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The Rule of Law in Conflict Management

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The changed nature of war at the beginning of the twenty-first century requires a fresh perspective on the methods of managing conflict on the one hand and of making and maintaining peace on the other. Today, the overwhelming majority of wars around the world are intranational rather than international. Wars fought between the military forces of two sovereign countries are increasingly the exception to the norm. In their stead, ethnic and religious conflicts, disputes over self-determination or secession, and violent power struggles between opposing domestic political factions account for 93 percent of the major armed conflicts recorded in recent years worldwide. In 2004, in fact, all nineteen major armed conflicts were intrastate.[1] This statistic has profound ramifications for the processes of conflict prevention, conflict resolution, and postconflict peacebuilding. Tools and techniques that may be appropriate for resolving "classical" wars between state actors are often inadequate for achieving a meaningful accommodation and reconciliation between domestic adversaries, who together must build a durable national union. One element that assumes far greater importance in this changed context of war is the development of the rule of law.

It is essential at the outset to distinguish between the rule of law and simply rule *by* law. Broad concepts like democracy and the rule of law can easily be distorted. Even totalitarian regimes frequently use law as a tool in their arsenal of mechanisms for social control. The Nazis clothed much of their atrocities with a veneer of legality. The Soviet constitution of 1936 reads like a litany of legal entitlements, yet it served Stalin well with its wide loopholes for contortion.[2] Repressive states from Romania to Zimbabwe have invoked the law even while attacking their own citizens. These are each examples of rule *by* law, in which courts, statutes, and regulations are manipulated in the service of tyranny. In contrast, the rule of law does not simply provide yet one more vehicle by which government can wield and abuse its awesome power; to the contrary,

it establishes principles that constrain the power of government, oblige it to conduct itself according to a series of prescribed and publicly known rules, and, in the postconflict setting, enable wary former adversaries to all play a vital role in keeping the new order honest and trustworthy.

Adherence to the rule of law entails far more than the mechanical application of static legal technicalities; it involves an evolutionary search for those institutions and processes that will best facilitate authentic stability through justice. Beyond its focus on limited government, the rule of law protects the rights of all members of society. It establishes rules and procedures that constrain the power of all parties, hold all parties accountable for their actions, and prohibit the accumulation of autocratic or oligarchic power. It also provides a variety of means for the nonviolent resolution of disputes, whether between private individuals, between groups, or between these actors and the government. In this way it is integrally related to the attempt to secure a stable peace. At a historic meeting in Copenhagen in 1990, the thirty-five nations then composing the Conference on Security and Cooperation in Europe (CSCE) affirmed this linkage, declaring that "societies based on . . . the rule of law are prerequisites for . . . the lasting order of peace, security, justice, and cooperation."[3]

The shift from international to intranational conflict engages the rule of law in two significant ways. First, international law is tracking and adapting to these new circumstances through evolutionary changes in the rules of warfare. Many of the normative standards that had previously governed only wars between states, proscribing a variety of wartime abuses as violations of international law, are increasingly applicable to intrastate conflicts as well.[4] Sixty years ago, when the world held individuals to account for war crimes and crimes against humanity at Nuremberg, those crimes were generally understood in international law as engendering liability only when perpetrated in the context of battles between states. By November 1994, when the United Nations Security Council established an international criminal tribunal to prosecute the genocide in Rwanda, that understanding had changed. As approved by the Security Council, the charter of the Rwanda tribunal severed any nexus requirement between the international prosecution and punishment of crimes against humanity, on the one hand, and the international or noninternational character of the conflict in which they were committed, on the other, applying these international prohibitions to purely domestic conflict.[5] The statute of the recently established International Criminal Court similarly incorporates this approach, defining genocide, crimes against humanity, and a range of war crimes as international offenses over which the court will have jurisdiction even when committed in conflicts of a noninternational character.[6]

A second example of the evolution in international law is the expanded acceptance of the principle of universal jurisdiction over these crimes, resulting in some countries asserting the jurisdiction of their national courts to prosecute genocide, war crimes, or crimes against humanity even when committed in an internal armed conflict in a second country. In the past decade, more than a dozen countries have undertaken investigation or prosecution of foreign nationals for such crimes allegedly committed in their home countries.

The shift from international to internal conflict also introduces a new problem in enforcing the law vis-à-vis those who may commit these grave crimes. As required by the Geneva Conventions (to which almost every country is a party), regular military forces in many countries receive basic instruction in the international rules that govern their conduct and their treatment of combatants and citizens even during times of war. In contrast, irregular forces and insurgent groups engaged in civil wars, to whom these international rules of conduct now apply, do not generally receive

any training in the laws of war. What are often ragtag, young illiterate militia members in many countries need to be exposed to the norms by which they will now be held accountable. Exacerbating the problem, the governments against which they are fighting are often reluctant to have such insurgent groups sign an agreement to adhere to the Geneva Conventions or receive such training, lest such steps be perceived as legitimizing the rebels. A challenge in the coming years is the need to more effectively disseminate and enforce these rules vis-à-vis such nonstate actors.

Yet another sense in which law is pertinent to the changed nature of war—and the principal focus of the present essay—is the central role played by the rule of law in establishing stability and a durable peace following an intranational conflict. It is completely plausible—and often the case—that a classical war between two independent states can be resolved and a durable peace developed without any modification to the internal rules, structures, or institutions of either party to the conflict. The 1980–88 war between Iran and Iraq could end and leave tyrannies firmly in place on both sides. The border conflict between Peru and Ecuador and the Ethiopia-Eritrea war demonstrate the same proposition. In none of these six combatant countries did conclusion of the conflict necessitate any significant degree of internal reorganization. On the other hand, resolving violent conflicts between groups within a state and preventing their recurrence require the nurturing of societal structures and institutions to assure each combatant group that its interests will be protected through nonviolent means. This is rarely, if ever, possible without attention to the establishment of the rule of law. As stated by then UN secretary-general Boutros Boutros-Ghali in his description of peacebuilding, "Peacemaking and peacekeeping operations, to be truly successful, must come to include comprehensive efforts to identify and support structures which will tend to consolidate peace and advance a sense of confidence and well-being among people. . . . There is an obvious connection between . . . the rule of law and . . . the achievement of true peace and security in any new and stable political order."[7]

EMERGING INTERNATIONAL STANDARDS AND INTERNATIONAL ASSISTANCE

In recent years, international standards have evolved to define the meaning of the rule of law with ever-greater detail, providing an increasingly nuanced road map for those engaged in peacebuilding efforts. This articulation of explicit standards results primarily from the convergence of trends in two areas—democracy and human rights—each of which is closely related to, but distinct from, the rule of law.

