

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

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I.	THE CHOICE: TO FORGET OR TO ESTABLISH THE TRUTH, TO PARDON OR TO PUNISH	343
II.	ATTITUDES TOWARD PAST WAR CRIMES AND HUMAN RIGHTS ABUSES.....	345
III.	TYPES OF REACTION TOWARD PAST WAR CRIMES AND HUMAN RIGHTS ABUSES.....	347
IV.	CORRESPONDENCE BETWEEN ATTITUDES AND TYPES OF REACTION.....	350
V.	EVOLUTION OF ATTITUDES AND EXPERIENCES WITH TYPES OF REACTION	352
VI.	CONCLUSION.....	360

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.¹ 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,

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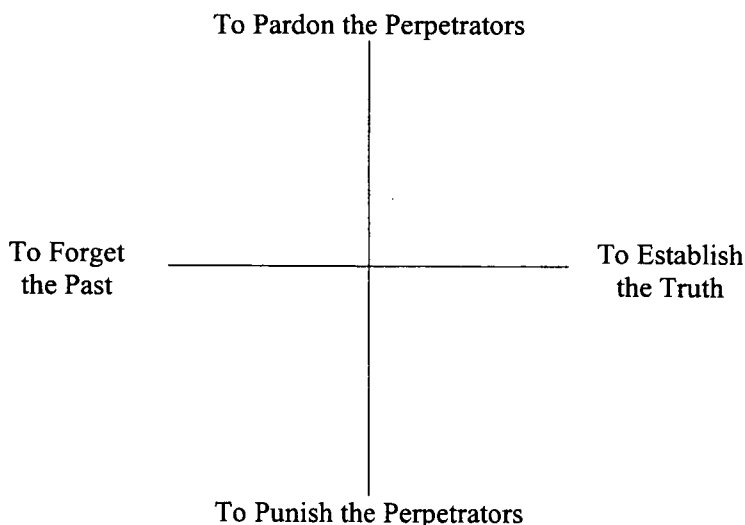
1. See, e.g., PAUL R. WILLIAMS & MICHAEL P. SCHARF, *PEACE WITH JUSTICE? WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA*, xiii (2002).

religious, or ethnic underpinnings (such as in South Africa, Rwanda, Guatemala, or Bosnia and Herzegovina).² 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.³

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. 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



2. 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*].

3. 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.

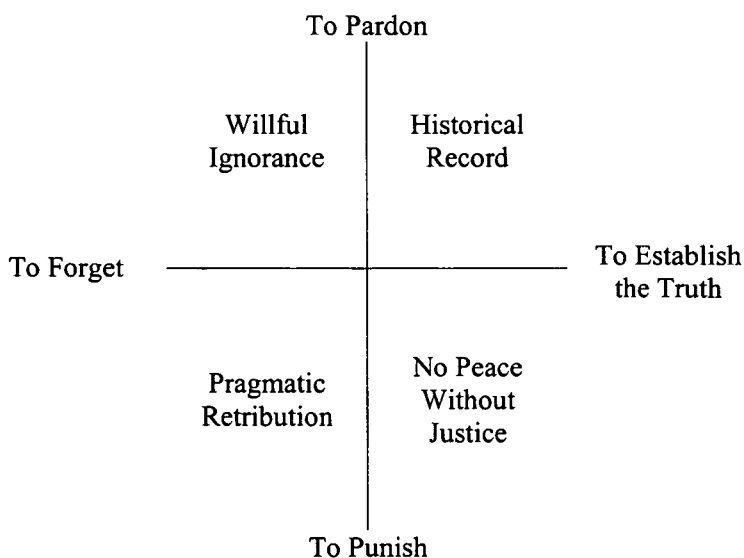
II. ATTITUDES TOWARD PAST WAR CRIMES AND HUMAN RIGHTS ABUSES

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:⁴

- (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



Each of the attitudes can be traced back to certain identifiable motives, as illustrated by some historical examples. The desire for “willful ignorance”

4. 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.

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.⁵ 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.⁶

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.⁷

“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.

