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A CAUTIONARY TALE

David Schwendiman*

I. INTRODUCTION

Among other things, the Utah Law Review symposium, “The Bystander Dilemma: The Holocaust, War Crimes, and Sexual Assault,” addresses the legal consequences of failure to act in the face of atrocity. The topic inspires a variety of questions: Who is a bystander? What makes one a bystander? When one witnesses atrocity does a legal duty attach that requires action? What are the consequences for the bystander or the observer, if one fails to act? Or simply chooses not to act? Are criminal sanctions available to address such failures or choices? Are criminal sanctions appropriate? Are existing modes of individual responsibility adequate for holding someone accountable for their failure or choice not to act? If not, is a new mode of liability required? And if it is, what acts or omissions and what levels of knowledge and intent will be enough to hold a person criminally liable for his or her inaction in the face of atrocity? What justifications might excuse inaction? Though not relevant to the question of guilt, what will aggravate or mitigate the punishment of one who is found guilty of being a bystander to atrocity under this new mode of liability?

The theme of the symposium is not entirely new. Neither are the questions. Writers and scholars have approached the failure to act in the face of atrocity in a variety of ways. Anthropologists, historians, ethicists, theologians, political and moral philosophers, novelists, among others, have taken up the topic and offered their own explanations and answers. Karl Jaspers, for example, confronted the moral dilemma of inaction in the face of atrocity for a generation of Germans in the lectures he delivered in 1945 on German guilt.¹ More recently, historian and political scientist Daniel Jonah Goldhagen, indirectly addressed the questions raised here in his book “Hitler’s Willing Executioners: Ordinary Germans and the Holocaust.”²

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¹ KARL JASPERS, *THE QUESTION OF GERMAN GUILT* (E.B. Ashton trans., Fordham University Press 2d ed. 2001).

² DANIEL JONAH GOLDHAGEN, *HITLER’S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (First Vintage Books 1997). Goldhagen focuses primarily

From a legal point of view, the symposium's theme suggests that a new mode of liability is required to extend individual responsibility for crime further than is currently the case. The question is: is that defensible? is it necessary or wise?

For a practitioner charged with investigating and prosecuting atrocity crimes,³ the question is more practical than it is theoretical. With that in mind, I choose to

on those who did the work of the Holocaust; that is, those who executed the plans to kill; "ordinary" Germans who did the killing. Since his subjects killed with knowledge and intent and were not simply observers who failed to act to prevent killing, they could not in any formulation be considered "bystanders." They were "direct perpetrators" under any recognizable conception of criminal liability. Nonetheless, his treatment of the origins of the thinking and circumstances that brought "ordinary" Germans to a point that when the historic opportunity presented itself they were not only able but motivated to kill Jews is instructive as an extreme study of how levels of culpability for atrocity can be evaluated. Where does the "bystander" who shared that thinking, did no killing, knew it was happening or suspected it, but did nothing to interfere with it, fit?

³ I choose to use the phrase "atrocity crimes," as coined by Ambassador David Scheffer in his 2012 book, *ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS* (2012), for economy and convenience rather than referring to "war crimes" or "crimes against humanity," or the crime of "genocide," or general collective terms such as "international criminal law," "international humanitarian law," or "international human rights law." According to Ambassador Scheffer, the term "atrocity crimes" describes "megacrimes" that may be "war crimes," or "crimes against humanity," or even "genocide," given the circumstances, or may be violations of conventions or norms covered by the larger collective terms. What sets them apart is they occur under circumstances that attract significant attention and cause the international community to react to them:

The simple reality is that until the atrocity crime reaches a high level of killing, wounding, or property destruction that decimates a society, tribunals will not prosecute the crime and the international community typically will not react to it.

Id., at 430.

Ambassador Scheffer summarizes his definition of "atrocity crimes" as follows:

In short, these are high-impact crimes of severe gravity that are of an orchestrated character, shock the conscience of humankind, result in a significant number of victims or large-scale property damage, and merit international response to hold at least the top war criminals accountable.

Id., at 429–30.

I am aware that by adopting this construction for economy and convenience I may be distorting the discussion a bit. Those who perpetrate crimes in the manner and on the scale contemplated by Ambassador Scheffer are clearly not "bystanders" by any definition. The direct question the essay asks is can one be prosecuted who merely knows of a crime or witnesses it as it is being committed, knows what is happening, knows it is part of a much larger set of crimes amounting to atrocity according to Ambassador Scheffer's definition, but does nothing to interfere with it, has no duty as a commander to intervene, may be

address the subject as a prosecutor, not as a scholar. I do so to caution against stretching individual responsibility for crime to cover the acts or lack of action of those who are mere observers, including, as a practical matter, many who must be relied upon as witnesses.

Fundamentally, promoting a new mode of liability that suggests a mere “bystander,” regardless how morally or ethically reprehensible his or her conduct might be under the circumstances, ought to be prosecuted for doing nothing—without more—threatens to encourage expectations in victims that will not be met. Hard experience has taught us that the resources, the will, and the patience of the victims, survivors and domestic and international support for the effort will not be there in the end if it tries to roam that widely or penetrate that deeply into the landscape of atrocity regardless how badly well-meaning, or not so well-meaning defenders of the effort might want it to. Introducing such expectations into the criminal justice process without a realistic possibility of meeting them will only compound the difficulty of achieving and preserving the legitimacy of the outcomes in atrocity prosecutions. Any expectation attached to atrocity prosecution must be managed well and managed successfully.

This Article examines and expands on this thesis by first addressing why we prosecute atrocity crime; that is, why a criminal justice approach has been favored in the past for holding people accountable for their misconduct, particularly during or in connection with conflict. I offer my reflections on the question rather than commentary on what I know of the thoughtful and extensive writing that has been done on the subject.⁴ My reflections are based on my experience as a war crimes investigator and prosecutor and as an executive prosecutor responsible for overseeing the investigation and prosecution of atrocity crimes. They are colored and limited, of course, by the conflict with which I am most familiar; the conflict that came with the break-up of the former Yugoslavia, including the struggle that preceded and followed when Kosovo broke away from Serbia in 1998, 1999, and 2000.

Next, I address the question of legitimacy; what I believe it means based on my experience as a war crimes prosecutor, executive prosecutor, and as an observer of justice systems in Afghanistan and elsewhere; and why I believe achieving legitimacy and the perception of legitimacy among those affected by atrocity prosecutions are the central challenges faced by the most recent efforts to hold people accountable for their conduct in conflict. I contend that expanding modes of liability for individual responsibility for that conduct is unwise because

powerless to interfere in any case, but is nonetheless present or on notice? The larger issue is whether holding out the possibility of being able to prosecute someone in that situation does more damage than good for the future of atrocity crimes prosecution as a whole. It is in this context and as a general description of the kinds of investigations and prosecutions I have been part of that I feel comfortable using Ambassador Scheffer’s term.