During the latter half of the twentieth century, one school of thought focused on democratic systems as the best guarantor not only of freedom, but also of peace. (This school was largely, but not exclusively, the domain of Western political conservatives who advocated democracy in a Cold War context.) Extensive research demonstrated what was to some an obvious postulate: democracies are less likely to go to war with one another than are totalitarian or authoritarian regimes.[8] But promoting democracy as a paradigm for the organization of society invites further inquiry. How does one create and ensure a democratic polity? Answering this question requires a shift from democracy as a macro concept to an examination of those specific institutional structures and mechanisms that are essential to democracy and that distinguish it from a nondemocratic system. The result is a recognition and articulation of the basic elements of the rule of law, which is the ultimate guarantor of democracy.

The human rights stimulus followed an opposite path of analysis, moving from the specific to the general. Prompted in part by the

atrocities of World War II, international law, as defined by the United Nations and various regional organizations, provided guarantees for an ever-widening catalog of human rights. Over time, however, the international human rights movement (dominated to some degree by more liberal perspectives) increasingly recognized a basic fact: while an international campaign could often free a political prisoner from detention, he or she could quickly be replaced by many new victims unless the system and the structures that permitted their abuse were changed. Stated differently, fundamental guarantees of individual human rights, already provided in international law, could most effectively be secured by more detailed guidelines on the institutions and procedures through which these rights should be enforced. The result once again was a recognition of the need to elaborate on the meaning of the rule of law.

As a consequence, a growing corpus of UN conventions, resolutions, declarations, and reports today elaborates standards on the rule of law. Various regional organizations have similarly contributed to the articulation of these guidelines. The Organization for Security and Cooperation in Europe (OSCE) has produced a detailed definition of the institutional and procedural elements of the rule of law—the most comprehensive catalog of this sort ever adopted by an international organization—which serves as a standard for its fifty-five member states.[9] The Council of Europe long ago made adherence to the rule of law an explicit requisite of membership in the organization and has similarly developed a sophisticated series of standards. Both the Organization of American States and the Council of Europe have developed and enforced their rule-of-law standards in part through the jurisprudence of a regional commission and court on human rights. (In the case of the Council of Europe, these two bodies were recently merged into one.) Although there are variations in emphasis in the definitions articulated by different sources,[10] the obligations imposed by the rule of law are generally understood to include the following:

- A representative government in which the executive is accountable to the elected legislature or to the electorate
- The duty of the government and security forces to act in compliance with the constitution and the law
- A clear separation between the state and political parties
- Accountability of the military and the police to civilian authorities
- Consideration and adoption of legislation by public procedure
- Publication of administrative regulations as the condition for their validity
- Effective means of redress against administrative decisions and provision of information to the person affected on the remedies available
- An independent judiciary
- Protection of the independence of legal practitioners
- Detailed guarantees in the area of criminal procedure
- Compensation of victims of official abuse
- Free and fair elections at regular intervals
- Comprehensive rights of political participation
- Equal access and equal protection of the law

In elaborating the principle of the rule of law, some of these documents reiterate and expand on traditional human rights commitments, including freedoms of association, religion, expression, and movement, and protection against torture.

Beyond the articulation of standards on the rule of law, there has been a vast expansion in recent years of assistance programs to facilitate their implementation, particularly in countries emerging from conflict. Assessments, technical assistance, training, expert consultations on drafting of legislative and regulatory reforms, observer and advisory missions, and donation of resources and materials for the enhancement

of the rule of law are now increasingly standard features of the postconflict scene. Those providing such assistance routinely include various agencies of the United Nations (including in particular the United Nations Development Programme, the Department of Peacekeeping Operations, and the Office of the High Commissioner for Human Rights), regional organizations, the World Bank, several bilateral governmental donors, and an assortment of foreign nongovernmental organizations.[11] Lawyers in military peacekeeping units have at times played an active role, and there is an emerging recognition that peacekeeping forces may need to fill important rule-of-law functions until the civilian contingents are able to be deployed to assume those functions; in various peacekeeping operations, this has included detaining suspected criminals, gathering evidence, surveying the needs of the courts and the justice system overall, and disseminating legal codes. There are so many providers of rule-of-law assistance that it has become common in many postconflict locations to convene rule-of-law donor coordination meetings on a regular basis to share information, avoid duplication, and attempt to provide sequenced assistance in keeping with the often-limited absorption capacity of postconflict local legal institutions. (Even with this heightened level of activity, the aggregate level of resources available for postconflict legal rebuilding has generally been much less than the amount needed, and donors often still pursue differing agendas.)

It must be kept in mind that the standards outlined here provide an important road map for development of the rule of law in a postconflict society but are seldom maintained to perfection in circumstances that are so far from perfect. In a country emerging from a protracted and bloody civil war, the justice system is generally in severe disrepair. Even if the courts had once been credible, the institutions and personnel of the system have typically been destroyed or corrupted. Notwithstanding significant foreign assistance, rebuilding an effective justice system (or, in the case of some countries, constructing one for the first time) will not occur overnight. The need to recruit and train investigators, prosecutors, judges, court administrators, police, and corrections personnel; adopt needed legislative and regulatory reforms; develop a robust independent legal profession; put in place the material resources and equipment necessary to the operation of the system; and create a culture of respect for the law will generally take several years at best. Postconflict evolution of the rule of law, like many other postconflict processes, may be somewhat messy and slow; it has to be nurtured intelligently with a view to the long term and a strategy that extends well beyond the funding cycle of many foreign donors.

Even when the international community intervenes so thoroughly as to take over the task of local judicial administration, it has been unable to satisfy all of its own rule-of-law standards. A telling case in point is that of postwar Kosovo, where the UN mission was vested with all executive and legislative powers, and foreign experts imported by the United Nations were given the mandate to administer the system of justice. Even in this case, an October 2000 report by the OSCE Kosovo office complained of common practices in the UN-run courts, and provisions of UN-imposed regulations, that fell short of these international standards.[12]

Meaningful postconflict rule-of-law reform, as implied earlier, requires attention to more than the number of laws passed or courthouses built. To be effective, there is a need for country- and context-specific strategies that are informed by political, economic, and social realities and by local legal tradition. It requires engaging both the personnel of the justice system and the general public over an extended period. It also requires a recognition that serious rule-of-law reform will impinge on the interests of various powerful interests in the postwar setting; this may include warlords, organized-crime

syndicates, tribal elders, and others whose influence will be affected by a transition to a more robust, transparent, and nondiscriminatory system of justice. A program of technical tinkering by those providing rule-of-law assistance will be inadequate to meet such challenges, which require sustained political will as well.

The international capacity to provide timely legal assistance in such countries still has a ways to go but is developing in significant new directions. It has often taken months to recruit, train, and place on the ground the small number of foreign personnel who will actually design and implement justice sector assistance. (In Afghanistan, for example, the primary rule-of-law post within the UN mission remained vacant for over two years.) Recently, the European Union and the OSCE have each begun to put in place rapidly deployable civilian response capacity for rule-of-law needs. The United Nations and the U.S. government are exploring the development of, respectively, a ready roster and a pretrained civilian reserve corps to fill postconflict rule-of-law functions.

