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In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes

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In Vindication of Justiciable Victims' Rights to Truth and Justice for State- Sponsored Crimes

*Raquel Aldana-Pindell**

ABSTRACT

In this Article, Professor Aldana-Pindell explores the norms establishing a state's responsibility to grant victims of human rights violations adequate rights in the criminal prosecution process as a remedy for their victimization. She argues that victim-focused prosecution norms comport and provide more effective means of promoting respect for human rights, in certain nations in democratic transition from mass atrocities. Moreover, she suggests that, as part of other justice reforms, states plagued with impunity should adopt criminal procedures granting surviving human rights victims greater standing in

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the prosecution process. Professor Aldana-Pindell then uses Guatemala to examine the factors that compel the need for reformed victim's rights in a country whose criminal justice system is wrought with incompetence and corruption.

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I. INTRODUCTION

The prominence of international human rights law emerged as nations encountered, at the end of World War II, one of the worst examples of what Kant deemed "radical evil."¹ Never before World

1. IMMANUEL KANT, REASON WITHIN THE LIMITS OF REASON ALONE 15 (Theodore M. Greene & Hoyt H. Hudson trans., 1960).

War II had humanity confronted an authoritarian leader who espoused an explicit doctrine of racial superiority to enslave and exterminate millions of Jews, homosexuals, gypsies, and other religious and ethnic minorities. The advent of the Holocaust drove most nations to reconsider state sovereignty claims over the individual rights of its citizens. As more stories and pictures emerged of the horror of the Holocaust, it became morally impossible for the Allied nations to ignore what had transpired. The Allied nations responded by establishing the Nuremberg Tribunals to prosecute some of the individuals responsible for the atrocities in the hope that similar acts would not be repeated. As Justice Robert Jackson stated in his opening remarks for the prosecutions of Nuremberg,

The privilege of opening the first trial of history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate this being ignored, because it cannot survive their being repeated.²

The Nuremberg Principles establishing the tribunals imposed individual criminal liability for grave international crimes and were later construed to require states to prosecute these crimes.³ Since then, as a matter of general principle, the international human rights norm that states have a duty to prosecute certain grave crimes has progressively become settled law. The majority of specialized human rights treaties impose a state duty to prosecute such acts, whether or not the crime was committed in the state's territory.⁴ Similarly, international case law interpreting comprehensive human rights treaties have read a similar duty to prosecute crimes against an individual's right to life and personal integrity, whether the crime was committed by a state agent or a private actor.⁵ This duty to prosecute norm also applies to governments in transition from civil war or authoritarian regimes during which mass atrocities were conducted.⁶

In practice, however, the state response to state-sponsored mass atrocities post-World War II has not been faithful to the duty to prosecute norm. Instead, a glance back at Southern Europe's transition from dictatorships in the 1970s, Eastern Europe's transition from communism in the 1980s and 1990s, the severe human rights violations in Asia, the violent civil wars in emerging

2. TELFORLD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 167 (1992).

3. U.N. GAOR, 5th Sess., Supp. No. 12, at 11, U.N. Doc. A/1316 (1950) (reporting on the Nuremberg Principles).

4. *See infra* note 76.

5. *Id.*

6. Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *YALE L.J.* 2537, 2542-44 (1991).

democracies in Africa, and the violent democratization process in Latin America has shown that prosecutions are rare and that inaction, amnesties, and pardons are the norm.⁷ In some countries, the state's lack of political will to admit responsibility and impose accountability for its past human rights abuses has led to the adoption of general amnesty laws and dismissal of the findings of truth commissions.⁸ In the instances where there has been some political will to admit institutional responsibility, some countries have nonetheless opted for non-prosecution alternatives, such as truth commissions or disciplinary sanctions, expressing concern that prosecutions could provoke further violence⁹ or frustrate other goals of democratic and economic development.¹⁰ When states have attempted prosecutions, these efforts have been halted or limited by other state factions¹¹ or have been hindered substantially by the weaknesses and corruption of the institutions charged with administering justice.¹² When states have adopted a strong rhetoric of prosecutions, the significant procedural irregularities that have characterized the process have significantly compromised their legitimacy and purpose.¹³ Even in the two instances where the United Nations has stepped in to prosecute—Rwanda and Former Yugoslavia—prosecutions have necessarily been few and slow, and have not escaped criticism over bias, due process violations, and shortcomings in bringing reconciliation to the region or addressing victims' needs.¹⁴

The numerous failures to prosecute in countries where state-sponsored mass atrocities have occurred have led many to reconsider the viability of the duty to prosecute norm in these contexts and even some to challenge its validity. Those who have reassessed its viability have conceded that non-prosecution alternatives represent a legitimate compromise to prosecutions when establishing individual responsibility is impractical, when prosecutions cannot be conducted without violating defendants' fundamental rights, or when

7. See CARLOS SANTIAGO NINO, *RADICAL EVIL ON TRIAL* 16-39 (1996).

8. See, e.g., MARGARET POPKIN, *PEACE WITHOUT JUSTICE: OBSTACLES TO BUILDING THE RULE OF LAW IN EL SALVADOR* 105-63 (2000).

9. See, e.g., ALEX BORAINÉ, *A COUNTRY UNMASKED: INSIDE SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION* 7 (2000).

10. See Orentlicher, *supra* note 6, at 2544-46.

11. See, e.g., NINO, *supra* note 7, at 60-104 (discussing the Argentine army's efforts to obstruct prosecutions).

12. See, e.g., Nathaniel Heasley et al., *Impunity in Guatemala: The State's Failure to Provide Justice in the Massacre Cases*, 16 AM. U. INT'L L. REV. 1115, 1118 (2001).

13. See, e.g., Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. OF INT'L L. & POL. 355 (2002).

14. See M. Cherif Bassiouni, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9, 11-12 (1996).

prosecutions would substantially impede transition to peace or to a democratic government.¹⁵ Many in this group, however, still affirm the superiority of prosecutions and propose that at least the prosecution of certain particularly grave offenses against those in high command should remain an alternative, even if prosecutions must take place at a later time or be conducted by international tribunals or other nations.¹⁶

Those who question the validity of prosecutions, however, challenge the core reasons why international human rights law universally adopted the duty to prosecute norm as the most effective response to mass atrocities. The case for prosecutions in democracies in transition has largely turned on punishment as the new regimes' most powerful guarantor of non-repetition of similar human rights violations.¹⁷ Prosecutions, for example, would advance the nation's democratic consolidation by increasing the legitimacy of the new regime and promoting respect for the rule of law.¹⁸ Subsequently, the case for prosecution also focused on punishment as a tool for reconciliation. This argument, for example, emphasizes the importance of retributive justice as a form of healing for the victims' and the public's anger for the wrongs committed against them.¹⁹

Critics of the validity of these claims challenge the assumption that prosecutions can guarantee non-repetition or promote reconciliation.²⁰ For example, some have argued that prosecutions may indeed spark more hatred and lead to further fragmentation and violence, even when those in power favor prosecutions.²¹ Others have questioned that prosecutions can restore the rule of law in society when these must be selective or conducted in violation of defendants' fundamental rights.²² Others have emphasized that the adversarial nature of prosecutions, in contrast to truth commissions, necessarily compromises the comprehensive truth about the past²³ and provides little opportunity for victims to tell their stories or for perpetrators to seek forgiveness.²⁴ These factors, they argue, impede rather than aid

15. See *infra* notes 306-313 and accompanying text.

16. See, e.g., NINO, *supra* note 7, at 21.

17. See generally *infra* Part IV.

18. See *infra* Part IV.B.

19. See *infra* Part IV.C.

20. See, e.g., MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998); Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39 (2002).

21. See, e.g., Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221 (2000) (arguing against prosecutions in certain post-genocidal societies (e.g., Rwanda) because of the inherent danger that prosecutions would provoke more violence).

22. See, e.g., Aukerman, *supra* note 20, at 75.

23. See *id.* at 74; MINOW, *supra* note 20, at 47.

24. See Aukerman, *supra* note 20, at 82-84.

the process of reconciliation.²⁵ These critics, therefore, conclude that non-prosecution alternatives are better suited to promote peace and reconciliation in nations in democratic transition from mass atrocities.²⁶

Despite these criticisms, states have responded collectively or individually to states' domestic failure to prosecute by solidifying their commitment to the duty to prosecute norm. For example, in addition to recent attempts by a few states to exercise universal jurisdiction to prosecute some human rights perpetrators,²⁷ states approved the Rome Statute to create a permanent international criminal court.²⁸ Also, international organizations and states have funneled millions to promote domestic justice reforms that emphasize combating impunity in democracies in transition. Such reforms have even included sending U.N. missions to these democracies to monitor compliance with human rights norms.²⁹ Moreover, states have continued to develop international human rights laws that expand the states' duty to prosecute norm—for example, by granting victims a justiciable right to prosecutions.

This Article examines the merits of the nascent international law developments on what the Author calls victim-focused prosecution norms. The stated purpose of these emerging norms has been to alleviate victims' exclusion from the criminal process, which states believe has worsened victims' treatment in the criminal justice system.³⁰ Generally, these norms establish that states must guarantee victims an effective prosecution as a remedy whenever violent crimes are committed against them.³¹ Second, these norms grant victims certain participatory rights in criminal proceedings that, while not intended to convert prosecutions into a private process, nevertheless limit states' prosecutorial discretion by establishing mechanisms by which victims may have input into the criminal process.³²

Such victim participation in the criminal process is by no means new. Surviving human rights victims,³³ in particular, often

25. *Id.*

26. *Id.*

27. See, e.g., Monica Hans, *Providing for Uniformity in the Exercise of Universal Jurisdiction: Can Either the Princeton Principles on Universal Jurisdiction or an International Criminal Court Accomplish this Goal?*, 15 *TRANSNAT'L LAW* 357, 367-68 (2002).

28. See *Human Rights Watch Campaign*, at <http://www.hrw.org/campaigns/icc>.

29. See, e.g., POPKIN, *supra* note 8, at 49-80, 201-42 (discussing such justice reform efforts in El Salvador).

30. See generally *infra* Part II.

31. See *infra* Part II.A.

32. See *infra* Part II.B.

33. Surviving human rights victims refers to the direct victim of the violation who survived and to the family members. See, e.g. *infra* notes 94, 102, 108-113, 138-139 and accompanying text. Many of these victims either form their own or are

participate in prosecutions against those accused of gross human rights violations. Their level of participation has varied depending on the degree of risk,³⁴ resources,³⁵ and the parameters established by law in their respective countries. The permissible scope of victim participation in the criminal process varies significantly from country to country. In some countries, including the United States, victims' place in the criminal justice system has evolved dramatically from being the sole executors of private justice to having virtually no role.³⁶ In these systems of law, victims are viewed as having ceded to the state the authority to punish on behalf of the public good.³⁷ In contrast, in many European and Latin American countries, for example, the accepted view is that victims are natural or juridical persons directly endangered or harmed by the criminal act.³⁸ Therefore, in these systems of law, victims can directly prosecute crimes considered to be private, or crimes viewed as implicating a

represented by non-governmental organizations that promote respect for human rights in their respective countries, including through representing victims in criminal proceedings.

34. Unfortunately, it is quite common that human rights victims who participate in the criminal process risk their lives. See, e.g., *Amnesty International 2001 Annual Report, Forward, AI and Human Rights Defenders*, available at <http://www.amnesty.org/ailib/aireport/index.html>.

35. Few countries that provide for victim participation in the criminal process provide state funding. See GUIDE FOR POLICY MAKERS ON THE IMPLEMENTATION OF THE UNITED DECLARATION OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME AND ABUSE OF POWER 21 (1999), available at <http://www.victimology.nl> [hereinafter GUIDE FOR POLICY MAKERS].

36. See VICTIMS OF CRIME: A NEW DEAL 10-13 (Mike Maguire et al. eds., 1988). Today, despite recent reforms to improve the treatment of victims by the criminal justice system, victim participation in the U.S. criminal process is generally limited to observer status or to rendering testimony at trial. See, e.g., PEGGY M. TOBOLOWSKY, CRIME VICTIM RIGHTS AND REMEDIES 9-10 (2001).

37. See Lynne Henderson, *Revisiting Victim's Rights*, 1999 UTAH L. REV. 383, 392.

Whether one grounds the argument for the social contract embodied in the [U.S.] Constitution on Hobbes, Locke, Nozick, Rawls, and other political philosophers, the theory is that we cede our right to exact revenge or restitution to the state and to the law in return for the state's protection and enforcement of the law. Accordingly, the state and federal governments of [the U.S.] hold a formal constitutional monopoly on the use of force. The criminal law, enacted by the legislatures, is part of that monopoly. Crimes are legally defined as offenses against the state and the community, even if those offenses involve the individual victims.

Id. (citations omitted). See also SUSAN JACOBY, WILD JUSTICE: THE EVOLUTION OF REVENGE 117 (1983) (citing Cesar Beccaria's 1764 treatise for the argument that both the right to punish and the right to forgive crimes rest equally not with the individual but with all citizens of the state or with the sovereign).

38. See, e.g., Matti Joutsen, *Listening to the Victim: The Victim's Role in European Criminal Justice Systems*, 31 EUR. CRIM. JUST. 95, 97 (1987). See also *infra* notes 485-99 and accompanying text (discussing victims' participatory rights in the Guatemalan criminal justice system).

broader public interest, and the prosecutorial role is either independent from or subsidiary to that of the public prosecutor.³⁹

Until the 1980s, however, in contrast to the development of international norms codifying the fundamental rights of criminal defendants, international human rights law had been silent about whether and how much domestic legal systems should prescribe victim participation in criminal proceedings. That is now changing. Victims are also being viewed, under international human rights law, as those most directly harmed by violent crimes and, therefore, as those with certain rights to participate in prosecutions. Given the diverse accommodation of victim participation in the criminal process by different legal systems, currently these norms consist principally of general recommendations on granting victims access to justice that also contemplate significant flexibility for state compliance.⁴⁰ Still, these norms urge states, for instance, to establish a review mechanism to limit the prosecutors' decision not to prosecute, to allow victim input into the collection of evidence, and to grant victims the opportunity to participate in the trial by permitting them to introduce evidence and cross-examine witnesses.⁴¹

Any evaluation of these victim-focused prosecution norms should consider at least three levels of analysis. First, these norms should be viewed as reaffirming in principle the more settled duty to prosecute norm, including in the context of state-sponsored mass atrocities, which is the focus of this Article. The analysis should therefore consider the broader on-going debate about the viability and validity of retroactive justice for mass atrocities, as well as whether victim-focused prosecutions, including their right to participate in the criminal process, would also further the stated goals of prosecutions in this context. Second, there are several valid pragmatic concerns about the application of these norms. For example, many observers have argued victim participation in the criminal process would not only endanger their lives but could lead to duplication, inefficiency, and conflicting agendas.⁴² Third, each proposed norm for victim participation in the criminal process should be assessed for its effect on others' fundamental rights. For example, many have cautioned that victim participation will substantially diminish the hard-earned, fundamental procedural rights of defendants.⁴³ The outcome of each

39. Joutsen, *supra* note 38, at 100-02.

40. *See infra* Part II.B.

41. *Id.*

42. *See generally* Rachel King, *Why a Victims' Rights Constitutional Amendment is a Bad Idea: Practical Experience From Crime Victims*, 68 U. CIN. L. REV. 357, 370-400 (2000).

43. For example, in the United States, legislatures and courts have been cautious about advancing victims' rights due to concerns that victims' rights will diminish defendants' rights in criminal trials. Therefore, victims' rights in criminal

of level of independent analysis could yield compelling reasons for or against victim participation in the criminal process.

This Article focuses principally on the first level of analysis and examines the merits of international law's promotion of prosecutions of state-sponsored mass atrocities through these emerging victim-prosecution norms. These norms, like the duty to prosecute, apply to all victims of right to life and personal integrity crimes generally,⁴⁴ and not solely to victims of state-sponsored mass atrocities. However, it would be a mistake to generalize the analysis of these types of victims' rights to all contexts. Victims' rights movements have emerged from both politically conservative and politically progressive impulses,⁴⁵ as well as from different ideological trends.⁴⁶ Because there is not a monolithic victims' rights movement nor a single social context in which victims' calls for greater participatory rights in criminal proceedings take place,⁴⁷ the merits of such reforms must be assessed independently.

The focus of this Article on state-sponsored mass atrocities also needs qualification, as it is not intended to generalize the characteristics of all state-sponsored mass atrocities. This Article will specifically examine the merits of victims' rights movement to further prosecutions in the aftermath of Guatemala's genocide.⁴⁸ The shared characteristics of Guatemala's genocide with other state-sponsored mass atrocities make it possible, however, to draw broader lessons from Guatemala's experience. More generally, this Article assesses the merits of victim-focused prosecutions in societies where state institutions and agents have directly committed or sponsored systematic, gross human rights abuses against members of their own citizenry. Moreover, these mass atrocities have resulted from deliberate, state-sponsored campaigns that vilify, and spark hatred

trials are quite limited, as are any remedies for their violations. See TOBOLOWSKY, *supra* note 36, at 113.

44. See generally *infra* Part II.

45. See ROBERT ELIAS, *THE POLITICS OF VICTIMIZATION: VICTIMS, VICTIMOLOGY, AND HUMAN RIGHTS* 23-26, 229-45 (1986) (discussing various political movements, such as the civil disturbances of the 1960s, the law-and-order backlash of the late 1960s and 1970s, the women's movement in the mid-1970s, the human rights movement in the late 1970s, and the new reactionary politics of the early 1980s that promoted victim interests).

46. Jan van Dijk created four ideologies that follow from the distinct theoretical perspectives on the needs of crime victims: the care ideology, whose principal goal is to provide economic and social services to victims; the rehabilitation ideology, whose focus has been to include the victim in the process to achieve the offender's rehabilitation; the retributive or criminal justice ideology, whose primary goal is to punish the offender in a way that responds to victim suffering; and the abolitionists ideology, which favors mediation, reparation, aid to victims, and crime prevention in the hands of neighborhood groups and other social networks over the control of the state. See *VICTIMS OF CRIME: A NEW DEAL*, *supra* note 36, at 115-18.

47. *Id.* at 2.

48. See *infra* Part V.

against, members of specific groups, usually on the basis of ethnic or social conflict. Although these mass atrocities have occurred often in the context of civil wars or civil unrest, the overwhelming majority of the violations have been attributed directly or indirectly to the state, as distinguished from societies with a widespread level of public participation as perpetrators and victims.⁴⁹ In these societies, particularly for the victims of the atrocities, states have replaced justice with impunity, so that the very systems charged with the administration of justice are controlled or are influenced by the perpetrators of the abuse and exist primarily to protect from punishment the very people who committed the crimes.

In this context of impunity for state-sponsored mass atrocities, surviving human rights victims have espoused that states must prosecute the perpetrators of human rights abuses as part of the remedy for the violations committed against them.⁵⁰ Alternatives to prosecutions, especially truth commissions, are sometimes distinguished from prosecutions precisely due to their focus on victims. Prosecution alternatives, therefore, have been characterized as more responsive to victims' needs.⁵¹ This Article, however, rejects this view. Following a discussion of the emerging international norms on victim-focused prosecutions in Part II, Part III explains why, consistent with these norms, many surviving human rights victims view prosecutions as the superior forum to guarantee them their rights to truth and justice.⁵² This is true because, through prosecutions, surviving human rights victims seek to promote individual and institutional accountability, to obtain retribution, and to attain equal protection under the law.⁵³ Surviving human rights victims have argued that truth commissions, despite some potential advantages for revealing certain aspects of the truth, cannot adequately satisfy their goals for accountability, retribution, and equality when the commissions must treat the perpetrators leniently and, thereby, compromise justice.⁵⁴

Even if prosecutions more effectively address surviving human rights victims' goals, however, this result does not resolve the broader question of whether prosecutions also better serve society's transitional justice goals. Despite the numerous valid concerns that many have expressed against prosecutions,⁵⁵ this Article advocates prosecutions as the superior mechanism for restoring respect for

49. See Drumbl, *supra* note 21 (discussing the widespread public complicity during the Rwanda genocide).

50. See generally *infra* Part III.

51. See Aukerman, *supra* note 20, at 78.

52. See *infra* Part III.A.2, III.B.

53. See generally *infra* Part III.

54. *Id.*

55. See *supra* notes 20-26 and accompanying text.

human rights in the aftermath of certain state-sponsored mass atrocities. The juxtaposition of prosecutions over other alternatives by no means suggests that these cannot or should not co-exist. Truth commissions, for example, also offer a superior forum to achieve certain important goals of transitional justice. This includes the advantage of truth commissions over trials to establish the historical and social context that gave rise to the atrocity, as well as to explain its more complex patterns of institutional responsibility and, sometimes, mass complicity.⁵⁶ Moreover, truth commissions may represent a necessary compromise in certain societies where only a select number of prosecutions are possible.⁵⁷ The preference, therefore, is to favor responses to mass atrocities that attempt to capitalize on the advantages offered by each of these alternatives and that address legitimate impediments to prosecutions.⁵⁸ Unfortunately, however, most observers, wrongly asserting that truth commissions and prosecutions cannot co-exist, generally frame the debate to favor one over the other.⁵⁹ This Article, therefore, responds principally to the arguments that place alternatives to prosecutions, principally truth commissions, not as compromises, but as overall superior forums to prosecutions.

The prosecution versus alternative response to mass atrocities debate is not new. In fact, whenever mass atrocities have occurred, whether the state response has been to adopt an amnesty law, a truth commission process, or prosecutions, observers have written vastly either to support or reject the respective response.⁶⁰ This debate, however, has occurred principally with prosecutions being conceived as a duty states owe the public as a response to certain grave crimes. This Article reframes the debate to consider a victim-focused approach to the debate between prosecutions versus other alternatives.

Part IV elaborates why surviving human rights victims' goals in prosecutions are equally crucial to restoring human rights.⁶¹ As with the duty to prosecute norm, the case for victim-focused prosecutions turns on the consequences of the state's failure to punish the perpetrators of human rights violations by, for example, adopting amnesty laws, or the state punishing them too leniently by imposing

56. See *infra* notes 234-35 and notes 434-36 and accompanying text.

57. See *infra* notes 306-13 and accompanying text.

58. See *infra* notes 444-47 and accompanying text.

59. *Id.*

60. See, e.g., William W. Burke-White, *Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation*, 42 HARV. INT'L L.J. 467 (2001) (suggesting that many have considered amnesty an over-studied phenomenon of the 1980s).

61. See ELIAS, *supra* note 45, at viii ("In examining victimology's origins, I discovered that as first conceptualized, it too stressed human rights, and not merely criminal victimization.").

disciplinary sanctions or demanding a public apology. Echoing the same arguments advanced for the state's duty to prosecute, surviving human rights victims fear inadequate punishment will fail to (1) purge the state of those who perpetrate violence or (2) deter others from committing similar acts in the future.⁶² Surviving human rights victims also argue that impunity undermines the state's legitimacy and ability to promote the rule of law.⁶³ Surviving human rights victims, more centered on their rights, argue the states' imposition of disparate punishments for human rights violations disparages victims and creates a dual system of justice.⁶⁴ By doing so, states send the wrong message to the perpetrators and the public about their level of tolerance for the commission of such acts, which may encourage others to commit similar infractions.⁶⁵ Finally, by doing so, the state risks rekindling the victims' and the public's anger and frustration against the state and those responsible for the abuse, encouraging some to take the law into their own hands.⁶⁶

It is possible and even preferable⁶⁷ for the state's criminal justice system to further victims' goals through prosecutions without victim participation in the criminal process. Surviving human rights victims, however, have considered their involvement in the criminal process crucial to holding the states' institutions of justice accountable to victims, particularly when corruption or incompetence have systematically prevented the state from effectively administering justice.⁶⁸ The argument in favor of increasing the accountability of state institutions of justice can be compelling. A state, even if it expresses a commitment to do so, will not always be able to comply with its duty to prosecute in societies where many of its agents and institutions have become too aligned with crime. Guatemala's story of impunity, recounted in Part V, provides a specific example of how a state's corrupt institutions of justice may render meaningless its duty to prosecute.

Due to mounting international and domestic pressure, Guatemala did not adopt a general amnesty law.⁶⁹ Instead, the country agreed to both a U.N. truth commission process and to

62. See *infra* Part IV.A.

63. See *infra* Part IV.B.

64. See *infra* Part IV.C.

65. See *infra* Part IV.C.1.

66. See *infra* Part IV.C.2.

67. See *infra* Part VI (discussing some drawbacks to victim participation in prosecutions).

68. See generally *infra* Part V. See also Inter-Am. C.H.R., *Third Report on the Human Rights Situation in Colombia*, OEA/ser. L./V./II.102, doc.9 rev.1, pts. 52, 71, ch.V (1999) [hereinafter *Third Colombia Report*], available at <http://www.cidh.oas.org/countryrep/colom99en/chapter-5.htm> (discussing needed legal reforms in Colombia to increase victim participation in the criminal process).

69. See *infra* note 479 and accompanying text.

prosecute gross human rights violations.⁷⁰ Unfortunately, Guatemala's dismal record of prosecutions⁷¹ has contributed to the assessment that Guatemala did not need to adopt a general amnesty law to guarantee impunity.⁷² Guatemala's record of impunity can be attributed, in part, to corrupt officials who obstruct the criminal process in individual cases and to the incompetence and inadequate resources that plague the institutions responsible for Guatemala's administration of justice.⁷³ Unfortunately, the poor record can also be attributed to Guatemala's culture of toleration for violent acts when directed at persons viewed as somehow contributing to the ills of Guatemalan society.⁷⁴ In that context, by infusing some public accountability into the process, surviving human rights victims' participation in prosecutions could increase the quality of the investigation and trial, at least in some cases. Some positive results, even in a few prominent prosecutions, could help curb Guatemala's culture of violence by sending a strong condemnatory message about the acceptability of such acts, and by restoring victims' and the public's faith in institutional justice.⁷⁵

Part VI of this Article concludes that states plagued with impunity should consider, as part of other reforms, adopting criminal procedure laws that codify victims' rights to prosecutions and grant victims greater standing to participate in the criminal process. Despite the compelling reasons offered in this Article for states to increase victim participation in the criminal process, however, this proposal should not be read as a blanket endorsement for victim-focused prosecutions in all democracies in transition from state-sponsored mass atrocities. Future research should be conducted, for example, into the effect of existing and proposed reforms for victim participation in prosecutions on victims, society, and on defendants' fundamental rights. The Article concludes, therefore, by highlighting some potential concerns related to the victims' role in transitional justice and offers some preliminary solutions that merit further study.

II. DEVELOPMENTS IN INTERNATIONAL LAW ON VICTIMS' RIGHTS IN THE CRIMINAL PROCESS

Since the 1980s, international human rights norms related to the prosecution of certain grave crimes have emerged as more victim-

70. See *infra* note 480 and accompanying text.

71. See *infra* notes 482-83 and accompanying text.

72. See POPKIN, *supra* note 8, at 157.

73. See *infra* Part V.B.1. and accompanying text.

74. See *infra* Part V.B.2.

75. See *infra* Part V.B.2-3.

focused. Despite the fact that many domestic legal systems in the world already prescribed victim participation in the criminal process, international human rights law initially conceived of prosecutions solely as a state duty to the public and not as a private right. Specifically, international human rights law established that states had a duty to the public to prosecute crimes against the individual's rights to life and personal integrity,⁷⁶ and to impose penalties that considered the grave nature of the crimes.⁷⁷ Primarily since the 1980s, however, international human rights law has developed to create norms that respond to many of the concerns expressed by surviving human rights victims about their exclusion from criminal proceedings, especially when states rampantly refuse to comply with their duty to prosecute. These victim-focused prosecution norms

76. International human rights tribunals have interpreted certain provisions in comprehensive human rights treaties as establishing a duty to prosecute right to life and humane treatment violations. See, e.g., *Velasquez Rodriguez v. Honduras*, Case No. 4, Inter-Am. C.H.R., OEA/ser. C, ¶¶ 159-88 (1988) (Article 1.1: obligation to respect rights of the American Convention), available at <http://www.corteidh.or.cr>; *Gulec v. Turkey*, 28 Eur. H.R. Rep. 121, ¶¶ 74-83 (1998) (Article 2 of the European Convention); *Commission Nationale des Droits de L'Homme et des Libertes vs. Chad* (merits), African Comm. Hum. & Peoples' Rights, Communication No. 74/92, ¶¶ 17-22 (1995) (Article 1 of the African Charter), available at <http://www1.umn.edu/humanrts/africa/comcases/comcases.html>. Some specialized human rights treaties expressly include provisions requiring signatory states to investigate, prosecute, and punish those responsible for gross human rights violations, including slavery, genocide, torture, forced disappearance, and other acts of violence. See *Convention to Suppress the Sale Trade and Slavery*, Sept. 25, 1926, art. 6, 60 L.N.T.S. 253, 46 Stat. 2183 [hereinafter *Slavery Convention*]; *Convention on the Prevention and Punishment of the Crime of Genocide*, Dec. 9, 1948, art. 1, 78 U.N.T.S. 277; *Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment*, Dec. 10, 1984, art. 4, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 [hereinafter *U.N. Torture Convention*]; *Inter-American Convention to Prevent and Punish Torture*, Dec. 9, 1985, art. 6, O.A.S. Treaty Ser. No. 67, OAS/Ser.L/V/II.4 rev. 7, reprinted in 25 I.L.M. 519 (1985) [hereinafter *Inter-American Torture Convention*]; *Declaration on the Protection of All Persons From Enforced Disappearances*, art. 4, U.N. GAOR, 47th Sess., Supp. No.49, at 207, U.N. Doc A/47/133 (1992) [hereinafter *U.N. Declaration on Enforced Disappearances*]; *Inter-American Convention on the Forced Disappearance of Persons*, art. 1, OAS Treaty Ser. No. 47, OAS/Ser.L/V/II.4 rev.7 [hereinafter *Inter-American Convention of Forced Disappearances*], available at <http://oas.org/cim/english>; *Declaration on the Elimination of Violence Against Women*, art. 4, G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/48/49 (1993); *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*, June 9, 1994, art. 7(c), 27 U.S.T. 3301, reprinted in 33 I.L.M. 1534; *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, art. 5, U.N. Doc. A/3/383 (2000) [hereinafter *Protocol on Human Trafficking*]. See also Orentlicher, *supra* note 6 (discussing the duty to prosecute norm under international human rights law).

77. See, e.g., *Slavery Convention*, *supra* note 76, art. 6; *U.N. Torture Convention*, *supra* note 76, art. 4; *U.N. Declaration on Enforced Disappearance*, *supra* note 76, art. 4; *Inter-American Convention on Forced Disappearance*, *supra* note 76, art. III; *Inter-American Convention on Torture*, *supra* note 76, art. 6.

establish that prosecutions are an essential component of the remedy states owe victims of certain grave crimes. Moreover, these norms began to recognize certain participatory rights of victims in criminal proceedings, other than as witnesses.⁷⁸

The framing of prosecutions as a victim's right has emerged primarily from international human rights tribunals' interpretation of provisions in comprehensive human rights treaties that generally establish a right of access to justice or to be heard, and a right to an effective remedy. That this occurred through case law is not surprising. Surviving human rights victims overwhelmingly file human rights complaints only when the state has refused to prosecute, has deliberately or recklessly obstructed the criminal process, or has conducted a sham prosecution.⁷⁹ These cases have revealed the anguish suffered by surviving victims of gross human rights violations that result from the lack of effective prosecutions.⁸⁰ This has influenced international tribunals to declare other forms of reparations, such as monetary compensation or disciplinary sanctions, as insufficient to remedy the harm caused by human rights violations.⁸¹ These case law developments are briefly summarized in Section A.⁸²

Second, international norms have also developed that grant victims standing to participate in the criminal process. Such participation allows victims to monitor the states actions and to advance their interests in truth and justice. Many of these norms have been codified in international declarations on victims' rights or have developed through human rights cases.⁸³ More recently, the Rome Statute of the International Court and its Rules of Procedure and Evidence have also included, for the first time, more ample participatory rights of victims in international criminal proceedings.⁸⁴ These codified legal developments are briefly summarized in Section B.⁸⁵

Victims' claims to prosecutions as a remedy does not mean, however, that prosecutions have been transformed into a purely private right that victims could renounce by, for example, asking the

78. See *infra* Part II.A., B.

79. See *generally infra* Part II.A.1.

80. *Id.*

81. *Id.*

82. For a more detailed discussion of international norms declaring prosecutions part of the remedy states owe victims for violent crimes see Raquel Aldana-Pindell, *An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes*, HUM. RTS. Q. (forthcoming).

83. See *infra* Part II.B.1-2.

84. See *infra* Part II.B.1.b.

85. For a more detailed discussion of international instruments codifying victims' participatory rights in the criminal process, see Aldana-Pindell, *supra* note 82.

state not to prosecute. Rather, victims' rights to prosecutions co-exist with the states' duty to prosecute. This important point was recently clarified by the Inter-American Court on Human Rights when it declared that the duty to conduct an effective criminal process is independent and separate from the state's duty to repair.⁸⁶ The Inter-American Court explained that were the state to leave human rights violations unpunished at the request of the victim, the state would ultimately be violating its general duty to guarantee the free and full exercise of the rights of persons under its jurisdiction.⁸⁷ Victims' claims to prosecutions as a remedy have come to mean, however, that prosecutions become a justiciable right that victims should be able to claim against the state. The Inter-American Court also stated that the fact that a right—like the right to truth—may take on a collective or general character, intended to benefit the public as a whole, does not mean that an individual may not have standing to assert that right.⁸⁸

A. *Prosecutions as an Effective Remedy For Victims of Violent Crimes*

Treaty-based international human rights tribunals have interpreted certain provisions in comprehensive human rights treaties as creating victims' right to prosecutions. These provisions generally include those that codify the right to access justice or to be heard and the right to obtain an effective remedy. These decisions have declared primarily that states must conduct an effective prosecution of gross human rights violations to repair victims' harm. Most cases have been decided by the European and American regional human rights systems, and a few have been decided by U.N. treaty-based bodies.⁸⁹ In addition, a few specialized human rights instruments include provisions on the right to complain and to an effective remedy, which have also been construed to require prosecutions as part of the remedy that states must provide victims of certain violent crimes.

