

LEGAL RESPONSES TO GENOCIDE AND OTHER MASSIVE VIOLATIONS OF HUMAN RIGHTS

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What can the enlightened sectors of the international community do to prevent and halt the proliferation of genocides and massive human rights violations around the planet? We evade the obvious, albeit costliest answer—to arrest them before, or at least while they are happening, by any means necessary: to stop them by stopping them. Instead, we focus on actions after the fact. One method, which is particularly favored is to create courts to try the perpetrators of atrocities. Indeed, in the course and the wake of the atrocities committed in Cambodia, southern Sudan, the former Yugoslavia, Haiti, Rwanda, Burundi, Zaire—the list grows relentlessly—many in the international community call for the creation of ad hoc or standing international criminal courts to deal with the gravest of international legal delicts.

Courts are indispensable institutions in many domestic criminal and civil systems, and any polity, no matter how structured, must construct mechanisms of varying degrees of institutionalization to apply the law to concrete cases. But lest we fall victim to a judicial romanticism in which we imagine that merely by creating entities we call “courts” we have prevented or solved major problems, we should review the fundamental goals that institutions designed to protect our public order seek to fulfill.

National legal systems allocate different responsibilities to criminal and civil law, but common to all legal systems is a set of fundamental sanctioning goals for the protection, restoration, and improvement of public order. While these fundamental goals have been expressed in many forms, they may be synthesized into seven specific goals:¹

- (1) *Preventing* imminent discrete public order violations;
- (2) *Suspending* current public order violations;
- (3) *Deterring*, in general, potential future public order violations;
- (4) *Restoring* public order after it has been violated;
- (5) *Correcting* the behavior that generates public order violations;

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Parts of the present article are drawn from W. Michael Reisman, *Institutions and Practices for Restoring and Maintaining Public Order*, 6:1 DUKE J. COMP. & INT'L L. 175 (1995).

1. See generally RICHARD ARENS & HAROLD D. LASSWELL, IN DEFENSE OF PUBLIC ORDER (1961); MYRES S. MCDUGAL ET AL., LAW AND PUBLIC ORDER IN SPACE (1963).

- (6) *Rehabilitating* victims who have suffered the brunt of public order violations; and
- (7) *Reconstructing* in a larger social sense to remove conditions that appear likely to generate public order violations.

Preventing is an anticipatory public order function. It anticipates the imminent rupture of public order, seeks to intervene before the rupture eventuates, and with the aim to obviate it. Once a rupture has occurred, *suspending* seeks to arrest the injuries by focusing on the agent of the violation. It involves an immediate response to the breach of public order, terminating the breach and containing the destructive effects of the act. While preventing and suspending are specific to particular violations of public order, *deterring* is more general. Deterrence involves the use of various conjectural devices to craft current responses that encourage putative violators in the future to refrain from committing violations. Deterrence may be accomplished by credible threats of consequences for violations and/or indulgences and rewards for compliance. *Correcting* involves identifying and adjusting individual or group patterns of behavior that have generated or may generate ruptures of public order. *Rehabilitating* focuses on the victims and may involve compensation in various forms designed to redress injuries. *Social reconstructing* involves identifying social situations that generate or provide fertile ground for violations of public order, and introducing resources and institutions that can obviate such situations.

These seven goals are cumulative in the sense that an efficient public order system performs all of them, though the achievement of some goals, such as prevention and deterrence, will reduce the importance of some of the others. The common denominator of all of these goals, however, should be to protect, reestablish, or create a public order characterized by low expectations of violence and a heightened respect for human rights. When the institutions assigned to fulfill these goals are effective, disruptions of the public order will be minimized and the destructive consequences of those that do occur will be contained. For those who would design institutions for the protection of public order, the challenge is not to imitate or transpose but rather to shape institutions that, in their idiosyncratic context, will fulfill the protective goals of public order.

A wide range of international institutions and practices is currently used in different combinations for accomplishing the goals just discussed. Although a variety of international practices can be used in the proper context to protect public order, eight institutional practices and arrangements are particularly important:

- (1) human rights law, the law of state responsibility, and the developing law of liability without fault;
- (2) international criminal tribunals;
- (3) universalization of the jurisdiction of national courts for certain delicts, called "international crimes";
- (4) nonrecognition or the general refusal to recognize and to

allow violators the beneficial consequences of actions deemed unlawful;

- (5) incentives in the form of foreign aid or other rewards;
- (6) commissions of inquiry or truth commissions;
- (7) compensation commissions; and
- (8) amnesties.