SOME MAJOR STRUCTURAL AND PROCEDURAL ELEMENTS

The rule of law incorporates many of the elements necessary to ease tension and lessen the likelihood of further conflict. While a comprehensive review of all aspects of the rule of law is far beyond the scope of this essay, an examination of some of the major elements is warranted to understand their vital role in postconflict peacebuilding and conflict prevention.

An Independent Judiciary

A primary requisite for the functioning of the rule of law, of course, is an independent judiciary. At the most fundamental level, the principal purpose of the courts in virtually any system is to serve as a forum for the peaceful resolution of disputes. Conflict and disagreement are inevitable in any human system; it would be foolhardy to construct an idyllic model that did not assume disagreements between individuals and between groups. To forge a durable peace, it is necessary to channel those conflicts into a routinized and accepted mode of amelioration before they become violent and less tractable.[13]

In any country emerging from armed conflict, numerous claims and grievances will remain. These may include demands for punishing the perpetrators of war crimes and other atrocities. Wars frequently displace large numbers of people, and the subsequent return of refugees or prisoners will often result in competing claims to property. In the postconflict context, courts are also often called upon to resolve disputes regarding the use of minority languages or the eligibility of various factions to participate in elections. Each of these is a highly volatile issue, and it is imperative to avoid a scenario in which vigilantism raises the risk of new cycles of violence. An independent judiciary can provide a peaceful and trustworthy means of addressing such claims. The judiciary also addresses, of course, the normal, everyday disputes between people, hopefully contributing to an overall culture that resolves its conflicts through such nonviolent means.

It is important to note that not every dispute is amenable to judicial resolution. Some points of conflict are purely political, not addressed by any law that the courts might apply. To make the courts the arbiter of such disputes—particularly if the judiciary is still a fragile institution—risks politicizing the very institution that must be blind to politics, undermining the credibility and independence of the judicial system. Several analysts have suggested that this sort of politicization characterized the Russian constitutional court in the early 1990s, rendering it a more high profile but less effective institution for facilitating Russia's difficult democratic transition.

Finally, it is important to avoid being too mechanistic or narrow when considering postconflict judiciaries. In the postconflict phase, the formal justice system is generally weak

and, even with international aid and personnel, has the capacity to handle only a relatively small number of the most important cases. Experience has shown that it will often take several years to significantly expand that capacity. On the other hand, various tribal, religious, or other traditional systems of justice often survive a prolonged conflict far more intact than the formal courts, and may be in a position to play a vital complementary role in providing justice and a nonviolent means for resolving disputes during the postconflict phase. These systems are routinely more accessible to the local population (both physically and financially) than the formal courts. In many countries, they also predate the formal system and may have deep roots in local culture. To resolve land disputes or matters of family law, for example, local people may view customary bodies as the appropriate and traditional redress. In evaluating and assisting postconflict justice, however, international actors have tended to ignore these customary systems, in part because they do not necessarily comport with international rule-of-law standards. This is beginning to change, and aid providers and policymakers are exploring how to shape more holistic rule-of-law strategies that integrate and perhaps adapt these customary systems of justice.

Law Enforcement and Criminal Justice

The rule of law requires a system of criminal justice that deters and punishes banditry and acts of violence, allowing the citizenry to live with a sense of security. At the same time, the criminal justice system must be immune from abuse for political purposes and must adhere to a lengthy list of internationally recognized rights of criminal procedure.[14] In other words, if societal tensions and the likelihood of further conflict are to be minimized, people must become confident that they will not be abused either by private sector criminals or by the authorities.

A problem confronting many countries emerging from war or from a repressive regime to a democracy is the hiatus in law enforcement capabilities. A transitional period unfolds during which the old police and security forces (as well as the system of authority in general) are eliminated or weakened, but the new order has yet to take hold. Retaining the old police and judiciary, many of whom were part of the problem rather than of the solution, undercuts the credibility of the new order and could threaten the ability of the new government to manage the transition. At the same time, as the recent experience in Iraq has vividly demonstrated, the dissolution of an effective police force can result in a dramatic deterioration of the security environment and render the rule of law a far more distant goal. This is a delicate balance, requiring a careful process of vetting and reprofessionalizing the police and related forces.

Under the best of circumstances, it takes at least a couple of years to train new personnel, establish new lines of command, and build a new and credible criminal justice system. In Russia, Haiti, South Africa, and El Salvador, to cite a few examples, this time lag has resulted in a security vacuum readily capitalized upon by criminal elements. In each of these four countries, the transition has produced a soaring crime rate; the same pattern occurs in many other states in the postconflict phase. While people's daily fear of being caught in the crossfire of war, or of being persecuted by the authorities because of their political views, has dramatically receded, it has been partially replaced by a new fear of the thieves, gangs, and mafias that operate with relative impunity in the interim period. In some cases these new criminals are demobilized combatants and commanders of the conflict just ended, still possessing their weapons but no new livelihood. In El Salvador, for example, an official inquiry determined that the death squads that killed thousands of leftists and moderates during the war transformed themselves into new criminal bands following the conflict, unchecked and undaunted by an ineffective criminal justice

system. Organized-crime gangs similarly emerged out of former combatant units in the Balkans and Iraq. Uncontrolled, this dramatic rise in crime poses a very real threat to the stability of the new peace.

Because of this vacuum of effective law enforcement, postconflict settings also provide fertile ground for the growth of transnational criminal operations. Once established, these organizations then become difficult to uproot and can undermine the stability not only of the country in question but of other nations as well. The postconflict absence of an effectively functioning government in Kosovo provides a poignant recent example. In January 2001, the British government was obliged to send a special criminal intelligence squad to Kosovo to focus on the entrenchment of criminal gangs involved in smuggling illegal immigrants, prostitutes, and drugs to Western Europe.[15] More recently, transnational criminal activities crisscrossing the borders of Sierra Leone, Liberia, and Côte d'Ivoire undermine efforts to build stability and the rule of law in these three countries. The void in law enforcement capacity can also provide a handy environment for exploitation by international terrorist groups, as occurred in Somalia and Afghanistan. Further compounding this problem, the postconflict government's incapacity to deal effectively with this threat may be viewed by outsiders as complacency toward transnational crime, which may in turn put at risk some of the international assistance and investment it badly needs.

To address these problems, postconflict reconstruction has to move quickly to establish courts that are above corruption and intimidation by criminal elements; police forces need to be supported, and individual officers must be held accountable for violations of the rule of law; and training and cleansing of the law enforcement and criminal justice systems need to begin promptly following the conflict. The 1995 Dayton Peace Accords to end the war in Bosnia and Herzegovina, for example, attempted to integrate this lesson, addressing each of these points explicitly in the terms for the postconflict phase.[16]

In addition, to confront some of the more serious and complex criminal threats, including in particular those posed by transnational and domestic organized-crime groups, it may be necessary to create specialized units, capacity, and legal tools within the justice system. Development of such targeted concentrations of expertise and resources focused on these more challenging categories of crimes may be warranted with respect to all components of the criminal justice apparatus, including investigations, enforcement, prosecution, the courts, and prisons, in order to track and pursue these crimes more effectively. At the same time, safeguards need to be in place to ensure that specialized units and tools to confront serious crimes stay within the bounds of the rule of law.