86. Villagrán Morales v. Guatemala, Case No. 63, Inter-Am. C.H.R., ser. C, ¶ 225 (1999), available at <http://www.corteidh.or.cr>.

87. *Id.*

88. Bámaca Velásquez v. Guatemala, Case No. 70, Inter-Am. C.H.R., ser. C. (2000), available at <http://www.corteidh.or.cr> (concurring opinions of Judges Hernán Salgado Pesantes and Sergio García Ramírez).

89. Similar research of the case law of the African Commission on Human and People's Rights did not yield any cases interpreting analogous provisions of the African Charter on Human and People's Rights as creating victims' rights in the criminal process.

1. Caselaw Interpreting Comprehensive Human Rights Treaties

a. The Human Rights Committee

The Human Rights Committee has interpreted Article 2.3 of the International Covenant on Civil and Political Rights (ICCPR)⁹⁰ to require states to conduct an effective prosecution to remedy the harm caused to victims of right to life and personal integrity violations. Article 2.3 generally provides that states must accord an effective remedy to any person whose rights under the ICCPR have been violated.⁹¹ In cases involving arbitrary detentions, forced disappearances, torture, and extrajudicial executions, the Human Rights Committee has ruled victims' effective remedy under Article 2.3 of the ICCPR must include a criminal investigation that brings to justice those responsible.⁹² In so holding, the Human Rights Committee expressly rejected some states' arguments that disciplinary sanctions or monetary damages should suffice as a remedy.⁹³ The Committee has accorded the remedy of prosecutions to

90. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1967) [hereinafter ICCPR].

91. Article 2.3 of the ICCPR reads:

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

Id.

92. See, e.g., *Chonwe v. Zambia*, Communication No. 821/1998, ¶ 7 (2000), available at <http://www.unhchr.ch/tbs/doc.nsf> (attempted murder); *Vicente et al. v. Colombia*, Communication No. 612/1995, ¶ 10 (1997), available at <http://www.unhchr.ch/tbs/doc.nsf> (arbitrary detention, torture, and forced disappearance); *Atachahua v. Peru*, Communication No. 540/1993, ¶ 10 (1996), available at <http://www.unhchr.ch/tbs/doc.nsf> (forced disappearance); *Bautista v. Colombia*, Communication No. 563/1993, ¶ 10 (1995), available at <http://www.unhchr.ch/tbs/doc.nsf> (forced disappearance); *Rodriguez v. Uruguay*, Communication No. 322/1988, ¶ 14 (1994), available at <http://www.unhchr.ch/tbs/doc.nsf> (arbitrary detention and torture); *Tshiongo v. Zaire*, Communication No. 366/1989, ¶ 7 (1993), available at <http://www.unhchr.ch/tbs/doc.nsf> (arbitrary detention and torture).

93. See, e.g., *Bautista v. Colombia*, Communication No. 563/1993, ¶ 8.2 (1995) (“[P]urely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, paragraph 3, of the Covenant, in the event of particularly serious violations of human rights, notably in the event of an alleged violation of the right to life.”); *Vicente v. Colombia*, Communication No. 612/1995, ¶ 8.2 (1997) (same).

the direct victim of right to life and personal integrity violations and to the family members.⁹⁴

b. The Inter-American Court on Human Rights

The Inter-American Commission and Court on Human Rights⁹⁵ have interpreted Articles 8, 25, and 1.1, respectively, of the American Convention on Human Rights⁹⁶ as jointly prescribing states to provide victims of right of life and personal integrity violations an effective prosecution as a remedy for right to life and personal integrity violations. Articles 8 and 25 respectively provide the right to be heard⁹⁷ and to an effective recourse⁹⁸ of every person who claims a violation of the American Convention, with Article 1.1 imposing a general duty on the state to ensure the full exercise of these rights.⁹⁹ The Inter-American Court has interpreted Articles 25

94. See, e.g., *Vicente v. Colombia*, Communication No. 612/1995, ¶ 10 (1997)

95. This Article only discusses the Inter-American Court's case law developing victim rights in the criminal justice system. This is not because the jurisprudence of the Inter-American Commission has been less substantial or important. In fact, in many ways, the Inter-American Commission pioneered many of the visionary developments recognizing victims' rights in the criminal process. In more recent times, however, the views of the Inter-American Commission and Inter-American Court in this area have become more consistent, with the Inter-American Court, in fact, taking the lead in developing a comprehensive body of case law about the place of victims in the criminal justice system.

96. The American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (1978).

97. Article 8 of the American Convention, *supra* note 94, reads in part,

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

Id. art. 8 (emphasis added).

98. Article 25 of the American Convention provides,

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake: a. to ensure that any person claiming such remedy shall have his rights determined by a competent authority provided for by the legal system of the state; b. to develop the possibilities of judicial remedy; and c. to ensure that the competent authorities shall enforce such remedies when granted.

Id. art. 25.

99. Article 1.1 of the American Convention reads,

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their

and 8 as directly related: the former requires the state to provide human rights victims access to a criminal trial as reparations for the violation, and the latter requires the criminal trial be conducted in a way that guarantees procedural fairness to victims.¹⁰⁰ These provisions, when read in conjunction with Article 1.1 of the American Convention, impose an affirmative duty on the state to effectuate these rights.¹⁰¹ In these cases, the definition of victims has included those whom the laws of the respective countries recognize as the direct victims' heirs.¹⁰²

Specifically, the Inter-American Court has declared that the right to be heard under Article 8 of the Convention contemplates victims' rights to have the crime investigated and to have those responsible prosecuted and, when appropriate, punished.¹⁰³ The state has to fulfill this right with due process guarantees, within a reasonable time, and by a competent, independent, and impartial tribunal.¹⁰⁴ The Inter-American Court similarly interpreted Article 25 to hold that access to a simple, prompt, and effective recourse before a competent tribunal for protection against right to life and personal integrity violations includes victims' access to criminal proceedings.¹⁰⁵ More recently, the Inter-American Court has held that these provisions also require states to conduct criminal trials in order to guarantee family members the right to know the truth. The

jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political, or other opinion, national or social origin, economic status, birth, and any other social condition.

Id. art. 1.1 (emphasis added).

100. See Castillo Páez v. Peru, Case No. 43, Inter-Am. C.H.R., OEA/ser. C, ¶ 106 (1998), available at <http://www.corteidh.or.cr>; see also Blake v. Guatemala, Case No. 48, Inter-Am. C.H.R., OEA/ser. C, ¶¶ 62-63 (1999), available at <http://www.corteidh.or.cr>; Durand & Ugarte v. Peru, Case No. 68, Inter-Am. C.H.R., OEA/ser. C, ¶¶ 111-30 (2000), available at <http://www.corteidh.or.cr>; Bámaca Velásquez v. Guatemala, Case No. 70, Inter-Am. C.H.R., ser. C, ¶¶ 182-96 (2000), available at <http://www.corteidh.or.cr>; Villagrán Morales v. Guatemala, Case No. 63, Inter-Am. C.H.R., ser. C, ¶¶ 199-238 (1999), available at <http://www.corteidh.or.cr>; Barrios Altos v. Peru, Case No. 75, Inter-Am. C.H.R. 75, OEA/ser. C, ¶¶ 45-49 (2001), available at <http://www.corteidh.or.cr>.

101. See sources cited *supra* note 100; American Convention, *supra* note 96.

102. These include generally, children, the spouse (including common law spouses), parents, siblings, uncles, and nieces. See, e.g., Barrios Altos, Case No. 75, Inter-Am. C.H.R., OEA/ser. C, ¶¶ 26-29.

103. See, e.g., Paniagua Morales v. Guatemala, Case No. 37, Inter-Am. C.H.R., OEA/ser. C, ¶¶ 155-56 (1998), available at <http://www.corteidh.or.cr>; Durand & Ugarte, Case No. 68, Inter-Am. C.H.R., OEA/ser. C, ¶ 130; Genie Lacayo v. Nicaragua, Case No. 30, Inter-Am. C.H.R., OEA/ser. C, ¶ 76 (1998), available at <http://www.corteidh.or.cr>; Blake, Case No. 48, Inter-Am. C.H.R., OEA/ser. C, ¶ 97; Villagrán Morales, Case No. 63, Inter-Am. C.H.R., ser. C, ¶ 227; Bámaca Velásquez, Case No. 70, Inter-Am. C.H.R., ser. C, ¶¶ 182-83.

104. See, e.g., Castillo Páez, Case No. 43, Inter-Am. C.H.R., OEA/ser. C, ¶ 106.

105. See *id.* ¶¶ 105-07.

Court held that there is a direct correlation between the state denying human rights victims' access to effective justice or to procedural fairness in criminal trials and their right to learn the truth, which includes obtaining knowledge of the circumstances of the crime and the identification of those responsible.¹⁰⁶

c. The European Court on Human Rights

The European Court on Human Rights has interpreted two articles of the European Convention for the protection on Human Rights and Fundamental Freedoms¹⁰⁷ as prescribing victims' rights in the criminal process: Article 2, right to life, and Article 13, right to an effective remedy. Similar to the Inter-American Court, the European Court has granted ownership of victims' rights in the criminal process to the direct victim of the violation. Furthermore, if the victim is dead or has consented to being represented, the victim's next of kin may assert the victim's rights. The European Court has specifically permitted, other than the direct victims,¹⁰⁸ parents,¹⁰⁹ spouses,¹¹⁰ siblings,¹¹¹ uncles,¹¹² and nephews¹¹³ to allege an independent violation arising from procedural errors or lack of victim access to the criminal process. In granting standing to victims' family members, the European Court focused not on the type of familial relationship, but instead on the closeness of the relationship in fact.¹¹⁴ The European Court has interpreted Article 13 of the

106. See, e.g., *Bámaca Velásquez*, Case No. 70, Inter-Am. C.H.R., ser. C, ¶ 201; *Castillo Páez*, Case No. 43, Inter-Am. C.H.R., OEA/ser. C, ¶ 85; *Barrios Altos*, Case No. 75, Inter-Am. C.H.R., OEA/ser. C, ¶ 48.

107. European Convention for the Protection on Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (1995) (as amended through Nov. 1998) [hereinafter European Convention].

108. See, e.g., *Mentes v. Turkey*, 26 Eur. H.R. Rep. 595 (1997).

109. See, e.g., *Gül v. Turkey*, 34 Eur. H.R. Rep. 28 (2000).

110. See, e.g., *Salman v. Turkey*, 34 Eur. H.R. Rep. 17 (2000); *Ilhan v. Turkey*, 34 Eur. H.R. Rep. 36 (2000).

111. See, e.g., *Ilhan*, 34 Eur. H.R. Rep. 36.

112. See, e.g., *Ergi v. Turkey*, 32 Eur. H.R. Rep. 18 (1998).

113. See, e.g., *Yasa v. Turkey*, 28 Eur. H.R. Rep. 408 (1998).

114. In *Ilhan v. Turkey*, the government challenged the standing of Nisar Ilhan, the victim's brother, to allege human rights violations on his own behalf because the direct victim was still alive and could raise allegations of his own torture. *Ilhan*, 34 Eur. H.R. Rep. 36, ¶ 49. The European Court distinguished between Ilhan acting on his own behalf and as representative of the victim and concluded that Ilhan had standing to do both. *Id.* ¶¶ 53-54. In examining Ilhan's own standing, the European Court highlighted that Ilhan could claim to have been closely concerned with the incident since he was the member of the family who came immediately to the hospital on news of his brother's injury and took responsibility for obtaining the necessary treatment. *Id.* ¶ 54. Similarly, in *Yasa v. Turkey*, the state challenged the applicant's, Mr. Esref Yasa, standing to submit an application on behalf of his deceased uncle, *inter alia*, since it had not been proved that the relationship of uncle/nephew made them direct relatives. *Yasa*, 28 Eur. H.R. Rep. 408, ¶ 61. The European Court dismissed the

European Convention as providing that prosecutions must be considered an effective remedy that states owe victims of violent crime. Article 2, which confers to victims certain participatory rights in criminal proceedings, will be discussed below in Section B.

Primarily in cases against Turkey, the European Court has found a violation of Article 13 of the European Convention in almost every case in which (1) there was no criminal investigation into alleged right to life or personal integrity violations, or (2) where the investigation was superficial or plagued with substantial errors.¹¹⁵ The language of Article 13 of the European Convention is very similar to Article 25 of the American Convention. It provides that every person alleging a violation of the European Convention has a right to an effective remedy before a national authority.¹¹⁶

By finding a separate Article 13 violation, the European Court established that a state's violation of its duty to prosecute right to life and inhuman treatment allegations¹¹⁷ also violates the individual

challenge by concluding that the deceased's nephew could legitimately claim to be a victim of an act as tragic as the murder of his uncle. *Id.* ¶ 66. The European Court agreed with the European Commission that Yasa in bringing the complaint, was acting "as a person who is himself . . . affected . . . and not as his uncle's representative." *Id.* ¶ 63.

115. The following cases involved extrajudicial executions: *Kaya v. Turkey*, 28 Eur. H.R. Rep. 1 (1998); *Gulec v. Turkey*, 28 Eur. H.R. Rep. 121 (1998); *Ergi*, 32 Eur. H.R. Rep. 18; *Yasa*, 28 Eur. H.R. Rep. 408; *Ogur v. Turkey*, 31 Eur. H.R. Rep. 40 (1999); *Tanrikulu v. Turkey*, 30 Eur. H.R. Rep. 950 (1999); *Mahmut Kaya v. Turkey*, App. No. 22535/93, 1416 Eur. Ct. H.R. 253 (2000); *Kilic v. Turkey*, 33 Eur. H.R. Rep. 58 (2000); *Salman*, 34 Eur. H.R. Rep. 17; *Akkoc v. Turkey*, 34 Eur. H.R. Rep. 51 (2000); *Gül*, 34 Eur. H.R. Rep. 28; *Tanli v. Turkey*; App. No. 26129/95, 956 Eur.Ct. H.R. 114 (2001). The following cases involved forced disappearances: *Kurt v. Turkey*, 27 Eur. H.R. Rep. 373 (1998); *Cakici v. Turkey*, 31 Eur. H.R. Rep. 5 (1999); *Timurtas v. Turkey*, 33 Eur. H.R. Rep. 6 (2000); *Tas v. Turkey*, 33 Eur. H.R. Rep. 15 (2000); *Cicek v. Turkey*, App. No. 25704/94, 934 Eur. Ct. H.R. 56 (2001); *Akdeniz et al. v. Turkey*, App. No. 23954/94, 854 Eur. Ct. H.R. 254 (1994). The following cases involved torture or other inhuman treatment: *Aksoy v. Turkey*, 23 Eur. H.R. Rep. 553 (1996); *Aydin v. Turkey*, 25 Eur. H.R. Rep. 251 (1997); *Tekin v. Turkey*, 31 Eur. H.R. Rep. 4 (1998); *Ilhan*, 34 Eur. H.R. Rep. 36. The following cases involved the destruction of property in a way that amounted to cruel and inhuman treatment: *Mentes*, 26 Eur. H.R. Rep. 595; *Selcuk & Asker v. Turkey*, 26 Eur. H.R. Rep. 477 (1998); *Dulas v. Turkey*, App. No. 25801/94, 1116 Eur. Ct. H.R. 350 (2001).

116. Article 13 (right to an effective remedy) of the European Convention, *supra* note 107, provides: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

117. The European Court has interpreted Articles 2 (right to life) and 3 (prohibition of torture) of the European Convention, when read in conjunction with the state's general duty under Article 1 of the European Convention, to "secure to everyone within their jurisdiction the rights and freedoms defined in . . . [the] Convention" as requiring states to carry out an effective official investigation capable of leading to the identification and punishment of those responsible. See, in relation to Article 2, *McCann v. United Kingdom*, 21 Eur. H.R. Rep. 97, ¶ 161 (1996); *Kaya*, 28 Eur. H.R.

victim's right to an effective remedy. The European Court specifically held that, given the importance of the rights to life and humane treatment, Article 13 requires the state to provide victims a thorough and effective investigation capable of leading to identification and punishment of those responsible, in addition to the payment of compensation where appropriate.¹¹⁸ Although victims' rights under Article 13 also coexist with the procedural duties to investigate violations of the right to life and personal integrity, the European Court has held that the requirements under Article 13 are broader than the procedural duties because Article 13 not only requires an effective investigation, but also requires that the entire system securing the remedy be effective.¹¹⁹

Some recent cases decided against the United Kingdom, however, appear to represent a shift in thinking about the European Court's interpretation of Article 13 in the Turkish cases.¹²⁰ In the U.K. Cases, the European Court examined, but did not find, an Article 13 violation, even though it otherwise found procedural errors in the criminal process that violated the state's duty to conduct an effective criminal investigation under Article 2 of the European Convention.¹²¹ Instead, the European Court distinguished the Southeast Turkey cases because in the United Kingdom civil proceedings for damages against state agents are independent from the criminal outcome.¹²² Implicit in this analysis is that states may

Rep. 1, ¶ 86; *Yasa*, 28 Eur. H.R. Rep. 408, ¶ 98. See also, in relation to Article 3, *Assenov v. Bulgaria*, 28 Eur. H.R. Rep. 652, ¶ 102 (1998).

118. In relation to the right to life, see *Kaya*, 28 Eur. H.R. Rep. 1, ¶ 107; *Ergi*, 32 Eur. H.R. Rep. 18, ¶ 98; *Yasa*, 28 Eur. H.R. Rep. 408, ¶ 114; *Tanrikulu*, 30 Eur. H.R. Rep. 950, ¶ 117; *Cakici*, 31 Eur. H.R. Rep. 5, ¶ 113; *Kili*, 33 Eur. H.R. Rep. 58, ¶ 91; *Mamhut Kaya*, 1416 Eur. Ct. H.R. 253, ¶ 124; *Timurtas*, 33 Eur. H.R. Rep. 6, ¶ 111; *Salman v. Turkey*, 34 Eur. H.R. Rep. 17, ¶ 121 (2000); *Akkoc*, 34 Eur. H.R. Rep. 51, ¶ 103; *Tas*, 33 Eur. H.R. Rep. 15, ¶ 91; *Gül v. Turkey*, 34 Eur. H.R. Rep. 28 (2000); *Cicek*, 934 Eur. Ct. H.R. 56, ¶ 178; *Tanli*, 956 Eur. Ct. H.R. 114, ¶ 171; *Akdeniz*, 854 Eur. Ct. H.R. 254, ¶ 112. In relation to the right to humane treatment, see *Aksoy*, 23 Eur. H.R. Rep. 553, ¶ 98; *Aydin*, 25 Eur. H.R. Rep. 251, ¶ 104; *Mentes*, 26 Eur. H.R. Rep. 595, ¶ 89; *Selcuk & Akser*, *supra* note 113; *Tekin*, 31 Eur. H.R. Rep. 4, ¶ 66; *Assenov*, 28 Eur. H.R. Rep. 652, ¶ 117; *Ilhan*, 34 Eur. H.R. Rep. 36, ¶ 97; *Egmez v. Cyprus*, 34 Eur. H.R. Rep. 29, ¶ 100 (2000); *Dulas*, 1116 Eur. Ct. H.R. 350, ¶ 66.

119. *Ergi*, 32 Eur. H.R. Rep. 18, ¶¶ 94-98. See also *Yasa*, 28 Eur. H.R. Rep. 408, ¶ 115; *Kaya*, 28 Eur. H.R. Rep. 1, ¶ 107; *Gül*, 34 Eur. H.R. Rep. 28, ¶ 102; *Tas*, 33 Eur. H.R. Rep. 15, ¶ 93.

120. *Jordan v. United Kingdom*, App. No. 24746/94, 1020 Eur. Ct. H.R. 300 (2001); *McKerr v. United Kingdom*, 34 Eur. H.R. Rep. 20 (2002); *Kelly v. United Kingdom*, App. No. 30054/96, 2004 Eur. Ct. H.R. 240 (2001); *Shanaghan v. United Kingdom*, App. No. 37715/97, 1814 Eur. Ct. H.R. 400 (2001).

121. *Jordan*, 1020 Eur. Ct. H.R. 300, ¶¶ 164-65; *McKerr*, 34 Eur. H.R. Rep. 20, ¶¶ 175-76; *Kelly*, 2004 Eur. Ct. H.R. 240, ¶¶ 158-59; *Shanaghan v. United Kingdom*, App. No. 37715/97, 1814 Eur. Ct. H.R. 400 (2001), ¶¶ 139-40.

122. *Jordan*, 1020 Eur. Ct. H.R. 300, ¶¶ 161-62; *McKerr*, 34 Eur. H.R. Rep. 20, ¶¶ 172-73; *Kelly*, 2004 Eur. Ct. H.R. 240, ¶¶ 154-56; *Shanaghan*, 1814 Eur. Ct. H.R. 400, ¶¶ 136-37.

satisfy victims' rights to an effective remedy under Article 13 by providing civil recourse in which victims may recover monetary damages, notwithstanding the results of a criminal trial. This analysis was more explicit when the European Court stated that it "has found no elements which would prevent (the pending civil) proceedings" from providing the redress contemplated under Article 13.¹²³

2. Specialized Treaties or Declarations

a. The Basic Principles and Guidelines on the Right to a Remedy and Reparation of Victims of Violations of International Human Rights and Humanitarian Law

The U.N. Commission on Human Rights has also adopted a revised draft titled Basic Principles and Guidelines on the Right to a Remedy and Reparation of Victims of Violations of International Human Rights and Humanitarian Law (Basic Principles).¹²⁴ The document is described as a "victim-oriented point of departure of the community, at local, national, and international levels, [that] affirms its human solidarity and compassion with victims of violations of international human rights and humanitarian law as well as with humanity at large."¹²⁵ The Basic Principles is not yet in final form, although during its 58th Session the U.N. Commission on Human Rights requested the U.N. High Commissioner for Human Rights to hold a consultative meeting for the purpose of finalizing the text for consideration by the U.N. Commission on Human Rights during the 59th Session.¹²⁶

The most relevant parts of the Basic Principles relating to victims' rights in the criminal process are those related to reparations and access to justice. Section X on "Forms of Reparation of the Basic Principles" lists the types of reparations states must provide victims of international human rights and humanitarian law violations.

123. *Jordan*, 1020 Eur. Ct. H.R. 300, ¶ 163; *McKerr*, 34 Eur. H.R. Rep. 20, ¶ 174; *Kelly*, 2004 Eur. Ct. H.R. 240, ¶ 157; *Shanaghán*, 1814 Eur. Ct. H.R. 400, ¶ 138.

124. The revised draft of the Basic Principles was prepared by Special Rapporteur, Mr. M. Cherif Bassiouni who was appointed by the Chairman of the Commission on Human Rights in accordance with Commission Resolution 1999/33 to prepare and revise the earlier version of the basic principles and guidelines elaborated by Mr. Theo Van Boven with a view of adopting them by the General Assembly. *Final Report of the Special Rapporteur, Mr. M. Cherif Bassiouni*, Commission on Human Rights, U.N. Doc. E/CN.4/2000/62, ¶ 1 (2000) [hereinafter Bassiouni Report].

125. *Id.* at Annex, Resolve Section of the Draft Basic Principles.

126. *The Right to Restitution: Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms*, U.N. Commission on Human Rights, 58th Sess., U.N. Doc. E/CN.4/2002/L.61, Resolution 2002/44 (2002) (adopted without a vote).

These include, among others, satisfaction and guarantees of non-repetition. The state must specifically guarantee victims

[v]erification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further unnecessary harm or threaten the safety of the victim, witnesses, or others; [t]he search for the bodies of those killed or disappeared and assistance in the identification and reburial of the bodies in accordance with the cultural practices of the families and communities; [a]n official declaration or judicial decision restoring the dignity, reputation and legal and social rights of the victim and of persons closely connected with the victim; [an] apology, including public acknowledgment of the facts and acceptance of responsibility; and [j]udicial or administrative sanctions against persons responsible for the violations."¹²⁷

b. Other U.N. Human Rights Instruments

The United Nations has also adopted specialized human rights instruments that include provisions on the right to complain or to an effective remedy. These provisions have also been interpreted to include victims' right to an effective investigation into the allegations with the aim of according the appropriate sanctions against the perpetrators.

One of the earliest international human rights treaties to include a provision related to victims' rights to complain is the U.N. Torture Convention.¹²⁸ Article 13 of the U.N. Torture Convention provides that "[e]ach State Party shall ensure that any individual who alleges he has been subject to torture in any territory under its jurisdiction has the right to complain, and to have his case promptly and impartially examined by its competent authorities."¹²⁹ The Committee against Torture¹³⁰ has held that a state violates Article 13

127. Bassiouni Report, *supra* note 124, art. 25(a)-(f) (emphasis added).

128. U.N. Torture Convention, *supra* note 76. This Convention was concluded in New York on December 10, 1984, and it entered into force June 26, 1987.

129. *Id.* U.N. documents related to the treatment of prisoners have included similar language. See, e.g., Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, Principle 33, U.N. Doc. A/Res/43/173 (1998).

A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment. . . . Every complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected or, in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority.

Id.

130. The Committee against Torture is the treaty monitoring body of the U.N. Torture Convention that, in addition to issuing country reports examining the level of compliance with the treaty among signatory states, receives communications from or on behalf of individuals claiming a violation under the Convention. U.N. Torture Convention, *supra* note 76, arts. 17-24.

when it fails to proceed with an impartial investigation of alleged acts of torture within its territory.¹³¹

The 1992 U.N. Declaration on Enforced Disappearances also includes the right to complain and expands the scope of this right to any persons with knowledge of the violation. Article 13 of this Declaration provides that "any person having knowledge or legitimate interest who alleges that a person has been subjected to enforced disappearance has the right to complain to a competent and independent state authority and to have that complaint promptly, thoroughly and impartially investigated by the authority."¹³² Article 13 elaborates that this right imposes the following duties on a state, whenever it has reasonable grounds to believe that an enforced disappearance has been committed: to refer the matter to the appropriate authorities; not to take any measure that would curtail or impede the investigation; to provide all the necessary powers and resources to conduct the investigation effectively; to protect all individuals involved in the investigation from harassment and ill-treatment; and to make its findings available to those parties concerned, unless doing so would jeopardize the investigation.¹³³ The Working Group on Enforced or Involuntary Disappearance similarly interpreted Article 19 of the U.N. Declaration on Enforced Disappearance, which pertains to the right to an effective remedy, to require the prosecution and punishment of human rights perpetrators.¹³⁴

In summary, most of the human rights cases and documents establishing victims' rights in the criminal process have declared that

131. *M'Barek v. Tunisia*, Communication No. 60/1996, ¶ 12, U.N. Doc. CAT/C/23/D/60/1996 (2000); *Blanco Abad v. Spain*, Communication No. 59/1996, U.N. Doc. CAT/C/20/D/59/1996 (1998).

132. U.N. Declaration on Enforced Disappearances, *supra* note 76. This same language, with minor modifications, has been incorporated into the U.N. Draft Convention on the Protection of All Persons from Forced Disappearance [hereinafter U.N. Convention on Forced Disappearance]. U.N. Draft Convention on Forced Disappearance, Report of the Sessional Working Group on the Administration of Justice, U.N. Doc. E/CN.4/Sub.2/1998/19 (1998). Article 11 of this Draft Convention reads, "Each State Party shall ensure that any person who alleges that someone has been subjected to forced disappearance has the right to complain to a competent and independent state authority and to have that complaint immediately, thoroughly and impartially investigated by that authority." *Id.* ¶ 10. Presently, the Commission on Human Rights is receiving views and comments from states, international organizations, and non-governmental organizations on the draft document. Question of Enforced or Involuntary Disappearances, U.N. Doc. E/CN.4/2001/69 (2001).

133. U.N. Declaration on Enforced Disappearances, *supra* note 76.

134. Report of the Working Group on Enforced or Involuntary Disappearances, U.N. Doc. E/CN.4/1998/43, ¶ 71 (1998). Other specialized U.N. human rights treaties that contain provisions on the right to an effective remedy include: the U.N. Declaration on the Elimination of Violence against Women, *supra* note 76, art. 4(d); the U.N. Declaration on Enforced Disappearance, *supra* note 76, art. 19; and the U.N. Draft Convention on Forced Disappearance, *supra* note 132, art. 24.

states must guarantee victims an effective prosecution as a remedy for violations implicating the right to life and personal integrity. Therefore, when states fail to conduct effective prosecutions, they not only violate the general duty to prosecute, but more specifically, they violate victims' rights to an effective remedy. The remedy has generally been to order states to rectify the violation by conducting an effective prosecution. In addition, international law has developed specific norms that grant standing to victims to participate in criminal proceedings, in part to ensure that states guarantee victims' right to prosecutions as a remedy.

B. *Victims' Participatory Rights in the Criminal Process*

Victims' participatory rights in the criminal process are found in Declarations and Recommendations by the United Nations and European countries, in the case law of the European Court on Human Rights, and in the Rome Statute for the International Criminal Court. These documents or cases generally provide that victims must have access to the criminal process. Some states have construed these instruments to grant victims the right to direct participation or to seek review of the state's prosecutorial practices.

1. The United Nations

a. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

The General Assembly adopted, by consensus, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power on November 29, 1985.¹³⁵ The Victims' Declaration has been described as "a reflection of the collective will of the international community to restore the balance between the fundamental rights of suspects and offenders, and the rights and interest of victims."¹³⁶ The Victims' Declaration has also become known as the Magna Carta for victims.¹³⁷ Part A of the Victims' Declaration broadly defines victims of crime to include persons who individually or collectively have suffered harm, which includes physical or mental injury,

135. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, U.N. Doc. A/CONF.121/22/Rev.1 (1985) [hereinafter Victims' Declaration]. The Victims' Declaration was adopted by the General Assembly in Resolution 40/34 of November 29, 1985, on the recommendation of the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders. *Id.*

136. GUIDE FOR POLICY MAKERS, *supra* note 35, at 1.

137. HANDBOOK ON JUSTICE FOR VICTIMS ON THE USE AND APPLICATION OF THE DECLARATION OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME AND ABUSE OF POWER 105 (1999), available at <http://www.victimology.nl> [hereinafter HANDBOOK ON JUSTICE FOR VICTIMS].

emotional suffering, economic loss, or substantial impairment of their fundamental rights through acts or omissions that violate existing domestic laws, including those proscribing criminal abuses of power.¹³⁸ Victims can also include, where appropriate, the immediate family or dependents of the direct victim who have suffered harm in intervening to assist victims in distress or to prevent victimization.¹³⁹

Part A of the Victims' Declaration recommends that states adopt measures that will improve, among other things, the access of victims of crime to justice and fair treatment.¹⁴⁰ These recommendations urge states to do the following: treat victims with compassion and dignity; guarantee them access to the mechanisms of justice; establish or strengthen judicial and administrative mechanisms to allow victims to secure redress through procedures that are fair, inexpensive and accessible; and inform victims of their rights to seek redress.¹⁴¹ This Section also outlines specific steps states can institute to improve the responsiveness of judicial and administrative processes to victims' needs. These include informing victims of crime of their potential role in the process and scope and progress of the disposition of their cases; allowing victims' views and concerns to be presented and considered at appropriate stages of the proceedings, without prejudice to the accused; providing proper assistance to victims through the legal process; taking measures to minimize inconvenience to victims, protect their privacy, and ensure their safety, and the safety of their families and witnesses on their behalf, from intimidation and violation; avoiding unnecessary delays; and creating informal mechanisms for the resolution of disputes, where appropriate, to facilitate conciliation and redress for victims.¹⁴²

Subsequent publications regarding the Victims' Declaration elaborate on how states can comply with its provisions and review the

138. Victims' Declaration, *supra* note 135, ¶ 1. The Victims' Declaration is divided into Part A and Part B. Part A contains the provisions related to victims of crime, which are the most relevant to victims' participatory rights in the criminal process. Many states intended this definition of victims of crime to include states' abuses of power, both when the state directly commits a crime and when it abuses its power by failing to enforce laws against others who commit crimes. LeRoy L. Lamborn, *The United Nations Declaration on Victims: Incorporating "Abuse of Power,"* 19 RUTGERS L.J. 59, 75-87 (1987). Part B contains the provisions related to victims of abuse of power for acts that have not yet been recognized as crimes under national law. Victims' Declaration, *supra* note 135, ¶ 18. The recommendations under this section generally include that states should consider providing remedies to victims of such abuses that include restitution and medical or psychological assistance and enacting laws that recognize these crimes. *Id.* ¶¶ 18-21.

139. *Id.* ¶ 1.

140. Part A of the Victims' Declaration also recommends that victims of crime receive restitution (from the offender), compensation (from the State), and social assistance. Victims' Declaration, *supra* note 135, ¶¶ 8, 12, 14.

141. *Id.*

142. *Id.*

specific steps implemented to date by some states in an effort to do so.¹⁴³ These publications reveal that some states have interpreted the Victims' Declaration as codifying victims' rights to have input into the prosecutorial decision-making throughout the criminal process. Specifically, some states have interpreted victims' rights to access justice to require states to accord victims a review mechanism to challenge state decisions in criminal investigations and trials that adversely affect victims' interests.¹⁴⁴ This interpretation has raised some concerns. During the Tenth Congress for the Prevention of Crime and the Treatment of Offenders,¹⁴⁵ for example, states specifically addressed potential for conflicts between offenders'¹⁴⁶ and victims' rights in the criminal process.¹⁴⁷ The Tenth Congress declared that the most debated victims' right in the criminal process is the right to be involved in the decision-making.¹⁴⁸ The Tenth

143. GUIDE FOR POLICY MAKERS, *supra* note 35; HANDBOOK ON JUSTICE FOR VICTIMS, *supra* note 137.

144. HANDBOOK ON JUSTICE FOR VICTIMS, *supra* note 137, at 39 ("Implicit in access to justice is the provision of a mean for obtaining a review of a decision taken.").