⁴ See, e.g., TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* (1993); SCHEFFER, *supra* note 3; LARRY MAY, *AFTER THE WAR ENDS: A PHILOSOPHICAL PERSPECTIVE* (2012); cf. DAVID RIEFF, *IN PRAISE OF FORGETTING: HISTORICAL MEMORY AND ITS IRONIES* (2016).

of the potential it has for inadvertently compromising the legitimacy and, more importantly, whether those affected by the outcomes of atrocity prosecutions see those outcomes as legitimate. If the efforts of those engaged in atrocity prosecution do not deliver outcomes that are perceived as legitimate by those they affect, the outcomes will likely be difficult to enforce and will do little to address the root causes of the conflicts that provided the opportunity for atrocity. In this regard, atrocity prosecution is unique.

Unrealistic expectations, expectations that cannot be met when it comes to atrocity prosecutions, are a major source of this threat. This Article discusses the critical need to manage expectations associated with atrocity prosecution. It looks at some of the means devised and used in the past to manage the unique situations and expectations with which I am familiar. It examines their relevance to current and future efforts to hold people accountable for atrocity crimes.

As I noted earlier, I have chosen to approach the subject of the symposium as a prosecutor. For that reason, the Article concludes by addressing some of the practical proof problems I believe argue against expanding existing modes of liability for prosecuting atrocity. One of the most obvious is that “bystanders” are often a primary source of direct evidence of the crime base and of evidence of individual liability in any atrocity prosecution, however reluctant they may be to participate in an investigation or testify in a prosecution. Adding potential criminal liability to the reasons they will assert for not giving evidence is not helpful.

II. FUNDAMENTAL QUESTIONS

The invitation to participate in the symposium and reduce to writing some thoughts on the “bystander dilemma” and its implications gives me as a practitioner a rare opportunity to reflect not only on the legal and technical issues raised by the subject, but also to examine some fundamental questions that surround them. It gives me the chance, for example, to consider independently from my duties and responsibilities as a chief prosecutor for a tribunal newly established to address accountability for conduct committed in conflict in the Balkans in 1998, 1999, and 2000,⁵ and why we go to the considerable expense and

⁵ See Constitution of the Republic of Kosovo, art. 162 (10).

To comply with its international obligations in relation to the Council of Europe Parliamentary Assembly Report Doc 12462 of 7 January 2011, the Republic of Kosovo may establish Specialist Chambers and a Specialist Prosecutor’s Office within the justice system of Kosovo. The organisation, functioning and jurisdiction of the Specialist Chambers and Specialist Prosecutor’s Office shall be regulated by this Article and by a specific law.

See also Law on Specialist Chambers and Specialist Prosecutor’s Office, Law No. 05/L-053 (05 August 2015), art. 1(2).

effort of prosecuting atrocity crimes at all. Why do we use up great stores of political and diplomatic capital to make it possible to prosecute atrocity crimes? Why do we expend great sums of money to finance investigations, build infrastructure, staff prosecutor's offices and courts, and provide money for prosecuting and defending atrocity crimes? Why do international and regional organizations such as the United Nations and the European Union risk prestige and credibility by involving themselves in the prosecution of atrocity crime? Is there value in holding people individually accountable for atrocity crimes?

If prosecuting those responsible for atrocity is deemed worth the expense, the energy and the political will it takes to do it, the commitment must be reasonable, but unequivocal. Further, the outcomes must be achieved by legitimate means; that is, by institutions and actors and through processes that meet international

Specialist Chambers within the Kosovo justice system and the Specialist Prosecutor's Office are necessary to fulfil the international obligations undertaken in Law No. 04/L-274, to guarantee the protection of the fundamental rights and freedoms enshrined in the Constitution of the Republic of Kosovo, and to ensure secure, independent, impartial, fair and efficient criminal proceedings in relation to allegations of grave trans-boundary and international crimes committed during and in the aftermath of the conflict in Kosovo, which relate to those reported in the Council of Europe Parliamentary Assembly Report Doc 12462 of 7 January 2011 ("The Council of Europe Assembly Report") and which have been the subject of criminal investigation by the Special Investigative Task Force ("SITF") of the Special Prosecution Office of the Republic of Kosovo ("SPRK").

Chapter III of the Law on Specialist Chambers and Specialist Prosecutor's Office limits the jurisdiction of Chambers and the mandate of the Specialist Prosecutor to "crimes set out in Articles 12-16 which relate to the Council of Europe Assembly Report ["Marty Report"]." The crimes set out in Articles 12 through 16 of the law are "Crimes Against Humanity Under International Law" (Article 13), "War Crimes Under International Law" (Article 14), the substantive criminal laws in force in Kosovo during the "temporal jurisdiction of the Specialist Chambers" (1998, 1999, 2000); that is, the Criminal Code of the Socialist Federal Republic of Yugoslavia (1976), the Criminal Law of the Socialist Autonomous Province of Kosovo (1977), any more lenient substantive criminal law in force between 1989 and 2000, and a variety of crimes in the Kosovo Criminal Code that address matters affecting the integrity of judicial proceedings (e.g. bribery) (Article 15). The law also requires the Specialist Chambers to apply "customary international law" as well as the substantive law just described. (Article 12) Chambers is permitted to determine "customary international law" by resorting to "sources of international law, including subsidiary sources such as the jurisprudence from the international *ad hoc* tribunals, the International Criminal Court and other criminal courts." (Article 3(3)). As noted, the temporal jurisdiction of the Chambers defined in Article 7 of the law to reach acts committed in or affecting the territory of Kosovo in 1998, 1999, and 2000 (i.e. "The Specialist Chambers shall have jurisdiction over crimes within its subject matter jurisdiction which occurred between 1 January 1998 and 31 December 2000.").

standards.⁶ More importantly, the institutions, actors, processes and outcomes must be perceived and accepted as legitimate by those they affect; a much more difficult challenge. Whatever the intention, whatever the cost, if this challenge is not met, true success is unlikely.

What the limits of the criminal sanction are in the case of atrocity crime,⁷ the expectations raised by the means that are available to investigate and prosecute atrocity crime, (specifically in the case of this Article), the existing modes of liability I have to work with,⁸ and the problems related to managing those

⁶ See, e.g., Universal Declaration of Human Rights; European Convention on Human Rights; International Covenant on Civil and Political Rights; Mount Scopus International Standards of Judicial Independence (2008/2015); UNITED NATIONS OFFICE ON DRUGS AND CRIME, COMPENDIUM OF UNITED NATIONS STANDARDS AND NORMS IN CRIME PREVENTION AND CRIMINAL JUSTICE (United Nations 2016).

⁷ See, e.g., Herbert L. Packer, *THE LIMITS OF THE CRIMINAL SANCTION* 72 (1968). Professor Packer's book was published well before the creation of the ICTY and the ICC. He does not discuss the application of criminal sanctions in cases of atrocity, but his treatment of culpability as the principal limiting factor in his description of the minimal doctrinal content of criminal law is as relevant to the discussion of "bystander" culpability as it is to the development of his thesis, the "prudential limits of the criminal law," which he calls the "main concern" of the book.

⁸ Law on Specialist Chambers and Specialist Prosecutor's Office, Law No. 05/L-053 (05 August 2015) art. 16(1)(a) provides:

a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of such crime shall be individually responsible for the crime.