Finally, international police operations have expanded significantly in the last few years, becoming commonplace in postconflict scenarios to help fill this void in law enforcement. In 2006, nearly 7,500 UN civilian police were authorized for deployment in nine postwar countries. The organization and fielding of such police operations is gradually becoming more professionalized, but numerous challenges remain with respect to the recruitment, training, coordination, and accountability of these forces in the future, as well as clarification of the law to be applied by them.

Transparency and Predictability

It is accepted and proven that transparency and predictability of action by adversaries reduce the likelihood of international conflict. Confidence-building measures have been instituted to reduce tensions in a variety of regions, under which certain actions that might agitate an opposing party (e.g., troop movements or missile testing) can be taken only according to prescribed procedures that facilitate communication and reduce suspicion.

Traditionally, diplomats and those involved in conflict resolution and conflict prevention have applied this principle primarily to conflicts between states. As conflicts have become increasingly intranational, however, the principle is equally valid. Confidence and trust will be increased—and the potential for suspicion, surprise, and tension reduced—when parties are required to conduct their activities in the open. The rule of law requires that governments adhere to principles of transparency and predictability, and it establishes several mechanisms to ensure that this is so. These include requirements that laws be adopted through an open and public process by a representative body, all regulations be published, no rules be applied retroactively, government agencies conduct their affairs according to prescribed rules, and the whole system be subject to judicial scrutiny to ensure compliance with these rules. As articulated by the conservative Austrian-born economist Friedrich von Hayek:

> Nothing distinguishes more clearly conditions in a free country from those in a country under arbitrary government than observance in the former of the great principles known as the Rule of Law. Stripped of all its technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.[17]

Controlling the Bureaucracy

Even when the relationship between securing the rule of law and avoiding further conflict is recognized, attention and foreign assistance tend to focus fairly exclusively on the courts and the legislature. These may be the primary institutions, but as technology advances and as society becomes more complex, parliaments are able to address a decreasing proportion of the issues with which governments must deal. Legislative bodies can generally paint only with broad brushstrokes, leaving more and more of the details, as well as the implementation, to be provided by the administrative bureaucracy of the modern state.

In many countries, the average citizen will most frequently experience the presence or absence of the rule of law (and will accordingly feel less or more alienated from the system) not through any interaction with the legislative or judicial process, not through any involvement in broad constitutional questions, but through encounters with the administrative state. Resolving a problem with their social security benefits, obtaining a license to run a business and support their family, getting a permit to build a house or a church or register a political party, obtaining state certification and funding for an ethnic language school—these are the sorts of events that bring most people into contact with the state, and they are not generally in the purview of the legislative branch. Unless the rule of law is extended to administrative decision making, these interactions are unlikely to be subject to public scrutiny and thus are open to corruption, manipulation, and discrimination. For most nationals and foreign advisers engaged in reconstructing war-torn societies, administrative procedure is hardly as glamorous as constitution writing or elections, but they are ill advised to neglect it, for it is in this realm that, unnoticed, the seeds of grievance and confrontation may quietly, even unwittingly, be sown.

In Peru in 1984, some correlation was believed to exist between the level of public confidence in the government on the one hand and the effectiveness of the violent opposition on the other. Peru had a functioning democratic legislature, with laws adopted and published following public debate; to the casual observer, the system adhered to the rule of law. Despite this appearance, economist Hernando de Soto found that 99 percent of the rules governing daily life in the country never went through the legislative process. They were, instead, the result of regulations issued by executive branch agencies, a process that was not

subject to public participation, procedural controls, or any oversight, and that was consequently highly corrupt.[18] At the start of the twenty-first century, this kind of situation is not unique to Peru. Insofar as the power of these administrative bureaucracies continues unchecked in the postconflict period, it makes it more likely that individuals and groups will feel disenfranchised from the system, individual and national economic growth will be hampered by corruption, and administrative regulations or decisions may discriminate on the basis of political affiliation, ethnicity, religion, race, or geography.

Other Institutional Elements

Although it is beyond the scope of the present essay to discuss all the structural components required for a justice system to function, an important lesson to emerge from postconflict experience over the past two decades is that the rule of law will not be viable if any one of its core components lacks adequate capacity. To establish an effective criminal justice system—always a priority in the postconflict period—assistance to the courts will be wasted unless efforts are also taken to ensure a professional and law-abiding police force, prison system, and criminal defense bar, all governed by a coherent legal framework. While the link to basic security concerns makes criminal justice a top priority, mechanisms to deal with adjudication of financial claims, property disputes, and administrative law challenges are also needed for postconflict progress. In addition, assistance to these various components should be provided in a coordinated manner, and the various institutional components need to understand their respective functions as part of a holistic system. Whether in Afghanistan or the Palestinian Authority, for example, turf battles between the Ministry of Justice, the attorney general's office, and the Supreme Court have had severely dysfunctional consequences for efforts to strengthen the rule of law, diluting the value of international aid.

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Those involved in postconflict peacebuilding and the rule of law will often need to confront two challenges of particular urgency for the process of societal reconstruction: accountability for past abuses and construction of a new constitutional order.

Reckoning with War Crimes and Other Past Abuses

A basic question confronting many societies in the postconflict phase is how to deal with the legacy of massive abuses that may have been inflicted by those on each side of the conflict. The worst of these offenses are those classified by international law as war crimes, crimes against humanity, and genocide. Nations also need to come to terms with the question of accountability for those abuses that, while not constituting such international crimes, still give rise to deeply felt resentment and antagonism in the postconflict phase. Some of these abuses may have been perpetrated in the heat of the conflict; others may have taken place earlier, fanning the resentments that led to the conflict. A variety of approaches need to be considered in contemplating the issue.

Criminal Accountability

Some argue that not only are the trial and punishment of these offenses essential to achieve some degree of justice, but that a public airing and condemnation of the crimes are the best way to draw a line between times past and present, lest the public perceive the new order as simply more of the same. A minority claim that these are simply show trials unbefitting a search for peace and democracy, that a public review of wartime atrocities will inflame passions rather than calm them, and that the best way to rebuild and reconcile the nation is to leave the past behind by forgiving and forgetting the sins of all parties to the

conflict. As noted earlier, the latter argument has been rejected by international law.

In many countries, prosecutions for abuses committed during the conflict can serve several functions. They provide victims with a sense of justice and catharsis—a sense that their grievances have been addressed and can more easily be put to rest rather than smoldering in anticipation of the next round of conflict. In addition, they can establish a new dynamic in society, an understanding that aggressors and those who attempt to abuse the rights of others will be held accountable.