145. United Nations Congresses on the Prevention of Crime and Treatment of Offenders are held every five years since 1955, in accordance with General Assembly Resolution 415(V) of December 1, 1950 (Geneva 1955; London 1960; Stockholm 1965; Kyoto 1970; Geneva 1975; Caracas 1980; Milan 1985; Havana 1990; and Cairo 1995). These Congresses bring together different categories of participants from all criminal justice fields and serve as a springboard for norm-setting and the development of standards for the improvement of national practice in criminal law. See Tenth U.N. Congress On the Prevention of Crime and the Treatment of Offenders, available at <http://www.uncjin.org>.

146. The Tenth Congress described the rights of offenders in the criminal process as follows:

The right not to be subject to arbitrary arrest, detention, search or seizure; the right to know the nature of the charges and evidence; the presumption of innocence; the standard of proof (beyond a reasonable doubt); the right to a public trial by an independent court; right to test the prosecution evidence (e.g., cross-examine witnesses); the right to give and call evidence; and the right to appeal.

Working Paper: Offenders and Victims: Accountability and Fairness in the Criminal Justice Process, Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Vienna, Apr. 10-17, 2000, ¶ 11, U.N. Doc. A/CONF.187/8 [hereinafter Tenth Congress Working Paper].

147. The Tenth Congress refers to the Declaration as containing "the internationally accepted basic elements of fairness for victims," which it describes to include the following: The right to be treated with respect and recognitions; the right to be referred to adequate support services; the right to receive information about the progress of the case; *the right to be present and to be involved in the decision-making process*; the right to counsel; the right to protection of physical safety and privacy; and the right to compensation, from both the offender and the state. *Id.* ¶ 14 (emphasis added). Notable about this description is that victims' rights to participate in the criminal process is no longer qualified by the phrase "without prejudice to the accused."

148. *Id.* ¶ 24. States disagree, for example, on the question of whether victims should have the right to be involved in the sentencing process by addressing the judge

Congress concluded, however, that not all victim involvement has been controversial. It observed that most states recognize victims' rights to initiate criminal proceedings when prosecutors refrain from prosecuting.¹⁴⁹ Many states also recognize victims' rights to seek review of the state's decision to close a case because of lack of evidence or reasons of expediency.¹⁵⁰ Not every state has adopted the same review procedures. Some have opted to establish an ombudsman office to intervene and ensure accountability.¹⁵¹ Other states allow victims to request direct review of the decision not to prosecute to a superior prosecutor¹⁵² or judge.¹⁵³ Some states have even allowed the victims to prosecute directly.¹⁵⁴ Moreover, in a few jurisdictions, neglect by the prosecutor or the court to consider victims' rights to claim redress in criminal proceedings may lead to administrative sanctions.¹⁵⁵ The Tenth Congress concluded that such provisions provide an important mechanism for correcting unfair case dismissals, such as those based on undue influence by politicians and corruption.¹⁵⁶ The Tenth Congress also recommended that states make law enforcement and prosecution officials accountable to an independent institution, such as an ombudsman, for failure to comply with victims' rights, and to provide civil and administrative remedies when the government fails to enforce those rights.¹⁵⁷

b. The Rome Statute and the Rules of Procedure and Evidence of the International Criminal Court

For the first time, with the establishment of a permanent international criminal court, victims will have certain participatory rights in international criminal proceedings.¹⁵⁸ Together, the Rome

or jury, or whether they should have any final say in decision on pre-trial detention, plea bargaining, sentencing or parole. *Id.*

149. *Id.*

150. *Id.* ¶ 27.

151. Such institutions help to ensure that the competent authorities conduct an impartial investigation, particularly when the crime is alleged to have been committed by law enforcement, military, administrative, medical, and other professions personnel. *GUIDE FOR POLICY MAKERS, supra* note 35, at 9.

152. *HANDBOOK ON JUSTICE FOR VICTIMS, supra* note 137, at 40 (citing as an example, Germany, where the victim may first petition a superior of the prosecutor, and, then, should this not lead to the desired result, may turn directly to the courts).

153. *GUIDE FOR POLICY MAKERS, supra* note 35, at 19 (citing Mexico as an example).

154. *Id.* (citing Australia and Finland as examples).

155. *Id.* (citing Mexico as an example).

156. Tenth Congress Working Paper, *supra* note 146, ¶ 27.

157. *Id.* ¶ 17.

158. The Statutes of the International Criminal Tribunals for the Former Yugoslavia (ICTY Statute) and Rwanda (ICTR Statute) did not contemplate any victim participation other than as witnesses. Like the Rome Statute of the International

Statute and the Finalized Draft Text of the Rules of Procedure and Evidence, contain the most comprehensive and specific list of victims' participatory rights in criminal proceedings. The Rules of Procedure and Evidence defines victims as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the court," which may include "organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes."¹⁵⁹

Generally, the Rome Statute and the Rules of Procedure and Evidence do not grant victims complete autonomy either to make decisions regarding the initiation of a criminal investigation or during the proceedings. They do, however, include language providing that victims' views must be taken into account by the appropriate officials responsible for the decisions and that victims must be kept informed of the proceedings. The Rome Statute and the ICC Rules of Procedure and Evidence also permit victims to have their own representatives and to make presentations independent from the prosecutor at various stages of the proceedings where their interests are implicated. In addition, the ICC Rules of Procedure and Evidence designates the Victims and Witnesses Unit as the organ responsible for providing resources and guidance to victims to ensure they are able to exercise their rights during the proceedings.

Victims' involvement begins in the early stages of the international criminal court process. For example, when deciding whether to initiate an investigation,¹⁶⁰ the prosecutor must take into account the gravity of the crime and the interests of victims.¹⁶¹ Moreover, the prosecutor must present reasons and seek the

Criminal Court, however, these tribunals did establish mechanisms for the protection of victims and witnesses. Statute of the International Criminal Tribunals for the Former Yugoslavia, May 25, 1993, arts. 15, 20.1, 22, U.N. Doc. S/RES/827 [hereinafter ICTY Statute]; Statute of the International Criminal Tribunals for Rwanda, Nov. 8, 1994, arts. 14, 19.1, 21, U.N. Doc. S/RES/955 [hereinafter ICTR Statute]; Rome Statute of the International Criminal Court, July 17, 1998, arts. 43.6, 57.3(c), 64.2, 68, U.N. Doc. A/CONF.189/9, *reprinted in* 37 I.L.M. 999 (1998) [hereinafter Rome Statute]. In addition, like the Rome Statute, these tribunals included special procedures to protect victim privacy. See ICTY Rules of Procedure and Evidence, Mar. 14, 1994, Rule 96, U.N.Doc.IT/32/Rev.7 [hereinafter ICTY Rules]; ICTR Rules of Procedure and Evidence, Rule 96, U.N.Doc.ITR/3/Rev.1 [hereinafter ICTR Rules]. Finally, like the Rome Statute, these tribunals also included provisions to guarantee victims monetary reparations. See ICTY Rules, *supra*, Rule 106; Rome Statute, *supra*, art. 75.

159. Rules of Procedure and Evidence of the International Criminal Court, June 30, 2000, Rule 85, U.N. Doc. PCNICC/2000/1/Add.1 [hereinafter ICC Rules of Procedure and Evidence].

160. Article 15 of the Rome Statute, *supra* note 158, grants authority to the Prosecutor to initiate an investigation *proprio motu* with the authorization of the Pre-Trial Chamber.

161. *Id.* art. 53.

confirmation of the Pre-trial Chamber for its decision not to prosecute. This procedure must be followed when the prosecutor has determined there is otherwise substantial reason to believe that an investigation would not serve the interest of justice, even when a reasonable belief may exist that a crime within the jurisdiction of the court has been or is being committed.¹⁶² During this process, the prosecutor shall inform victims that she intends to initiate a prosecution, unless the prosecutor decides that doing so would pose a danger to the integrity of the investigation or the life or well-being of the victims and witnesses.¹⁶³ If the prosecutor informs victims that she intends to initiate a prosecution, victims may make presentations to the Pre-Trial Chamber to request authorization for the investigation¹⁶⁴ and shall receive notice of the Pre-Trial decision.¹⁶⁵

In addition, the Pre-Trial Chamber may ask the prosecutor to reconsider her decision not to prosecute, in which case the prosecutor must proceed with the investigation.¹⁶⁶ Once the investigation is underway, the Rome Statute establishes that the prosecutor must take measures to ensure the effective investigation and prosecution of crimes and, in doing so, respect the interests and personal circumstances of victims and witnesses.¹⁶⁷ However, neither the Rome Statute nor the Rules of Procedure and Evidence specify how victims' interests should influence the investigation; for example, whether victims may request the collection of evidence or have access to the evidence collected is not discussed.

During the preliminary hearings, the Registrar Relating to Victim and Witnesses of the Victims and Witnesses Unit must inform the victims who have chosen to participate in the proceedings about any question or challenge to the court's jurisdiction and admissibility of the case, provided it does not violate the confidentiality of the information or risk the protection of any person or the preservation of evidence.¹⁶⁸ Victims may respond to these challenges in writing¹⁶⁹ and may have access to the full record of the proceedings, subject to any restrictions for confidentiality and national security concerns.¹⁷⁰ Similarly, if the Pre-trial Chamber declares the case inadmissible, the prosecutor shall inform the victims if she intends to appeal the ruling, provided such disclosure (1) does not violate the confidentiality of information, or (2) risk the protection of any person or the

162. *Id.*

163. ICC Rules of Procedure and Evidence, *supra* note 159, Rules 50.1, 92.2.

164. Rome Statute, *supra* note 158, art. 15.3; ICC Rules of Procedure and Evidence, *supra* note 159, Rule 50.3.

165. ICC Rules of Procedure and Evidence, *supra* note 159, Rule 50.3.

166. *Id.* Rule 110.2.

167. Rome Statute, *supra* note 158, art. 54.

168. ICC Rules of Procedure and Evidence, *supra* note 159, Rules 59.1(b), 59.2.

169. *Id.* Rule 59.3.

170. *Id.* Rule 140.10.

preservation of evidence. Victims may submit their observations in writing.¹⁷¹

Once the trial is underway, the Rome Statute, adopting similar language to the Victims' Declaration,¹⁷² provides that,

[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceeding determined to be appropriate by the Court in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.¹⁷³

The ICC Rules of Procedure and Evidence specify, moreover, that the interests of victims must be taken into account by the Chambers even as to any decision related to stipulated facts.¹⁷⁴ Generally, the Chamber decides the manner and scope of victim participation during the trial.¹⁷⁵ For example, the Chamber can determine whether victims' participation during the hearing will be orally or in writing.¹⁷⁶ Furthermore, the Chamber can supervise victims' oral participation by, for instance, pre-viewing any questions victims wish to pose to witnesses.¹⁷⁷ In order to guarantee victims' participation, the Chamber must notify victims of its decision to hold a hearing;¹⁷⁸ the dates and times of the hearings;¹⁷⁹ and any request, submission, or motion made to the Court.¹⁸⁰ Although it does not appear that victims may participate during closing statements,¹⁸¹ if the Court decides to hold a sentencing hearing, victims might be able to participate if requested to do so by the Chamber.¹⁸² In any case, at

171. *Id.* Rule 62.1.

172. Victims' Declaration, *supra* note 135 and accompanying text.

173. Rome Statute, *supra* note 158, art. 68.3; *See also* ICC Rules of Procedure and Evidence, *supra* note 159, Rule 91.3(b). Rule 91.3(b) reads in part, "[t]he Chamber shall then issue a ruling on the request [for victim participation] taking into account the stage of the proceedings, the rights of the accused, [and] the interests of the witnesses, the need for a fair, impartial and expeditious trial." *Id.*

174. ICC Rules of Procedure and Evidence, *supra* note 159, Rule 69.

175. *Id.* Rule 93.

176. *Id.* Rule 91.2.

177. *Id.* Rule 91.3.

178. *Id.* Rule 92.3.

179. *Id.* Rule 92.5(a).

180. *Id.* Rule 92.5(b).

181. *Id.* Rule 141.2. The Rule reads, "The Presiding Judge shall invite the Prosecutor and defense to make their closing statements. The defense shall always have the opportunity to speak last." Implicit in the language is that victims are not permitted to participate.

182. This is implied from the language of Rule 143 that reads, "Pursuant to article 76, paragraphs 2 and 3, for the purpose of holding a further hearing on matters related to sentence, and if applicable, reparations, the President Judge shall set the date of the further hearing. This hearing can be postponed, in exceptional circumstances, by the Trial Chamber, on its own motion, or at the request of the Prosecutor, the defence or the legal representatives of the victims participating in the proceedings pursuant to rule 89-91." *Id.* Rule 143 (Emphasis added).

sentencing, the Court must consider the particular harm caused to the victims and their families and should consider aggravating factors if the victim is particularly defenseless or if there were multiple victims.¹⁸³ Once a judgment is final, the victim's right of appeal is limited to the decision on reparations.¹⁸⁴

In terms of the resources available to victims to guarantee their ability to exercise their rights during the proceedings, the ICC Rules of Procedure and Evidence establish that it will be the responsibility of the Registrar Relating to Victims and Witnesses (Registrar) to assist victims in obtaining legal advice and organizing their legal representation.¹⁸⁵ The Registrar must also provide the legal representatives with adequate support, assistance, and information, including the use of facilities that may be necessary for the direct performance of their duties.¹⁸⁶ When the victims lack the necessary means to pay for legal representation, the Registrar may at her discretion provide assistance, including financial assistance.¹⁸⁷

c. Other U.N. Human Rights Instruments

Other international instruments that prescribe victims' participatory rights in criminal proceedings include, for example, Article 6 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.¹⁸⁸ Article 6 provides that, in appropriate cases, victims of trafficking shall be (1) informed of relevant court and administrative proceedings, and (2) assisted to express their views and concerns at appropriate stages of criminal proceedings in a manner not prejudicial to the rights of the defense.

The Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment similarly provide that victims and their legal representatives have rights both to be informed and to have access to any hearing or relevant information about the investigation, including the right to present additional evidence.¹⁸⁹

183. *Id.* Rule 145.1(c), (b)(iii)-(iv).

184. Rome Statute, *supra* note 158, arts. 81, 82. Article 81 provides that the Prosecutor and the convicted person may appeal the judgment. *Id.* art. 81. Article 82.4 permits the victims and the convicted person to appeal against the order of reparations. *Id.* art. 82.

185. ICC Rules of Procedure and Evidence, *supra* note 159, Rule 16.1(b).

186. *Id.*

187. *Id.* Rule 90.5.

188. Protocol on Human Trafficking, *supra* note 76.

189. The Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 9842, U.N. GAOR, 55th Sess., Annex 4, Agenda Item 114(c), U.N. Doc. A/RES/55/89 (2000).

2. European Nations

a. The Council of Europe and the Committee of Ministers

The Committee of Ministers of the Council of Europe¹⁹⁰ has adopted human rights instruments that increase victim standing to participate in the criminal process. In addition, the European Court on Human Rights has interpreted the procedural right to life of Article 2 of the European Convention on Human Rights to include victims' participatory rights in the criminal process.

As early as 1983, the Committee of Ministers of the Council of Europe recognized the importance of victim participation in the administration of justice. In a recommendation entitled *On Participation of the Public in Crime Policy*,¹⁹¹ the Committee of Ministers stressed that crime policy must take into account the victims' interests and recommended establishing a system of legal aid for victims to help them gain access to justice in all circumstances.¹⁹²

In 1985, the same year the Victims' Declaration was adopted, the Committee of Ministers also issued a more specific recommendation to Member States titled *On the Position of the Victim in the Framework of Criminal Law and Procedure*.¹⁹³ In the preamble, the Committee explained the purpose of the recommendation was to alleviate victims' exclusion from the criminal process, which the Committee felt had worsened the treatment of victims by the criminal justice system, without regard to whether victim participation conflicted with defendants' rights.¹⁹⁴ Therefore, the Committee

190. Upon joining the Council of Europe, states agree to abide by certain principles and to fulfill specific commitments in human rights, democracy and the rule of law. *The Committee Of Ministers' Monitoring Procedure*, available at http://www.humanrights.coe.int/police/coe_police/cm.html. The Committee of Ministers was created by the Vienna Declaration of Council of Europe Heads of States and Governments to serve as the monitoring mechanisms to "ensure compliance" with these commitments. *Id.*

191. Recommendation of the Committee of Ministers, Doc. No. R(83) 7 (June 23, 1983), available at <http://cm.coe.int/ta/rec/1983/83r7htm>. Most of the recommendations were aimed on providing information, technical assistance, and psychological and other material assistance to victims. *Id.*

192. Also in 1983, the Council of Europe opened for signature the Convention on the Compensation of Victims of Violent Crimes, which entered into force January 2, 1988. European Convention on the Compensation of Victims of Violent Crimes, Nov. 23, 1983, Eur. T.S. No. 116. This Convention, however, focused primarily on measures designed to alleviate the psychological distress of victims and on monetary compensation for victims' injuries. *Id.*

193. Recommendation of the Committee of Ministers, Doc. No. R(85) 11 (June 28, 1985), available at <http://cm.coe.int/ta/rec/1985/85r11.htm>.

194. Relevant parts of the Preamble read, "Considering that the objectives of the criminal justice system have traditionally been expressed in terms which primarily concern the relationship between the state and the offender; Considering that consequently the operation of this system has sometimes tended to add to rather than

recommended that victims should have the rights to (1) obtain information on the outcome of police investigations and of any final decision concerning prosecution, (2) ask for a review by a competent authority of any decision not to prosecute, or (3) institute private proceedings.¹⁹⁵

In a more recent Recommendation by the Committee of Ministers on the role of public prosecutions in the criminal justice system, the Committee restated its recommendation that victims and other interested parties of identifiable status should be able to challenge the decisions of public prosecutors not to prosecute, either by way of judicial review or by authorizing parties to engage in private prosecutions.¹⁹⁶

b. The European Court on Human Rights

The European Court decided several cases in which it found a violation of Article 2 of the European Convention by the United Kingdom for denying victims certain participatory rights in criminal proceedings.¹⁹⁷ Article 2 of the European Convention protects the right to life¹⁹⁸ and had been interpreted earlier by the European Court as imposing a duty on states to prosecute right to life violations.¹⁹⁹ The European Court specifically held that Article 2 also requires that there be sufficient public scrutiny of a criminal investigation or its results in order to secure accountability in the process.²⁰⁰ Moreover, although the degree of public scrutiny required

diminish the problems of the victim. . . . Considering that measures to this end need not necessarily conflict with other objectives of criminal law and procedure, such as the reinforcement of social norms and the rehabilitation of offenders." *Id.*

195. *Id.* ¶¶ 3, 6-7.

196. Recommendation of the Committee of Ministers, Doc. No. R(2000) 19 (October 6, 2000), available at <http://cm.coe.int/ta/rec/2000/2000r19.htm>.

197. See *Jordan v. United Kingdom*, App. No. 24746/94, 1020 Eur. Ct. H.R. 300 (2001); *McKerr v. United Kingdom*, 34 Eur. H.R. Rep. 20 (2002); *Kelly v. United Kingdom*, App. No. 30054/96, 2004 Eur. Ct. H.R. 240 (2001); *Shanaghan v. United Kingdom*, App. No. 37715/97, 1814 Eur. Ct. H.R. 400 (2001).

198. Article 2 reads, in part, "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which the penalty is provided by law." European Convention, *supra* note 107, art. 2.

199. See Orentlicher, *supra* note 6, at n.135; sources cited *supra* note 117.

200. The European Court highlights that an effective investigation, that may vary in different circumstances, requires at least the following five factors: The authorities must act on their own, once the matter has come to their attention, without relying on the initiative of the next of kin; the investigation must be carried out by person who are independent from those implicated in the events; the investigation must be capable (have the means) of leading to the determination of responsibility and the identification and punishment of those responsible; the process must be prompt and reasonable; and the process must have a sufficient element of public scrutiny to ensure accountability. *Jordan*, 1020 Eur. Ct. H.R. 300, ¶¶ 105-09; *McKerr*, 34 Eur.

may vary from case to case, the European Court established that in all cases "the next of kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests."²⁰¹

Specifically, the European Court criticized the British criminal justice system for not requiring the prosecutor to justify the decision not to prosecute and for not subjecting such decisions to judicial review.²⁰² The European Court observed that, when the state is not required to justify its decision not to investigate allegations of crimes that may implicate its agents, the state undermines public confidence in the administration of justice and casts doubt on its lack of independence, whether or not the state is independent in fact.²⁰³ The European Court also found problematic the inability of the next of kin to obtain copies of witness statements prior to the witness presented oral testimony.²⁰⁴ The European Court considered that families' lack of access to witness statements before the appearance of the witness placed them at a disadvantage in terms of preparation and ability to participate in questioning.²⁰⁵ The European Court also held that the frequent use of public interest immunity by the United Kingdom, when it prevented certain questions or disclosure of certain documents that were material to the investigation, also hindered an effective investigation.²⁰⁶ Finally, although the European Court did not find a violation on the facts in these U.K. cases, the cases suggest that the lack of legal aid to the victim or next of kin during the criminal proceedings might also be a violation of Article 2.²⁰⁷

The U.K. cases were not the first time that the European Court held that such denial of access amounted to an Article 2 violation. Previously, the European Court held that Turkey violated Article 2 when it did not inform victims or their closest relatives of the state's decision not to prosecute.²⁰⁸ The European Court considered this lack of information particularly troublesome because it robbed the next of kin from the possibility of appealing the decision not to prosecute to a

H.R. Rep. 20, ¶¶ 111-15; *Kelly*, 2004 Eur. Ct. H.R. 240; *Shanaghan*, 1814 Eur. Ct. H.R. 400, ¶¶ 88-92.

201. *Jordan*, 1020 Eur. Ct. H.R. 300, ¶ 109; *McKerr*, 34 Eur. H.R. Rep. 20, ¶ 115; *Kelly*, 2004 Eur. Ct. H.R. 240, ¶ 98; *Shanaghan*, 1814 Eur. Ct. H.R. 400, ¶ 92.

202. *Jordan*, 1020 Eur. Ct. H.R. 300, ¶ 122; *McKerr*, 34 Eur. H.R. Rep. 20, ¶ 130; *Kelly*, 2004 Eur. Ct. H.R. 240, ¶ 116; *Shanaghan*, 1814 Eur. Ct. H.R. 400, ¶ 106.

203. *Jordan*, 1020 Eur. Ct. H.R. 300, ¶ 123; *McKerr*, 34 Eur. H.R. Rep. 20, ¶ 131; *Kelly*, 2004 Eur. Ct. H.R. 240, ¶ 117; *Shanaghan*, 1814 Eur. Ct. H.R. 400, ¶ 107.

204. *Jordan*, 1020 Eur. Ct. H.R. 300, ¶ 133; *McKerr*, 34 Eur. H.R. Rep. 20, ¶ 147; *Kelly*, 2004 Eur. Ct. H.R. 240, ¶ 116; *Shanaghan*, 1814 Eur. Ct. H.R. 400, ¶ 106.

205. *Jordan*, 1020 Eur. Ct. H.R. 300, ¶ 134; *McKerr*, 34 Eur. H.R. Rep. 20, ¶ 148; *Kelly*, 2004 Eur. Ct. H.R. 240, ¶ 128; *Shanaghan*, 1814 Eur. Ct. H.R. 400, ¶ 117.

206. *McKerr*, 34 Eur. H.R. Rep. 20, ¶ 151.

207. *Jordan*, 1020 Eur. Ct. H.R. 300, ¶ 131; *McKerr*, 34 Eur. H.R. Rep. 20, ¶ 146; *Kelly*, 2004 Eur. Ct. H.R. 240, ¶ 126; *Shanaghan*, 1814 Eur. Ct. H.R. 400, ¶ 131.

208. *Gulec v. Turkey*, 28 E.H.R.R. 121, ¶ 82 (1998); *Ogur v. Turkey*, App. No. 21594/93, ¶ 92 (1999).

higher authority.²⁰⁹ The European Court also found Article 2 violations against Turkey where the next of kin was not given access to the investigation and court documents.²¹⁰ For example, the European Court required the next of kin to have access to the investigation files and to be able to introduce evidence to substantiate the record.²¹¹

c. The European Union

The Council of the European Union²¹² has similarly adopted a Council Framework Decision meant to improve victims' standing in criminal proceedings.²¹³ This Decision urges Member States to ensure that victims have a "real and appropriate role in its criminal legal system."²¹⁴ In addition, the Decision calls on Member States specifically to do the following: "safeguard the possibility for victims to be heard during the proceedings and to supply evidence;"²¹⁵ ensure that victims are kept informed of the outcome of the complaint and the conduct of the criminal proceeding;²¹⁶ and afford victims, who have the status of parties or witnesses, reimbursement of expenses incurred in their participation.²¹⁷ This latter provision does not require states to afford victims the status of parties in criminal

209. See *Ogur*, 31 Eur. H.R. Rep. 40, ¶ 92.

210. *Gül v. Turkey*, 34 Eur. H.R. Rep. 28, ¶ 93 (1999); *Ogur*, 31 Eur. H.R. Rep. 40, ¶ 92.

211. *Ogur*, 31 Eur. H.R. Rep. 40, ¶ 92 (holding, *inter alia*, that since the Administrative Court made its decision solely on the basis of state produced paper on file, the proceedings had been inaccessible to the victim's relatives). In the U.K. cases, the European Court, while still affirming the victims' right to have access to the investigation files, clarified that it is not an automatic requirement and that it may happen later in the process if the state can show that the contents must be kept confidential until later stages of the prosecution to safeguard the efficiency and efficacy of the procedures. *Kelly*, 2004 Eur. Ct. H.R. 240, ¶ 115; *McKerr*, 34 Eur. H.R. Rep. 20, ¶ 129; *Shanaghan*, 1814 Eur. Ct. H.R. 400, ¶ 105; *Jordan*, 1020 Eur. Ct. H.R. 300, ¶ 121.

212. The Council is the European Union's decision-making body that regularly brings together representatives of Member States at the ministerial level to exercise, *inter alia*, legislative power in co-decision with the European Parliament and to coordinate the activities of Member States and adopt measures in the field of police and judicial cooperation in criminal matters. See *Institutions of the European Union*, available at <http://www.europa.eu.int/inst-en.html>.

213. Council Framework Decision 2001/220/JHA, 2001 O.J. (L 82) 1-4 (2001). In this document, victims are defined as a "natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omission that are in violation of the criminal law of a Member State." *Id.* art. 1.

214. *Id.* art. 2.

215. *Id.* art. 3.

216. *Id.* art. 4.

217. *Id.* art. 7.

proceedings, but it does encourage those states which do so to facilitate that role by providing financial assistance.²¹⁸

In summary, efforts to codify victims' participatory rights in the criminal process by the United Nations and European countries have developed slowly, in part given the wide variance in how countries accommodate victims' standing in their domestic systems. There is consensus on the general principle that victims should have greater access to the criminal process, although some disagreement or vagueness exists as to the scope of access. One recurring theme is that victims should have available a review mechanism for challenging the prosecutor's decision not to prosecute or to close a case. Similarly, the norms favor some victim participation during the trial, including access to the prosecutor's files, and the ability to present evidence or cross-examine witnesses.

These international law developments, which have transformed prosecutions into a more victim-focused process, are in response to the concern that victim exclusion has been detrimental to victims' interests. Although this concern has been expressed by several victims' rights movements seeking legal reform domestically and internationally, this Article explores the detriment of victim exclusion from the criminal process as it relates to surviving victims of state-sponsored mass atrocities. These surviving human rights victims, in particular, have greatly influenced the development of victim-focused international legal norms by convincingly arguing that states that respond to violent crimes committed against them with impunity cannot be trusted to represent their interests in prosecutions. But what exactly are their interests, and why should these interests be advanced within the criminal justice system? The following sections elaborate on the reasons surviving human rights victims conceive of prosecutions as an essential component of the remedy states should accord them for violent crimes.

III. WHY SURVIVING HUMAN RIGHTS VICTIMS' DEMAND PROSECUTIONS AS A REMEDY FOR STATE-SPONSORED CRIMES

Surviving human rights victims often file complaints with international tribunals²¹⁹ or in domestic courts²²⁰ when the state has treated with impunity the violations committed against them. These

218. *Id.*

219. See generally *supra* Part II (discussing international human rights complaints of impunity).

220. For example, human rights victims have filed complaints to declare unconstitutional states' adoption of amnesty laws. POPKIN, *supra* note 8, at 152-53 (discussing surviving human rights victims' efforts in El Salvador to overturn El Salvador's amnesty law).

victims' stories comprise two distinct chapters of victimization. The first includes what is known of the horrific acts of extrajudicial executions, massacres, genocide, forced disappearances, torture, or other inhuman treatment committed or condoned by the state. The second entails the oft non-existent, inept, or corrupt state response to the surviving human rights victims' demands for prosecutions.

Surviving human rights victims who seek prosecutions do so to obtain the truth and to seek justice.²²¹ As the following sections explain, these victims prefer the truth be revealed through a criminal process because alternative forums, like truth commissions that substitute for criminal prosecutions, in whole or part, compromise justice. To surviving human rights victims, justice, if it is to fulfill certain important goals, must mean the state prosecuting and punishing the perpetrators in a manner commensurate with the grave nature of the violations. These goals include holding the state institutions and agents accountable for the state's past wrongs, obtaining retribution for the terrible harm inflicted upon them, and upholding the rule of law by demanding to be treated equally under the law. Ultimately, surviving human rights victims hope meeting

221. This reflection of why surviving human rights victims demand prosecutions is based mainly on my work as a staff attorney at the Center for Justice and International Law (CEJIL). CEJIL is a non-governmental organization that has represented thousands of surviving human rights victims in Latin America over the last decade in cases filed with the Inter-American System on Human Rights. At CEJIL, I worked along hundreds of local non-governmental organizations on efforts to combat impunity in Latin America. See *Annual Report 2000 of the CEJIL (Annex I)*, available at <http://www.cejil.org/ourwork.htm>. (listing human rights NGOs representing victims in the Americas). In the briefs that we prepared, and from which I draw the lessons contained in this Article, we tried to capture the voices of the surviving victims of state-sponsored atrocities. Of course, not every surviving human rights victims share equally the reasons for pursuing prosecutions. Some victims, for example, may be more motivated by retribution than they are by accountability, or vice versa. It is also true that not all surviving human rights victims will pursue prosecutions. Many are deterred from doing so by fear, lack of resources, or by a sense of futility and powerlessness. Others argue that surviving human rights victims are also deterred by a conviction that prosecutions will not provide them the answers they seek.

Little empirical data exists, to determine the prevalence of surviving human rights victims' call for prosecutions, although what exists suggests that victims favor prosecutions over other alternative responses. See, e.g., Sanja Kutnjak Ivkovic, *Justice by the International Tribunal for the Former Yugoslavia*, 37 STAN. J. INT'L L. 255, 301 (2001) (reporting on surveys of victims of the conflict in the Former Yugoslavia). International or domestic non-governmental organizations that are comprised of or represent surviving human rights victims have also overwhelmingly adopted a preference for prosecutions. See, e.g., International Justice, available at http://web.amnesty.org/web/web.nsf/printpages/int_jus; Human Rights Watch, *Making the International Criminal Court Work: A Handbook for Implementing the Rome Statute*, Sept. 2001, available at <http://www.hrw.org/campaigns/icc>. In so far as these groups work most closely with surviving human rights victims, their positions probably reflect (or at least should reflect) a majority consensus among surviving human rights victims for prosecutions over other alternatives.

these goals will improve the enjoyment of human rights in society through several means: (1) by purifying the state of the forces that commit the human rights abuses; (2) by vindicating universal principles of fundamental human rights; and (3) by restoring the faith of its citizens, including the victims, in the rule of law and in the institutions of the state charged with enforcing it.²²² The following two sections both elaborate on the meaning of what surviving human rights victims often term their rights to truth and justice, and introduce some of the issues that have been the subject of debate around these rights.

A. *The Right to Truth*

The truth is important to surviving human rights victims for several reasons: (1) the truth alleviates the suffering of the surviving victims; (2) vindicates the memory or status of the direct victim of the violation; (3) encourages the state to confront its dark past; and (4) through it, to seek reform. To achieve each of these goals, surviving human rights victims impose substantive and procedural requirements.

1. The Substantive Right to Truth

As a substantive matter, surviving human rights victims generally seek to learn three things: what happened, why the crime was committed, and who committed the crime. Learning what happened is most important when the direct victim of the violation does not survive. In such cases, the surviving human rights victims—the family members of the direct victim—consider the uncertainty of what may have happened to their loved ones as more painful than the truth itself, even when what they learn is gruesome.²²³ This is particularly important in cases of forced disappearance because next of kin do not know if their family members are dead, how they died or where their remains are buried.²²⁴ In cases involving massacres, family members may generally know how the direct victims died but may not know where they are buried or, if buried in mass graves, which of the remains are theirs.²²⁵ In such cases, the surviving human rights victims are often willing to participate in emotionally difficult search practices to learn these details, including, for

222. See generally *infra* Part IV.

223. See, e.g., *Blake v. Guatemala*, Case No. 48, Inter-Am. C.H.R., OEA/ser. C, ¶¶ 110, 113-14 (1999).

224. *Id.* ¶ 115.

225. See, e.g., *Durand & Ugarte v. Peru*, Case No. 68, Inter-Am. C.H.R., OEA/ser. C, ¶ 38(i)-(m) (2000) (summarizing the testimony of several doctors involved in the identification of the remains of the dead after a massacre).

example, exhumations.²²⁶ Being able to see the direct victims' remains and to confirm their deaths is crucial in allowing surviving human rights victims to grieve. Otherwise, they may continually wonder and hope that their family members remain alive.²²⁷ Motivating surviving human rights victims is also the symbolic or spiritual importance of conducting an appropriate burial for their loved ones.²²⁸

Surviving human rights victims may also wish to know why the state committed or condoned the human rights violation, in case the state has wrongfully accused the direct victim of crimes that justified their imprisonment, mistreatment, or death. For example, the state may allege that the direct victims died while participating in subversive activities against the state.²²⁹ Surviving human rights victims understand the direct victim's alleged participation in subversive activities, even, if true, cannot justify the crime.²³⁰ Still, surviving human rights victims who are motivated by the desire to "clear" their family members' or their own reputation and to restore their dignity, typically believe that the state has no foundation for the allegation and wish for the state to publicly recant the charges.²³¹ For this reason, surviving human rights victims also consider it important for the public to learn the gruesome details of the crimes. Through publicity, surviving human rights victims aspire to raise public consciousness about what really happened in order to undo the state's campaign of hatred against the direct victims and to shift attitudes of complacency by provoking public indignation.