These practices and institutional arrangements are not interchangeable. Each deals with a different aspect of the problem and may not be appropriate for all circumstances. Additionally, each practice or institution need not be consistent with all the sanctioning goals in every case. Some may provide high returns for certain goals in particular cases, but may also prove very costly for alternative goals in other cases. For example, major cash payments or other concessions may prevent an imminent violation or secure the release of hostages, but they will have high costs for deterrence in the future, as other actors may calculate that they too can extort concessions from the community by threatening to violate public order. On the one hand, international criminal tribunals may serve to deter violations in future cases, but may increase the costs of suspending ongoing violations if violators conclude that continued resistance is preferable to facing a judgment by the tribunal. On the other hand, amnesties may facilitate suspension of ongoing violations, but amnesties also undermine deterrence, the law of state responsibility, and human rights. Prospective violators may conclude that if they do not prevail, they can negotiate an amnesty.

Criminal tribunals involve the identification of perpetrators of violations of the law, confirmation of the norms that apply, and the imposition of penalties. Depending on the nature and goals of incarceration, criminal tribunals may be corrective. Although many in the international community often demand criminal tribunals when there are serious breaches of public order, tribunals only indirectly perform sanctioning goals. Tribunals in the international context also encounter a "fit" problem. In liberal societies, the criminal law model presupposes some moral choice or moral freedom on the part of the putative criminal. In many of the most hideous international crimes, many of the individuals who are directly responsible operate within a cultural universe that inverts our morality and elevates their actions to the highest form of group, tribe, or national defense. After years or generations of acculturation to these views, the perpetrators may not have had the moral choice that is central to our notion of criminal responsibility. At the very end of his long book, Professor Goldhagen writes, in an endnote:

By all accounts, during the Nazi period the youth of Germany were thoroughly racist and antisemitic, were living, essentially, in a world structured by important cultural cognitive assumptions as fantastically different from our own as those that have governed distant times and places. One former Hitler Youth, Alfons Heck, *The Burden of Hitler's Legacy* (1988), describes the widespread antisemitism, "shared by millions of Germans," which was imparted to them in school during their weekly "racial science" classes. He and the other children "absorbed their teacher's demented views as matter-of-factly as if he were teaching arithmetic" Heck, drawing on his own ex-

perience, rightly indicts his countrymen: "All children are defenseless receptacles, waiting to be filled with wisdom or venom by their parents and educators. We who were born into Nazism never had a chance unless our parents were brave enough to resist the tide and transmit their opposition to their children. There were few of those. ..." For accounts of the racist antisemitic ideas with which German students were inundated, see *The Nazi Primer: Official Handbook for Schooling the Hitler Youth* (1938), which was the textbook for the seven million fourteen to eighteen-year-olds in the Hitler Youth. It presents the Jews in an explicit eliminationist [manner]²

In the cascade of atrocities in Africa, a comparable type of acculturation may have occurred. There, the use of child soldiers is wise-spread and well-documented. For example, a force that styles itself "the Lord's Resistance Army," an outgrowth of a Christian fundamentalist revolt, is leaving a wake of atrocities in northern Uganda, most of them committed by teenagers. Sisto Okello, who was abducted by the Lord's Resistance Army, but escaped, said, "It's most young teen-age children. ... The children do these atrocities because they are ordered to do so. If they are told to be ruthless, they are absolutely ruthless, and they can kill."³ Is the criminal law model an effective measure in circumstances—lamentably wide-spread—such as these?

Punishment is often a theoretical possibility which is only rarely applied to these cases. If it is applied, it may have a deterrent effect and/or may suspend violations by depriving certain individuals of their liberty. In contrast, the focus of compensation tribunals or commissions shifts from the perpetrator of the crime to the victim of the crime, for whom some compensation is established and paid according to standards for the actors involved. Human rights law, the law of state responsibility, and the more recent "liability without fault" regime,⁴

provide substantive and procedural standards for state and nonstate actors as well as guidance for compensation tribunals. For instance, commissions of inquiry, now often referred to as "truth commissions," involve, with varying degrees of system and rigor, authoritative investigation and publication of violations of international norms. These institutions seek to perform a wide range of sanctioning goals.