Article 12 of the special law directs the "Specialist Chambers" to apply customary international law applicable at the time crimes were committed "in accordance with Article 7(2) of the European Convention of Human Rights and Fundamental Freedoms and Article 15(2) of the International Covenant on Civil and Political Rights, as incorporated and protected by Articles 19(2), 22(2), 22(3) and 33(1) of the Constitution." Article 3(3) allows the judges to look to "sources of international law, including subsidiary sources such as the jurisprudence from the international *ad hoc* tribunals, the International Criminal Court and other criminal courts" to determine what customary international law is in that regard. For these reasons, it is useful to help sort out what the existing modes of liability in atrocity crimes prosecutions are to briefly examine the jurisprudence of the ICTY, the ICTR, and that of other special tribunals and domestic courts that have dealt with the substantive law the new special courts will be using, as well as commentary and other "sources" traditionally considered authoritative.

The Kosovo provision on individual responsibility is virtually identical to Article 7(1) of the Statute of the ICTY:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

Article 25(3) of the Rome Statute, is similar, but expands on the definition of individual responsibility that applies in cases brought before the ICC:

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
- (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
- (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

See WOMEN'S INITIATIVE FOR GENDER JUSTICE, EXPERT PAPER NO. 1, MODES OF LIABILITY, November 2013, <http://iccwomen.org/documents/Modes-of-Liability.pdf>, accessed on January 5, 2017. A thorough examination of "co-perpetration" as a mode of liability acknowledged by the ICC as permitted by Article 25(3)(d) of the Rome Statute. "Joint criminal enterprise" as interpreted by the ICC.

The Kosovo special law, the Statute of the ICTY, and the Rome Statute all address the concept of command responsibility in virtually the same way. See Article 16(1)(c) and (d), Law on Specialist Chambers and Specialist Prosecutor's Office, Law No. 05/L-053 (05 August 2015); Article 7(3) and (4), Statute of the ICTY; Article 28, Rome Statute.

With the exception of its treatment of joint criminal enterprise as a "commission" mode of liability, the jurisprudence of the ICTY is relatively settled regarding what is covered by Article 7(1):

- **Planning**, see, e.g., *Kordic and Cerkez* (Trial Chamber), February 26, 2001, para. 386 (" . . . an accused may be held criminally responsible for planning

alone.”); *Kordic and Cerkez* (Appeals Chamber), December 17, 2004, para. 26 (“The *actus reus* of ‘planning’ requires one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated.”); *Kordic and Cerkez* (Appeals Chamber), December 17, 2004, para. 31 (“[I]n relation to ‘planning,’ a person who plans an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that plan, has the requisite *mens rea* for establishing responsibility under Article 7(1) of the Statute pursuant to planning. Planning with such awareness has to be regarded as accepting that crime.”); *Kordic and Cerkez* (Appeals Chamber), December 17, 2004, para. 26 (“It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.”).

• **Instigating**, *see, e.g.*, *Kordic and Cerkez* (Appeals Chamber), December 17, 2004, para. 27 (“The *actus reus* of ‘instigating’ means to prompt another person to commit an offence.”); *Galic* (Trial Chamber), December 5, 2003, para. 168 (“‘Instigating’ means prompting another to commit an offence, which is actually committed.”); *Brdjanin* (Trial Chamber), September 1, 2004, para. 269 (“The nexus between instigation and perpetration requires proof. It is not necessary to demonstrate that the crime would not have been perpetrated without the accused’s involvement; it is sufficient to prove that the instigation was a factor clearly contributing to the conduct of other persons committing the crime in question.”); *Limaj et al.* (Trial Chamber), November 30, 2005, para. 514 (“Both acts and omissions may constitute instigating, which covers express and implied conduct.”); *Galic* (Trial Chamber), December 5, 2003, para. 168 (“It has been held in relation to ‘instigating’ that omissions amount to instigation in circumstances where a commander has created an environment permissive of criminal behavior by subordinates.”); *Kordic and Cerkez* (Appeals Chamber), December 17, 2004, para. 32 (“With respect to ‘instigating,’ a person who instigates another person to commit an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that instigation, has the requisite *mens rea* for establishing responsibility under Article 7(1) of the Statute pursuant to instigating. Instigating with such awareness has to be regarded as accepting that crime.”).

• **Ordering**, *see, e.g.*, *Kordic and Cerkez* (Appeals Chamber), December 17, 2004, para. 28 (“The *actus reus* of ‘ordering’ means that a person in a position of authority instructs another person to commit an offence”); *Kordic and Cerkez* (Appeals Chamber), December 17, 2004, para. 28 (“A formal superior-subordinate relationship between the accused and the perpetrator is not required.”); *Blaskic* (Trial Chamber), March 3, 2000, para. 282 (“[A]n order does not need to be given by the superior directly to the person(s) who perform(s) the *actus reus* of the offence.”); *Blaskic* (Trial Chamber), March 3, 2000, para. 281 (The order “can be explicit or implicit.”); *Strugar* (Trial Chamber), January 31, 2005, para. 232 (“As this form of liability is closely associated with ‘instigating,’ subject to the additional requirement that the person ordering the commission of a crime have authority over the person physically perpetrating the offence, a causal link between the act of ordering and the physical perpetration of a crime, analogous to that which is required for instigating, also needs to be demonstrated as part of the *actus reus* of ordering. The Chamber further accepts that, similar to instigating, this link need not be

such as to show that the offence would not have been perpetrated in the absence of the order.”); *Kordic and Cerkez* (Appeals Chamber), December 17, 2004, para. 30 “[T]he Appeals Chamber held that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing responsibility under Article 7(1) of the Statute pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime.”).

- **Committing**, *see, e.g., Galic* (Trial Chamber), December 5, 2003, para. 168 (“‘Committing’ means that an ‘accused participated, physically or otherwise directly, in the material elements of a crime under the Tribunal’s Statute.’ Thus, it ‘covers first and foremost the physical perpetration of a crime by the offender himself.’”); *Krstic* (Trial Chamber), August 2, 2001, para. 601 (“‘Committing’ covers physically perpetrating a crime or engendering a culpable omission in violation of criminal law.”); *Kvočka et al.* (Trial Chambers), November 2, 2001, para. 251 (“The requisite *mens rea* [for committing a crime] is that, as in other forms of criminal participation under Article 7(1), the accused acted in the awareness of a substantial likelihood that a criminal act or omission would occur as a consequence of his conduct.”).

The ICTY considers joint criminal enterprise (JCE) to be one form of “commission” liability under Article 7(1). *See, e.g., Stakic* (Trial Chamber), July 31, 2003, paras. 438, 528 (“The Trial Chamber emphasizes that joint criminal enterprise is only one of several possible interpretations of the term ‘commission’ under Article 7(1) of the Statute and that other definitions of co-perpetration must equally be taken into account. Furthermore, a more direct reference to ‘commission’ in its traditional sense should be given priority before considering responsibility under the judicial term ‘joint criminal enterprise.’”). This essay is not intended as a thorough examination of these modes of liability, as settled or as, in the case of JCE-3, controversial as they are or are likely to be in future. Neither is it an examination of how the International Criminal Court (ICC) has dealt with the question of conspiracy in its practice. Safe to say that JCE in any of its three generally understood forms, whether one accepts any or all of them as viable and useable modes of liability for purposes of prosecuting atrocity crime or not, requires proof of more than mere observation and failure to act. A JCE theory of liability would not be used to deal with mere “bystanders.”