Finally, surviving human rights victims also wish to learn the names of those responsible for the horrific acts: not simply who committed the act but who gave the order. The latter is often more important, especially if the perpetrator remains in a position of power within the state and possesses significant social prestige. The revelation of who committed the acts is crucial because it allows the state to demand individual accountability from the perpetrators. For the surviving human rights victims, individual accountability

226. *Id.*

227. *See, e.g., Blake*, Case No. 48, Inter-Am. C.H.R., OEA/ser. C, ¶¶ 110, 114.

228. *Id.* ¶ 115.

229. The state could argue that it acted in self-defense or that the victims' deaths were legitimate casualties of civil conflict or war. *See, e.g., Las Palmeras Case*, Case No. 6, Inter-Am. C.H.R., ser. C, ¶ 43 (2001).

230. Unfortunately, in many cases in which the state tries to defend its actions as legitimate acts of war or self-defense, the facts do not support this position, either because the state is lying to cover up the facts, or used a disproportionate amount of force in violation of international law. *See, e.g., Bámaca Velásquez v. Guatemala*, Case No. 70, Inter-Am. C.H.R., ser. C, ¶ 230 (2000) (holding that by torturing or forcibly disappearing guerilla commander Bámaca Velásquez, Guatemala violated, *inter alia*, his right to life, liberty, personal integrity, and judicial personality).

231. *See, e.g., Loayza Tamayo v. Peru*, Case No. 42, Inter-Am. C.H.R., ser. C, ¶ 155 (1998), available at <http://www.corteidh.or.cr>.

requires the prosecution and punishment of those responsible if the state is to be successful in purging its institutions of wrongdoers, meeting victims' demands for retribution, and according victims equal treatment under the law.²³²

2. The Procedural Right to Truth

The right to truth is not violated if the state does not uncover each of the components of truth that surviving human rights victims seek from the state. Rather, crucial to the search for truth is a state process signaling a commitment to institutional reform. Moreover, even when aspects of the truth may be more successfully achieved through truth commissions,²³³ surviving human rights victims demand the truth to be revealed through a criminal process because it is the only way to ensure individual accountability.

There are two reasons why the process for uncovering and revealing the truth must be an official state act. First, surviving human rights victims have discovered the state can too easily deny the findings or refute the legitimacy of the fact-finder when the fact-finder is not the state. For example, U.N. or non-governmental sponsored truth commissions or reports²³⁴ provide an important forum for surviving human rights victims to tell their story. They also create an important historical record of a painful chapter of a nation's history. However, the reality is that many governments have refused to cooperate with these truth commissions,²³⁵ or have

232. See *infra* Part III.B.

233. See BORAINÉ, *supra* note 9, at 286.

Firstly, insofar as information is concerned, both qualitatively and quantitatively, the TRC has been able to secure information far beyond what any trial could have elicited. The information is contextual, exploring people's motives. The victim hearings in particular mean that thousands of those who had endured human rights violations would, in their own languages, in their own styles, at their own pace, and without cross-examination, tell what happened to them. In the case of perpetrators, because amnesty was conditional on telling the truth, full disclosure was part of the demand. In the confessions offered by those applying for amnesty, very wide and detailed information was made available, not only to the Amnesty Committee but to the whole of South Africa, because of the public nature of the hearings. The silence was broken and at least a measure of truth was revealed.

Id. See also *infra* notes 434-36 and accompanying text (discussing prosecutions' limitation to address collective guilt in the context of mass atrocities).

234. See, e.g., *Informe del Proyecto Interdiocesano de Recuperación de la Memoria Histórica, Guatemala: Nunca Más*, available at <http://www.tulane.edu/~latinlib/guatemala.html>.

235. For example, Christian Tomuschat, who presided over the Guatemalan Commission for Historical Clarification (CEH), characterized the contribution made by the Guatemalan government of clarification as next to nothing. See Christian Tomuschat, *Clarification Commission in Guatemala*, 23 HUM. RTS. Q. 233, 249-50

diminished the importance of the commissions' reports by challenging their partiality²³⁶ or by failing to follow their recommendations.²³⁷ For this reason, surviving human rights victims understand that the "ownership" which the state attaches to the truth is as important as the truth itself. The second reason why uncovering the truth must be a state process is because by uncovering, confronting, and publicly revealing its dark past, the state moves closer to significant reform. This is because the process serves as the state's initial recognition that its institutions must be reformed and purged of wrongdoers. Also for this reason, the state's act of telling the truth must be a public apology that unequivocally accepts responsibility for the human rights violations and vindicates the direct victim's memories.

Surviving human rights victims also prefer the truth be revealed through a criminal process, even when the state offers truth commissions as an alternative to prosecutions. States can and do officiate national truth commissions in lieu of prosecutions,²³⁸ which improve the states' response to their findings.²³⁹ However, to many

(2001). Specifically, Tomuschat states that the President ignored repeated requests to provide the CEH with information, while the armed forces pursued deliberate strategies of obstruction. *Id.* Even more impenetrable was the secret service. *Id.* at 251.

236. See, e.g., POPKIN, *supra* note 8, at 121 (describing the overwhelming rejection of the U.N. Truth Commission's findings by El Salvador's important government officials). President Christiani deplored the commission for "exceeding its mandate," the Minister of the Presidency termed the report an "insult to Salvadoran society . . . and very explosive," while the entire leadership of the armed forces appeared on national television to blast the report as "unfair, incomplete, illegal, unethical, partisan and insolent." *Id.*

237. In Guatemala, for example, in March 1999, the Government of President Arzu, in a newspaper advertisement, made public its first response to the report and the recommendations of the CEH. It declared that nothing needed to be done; rejected the need for an apology because the state had already given one at the conclusion of the final peace Agreement; and contended that there was no need to purge the armed forces. See Tomuschat, *supra* note 235, at 254. Moreover, no consequences resulted from the CEH's findings that genocide had been committed in Guatemala. *Id.* Overall, Tomuschat characterizes Guatemala's compliance with the CEH recommendations as fairly negative. *Id.* at 255. More recently, the current administration of Alfonso Portillo has taken a few modest steps toward compliance with a portion of the CEH recommendations. See Report of the Situation of Human Rights in Guatemala, Inter-Am. C.H.R., OEA/Ser.L/V/II.111, doc. 21, rev. 6, ¶¶ 5-13 (2001).

238. For example, the idea for a South African Truth Commission came from the African National Congress, the very ruling party of South Africa during apartheid. BORAINE, *supra* note 9, at 11. Subsequently, the South African Parliament, under the leadership of President Nelson Mandela, decided on May 27, 1994 to set up a commission of truth and reconciliation of enable South Africa to come to terms with its past. *Id.* at 40. Other countries that have created their own truth commission include Argentina, Chile, the Dominican Republic, Colombia, Uruguay, the Philippines, Chad, Bolivia, Zimbabwe, Ethiopia, Germany and Uganda. Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 600 (1994); see also POPKIN, *supra* note 8, at 137-38.

239. In contrast to U.N. or NGO-sponsored truth commissions, states have been more willing to accept the findings of their own truth commissions. See POPKIN, *supra*

surviving human rights victims, truth commissions that substitute for criminal prosecutions, in whole or part, compromise individual accountability. Truth commissions are better able to reveal institutional accountability rather than determine individual guilt.²⁴⁰ With few exceptions, truth commissions or reports do not name individual perpetrators because doing so violates the fundamental precept that the accused is innocent until proven guilty.²⁴¹ Moreover, when truth commissions reveal names, states question the fact-finder's impartiality and refuse to impose sanctions.²⁴² Most truth commissions function with, and their success may depend on, an amnesty law or de facto amnesty.²⁴³ In the eyes of surviving human rights victims, the lack of any prosecution undermines justice by eroding individual responsibility.²⁴⁴

B. *The Right to Justice*

What is justice? To surviving human rights victims, justice means states imposing punishment that takes into account the severe nature of the crime.²⁴⁵ Justice, at a minimum, requires punishment

note 8, at 121 (describing Chile's and Colombia's public apologies after the state revealed the findings of state-sponsored truth commissions).

240. See *infra* notes 437-43 and accompanying text.

241. In Latin America, for example, only El Salvador's U.N. Truth Commission published the individual names of perpetrators in its Final Report. This decision was not without controversy. See Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 VAND. J. TRANSNAT'L L. 497, 519-22 (1994). Guatemala's U.N. Truth Commission decided not to do the same believing that doing so violated the fundamental rights of the accused. See *infra* note 531 and accompanying text; see also BORAINÉ, *supra* note 9, at 304 (describing F.W. de Klerk's, head of the former government in South Africa during 1989-1994, successful injunction granted by the Cape High Court halting the South African Truth Commission from including in the Report the findings against him).

242. See, e.g., POPKIN, *supra* note 8, at 121-22 (describing El Salvador's negative response to the U.N. Truth Commission Report, viewing particularly the inclusion of individual names as exceeding the Commission's mandate).

243. Even when states do not adopt amnesty laws, in most cases there still exists a de facto amnesty since prosecutions are rare. Only Argentina and Bolivia conducted some prosecutions following the truth commission report. See Hayner, *supra* note 238, at 604 n.4.

244. Jeanne Woods has argued that a truth commission process can also undermine the truth. She elaborates that there are at least two types of truth: literal and moral. Literal truth encompasses a factual reckoning, whereas moral truth implies a judgment as to the wrongfulness of the literal truth. She observes, in reference to the South African Truth Commission, that neither literal truth nor moral truth can be found through a process that equated both sides to a quasi-colonial conflict and failed to distinguish the wrongs committed by state actors and civilian youths. Jeanne M. Woods, *Reconciling Reconciliation*, 3 UCLA J. INT'L L. & FOREIGN AFF. 81, 105 (1998).

245. See, e.g., Ivkovic, *supra* note 221, at 256-57, 322 (reporting that two separate surveys of victims of the conflict in the Former Yugoslavia (1997 Survey of 263 displaced persons from Croatia and Bosnia and Herzegovian and 2000 Survey of

for gross human rights violations similar to that prescribed by national law for the commission of grave felonies.²⁴⁶ Surviving human rights victims consider criminal punishment for state-sponsored crimes essential to achieving the goals of accountability, retribution, and equal treatment under the law.

1. Criminal Punishment for Accountability

Echoing the duty to prosecute norm, surviving human rights victims have espoused the principle that only if states impose accountability for past human rights violations can states effectively guarantee non-repetition of abuses. In demanding accountability, surviving human rights victims understand that they are acting as representatives of the public as a whole. States should be the ones to represent this interest on behalf of the public. The public, after all, has ceded to states the resources and authority to curb crime through the enforcement of its criminal law.²⁴⁷ When states refuse to do so, however, surviving human rights victims consider that, since they have most directly borne the harm of past human rights abuses, they have greater standing to demand this type of accountability from the state.

Surviving human rights victims require states to apportion both individual and institutional accountability for past mass atrocities. Individual accountability means states must be willing to punish state agents who perpetrated or aided the human rights violation through complacency and inaction. A prime concern of surviving human rights victims is that discovery of the truth, without individual accountability, may only empower violators to commit similar acts in the future.²⁴⁸ Surviving human rights victims also challenge the state's professed commitment to institutional reform if the truth goes unpunished. Surviving human rights victims

299 Sarajevo citizens) revealed that 90% and 96.8% of the 1997 and 2000 respondents selected either the death penalty or life imprisonment as the appropriate punishment for persons guilty of war crimes or crimes against humanity).

246. Most systems of criminal justice around the world employ some type of incarceration or criminal punishment. See UNITED NATIONS OFFICE OF DRUG CONTROL AND CRIME PREVENTION, GLOBAL REPORT ON CRIME AND JUSTICE, available at <http://uncjin.org/Special/overview.html> ("For those convicted of serious crimes, prison is near universal sanction, applied more than any other punishment, and regardless of the type of legal system or level of development of a country.").

247. See, e.g., Gerard V. Bradley, *Retribution and the Secondary Aims of Punishment*, 44 AM. J. JURIS. 105, 108 (1999).

248. See, e.g., Ivkovic, *supra* note 221, at 256-57, 322 (reporting that two separate surveys of victims of the conflict in the Former Yugoslavia (1997 Survey of 263 displaced persons from Croatia and Bosnia and Herzegovian and 2000 Survey of 299 Sarajevo citizens) revealed that 56% and 30.7% of the 1997 and 2000 respondents respectively chose deterrence as the main purpose for punishing human rights violators).

primarily request the state to purge its institutions of corrupt agents' participation and influence in the public domain, although other systemic reforms may also be necessary. Moreover, surviving human rights victims advocate that state-imposed criminal punishment is necessary to achieve individual and institutional accountability. The issue of why criminal punishment is needed for accountability is addressed in Part IV.

2. Criminal Punishment for Retribution

Surviving human rights victims also seek the state to punish human rights violators for reasons related to retributive justice.²⁴⁹ In its simplest terms, surviving human rights victims seek the punishment of the alleged perpetrators because they deserve it as a form of payback for the terrible harm they inflicted upon their victims. Surviving human rights victims also argue that, in order to meet the goals of retribution, perpetrators of grave crimes must be criminally punished because civil remedies can never adequately compensate victims for their suffering and loss.²⁵⁰ Unlike the demand for accountability, surviving human rights victims seek retribution as a type of private remedy against the perpetrator for the violations committed against them. Carlos Nino has referred to this as a theory of mandatory retribution, which implies that victims have a right that their abusers be punished.²⁵¹

Many argue, however, that victims have ceded to the state their right to exact retribution in return for the state's protection and enforcement of criminal law.²⁵² In fact, the goals of retributive justice have permeated most domestic criminal justice systems.²⁵³ International criminal tribunals prosecuting human rights violators

249. See, e.g., *id.* (reporting that the two surveys of victims of the conflict in the Former Yugoslavia (1997 Survey of 263 displaced persons from Croatia and Bosnia and Herzegovina and 2000 Survey of 299 Sarajevo citizens) revealed that 42% and 65% of the 1997 and 2000 respondents respectively chose retribution as the most important purpose for punishment).

250. Many states have proposed that the payment of monetary compensation by the state or the perpetrator as a remedy for human rights violations. Monetary awards for human rights violations are problematic because some rights are so inalienable that they cannot be compensated or negotiated away. See JEFFRIE G. MURPHY, *Why Have Criminal Law at All?*, in RETRIBUTION RECONSIDERED 5 (1992) (discussing Robert Nozick's argument that criminal punishment exists because not all border crossing (transgressions) may be compensated with money when the rights violated are invaluable and non-negotiable). International human rights tribunals have similarly rejected that civil remedies can be the sole remedy for violations to the rights to life and personal integrity. See also *supra* note 93 and accompanying text.

251. Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina*, 100 YALE L.J. 2620-21 (1991).

252. See, e.g., Henderson, *supra* note 37, at 392.

253. See, e.g., Mirko Bagaric & Kumar Amarasekara, *The Errors of Retributivism*, 24 MELB. U. L. REV. 124 (2000).

have also recognized that retribution must be among the aims of criminal punishment for grave crimes.²⁵⁴ Similarly, international treaties include similar principles of proportional punishment in their provisions on state responsibility for prosecuting gross human rights violations.²⁵⁵ Insofar as the state's duty to prosecute norm require states to consider retributive justice when punishing, many would argue it is both unnecessary and undesirable to return the administration of justice to a system of apportioning private revenge.²⁵⁶ Surviving human rights victims argue, however, that they should have standing to demand their right to retribution when the state refuses to accord them this remedy.²⁵⁷

Theorists of retributive justice have grappled with its role in the criminal justice system, as a general matter, and particularly when victims seek a role in enforcing it. In its pure form, retributive justice, principally associated with the teachings of Kant,²⁵⁸ justifies

254. For example, the sentencing judgments of the International Tribunal for the Former Yugoslavia (ICTY) provide forceful language that deterrence and retribution are the main principles in sentencing for international crimes. See *Prosecutor v. Todorovic*, Case No. IT-95-9, Sentencing Judgment, ¶ 28 (I.C.T.Y. July 31, 2001), available at <http://www.un.org/icty/judgement.htm>; *Prosecutor v. Tadic*, Case No. IT-94-1-T, Sentencing Judgment, ¶¶ 7-8 (I.C.T.Y. Nov. 11, 1998), available at <http://www.un.org/icty/judgement.htm>; *Prosecutor v. Erdemovic*, Case No. IT-96-22-T, Sentencing Judgment, ¶¶ 59, 62 (I.C.T.Y. Nov. 29, 1996), available at <http://www.un.org/icty/judgement.htm>. Similarly, the International Criminal Tribunal for Rwanda (ICTR) has held that among the principle aims of sentencing should be retribution, deterrence, rehabilitation and justice. See *Prosecutor v. Ruggiu*, ICTR-97-32-I, Judgment and Sentence, ¶ 33 (I.C.T.Y. June 1, 2000), available at <http://www.icttr.org/wwwroot/ENGLISH/cases/ruggiu/index.htm>; *Prosecutor v. Musema*, ICTR-96-13, Judgment and Sentence, ¶ 986 (I.C.T.Y. Jan. 1, 2000), available at <http://www.icttr.org/wwwroot/ENGLISH/cases/musema/index.htm>; see also Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415 (2000) (discussing efforts of international criminal tribunals to apportion punishment according to the severity of the crime); but see Andrew N. Keller, *Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR*, 12 IND. INT'L & COMP. L. REV. 53, 65 (2001) (concluding that the ICTY and the ICTR have not always respected the goals of retributive justice at sentencing).

255. See, e.g., U.N. Torture Convention, *supra* note 76, art. 4.2. ("Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature"); U.N. Declaration on Enforced Disappearances, *supra* note 76, art. 4.1 ("All acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties which shall take into account their serious nature"); Inter-American Convention on Forced Disappearance, *supra* note 132, art. III ("The States Parties undertake . . . to impose an appropriate punishment commensurate with its extreme gravity."); Inter-American Torture Convention, *supra* note 76, art. 6 ("The States Parties shall make [acts of torture] punishable by severe penalties that take into account their serious nature.").

256. See Auckerman, *supra* note 20, at 54-56 (discussing opinions in support and in opposition to retribution as a goal of prosecution).

257. *Id.*

258. See JEFFRIE G. MURPHY, *Retributism, Moral Education, and the Liberal State*, in RETRIBUTION RECONSIDERED, *supra* note 250, at 22; JEFFRIE G. MURPHY,

punishment not by forward-looking considerations such as deterrence, but rather by backward-looking ones—the criminal deserves punishment, irrespective of whether punishment will have any future utility.²⁵⁹ The idea that punishment should be devoid of any forward-looking utility has led many to characterize retributive justice as simply an institution of vindictiveness and hatred.²⁶⁰ So characterized, retributive justice makes many uncomfortable because “civilized” societies should not foster intense emotions of anger, hatred, and revenge.²⁶¹ As Nietzsche put it “[m]istrust all in whom the impulse to punish is powerful.”²⁶²

Kant's Theory of Criminal Punishment, in RETRIBUTION, JUSTICE, AND THERAPY: ESSAYS IN THE PHILOSOPHY OF LAW 82 (1979) (quoting Kant's famous passage).

Even if a civil society were to dissolve itself by common agreement of all its members (for example, if the people inhabiting an island decided to separate and disperse themselves around the world), the last murderer remaining in prison must be executed, so that everyone will duly receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment; for if they fail to do so, they may be regarded as accomplices in this public violation of legal justice.

Id.

259. Jeffrie G. Murphy, *Cruel and Unusual Punishments*, in RETRIBUTION, JUSTICE, AND THERAPY: ESSAYS IN THE PHILOSOPHY OF LAW, *supra* note 258, at 227. Murphy writes, “The retributive theory of punishment, speaking very generally, is a theory that seeks to justify punishment . . . in terms of this cluster of moral concepts: rights, desert, merit, moral responsibility, justice and respect for moral autonomy.” *Id.* See MURPHY, *Retributism, Moral, Education and the Liberal State*, *supra* note 258, at 227; see also HERBERT MORRIS, *Persons and Punishment*, in ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY 34 (1976). *But see infra* Part V (discussing several forward-looking rationales for retributive justice).

260. See JEFFRIE G. MURPHY, *Getting Even: The Role of the Victim*, in RETRIBUTION RECONSIDERED, *supra* note 250, at 62-63; see also MURPHY, *Kant's Theory of Criminal Punishment*, *supra* note 258, at 83. Murphy questions, however, whether utilitarian objectives for punishment is any less problematic than punishment for retributive reasons. He argues that to the extent that punishment is justified in terms of its social results—e.g., deterrence, incapacitation, rehabilitation—then a man is being punished, not necessarily because of his guilt—even if he is guilty—but because of the instrumental value the action of punishment will have in the future. See MURPHY, *supra* note 250, at 62-63. To punish persons as a mere means to an end should, then, also present concerns because it only addresses the good and bad utility of punishment without addressing what gives society a moral right to inflict it. *Id.*

261. See JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 2 (1988). Consider Achilles' insatiable desire for revenge, “Not if his gifts outnumbered the sea sands or all the dusts the grains in the world could Agamemnon ever appease me—not till he pays me back full measure, pain for pain, dishonor for dishonor.” THE ILLIAD (IX.383-386) (quoted in MURPHY, *supra* note 250, at 61).

262. Thus spoke Zarathustra, Second Part, “On the Tarantulas.” PORTABLE NIETZSCHE 212 (Walter Kaufmann trans., 1970). Nietzsche is one of the most ardent critics of retributive justice. He describes retributivists, with their scorekeeping and their tit for tat, as having the sensibilities of accountants. Jeffrie G. Murphy, *Moral Epistemology, the Retributive Emotions, and the “Clumsy Moral Philosophy” of Jesus Christ*, in SUSAN A. BANDES, THE PASSIONS OF LAW 149 (1999).

To be sure, many surviving human rights victims experience deep emotions of anger and hatred and the desire for revenge.²⁶³ Some view these feeling as contributing little²⁶⁴ to victims' healing and question the benefits of emphasizing such feelings through the criminal justice system.²⁶⁵ It is mistaken, however, to dismiss these emotions as wholly invalid, irrational, or evil.²⁶⁶ It is not only natural for victims to hate those who wronged them and to seek revenge against those who victimized them,²⁶⁷ but it is also beneficial for them to despise passionately what they have experienced.²⁶⁸ Retributive feelings, for example, can be synonymous with self-respect because they demonstrate that victims take their rights seriously.²⁶⁹ In contrast, the victims' failure to resent grave moral injuries done to them may signify their failure to care about the moral value of their own persons.²⁷⁰ In fact, a victim's lack of

263. See, e.g., Jeffrie G. Murphy, *Mercy and Legal Justice*, in FORGIVENESS AND MERCY, *supra* note 261, at 164 (explaining that retributive emotions are natural).

264. See, e.g., Jean Hampton, *Forgiveness, Resentment and Hatred*, in FORGIVENESS AND MERCY, *supra* note 261, at 54-79 (arguing that victims' resentment amounts to victims fostering doubts about their value and rank and that victims' spite or malice, which can be precipitated by resentment, contribute little to overcoming victims' negative feelings because the victims' vengeful acts are misdirected at recovering their worth).

265. See, e.g., Henderson, *supra* note 37, at 395-96 (arguing that emphasizing individual vengeance in the criminal justice system can undermine, rather than facilitate, the effective role of the system).

266. Those who condemn retributive justice argue, *inter alia*, that its motives—hatred and revenge—are irrational, destructive, or inherently evil. See MURPHY, *supra* note 250, at 67. To label hatred and the desire for revenge as inherently sick or evil is part of the Christian culture that teaches that, above, all, those wronged should learn forgive and to show mercy. FORGIVENESS AND MERCY, *supra* note 261, at 4-5.

267. As a matter of common sense, most people accept that in some circumstances, given the right crime, hatred and revenge are the appropriate responses by victims of serious wrongdoing. MURPHY, *supra* note 250, at 64; see also Robert C. Solomon, *Justice v. Vengeance*, in THE PASSIONS OF LAW, *supra* note 262, at 126 ("The desire for vengeance seems to be an integral aspect of our recognition and reaction to wrong and being wrong.").

268. Jeffrie G. Murphy, *Mercy and Legal Justice*, in FORGIVENESS AND MERCY, *supra* note 261, at 164 (arguing that a retributive desire is a good emotion and a necessary ingredient in a system of criminal justice).

269. Jeffrie G. Murphy, *Forgiveness and Resentment*, in FORGIVENESS AND MERCY, *supra* note 261, at 16-17 ("A person who does not resent moral injuries done to him [. . .] is almost necessarily a person lacking in self-respect.").

270. *Id.* at 18 (citing Thomas E. Hill, Jr., *Servility and Self-Respect*, 57 MONIST 84 (1973)). Murphy quotes at the beginning of his essay on Forgiveness and Resentment an excerpt from Fay Weldon's *Female Friends*, that captures the point that too much forgiveness, sometimes, is not good:

Understand, and forgive, my mother said, and the effort has quite exhausted me. I could do with some anger to energize me, and bring me back to life again. But where can I find that anger? Who is to help me? My friends? I have been understanding and forgiving my friends, my female friends, for as long as I can remember. . . . Understand and forgive. . . . Understand husbands, wives, fathers, mothers. Understand dog-fights above and the charity box below,

resentment may reveal a servile personality, which may expose them to greater victimization.²⁷¹

Surviving human rights victims also experience anger because they recognize the immorality of the crime.²⁷² Indignant victims, then, speak against the wrong to oppose and defeat the immoral cause.²⁷³ Viewed this way, retribution comes closer to Hegel's conception of retributive punishment as the defeater of the wrong.²⁷⁴ Under this theory, retribution calls for the restoration of moral autonomy between wrongdoer and victim, and between wrongdoer and the community, which, having been altered by the wrongdoer through the commission of an evil act, requires the victim's and the public's condemnation.²⁷⁵ Many scholars have advanced various other similar rationales for retributive justice that offer forward-looking explanations for punishing crimes. These are explored in Part IV.

Even if surviving human rights victims are motivated by the desire to reinstate moral autonomy, a second challenge to retributive justice is society's ability to determine what kind or amount of punishment is "deserved" by the wrongdoer.²⁷⁶ It is important to

understand fur-coated women and children without shoes. Understand school-Jonah, Job and the nature of the Deity; understand Hitler and the bank of England and the behavior of Cinderella's sisters. Preach acceptance to wives and tolerance to husbands; patience to parents and compromise to the young. Nothing in this world is perfect; to protest takes the strength needed for survival. Grit your teeth, endure. Understand, forgive, accept, in the light of your own death, your own inevitable corruption. . . .

Oh mother, what you taught me! And what a miserable, crawling, sniveling way to go, the worn-out slippers neatly placed beneath the bed, careful not to give offense.

Id. at 14.

271. JEFFRIE G. MURPHY, *Forgiveness, Reconciliation and Responding to Evil: A Philosophical Overview*, in FORGIVENESS IN THE LAW 1359 (2000).

272. See JEAN HAMPTON, *Forgiveness, Resentment, and Hatred*, in FORGIVENESS AND MERCY, *supra* note 261, at 55-56; MURPHY, *Forgiveness, Reconciliation and Responding to Evil*, *supra* note 269, at 1359.

273. See JEAN HAMPTON, *Forgiveness, Resentment and Hatred*, in FORGIVENESS AND MERCY, *supra* note 261, at 59.

274. See George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51, 54 (1999) (exploring Hegel's theory that the purpose of punishment is to defeat the wrong).

275. *Id.*

276. Kant advocated the eye for an eye, a tooth for a tooth—*jus talionis* ("like for like") approach. MURPHY, *Cruel and Unusual Punishments*, *supra* note 259, at 231. A *jus talionis* approach to punishment, however, would be inconsistent (and even hypocritical) with a retributivist's goals of restoring morality if the punishment were also immoral. Kant himself saw the potential for immoral punishment as a problem of applying the principle of *jus talionis*. *Id.* For example, Kant admitted that raping the rapist would also be immoral. *Id.* See also Solomon, *supra* note 267, at 139-40 ("[S]ome crimes like fraud, are inappropriate for strictly "like for like" legal retribution.

acknowledge that moral hatred, when directed at the wrongdoers, is a call for their punishment. Surviving human rights victims, moreover, advocate that the wrongdoer be punished in a way that is at least symbolically commensurate to the reprehensible evil committed by the wrongdoers. Yet how does a society determine the type of punishment to accord a person who has ordered or executed the genocide, massacre, torture, rape, or forced disappearance of people? Is society equipped to make such determinations? Does society risk committing more evil in the name of morality?²⁷⁷

The more widely accepted position on the appropriate character of retributive punishment is that it be symbolically commensurate and proportional to the reprehensible evil committed by the wrongdoer²⁷⁸ and to the scope of suffering endured by the victims.²⁷⁹ Proportionality does not require that there be an ideally appropriate relationship between a single crime and its punishment. On the scale of punishment, however, more wicked crimes should receive proportionally greater punishment than less serious offenses.²⁸⁰

The proportionality objectives of retributive justice must still confront the dilemma of whether punishment, even for gross human rights violations, can be moral. Different societies and cultures cannot reach consensus on what constitutes proportional, much less moral, punishment. Most states that incorporate goals of retribution in their criminal justice systems agree that punishment must involve

More important, what the law can do is to impose "fit" and fair punishment for such offenses as fraud and rape that do not repeat the offense itself.").

277. See MURPHY, *Kant's Theory of Criminal Punishment*, *supra* note 258, at 87 (posing similar questions).

278. Kant also concedes that equality of suffering between crime and punishment is impossible because it would require exploring the criminal's inner sensibilities, which would be impossible to pursue with any degree of certainty. See JEFFRIE G. MURPHY, *Does Kant Have a Theory of Punishment?*, in *RETRIBUTION RECONSIDERED*, *supra* note 250, at 59.

279. Proponents of retributive punishment usually refer to proportionality of punishment only in terms of the nature of the evil intentions of the criminal. See H.L.A. Hart, *Intention and Punishment*, in *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 129 (1968). However, it is also true that the proportionality of punishment also depends on the amount of harm caused. *Id.* at 130. Most times, the distinction is not apparent because there usually exists a correlation between the nature of the evil and the harm caused. It is logical to say, for instance, that the massacre of an entire community both causes greater suffering (because of the number of victims involved) and is a result of greater evil than the killing of one person. This correlation breaks down, however, when in one instance, the intended massacre results in a failed attempt due to external circumstances unrelated to the desire of the perpetrator to carry out the act. The fact that the massacre was not committed does not lessen the evil intentions of the attempted perpetrator; and yet, it changes dramatically the result. See *id.* Most legal systems draw this distinction between attempted and completed crimes at sentencing.

280. See H.L.A. Hart, *Elimination of Responsibility*, in *PUNISHMENT AND RESPONSIBILITY*, *supra* note 279; JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 117-18 (1970).

incarceration, corporal punishment, or both.²⁸¹ Most cannot agree, however, when such punishment becomes immoral, as exemplified by the ongoing debates about the death penalty.²⁸² This lack of consensus on the appropriate level of punishment should not be dismissed as an insignificant consequence of cultural relativism. Rather, it should highlight society's limitations and inability to restrain the urge to punish within moral bounds.²⁸³

Additionally, insofar as retributive justice depends on the concept of assessing blame, some have questioned the viability of this type of character evaluation, particularly in the context of radical evil.²⁸⁴ Such reflection on the potential dangers of retributive justice has led some defenders of the theory to ponder whether society should even attempt to restore social morality through punishment.²⁸⁵ Part IV revisits this dilemma.

3. Criminal Punishment for Equal Treatment

Finally, surviving human rights victims demand prosecutions in order to be treated equally under the law. Because countries impose criminal punishment for such crimes as murder and torture,²⁸⁶ surviving human rights victims also demand criminal prosecution as opposed to truth commissions or civil sanctions for state-sponsored crimes. Surviving human rights victims' unequal treatment under

281. See *supra* note 246.

282. Today, countries still disagree on the morality of applying the death penalty for serious crimes. Still, many countries, including many European and some Latin American countries, perceive the death penalty as barbaric and immoral. See Octavi Marti, *Un foro contra la pena de muerte exige su abolición donde está en vigor*, EL PAIS, June 22, 2001 (explaining that whereas 100 years ago, only three countries in the world had abolished the death penalty, that number has now grown to 108 countries); see also Amnesty International, *Abolitionist and Retentionists Countries*, Nov. 2001, available at <http://66.151.110.201/abolish/abret.html> (explaining that more than half the nations of the world have abolished the death penalty in law or practice).

283. See MURPHY, *supra* note 250, at 73. Kant himself once said: "[W]oe to the legislator who wishes to establish through force a policy directed to ethical ends!" IMMANUEL KANT, *RELIGION WITHIN THE LIMITS OF REASON ALONE* 16 (T. Greene & H. Hudson trans., 1960). Whereas Kant's concern is important, the alternative—having a criminal system that does not involve *mens rea*, excuse, or other justifications—seems more problematic than the imperfections or errors that may occur due to man's limitations in knowledge. See MURPHY, *supra* note 250, at 40-41.

284. See NINO, *supra* note 7, at vii. Kant himself worried about the capability of the state to institute procedural fairness in the enforcement of retributive goals, due to the state's inability to empirically (scientifically) determine *mens rea*. See MURPHY, *Kant's Theory of Criminal Punishment*, *supra* note 258, at 40-41.

285. See MURPHY, *Retributism, Moral Education, and the Liberal State*, *supra* note 258, at 17 (arguing that it is insufficient for social and political philosophers, like him, to defend the virtues of the retributive theory of punishment without also exploring whether those goals—however admirable—should be the legitimate goals of the state).