Because these trials tend to receive much attention from both the local population and foreign observers, they often provide an important focus for rebuilding the judiciary and the criminal justice system in accordance with rule-of-law principles. Perhaps most important for purposes of long-term reconciliation, this approach underscores that specific individuals—not entire ethnic or religious or political groups—committed atrocities for which they need to be held accountable. In so doing, it rejects the dangerous culture of collective guilt and retribution that too often produces further cycles of resentment and violence.

The issue of accountability versus impunity not only is relevant to the resolution of conflict within a war-torn country; it also may have grave consequences for future, seemingly unrelated conflicts in other parts of the world. In explaining his confidence that he could proceed with his diabolical campaign of genocide without fear of retribution by the international community, Adolf Hitler is infamously alleged to have scoffed, "Who remembers the Armenians?"—referring to the victims of a genocide twenty-five years earlier for which no one had been brought to account. Recent evidence suggests that the Bosnian Serb leadership, in pursuing a campaign of ethnic cleansing and genocide in the 1990s, was emboldened by the fact that the Khmer Rouge leadership had never been prosecuted or punished for the atrocities it committed in Cambodia in the 1970s. (Nearly thirty years after the killing fields, a special tribunal is now being put in place in Phnom Penh to prosecute some of those cases.)

When prosecutions are undertaken, how widely should the net be cast in imposing sanctions on those who committed war crimes or similar abuses? How high up the chain of command should superiors be responsible for wrongs committed by their underlings? Conversely, how far down the chain should soldiers or bureaucrats be held liable for following the orders of their superiors in facilitating these abuses?

International legal standards are evolving that help address these questions; at least for the most heinous violations of human rights and international humanitarian law, a sweeping amnesty is now understood to be impermissible.[19] On the other hand, offenses like genocide or crimes against humanity generally require the participation of a vast number of people, and international law does not demand the prosecution of every individual implicated in the atrocities. Putting all of the hundreds and sometimes thousands of such individuals on trial, whether before a local or international court, would be financially, politically, and logistically untenable. A symbolic or representative number of prosecutions of those most culpable may satisfy international obligations, especially if an overly extensive trial program would threaten the stability of the country. The Special Court for Sierra Leone, for example, is limited to prosecution of those "who bear the greatest responsibility for serious violations of international humanitarian law" and specified crimes under Sierra Leonean law; accordingly, even though large numbers of combatants participated in gruesome atrocities, the Special Court has issued indictments against just thirteen people. Often, the challenge of numbers is addressed by using different mechanisms to deal with (1) the leaders, those who gave the orders to commit war crimes, and those who actually carried out the

worst offenses (inevitably the smallest category numerically) and (2) those who perpetrated serious abuses but do not rise to the first category. In East Timor, perpetrators of minor crimes (generally property offenses) could apply to participate in a "community reconciliation process" in which they confessed to their offense in a local public hearing, and the local community decided on an appropriate form of community service for the applicant, ranging from an apology to a fine to rebuilding a property he had burned down during the 1999 violence in East Timor. Perpetrators of war crimes, crimes against humanity, murder torture, or rape, on the other hand, were ineligible for this process and were subject to the jurisdiction of a "Serious Crimes Unit" established to investigate and prosecute these major abuses.

The Rwandan case demonstrates the need for pragmatism to temper an absolutist approach to prosecution. For decades, elites maneuvering for power manipulated ethnic rivalries between Hutu majorities and Tutsi minorities for political ends, without any fear of being called to account for their actions. This culminated in 1994 in one of the most horrific genocidal massacres in recent memory, as between 800,000 and 1 million Tutsis and moderate Hutus were brutally slaughtered in just fourteen weeks.

To break this cycle of violence, the new Rwandan government correctly insisted that it was necessary to replace the endemic culture of impunity with a sense of accountability. To achieve this, many senior members of the new government insisted throughout their first year in office that every person who participated in the atrocities should be prosecuted and punished. The result was the multiyear pretrial detention of some 125,000 alleged *génocidaires* in prisons built to house a small fraction of that number—far fewer than the total number of potential defendants but vastly more than the number of genocide cases that could be handled by the most robust criminal justice system in a reasonable amount of time. To compound the problem, Rwanda's criminal justice system was decimated during the genocide, as most lawyers and judges were killed, in exile, or in prison. By 2004, the Rwandan courts had actually processed more than 7,000 genocide cases—a herculean feat matched by virtually no society in history, let alone one still reeling from destruction—in proceedings that were evaluated as generally fair by independent observers, including those representing the defense. As impressive a record as this is, however, and notwithstanding the importance of a rhetorical commitment to put every perpetrator of gross abuses in the dock, 125,000 genocide defendants were never going to be tried in Rwanda, and during the several years it was attempted, this task largely monopolized the justice system and delayed progress on other matters crucial to social reconstruction.

The Rwandan solution has been to move the overwhelming majority of the caseload to a new village-level system called *gacaca,* loosely based on an indigenous model of traditional justice. The program does not satisfy all the criteria set by international standards relating to criminal defense rights and fair trials; defense lawyers are not permitted, the judges of the more than 12,000 gacaca courts lack legal training, and there have been allegations of witness intimidation. On the other hand, most Rwandans in the justice system feel they have no alternative: the caseload cannot be handled by the courts in any timely manner; it is politically not an option to simply throw open the prisons and release more than 100,000 alleged génocidaires; and it is not acceptable to continue to keep people locked up for years without trial. Although it will be controversial, Rwandans argue that the gacaca program will engage local villages in the process of justice (attendance is actually compulsory), return and reintegrate perpetrators into their home communities, and empty the prisons of untried cases within a relatively short time. Perhaps of

most concern are the staggering projections by some senior government and gacaca system officials that rather than reducing the caseload, the gacaca process will ultimately identify and process some 750,000 genocide defendants—a tenth of the Rwandan population—compounding rather than relieving the challenge of numbers.[20]

Given the complexity of the imperative to deliver adequate criminal justice for past grave abuses, reasonably clear objectives need to be established early on. Although the answer to "How much is enough?" may change during the course of a nation's transition, and although the question will continue to be a point of debate both in the international community and within countries where massive atrocities have occurred, experience over the past few decades in several transitional countries suggests the need for flexibility and realism in the quest for criminal accountability for such horrific offenses. Concern for the needs of victims is not best served by encouraging them to mistakenly assume that every perpetrator will be brought to trial when this is clearly not possible. Similarly, the interest in quickly establishing an effective justice system will not be best served by overwhelming the entire system for years with nothing but atrocity cases. Exempting all perpetrators from justice is morally, and now legally, unacceptable, but subjecting every participant in an extended campaign of mass abuses to trial will usually be impossible. A careful balance will be needed in each case, based on the crimes committed and numbers involved, the capacity of the criminal justice system, local culture and priorities, and available resources.