- **Aiding and abetting** is considered by the ICTY to be a form of accessory liability. *See Kunarac, Kovac and Vukovic* (Trial Chamber), February 22, 2001, para. 391 (“As opposed to the ‘commission’ of a crime, aiding and abetting is a form of accessory liability.”). As to the elements, *see, e.g., Blaskic* (Appeals Chamber), July 29, 2004, para. 46 (“In this case, the Trial Chamber, following the standard set out in *Furundzija*, held that the *actus reus* of aiding and abetting ‘consists of practical assistance, encouragement, or moral support which has a substantial effect of the perpetration of the crime.’ . . . The Appeals Chamber considers that the Trial Chamber was correct in so holding.”); *Simic, Tadic and Zaric* (Trial Chamber), October 17, 2003, para. 162 (“The *actus reus* of aiding and abetting may be perpetrated through an omission, based on a duty to act, provided that the failure to act had a substantial effect on the commission of the crime and that it was coupled with the requisite *mens rea*.”); *Blaskic* (Trial

expectations need to be carefully examined in order to better understand how they affect the outcomes and the perceptions of those affected by them.

III. WHY PROSECUTE ATROCITY CRIME?

Contemplating creation of a bystander mode of criminal liability for atrocity crimes does not call into question the need, or even the advisability, of prosecuting those responsible for atrocity crimes. Accountability has value regardless. Simply, committing atrocity crimes must have consequences for those responsible notwithstanding the mode of liability used. At its core, the reason for spending the time, effort, and treasure to prosecute atrocity crimes is captured in this verse from “The Rose Garden” in which Sheikh Saadi reflects on the character and conduct of kings. In the story a dervish gives advice, a warning, to an unjust Arab king who comes upon the dervish in a mosque at Damascus. The dervish tells him to treat his subjects more justly, then offers this:

The human race is made up of men
all created from the one source.

Chamber), March 3, 2000, para. 284, (The failure to act must have a “decisive effect” on the commission of the crime.); *Blaskic* (Appeals Chamber), July 29, 2004, para. 45 (“In *Vasiljevic*, the Appeals Chamber set out the . . . *mens rea* of aiding and abetting. It stated: . . . In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist [in] the commission of the specific crime of the principal. . . .”); *Strugar* (Trial Chamber), January 31, 2005, para. 350 (“Regarding the requisite *mens rea*, it must be established that the aider and abettor was aware that his acts were assisting in the commission of the crime by the principal. This awareness need not have been explicitly expressed, but it may be inferred from all relevant circumstances.”).

With regard to whether it is enough to merely be present at the scene of a crime to be found to be an aider and abettor, *see* *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 517 (“While each case turns on its own facts, mere presence at the scene of a crime will not usually constitute aiding or abetting. However, where the presence bestows legitimacy on, or provides encouragement to, the actual perpetrator, that may be sufficient.”); *Vasiljevic* (Trial Chamber), November 29, 2002, para. 70 (“Mere presence at the scene of the crime is not conclusive of aiding and abetting unless it is demonstrated to have a significant encouraging effect on the principal offender.”); *Aleksovski* (Trial Chamber), June 25, 1999, para. 64 (“Mere presence constitutes sufficient participation under some circumstance so long as it was proved that the presence had a significant effect on the commission of the crime by promoting it and that the person present had the required *mens rea*.”).

See also GUENAELE METTRAUX, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS 279–93 (2006); GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 116–27 (2005).

If one man feel pain, the others,
from the same source, cannot be
indifferent to it.
You, who are unmoved by others'
suffering, are not entitled to the
name of man!⁹

Holding a person accountable for causing the suffering of others is the human thing to do.

The goal of holding those responsible for atrocity crime accountable in a criminal trial, from a practical standpoint, cannot be to achieve a political outcome or to vindicate, defend, dismantle or correct a particular political or historical narrative associated with conflict. It must simply be to make those responsible for atrocity answer for their crimes and suffer appropriate punishment as a consequence.

There is the potential, however, for investigations and prosecutions of atrocity to produce a record that will affect the history of the conflict and the period and context in which it occurred; facts that have the potential to change the way that events and the people involved in conflict are understood. Criminal trials and guilty pleas can help correct the historical record, shape new narratives, debunk revisionism, and foster common understanding that reduces the likelihood of future conflict. In this way, perhaps, atrocity prosecutions help to make it possible for victims, survivors and perpetrators alike to begin to live with the past rather than be trapped by narratives that condemn them to live in the past.

Prosecution of atrocity crimes is unlikely, except in the most indirect way, to compensate victims for their losses, even when there is an obligation on the part of the prosecutor and court to provide means for victims to obtain reparations from the perpetrators.¹⁰ Neither is it going to take back the beatings nor restore lost lives. Prosecuting atrocity crimes cannot restore the victims back to where they were before what was done to them.

The very act of investigating and then prosecuting atrocity crime, however, may prevent further suffering or additional damage from being done to victims and survivors.

Conversely, investigating and prosecuting atrocity crimes when perpetrators are at large and still in control of some areas or aspects of conflict, if the effort is taken seriously by those likely to be subjects of the investigations and

⁹ SHEIKH MUSLIHUDDIN SAADI SHIRAZI, *THE ROSE GARDEN (GULISTAN)* 33 (Omar Ali-Shah trans., Tractus Books 1997).

¹⁰ *See, e.g.*, art. 2 (Right to Life) and art. 13 (Right to an Effective Remedy), The European Convention on Human Rights; *see also*, art. 193, Criminal Procedure Code, Bosnia and Herzegovina (2003) (i.e., “(1) A claim under property law that has arisen because of the commission of a criminal offense shall be deliberated on the motion of authorized officials in criminal proceedings if this would not considerably prolong such proceedings. (2) A claim under property law may pertain to reimbursement of damage, recovery of items, or annulment of a particular legal transaction.”).

prosecutions, and there is a real possibility that they will be held accountable, may lead to greater atrocity and greater suffering, as the offenders attempt to get rid of evidence and eliminate or silence witnesses.

It is possible that in addition to having forensic value, a humanitarian benefit will derive from the collection and analysis of evidence of atrocity if it leads to locating, recovering and identifying the dead. Families may be re-united with those they lost, for example. In some small way, doubts and the daily terror that comes from not knowing might be resolved. Victims of mass murder often go nameless: their individuality lost. Locating, recovering, and identifying the dead may also bring a measure of dignity to those who were murdered by giving them back their identities, by restoring their names, by seeing them again as people rather than nameless numbers.

Restoring or protecting the dignity of those who have suffered is a worthy byproduct of atrocity prosecution regardless whether it deters or prevents present or future crimes. Giving evidence at trial, having a chance to speak publicly about what happened to them, facing their tormentors in a public place, in a courtroom where the accused no longer have control over anything and can do no further harm to those they victimized, may return some control to the lives of those from whom control was taken when atrocity was committed. Participating in a prosecution may, for some, provide a means for expiating survivors' guilt.