286. See, e.g., *supra* note 226 and accompanying text.

the law is clearer when the state rejects any possibility of conducting criminal prosecutions for past human rights violations by, for example, enacting amnesty laws. Equal treatment concerns can also arise, however, when a state adopts a policy of intentionally obstructing prosecutions, either because it wishes to protect the accused, or is not interested in validating certain victims' allegations.

Surviving human rights victims worry about the message states send when they do not equally enforce their criminal laws, especially when states exhibit a pattern of tolerating crimes committed against certain victims.²⁸⁷ This concern is critical, particularly because surviving human rights victims are often disenfranchised members of society²⁸⁸ who have been the target of the state's ethnic and social cleansing campaigns.²⁸⁹ Insofar as such campaigns have successfully vilified the direct victims, surviving human rights victims worry the public will come to view the violence against them as somehow legitimate or justified.

Surviving human rights victims also express equal protection concerns over restorative justice arguments that bestow the superiority of truth commissions or alternative forums for dealing with state-sponsored crimes, when prosecutions persist as the appropriate response to grave, common crimes.²⁹⁰ Under the restorative justice model, crime is treated primarily as a conflict among individuals and communities, and only secondarily as a crime against the state.²⁹¹ Therefore, it emphasizes a process that both achieves reparation for the victims' injuries and seeks to reconcile the parties by facilitating the active participation of victims, offenders, and their communities.²⁹² Under this theory of justice, reparation and conflict resolution must go hand in hand. Therefore, restorative justice is inconsistent with traditional notions of justice that seek to exclude the victims, perpetrators, and the community from the process.²⁹³

Surviving human rights victims' equal protection concerns over the adoption of non-prosecution alternatives to address mass atrocities is less when this choice is based on the impracticality of

287. See *infra* Part V.B.2 (discussing Guatemala's toleration of certain crimes).

288. By disenfranchised, I mean the poor and the ethnic or cultural and religious minorities, but it can also include prominent members of a society who are also part the majority but who are disfavored by the state because of their political beliefs.

289. See, e.g., *infra* Part V.B.2 (discussing Guatemala's social cleansing campaign).

290. In fact, in the domestic context, restorative justice programs are usually restricted to minor offenses. See Aukerman, *supra* note 20, at 80.

291. See Aukerman, *supra* note 20, at 77-78.

292. *Id.*

293. *Id.*

providing prosecution to all victims of mass atrocities²⁹⁴ or on the inherent limits of prosecutions to reveal the truth.²⁹⁵ Surviving victims of mass atrocities draw an important distinction between considering alternatives to prosecutions as compromises, and proposing that alternatives are morally superior or even better suited to address surviving human rights victims' needs.²⁹⁶ In contrast, surviving human rights victims' equal protection concerns are greater when proponents of non-prosecution alternatives argue that victims will fare better by resisting revenge and seeking to forgive,²⁹⁷ or, at least, that restorative justice will promote national reconciliation by allowing victims to work alongside perpetrators to develop a common national historical narrative.²⁹⁸ Pragmatic considerations may indeed force most surviving human rights victims to accept truth commissions as the only alternative to achieve some form of reparation such as the truth or an apology.²⁹⁹ This is different, however, from the argument that national reconciliation necessarily

294. See *infra* notes 307-13 and accompanying text (discussing the necessarily selective nature of prosecutions in the context of mass atrocities).

295. See Auckerman, *supra* note 20, at 79 (arguing that the reparative functions of prosecutions is dubious, at least in so far as it is not an ideal tool for identifying victims who deserve compensation or for revealing the truth). *But see infra* notes 437-43 and accompanying text (discussing the limits of truth commissions to reveal important components of the truth).

296. See generally MINOW, *supra* note 20, at 26-50, 88 (comparing truth commissions with trials and concluding that truth commissions are better suited to meet victims' goals).

297. For example, Donald Shriver asks victims to

face still-rankling past evils with first regard for the truth of what actually happened; with resistance to the lures of revenge; with empathy—and no excusing—for all the agents and sufferers of the evil; and with real intent on the part of the sufferers to resume life alongside the evildoers or their political successors.

DONALD SHRIVER, JR., AN ETHIC FOR ENEMIES: FORGIVENESS IN POLITICS 67 (1995).

298. See Susan Dwyer, *Reconciliation for Realists*, 13 ETHICS & INT'L AFF. 81, 89-90 (1999) (distinguishing between personal reconciliation with the perpetrator, which requires forgiveness, and national reconciliation which requires only that victims and perpetrators learn to live side by side by reaching a common understanding of past abuses). See also Charles Villa-Vicencio, *Why Perpetrators Should Not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L.J. 205, 213 (2000) ("Democracy requires getting to know one another, gaining a new insight into what happened, an empathetic attempt to understand why it happened and ultimately who was responsible.").

299. Christian Tomuschat, former Coordinator of the Commission for Historical Clarification in Guatemala, describes all truth commissions as "instruments of a deliberate policy of compromise" because they arise not in the context of the winning party imposing its will on the losing one, but when the rival parties have agreed to a peaceful transition of shared power. Tomuschat, *supra* note 235, at 235. For example, many observers view the South Africa Truth and Reconciliation Commission as the only alternative because the ANC would not have accepted a peaceful negotiation or free elections if prosecutions were contemplated. See BORAINÉ, *supra* note 9, at 7.

requires that victims, perpetrators, and the larger community engage in a process of rendering confessions, seeking and asking for forgiveness, and public grieving.³⁰⁰ In the context of mass atrocities, however, the expectation of personal forgiveness, or a process that forces victims and perpetrators to work together to achieve reconciliation, is being urged upon victims of terrible human rights abuses who have already born the brunt of state-sanctioned subjugation.³⁰¹ Surviving human rights victims, moreover, stress that the emphasis on restorative justice in this context amounts to a double-standard regarding the place for retributive justice in the treatment of grave crimes.³⁰² Similarly, some observers have expressed concern when restorative mechanisms are disproportionately applied to grave crimes affecting women or ethnic minorities.³⁰³

Surviving human rights victims' claims to prosecutions both for retribution and equal treatment under the law conceptualize prosecutions as a type of private remedy, which some have suggested may mean that the state is required to prosecute every case.³⁰⁴ This is not so, however. As a matter of law, states do not have a duty to prosecute every case, provided they establish a compelling interest for not doing so.³⁰⁵ This applies with equal force to surviving human

300. See generally Dwyer, *supra* note 298, at 97 (proposing reconciliation cannot be mutually obligatory because of human psychology).

301. *Id.* at 91-92. It may be that the more active and informal participation of victims, perpetrators and the community is necessary for national reconciliation when mass atrocity has resulted from widespread complicity or when it becomes harder to classify persons solely as victims or perpetrators. For example, many lower level agents who execute grave crimes in the context of mass atrocity were arguably the victims of state coercion and brain-washing. Alex Boraine, who presided as President of the South African Truth Commission, for example, characterized many of the lower-ranked perpetrators as themselves victims of the propaganda from superior officers or the militant speeches from Cabinet ministers and other politicians who convinced them that they were defending the country against communism and terrorism. BORAINÉ, *supra* note 9, at 128. ("They believed the propaganda, and, in the course of carrying out their duties as the situation deteriorated, their own consciences seemed to be deadened and dulled, allowing them to participate in the worst atrocities."). See also, *e.g.*, *infra* notes 559-61 and accompanying text (describing Guatemala's strategy of co-opting indigenous people into participating in the war).

302. See, *e.g.*, Woods, *supra* note 244, at 108-09.

303. See, *e.g.*, *id.* at 116-17 (arguing that the crimes committed in South Africa were not significantly distinguishable from other states where the international community insisted and provided the resources for prosecutions and attributing this to efforts to protect the sovereignty of the British White minority of South Africa). Similarly, other observers have noted that domestic restorative justice efforts have principally been applied to crimes affecting women or minorities. See, *e.g.*, John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 93-95 (1999).

304. See, *e.g.*, Nino, *supra* note 251, at 2620-21, 2639 and accompanying text (discussing Nino's theory of mandatory retribution).

305. See Orentlicher, *supra* note 6, at 2599-2601 (arguing that international law does not require prosecution of all offenders). See also William W. Burke-White,

rights victims' demand for prosecutions for retribution and equal treatment. For example, particularly in societies that have experienced mass atrocities, states must, by necessity, be selective in the cases they can prosecute.³⁰⁶ Massive human rights violations usually implicate large numbers of perpetrators and not merely a select group of government elites.³⁰⁷ Many commentators recognize that in the wake of such widespread guilt, the requirement to prosecute every case could simply be politically, logistically, or economically untenable.³⁰⁸ In fact, given the need to concentrate on limited resources, much of the discussion on prosecutions focused on creating criteria to identify the most culpable offenders. Those "most culpable" has generally come to mean those in top command,³⁰⁹ however difficult it has been to prosecute them.³¹⁰ Also, the

Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation, 42 HARV. INT'L L.J. 467, 499-518 (2001) (discussing several examples, including Haiti, Guatemala, Bosnia, and Croatia, when international organs have sanctioned partial amnesties when these have been appropriately limited in scope or necessary for a peaceful transitions).

306. See Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 127, 138 (1996).

307. See, e.g., Bernard Muna, *The ICTR Must Achieve Justice For Rwandans*, 13 AM. U. INT'L L. REV. 1469, 1480 (1998) (explaining that the Rwandan genocide was five times faster than genocide during Nazi Germany, approximating a low estimate of about 5,000 people a day being killed by a large proportion of the population with machetes and spears). See also *infra* Part V (discussing Guatemala's genocide).

308. See Kritz, *supra* note 306, at 138-39. See also Paul van Zyl, *Justice Without Punishment: Guaranteeing Human Rights in Transitional Societies*, in LOOKING BACK/REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA 42-44 (Charles Villa-Vicencio & William Verwoerd eds., 2000) (arguing that there are only two instances when a state should not be required to prosecute: when there is persuasive evidence that the state is unable to prosecute because doing so could undermine the political transition or when "insuperable practical difficulties make it impossible to punish," including the lack of an adequate legal infrastructure and inadequate economic resources).

309. See, e.g., *Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135*, ¶¶ 106, 109-10, U.N. Doc. A/53/850 (1999) (proposing that prosecutions in Cambodia should be limited to top leaders because an effort to try all perpetrators would be "logistically and financially impossible for any sort of tribunal that respects the due process rights of defendants").

310. In addition to the political impediments to prosecuting top leaders, existing legal principles of criminal law has also made it more "difficult to convict those who orchestrated abuses rather than simply carrying them out." See, e.g., Aukerman, *supra* note 20, at 61. The international principle of command responsibility has permitted those in command to be held responsible for the actions of their subordinates. In the past, the theory has been difficult to apply. For example, reunified Germany found it difficult to hold East Germans leaders adequately accountable for ordering that fleeing citizens be shot, and decided instead to prosecute several young East German border guards, despite consensus that these prosecutions did not comport with public notions of culpability. See TINA ROSENBERG, *THE HAUNTED LAND: FACING EUROPE'S GHOSTS AFTER COMMUNISM* 261-305, 340-51 (1995). Yet, this may be changing given the international criminal court's successful prosecution of several top leaders under the doctrine. See generally George P. Fletcher, *Liberals and Romantics at War: The*

international law requirement of due process for defendants' rights could also limit the permissible scope of prosecutions.³¹¹ Moreover, some have convincingly cautioned that the insistence on widespread prosecutions in certain post-genocidal societies where victims and perpetrators must share power and continue to live side-by-side, may create short-sighted, unproductive results, including further violence.³¹² The decision not to prosecute some cases could also be justified due to lack of evidence where the truth is only possible through a truth commission process that offers amnesty in return for the perpetrators' confession and request for forgiveness.³¹³

These arguments should be distinguished, however, from many current states' blanket arguments against all prosecutions that often overstate the perceived challenge to prosecutions while also undermining their importance.³¹⁴ Leaders in some countries emerging from long periods of armed conflict or dictatorships have argued, for instance, that their fragile democracies are better served by looking forward and concentrating on rebuilding the country.³¹⁵ They argue, for example, that their limited resources are better spent on trying to strengthen their weak institutions and economies.³¹⁶ Other countries simply discredit prosecutions as victims unnecessarily dwelling on past conflicts that only re-open wounds. For example, in defense of its amnesty law, Uruguay argued, in part, "to investigate past events . . . is tantamount to reviving the confrontation between persons and groups. This certainly will not

Problem of Collective Guilt, 111 YALE L.J. 1499, 1542 (2002) (discussing the prosecution of Slobodan Milosevic); Mary Margaret Penrose, *It's Good to Be the King!: Prosecuting Heads of State and Former Heads of State Under International Law*, 39 COLUM. J. TRANSNAT'L L. 193-95 (2000).

311. See MINOW, *supra* note 20, at 25. See also Leah Werchick, *Prospects for Justice in Rwanda's Citizens Tribunals*, 3 HUM. RTS. BRIEF 15 (estimating that at the current rate at which Rwanda's domestic courts are handling trials, it would take as much as 113 years to try approximately 110,000 genocide suspects, many who have already been detained for years without being charged, and discussing the substantial due process violations inherent in the proposed "gacaca" tribunals to try many of the remaining accused of the Rwanda genocide).

312. See Drumbl, *supra* note 21, at 1237-39.

313. In fact, many legal systems already rely on plea bargaining and offers of immunity in exchange for the defendant's testimony that could lead to the resolution of a crime and to the prosecution of others implicated in the crime. See generally Eli Paul Mazur, *Rational Expectations of Leniency: Implicit Plea Agreements and the Prosecutor's Role as a Minister of Justice*, 51 DUKE L.J. 1333 (2002); Korin K. Ewing, *Establishing an Equal Playing Field for Criminal Defendants in the Aftermath of United States v. Singleton*, 49 DUKE L.J. 1371 (2000) (analyzing the fairness and legality of prosecutors offering plea bargains in exchange for witness testimony in light of the federal gratuity statute).

314. See Orentlicher, *supra* note 6, at 2548.

315. See *id.* at 2544-46.

316. *Id.*

contribute to reconciliation, pacification and strengthening of democratic institutions.”³¹⁷

Part IV of this Article generally reaffirms why states are wrong to consider prosecutions following state-sponsored mass atrocities as inconsistent with the country’s needs—including the need to promote reconciliation and peace, and to strengthen its democratic institutions. More specifically, Part IV discusses why states ought to consider the arguments advanced by surviving human rights victims in favor of prosecutions that address their demands for truth and justice, even when this is possible only through exemplary prosecutions.

IV. THE CASE FOR VICTIM-FOCUSED PROSECUTIONS

The surviving human rights victims’ case for victim-focused prosecutions is based on the consequences of the state’s failure to punish the perpetrators of human rights violations or the state punishing them too leniently. Echoing the same arguments advanced for the state’s duty to prosecute norm, surviving human rights victims fear that the absence of punishment or too lenient punishment will fail to purge the state of those who perpetrate violence and to deter others from committing similar acts in the future. Surviving human rights victims also argue that impunity undermines the state’s legitimacy and ability to promote the rule of law. Surviving human rights victims, more centered on their rights, argue the state’s imposition of disparate punishments for human rights violations disparages victims and creates a dual system of justice. By doing so, the state sends the wrong message to the perpetrators and the public about its level of tolerance for the commission of such acts, which may encourage others to commit similar infractions. Finally, impunity, by robbing surviving human rights victims of an appropriate remedy, rekindles victims’ and the public’s anger against states and those responsible for the abuse, encouraging some to take the law into their own hands. The following sections of this Article places surviving human rights victims’ arguments for victim-focused prosecutions in the context of several theories of punishment: punishment as deterrent, punishment as legitimator, punishment as moral educator, and punishment as tamer of anger. The discussion also returns to the themes of accountability, retribution, and equal treatment explored previously in Part III.

317. *Rodriguez v. Uruguay*, Communication No. 322/1988, ¶ 8.5, U.N. Doc. CCPR/C/51/D/322/1988 (1994).

The case for victim-focused prosecutions, although returning to the theory of retribution, is principally consistent with the utilitarian justifications for criminal punishment—punishment is intended to help prevent or reduce crime.³¹⁸ Many surviving human rights victims' goals relate to the actual effect of punishment of protecting individuals against the infringement of their rights by others who seek to gain an unfair advantage.³¹⁹ Nietzsche wrote that punishment renders the perpetrator harmless: it generally prevents further harm and isolates a disturbance of equilibrium to prevent its further spread.³²⁰ Another prominent justification for punishment appeals to the natural idea of allowing something otherwise bad, such as criminal punishment, if it can bring about a greater good than would otherwise occur;³²¹ for example, if more evil is produced in the absence of punishment than by its employment.³²² Preventing future crimes may be part of this greater good, as may be other utilities—namely, compensating victims for the harm inflicted.³²³

Punishment, on the other hand, also represents the most intrusive exercise of state power over the most fundamental rights of citizens. The state, thus, must resort to punishment only when it is absolutely necessary to protect the rights of its citizens or to produce more good than evil.³²⁴ Hobbhouse wrote that “punishment is compelled to justify itself by its actual effect on society, in maintaining order without legalizing brutality.”³²⁵ “It is not, like reward, a part of ideal justice, it is a mechanical and dangerous means of protection which requires the greatest wisdom and humanity.”³²⁶ Therefore, any consideration of surviving human rights victims' calls for criminal prosecutions should examine both whether victim-focused prosecutions will, in fact, foster greater good, and whether less intrusive ways of meeting this goal are unavailable.

318. This classic utilitarian position was espoused by Jeremy Bentham and William Paley. JEREMY BENTHAM & WILLIAM PALEY, *THE PRINCIPLES OF MORALS AND LEGISLATION*, ch. xii, ¶ 36, ch. xv, ¶ 28 (1830). Most retributivists, however, have also come to believe that consequentialist goals of punishment—such as crime prevention—plays an important role in retributive punishment. See Kenneth W. Simons, *The Relevance of Community Values to Just Deserts: Criminal Law, Punishment Rationales, and Democracy*, 28 HOFSTRA L. REV. 635, 641 (2000).

319. See, e.g., MURPHY, *supra* note 250, at 9 (citing to ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974)); MURPHY, *Kant's Theory of Criminal Punishment*, *supra* note 258, at 101 (discussing Kant's analysis of punishment as a type of debt owed to the law-abiding members of one's community; which, once paid, allows re-entry into the community of good citizens on equal status).

320. FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS* PT. II 80-81 (1989).

321. See WHAT IS JUSTICE?: CLASSIC AND CONTEMPORARY READINGS 205 (Robert C. Solomon & Mark C. Murphy eds., 2d ed. 2000).

322. See Solomon, *supra* note 267, at 133.

323. See NIETZSCHE, *supra* note 320, at 81.

324. See MURPHY, *supra* note 250, at 9.

325. L.T. HOBHOUSE, *MORALS IN EVOLUTION* 130 (1929).

326. L.T. HOBHOUSE, *THE ELEMENTS OF SOCIAL JUSTICE* 146-47 (1922).

The following sections, therefore, consider whether non-prosecutorial alternatives for addressing human rights abuses, such as truth commissions, can achieve similar goals.

A. *Criminal Punishment to Purge the State of Human Rights Violators*

One argument for the prosecution of human rights violators is that lesser sanctions will not create sufficient or equal incentives for state officials and agents to stop committing or condoning human rights violations. Moreover, prosecutions in democracies in transition will more effectively marginalize nationalist political leaders or institutions who ordered or condoned the mass atrocities but who still retain power or influence over the public.

This first argument relies on the classical theory of criminal punishment as a general deterrent.³²⁷ This theory proposes that people shape their behavior and respond to tangible, immediate incentives and penalties associated with deciding whether to follow the law.³²⁸ The general deterrence model advocates that increasing the certainty and severity of punishment is an effective way of reducing the rate at which the crime is committed.³²⁹ General deterrence occurs, therefore, when people refrain from crimes because they fear the possible consequences of their actions.³³⁰

For example, because many political leaders who engage in gross human rights abuses do so to exercise sustained power, the threat of criminal punishment can increase the costs of committing such violations.³³¹ This assumes, of course, that political leaders who

327. The deterrence theory contemplates two types of deterrent effects: individual and general. Individual deterrence is concerned with preventing the particular offender from repeating the crime, while general deterrence is concerned that others will similarly be deterred out of fear of a similar penalty. TOM TYLER, *WHY PEOPLE OBEY THE LAW* 3 (1990).

328. *Id.*

329. *Id.*

330. NIGEL WALKER, *WHY PUNISH?* 13 (1991).

331. Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities*, 95 AM. J. INT'L. L. 7, 12 (2001). Some may counter that deterrence arguments overemphasize that people follow the law out of fear or because it is in their self-interest to do so, while ignoring that people also abide by what they regard as just and moral (i.e., normative reasons). See *infra* Part IV.B. This argument has merit but is weaker when applied to human rights violators. Persons who commit or order the commission of, *inter alia*, murder, torture, or forced disappearances know these acts are immoral and still engage in them or justify them as necessary for some greater good. The problem with the latter is the wrongdoers' morality completely contravenes universal principles of fundamental rights. In such cases, criminal punishment is important to restore society's moral balance, particularly when human rights violators' values have permeated broad areas of social values and culture (e.g., when violence and intimidation become common and normative). The role of punishment as moral educator is discussed in Part IV.C.

commit human rights violations are capable of engaging in a rational cost-benefit analysis, which may seem dubious given their potential for irrational evil.³³² Willful engagement in even the most reprehensible human rights violations, however, does not prevent those who order or commit them from making self-serving choices.³³³ In fact, unlike offenders who commit certain grave crimes in a moment of passion,³³⁴ those who order the commission of human rights violations often act in a deliberate and calculated fashion.³³⁵ Short-lived glory and political ascendancy may not be worth the risk if downfall, humiliation, and punishment are certain to follow.³³⁶ It may be possible, however, that national political leaders underestimate the actual risk of being held accountable, even when they engage in such analysis. Robert Jackson, the lead prosecutor at Nuremberg, for example, questioned the degree to which the tribunal would serve as a deterrent, given that wars are almost always started in anticipation that they will be won.³³⁷ However, as the world community increases its commitment to intervene when such atrocities occur, including by relying on humanitarian intervention, national political leaders may become less prone to such miscalculations.

Some observers have argued, nonetheless, that because only a few of the perpetrators of mass atrocities are ever prosecuted, the uncertainty of punishment undermines the deterrence argument.³³⁸ Critics also point to the continued mass atrocities since Nuremberg to suggest that prosecutions seem to have had little discernible effect of preventing such crimes.³³⁹ These arguments, however, do not negate the importance of prosecutions as a deterrent. Arguably, more atrocities could have taken place had the prosecutions not occurred. Moreover, these arguments could also support the need to increase the certainty of prosecutions, at least for the most culpable offenders of gross human rights violations.³⁴⁰ Still, critics point to the

332. MINOW, *supra* note 20, at 50.

333. Isaac Ehrlich, *Crime, Punishment, and the Market for Offenses*, 10 J. ECON. PERSP. 43 (1996).

334. For example, some scholars have argued that certain crimes, like murder, are not deterrable because they are committed in undeterrable states of mind. WALKER, *supra* note 330, at 16.

335. See, e.g., REPORT OF THE COMMISSION OF TRUTH FOR EL SALVADOR, FROM MADNESS TO HOPE: THE 12 YEAR WAR IN EL SALVADOR (United Nations 1993); *Guatemala Memory of Silence*, ¶ 142, available at <http://shr.aaas.org/guatemala/ceh/report/english/conc2/html>.

336. See Akhavan, *supra* note 331, at 12.

337. See MINOW, *supra* note 20, at 49-50.

338. See, e.g., Aukerman, *supra* note 20, at 67.

339. See MINOW, *supra* note 20, at 27-28.

340. See *supra* notes 307-13 and accompanying text (discussing that the selective nature of prosecutions dictated by mass atrocities requires a focus on

impracticality of carrying out prosecutions in the context of mass atrocities. While prosecutions will continue to be selective and difficult to achieve in the context of mass atrocities,³⁴¹ these limitations do not mean that their deterrent effectiveness cannot improve. General deterrence does not require that every offender be punished, only that the threat of punishment is sufficiently real to third parties. Recent efforts by nations to exercise universal jurisdiction³⁴² and to create a functioning permanent international criminal court represent efforts to improve the track record of these types of prosecutions. Furthermore, an indictment, even where a trial is unlikely, could have a deterrent effect, as it would make that person likely to face arrest in virtually every country, which in turn would make it difficult for that person to conduct public office.³⁴³

Critics of the deterrent effect of prosecutions have also argued that alternative sanctions like civil liability and public shaming should be considered a more effective deterrent than prosecutions because these sanctions are more achievable in the context of state-sponsored mass atrocities.³⁴⁴ While alternative sanctions are more likely to be imposed on the majority of human rights violators, it does not follow that these sanctions produce much deterrent effect. For national political leaders who commit gross human rights violations, the deterrent motivation from these lesser sanctions will rarely outweigh the benefits of even short-lived glory in power. For officials of lower status, apologizing or losing their jobs may also mean little or nothing because they may face more immediate, and possibly more severe, consequences by failing to follow orders.³⁴⁵

The reduced deterrent effect of alternative sanctions is especially true with public shaming mechanisms such as public apologies, confessions, or the revelation of names in truth commission proceedings, which are rare or easy to manipulate.³⁴⁶ For example, with few exceptions, perpetrators rarely participate in the truth commission process, admittedly because most truth commissions do not make amnesties contingent on the perpetrator's confession and

prosecuting the most culpable, which public consensus dictates should be those in high command who order the atrocities).

341. *Id.*

342. *See supra* notes 27-28 and accompanying text.

343. *See* Richard Goldstone, *Exposing Human Rights Abuses—A Help or a Hindrance to Reconciliation*, 22 HASTINGS CONST. L.Q. 607, 615, 620 (1995).

344. *See, e.g.,* Aukerman, *supra* note 20, at 69.

345. The more effective deterrent force for lower-ranked agents, in fact, may be prosecuting those who issue the orders to commit the violations. Therefore, limited prosecution resources should still be devoted to trying those in power who gave the orders to commit the crimes.

346. *See, e.g.,* Jo M. Pasqualucci, *The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System*, 12 B.U. INT'L L.J. 321, 336-43 (1994) (discussing the reports by truth commissions in Argentina, Chile, El Salvador, and Honduras, and their varied successes).

apology.³⁴⁷ When perpetrators have participated in a truth commission process, it has been to offer their version of why violence was necessary or justified. This was the case, for example, when Serbian President Slobodan Milosevic, Croatian President Franjo Tudjman, and Bosnian Serb leader Rodovan Karadzic identified ancestral and religious strife as the main reason for the atrocities.³⁴⁸ Even when perpetrators have been offered immunity in return for their confessions, they have often tried to justify their actions, to deflect blame on others, or weaken the language of the apology to avoid future liability or public shame.³⁴⁹ For example, many of the perpetrators of South Africa's apartheid human rights violations offered the Commission various excuses for their actions.³⁵⁰ Some explained that South Africa was at war and, therefore, the end as they saw it—defeating the terrorists and communists—justified the means they used.³⁵¹ Others simply declared that they had been acting on instructions and orders.³⁵² It also became a common theme throughout the South African amnesty hearings for high officials and senior politicians to deny they had known that human rights violations were taking place.³⁵³ Often, political leaders only admitted either a lack of diligence in investigating allegations of wrongdoing or a lack of foresight to recognize what may have been happening around them.³⁵⁴ Finally, when truth commissions have revealed names, the perpetrators and their supporters—often the state—have

347. See *id.* at 336-39 (explaining that the Argentine and Chilean forces did not obey the order to cooperate with the truth commission process because the truth commissions did not have subpoena authority and could not otherwise compel enforcement); Tomuschat, *supra* note 235, at 246 (explaining that for similar reasons very few perpetrators participated in the Guatemala truth commission).

348. LEO TINDEMANS ET AL., UNFINISHED PEACE: REPORT OF THE INTERNATIONAL COMMISSION ON THE BALKANS 13-26 (1996). According to the Commission, politicians "invoked the 'ancient hatreds' to pursue their respective nationalist agendas and [] deliberately used their propaganda machines to justify the unjustifiable." *Id.* at xiv.

349. See Woods, *supra* note 244, at 122-24 (highlighting examples of testimony during the South African Truth Commission hearing in which perpetrators did not admit their wrongs).

350. *Id.*

351. BORAINÉ, *supra* note 9, at 129.

352. *Id.* at 126.

353. *Id.* As a specific example, Borainé highlights the testimony of F.W. de Klerk who stated over and over again that "he accepted that violations had taken place but that he had never issued any instructions to perform such actions, nor had he known that they were taking place." *Id.* at 130.

354. Alex Borainé explains, for example, that during the South African Amnesty Committee hearings political leaders of the National Party accused the military and police of engaging in extra-legal procedures which they knew nothing about, while the "generals and foot soldiers were adamant they had received their instructions and that the politicians were well aware and, indeed, created the climate which enabled them to plan their assassinations and torture. . . ." *Id.* at 130.

dismissed the findings as false and biased, and have criticized them for violating due process.³⁵⁵

Similarly, removal from office rarely serves as an effective deterrent principally due to the way removals are conducted. Removing national political leaders from office, unless conducted in the context of a disciplinary hearing, is rarely permanent or even tied to the human rights abuse. The most common practice has simply been simply to retire them, sometimes with pay. Alternatively, some countries transfer the more controversial state officials without acknowledgment that the transfer is in response to strong allegations that the individual has been involved in gross human rights abuses.³⁵⁶ As with prosecutions, states will often cite the potential for retaliation were the removal to be publicly announced as a type of sanction for human rights abuses.³⁵⁷

Removal from office, moreover, may not necessarily implicate a simpler process than prosecutions if removals are to be carried out with full due process.³⁵⁸ In some legal systems, disciplinary sanctions are not even available unless the state establishes criminal liability.³⁵⁹ Furthermore, for military agents who justify their acts as simply following their superiors, the threat of losing their jobs may be an insufficient deterrent if they are likely to suffer greater punishment for *not* following orders, such as corporal punishment or losing their jobs more quickly. Moreover, in countries where many human rights violators are private individuals working in collusion with state agents, their dismissal is not even possible.³⁶⁰

Some critics have altogether dismissed the potential for prosecutions to deter the commission of mass atrocities because such acts occur when certain political conditions are present—most commonly, a totalitarian or authoritarian regime that constrains criticism and prevents the diffusion of knowledge.³⁶¹ It may be that as long as these political conditions favor an authoritarian regime already in power, the risk of being punished would only harden the leader's resolve to stay in power.³⁶² A different question, however, is

355. See *supra* notes 235-37 and accompanying text.

356. See, e.g., Human Rights Watch, *WORLD REPORT 2002: COLOMBIA*, available at <http://www.humanrightswatch.org> (reporting that in Colombia officers charged with abuses remained on active duty in charge of field groups); see also *infra* Part V.B.1 (discussing Guatemala's practice of retiring military officers responsible for human rights abuses).

357. See *id.*

358. See Juan E. Méndez, *In Defense of Transitional Justice*, in *TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES* 19 (1997) (cautioning that lustration measures carried out without due process would be illegitimate).

359. See *infra* notes Part V.B.1 (discussing Guatemala's procedural impediments to remove corrupt agents from office).

360. See *infra* Part V.B.3 (discussing private militia groups in Guatemala).

361. NINO, *supra* note 7, at x.

362. *Id.*

presented about the effect of prosecutions to deter the resurgence of authoritarian regimes in societies where these favorable political conditions have been weakened but where the leaders who sponsored the mass atrocities retain influence or power.

Prosecutions may not deter individuals from committing human rights violations so long as the favorable political conditions that keep them in power persist. Once these leaders have been removed from power, however, prosecutions may deter similar conditions from resurfacing that would permit a similar rise of authoritarian power.³⁶³ Therefore, the second argument in favor of prosecutions is that, unlike lesser sanctions, prosecutions will successfully marginalize temporarily weakened nationalist political leaders or institutions that sponsored or committed mass atrocities.³⁶⁴ National political leaders or institutions are often successful in committing human rights abuses because they have won the public's support either by promoting nationalistic propaganda and vilifying the victims, or usurping their power by instilling fear.³⁶⁵ The purpose of punishment, therefore, is to incapacitate the national leader's or institution's ability to exercise control by stripping the source of power and influence. Recognizing, in some instances, that the perpetrator's own morality has permeated broad areas of social values and culture, one way to strip the perpetrator of their power and influence is to use punishment to express moral repudiation for the act.³⁶⁶ When the national political leader has also used fear to exercise power, then punishment must also be designed to undo the perpetrator's continued ability to sustain this culture of domination.

Benjamin Sendor has argued that crime establishes a relationship of dominance and subordination between offender and victim and conveys a message to the public that the offender has the power to exercise a similar type of dominion over every member of the community.³⁶⁷ This message, in turn, can produce a sense of vulnerability and fear in other members of the community about the

363. See Rene Antonio Mayorga, *Democracy Dignified and an End to Impunity: Bolivia's Military Dictatorship*, in TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES, *supra* note 358, at 83.

364. *Id.*

365. For example, James C. Scott has described relations of domination. He uses this term where those who dominate continuously exercise outward power against the will of the dominated to reinforce and maintain the hierarchical order. Both use of force and symbolic gestures of domination, including public punishment and ceremonial apologies by those who rebel are part of this. See James C. Scott, *The Value and Cost of the Public Transcript*, in DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS 45, 45 (1990).