5. *Letter Dated 12 July 1999 from the Chargé 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), <http://www.sierra-leone.org/lomeaccord.html> [hereinafter Lomé Peace Agreement].

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

7. 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).

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.⁸ 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 Yugoslavia⁹ 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 Croatsians, Muslims, and Albanians.¹⁰

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.¹¹

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

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

9. 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.

10. Milošević is being prosecuted for those crimes, however, by the International Criminal Tribunal for the Former Yugoslavia in The Hague. On the trial against Milošević, see, generally, MICHAEL P. SCHARF & WILLIAM A. SCHABAS, *SLOBODAN MILOŠEVIĆ ON TRIAL: A COMPANION* (2002).

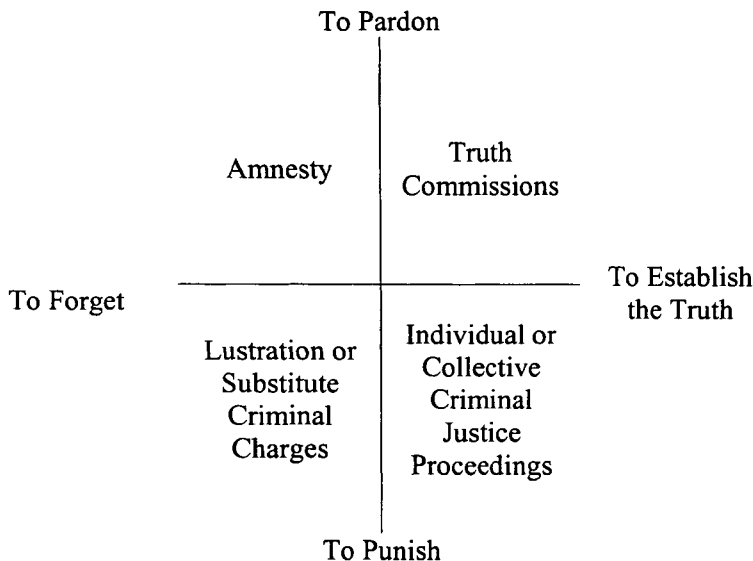
11. Because it would have taken many decades for the ICTR or national courts to process the high number of cases, it became necessary to adopt a pragmatic approach. Confessions have been encouraged in exchange for reduced sentences, and lesser offenders have been moved to a new, village-based community 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.

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.¹²

- (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



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.¹³ Alternatively, a conditional or individual amnesty can be

12. 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.

13. 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.

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.¹⁴

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

14. *Id.* at 36.

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).¹⁵ 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

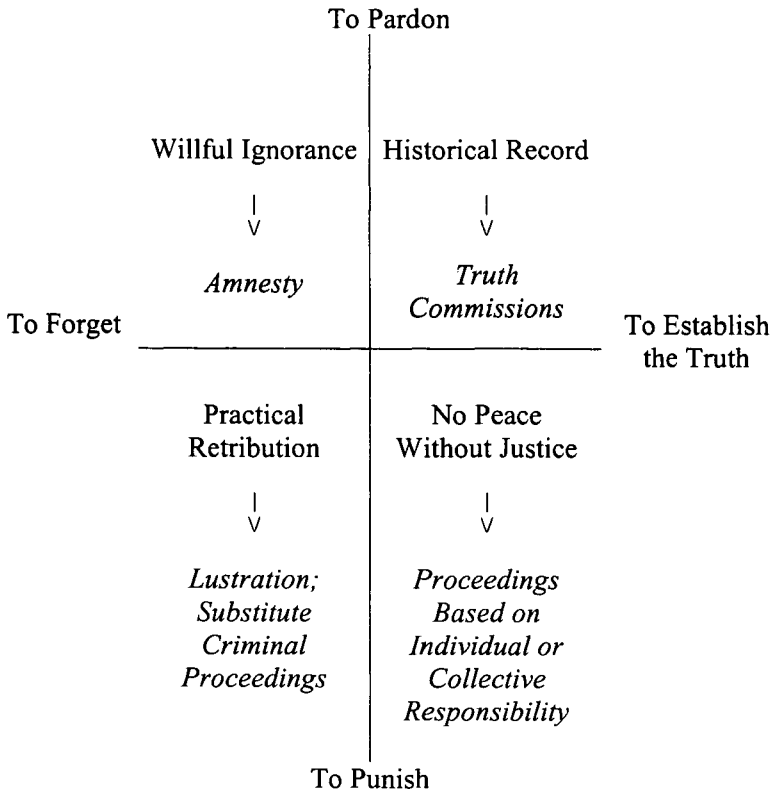
Each of the four basic attitudes to past war crimes and human rights abuses described in Part II corresponds to a certain form of reaction described in Part III:

- (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.

15. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.)* I.C.J. (Mar. 20, 1993) para. 135(r), <http://212.153.43.18/icjwww/idocket/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/idocket/icry/icry_orders/icry_iapplication_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.

FIGURE 4. ATTITUDES AND TYPES OF REACTION
TOWARD PAST WAR CRIMES AND HUMAN RIGHTS ABUSES



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

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 rehashing 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

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.¹⁶ 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.¹⁷ 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 majority 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.¹⁸

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.¹⁹ 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.²⁰

16. On the impact of this trend on state sovereignty, see Ivan Šimonović, *State Sovereignty and Globalization: Are Some States More Equal?*, 28 GA. J. INT'L & COMP. L. 3, 381, 384-89, 395-98 (2000).

17. 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).

18. 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. 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).

19. 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.

20. 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 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.²¹ The International Committee of the Red Cross (ICRC) interprets the Geneva Conventions accordingly,²² and, importantly, the United Nations also has finally taken a firm stand on this matter.²³ It might be easier to negotiate a peace agreement by including an unlimited amnesty, but the resulting peace

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/rome.htm>.

21. 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.

22. 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.

23. 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 Lomé in 1999. See Lomé 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." Kritiz, *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.

would likely be unsustainable.²⁴ 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.²⁵ 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.²⁶ Even in cases where they do not have a direct mandate, truth commissions have tended to issue such recommendations.²⁷ Lustration and substitute criminal charges provide fast

24. The Lomé 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.

25. 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.

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

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.²⁷ 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.²⁸ 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.²⁹

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.³⁰ Whether the

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

28. 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.*

29. 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.

30. See Ivan Šimonović, *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>.

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.³¹ 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.³² 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;³³ 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 2003.³⁴

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.³⁵ 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.³⁶

31. 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.ipacademy.org/Publications/Reports/PublRepo_Inde_body.htm.

32. 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).

33. For comparison between the ad hoc tribunals for the Former Yugoslavia and Rwanda, see Catherine Cissé, *The International Tribunals for the Former Yugoslavia and Rwanda: Some Elements of Comparison*, 7 *TRANSNAT'L L. & CONTEMP. PROBS.* 103 (1997).

34. 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 Šimonović, *The Role of the ICTY in the Development of International Criminal Adjudication*, 23 *FORDHAM INT'L L.J.* 440 (1999).

35. 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”).

36. 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).

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.³⁷ 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.³⁸ It is shocking that in spite of all the international efforts, indicted war criminals in the Tribunal's custody—such as Milošević and Vojislav Šešelj—have remained the leaders of successful political parties in Serbia and Montenegro.³⁹ 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.⁴⁰ In the Republic of Croatia, national proceedings launched against the

37. 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.

38. 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.

39. Slobodan Milošević is the former president of Serbia (1989-97) and the Federal Republic of Yugoslavia (1997-2000). Vojislav Šešelj 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. Šešelj'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/serbiamontenegro.htm>.

40. 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.

young and popular general Mirko Norac—who had substantial 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.⁴¹

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.⁴² In hybrid courts, it can be decisive whether local or international judges form a majority.⁴³ 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.⁴⁴ 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

41. 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).

42. 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.

43. 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.

44. 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).

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.⁴⁵ 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

45. 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.

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 remains crucial for wounded societies to strengthen their own national justice systems in order to ensure sustainable peace and the rule of law.⁴⁶

46. 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).