Cleansing the Structures of Government

Holding individuals accountable will usually entail more than criminal trials. In many countries, limitations may be placed on participation in the public sector by those associated with past abuses. A durable peace requires the establishment of public confidence in the institutions of the new order. That confidence can be seriously undercut if these institutions are staffed by the same personnel who gave rise to old resentments. Those who kept the engine of a now-ousted government running may be perceived as of uncertain loyalty. Even though they are not liable in a criminal sense, those who facilitated past abuses should not be permitted to infect or represent the new governmental structures. On the other hand, if people have not personally been involved in past abuses, then some of these people may be vital to national reconstruction in the immediate postconflict phase, with knowledge and experience that will be useful in making the new order function.

In El Salvador, the peace agreement provided for a special commission, which identified one hundred senior military officers for retirement due to their implication in past human rights abuses. In Bosnia, the International Police Task Force was tasked with excluding from the newly reconstituted local police any candidate who had previously engaged in abuse of ethnic minorities. Even if such individuals are not prosecuted for their crimes, permitting them to occupy positions in which their presence would be cause for a sense of insecurity among their former victims would be unjust and would detract from peacebuilding efforts.

Administrative purges do not, however, provide the same level of due process protection as does a criminal proceeding. Because they involve a large number of people, purges tend to be conducted in summary fashion. In stressing the importance of individual responsibility and accountability, the rule of law rejects any notion of collective guilt. When large numbers of people are removed from their places of employment solely because they had worked there during the conflict or because of their membership in a particular political party, without any demonstration of individual wrongdoing, they may legitimately cry foul and question the democratic underpinnings of the new

government. Rather than contributing to reconciliation and rebuilding, such purges may create a substantial ostracized opposition that threatens the stability of the new system. In Iraq, a major controversy has been ongoing over precisely this point for more than three years, often pitting Sunni against Shiite constituencies, in the context of the appropriate scope of exclusion from public positions through "de-Ba'athification." In some cases, the dislocational effects of such a measure have been tempered by limiting any ban on public service by implicated individuals to a cooling-off period of a few years, permitting their reentry only after the initial postconflict phase and after stable and trustworthy public institutions are in place. In other instances, people are appointed or reinstated on a probationary basis, to monitor and verify their adherence to the norms of the new democratic order.

Although they vary from country to country, such vetting efforts, sometimes referred to as "lustration," routinely target a far larger number of offenders than do most programs of criminal trials, but they have not received adequate attention. In the next few years, significant work will be needed to develop guidelines on how best to strike the right balance and design vetting programs that do not constitute simple political purge programs but that instead legitimately cleanse the structures of government and contribute to the establishment of the rule of law.

Establishing a Historical Record

In the transitional period after an intranational conflict, history is always controversial. Each side will still have its defenders who will deny that the abuses of which it is accused ever took place, will claim that they were actually perpetrated by others, or will suggest that they were justified by exigent circumstances. Left uncontested, these competing claims may undermine the new order and the effort at peacebuilding; they may also add insult to the injury already inflicted on the victims, deeply sowing seeds of resentment that can result in a new round of violence. The Bosnian war displayed unresolved issues of history and resentment dating back some seven centuries; a decade after the war, the country's next generation is being socialized into one of three competing Bosniak, Serb, or Croat realities identifying their own ethnic group as victims and the other two as perpetrators of atrocities during the conflict in the 1990s.

As a consequence, in addition to the focus on individual perpetrators, establishing an official overall accounting of the past is often an important element to a successful transition, providing a sense of national justice, reckoning, and catharsis. Fairly conducted criminal trials are one way to establish the facts and figures of past abuses; the formation of a "truth commission" is another. While the two processes can complement each other, a truth commission may be all the more useful for healing and reconciliation if the country is not equipped to conduct fair and credible trials. Long-term reconciliation requires a careful examination of the mix that will best fit the society in question.

In El Salvador, the twelve-year civil war between the government and the Farabundo Martí National Liberation Front (FMLN) left some 75,000 people dead. "As the peace negotiations advanced, the charges and countercharges relating to [atrocities committed by each side] threatened to become serious obstacles to any peaceful resolution of the conflict. It was soon recognized, therefore, that the hate and mistrust built up over the years required . . . some mechanism permitting an honest accounting of these terrible deeds."[21] At the war's conclusion in 1992, the judiciary was intact, but it was highly politicized and compromised and incapable of credibly addressing the difficult issue of accountability for war crimes or egregious violations of human rights in an objective manner. The three-member United Nations Commission on the Truth, established by the peace agreement between the warring parties, was seen as an

alternative vehicle through which to attain some sense of justice and accountability.[22]

Although not a court, the commission—like similar entities that have been created in several countries facing a legacy of abuses on a mass scale—investigated and reported on abuses that had been committed by both sides during the war, giving both victims and perpetrators an opportunity to make their testimony part of the official record. Because of the absence of a credible criminal justice system, the commission also felt obliged to render certain judgments in its 1993 report that would otherwise have been left to the Salvadoran judiciary. A prime example was the commission's decision to publicly name those individuals it determined were guilty of particularly egregious abuses, even though the commission process had not afforded these individuals all the due process protections to which they would be entitled in a judicial proceeding. Had a credible national justice system been functioning, the commission might have kept all such names confidential in its report and instead turned them over to the authorities for prosecution.[23] In its report, the commission analyzed the ways in which the militarization of Salvadoran society had eviscerated all three branches of government; it also made recommendations to enhance the prospects for each of these institutions and the military to function in accord with the precepts of the rule of law.

Truth commissions have provided a forum and voice for the hundreds or thousands of victims who will never be called to testify at trial. More than 20,000 victims in South Africa, 22,000 in Morocco, 17,000 in Peru have provided their accounts to the truth commissions in those countries, ensuring that what happened to them or their relatives or colleagues is acknowledged and woven into the fabric of the nation's official history. Truth commissions have been used in several countries to look not simply at individual cases, but also at the systemic problems that made abuses possible, at the role of various sectors, through acts of omission and commission, in engendering the environment for these offenses to occur—be it the security forces, religious leadership, the media, the educational system, the judiciary, and so on. Based on their analysis, they have been tasked with developing detailed recommendations for appropriate governmental and societal reforms. Truth commissions established or contemplated in postconflict settings have recently been charged with developing ways to contribute to the process of reconciliation. In Guatemala, where a civil war raged for thirty-five years and cost more than one hundred thousand lives, the peace agreement provided for appointment of a truth commission and stressed the importance of establishing the "whole truth" about past abuses by all parties, presenting this as part of a process that "will help lay the basis for a peaceful coexistence" and that "will eliminate all forms of retaliation or revenge as a prerequisite for a firm and lasting peace."[24] In Bosnia, if a truth commission is established, all stakeholders have agreed that its mandate will include a requirement, in the context of documenting the atrocities that occurred, to also expose the positive stories of individuals on all sides of the conflict who took risks to protect fellow citizens from other ethnic groups from abuse.