366. The role of punishment as moral educator is discussed in Part IV.C.

367. Benjamin B. Sendor, *Restorative Retributivism*, 1994 J. CONTEMP. LEGAL ISSUES 323, 334 (2000).

security of the victim's right that was violated.³⁶⁸ To Sendor, therefore, the function of punishment, which he labels restorative retributivism, is twofold: (1) to defeat the offender's imposition of control over victims' violated rights, and (2) to undo the offender's implicit assertion of power to impose control over other members of the community.³⁶⁹ Unfortunately, confessions or apologies rarely accomplish the goal of stripping perpetrators of their ability to exercise power through fear. After all, perpetrators of human rights abuses will rarely be humble in their apologies or confessions.³⁷⁰ In a criminal trial, those accused will commonly remain silent or deny wrongdoing.³⁷¹ In contrast, however, their silence or denial does not diminish the importance of the verdict and judgment, provided the violators are found guilty in a court of law.³⁷²

B. Criminal Punishment to Legitimate the State

Perhaps the most commonly stated reason for favoring the prosecution of at least some human rights violators has been the concern that rampant impunity for past atrocities will only exacerbate the precarious standing of the rule of law in countries where mass atrocities have been conducted. This argument highlights the importance of the relationship between legal responses to past repression and a country's ability to effectuate political change to advance the nation's transition to democracy.³⁷³ The state's prosecution of past abuses functions to legitimize the new regime's institutions, without which it could not effectively govern.

The argument that the new regime must first establish legitimacy to govern is based on the normative theory of law.³⁷⁴ Under this theory, many people comply with the law not necessarily because of the threat of legal punishment or sanctions, but rather because they view themselves as moral beings desiring to do the right

368. *Id.* at 336. Sendor also asserts that crime conveys a message that the victim's rights are not sufficiently important to refrain from violating them in pursuit of the offender's own interests. This devaluing message, when coupled with the message of dominion, causes citizens to feel a sense of insecurity about the protection of their rights. *Id.*

369. *Id.* at 338. Sendor also argues that punishment annuls the message that the victim's rights are not sufficiently important. *Id.* This expressive function of punishment is discussed in Part IV.C.

370. See *supra* notes 347-54 and accompanying text.

371. See, e.g., Anthony Borden, *Milosevic at the Bar*, NATION, Apr. 1, 2002, at 6 (discussing Milosevic's rejection of the ICTY).

372. See *id.*

373. See Orentlicher, *supra* note 6, at 2541.

374. See Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks is Just?: Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839, 1861 (2000).

thing and because they fear the disapproval of their community.³⁷⁵ Law, in fact, can develop a reputation as a reliable statement of existing norms to which people would be willing to defer, even when there exists some ambiguity.³⁷⁶ Law will not have this effect, however, if the institutions that promote and enforce the law lack the legitimacy to govern.³⁷⁷ Tom Tyler, in particular, has reviewed a number of studies that suggest that an individual's level of commitment to obey the law is proportional to two perceptions: first, that the law instantiates his moral beliefs, and second, that the law came into being via fair procedures conducted by the appropriate authorities.³⁷⁸ Through a series of studies, Tyler concludes that people will more readily obey the law when they view the state's legal authority as having a legitimate right to dictate behavior.³⁷⁹ If the state lacks legitimacy, it cannot regulate public behavior and influence social change, unless it resorts to force.³⁸⁰

There are several ways in which impunity for past atrocities undermines the state's legitimacy to influence social change through the law. One of the essential functions of the judiciary is the guardianship of the Constitution as a way of controlling the actions of the executive and legislature.³⁸¹ Yet the judicial systems of societies in transition from mass atrocities have often been identified as contributors of violence by their refusal or inability to punish the state agents who ordered or perpetrated the crimes.³⁸² In Argentina, for example, Carlos Nino describes the judicial recognition of the legitimacy of the coup d'etat and the dictatorship's ensuing laws as a clear example of what he calls "institutional anomie," which consists of a disregard for social norms including the law.³⁸³ Institutional anomie is aggravated because it is often related to what Nino labeled "corporatism"—a tendency in certain societies to grant particular groups special privileges, including the non-application of existing laws.³⁸⁴ In the context of mass atrocities, the judicial systems have, in effect, created a dual system of justice that treats the state's agents or accomplices leniently, while punishing harshly and without due process the private actors committing similar crimes. The selective enforcement of criminal law defies the legitimacy of the rule of law

375. *Id.*

376. *Id.* at 1864.

377. *See id.* at 1864-65 (discussing the importance of a community's perceptions of the fairness of the law in whether individuals follow its rules).

378. TYLER, *supra* note 327, at 32-37, 64-68, 161-63.

379. *Id.* at 19-27.

380. *Id.* at 5, 57.

381. *See, e.g.,* Mayorga, *supra* note 363, at 73.

382. *See infra* Part V.A. (discussing the role of Guatemala's justice system in perpetuating the commission of human rights violations).

383. NINO, *supra* note 7, at 47.

384. *Id.* at 48.

and, therefore, encourages widespread anomie.³⁸⁵ In contrast, prosecution of powerful state actors can demonstrate that the judiciary can, in fact, play an impartial role in the face of opposition from other political branches of government.³⁸⁶

Impunity for past crimes, especially when those who benefit are the officials and agents entrusted with protecting the public, also threatens the public's faith in the institutions of justice for protection. A second essential function of the administration of justice is to protect and guarantee the security of society.³⁸⁷ Yet the fact that the judiciary has failed in its job shows that the public simply does not trust the judicial system to protect them, even as new waves of crime plague many of these nations.³⁸⁸ Perhaps the most unfortunate result of institutional anomie is the increasing tendency for the public to take the law into their own hands as a form of private security and survival in many countries where impunity reigns.³⁸⁹ Prosecution of the country's worst crimes, therefore, could help bolster the legitimacy of the new democratic institutions by increasing the public's confidence in their ability to administer justice.³⁹⁰

Impunity for past crimes could also undermine the state's legitimacy if it does not respond to victims' demands for retributive justice, at least when such feelings are widespread among the public. Paul Robinson has argued, for example, that systems of law that otherwise reject retributive justice rationales in the criminal justice system may otherwise incorporate notions of just deserts in the enforcement of criminal law for normative reasons.³⁹¹ Yet it is important to acknowledge that prosecutions for purposes of imposing retribution may not necessarily legitimate the new government. This

385. *Id.* Nino explains that from these institutional ramifications, anomie is a widespread societal, as well as political phenomenon. As examples, he points to the fact that the black market flourishes in Argentina, that tax evasion is rampant, that private citizens partake in corrupt practices, ranging from smuggling to bribery, and that they Argentines are even unwilling to follow the traffic laws. *Id.*

386. See, e.g., Mayorga, *supra* note 363, at 84 (arguing that García-Meza's trial in Bolivia helped to overcome a prevailing sense of skepticism in Bolivia toward the judiciary's independence from the military).

387. *Id.* at 62.

388. See, e.g., Luis Salas, *From Law and Development to Rule of Law: New and Old Issues in Justice Reform in Latin America*, in *RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM* 42, n.95 (2001) (explaining that surveys in Latin America reveal a growing distrust in the capacity of the justice system to combat crime and even raise questions as to its complicity in criminality).

389. See *infra* Part V.B.3 (discussing the rise of private security forces in Guatemala).

390. See Catalina Smalovitz, *Argentina*, in *THE HEALING OF A NATION* 56 (1995).

391. Robinson, *supra* note 374, at 1840 (arguing that the U.S. Model Penal Code, which was principally guided by instrumentalists principles to reduce crimes, still reveals an unexposed retributivist streak in the drafters that could be explained as the drafter's attempt to increase the moral authority of criminal law by being responsive to the laypersons' conception of criminal law in terms of just deserts).

is especially true when the public perceives that the actions of those accused of human rights violations were justified and when the public's identification with the plight of victims is low.³⁹² For example, in contrast to Greece where demands for prosecutions and victim identification were high, in countries like Argentina, the public's identification with the perpetrators was greater because the threat of terrorism or communism had been perceived as quite serious.³⁹³ This is not to suggest that prosecutions should never occur when the public's identification with perpetrators is high, although its function may not relate to normative rationales for punishment. The purpose is rather to educate the public about the immorality of the acts committed against the victims, irrespective of its proffered justifications. The role of punishment as a moral educator is discussed in Part IV.C.

In pursuing prosecutions for purposes of the state's legitimation, it is also important to consider these goals in light of the new regime's competing concerns in enforcing the rule of law, which may also have implications for its legitimacy. For instance, pragmatic considerations related to the state's insufficient resources may compel the state to prioritize a selective number of cases involving past human rights violations. If law enforcement and prosecuting authorities were to devote a significant share of its resources to dealing with past human rights violations so as to substantially compromise the state's ability to battle ongoing crime,³⁹⁴ then the state would still fail to convince the public that it is willing and capable of protecting it from crime.³⁹⁵ At the same time, however, it is a mistake to conclude that, due to limited resources, democracies in transition should devote all their capital resources solely to creating forward-looking legal institutions and laws.³⁹⁶ This approach ignores that forward-looking laws will have little normative effect if the new regime lacks legitimacy.³⁹⁷

392. Juan J. Linz, *Crisis, Breakdown, and Reequilibration*, in *THE BREAKDOWN OF DEMOCRATIC REGIMES* 42, 45-46 (1978).

393. NINO, *supra* note 7, at 126.

394. See, e.g., Paul van Zyl, *Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission*, 52 *J. INT'L AFF.* 647, 652 (1999) (arguing that had South Africa devoted a significant share of its resources to deal with human rights violations, it would most certainly lose its current battle against ongoing crime).

395. *Id.*

396. NINO, *supra* note 7, at 128 (citing BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* (1992), which makes the argument that becoming entangled in retroactive justice risks loss of the moral capital due to scarcity of the organizational capital).

397. NINO, *supra* note 7, at 129. In fact, Ackerman faulted President Alfonsín for failing to take advantage of his popular support to call for a new constitution that would address many of the deficiencies in the law that permitted the human rights abuses, including putting in place stringent institutional limitations on the military in

Of course, prosecutions must be conducted in a legitimate and fair process if they are to safeguard the government's legitimacy.³⁹⁸ The impartiality of the trial court and its procedure is not only a prerequisite of justice but also adds legitimacy to any attempt to prosecute past crimes.³⁹⁹ One due process concern that arises in all contexts of mass atrocities is that, given the magnitude and complexity of the types of cases arising from mass atrocities, prosecutions must be selective. In the past, selectivity of prosecutions has compromised perceptions of fairness when, for example, prosecutions of low-level officers are viewed as scapegoating.⁴⁰⁰ Selectivity of prosecutions would not render the process unfair, however, unless the selection is deliberately discriminatory, unbalanced, vindictive, and unreasonable.⁴⁰¹ Legitimate selecting factors could consider the availability of evidence to prosecute in a given case, or focus on the most culpable offenders, who are generally those in high command.⁴⁰² In addition, it may also be important to prosecute those material actors who acted knowingly and willingly.⁴⁰³

A second due process concern relates to the ambivalence and fluidity that has generally characterized the law during periods of political transition.⁴⁰⁴ One dilemma is whether the putative law under the past regime, even if it lacked morality or perhaps contravenes international law, should still constitute a valid legal regime.⁴⁰⁵ Specifically, some of the concerns that have arisen generally relate to ex post facto laws, the application of statutes of limitations, and whether to recognize available domestic defenses like due obedience laws.⁴⁰⁶ Although elaborating on each of these due process dilemmas is beyond the scope of this Article, a few important general principles should guide this discussion. First, consistent with what Ruti Teitel has argued, in the transitional context, departure

general. *Id.* Nino not only refutes Ackerman's bleak assessment of Argentina's experience with dealing the past atrocities, but criticizes Ackerman for his assumption that the whole legitimacy of Alfonsín's government did not rest with his charisma, but rather due to his best efforts at strict compliance with the Constitution of 1853. *Id.*

398. Méndez, *supra* note 358, at 13 (stating that "[o]ne must be careful not to overwhelm courts ill-prepared to handle retroactive justice due to lack of independence, long-standing tradition of ineptitude and corruption or lack of resources if prosecutions will led to worse due process abuses").

399. NINO, *supra* note 7, at 125.

400. See *supra* note 310 and accompanying text.

401. Méndez, *supra* note 358, at 17.

402. See *supra* notes 308-12 and accompanying text.

403. Méndez, *supra* note 358, at 18 (arguing that important distinctions should be made between knowing and willing participants and those who acted without knowledge or appreciation for the illegality of their actions or under coercion).

404. See Ruti Teitel, *Transitional Jurisprudence: The Role of the Law in Political Transformation*, 106 YALE L.J. 2009, 2077-78 (1997).

405. *Id.* at 2081.

406. *Id.* See also NINO, *supra* note 7, at 149-85 (discussing several legal impediments to prosecuting past human rights violators).

from the old regime's laws should not represent a departure from the rule of law, but rather a shift from corruption to a normative approach to law.⁴⁰⁷ Law in the transitional context can function to clarify and sanction past wrongs.⁴⁰⁸ By exposing the value system associated with the past rule, the law clears the way for a transformative norm change.⁴⁰⁹ In this way, the emerging law can function to legitimate the rule of law, insofar as it recognizes past abuses of power by the state.⁴¹⁰ Second, international norms creating special rules about the treatment of crimes against humanity should serve as the basis for the reforms adopted during this transformative period.⁴¹¹ As international norms become better defined and reach wide consensus among nations, reliance on these norms by new regimes will not depart from the rule of law, particularly if it can be shown that the prior regime acted in contravention of these norms.⁴¹²

C. *The Expressive Functions of Punishment*

Criminal punishment is also preferable because lesser sanctions do not correspond to the severity of gross human rights violations. This argument returns to the theory of punishment as retribution.⁴¹³ Retributive punishment serves a public interest because without it, two disturbing outcomes may flow. First, there is the danger that the state's toleration of gross human rights violations will permeate broad areas of social values and attitudes, and create a culture in which violence is the norm.⁴¹⁴ This is particularly dangerous in societies where the state has condoned violence directed at particular groups that have been discriminated against, vilified, or diminished in value by segments of society.⁴¹⁵ Second, there is the danger that the victim's and society's anger caused by the violation and by the state's lack of a proportionate response will create societal ills. These ills include the social and political alienation of certain sectors of society, and perhaps even their lawlessness, which could result in "popular justice."⁴¹⁶ The argument that follows is that retribution has expressive functions that can curtail further violence in society by restoring society's lost values and by taming the victim and the public's anger. This theory of retribution is not faithful to the

407. Teitel, *supra* note 404, at 2078.

408. *Id.*

409. *Id.*

410. *Id.* at 2079.

411. *Id.* at 2088.

412. *Id.*

413. *See supra* Part III.B.2.

414. *See id.*

415. *See, e.g., infra* Part V.A.2 (discussing Guatemala's ethnic and social cleansing campaigns).

416. *See, e.g., infra* Part V.A.3 (discussing Guatemala's vigilante justice).

classical retributivist model that criminals should receive their just deserts, whether or not doing so would have utilitarian results.⁴¹⁷ J.L. Mackie labeled this “negative retributivism” because imposing just deserts is not, in and of itself, a goal of punishment, but is simply a side constraint on the permissible means states may employ to pursue the legitimate goals of punishment.⁴¹⁸

1. Criminal Punishment as Moral Educator

The argument that punishment prevents violence by restoring values in society advances the theory of punishment as moral educator.⁴¹⁹ Under this theory, punishment is viewed as having a dual expressive function—one of which is when the state communicates, on behalf of the people, its strong disapproval and judgment against the criminal conduct to the lawbreaker and the community as a whole.⁴²⁰ The purpose of the punishment is not to discourage recidivism but to teach lawbreakers that there are societal barriers to acts they wish to perform.⁴²¹ Lawbreakers may reject the moral message implicit in the punishment, yet they will learn there are legal barriers to the acts they committed.⁴²² Moreover,

417. MURPHY, *Retributism, Moral Education, and the Liberal States*, *supra* note 258, at 22.

418. *See id.* at 21. In contrast, positive retributivism (also Mackie’s term) is itself the general justifying aim of punishment; the very point of having a practice of punishment is to guarantee that criminals will get their just deserts, even in cases where this would be clearly disutilitarian. *Id.* at 22. Not all retributivists, however, believe that crime prevention is relevant to the proper justification of retributive punishment. Michael Moore is still viewed as one of the few contemporary criminal theorists with unqualified support for retributivism. According to Moore, consequentialists consideration play no role in the justification of punishment. MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 153-59 (1997).

419. The moral education theory of punishment has been advanced by many scholars writing on theories of criminal law and punishment. *See, e.g.*, R.A. DUFF, *TRIALS AND PUNISHMENTS* 233-34 (1986); EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 63 (1984); DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* 249 (1990); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 255 (1968); ANDREW VON HIRSCH, *CENSURE AND SANCTIONS* 10 (1993); Jean Hampton, *The Message of Punishment*, Michael Moore, *A Defense of the Retributivist View*, and Robert Nozick, *Retribution and Revenge*, in *WHAT IS JUSTICE?: CLASSIC AND CONTEMPORARY READINGS* (1998); Henry M. Hart, *The Aims of the Criminal Law*, 28 *LAW & CONTEMP. PROBS.* 153 (1958); Tatjana Hörnle, *Distribution of Punishment: The Role of a Victim’s Perspective*, 3 *BUFF. CRIM. L. REV.* 175, 178 (1999); Dan M. Kahan, *Three Conceptions of Federal Criminal-Lawmaking*, 1 *BUFF. CRIM. L. REV.* 5 (1997); Cornelius Prittwitz, *The Resurrection of the Victim in Penal Theory*, 3 *BUFF. CRIM. L. REV.* 109 (1999).

420. Hörnle, *supra* note 419, at 178; Nozick, *supra* note 419, at 215. The expressive function of punishment also serves as a vehicle for victims to express resentment for the injury received. *See* FEINBERG, *supra* note 280, at 69.

421. *See* Hampton, *supra* note 419, at 247; *see also* DUFF, *supra* note 419, at 70, 233-34.

422. *See* Hampton, *supra* note 419, at 248.

punishment serves the desirable social goal of educating the larger community about the immorality of the offense.⁴²³ In contrast, if the state does not create or enforce barriers against certain actions, it sends the opposite message that certain actions are morally acceptable in society. Alternatively, at minimum, if the boundary exists but is not enforced, the state communicates that these actions are tolerated because doing so serves a greater societal good. As Anthony Duff exclaimed, “[w]e are not sincere in our condemnation of an act if we are silent in the face of its commission: to ignore manifest breaches of what we have declared to be important norms is in effect to deny what we claim to have declared.”⁴²⁴

The principal goal of the moral education theory of punishment is distinct from the pure traditional retributive model of just deserts.⁴²⁵ Yet retributivists are drawn to this theory of punishment because the consequences that flow from it also respond to the aims of retribution. If punishment conveys to criminals and others that they wronged the victim, it implicitly recognizes the victim’s plight and honors her moral claims, even if the goal is not to give the wrongdoers their just deserts.⁴²⁶ Moreover, the expression of moral condemnation, if the message is to be effective, guards against leniency, thereby justifying sentencing in proportion to the seriousness of the crime.

Some criticize the moral education theory of punishment because it presupposes that states or societies have a shared motivating conception of the moral good.⁴²⁷ The moral education theory of punishment involves the state in the determination of what constitutes moral good and when punishment is severe enough to serve the moral education purpose.⁴²⁸ This risks having the state

423. *Id.* See also FEINBERG, *supra* note 280, at 5; Hörnle, *supra* note 419, at 178.

424. ANTHONY DUFF, *Desert and Penance*, in *PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY* 162 (2d ed.1998).

425. See Hampton, *supra* note 419, at 249 (arguing that retributism understands punishment as performing a rather metaphysical task of negating the wrong and reasserting the right, whereas the moral education theory proposes a concrete moral goal of benefitting the criminal himself through educating him about his wrongs).

426. See Danner, *supra* note 254, at 490 (arguing that “expressive theory of punishment” informs both the retributive and utilitarian philosophies of punishment).

427. See MURPHY, *Retributism, Moral Education, and the Liberal State*, *supra* note 258, at 26; see also Murphy, *Moral Epistemology, the Retributive Emotions and the “Clumsy Moral Philosophy” of Jesus Christ*, *supra* note 262, at 149 (containing Murphy’s more cautious approach to retributive justice, in which he advocates that we (society) should approach punishment with regret and humility and admonishes that “iniquity and madness awaits us if we let ourselves think that, in punishing, we are involved in some cosmic drama of good and evil – that, like the Blues Brothers, we are on a mission from God”).

428. See MURPHY, *Retributism, Moral Education, and the Liberal State*, *supra* note 258 at 26-27.

coerce the moral education and moral improvement of its citizens, which is problematic at least for those who espouse a liberal theory of the state—a theory making liberty and individual rights the primary political values.⁴²⁹ These arguments have force when viewed in the context of the state punishing certain acts in the name of morality, but which are private in nature, such as sodomy. They lose their force, however, in the face of acts such as murder and torture, that violate universally recognized fundamental rights precisely because of the severe harm they cause to others. Jeffrie Murphy has attempted to reconcile the tension between the regulation of morality and the liberal state by suggesting that a liberal state exists not only to protect rights by punishing their violations but also to foster a social climate in which human rights are respected or even regarded as sacred.⁴³⁰ Under this version of the liberal state, which Murphy calls “communitarian liberalism,” the right to moral independence would include many important values, such as sexual preference, but not all values.⁴³¹ “It would not, in particular, include the right to degrade the value of others and to hold the rights of others in contempt. . . . Must liberal communities manifest neutrality even to gross affronts to the very idea of basic human dignity on which the liberal state itself is based?”⁴³²

Perhaps the strongest argument for moral education through punishment is the absence of an adequate response to the question, “If not the State, then who?”⁴³³ If the state remains silent about the condemnation of violations to universally-acknowledged fundamental rights, does this mean that it is the people themselves who must judge the violators? As the next section discusses, the state is in a better position to judge because, unlike “popular justice,” institutionalized retribution must balance victims’ demands for retribution with other universally recognized fundamental rights, including the rights of the accused to fairness and humane treatment in the criminal justice system.

Some who otherwise accept the moral education theory of punishment nonetheless question the communicative effectiveness of prosecutions in the context of state-sponsored mass atrocities, insofar

429. See *id.* at 27 (arguing that the state engaging in moral education would abandon the liberal theory of the state and citing Ronald Dworkin’s basic tenet of liberalism that “governments must be neutral on what might be called the question of the good life (and thus) political decisions must be, so far as possible, independent of any particular conception of the good life, or of what gives value to life”); see also Jean Hampton, *Retribution and the Liberal State*, 1994 J. CONTEMP. LEGAL ISSUES 117, 128-30 (2000).

430. Jeffrie G. Murphy, *The State’s Interest in Retribution*, 1994 J. CONTEMP. LEGAL ISSUES 283, 295 (1998).

431. *Id.*

432. *Id.* at 295-97.

433. The obvious response to some may be God.

as prosecutions, by focusing too much on individual guilt, are unable to relay a holistic story of what transpired.⁴³⁴ Unlike most common crimes, mass atrocities implicate complex layers of institutional guilt and, sometimes, widespread levels of shared public complicity in the atrocities, which are, admittedly, better captured through a truth commission process.⁴³⁵ In fact, for due process reasons, prosecutions are ill-suited to deal with the subtleties of facing the past because they risk sacrificing the rights of the accused as the focus shifts to a history lesson rather than the relevant facts of the particular accusation.⁴³⁶

By the same token, it is as important to acknowledge that truth commissions are similarly ill-suited to address individual guilt.⁴³⁷ Unless the identification of those who perpetrated crimes is voluntary, truth commissions that name individual perpetrators for the commission of crimes also violate the due process right to innocence until proven guilty.⁴³⁸ Moreover, precisely due to the informality of truth commissions, those named can later deny the accuracy or fairness of the findings.⁴³⁹ More importantly, individual guilt is often undermined by those who confess in a truth commission process because they deflect blame on institutions or excuse their behavior by citing the social context in which their actions took place.⁴⁴⁰ As Carlos Nino explains, post-transition societies are frequently characterized by what he termed "extreme conceptual divergence," whereby those who committed the abuses are sincerely convinced they acted in society's best interest.⁴⁴¹ Either when individual guilt is lost in institutional responsibility, or worse yet, is justified, punishment's expressive function fails to teach the lawbreaker about the injustice of his actions or to send a strong condemnatory message about the immorality of the acts.⁴⁴² In any case, the leniency with which truth commissions respond to

434. See Auckerman, *supra* note 20, at 88.

435. MINOW, *supra* note 20, at 87.

436. In his reflections of the trials in Germany and Japan after World War II, Ian Buruma wrote, "[W]hen the court of law is used for history lessons, then the risk of show trials cannot be far off." IAN BURUMA, *THE WAGES OF GUILT: MEMORIES OF WAR IN GERMANY AND JAPAN* 142 (1995). Similarly, Tina Rosenberg observes, "[T]rials that seek to do justice on a grand scale risk doing injustice on a small scale; their goal must not be Justice but justice bit by bit." ROSENBERG, *supra* note 310, at 351.

437. MINOW, *supra* note 20, at 87.

438. See *supra* notes 241-42 and accompanying text.

439. *Id.* (discussing common practice by states and individual perpetrators to question the impartiality and fairness of truth commissions that identify individuals' participation in the atrocities).

440. See *supra* notes 347-54 (discussing common practice by perpetrators who confess crimes through a truth commission process to deny or deflect their individual guilt).

441. NINO, *supra* note 7, at ix.

442. *Id.*

individual guilt when the perpetrators are granted amnesty undermines the effectiveness of the condemnatory message, at least insofar as similar or lesser common crimes are still punished with incarceration. In contrast, the aggressive prosecutions of some of the worst perpetrators can also counteract the impression that some groups are above the law.⁴⁴³

Ideally, therefore, whenever possible, truth commissions should co-exist alongside individual prosecutions, at least against those responsible for ordering the atrocities.⁴⁴⁴ The truth commission process can address the historical and social context of the atrocity, and reveal the complex lines of responsibility for complicity, while individual prosecutions can determine individual guilt and impose criminal punishment. Many scholars claim that prosecutions can shipwreck truth commissions because perpetrators will not confess unless they are offered an amnesty;⁴⁴⁵ however, this assumes that individual guilt could not be established independent from a truth commission process in a criminal trial. Yet, at least in some cases, the state or international criminal tribunals may possess sufficient evidence to prosecute without confessions by relying on forensic evidence, declassified intelligence reports, surviving human rights victims' testimony, or even from the testimony of lower-level participants in the atrocities who are offered immunity. In fact, many states, including Guatemala, have not entirely foreclosed the possibility of prosecutions.⁴⁴⁶ These states have opted for a truth commission process and in certain instances have relied on the information gathered from the truth commission investigation to pursue prosecutions.⁴⁴⁷

Some have suggested, however, that the inevitably selective nature of prosecutions in the context of mass atrocities further

443. *Id.* at x; see also Mayorga, *supra* note 363, at 85 (arguing that García-Meza's trial in Bolivia sent an "implicit warning against any future attempts by members of Bolivia's political class to arrive at power through illicit means").

444. See *supra* notes 309-10 and accompanying text (explaining the consensus that those who order the commission of mass atrocities are more culpable than lower-level agents who carry them out pursuant to the order).

445. See, e.g., Villa-Vicencio, *supra* note 298, at 209.

446. See *infra* Part V.

447. Argentina's truth commission, for example, turned over to the government the names of over 1,000 alleged offenders gathered during its investigation. As a result of the report, two former presidents and military leaders were tried. Jaime Malamud Goti, *Punishing Human Rights Abuses in Fledgling Democracies: The Case of Argentina*, in *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* 161 (1995). Similarly, the new Federal Republic of Germany decided to deal with East Germany's transition to democracy by choosing a dual approach of a truth commission and prosecutions. Maryam Kamali, *Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa*, 40 *COLUM. J. TRANSNAT'L L.* 89, 104 (2001).

undermines their communicative function.⁴⁴⁸ The moral education function of punishment may be compromised in regard to the individual offenders who are not prosecuted.⁴⁴⁹ Exemplary prosecutions of some of the most culpable and most representative cases, however, can still effectively communicate reprobation for the immoral act.⁴⁵⁰ Scholars who have studied the impact of the criminal prosecutions of some political leaders who enjoyed substantial popularity and support have concluded that criminal prosecutions have contributed to their stigmatization.⁴⁵¹ For example, Payam Akhavan observes that the prosecutions of Bosnian war leaders by the International Criminal Court for the Former Yugoslavia, contrary to oft quoted predictions that the criminal prosecution of popular leaders would only lead to public revolt or help to martyr the image of nationalist “saviors,” have actually discredited leaders, and have allowed new leaders to emerge and make statements that would have constituted political suicide in another context.⁴⁵² Similarly, Carlos Nino reflected that the few trials in Argentina served as a great occasion for social deliberation and for collective examination of the moral values underlying public institutions among Argentines.⁴⁵³ He wrote,

This type of value searching deliberation was evident in the debates surrounding the trials in Argentina. The accusations, the defenses, judicial decisions, and arguments taking place among the various sectors of society were precisely about the role of the military and other groups in a democratic society.⁴⁵⁴

2. Criminal Punishment as Tamer of Anger

Criminal punishment expresses more than the state's strong disapproval of the wrongdoer's acts. It also expresses the surviving human rights victim's resentment for the injury received⁴⁵⁵ and the community's anger for the act committed.⁴⁵⁶ The idea that criminal punishment expresses revenge and payback has always troubled many.⁴⁵⁷ However, these feelings of anger are a natural, and often a healthy, response to wrongdoing.⁴⁵⁸ More importantly, the presence

448. See Auckerman, *supra* note 20, at 89.

449. *Id.*

450. Akhavan, *supra* note 331, at 13-14.

451. *Id.*

452. *Id.*

453. NINO, *supra* note 7, at 133.

454. *Id.*

455. See FEINBERG, *supra* note 280, at 69; see also Prittwitz, *supra* note 419, at 121-29.

456. See FEINBERG, *supra* note 280, at 82.

457. See *supra* notes 258-62 and accompanying text.

458. See *supra* notes 263-78 and accompanying text.

of strong feelings of anger in the community should be seen by the state as a serious problem that requires a positive legal response.⁴⁵⁹

Ancient Athens, for example, did not hesitate to incorporate what later became known as retributive punishment because it recognized that wrongdoing and punishment implicated the relations between the community and the wrongdoer.⁴⁶⁰ Athenians punished because someone, principally the victims, but also other citizens, were angry at a wrong and wanted to have that anger assuaged.⁴⁶¹ Punishment, then, was understood as a system that cured anger and treated the problem of disordered intersubjectivity.⁴⁶²

Viewed in this light, retributive justice can be understood as vengeance curbed or tamed by the intervention of someone other than the victims.⁴⁶³ This line of argument also raises concerns over the state performing the role of avenger because its apportionment of punishment may overstep the boundaries of morality.⁴⁶⁴ However, removing the state from this role means that other serious societal ills will occur due to the loss of faith in the state that those who feel unprotected will experience. These ills might include, for example, a growing apathy or detachment of certain sectors of the population from social and political participation in the community, or even a rise in popular justice in the name of self-preservation.⁴⁶⁵ This

459. See Danielle S. Allen, *Democratic Dis-ease: Anger and the Troubling Nature of Punishment*, in *THE PASSIONS OF LAW*, *supra* note 262, at 193.

460. *Id.*

461. *Id.* at 194.

462. *Id.* at 196.

463. See MINOW, *supra* note 20, at 12; FEINBERG, *supra* note 280, at 83; Solomon, *supra* note 267, at 129; Nietzsche, *Punishment and Ressentiment*, in *WHAT IS JUSTICE: CLASSICAL AND CONTEMPORARY READINGS* 230 (2000).

464. See MINOW, *supra* note 20, at 12.

465. Some scholars have challenged the argument that the lack of retributive justice can lead to acts of private revenge by pointing out that popular justice is unusual and almost nonexistent. See, e.g., Henderson, *supra* note 37, at 127. Popular justice (i.e., mob violence, lynchings and other acts of vigilante justice) tends to happen only in cases of extreme denial of justice, but the phenomena should not be dismissed as insignificant. This Article, for example, documents Guatemala's experience with popular justice which has surfaced as a direct result of Guatemala's failed administration of justice. See *infra* Part V.B.3. Guatemala is not the only country in Latin America experiencing similar problems. See, e.g., Mary Jordan, *Dubious Justice in Mexico: Village Vigilantes Block Path to Modernity*, WASH. POST, July 31, 2001, at A1. The examples, however, need not be that extreme. George Fletcher documents examples of mob violence in the United States as responses from Blacks, Jews, gays, and women indignant by the lack of response of the U.S. justice system to violent acts of hatred directed against them. See GEORGE FLETCHER, *WITH JUSTICE FOR SOME: VICTIM'S RIGHTS IN THE CRIMINAL TRIAL* (1995); see also Sherrilyn Iffil, Editorial, *It's Time to Face the Role of Everyday People who Condoned White Supremacy and Violence in the Community*, BALTIMORE SUN, June 17, 2001, at D1 (discussing the United States's failure to prosecute and convict those responsible for crimes of racial violence during the civil rights era has contributed to the legacy of mistrust, betrayal and fear of blacks toward the U.S. criminal justice system).

happens because people's anger will not simply go away in the absence of an appropriate institutionalized response, particularly if crimes involved are acts of murder, torture, or forced disappearances.⁴⁶⁶ Danielle Allen, who likens people's anger resulting from crime to a disease, writes that the problem with the state obfuscating anger in society is that the state ignores one of its crucial roles of restoring peaceful relationships within the community.⁴⁶⁷ To extend the metaphor, the state plays the role of healer whose purpose is to resolve the anger between community and wrongdoer.⁴⁶⁸

Why is the state better suited, however, to resolve community anger resulting from crime? Scholars have proposed that vengeance, when properly construed, can include its own criteria for satisfaction and fairness.⁴⁶⁹ What is more unpredictable is when novices on vengeance, with limited knowledge of its consequences, nevertheless exercise it.⁴⁷⁰ The deep experiences of legal tradition and the collective wisdom of society and history, however, ultimately allow the state to set the appropriate limits required to realize the public good.⁴⁷¹ In the post-Enlightenment world, the state learned the legitimacy of criminal punishment could no longer be established solely by the social authority of the avenger.⁴⁷² Rather, the extreme nature of certain punishments and the inequities in its application also stripped the state of legitimacy, which led to the gradual acceptance of proportionality as a limitation on punishment.⁴⁷³ In modern times, a strong indicator that law retains the potential of taming vengeance with humanity is reflected in the significant opposition that societies have shown to the death penalty.⁴⁷⁴

466. See NINO *supra* note 7, at 147 (arguing that the need to avoid vengeance is not less important in the context of radical evil).