One of the assumptions made when civilian criminal trials are chosen as the way to deal with allegations of atrocity is that subjecting them to the rigorous demands of a criminal trial will clear the air for reconciliation. Another is that such allegations can be addressed in criminal trials in ways that promote and maintain stability in the places where conflict occurred. It is further assumed that addressing atrocity in this way, fixing responsibility by making people answer criminal charges and depriving them of their liberty or administering other punishments if they are found guilty, will lead to greater security and stability and help advance development in the places that are affected both by the conflict and by the aftermath. In this reading, there can be no "reconciliation" without accountability, without correcting narratives or reconciling them so they no longer aggravate the sentiments that bred conflict and might eventually lead to renewed violence. And all of that, by this logic, is done to some extent (one worth the time, energy, political capital, and resources it takes to do it properly) by a criminal trial.

There is, however, no clear body of empirical evidence or scholarship that answers whether holding people accountable for atrocity crimes achieves, truly promotes or preserves stability or security during conflict or in a post-conflict state.¹¹ In fact, the result may be just the opposite, at least in the short term. In cases of international and regional intervention in armed conflict, efforts to save lives, stop uncontrollable displacement, dislocation and mass migration, and to put an end to fighting by political means, are often complicated by questions of how to deal with atrocity committed in connection with the conflict.

¹¹ See DAVID RIEFF, IN PRAISE OF FORGETTING: HISTORICAL MEMORY AND ITS IRONIES (2016).

Interventions in cases of atrocity are fraught political endeavors even when they are undertaken to address humanitarian crises and regardless whether they involve the use of military force. As a consequence, diplomats and politicians may prefer to avoid addressing responsibility for atrocity in negotiations to end conflict in favor of stopping the fighting and ameliorating its affects. They may consider the prospect of atrocity prosecutions an unwelcome and nettlesome distraction. This is partly because ending the fighting, saving lives, stopping dislocation and mass migration, and beginning the process of achieving political settlement almost invariably and unavoidably involves making peace with or even making allies of people who are known to have committed atrocity or who have enriched themselves corruptly during and as part of the conflict.

Negotiators may want to sideline discussion of atrocity because the states they represent deliberately chose to ignore the conduct of allies or sponsored actors during conflict in order to give them time and space to achieve certain tactical or strategic objectives the intervenors favored. Intervenors themselves may have engaged in conduct that could be considered marginally culpable. It may be embarrassing for intervenors to acknowledge atrocity that occurred in areas for which they were notionally or practically responsible if they were unable to stop what they could do little to control.

Complicating all of this is the fact that people who are part of the political, military, and power elite on all sides of a conflict (often with the help or encouragement of international or regional sponsors) strive to position themselves to protect their gains, recoup their losses, and acquire a say in the resolution of conflict that will advance their self-interest and will insist on significant post-conflict leadership roles, including major roles in government, as a condition of their participation in any peace process.

Regardless, whether they are forced to acknowledge the level of atrocity engaged in by parties to a conflict, the desire to achieve a political settlement on the part of the states that intervene bodes ill for negotiators taking hard positions with regard to accountability in talks to end conflict.

The goal of any political settlement is to achieve security and restore stability to an affected state or region so intervention can end and recovery can begin. The looming specter of atrocity prosecution is an unwelcome interloper when it comes to the diplomacy required to achieve such a settlement. Negotiators may talk about accountability, but their true focus will be on what needs to be done to stop the killing, staunch the bleeding, and end forced dislocation and mass migration. This is so the process of putting the pieces back together again, something that will allow the intervenors to withdraw.

Considerable public sentiment is often marshaled in support of this kind of approach because stopping the bloodshed and dislocation, something that is widely and vividly reported on a daily basis in the world media, becomes a practical, political, and moral imperative.

In states that intervene, domestic impatience with the cost of an intervention, in casualties as well as treasure, drives intervenors to want to disengage as soon as possible. So, while accountability for atrocity may come up during negotiations,

rarely is it taken seriously by those who worry that discussion of atrocity will derail the path to settlement and disengagement.

Accountability is left for another, more settled time—a time that in nearly every case never comes or comes many years later when dealing effectively with the cases is extremely difficult and costly if not practically impossible.

Investigating and prosecuting perpetrators of atrocity crime who occupy positions of influence and control, and threaten the resolution of conflict and long-term stability, however, may be one way to dislodge them or neutralize them, even if they are still in power, to allow an end to conflict. If this is done, it must be done legitimately (i.e. without political influence or improper interference; by independent prosecutors and judges acting according to facts carefully collected and tested and their best, most well-informed reading and understanding of applicable law; without fear or favor) and must achieve results that are both legitimate and perceived to be legitimate by those affected by them. The will must exist on the part of the intervenors to promote and support the effort. The system must be robust enough to manage it. Resources must exist to make it possible. Personal jurisdiction must be acquired over the actors. The prospect of succeeding must be real; that is, there must be a realistic chance that evidence admissible in a properly constituted court, available to be used in trial, is going to be sufficient in quality and quantity to result in conviction that will support meaningful and enforceable punishment and survive appeal. The process must advance at a pace, both with regard to charges and to their ultimate resolution, that promotes rather than corrodes real legitimacy and the perception of legitimacy.

Accountability is also an international legal obligation. The choice of criminal prosecution for achieving it is already prescribed by treaty and convention. What the impact is or might be is irrelevant. People must be prosecuted because international obligations undertaken by the state must be honored.¹² This duty to

¹² See, e.g., Convention on the Prevention and Punishment of Genocide (1949), art. 1 (i.e., “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”); see also Geneva Convention IV: Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, art. 146 (i.e., “The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.”); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 4(1) and (2) (i.e., “(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.”).

prosecute is presumably based on the assumption made at the time the conventions were agreed to that there is a political and practical, as well as a humanitarian, benefit to be derived from punishing violations of the norms associated with the international obligations. It is a legal as opposed to a moral, political, or practical imperative.

In light of all of this, aside from being the human thing to do, it seems intuitive that holding people accountable for committing atrocity by prosecuting them criminally, notwithstanding the problems that may create for negotiating an end to conflict and relief for intervenors, is an essential proven feature of the process that must be undertaken to achieve durable long-term resolution of the tensions that promoted conflict and contributed to violence in the first place. If conduct that violates universally recognized norms is not dealt with by means that attract the confidence of those affected by atrocity; if people are not held accountable for what they do in conflict that violates those norms; if harm done is not acknowledged openly; if victims aren't at least given a chance to confront those who did them harm in a controlled setting where the accused do not have the upper hand; and if corrosive narratives built on inaccurate or manipulated facts are allowed to go unchecked and uncorrected; there is little hope for a lasting end to conflict and a lingering likelihood of future atrocity.

IV. LEGITIMACY

Assume for purposes of discussion that the problems I've suggested and others can be resolved, that existing modes of liability (e.g. aiding and abetting) are not adequate or not available to hold those who engage in atrocity crime accountable for their acts. Assume as well that a new mode of liability is needed to reach those who simply observe atrocity and fail to intervene regardless how futile the intervention is likely to be. The expectations that such a mode of liability will raise for victims and survivors of atrocity must then be considered. The effects of those expectations on the system given the task of prosecuting atrocity crime and on those in it who are responsible for making the decision to prosecute must also be examined. The consequences occasioned by the loss of credibility and legitimacy that will attend a decision not to use the "bystander" mode of liability in an atrocity crimes case must be weighed. The damage that may be done to the political will to engage in atrocity crime prosecution in the first place must be taken into account. The long-term effect on doing atrocity crime prosecutions must also be considered.