The Need for an Integrated Approach

Massive and systemic atrocities are often an outgrowth of complex problems in a society, or they contribute to the creation of the same. They are not generally amenable to simplistic solutions. It has become increasingly clear that effective postconflict peacebuilding generally requires not one of the mechanisms outlined here, but a nuanced and integrated approach that combines and sequences various approaches to address the particular case. For more than two years in postwar Bosnia, many argued that a truth and reconciliation commission should be created, as a complementary

process to the work of the International Criminal Tribunal in the The Hague, to provide a forum for thousands of victims, to develop recommendations for systemic reforms, and to undertake other tasks. The effort was stymied by those who insisted that no such body should be established until conclusion of the tribunal's work. The result would have been an implicit statement that, if a postconflict society is determined to be incapable of conducting its own credible war crimes trials and the function is assumed by the international community, that society should then be blocked for several years from pursuing any other program to deal with its own troubled past. Similarly, in Sierra Leone, the 1999 Lomé peace agreement provided for establishment of a truth and reconciliation commission. Subsequently, the UN Security Council mandated the establishment of a special war crimes court in Sierra Leone—at which point many international actors suggested that the commission effort could be abandoned. Ultimately, both bodies were established.

Increasingly, however, while truth commissions may precede prosecutions as they did in Argentina and Chile, function concurrently with trials as in Sierra Leone and East Timor, or follow initial trials as may occur in Bosnia, they are understood to be not alternatives but complements to criminal trials, serving a different but often vital function for societies in transition.

THE CONSTITUTION-MAKING PROCESS

In many countries in transition from civil war to a new government, one of the first important tasks is drafting a new constitution. The constitution is, of course, the foundational legal document from which the entire national system of rules will derive; it is the cornerstone for the rule of law. In addition, insofar as the constitution enshrines the vision of a new society, articulates the fundamental principles by which the political system will be reorganized, and redistributes power within the country, both its substantive provisions and the process by which it is created can play a significant role in the consolidation of peace.

When a constitution is drafted and imposed by a small group of elites from the victorious party, a foundation may result that is not only less democratic but also less stable. While powerful elite factions will play a dominant role in any postconflict constitution-making process, it is important to reduce their monopolization of that process and to avoid a final constitution that simply reflects a division of the spoils between such factions. If the constitution and the process of its adoption are to play a positive role in transforming society, then constraints on such monopoly of power need to be built into the process.

In an alternative scenario to such closed-door division of spoils, constitution making can involve a process of national dialogue, allowing competing perspectives and claims within the postwar society to be aired and incorporated, thus facilitating reconciliation among these groups. It can also be a process of national education with respect to concepts of government, the problems and concerns of different groups within the country, the development of civil society and citizen responsibility, and international norms of human rights, nondiscrimination, and tolerance that have been incorporated into recent constitutions. In short, the process of constitution making can contribute to peace and stability.[25]

To provide the best chance of success in this vital endeavor, there should be broad national agreement on the constitutional process. This is frequently characterized by two elements, as seen with increasing regularity in the constitutional processes of a variety of postconflict or transitional countries. The first element is an articulation of the rules, details, and timetable of the constitutional process. Having such a framework from the outset facilitates greater transparency and public credibility with respect to the steps in the constitu-

tional process. It enables all actors—including not only the members of a constituent assembly or constitutional commission, but also civil society organizations, the media, and the general public—to know what to expect, how to monitor the process, and how and when they can provide input to the constitution-making process. The second element is a set of fundamental principles to which the new constitution must adhere. These principles typically include human rights such as freedom of religion and expression; freedom of assembly; nondiscrimination on the basis of gender, religion, nationality, or belief; and the guarantee of a range of rights in the criminal justice system. They may also include the organization of the state and the relationship between the branches of government, or other substantive bargains that have been agreed to by the parties at the outset. In some cases, such as South Africa, the new draft constitution may be made subject to judicial review by a constitutional court to ensure that it in fact comports with these fundamental principles. These interim arrangements can establish adequate political space to enable all stakeholders to participate in the process and debate even hotly contentious constitutional issues in an atmosphere that safeguards their rights and interests during the development of a final constitution and permanently thereafter.

This initial package of temporary rules, whether in the form of an interim constitution or otherwise, will typically be the product of negotiations between key factions (in contrast to the more broadly based and open constitutional process to follow). As a consequence, pressure from outside groups, including international institutions and donors, is important to producing a set of rules that will enable a robust and democratic process to follow.

Meaningful public participation is increasingly regarded as an essential ingredient to ensure the legitimacy of the constitution-making process and to ensure real public ownership of the process and of the resulting constitution. Such an approach, however, has consequences for the duration of the process. A rapidly adopted constitution will generally only reflect a deal between the powerful. A more open and extended process that provides an opportunity for other groups and civil society in general to challenge and debate and influence the process is far less efficient in the short run. It takes longer and costs more. For this reason, the international community has frequently sought to expedite the process, at times to the detriment of the constitutional result. In Cambodia, for example, the Paris Peace Accords of 1991 provided that the constitution-making process should be completed in a period of ninety days. Although a very limited effort at national dialogue and input from certain groups occurred during this time, analysts of this process have unanimously taken the view that this period was clearly too short, particularly given the lack of human resources resulting from the Cambodian genocide and the impossibility generally of conducting an effective constitution-making process under such time constraints even in the most ideal of circumstances. Some have suggested that the rushed nature of the process contributed to the weakness of the system created under the constitution, and the coup d'état of 1997 has lent credence to that view. In East Timor, only one month was allocated to the public consultation component of the constitutional process; several months later when the process was seen to have failed, a new round of public consultation was conducted.

Developing a constitution through this process of national dialogue, however, is far less efficient than the alternative model, in which the terms of this crucial social compact are determined by a small group behind relatively closed doors and handed down to the people like contemporary tablets from Mount Sinai. A drawn-out process of constitution making could be destabilizing, for example, if it means a lengthy transition governed by no basic rules or a transition still governed by an

old constitutional system that had exacerbated the conflict. In such situations interim arrangements may first be needed for the consolidation of peace. Such was the case in South Africa, where a negotiated interim constitution established the basis for transition, and a lengthier process then followed to debate the tough issues and develop the final document.

Constitution making in South Africa provides an example of the usefulness of this approach. During one session in the spring of 1995, for instance, the Constitutional Assembly spent hours deliberating over provisions in the new draft constitution concerning the security forces in the new South Africa, hardly a minor or noncontroversial topic for opponents emerging from years of conflict. A variety of sensitive issues—such as emergency powers and their limits, the authorization of soldiers to disobey orders that violate international law, and civilian control of the security forces—were all respectfully discussed and debated by former enemies now in parliament, ranging from Pan-African Congress members on the left of the political spectrum to those of the Freedom Front on the right. Several participants subsequently acknowledged that as little as a year earlier, such a discussion would have been inconceivable.[26] In the context of the transition, however, the lengthy Constitutional Assembly process (made possible by an interim constitution and rules for the process) provided an important avenue for previously violent adversaries to negotiate and collaborate in constructing each piece of their new order.