467. Allen, *supra* note 459, at 205.

468. Allen further explains that institutionalized punishment to address anger should not be viewed as the state condoning or indulging anger, but rather as an insightful recognition "(1) that wrongdoers are members of the community whose acts implicate the community, (2) that punishment arises from the need to deal with disordered relationships within the community, (3) that it is precisely anger that spotlights or signals the need to deal with those disordered relationships, and (4) that we need to make efforts not to satisfy anger but to resolve that anger and to restore peace in the community when anger arises." *Id.*

469. See Solomon, *supra* note 267, at 142 ("It is said that vengeance knows no end, but this is not true. There is a very clear sense of satisfaction that is built into the idea of and the urge to revenge.").

470. *Id.*

471. *Id.* at 143-44. ("To be sure, vengeance is a powerful and therefore dangerous passion, but it can also [be] a socially constructed emotion that can be cultivated to contain not only its own limits but a full appreciation of the general good and the law as well.").

472. JACOBY, *supra* note 37, at 139.

473. *Id.*

474. See *supra* note 282.

It is possible that societies may evolve towards a conception of criminal punishment that allows institutions, like the currently unconventional approach of the African Truth and Reconciliation Commission, to become the more widely accepted means of state punishment for common violent crimes. "There was a time, after all, when the gallows and the rack were the leading clear symbols of shame and ignominy."⁴⁷⁵ Until that happens, however, surviving human rights victims should not be expected to view truth commissions as other than secondhand justice for two reasons. First, these mechanisms simply cannot serve the expressive function of punishment as moral condemnation for certain crimes so long as the state retains harsher penalties for similar or even lesser common crimes. For this very reason, such mechanisms also cannot fully address victims' and society's anger over certain crimes because the inequality in treatment will serve as a constant reminder that the justice they received was a compromise surviving human rights victims had to accept, often to accommodate the coercive demands of their own perpetrators.

Many have lauded truth commissions' therapeutic effects when victims come together to tell their stories of suffering.⁴⁷⁶ This initial therapeutic effect may diminish, however, without some measurable level of accountability. Some critics of the South African Truth Commission process, for example, have charged that the truth commission hearings only worsened race relations in South Africa through the regular exposure of apartheid's atrocities.⁴⁷⁷ Moreover, some report that victim dissatisfaction worsened when most victims had not received even the monetary reparation that they had been promised.⁴⁷⁸

475. FEINBERG, *supra* note 280, at 115. Feinberg elaborates that it is possible

to imagine an elaborate public ritual, exploiting most trustworthy devices of religion and mystery, music and drama, to express in the most solemn way the community's condemnation of a criminal for his dastardly deed. Such a ritual might condemn so very emphatically that there be no doubt of its genuineness, thus rendering symbolically superfluous any further hard physical treatment. Such a device would preserve the condemnatory function of punishment while dispensing with its usual physical media—incarceration and corporal mistreatment.

Id.

476. See, e.g., Kamali, *supra* note 447, at 139.

477. See, e.g., Emily W. Shabacker, *Reconciliation or Justice and Ashes: Amnesty Commissions and the Duty to Punish Human Rights Offenses*, 12 N.Y. INT'L L. REV. 1, 8 (1999) (noting that it would be difficult to imagine anything more calculated to exacerbate race relations and create hatred among blacks who daily hear of the atrocities committed by the white security forces).

478. Jennifer Ludden reported that many of the South Africans she interviewed said reliving their stories for the TRC did not heal their emotional wounds but exacerbated them. What made matters worse was that as of December 1999, most had received no reparations or only a minimal amount. Kamali, *supra* note 447, at 139

In summary, the state should prosecute human rights perpetrators and grant surviving human rights victims' demands for accountability, retribution, and equal protection. More lenient responses to atrocious crimes sap the state's power to deter proscribed conduct by allowing corrupt agents to retain power or influence, by robbing the state of its legitimacy, and by stripping punishment of its expressive function.

V. GUATEMALA'S STORY OF IMPUNITY

Part V of the Article recounts Guatemala's grave failure to prosecute past and present human rights violations. Guatemala offers a compelling example of a society that has experienced the painful cost of impunity, particularly the violence and lawlessness it foments. Due to mounting international and domestic pressure, Guatemala did not adopt a general amnesty law.⁴⁷⁹ Instead,

(citing Nick Child, *South Africa Concludes Healing Process*, BBC NEWS, May 31, 2001, available at <http://news.bbc.co.uk>).

479. Guatemala committed to ten human rights goals in the Guatemalan Comprehensive Agreement on Human Rights:

I. To adhere to human rights principles and norms; II. To strengthen the institutions to further the protection of human rights; III. Not to adopt any law to prevent the prosecution and punishment of persons responsible for human rights violations; IV. To eliminate illegal security forces and to regulate firearms; V. To respect and protect freedom of association and freedom of movement; VI. To end conscription for compulsory military service; VII. To create safeguards and protections for individuals and entities working for the protection of human rights; VIII. To pay compensation and to assist victims of human rights violations with humanitarian aid; IX. To aim to stop the internal armed confrontation; and X. To allow U.N. verification of compliance with the agreement.

See *Comprehensive Agreement Human Rights*, available at http://www.minugua.guate.net/acuerdos/human_rights/html [hereinafter Human Rights Agreement]. Guatemala did subsequently adopt a partial amnesty law titled the Law of National Reconciliation, which exempted from prosecution political offenses or related common crimes committed by individuals during the war, as well as those crimes committed by the state or its agents and accomplices to stop or prevent these same crimes. Law of National Reconciliation, Decree Number 145-96, adopted by the Congress of the Republic of Guatemala, Dec. 18, 1996, arts. 1-7, available at [http://www.url.edu.gt/idies/acuerdos%20paz\(24\)%20apendice%201.html](http://www.url.edu.gt/idies/acuerdos%20paz(24)%20apendice%201.html). Article 8 of decree 145-96, however, excluded from amnesty "crimes of genocide, torture and forced disappearance, as well as those violations that do not have a statute of limitations or which do not permit the extinction of criminal responsibility, in accordance with the domestic law and the international treaties ratified by Guatemala." *Id.* art. 8 (translation by author). Subsequent attempts by members of Guatemala's Congress to pass a broader amnesty law have failed. See Urgent Action of the Social Justice Committee, *Guatemalan NGO's Reject Draft Bill for General Amnesty as an Attempt to Perpetuate Impunity in Guatemala*, June 27, 2000, available at http://www.s-j-c.net/new_page_39.html.

Guatemala agreed to both a U.N. truth commission⁴⁸⁰ and to pursue the prosecution of gross human rights violations.⁴⁸¹ Unfortunately, Guatemala has granted de facto amnesty to human rights violators, with a few notable exceptions.⁴⁸² Guatemala's record of impunity can be attributed to corrupt officials who obstruct the criminal process in individual cases and to the incompetence and inadequate resources that plague the institutions responsible for the administration of justice in Guatemala.⁴⁸³ The next sections of this Article paint a picture of Guatemala's systemic corruption in the administration of justice. It does not, however, portray every state official or agent. In fact, many are unsung heroes who work in the most dire of circumstances, often at grave risk to their own and their families' lives and livelihood.⁴⁸⁴

480. The Commission for Historical Clarification (CEH) was created by the fifth peace agreement between the State of Guatemala and the URNG. Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence That Have Caused the Guatemalan Population to Suffer, June 23, 1994, available at http://www.usip.org/library/pa/guatemala/guat_940633.html. The CEH's purpose was to clarify with all objectivity, equity and impartiality the human rights violations and acts of violence that caused the Guatemalan population to suffer and to issue a report containing the findings of the investigations regarding the events during the period from the start of the armed conflict until the signing of the firm and lasting peace agreement between Guatemala and the URNG. *Id.*

481. Human Rights Agreement, *supra* note 479.

482. There are at least two notable exceptions to impunity for human rights abuses in Guatemala. The first is the Río Grande massacre case, in which three former patrol members were sentenced to life in prison without parole. See *Eleventh Report on Human rights of the United Nations Verification Mission in Guatemala (MINUGUA)*, 55th Sess., Annex, Provisional Agenda Item 43, ¶ 63, U.N. Doc. A/55/174 (2000) [hereinafter *Eleventh Report of MINUGUA*]. The courts convicted the three former members of a civilian indigenous patrol, but left unresolved the charges against the then commander of the Rabinal military detachment and other members of the army. *Id.* The second is the conviction to 30 years in jail of three army officers and a priest to between 20 and 30 years for the murder of Roman Catholic Bishop Juan Gerardi in 1998. *Guatemala Court Jails Bishop's Killers*, BBC NEWS, June 8, 2001, available at <http://news.bbc.co.uk>.

483. See *infra* Part V.B.1; see also Heasley et al., *supra* note 12, at 1121 (identifying six obstacles that prevent Guatemala from fulfilling its international duty to investigate and provide an effective remedy for violations to the right to life in the massacre cases: (1) intimidation of witnesses and officials; (2) corruption of officials; (3) incompetence of officials; (4) inadequate resources and resource management; (5) lack of a definition of military secrets; and (6) misuse and failure to utilize procedural mechanisms).

484. For example, Judge Barrios, who presided in the criminal trial against three former officers for the murder of Bishop Juan Gerardi, had two explosive devices thrown over the back wall of his house in Guatemala city hours before the start of the trial. *Guatemala Bishop Murder Trial Halted*, BBC NEWS, Mar. 22, 2001, available at <http://news.bbc.co.uk>. The week before the trial was to start, unidentified gunmen tried to break into her house but were scared off by a passing police car. *Id.* Despite repeated attempts to intimidate her, Judge Barrios stayed until the completion of the trial and, in an unprecedented move, sentenced the three military officers to 30 years in jail. She left the country shortly thereafter. *Id.* See also *Guatemala Prosecutor Flees*, BBC NEWS, July 31, 2001, available at <http://news.bbc.co.uk> (reporting that

Guatemala's story serves two purposes in this Article. First, it lends support to many of the theories on punishment advanced in Part IV for victim-focused prosecutions. A related but different question, however, is whether the law should permit victim participation in the criminal process to advance these interests when the state has failed to do so. A closer examination of some of the factors contributing to impunity in Guatemala reveals why the State has been unable or unwilling to fulfill its duty to prosecute and provides support for the arguments that surviving human rights victims' participation in the criminal process could help achieve some important goals. In a society where some state officials and agents have become too closely aligned with crime, victim participation could infuse the administration of justice with accountability and allow victims to channel their anger constructively by seeking to improve the criminal process' outcomes and fairness.

It should be noted that Guatemala's Criminal Procedure Code already contemplates substantial victim participation in criminal proceedings, including for crimes considered to implicate a public interest.⁴⁸⁵ In such cases, victims⁴⁸⁶ or their representatives may file a criminal complaint directly with the trial judge⁴⁸⁷ or join a criminal process already initiated by the public prosecutor, including when the defendant is an agent of the state.⁴⁸⁸ The trial judge, who is in charge of the investigation,⁴⁸⁹ can remit the victim's criminal complaint to the public prosecutor and order an immediate investigation.⁴⁹⁰ During the investigation phase, victims may collaborate with the public prosecutor and shall have the right to request the collection of evidence and to receive the results of the investigation.⁴⁹¹ When disagreements arise between the public prosecutor and victims, victims may request that the trial judge

Leopoldo Zeissig, the lawyer who successfully led the prosecution of three army officers in the Bishop Gerardi trial, also fled the country after receiving threats).

485. As in many civil law countries, Guatemala's criminal procedure code distinguishes between public and private crimes. In Guatemala, private crimes, those which can only be prosecuted by the victim, include those having to do with honor, criminal torts, copyright claims, industrial property, and check fraud. Código Procesal Penal art. 24(4) (Guat.).

486. The Guatemalan Criminal Procedure Code defines victim (*agraviado*) as (1) the direct victim of the crime; (2) their spouse by marriage or common law, parents, and children; (3) representatives of a community against whom the crime was committed; or (4) certain organization in representation crimes that are collective in nature. *Id.* art. 117.

487. The victim may initiate a public prosecution (a *querrela*) only before the public prosecutor has begun the trial or ordered investigation closed or the judge has dismissed the charges. *Id.* art. 118.

488. *Id.* art. 116.

489. *Id.* art. 302.

490. *Id.* art. 303.

491. *Id.* art. 116.

decide the matter.⁴⁹² During the pre-trial phase, victims may join, amend, or object to the complaint filed by the public prosecutor.⁴⁹³ During the trial phase, victims may examine and cross-examine witnesses, including the defendant who may choose to testify.⁴⁹⁴ During closing arguments, victims may make a statement, although it must be limited to the issues relevant to the defendant's civil liability.⁴⁹⁵ Neither victims nor the public prosecutor, however, participate at sentencing, during which the trial judges deliberate in secret.⁴⁹⁶ Victims may also seek appellate review of the trial judge's decision to deny their participation in the proceedings⁴⁹⁷ or any decision to dismiss the case or otherwise terminate the process.⁴⁹⁸ Victims, in any case, must pay for their own legal costs.⁴⁹⁹

Many surviving human rights victims in Guatemala, represented by local human rights groups, have often employed their participatory rights in criminal proceedings, often at a grave risk to their lives.⁵⁰⁰ Many have attributed improvements, however modest, in the administration of justice to their participation in the criminal process.⁵⁰¹ Examining the effectiveness of victim participation in Guatemala or the merits of each of their participatory rights in general is beyond the scope of this Article. Although the conclusion to this Article makes some general observations about the various considerations that should be taken into account in evaluating the merits of victim participation in the criminal process, the purpose of this Section is solely to convey the compelling reasons why surviving human rights victims in Guatemala have chosen to risk their lives in order to achieve their goals of truth and justice.

492. *Id.* art. 315.

493. *Id.* art. 332.

494. *Id.* arts. 362-77.

495. *Id.* art. 382.

496. *Id.* art. 383.

497. *Id.* art. 404(3).

498. *Id.* art. 437.

499. *Id.* art. 119.

500. See, e.g., *Global Concerns: Guatemala*, June 18, 2002, available at http://www.maryknoll.org/GLOBAL/ALERTS/guate_urgent.htm; see also, e.g., *Guatemala-Human Rights: Guatemalan Rights Groups Demand End to Threats and Violence*, EFE NEWS, May 4, 2002, available at <http://www.efenews.com>.

501. See, e.g., *Illegal Adoptions: Overview of the Bruce Harris Case*, available at <http://www.casa-alianza.org/EN/human-rights> (discussing Casa Alianza's formal cooperation agreement with the Solicitor General's Office in Guatemala under which Casa Alianza cooperates in the investigations regarding situations affecting the children of Guatemala).

A. Guatemala's Cycle of Violence

Six years after the end of a bloody 36 year civil war,⁵⁰² Guatemala's surviving human rights victims are still clamoring for truth and justice, even as some experience renewed repression at the hands of state officials and agents who committed or continue to commit grave crimes, or who allow private actors to do so with impunity.⁵⁰³ The U.N. Mission for the Verification of Human Rights and Compliance with the Commitment of the Comprehensive Agreement on Human Rights in Guatemala (MINUGUA) has concluded, after monitoring Guatemala's compliance with its human rights obligations for the past seven years, that two of Guatemala's greatest impediments to the full enjoyment of human rights have been: (1) the reigning impunity for crimes committed during the war, and (2) the persistent failure of the administrative system of justice to uphold the rule of law despite some modest reforms and gains.⁵⁰⁴ MINUGUA's reports and the findings of the Commission for Historical Clarification (CEH Report) reveal a vicious cycle of violence

502. Guatemala's 36 year civil war (1962-1996) left a toll of at least 42,275 victims (does not include legitimate war casualties), of which 23,671 were summarily executed and 6,159 forcibly disappeared. *Guatemala, Memory of Silence, Conclusions and Recommendations of the Report of the Commission for Historical Clarification*, available at <http://hrdata.aaas.org/ceh/reports/spanish.toc.html> [hereinafter CEH Report]. The war ended December 29, 1996, after 6 years of intense negotiations in which the United Nations played a key role, with the signing of the Agreement on a Firm and Lasting Peace, the last of 12 peace agreements negotiated between the Government of Guatemala and the Guatemalan National Revolutionary Unit (URNG). Agreement on a Firm and Lasting Peace, Dec. 29, 1996, available at <http://incore.hq.unu.edu/cds/agreements/pdf/guat2.pdf>.

503. See, e.g., David Gonzalez, *Right in Guatemala: At Risk Still*, N.Y. TIMES, Nov. 5, 2000, at 12 (reporting that robberies, assaults and death threats have set back many of Guatemala's human rights groups in the months after several filed lawsuits in Spain that charged former military for past abuses); Christopher Marquis, *American Human Rights Worker Survives Attack in Guatemala*, WASH. POST, June 15, 2001, at B1 (reporting an assault against Barbara Bocek, an Amnesty international investigator in Guatemala City).

504. MINUGUA was created pursuant to General Assembly Resolution 48/267 of September 19, 1994 with a mandate of verifying the implementation of the Comprehensive Agreement on Human Rights, signed by the Government of Guatemala and the Unidad Revolucionaria Nacional Guatemalteca (URNG) at Mexico City on March 29, 1994. *First Report on Human Rights of the United Nations Verification Mission in Guatemala* (MINUGUA), 49th Sess., Annex, Agenda Item 42, ¶ 1, U.N. Doc. A/49/856 (1995) [hereinafter *First Report of MINUGUA*]. MINUGUA was instructed by the agreement, that, in verifying Guatemala's compliance with human rights, it should receive, consider and follow up complaints of possible human rights violations; establish whether the competent national institutions carried out the necessary investigations autonomously, effectively and in accordance with Guatemalan and international human rights norms, and determine whether or not a violation had occurred. *Id.* ¶ 2. MINUGUA has been functioning in Guatemala since November 29, 1994.

abetted and created by impunity that is, unfortunately, repeating itself in Guatemala. The CEH Report concluded that although Guatemala's civil war was rooted in the repressive response by authoritarian governments to social movements seeking economic, political, social, and cultural reform, its realization can be attributed substantially to the deliberate or negligent failure of the state's judicial system to enforce the rule of law:

Due to their omissions or actions, the judicial institutions contributed to the deterioration of the social conflict at different periods in the history of Guatemala. Impunity reached the level of taking over the very structure of the State, and transformed itself not only as a mean but also as an end unto itself. As a mean, it sheltered and protected the repressive actions of the State as well as those of private actors carrying out similar goals; while at the same time, as an end unto itself, it caused the very methods applied to repress and eliminate the political and social enemies.⁵⁰⁵

Similarly, each of MINUGUA's 12 reports to the U.N. General Assembly has emphatically concluded that the greatest impediment to the enjoyment of fundamental rights in Guatemala is the lack of public security.⁵⁰⁶ This is a direct result of the persistent number of violations of the state's legal duty to prevent, investigate, and punish

505. CEH Report, *supra* note 502, ¶ 10 of Conclusion (translation by author).

506. *First Report of MINUGUA*, *supra* note 504, ¶ 93; *Second Report on Human Rights of the United Nations Verification Mission in Guatemala (MINUGUA)*, 49th Sess., Annex, Agenda Item 42, ¶ 201, U.N. Doc. A/49/929 (1995) [hereinafter *Second Report of MINUGUA*]; *Third Report on Human Rights of the United Nations Verification Mission in Guatemala (MINUGUA)*, 50th Sess., Annex, Agenda Item 45, ¶¶ 87, 185-86, U.N. Doc. A/50/482 (1995) [hereinafter *Third Report of MINUGUA*]; *Fourth Report on Human Rights of the United Nations Verification Mission in Guatemala (MINUGUA)*, 50th Sess., Annex, Agenda Item 45, ¶ 160, U.N. Doc. A/50/878 (1996) [hereinafter *Fourth Report of MINUGUA*]; *Fifth Report on Human Rights of the United Nations Verification Mission in Guatemala (MINUGUA)*, 50th Sess., Annex, Agenda Item 45, ¶ 55, U.N. Doc. A/50/790 (1996) [hereinafter *Fifth Report of MINUGUA*]; *Sixth Report on Human Rights of the United Nations Verification Mission in Guatemala (MINUGUA)*, 51st Sess., Annex, Agenda Item 40, ¶ 56, U.N. Doc. A/51/790 (1997) [hereinafter *Sixth Report of MINUGUA*]; *Seventh Report on Human Rights of the United Nations Verification Mission in Guatemala (MINUGUA)*, 52nd Sess., Provisional Agenda Item 45, ¶¶ 5, 95, U.N. Doc. A/52/330 (1997) [hereinafter *Seventh Report of MINUGUA*]; *Eighth Report on Human Rights of the United Nations Verification Mission in Guatemala (MINUGUA)*, 52nd Sess., Agenda Item 45, ¶¶ 5, 95, U.N. Doc. A/52/946 (1998) [hereinafter *Eighth Report of MINUGUA*]; *Ninth Report on Human Rights of the United Nations Verification Mission in Guatemala (MINUGUA)*, 53rd Sess., Agenda Item 44, ¶ 92, U.N. Doc. A/53/853 (1999) [hereinafter *Ninth Report of MINUGUA*]; *Tenth Report on Human Rights of the United Nations Verification Mission in Guatemala (MINUGUA)*, 54th Sess., Agenda Item 47, ¶ 53, U.N. Doc. A/54/688 (1999) [hereinafter *Tenth Report of MINUGUA*]; *Eleventh Report of MINUGUA*, *supra* note 482, ¶ 7; *Twelfth Report on Human Rights of the United Nations Verification Mission in Guatemala (MINUGUA)*, 56th Sess., Agenda Item 55, ¶¶ 4-6, 49, U.N. Doc. A/56/273 (2001) [hereinafter *Twelfth Report of MINUGUA*].

grave violations affecting the right to life, security, and physical integrity of its citizens.⁵⁰⁷

MINUGUA's monitoring of Guatemala's compliance with the Human Rights Agreement has revealed the persistence of alarmingly high numbers of continuing grave human rights violations.⁵⁰⁸ Most of the recorded human rights violations are being committed directly by police agents;⁵⁰⁹ although, members of the military are also implicated,⁵¹⁰ as are illicit private associations with ties to the state.⁵¹¹ Although a number of these human rights violations

507. See sources cited *supra* note 506.

508. For example, based on the numbers provided in the 12 separate Reports submitted by MINUGUA to the U.N. General Assembly, between November of 1994 and June 2001, MINUGUA confirmed 1,110 violations to the right to life (extrajudicial or attempted extrajudicial executions, executions in violation of due process, death threats), 3,951 violations to the right to integrity and security of the person (torture, cruel, inhuman or degrading treatment, ill-treatment, excessive use of force, other threats), and 783 violations to the right to individual liberty (arbitrary detention, detention in violation of legal guarantees, kidnaps; hostage-taking, forced disappearance, forcible recruitment). These numbers do not reflect those violations that MINUGUA has not been able to link to the state, for example, if the victim does not know who is responsible, a problem that is exacerbated by the fact that the state is not investigating the majority of crimes. For example, in the period between August and December 1995, MINUGUA received 3,000 complaints but only admitted 368, explaining that in the majority of them they were unable to attribute the violation to state action. *Fourth Report of MINUGUA*, *supra* note 506, ¶ 20.

509. *First Report of MINUGUA*, *supra* note 504, ¶ 31; *Second Report of MINUGUA*, *supra* note 506, ¶¶ 31-32; *Fourth Report of MINUGUA*, *supra* note 506, ¶ 35; *Fifth Report of MINUGUA*, *supra* note 506, ¶ 27; *Sixth Report of MINUGUA*, *supra* note 506, ¶ 130; *Seventh Report of MINUGUA*, *supra* note 506, ¶¶ 17, 26; *Eighth Report of MINUGUA*, *supra* note 506, ¶ 16; *Ninth Report of MINUGUA*, *supra* note 506, ¶ 24; *Tenth Report of MINUGUA*, *supra* note 506, ¶¶ 6, 55; *Eleventh Report of MINUGUA*, *supra* note 482, ¶¶ 17, 27; *Twelfth Report of MINUGUA*, *supra* note 506, ¶ 8.

510. *Third Report of MINUGUA*, *supra* note 506, ¶ 30; *Sixth Report of MINUGUA*, *supra* note 506, ¶ 130; *Eleventh Report of MINUGUA*, *supra* note 482, ¶ 17; *Twelfth Report of MINUGUA*, *supra* note 506, ¶ 8.

511. *Twelfth Report of MINUGUA*, *supra* note 506, ¶¶ 57-66. The collaboration between public and private individuals to carry out human rights violations has been a common practice in Guatemala since the war. The CEH Report documented that predominantly military officials but also the police collaborated with military commissioners, paramilitary groups, and private land owners to carry out clandestine activities including forced disappearances and extrajudicial executions. CEH Report, *supra* note 504, ¶ 80 of Conclusions. In fact, whereas 93% of all the violations recorded by the CEH are attributable to the state, 31% of them were carried out by private actors in collusion with the state. *Id.* ¶ 81 of Conclusions. Although after the war Guatemala has taken some steps to demobilize both the military commissioners and the VCDC's, MINUGUA still found substantial evidence that informal collaboration still exists between former military commissioners or former VCDC's who joined different illicit associations to carry similar violent acts. *Third Report of MINUGUA*, *supra* note 506, ¶ 104; *Sixth Report of MINUGUA*, *supra* note 506, ¶ 61; *Eighth Report of MINUGUA*, *supra* note 506, ¶ 82; *Tenth Report of MINUGUA*, *supra* note 506, ¶ 73; *Eleventh Report of MINUGUA*, *supra* note 482, ¶¶ 73, 84. In addition, once disbanded, these groups nonetheless have been allowed to keep their weapons, which facilitated their reorganization and continuation of their prior illicit activities. *Sixth Report of*

continue to be politically motivated,⁵¹² many are carried out for personal gain⁵¹³ and to further the "social cleansing" campaign whose aim is to rid Guatemalan society of its "undesirables" through illegal and violent means.⁵¹⁴

In addition to the persistence of human rights violations in Guatemala, it is also alarming that many Guatemalans have taken the law into their own hands in a backlash response to the free reign inefficiency, corruption, and disrespect for human rights by Guatemala's institutions of justice.⁵¹⁵ Although MINUGUA did not record what would be considered common crimes such as those with no links to the state, its reports mention the rise in private security firms⁵¹⁶ and private citizen watch groups organized to replace the urgently needed protection Guatemalans do not feel they can obtain from the state in a climate of generalized violence, often perpetrated

MINUGUA, *supra* note 506, ¶ 85. Moreover, sometimes, members of the disbanded groups have been encouraged by the state to join the army or police forces. *Id.* ¶ 80.

512. For example, many threats, harassment, and actual assaults continue to be directed at human rights organizations that are working towards social change in Guatemala, including to put an end to impunity. *First Report of MINUGUA*, *supra* note 504, ¶¶ 27-32; *Second Report of MINUGUA*, *supra* note 506, ¶ 33; *Third Report of MINUGUA*, *supra* note 506, ¶¶ 32, 131; *Fourth Report of MINUGUA*, *supra* note 506, ¶ 78; *Fifth Report of MINUGUA*, *supra* note 506, ¶ 89; *Sixth Report of MINUGUA*, *supra* note 506, ¶ 87; *Eighth Report of MINUGUA*, *supra* note 506, ¶ 90; *Ninth Report of MINUGUA*, *supra* note 506, ¶ 76; *Tenth Report of MINUGUA*, *supra* note 506, ¶ 81; *Eleventh Report of MINUGUA*, *supra* note 482, ¶ 13.

513. For example, crimes are committed to cover up prior crimes or to profit from crime, such as the kidnaping industry. *First Report of MINUGUA*, *supra* note 504, ¶ 91; *Second Report of MINUGUA*, *supra* note 506, ¶ 82; *Third Report of MINUGUA*, *supra* note 506, ¶¶ 83, 104; *Fourth Report of MINUGUA*, *supra* note 506, ¶¶ 52-54; *Fifth Report of MINUGUA*, *supra* note 506, ¶ 52; *Sixth Report of MINUGUA*, *supra* note 506, ¶¶ 61-62; *Seventh Report of MINUGUA*, *supra* note 506, ¶ 19; *Eighth Report of MINUGUA*, *supra* note 506, ¶ 27; *Tenth Report of MINUGUA*, *supra* note 506, ¶ 85; *Eleventh Report of MINUGUA*, *supra* note 482, ¶ 54.

514. The "social cleansing" campaign is an unfortunate remnant of the war during which the strategy of the state became to "criminalize" the victims; that is to make them culpable before Guatemalan society so that their deaths would be justified as the legitimate targets of repression. CEH Report, *supra* note 502, ¶ 49 of Conclusions. The "undesirables" have included the Mayans, human rights defenders, and the children of the streets. See *infra* Part V.B.2.

515. *First Report of MINUGUA*, *supra* note 504, ¶ 16; *Fifth Report of MINUGUA*, *supra* note 506, ¶ 72; *Eighth Report of MINUGUA*, *supra* note 506, ¶ 6; *Eleventh Report of MINUGUA*, *supra* note 482, ¶ 68; *Twelfth Report of MINUGUA*, *supra* note 506, ¶ 9.

516. Guatemala permits by law the creation of private security firms. Private Police Act, Congressional Degree 73-70 (Guat.). Despite the fact that these companies are regulated by law, they operate essentially without any governmental controls. *Ninth Report of MINUGUA*, *supra* note 506, ¶ 74; *Eleventh Report of MINUGUA*, *supra* note 482, ¶ 85. Moreover, the majority of these private firms choose to operate without legal authorization. *Id.* MINUGUA reports that of the over 200 such private firms that exist, only about 55 are legally authorized to operate. *Id.*

by the state itself.⁵¹⁷ Unfortunately, the “social cleansing” methods employed by these private groups are quite violent and include acts of public lynching, extrajudicial execution, and inhuman treatment.⁵¹⁸ Moreover, these groups act with the acquiescence of the state; thus, their acts go unpunished and are sometimes even encouraged by the state.⁵¹⁹ In fact, these organizations often become indistinguishable from, or join, the very groups that collude with the state to inflict human rights violations or engage in organized crime.⁵²⁰

B. Impunity's Contribution to Guatemala's Violence

MINUGUA has ascribed Guatemala's critical levels of violence, including serious human rights violations, to the reigning impunity of human rights violations and other private acts of violence, especially those associated with social cleansing.⁵²¹ Several reasons explain why this has happened. First, impunity in Guatemala has permitted those state agents who are most responsible for human rights violations to retain their power and influence, which allows them to continue committing human rights abuses.⁵²² Second, impunity in Guatemala has embodied the state's selective refusal to enforce its existing criminal laws against morally reprehensible acts. Guatemala's selective enforcement of its criminal laws has increased tolerance for the use of repressive tactics by state agents and private actors alike, particularly when directed against certain vulnerable sectors of Guatemalan society.⁵²³ Impunity in Guatemala has also contributed to victims' and the public's growing feelings of insecurity and complete distrust that the judiciary is willing and capable of

517. In October of 1995, MINUGUA reported that there were approximately 1,200 private security companies and self-defence groups, such as neighborhood watch groups in Guatemala. *Fifth Report of MINUGUA*, *supra* note 506, ¶ 11.

518. *See infra* Part V.B.2.

519. *Eighth Report of MINUGUA*, *supra* note 506, ¶¶ 81-83; *Ninth Report of MINUGUA*, *supra* note 506, ¶¶ 11, 70.

520. *Ninth Report of MINUGUA*, *supra* note 506, ¶ 68.

521. *See supra* notes 504-07 and accompanying text. However, not all crimes or alleged criminals are treated the same by the justice system in Guatemala. In the same way that Guatemalan agents engage in illicit and violent activities against “the undesirables” as part of a social cleansing campaign, so do they discriminate in the enforcement of the law against the poor, women and the indigenous population accused of crimes. *Fifth Report of MINUGUA*, *supra* note 506, ¶ 34. The mistreatment of detainees, for example, and the decisions to arrest depend on the social, economic class, or racial group of the accused, as well as whether the accused is a member of any state institution, including the police or the army. *Id.* ¶ 30. Moreover, many judges make arbitrary decisions about the use of preventive detention to favor state agents accused of crimes, while keeping those accused of petty crimes in jail without prior justification. *Id.* ¶ 35; *Sixth Report of MINUGUA*, *supra* note 506, ¶ 67 (reporting that 74.2% of population in jail have not yet been convicted of crimes).

522. *See infra* Part V.B.1.

523. *See infra* Part V.B.2.

protecting them against the widespread violence. Moreover, the state's denial of retributive justice to victims has increased their feelings of alienation, revulsion, and indignation. Whether acting out of fear or anger, many Guatemalans have begun to take justice into their own hands.⁵²⁴

1. State Corruption

In Guatemala, the primary reason why impunity remains the state's response to violent crimes is that Guatemala rarely sanctioned human rights violators in any way for past human rights abuses.⁵²⁵ In fact, many individuals who committed human rights violations during the war, or who continue to commit them today, are the very agents and officials entrusted by the state to carry out justice or, at least, agents with sufficient power and influence to obstruct justice for self-protection or the protection of others who work for them.⁵²⁶ Most illustrative is Efraín Ríos Montt, one of the most powerful Guatemalan Generals and former president during its repressive civil war years. Ríos Montt remains a highly influential public figure as the President of Guatemala's Congress, even though many human rights activists have identified him as a major perpetrator of Guatemala's horrid human rights abuses.⁵²⁷

Despite the CEH and MINUGUA findings implicating Guatemala's military and police in human rights abuses,⁵²⁸ Guatemala has also taken no significant steps to "purify" these institutions.⁵²⁹ With the exception of some changes in the military high command, including the retirement of some generals from active service,⁵³⁰ Guatemala has never investigated which military officials

524. See *infra* Part V.B.3.

525. See *supra* note 482 and accompanying text.

526. See Gonzalez, *supra* note 503; see also *Eleventh Report of MINUGUA*, *supra* note 482, ¶¶ 18, 20, 28.

527. In December of 1999, for example, Rigoberta Menchú Tum, winner of the Nobel Peace Prize, filed a criminal complaint in the Spanish courts for the crimes of genocide, state terrorism and torture against, *inter alia*, three generals and de facto Heads of State, Oscar Humberto Mejía Victores, Fernando Romero Lucas García, José Efraín Ríos Montt and Pedro García Arredondo (also currently in public office as Mayor of Nueva Santa Rosa). *Eleventh Report of MINUGUA*, *supra* note 482, ¶ 3. See also, *Amnesty International Report 2002, Guatemala*, available at <http://web.amnesty.org> (reporting that General Ríos Montt and other military officers reported continued to operate parallel power structure, obstructing efforts to bring human rights violators to justice and ensuring positions of influence for former military official with dubious human rights records).

