturer and the tortured through regression 'deconstructs' the primary basic unit of human civilization in the internal world of the individual (Scarry, 1985). Such relationships in the external world are internalized in the psychic world of the survivor and associated with pain, degradation, and dehumanization. This often reduces the survivors' capacity for human relatedness in the future. This aspect of the problem is of great importance in terms of future interactions between the patient and the therapist during psychotherapy. The symptomatology presented by tortured survivors should also be seen as related to extreme regression during torture and a reduced capacity for relatedness.

The main objectives of psychodynamic treatment are generally formulated in the following terms: relief from distressing symptoms, working through of the traumatic experience, reconstruction of new expectations of life, and resolution of family and social problems. A Chilean group used to include the restoration of a 'life project' as the main objective of the psychotherapeutic process (Weinstein, 1984; Lira *et al.*, 1987).

Most descriptions of therapy models for torture survivors have followed the tradition of classifying the various phases of treatment. These descriptions are outlined below.

### The opening phase

This phase involves the linking of the survivor's traumatic memories to the symptoms and the corresponding affective states. The mapping of the core conflict and the associated psychopathology is one of the important processes of this phase. Attaining the basic confidence of the patient is necessary for the challenges with which the patient and the therapist will be confronted in the therapy process. The therapist's ability to understand the individual's regressive behavior during this phase is essential for the establishment of a therapeutic relationship and the patient's recovery of his/her sense of identity and basic trust in humanity. Mollica, Wyshak & Lavelle (1987) state how difficult it is to obtain a detailed description of the trauma in a research interview and stress the importance of developing a trusting relationship before eliciting the patient's trauma story. Chilean psychologists have developed a special method for obtaining information during this phase. This method involves the use of testimony as a therapeutic technique. The aim of this technique is to facilitate the integration of the traumatic experience and the restoration of self-esteem, while also providing symptomatic relief in certain patients (Cienfuegos & Monelli, 1983; Lira & Weinstein, 1984b; Weinstein, 1984). Agger & Jensen (1990) have adapted this method for political refugees living in exile but have included concepts and techniques outside the framework of psychodynamic approach.

### The working-through phase

This phase is characterized by the formation of the therapist-patient unit or, in classical terms, the working alliance. This alliance initiates the working-through of the trauma. During this phase the therapist helps the patient to verbalize the chaotic, frightening, life-threatening, and incomprehensible experiences, receives such anxiety-charged psychological material without being overwhelmed by uneasiness and fear, and takes care to distinguish between resistance and inability to give a coherent narrative. The expression of the traumatic experiences during torture and imprisonment is usually encouraged by means of verbal and non-verbal methods of reconstruction. Santini's (1989) eight-year-long treatment of a survivor illuminates the significance of the psychotherapeutic process in the construction of a reparative link, whereby the patient, by externalizing conflicts and fantasies, can achieve insight and integration of the trauma into his/her personal history.

### The termination phase: establishment of a new equilibrium

Termination of therapy will be determined by the patient's life circumstances as well as by the circumstances of the therapy situation. The emergence of new problems during the course of the therapy often requires a reconsideration of the objectives and lines of action. In the final stage, the patient should have gained a satisfactory level of psychological, personal, and social functioning. Giving a new meaning to, and regaining control over, the trauma help gain mastery over traumatic memories and new related stimuli. The drama of separation at this phase tests the patient's ability (and the effectiveness of the psychotherapeutic process) to cope with an irretrievable loss of a human relationship involving solidarity, attachment, and affection.

The fundamental difference between the traditional psychodynamic model and others concerns the issue of therapist neutrality. Many psychodynamically oriented professionals argue that neutrality has to be put aside during treatment (Guinsberg, 1984; Jensen & Agger, 1990; Lenhardtson *et al.* 1990; Lira *et al.* 1987). Many mental health professionals who are aware of the adverse effects of political repression on society and individuals have taken up Human Rights campaigning in addition to their treatment work with survivors of torture. Schlapobersky (1990), in describing the rehabilitation work carried out by the Medical Foundation in the United Kingdom, points to the importance of advocacy for the rights of asylum seekers and refugees. He states that, for therapists, working with torture survivors is 'a part of a broader human rights commitment'. Bonano (1986) also emphasizes this view in his analysis of the work undertaken by the Group of Psychological Assistance to the Mothers of Plaza de Mayo in Argentina.

### THE PSYCHOTHERAPEUTIC PROCESS

The experience of torture leads to an extreme use of psychological defences in order to avoid depression, guilt, shame, and helplessness. The affective regression and the impoverishment in cognition lead to an increased use of primitive defenses like denial, splitting, and projective identification (Krystal, 1988; Ogden, 1982). Also observed are a breakdown in the interactional patterns of the patient with the family members and an alteration of the relationship between the individual and social reality (Lira, Becker & Castilo, 1990).

### Regression

The survivor of torture has gone through extremely traumatic experiences during which human relationships were associated with danger, anxiety, and fear of annihilation. The internal world of the survivor has been altered by pathologically internalized external objects. Splitting or denial are the common defenses against pathological internalizations related to traumatic situations, and they prevent the formation of accurate representational memories. Amnesia and numbing serve to prevent the repetitive and intrusive flooding of painful memories and to block affects related to the internalized relationships. In some cases, this leads to a psychological shutting-off. Torture leads to an overwhelming of the self-preserving functions and diminution of problem-solving abilities. This creates a regressive state with a disorganization of feelings, thoughts, and behaviour (Amati, 1990; Krystal, 1988). The incidence of such disorganization after torture is variable. Because of associative processes and the defensive use of regression, disorganization may persist and even become worse. In some individuals, protective defences such as derealization, depersonalization, and other states of altered consciousness may arise, leading to a severe constriction, desymbolization, and fragmentation of mental functioning (Krystal, 1988).

### Human relatedness

The experience of helplessness and total dependence on others constitutes a psychological bedrock for all subsequent emotional events in the life of the traumatized refugee. Apitzsch (1987) has defined torture as a psychological construction where the individual is forced into a state of extreme infantile helplessness, faced with the absolute mercilessness of an omnipotent persecutor. Gómez (1985), based on her experience with tortured Chileans in Chile, has outlined five aspects of the relationship between the torturer and the tortured

- 1 extreme inequality in the exercise of power
- 2 exercise of highly irrational aggressive behaviour
- 3 sadistic qualities in the torturer's behaviour
- 4 constant dehumanization of the tortured
- 5 intense emotional involvement during torture.

According to Foighel & Jørgensen (1990), torture undermines the ability to develop and maintain confidence and basic trust in others. This view is also expressed by Müller (1990), who stresses the







































































