Amnesties have been singled out recently as a technique for reestablishing internal public order after its violent disruption within a nation-state.⁵ Their compatibility with sanctioning goals will depend on their design and other contextual features. Amnesties are especially useful tools for prison administrators and political negotiators. For the administrator of a prison, the authority to grant amnesty on a discretionary basis is a technique of internal control; many

2. DANIEL GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* 597-98 n.1 (1996) (references in the quotation have been altered to meet standard legal conventions; internal page references omitted).

3. James C. McKinley, Jr., *Christian Rebels Wage a War of Terror in Uganda*, N.Y. TIMES, Mar. 5, 1997, at A1.

4. See generally Summary Records of the Meetings of the 44th Session, [1992] 1 Y.B. Int'l L. Comm'n. 92, U.N. Doc. A/CN.4/SER.A/1992 (offering an explanation of the concept of "international liability for injurious consequences arising out of acts not prohibited by international law").

5. For example, amnesties were the institution of choice in such countries as Argentina, Uruguay, Chile, Nicaragua, and El Salvador.

prisoners will behave well if they think there is a high probability that they will be rewarded with a shortened sentence or complete amnesty. For the political negotiator, whether in a domestic or transnational conflict, the capacity to offer amnesty is also an indispensable tool. If the elite and substantial parts of the rank-and-file of one side anticipate that a consequence of a peace agreement will be their prosecution for acts undertaken in the course of the conflict, they hardly will be disposed to lay down their arms. The strict application of law in these circumstances may result in continued intense conflict, with the consumption of the social values that the law entails, ended only by the elimination or the unconditional surrender of one side. Furthermore, because a political elite often will be highly dependent on the morale and commitment of its rank-and-file, the prospect of a negotiated settlement that secures amnesties for the leadership but not for those in the ranks well may prevent that leadership from concluding an agreement.

Amnesties also may be important as a technique for stitching together the wounds in civil society that precipitate and often result from conflicts. Article 6(5) of Protocol II Additional to the Geneva Conventions of 1949 provides that “[a]t the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.”⁶

However, there are significant protective public order costs to amnesties. The jurist may have the luxury of time to foresee long-term strategy, while the political negotiator usually faces sharp time demands, requiring quick tactical decisions. Thus the jurist is more likely to appreciate that the most urgent objective in the application of law is not to punish those who may have violated it, but to stop ongoing atrocities and, insofar as possible, to sustain the expectations of law’s effectiveness in the minds of all other potential violators. What is done cannot be undone. What is not yet done may yet be prevented. Acts of kindness or grace to current violators, or, as is sometimes the case, convenient deals, may have very high, long-term costs: Potential violators may assume that, threats of strict application of law notwithstanding, when the time comes for settlement, they, too, can strike a bargain in which they will be forgiven.

The lesson to be learned from this review, I submit, is that the varied circumstances of the international community are such that, rather than a single institution, a toolbox of different institutions should be on hand. There is no general institution that can be applied as a paradigm for all circumstances. In each context, an institution appropriate to the protection and re-establishment of public order in the unique circumstances that prevail must be fashioned such that it provides the greatest return on *all* the relevant goals of public order. Thus, these tools may be adapted and used in particular circumstances to fulfill,

6. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *opened for signature* June 8, 1977, 1125 U.N.T.S. 609, 614.

in the most optimal fashion possible, the fundamental goals of international law: the protection and reestablishment of public order. In circumstances in which the international community is prepared to defeat an adversary, an international tribunal, applying an approximation of the domestic criminal law model, is an effective strategy. The tribunal model is much more satisfying in a moral and legal sense because it provides vivid confirmation of international authority. Total victory creates, at least momentarily, the monopoly of power that is the pre-condition of an effective criminal justice system in the municipal setting. In circumstances in which the international community is unwilling to make such an investment, and such reluctance seems to be more often than not the order of the day, it may be preferable to emphasize techniques that reestablish public order as quickly as possible and fulfill, to the extent actually possible, feasible sanctioning goals of public order.