528. See *supra* notes 509-11 and accompanying text.

529. *Eleventh Report of MINUGUA*, *supra* note 482, ¶ 106.

530. During the first six months of 1996, shortly before the final agreement for peace, Guatemala did carry out significant personnel movements in the military high command, including the retirement of some generals from active service. See *Fifth Report of MINUGUA*, *supra* note 506, ¶ 10. This happened, however, without the state

in particular should be held accountable for the atrocities committed during the war. Because the CEH Report, by its own mandate, did not include specific names of the alleged perpetrators,⁵³¹ a criminal investigation should be conducted to hold individuals accountable for crimes committed during the war.

Guatemala did institute some measures to dismantle military commissioners and the civil patrols that collaborated with the military during the war and which were ultimately responsible for one-third of all the violations.⁵³² However, these efforts have been undermined over time because those members' entities have either joined the military or police, or have simply formed new illicit organizations and even private security firms that are now committing human rights violations in collusion with, or with the acquiescence of, the state.⁵³³

Efforts to "purify" Guatemala's police forces, which, after the war, replaced the army as the institution mostly responsible for human rights violations, have been similarly deficient.⁵³⁴ For

specifically attributing any responsibility to any of these officers for the atrocities committed during the war. *Id.* The only instance when some responsibility may have attached to the voluntary or forced dismissal of military officials was when the Minister of Defense resigned following the Xamán massacre, then President Ramido de León accepted responsibility as Head of State, and dismissed the Chief of the Military Zone where the massacre occurred. *Fourth Report of MINUGUA*, *supra* note 506, ¶ 116.

531. The Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations specifically provided that "[t]he Commission shall not attribute responsibility to any individual in its work, recommendations and report nor shall these have any judicial aim or effect." Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations, *supra* note 480. Christian Tomuschat, who presided over the Commission describes that despite arguments that the ambiguity of this provision could be interpreted to allow the mention of names, the CEH chose not to do, even if that choice was controversial. Tomuschat, *supra* note 235, at 243. Human rights organizations originally felt that not naming those responsible would emasculate any result that the CEH might produce. *Id.* Still, the CEH felt that agreeing to provide names would make its truth finding task unmanageable and would lead to arbitrary results. *Id.* at 244; *see also* Andrew N. Keller, *To Name or Not To Name? The Commission for Historical Clarification in Guatemala, Its Mandate, and the Decision Not to Identify Individual Perpetrators*, 13 FLA. J. INT'L L. 289, 313 (2001) (explaining that including the names of alleged perpetrators in the CEH Report would have violated the accused's due process rights).

532. For example, in 1995, Guatemala's Congress approved a Presidential decree to demobilize approximately 25,000 military commissioners. *Third Report of MINUGUA*, *supra* note 506, ¶ 12; *Fourth Report of MINUGUA*, *supra* note 506, ¶ 56. Also, in November of 1996, Guatemala's Congress repealed Decree 19-86, which conferred legal status on counter-insurgency organizations created during the war which became known as Voluntary Civil Defense Committees (CDVC) and agreed to disarm and disband them. *Sixth Report of MINUGUA*, *supra* note 506, ¶ 9. The disarming and disbanding of these organizations, which was not monitored by MINUGUA, was to take place between July and December of 1996. *Id.* ¶ 35.

533. *See supra* note 511, 515-20 and accompanying text.

534. *Second Report of MINUGUA*, *supra* note 506, ¶ 190; *Sixth Report of MINUGUA*, *supra* note 506, ¶ 36 (reporting that between July and October of 1996,

example, MINUGUA commended the Office of Professional Accountability of the National Police for investigating cases in which police officers committed crimes.⁵³⁵ However, the work of this office has been limited because dismissals require a finding of guilt by a criminal court, which is rare due to the corruption and inefficiency of Guatemala's justice system.⁵³⁶ The Office of Professional Accountability, thus, has dismissed only a few members of the Guatemalan police forces, although many have been investigated for various crimes.⁵³⁷ Moreover, the decisions to investigate can be selective and often are not for crimes that involve "social cleansing" campaigns.⁵³⁸

MINUGUA has concluded that some reasons for Guatemala's level of impunity relate to the overall institutional weaknesses of Guatemala's justice system,⁵³⁹ most of which have been the primary focus of Guatemala's reforms.⁵⁴⁰ Most blame for impunity, however,

134 police officers were brought before the disciplinary court for various illicit acts, including homicide, illegal house searches, physical injury, extortion, threats, robbery and bribery).

535. *Second Report of MINUGUA, supra* note 506, ¶ 190.

536. *Eleventh Report of MINUGUA, supra* note 482, ¶ 66.

537. *Fourth Report of MINUGUA, supra* note 506, ¶ 70 (reporting that even though nearly "530 officers were sent to court for various crimes, including 28 for homicide or murder and 55 for robbery, it has not been possible to procure their final dismissal due to the lack of response from the Labour and Security Tribunal").

538. *Second Report of MINUGUA, supra* note 506, ¶ 88.

539. *Third Report of MINUGUA, supra* note 506, ¶ 95. Institutional weaknesses include, for example, the poor level of funding to the National Police which has left many communities completely unprotected. *Second Report of MINUGUA, supra* note 506, ¶ 88. In addition, police officers and public prosecutors are inadequately trained in the carrying out of effective criminal investigations. *Third Report of MINUGUA, supra* note 506, ¶ 90; *Fifth Report of MINUGUA, supra* note 506, ¶ 76. Moreover, the lack of coordination among the institutions responsible for carrying out justice—the police, the prosecutors and the judges—contributes to the overall inefficiency of the system. *Fourth Report of MINUGUA, supra* note 506, ¶ 58; *Fifth Report of MINUGUA, supra* note 506, ¶ 48; *Ninth Report of MINUGUA, supra* note 506, ¶ 33; *Twelfth Report of MINUGUA, supra* note 506, ¶ 5. Mishandling of cases by the courts (i.e., excessive delays, inability to protect witnesses and judges, failure of issuing arrest warrants in time) is also, in part, attributable to poor funding, lack of training and excessively onerous legal procedures. *Sixth Report of MINUGUA, supra* note 506, ¶¶ 68, 77, 138-43; *Eighth Report of MINUGUA, supra* note 506, ¶ 71; *Ninth Report of MINUGUA, supra* note 506, ¶ 60; *Tenth Report of MINUGUA, supra* note 506, ¶ 57. Finally, the inefficient system of incarceration and shortage of guards has contributed to prison escapes. *Sixth Report of MINUGUA, supra* note 506, ¶ 76.

540. Institutional changes have included, for example, the receipt of technical and other monetary assistance from international organizations by the prosecutors office and judges, *Second Report of MINUGUA, supra* note 506, ¶¶ 147, 157, 164, *Sixth Report of MINUGUA, supra* note 506, ¶ 97, a commitment to restructure the public prosecutor's office to make the work for efficient, as well as to monitor the work of prosecutors, *Seventh Report of MINUGUA, supra* note 506, ¶ 54, *Eighth Report of MINUGUA, supra* note 506, ¶ 61, increased inter-institutional meetings to improve coordination in the handling of criminal matters, *Sixth Report of MINUGUA, supra* note 506, ¶ 30. Over the years, MINUGUA did report some institutional improvements

should be assigned to the unwillingness of many officials to prosecute human rights cases and to the deliberate and orchestrated steps taken by the police and the military, and sometimes also by public prosecutors and judges, to protect their own agents or the private actors who act in collusion with the state—or with its acquiescence—from all forms of punishment.⁵⁴¹

Some of the steps to prevent the prosecution of human rights violations are willful state agents' omissions to carry out their functions. For example, the police and the military will often refuse to cooperate with public prosecutors in the completion of investigations, particularly those involving their own agents.⁵⁴² Police officers also do not carry out arrest warrants or they fail to collect crucial evidence at the crime scene.⁵⁴³ Similarly, public prosecutors fail to perform their functions by not investigating diligently or by changing the classification of crimes to less serious ones.⁵⁴⁴

The obstruction can involve deliberate acts of corruption or violence. For example, prosecutors, judges, human rights activists, and witnesses are intimidated through death threats and attempted or actual assaults to obstruct investigations.⁵⁴⁵ Noble and honest

including better inter-agency coordination, *Fourth Report of MINUGUA*, *supra* note 506, ¶ 56, better performance on the part of some prosecutors, as well a progress toward a more rational administration of the agency, *Sixth Report of MINUGUA*, *supra* note 506, ¶¶ 22, 97, better selection process and training of judges, both resulting in the overall improvement in the caliber of judges, *Sixth Report of MINUGUA*, *supra* note 506, ¶ 28, *Seventh Report of MINUGUA*, *supra* note 506, ¶¶ 46-54, *Tenth Report of MINUGUA*, *supra* note 506, ¶ 43, and the expansion of the territorial coverage of the judiciary by adding over 102 new courts, *Ninth Report of MINUGUA*, *supra* note 506, ¶ 7.

541. *Ninth Report of MINUGUA*, *supra* note 506, ¶ 65.

542. *First Report of MINUGUA*, *supra* note 504, ¶ 90; *Third Report of MINUGUA*, *supra* note 506, ¶ 91; *Fourth Report of MINUGUA*, *supra* note 506, ¶¶ 62-63; *Sixth Report of MINUGUA*, *supra* note 506, ¶ 82; *Seventh Report of MINUGUA*, *supra* note 506, ¶ 60; *Eighth Report of MINUGUA*, *supra* note 506, ¶ 65; *Ninth Report of MINUGUA*, *supra* note 506, ¶ 62; *Tenth Report of MINUGUA*, *supra* note 506, ¶¶ 50, 55.

543. *Third Report of MINUGUA*, *supra* note 506, ¶ 54; *Fifth Report of MINUGUA*, *supra* note 506, ¶ 24; *Tenth Report of MINUGUA*, *supra* note 506, ¶ 50.

544. *Seventh Report of MINUGUA*, *supra* note 506, ¶ 34; *Ninth Report of MINUGUA*, *supra* note 506, ¶ 65; *Tenth Report of MINUGUA*, *supra* note 506, ¶ 50.

545. *First Report of MINUGUA*, *supra* note 504, ¶ 91; *Second Report of MINUGUA*, *supra* note 506, ¶ 82; *Third Report of MINUGUA*, *supra* note 506, ¶ 83; *Fourth Report of MINUGUA*, *supra* note 506, ¶¶ 52, 54, 59; *Fifth Report of MINUGUA*, *supra* note 506, ¶¶ 50-52; *Seventh Report of MINUGUA*, *supra* note 506, ¶ 19; *Eighth Report of MINUGUA*, *supra* note 506, ¶¶ 27, 66, 90; *Ninth Report of MINUGUA*, *supra* note 506, ¶ 76; *Eleventh Report of MINUGUA*, *supra* note 482, ¶ 88; *Twelfth Report of MINUGUA*, *supra* note 506, ¶¶ 41-42. In fact, eventually, even MINUGUA's work to monitor Guatemala's compliance with human rights record began to be hindered by death threats and other intimidating conduct, including a bomb. *Fifth Report of MINUGUA*, *supra* note 506, ¶ 16. Many of the death threats are carried out by the

criminal judges, who advance important cases, are suddenly transferred from those cases.⁵⁴⁶ Important evidence, often in cases involving state agents, is altered or destroyed by the police or the army.⁵⁴⁷ At other times, state agents will simply lie to cover up for each other.⁵⁴⁸ Corrupt judges or judges who experience external pressure also contribute to impunity by releasing defendants on bail and allowing them to escape, dismissing the charges altogether, or rendering a judgment of acquittal when the evidence strongly points to culpability.⁵⁴⁹ Failing that, criminals who were convicted, ultimately are allowed, with the state's help, to escape from prison.⁵⁵⁰ All of these factors have increased the number of victim complaints to MINUGUA regarding the denial of access to justice, obstruction of the work of the institutions responsible for carrying out justice, and the general failure of the state to investigate human rights violations.⁵⁵¹

Given that much of the blame of Guatemala's record of impunity resides in the corrupt practices of the institutions charged with administering justice, one strong argument in favor of victim

illicit organized groups that maintain connections with the state to protect themselves or other agents accused of crimes. *Id.* ¶ 55.

546. *Second Report of MINUGUA*, *supra* note 506, ¶ 94.

547. *Third Report of MINUGUA*, *supra* note 506, ¶ 29; *Tenth Report of MINUGUA*, *supra* note 506, ¶ 67; *Twelfth Report of MINUGUA*, *supra* note 506, ¶ 48.

548. *Third Report of MINUGUA*, *supra* note 506, ¶ 39; *Eleventh Report of MINUGUA*, *supra* note 482, ¶ 20.

549. *Third Report of MINUGUA*, *supra* note 506, ¶ 94; *Fourth Report of MINUGUA*, *supra* note 506, ¶ 60; *Fifth Report of MINUGUA*, *supra* note 506, ¶ 33; *Sixth Report of MINUGUA*, *supra* note 506, ¶ 67; *Tenth Report of MINUGUA*, *supra* note 506, ¶¶ 50, 57.

550. *Third Report of MINUGUA*, *supra* note 506, ¶ 54; *Eleventh Report of MINUGUA*, *supra* note 482, ¶ 11; *Twelfth Report of MINUGUA*, *supra* note 506, ¶ 52. See also, Mike Lancin, *Guatemalan Troops Hunt Escape Inmates*, BBC NEWS, June 19, 2001, available at <http://news.bbc.co.uk> (reporting that the directors of Guatemala's maximum security prison were arrested amid accusations of complicity after 78 prisoners escaped in the biggest jail break in the country's history).

551. Every year, the overwhelming majority of violations of due process rights have involved denial of justice to victims. From November 1994 to December of 1995, 196 of the 241 complaints involving due process violations were about denial of access to justice. *Fourth Report of MINUGUA*, *supra* note 506, tbl. 1. During 1996, the numbers of such complaints increased to approximately 1,200. *Fifth Report of MINUGUA*, *supra* note 506, ¶ 38; *Sixth Report of MINUGUA*, *supra* note 506, tbl. 1. The number decreased during January of 1997 to March of 1998 to 134 complaints since it was also the time that the number of human rights violations decreased generally due to the signing of the peace agreements. *Seventh Report of MINUGUA*, *supra* note 506, tbl. 1; *Eighth Report of MINUGUA*, *supra* note 506, tbl. 1. Unfortunately, the latest numbers MINUGUA reported to the General Assembly show a significant increase in the number of confirmed complaints involving obstruction of the work of the justice system (545) and failure to comply with the legal duty to investigate and punish (2,018). *Twelfth Report of MINUGUA*, *supra* note 506, App. 1, *Statistics on Human Rights Violations During the Period from 1 July 2000 to 30 June 2001*.

participation in the criminal process is that it could improve Guatemala's administration of criminal justice by increasing the public scrutiny of these institutions. It is perhaps unrealistic to expect Guatemala's current system of justice administration to function without corruption because many current state officials and agents who participate in those institutions cannot be trusted to place victim's interests in truth and justice ahead of their own interests in self-preservation. The additional public scrutiny that victims could bring to the criminal investigation and trial could decrease the likelihood that the state will willfully or through omission taint the process in favor of the accused. Moreover, victim participation could also potentially increase the quality of the way the investigation and trial is conducted by safeguarding against incompetence and deficiencies on the part of the public prosecutor or judges.⁵⁵²

2. Toleration for Human Rights Violations

Guatemala has tolerated, and continues to tolerate, the breaking of laws by state agents and private individuals who kill, torture, and otherwise mistreat individuals whom the state perceives to threaten the social fabric and stability of Guatemalan society. Unfortunately, impunity for these types of crimes has also resulted in increasing the criminal's and the public's perception that these acts are tolerated or even encouraged for the betterment of Guatemalan society.

Much of the civil war was a genocide directed at eliminating the Mayan population.⁵⁵³ This policy not only fed on Guatemala's racist feelings of superiority,⁵⁵⁴ but also was a concerted, manipulative effort by the state to portray the Mayans as the collective enemy of

552. René Antonio Mayorga, for example, attributed the quality and success of Bolivia's prosecution of García-Meza to the participation of civil parties in the process. Mayorga explains, for example, that civil parties presented nearly 2,000 pieces of documentary evidence. Also, according to Mayorga, in contrast to the Attorney General's weak closing arguments, the civil party's summation constituted the most complete, convincing, and forceful testimony ever provided about Bolivian accountability. Ultimately, the legal and political argumentation that the courts used to justify its verdict of 30 years against García-Mendoza for the crimes of sedition, armed uprising, genocide, anti-constitutional decrees, and economic damage against the state, were not essentially different from those expressed in the civil party's summation. Mayorga, *supra* note 363, at 80-81.

553. Of the 42,275 victims registered by the CEH, 83% were Mayan. CEH Report, *supra* note 502, ¶ 1 of Conclusions.

554. The deeply ingrained racism of Guatemalans against the Mayans contributed to violence turning into a genocide, an ethnic cleansing campaign to "whiten" or assimilate Guatemalan society. *See id.* ¶¶ 31-33 of Conclusions; *see also* Tomuschat, *supra* note 235, at 257 (observing that far into the twentieth century, the ruling elites in Guatemala saw themselves as constituting a Hispanic nation within which the indigenous population had no true right of abode).

the state and of white or Ladino⁵⁵⁵ Guatemalans. The state deliberately exaggerated the affinity between the guerilla forces and the Mayan communities in general to justify the massacres, forced disappearances, and other methods for eliminating entire communities.⁵⁵⁶ Moreover, the war techniques used against the Mayans were meant to destroy both the social bases of support for the guerilla movement and all the Mayan cultural values that were the basis for their identity, cohesiveness, and collective action.⁵⁵⁷ Guatemala also employed similar methods of vilifying human rights victims and their representatives, whose activism converted them into enemies of the state and legitimate war targets.⁵⁵⁸

Even worse is that the state achieved this mass indoctrination by co-opting, requesting, or forcing large sectors of Guatemala's institutions or private citizens into carrying out many of the state's repressive tactics.⁵⁵⁹ One well-planned strategy of the Guatemalan army was to militarize much of the state and society and to convert them into active participants in the war.⁵⁶⁰ In addition to the forced recruitment of young people into the military, for example, the state purposefully created and legalized paramilitary structures, whose members were sometimes encouraged or forced by the military to torture, kill, and rape members of communities perceived to pose a threat to society.⁵⁶¹ Moreover, the National Police became militarized, acting under the orders of the army, to carry out many grave human rights violations recorded during the war.⁵⁶² Even Guatemala's justice institutions became co-conspirators through their

555. Ladino means of mixed indigenous and white blood. Many assimilated indigenous people in Guatemala also consider themselves Ladino.

556. CEH Report, *supra* note 502, ¶ 32 of Conclusions.

557. For example, by converting all Mayans into legitimate war targets, they were forced to hide their ethnic identity and assimilate into mainstream culture. *Id.* ¶ 62 of Conclusions. Violence was also directed at belittling important Mayan rituals or symbols like the murdering of their old, the lack of burials for their dead due to clandestine mass graves and forced disappearances, and the destruction of their corn fields. *Id.* Moreover, ultimately the traditional Mayan authorities were replaced by military commissioners, leaders of the Voluntary Civil Patrol Units or the military itself, which had the effect of rupturing community structures, destroying the oral tradition and the passing down of culture and history, and, ultimately, the strength and pride of their values and culture. *Id.*

558. *Id.* ¶ 49 of Conclusions.

559. *See id.*

560. *Id.* ¶ 36 of Conclusions. The CEH explains that the militarization of the state took on various characteristics throughout the years. *Id.* It first began in 1960 when the military took control of the Executive Branch. Ultimately, the military was able to infiltrate entire sectors of public life during the 1980s until its control was powerful yet its presence, so well ingrained, was almost invisible. *Id.*

561. The CEH reports that it documented hundreds of cases in which individuals were forced to join paramilitary groups and made to commit crimes. *Id.* ¶ 50 of Conclusions. Particularly troubling is that many of the participants in these organizations were Mayan young males. *Id.*

562. *Id.* ¶ 43 of Conclusions.

toleration and encouragement of these acts by refusing to enforce and sometimes even by obstructing the rule of law.⁵⁶³

The current situation of violence in Guatemala substantially follows a similar pattern of "social cleansing."⁵⁶⁴ Although responsibility for the violations committed has shifted away from the armed forces, many of the same players remain. For example, the National Police and many private groups include numerous members of paramilitary groups who participated in the war.⁵⁶⁵ As with past human rights violations, the overwhelming majority of these current acts go unpunished because those responsible for the administration of justice in Guatemala persistently fail to prosecute.⁵⁶⁶ On this situation, MINUGUA trenchantly observed:

In the course of its verification support work supporting institution-building, the Mission has noted the convergence of various values, attitudes and expressions of violence in Guatemalan society which permeate broad areas of national life and have, overtime, created a culture of violence and intimidation. The reform of State institutions must be matched by a transformation of this culture of violence.⁵⁶⁷

If Guatemala is to transform the climate that allows many Guatemalans to accept violence, the state must reverse the leniency with which its institutions of justice have responded and continue responding to these crimes. To do this, Guatemala must redraw, and then reinforce, the moral boundaries of what is acceptable behavior in society by punishing those who commit such acts. Punishment must serve its expressive functions by sending a message to the wrongdoers and to each Guatemalan citizen that it is terribly wrong to torture, maim, rape, or murder any person, even if the wrongdoer

563. See *supra* Part V.B.1.

564. After the war, the victims are not necessarily labeled insurgents (unless they are human rights activists who are also the targets of social cleansing), but they are often the poor, the children of the streets and the homeless who may or may not have committed a crime. The victims of social cleansing will often be extrajudicially executed following a similar modus operandi of a shot to the head with the body being left in areas known as "body dumps." *Second Report of MINUGUA, supra* note 506, ¶ 32; *Fifth Report of MINUGUA, supra* note 506, ¶ 73. At other times, the victim will be arbitrarily arrested and subjected to mistreatment or torture. *Fifth Report of MINUGUA, supra* note 506, ¶¶ 27, 29-30; *Eighth Report of MINUGUA, supra* note 506, ¶ 28; *Ninth Report of MINUGUA, supra* note 506, ¶ 18. See also *First Report of MINUGUA, supra* note 504, ¶ 98; *Eighth Report of MINUGUA, supra* note 506, ¶ 20; *Tenth Report of MINUGUA, supra* note 506, ¶ 73 (discussing Guatemala's social-cleansing operations in general).

565. See *supra* notes 515-20.

566. See *infra* Part V.B.1.

567. *Sixth Report of MINUGUA, supra* note 506, ¶ 133. MINUGUA repeated this observation more recently in its latest submission to the General Assembly when it observed that "the State's inability to safeguard human rights [. . .] has made the public feel defenceless and has increased tolerance for illegal, increasingly violent phenomena such as lynchings and 'social cleansing.'" *Twelfth Report of MINUGUA, supra* note 506, ¶ 79.

believes the person to be either an enemy of the state or a criminal. Unfortunately, due to the corruption and ineptitude of Guatemala's institutions of justice, Guatemala's system of justice will probably not do this on its own without substantial reform. Worse yet, Guatemala's institutions of justice and society at large may not share victims' commitment to express the condemnatory message. In societies like Guatemala, unfortunately, victims are often unconnected in space, ethnicity, religion, culture, and class from those who control the institutions.⁵⁶⁸ Moreover, identification with victims in Guatemala is further weakened insofar as the perpetrators succeeded in portraying victims as the enemy of the state and the public as involved in left-wing or terrorist efforts or in violent common crime.⁵⁶⁹ Unfortunately, the more readily society accepts the justification for the atrocities, the more society will identify with the perpetrators, making prosecutions even less likely.⁵⁷⁰ Recognizing some type of victim oversight and participation in criminal trials, however, can permit victims to aid the state in expressing the condemnatory message when some of its institutions or their parts are unable or unwilling to prosecute.

3. Vigilante Justice

The systematic repressive tactics employed by the state against its own citizenry, combined with the lack of punishment for such crimes, has also contributed substantially to the demise of Guatemalans' faith in institutionalized justice. This has left deep scars in the Guatemalan psyche, which is reflected in citizens' fear, silence, and apathy about social and political participation.⁵⁷¹ Many simply do not trust the state to punish common criminals, much less their own agents who violate individual rights. Many are angry because the state has done little to accord them justice. For this reason, some Guatemalans have begun taking the law into their own hands.⁵⁷²

568. See NINO, *supra* note 7, at 123.

569. See *id.*

570. *Id.* at 124.

571. See CEH Report, *supra* note 502, ¶ 49 of Conclusions.

572. Between March 1996 and March 1998, for example, MINUGUA recorded the occurrence of 120 lynchings that resulted in 100 persons murdered and 100 injured. *Eighth Report of MINUGUA*, *supra* note 506, ¶ 22. Also, between April and December of 1998, MINUGUA recorded another 47 lynchings in 9 different Departments in Guatemala, resulting in 38 people murdered and an unknown number of injured. *Ninth Report of MINUGUA*, *supra* note 506, ¶ 10-11. During the first six months of the year 2000, MINUGUA recorded another 22 lynchings or attempted lynchings which resulted in 5 people dead and 30 others injured. *Eleventh Report of MINUGUA*, *supra* note 482, ¶ 68. In the latest submission to the General Assembly covering June 2000 through July 2001, MINUGUA recorded that 2,000 men beat and burned to death 8 other victims. *Twelfth Report of MINUGUA*, *supra* note 506, ¶ 9. Altogether, since

Guatemala's alarming rise of private watch groups and the use of public lynching and other forms of vigilante justice strongly support the argument that criminal punishment is justified—even required—as a way of taming or channeling the anger and frustration felt by victims and others,⁵⁷³ and as a way of legitimating the state's willingness and ability to combat crime.⁵⁷⁴ Guatemala must recognize that enforcement of the state's criminal laws and according perpetrators their deserts could prevent victims from taking untamed revenge into their own hands. Moreover, Guatemala must recognize that victims will not be deterred from popular justice until faith in Guatemala's administration of justice is restored. The recognition by the state of victims' rights in the criminal process, particularly victims' increased ability to hold the state accountable for its failures, may help restore Guatemalans' faith in institutionalized justice and move them away from vigilantism.

In summary, impunity has hindered Guatemala's transition away from violence by condoning state corruption, tolerating gross human rights violations—specifically against “the undesirables”—and ignoring the public's anger and frustration over unpunished violence.⁵⁷⁵ Guatemala should fulfill its promise to prosecute; although, to do so its institutions of justice will require significant reform. Victim participation in the criminal process could be part of the reforms. Even though victim participation in the criminal process will not solve, and should not be viewed as a solution to, state corruption, it could be very beneficial in some cases. In these instances, fair outcomes could help to consolidate the rule of law in Guatemala by negating the impression that some groups or crimes are above the law and by restoring the public's faith in Guatemala's commitment to justice.

VI. CONCLUSION

Emerging international norms have addressed the concerns related to impunity's effect on victims rights and have codified principles to improve states' treatment of victims in the criminal

December of 1996 to the present, MINUGUA reports a total of 355 cases of lynchings. See also José Elías, *2000 Campesinos Linchan y Queman Vivos en Guatemala a 8 Salteadores de Caminos*, EL PAÍS, July 18, 2001. The rise in vigilante justice is by no means unique to Guatemala. Recently, the Washington Post reported a rise in private lynchings in rural Mexico, where villagers do not trust the Mexican government to bring them justice. See Kevin Sullivan, *Village's Rage Rattles an Army: Unlikely Protest Forces Military to Answer for Boy's Death*, WASH. POST, June 21, 2001, at A1; Mary Jordan, *supra* note 465.

573. See *infra* Part IV.C.2.

574. See *infra* Part IV.B.

575. See *infra* Part V.D.2.

process. These norms have declared that states owe victims prosecutions as a remedy for gross human rights violations, and, furthermore, that states should grant victims certain participatory rights in the criminal process, primarily to infuse public accountability into the administration of justice. This Article argued why these victim-focused prosecution norms, in societies in transition from authoritarian state-sponsored mass atrocities, comport and provide the more effective means of promoting respect for human rights, even if only exemplary prosecutions are possible. This Article also offered reasons why states plagued with impunity should consider, as part of other justice reforms, adopting criminal procedures that grant victims greater standing to participate in the criminal process.

This Article, however, should not be read as a blanket endorsement for every proposed reform to increase victim participation in the criminal process in every social context undergoing democratic transition. In fact, victim participation in prosecutions in some contexts could further compromise a country's democratic transition. Some worry, for example, that increased victim participation may further encourage the state to fail in its duty to prosecute and contribute little to strengthening the institutions of justice.⁵⁷⁶ Also, surviving human rights victims may be unwilling to compromise in their demands for prosecuting past human rights violators in a way that risks frustrating the state's legitimate reasons for being more selective about whom to prosecute.⁵⁷⁷ Unrestricted victim discretion about what prosecutions to pursue, therefore, could result in overwhelming criminal justice systems which are ill-prepared to process the cases without committing due process abuses. Some have argued, for instance, that Rwanda's recent decision to

576. I thank Margaret Popkin, Executive Director of the Due Process Law Foundation, for cautioning me against arguing too strongly for the privatization of justice, insofar as it may encourage the state to fail even more in its duty to prosecute. She explained that a common complaint in Guatemala and El Salvador is that the prosecutor's office makes no effort to investigate, leaving the victims the onerous task of uncovering the evidence. I am not sure, however, that prosecutors would undertake their duty to prosecute more seriously were victim participation not permitted by law. Prosecutor's motivations for not carrying out their duty may not be related to the perception that victims will perform the task. This issue, however, merits further study.

577. Carlos Nino, for example, has criticized the human rights groups in Argentina, which he characterized as being intransigently retributive. According to Nino, human rights groups demanded that President Alfonsín punish every person responsible for the abuses, regardless of their degree of involvement. NINO, *supra* note 7, at 115-16. In Nino's assessment, the unbending position of Argentine human rights groups debilitated President Alfonsín's basic strategy to accommodate pragmatic impediments to full retribution, while at the same time responding to victims' concerns for truth and justice. Nino writes, "The demands of the military and the human rights groups, instead of counteracting each other, worked somewhat synergistically to debilitate the government strategy." *Id.* at 116.

employ community justice centers to try alleged participants of the genocide may ultimately result in further undermining respect for the rule of law and for the institutions of justice by disregarding the fundamental rights of defendants.⁵⁷⁸

This Article also does not suggest that increased victim participation, without other needed reforms,⁵⁷⁹ will substantially improve the administration of justice in countries like Guatemala or in other legal systems in transition from authoritarian, state-sponsored mass atrocities. In fact, in proposing greater victim participation in such contexts, and despite the compelling reasons that justify it, there are some immediate pragmatic concerns raised by such victim participation that merit careful consideration.

Victim participation is costly and beyond the means of most victims, unless an organization takes up their cause. This also means, unfortunately, that unless public funding becomes available, which is already quite limited, only those victims with sufficient resources will be able to participate in the process. Also, in societies like Guatemala, where human rights victims are already accorded many opportunities to participate in the criminal process, their participation has been risky.⁵⁸⁰

None of these considerations, however, should be fatal to any proposal for increased victim participation in the criminal process. Rather, these factors should be taken into account when evaluating the scope and mechanisms that should be in place for best guaranteeing the effectiveness of victim participation. For example, whenever pragmatic considerations force states to be selective about what prosecutions to pursue, states could restrict surviving human rights victims discretion to pursue prosecutions by establishing guidelines that comport with international norms.⁵⁸¹ Also,

578. Daly, *supra* note 13.

579. For example, after tracing the long historical roots of impunity in El Salvador and the many futile attempts to reform that country's administration of justice, Margaret Popkin cautions that significant reform must be able to change entrenched attitudes and practices, which is far more difficult than outside actors (i.e., the international community) tend to appreciate. See POPKIN, *supra* note 8, at 259-61. She suggests, for example, involving different actors in the justice and political sectors, educating the public about the importance of justice, training and retraining those responsible for administering justice, constant follow-up and oversight, and long-term international involvement. *Id.* at 263.

580. I thank Professors Lynne Henderson and Chris Blakesley for reminding me to consider this crucial point in this Article.

581. In Argentina, for example, President Alfonsín identified three categories of people who participated in the atrocities: Those who planned the repression and gave the accompanying orders; those who acted beyond the scope of order, motivated by cruelty, perversity, or greed; and those who strictly followed orders. President Alfonsín declared the third group would not be prosecuted. Congress agreed and enacted the Due Obedience Law. NINO, *supra* note 7, at 63. Despite some criticism about the vagueness of the distinctions, many have praised the reasonableness of these distinctions. See, e.g., Mendez, *supra* note 358, at 17-18. Argentina also later

international donors could fund projects to provide legal services to victims wishing to participate in the criminal process or establish mechanisms to ensure the safety of victims and witnesses who choose to participate. This type of funding could be deposited, for example, with institutions like human rights ombudsman's offices or directly with non-governmental groups conducting this type of representation.

restricted prosecutions by placing a time limit on when these could be filed. Similarly, in Greece, where privately initiated prosecutions following the 1967 coup resulted in a total of 55 active and retired military officers being brought to trial, the government ultimately intervened to limit private lawsuits by placing a time limit on the filing of lawsuits. Nicos C. Alvizatos & P. Nikiforos Diamondouros, *Politics and the Judiciary in the Greek Transition to Democracy*, in *TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES*, *supra* note 358, at 36-37.

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