Answering these inquiries raises questions about how prosecutors decide what and who to prosecute for atrocity crimes. Given the number of victims, the number of people involved in one way or another actually doing the acts that constitute the atrocity; given the intensity of the crimes committed and the impact of those crimes across communities, lasting impact that lingers in narratives that live on for generations in some cases; given the number of direct perpetrators who are viable candidates for prosecution for their role in atrocity crimes; given the resources

available to attempt to address accountability for those crimes; given the political will that must exist to enable the prosecution of atrocity crimes; and given the time it takes to prosecute even the most rudimentary atrocity crimes case, selecting and prioritizing cases is a fundamental concern for a prosecutor tasked with investigating and prosecuting atrocity crime. The prosecutor is the gate through which all of this is done. It is his or her decision that initiates the commitment of resources, engages the system created to investigate, prosecute and punish atrocity crimes, and puts political will to the test in every case. How is that decision to be made? And how will that decision affect legitimacy?

As noted earlier, one of the primary goals of atrocity crimes prosecution is to hold those responsible for such crimes accountable by achieving legitimate outcomes that are perceived and accepted as legitimate by those they affect. Legitimacy is a complex word; one often carelessly used and, like justice, one subject to a myriad of definitions and applications and understood, if understood at all, in a variety of ways depending on a person's self-interest; that is how he or she has been or is or is likely to be impacted by events and circumstances and what he or she stands to gain or lose as it relates to those circumstances and events.

As a practitioner responsible for playing a role in achieving outcomes that are legitimate and perceived and accepted as such, I must give the term basic content if it is to serve as a guide for decision-making for me and those I supervise, and for the courts and constituencies I serve. My definition is a practical, useful, and useable one; not one intended to be comprehensive. It is a definition arrived at by experience and reflection, not study.

With that in mind, I define legitimate outcomes for my purposes to mean results achieved by applying substantive law that is consistent with generally recognized international norms.¹³ These outcomes must be achieved by institutions and by processes governed by fundamental internationally recognized due process and human rights norms.¹⁴ They must be consistent with domestic substantive law, norms and practices that are not in conflict with or can be reconciled with international norms to ensure they are accepted and enforceable. Likewise, outcomes must be consistent with the beliefs and the religious and cultural laws, norms and practices of the communities affected by them to the extent they can be reconciled with international norms.

¹³ See, e.g., Nuremberg Principles, Chapter LX, Agreement and Charter, August 8, 1945, Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London (1945), http://loc.gov/r/rfd/Military_Law/pdf/jackson-rpt-military-trials.pdf; ICTY and ICTR Statutes; the Rome Statute; Genocide Convention, Convention Against Torture, Geneva Conventions and Protocols; JENNIFER TRAHAN, GENOCIDE, WAR CRIMES, CRIMES AGAINST HUMANITY: A TOPICAL DIGEST OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (Human Rights Watch, 2006).

¹⁴ See, e.g., Universal Declaration of Human Rights; European Convention on Human Rights; International Covenant on Civil and Political Rights.

Legitimate outcomes are those achieved by independent institutions¹⁵ and actors¹⁶ competent to conduct their business in accord with international norms, domestic practices and norms, and local beliefs and practices, and able to reconcile any conflicts and differences in ways that are accepted by those affected by the outcomes. Institutions and actors must not succumb to influence (i.e. political, financial, ideological) that causes them to render decisions on anything other than the merits (i.e. relevant facts developed to the extent needed to enable a meaningful decision; an application of law that reflects knowledge and understanding of relevant law and practice; decisions that are reasonably consistent with how similar matters have been resolved in the past and defensible as a reasonable extension of existing law if not). Legitimate outcomes are enforceable because the means exist now, and in the future, to enforce them, and because they meet the reasonable expectations of those they affect—the key word reasonable—and thus are likely to be accepted.

In atrocity crimes prosecution then, outcomes, whether they are achieved in international tribunals, domestic tribunals, or in the variety of hybrid courts and tribunals that have emerged since the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Court (ICC), are likely to be legitimate if achieved in institutions, by actors, and through means that satisfy the criteria I've described. The remainder of this Article focuses on but one of those criterion—the reasonable expectations of those the outcomes affect.

V. RAISING AND MANAGING EXPECTATIONS

During the question and answer session at a recent program put on by The Hague Institute to examine the European Union's contribution to achieving "a more just global order,"¹⁷ one of the attendees, in the context of a discussion of the use of criminal investigations and prosecutions to hold actors accountable for misconduct in conflict, asked, "Who can stop the holocaust in Aleppo?" The implication was clear and expressed an expectation that is all too common; that investigating and prosecuting atrocity crime can stop misconduct in conflict, even misconduct as wide-ranging and as catastrophic as what has produced devastation and suffering in the civilian population of Aleppo on a scale and intensity that is as great or greater than any conflict related human catastrophe since the end of World War II.

¹⁵ See, e.g., Mt. Scopus Approved Revised International Standards of Judicial Independence (Mar. 19, 2008), <http://www.cristidanilet.ro/docs/MtScopusInternationalStandrds.pdf>.

¹⁶ See, e.g., International Association of Prosecutors, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors (Apr. 23, 1999).

¹⁷ The Hague Institute, "The EU's Contribution to a More Just Global Order," Panel Discussion (Nov. 30, 2016), <http://www.thehagueinstituteforglobaljustice.org/latest-insights/latest-insights/news-brief/the-eus-contribution-to-a-more-just-global-order>.

Recent efforts by the United States, Britain and others in the United Nations Security Council to bring desperately needed attention to the plight of civilians in Aleppo, illustrate both the value, the danger and the challenge posed by indulging the assumption that investigating and prosecuting atrocity crime can somehow end a human catastrophe like the one that has occurred in Syria. On September 25, 2016, British Ambassador to the United Nations Matthew Rycroft, speaking in an emergency Sunday session of the Security Council called to address the murderous siege of Aleppo, observed:

So this Council must now do more than demand or urge. We must now decide. What can we do to enforce an immediate end to the bombardment of Aleppo and other civilian areas in Syria? We must decide what we can do now to end the siege, to end the chokehold that is preventing aid getting in. And in doing so, we must speak loudly and clearly that there will be accountability for these crimes and so many more – including the barbaric, despicable use of chemical weapons by the regime against its own people. That is the only way to stop the suffering. And it is the only way for Russia to atone for its deplorable actions in Syria.¹⁸

Ambassador Rycroft's remarks were preceded earlier in September by a statement he made in a session of the United Nations Trusteeship Council on the subject of the "Responsibility to Protect," a statement calibrated partly to address the darkening situation in Syria and partly to call for action against Da'esh¹⁹ brutality in Iraq and Syria. In the remarks he made on that occasion he noted:

Part of our Responsibility to Protect lies in ensuring that those who seek to harm civilians know that impunity is not an option. In July, British Foreign Secretary Boris Johnson announced plans for a UK-led campaign to hold Da'esh to account. I am pleased to say it [sic] today we will officially launch that campaign during the high level week of UNGA (UN General Assembly) this year.

Holding these heinous individuals to account will send a strong signal to those who seek to harm civilians. It's part of our commitment, not only to the doctrine of the Responsibility to Protect but also, and more

¹⁸ Ambassador Matthew Rycroft, "It is difficult to deny that Russia is partnering with the Syrian regime to carry out war crimes," UN Security Council, 25 September 2016, accessed on May 15, 2017.

¹⁹ "Da'esh" is a transliteration of the Arabic acronym formed of the same words that make up "I.S.I.S," the acronym for the "Islamic State in Iraq and Syria," in English. Alice Guthrie, *Decoding Daesh: Why is the new name for ISIS so hard to understand?*, FREE WORD CENTRE (Feb. 19, 2015), <https://www.freewordcentre.com/explore/daesh-isis-media-alice-guthrie>.

importantly, to the survivors and the victims and those who have lost loved ones to Da'esh's brutality.²⁰

Though clearly his remarks were not limited to suggesting that holding individuals accountable for actions causing the kind of damage and civilian suffering in Syria and Iraq that has occurred there in the last several years is necessary to bring about an end to the human catastrophe the world is watching, the implication is the same as the one embedded in the question asked during the event at The Hague Institute: investigating and prosecuting atrocity crime can stop ongoing misconduct.

The expectations implicit in the foregoing follow from the promise encouraged by the Rome Statute, by the work of the ICTY and the ICC, as imperfect as it is, and by the creation of hybrid tribunals and courts to deal with atrocity crimes, experiments in the application and enforcement of now nearly universally accepted norms governing conflict; that is that investigating and prosecuting the crimes the world witnesses for itself every day through the media will bring an end to the misconduct and the suffering it causes.

The promise, of course, is a hollow one; a promise that cannot be kept. The political reasons for elevating discussion of events in Syria and Iraq to one of atrocity crimes are many—and justified. Not the least of the reasons for doing it is to put nations supporting those committing atrocity on notice that they are on the verge of becoming international outlaws subject to sanctions – a potential deterrent to continuing support. But talk of accountability in this context assumes both a will and a means for investigating the actions of those engaged in the conduct and the existence of mechanisms for presenting proof sufficient to support criminal convictions and meaningful and enforceable punishments. Only then can there be some prospect that the outcomes produced, outcomes consistent with international norms, will be accepted by those affected by them and enforceable. Without the possibility of any of that occurring, calls for accountability to have little, if any, force.

Further, accountability has not yet resulted in meaningful prevention or avoidance of atrocity. The threat of accountability has had little demonstrable effect on ongoing atrocity. Though in the absence of hard proof and in the face of enormous suffering, there is no reason not to pursue effective investigations and prosecutions of atrocity crime, even while it is happening, in hopes of affecting misconduct in current and future conflicts.²¹ As noted above, accountability is significant, important, even necessary, for reasons that transcend deterrence, prevention or avoidance, but managing expectations for what investigating and prosecuting atrocity can accomplish is important if corroding its credibility and the

²⁰ Ambassador Matthew Rycroft, "Part of our Responsibility to Protect lies in ensuring that those who seek to harm civilians know that impunity is not an option," UN Trusteeship Council, 06 September 2016, <https://www.gov.uk/government/speeches/part-of-our-responsibility-to-protect-lies-in-ensuring-that-those-who-seek-to-harm-civilians-know-that-impunity-is-not-an-option>, accessed on May 15, 2017.

²¹ See JENNIFER SCHENSE, LINDA CARTER, ED., *TWO STEPS FORWARD, ONE STEP BACK: THE DETERRENT EFFECT OF INTERNATIONAL CRIMINAL TRIBUNALS* (2016).

legitimacy of efforts to pursue atrocity investigations and prosecutions is to be avoided. It is also important to ensure that valuable and limited political will and the relatively scant resources that are available for doing anything about investigating and prosecuting atrocity crimes are not exhausted by efforts that endeavor to meet inflated expectations of what can be done; expectations that experience tells us simply cannot be met.

Nonetheless, when those affected by atrocity, including victims and survivors, those providing aid and assistance, states affected by the consequences of atrocity, including the migration of great populations of displaced persons, and regions affected by ongoing political, cultural, and economic instability resulting from atrocity, as well as those otherwise interested in or engaged with the subject, begin to talk about accountability assumptions are often made about the prospect of investigating, prosecuting and punishing those responsible, assumptions that are often inflated and not well-informed by reality. If such assumptions are encouraged, unless managed properly, and even despite well-intentioned efforts to manage them, they invariably become expectations: I expect people will be prosecuted for the suffering I endured; for what my family and community experienced. I expect people to be convicted and imprisoned. I expect to be made whole again by the process. In one way or another what happened to me and my family, my community, will be acknowledged and dealt with, and a trial is what I am led to expect will do that for me.

For political purposes in conflict torn regions, creating and exploiting such expectations may serve as a way to allow intervenors or those who prevail in a conflict to avoid dealing directly with the effects of atrocity and its long-term implications. This they do by shifting the risk associated with atrocity investigation and prosecution to the criminal justice system even in places where the system is not sufficiently competent, not adequately resourced, nor robust or credible enough, or independent enough, to produce outcomes that will be truly legitimate let alone be perceived as legitimate by those they affect. In some cases, that may be deliberate; done to keep the criminal justice system weak; done to protect those who prevailed and perhaps intervenors as well from being pursued for their part in atrocity. In others, just an accident resulting from the uncertainty and instability that follows conflict in which atrocity has occurred.

In situations following conflict marked by atrocity, poorly informed assumptions are often made about the value of using the need to investigate, prosecute, and punish atrocity crime as justification for funding the development of a conflict-torn state's criminal justice system. In such cases even well-meaning intervenors and developers fail to acknowledge that atrocity crime is so unique and so deeply woven into the political dynamics of a post-conflict state, into the resolution of the conflict, and into the narratives that accompany conflict, narratives that persist long after the killing ends, that asking the domestic criminal justice system to take responsibility for investigating, prosecuting, and punishing atrocity is much more likely to put crushing strain on that system and corrode respect for its institutions and the rule of law than it is to encourage the rehabilitation and improvement needed in order for the system to be able to deal

with the demands placed on it by ordinary crime, including serious crime affecting public order. Development of assumptions in these situations as in others is often a prescription for failure.

Managing the subject of atrocity investigation and prosecution by not allowing assumptions to be made that harden into expectations regarding how much can be done to deal with atrocity is essential to avoid disappointment that will affect the legitimacy of any effort to address atrocity crimes. This is done by being realistic about what should be expected. It starts by educating those likely to be affected by, or interested in, the outcomes about the reach of the mandate investigators, prosecutors and courts have to work with.²² Properly selecting and prioritizing what can be dealt with and being as objective and transparent as possible about how that will be done is essential.²³ The affected public must be informed of the limits and restrictions on the process, including the standards that will be used to charge crimes,²⁴ the criteria that will apply to deciding whether a plea of guilty will be considered,²⁵ and how other features of the process will be managed.²⁶

²² Taylor, *supra* note 4.

²³ See, e.g., Prosecutor's Office of Bosnia and Herzegovina, Special Department for War Crimes, Prosecution Guidelines, 5. Prioritization, Practice Direction (09 February 2009), reproduced at Annex A. The prioritization guideline and practice direction is one of several such instructions produced by the Deputy Chief Prosecutor and Head of the Special Department for War Crimes and adopted by the Special Department to regularize and standardize essential prosecution functions and to bring them into compliance with international standards. The prioritization guideline was used together with a comprehensive historical study of the conflict to attempt to achieve a more strategic, objective and transparent selection of cases from the confusion of complaints and matters that were competing for the limited resources of the Special Department for War Crimes and the War Crimes Chamber of the State Court. The goal of this and the other guidelines was to ensure greater legitimacy for the process and for the outcomes achieved by the prosecution and the courts and to help promote the perception of legitimacy among those affected by the process and the outcomes. Extensive public messaging was done to inform the general public about the guideline and the study and about how they were being used. Efforts were also made, successfully in most cases, to enlist the support of victim groups and leaders for the process the guidelines established. The guidelines were effective for a time, but were largely abandoned after the international leadership of the Special Department for War Crimes was withdrawn from the State Prosecutor's Office at the end of 2009; see also ROBERT CRYER, PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL REGIMES (2005).

²⁴ See, e.g., Prosecutor's Office of Bosnia and Herzegovina, Special Department for War Crimes, Prosecution Guidelines, 1. Charging, Practice Direction (13 January 2009), reproduced at Annex B.

²⁵ See, e.g., Prosecutor's Office of Bosnia and Herzegovina, Special Department for War Crimes, Prosecution Guidelines, 2. Pleas and Plea Bargaining, Practice Direction (15 April 2009), reproduced at Annex C.

²⁶ See, e.g., Prosecutor's Office of Bosnia and Herzegovina, Special Department for War Crimes, Prosecution Guidelines, 3. Immunity, Practice Direction (27 May 2007), reproduced at Annex D.

VI. PROVING SOMEONE IS A CULPABLE “BYSTANDER”

Aside from the inherent problem of preserving the ability to investigate, prosecute, and punish atrocity crime for the most worthy offenders by not creating expectations that promise too much, assuming again for purposes of discussion that liability for crime is extended so that it reaches a “bystander” to atrocity crime, as a practitioner contemplating the prosecution of someone based on “bystander” liability, how to prove the mode of liability will be a serious concern. As noted earlier, existing modes of liability for atrocity crimes have a well-developed jurisprudence.²⁷ Each requires proof of acts or omissions that either are the criminal act or omission or significantly contribute to the commission of a crime. Each requires that the actor have requisite knowledge of the circumstances in which he or she is acting or failing to act; that is, the person is aware that a crime is being committed. And each requires the actor to act with criminal intent; that is, knowing that his or her acts or omissions are contributing to the commission of the crime and intending same. For each recognized existing mode of liability then, the prosecution must, in varying forms and degrees, prove acts or omissions, knowledge and intent.²⁸

The existing mode of liability that is the most likely candidate for use in the case of someone who might be classed as a “bystander,” is aiding and abetting. If each of the elements of aiding and abetting can be proven, there is no need for a new mode of liability—at least for purposes of holding someone criminally accountable for his or her acts or failures to act in the face of atrocity. The wisdom of using an aiding and abetting theory for such prosecutions is another question answered in part by the jurisprudence that has grown up around the aiding and abetting theory and by the same considerations regarding expectations that are discussed above.

The question is what “acts” or “omissions” will the prosecutor be required to prove to establish that a person participated in an atrocity crime as a “bystander.” What is the *actus reus*? Presence? By definition, atrocity crimes involve broad and deep criminal activity comprising multiple acts committed by numerous actors that together result in significant loss of life, human suffering, loss of individual dignity, cultural, religious and economic destruction, dislocation and instability, and the large-scale loss or expropriation of private and public property. How then is a prosecutor to prove someone was “present” for purposes of an atrocity crime? Present at one of the single acts that is part of the larger pattern of conduct that is the atrocity? Present at many? Has one acted or omitted to act because he or she didn’t go to places where acts were being committed to protest or intervene? Stayed home? What other acts or omissions will qualify?

If an aiding and abetting theory won’t work, the question is what will the prosecutor be required to prove for a person to be found to be a culpable

²⁷ Universal Declaration of Human Rights, *supra* note 6.

²⁸ *Id.*

“bystander”? Will it be enough to show that the single act or the acts witnessed were forbidden predicate offenses that were part of a larger attack on a protected community? Perhaps that an act or omission the person knows about, but does not witness, intentionally avoids was part of the larger attack? How far from the actual offense will the prosecutor be allowed to reach to pick off those who knew, but simply did nothing? Must it be proven that the “bystander” intended not only that the act or omission he or she is observing or has knowledge of was part of a greater pattern of conduct that was the atrocity crime but that he or she also shared the intent of the perpetrator? How will that be proven? Is it enough to prove that the person knew that the act or omission was part of something larger, didn’t object to it, may even wanted it to occur, didn’t do anything to interfere with it?

What contribution must the actor be proven to have made to the commission of the atrocity? Will it be enough for one to contribute in some way to a single act that is part of the larger pattern of conduct? Watching as books are thrown into the fire by others when a library is being destroyed to persecute members of a religious community as part of a widespread or systematic attack on that community? Encouragement? What kind of encouragement will be enough to be a culpable contribution to the crime? Saying nothing as the books are thrown? Doing nothing to stop it?

What defenses should the prosecutor anticipate? How does the prosecutor answer the claim that to act under the circumstances would have been futile, perhaps resulting in death or serious injury to the “bystander?” Is one compelled to act, does one have a duty to act, when he or she has a reasonable belief that acting would not prevent or even mitigate the effects of the crimes he or she is aware of or observes? Must one risk his or her life under the circumstances? Will the failure to act in such cases excuse liability? How does the prosecutor prove that acting would not have been futile under the circumstances or that the accused’s safety or that of others would not have been jeopardized if he or she did act?

Proof problems will almost certainly discourage sensible prosecutors from using the “bystander” mode of liability in atrocity crimes cases, just as they have made prosecutor’s reluctant to use aiding and abetting as a theory in atrocity crimes cases, but that will not lower the expectation of victims, survivors and others that it will be used to prosecute those who saw, who knew, and who did nothing, who simply stood by when atrocity was being committed.

VII. CONCLUSION

It is imperative when talking about accountability and the enforcement of internationally recognized and accepted criminal norms governing conflict, when talking about investigating and prosecuting atrocity crime, not to raise expectations that have little or no chance of being met. Expanding the modes of liability to reach bystanders has the potential to raise such expectations, pushing the range of subjects that victims, survivors and others with an interest in the outcome of atrocity crime investigations and prosecutions expect will be prosecuted out

beyond those as to whom there is likely to be political will to prosecute and certainly beyond the capacity and resources likely to be available to prosecute them. Inevitably, confidence in the process for holding people accountable for atrocity will be corroded and the legitimacy of the outcomes achieved by the process will be compromised. Holding out the prospect that too much can be done is likely to be the enemy of being able to do enough.