In Albania, broad-based civic education and public consultation regarding the constitution included radio and television programs and telephone call-ins, dissemination of pamphlets and newspaper serials on constitutional issues, essay contests, and public forums throughout the country that focused on various constitutional questions. As a result of extensive comments from members of the public on a draft constitutional text published by the Albanian constitutional commission, the commission amended no less than 25 percent of the articles in the draft before finalizing the text and submitting to parliament and then to public referendum.

In country after country, the public has demonstrated that, when given an opportunity to participate in the shaping of the supreme law and social compact by which their nation will be governed, they will seize the opportunity. An informed and engaged citizenry is a requisite for the rule of law. In South Africa, those organizing the constitutional process embraced the principle of public participation and thought they might need to process as many as a couple thousand inputs; instead, the consultation process resulted in an astounding two million public submissions. In Iraq, notwithstanding the high level of violence that restricted the possibilities for public forums and outreach, the constitutional commission received some 400,000 public submissions. Owing to the overly brief time line allotted for the constitutional process and the insufficient capacity of the commission staff, however, there was no opportunity to review these submissions or in any way have them taken into consideration by the constitution drafters.

While robust public participation will strengthen the constitutional system that follows, a lesson of past cases is that the constitutional process also needs to build in institutional and political mechanisms to ensure constitutional implementation. In Eritrea, following a thirty-year war for independence, the constitution-making process was intentionally structured to facilitate the consolidation of peace—a two-year effort that was proclaimed "a historic process of a coming together of Eritreans for a creative national discourse."[27] The Constitutional Commission included a variety of religious, ethnic, and regional constituencies. Offices were established in five regions of the country, with an additional office responsible for involving the estimated 750,000 Eritreans living abroad in the process. The Constitutional Commission adopted a

strategy "which involves the widest possible public consultation, a strategy which eschews the top-down approach."[28] Discussions were initiated through an extensive series of civic education seminars, debates, and town and village meetings reaching more than a hundred thousand people. Pamphlets, newspapers, television, and radio were used to facilitate public education and dialogue. Articulation of basic principles and of a draft constitution was the subject of further public debate and input. Nine years after its adoption, although the resulting national charter has deep public support, an authoritarian government has not yet implemented the constitution.

Finally, it is essential to recognize that not all of society's problems can be resolved through the constitution. As was suggested earlier with respect to the courts, viewing constitution making as a means of redressing all group grievances may force onto the plate issues that are not appropriate to this process. This can result either in rejection of the process by disgruntled factions or inclusion of promises in the new document that cannot be fulfilled, either of which would damage the credibility of the process and of the new constitution.

Enabling a broad spectrum of society to participate in shaping the compact means that the process will take longer to complete, entail higher administrative costs and greater debate, and possibly result in some compromises that might otherwise be avoided. On the other hand, it can also produce a constitutional system that is more widely understood and accepted, more stable, and more supportive of peace.

HOW LARGE A FOREIGN ROLE?

As noted, while the challenge of demonstrating a new beginning founded on justice and the rule of law will present itself very early in the postconflict phase, constructing new institutions and training new lawyers, judges, police, and other personnel can take years. This a recurring quandary.

In some instances, the solution has been to pursue justice through the medium of an international entity. In El Salvador, for example, the country's relatively small population was felt to be too polarized to achieve any consensus on the abuses committed during the conflict. As a consequence, the UN truth commission was composed entirely of non-Salvadorans in order to achieve a degree of neutrality, objectivity, and acceptability that could not be garnered by any domestic body at that early stage in the transition from war.

The United Nations Security Council created two international criminal tribunals to respond to civil war and genocide in Rwanda and the former Yugoslavia—the first such bodies established since the Nuremberg tribunal a half-century earlier. Several factors militated in favor of internationalizing the response in these cases:

- The crimes were so horrific and so great a challenge to basic precepts of international law
- The need for justice as an essential ingredient in achieving reconciliation and breaking the cycle of violence was so apparent
- The domestic justice systems (particularly in Rwanda) were so thoroughly decimated

In addition, an international tribunal was better positioned than a domestic court to (1) convey a clear message that the international community will not tolerate such atrocities, hopefully deterring future carnage of this sort, not only in Rwanda and Bosnia but worldwide; (2) be staffed by experts able to apply and interpret evolving international law standards; (3) be more likely to have the necessary human and material resources at its disposal; (4) function—and be perceived as functioning—on the basis of independence and impartiality rather than retribution; (5) advance the development and enforcement of international criminal norms; and (6) obtain jurisdiction over many of the worst perpetrators who were no longer in the country. The two tribunals

have produced several important advances in the understanding and treatment of war crimes, crimes against humanity, and genocide.

In rare circumstances such as these, creating an international entity to provide a sense of justice has served vital goals. In the vast majority of instances, however, this should only be the second choice. Even in cases such as Rwanda and Bosnia, where the establishment of international criminal tribunals was appropriate, durable peace requires that robust domestic institutions be established, developing within the states in question the capacity to undertake efforts at justice and reconciliation. Although it is hardly a zero-sum equation, the relative allocation of resources makes a statement regarding international priorities in the area of postwar justice and the rule of law: total contributions to the two international tribunals has been more than $2 billion; at some $250 million per year, they represent more than 15 percent of the ordinary UN budget. Allocations during this same period to develop the legal institutions within the countries in question have been a small fraction of that amount.

Whether accountability and justice are achieved through a court or through a truth commission, they are generally best achieved through a domestic process managed by the country in question. If it can be conducted in accord with the protections afforded by the rule of law, prosecution before domestic courts can enhance the legitimacy of the new post-conflict government and of the judiciary, be more sensitive than outsiders to nuances of the local community, emphasize that the nation will henceforth hold all individuals accountable for their crimes, and stress a viable alternative to vigilante justice. In addition, the state and the body politic will generally be most likely to integrate these lessons of justice, accountability, and reconciliation following a cathartic *domestic* process that includes representatives of all parties. This internalization is extremely important to building peace. Conversely, if the state is relieved of the need to face these issues, leaving them to be handled and concluded by outsiders (and therefore easily disowned by local leaders if that becomes politically expedient), then the experience may contribute less to a durable peace and the entrenchment of the rule of law.

A UN Commission of Experts that preceded creation of the Rwanda tribunal acknowledged this point, noting that domestic courts could be more sensitive to individual cases and that resulting decisions "could be of greater and more immediate symbolic force, because verdicts would be rendered by courts familiar to the local community."[29]

Two developments suggest a gradual acknowledgment of the priority to be given to domestic ownership of the process. First, since 1995, there has been no purely international body established, à la the El Salvador commission or the Yugoslavia and Rwanda tribunals. Instead, where an international role (beyond support and assistance) is deemed necessary, the trend has been toward creation of hybrid international-domestic bodies, with local members generally forming the majority. Examples include the truth commissions in Guatemala and Sierra Leone, and hybrid courts in Cambodia, Sierra Leone, and Bosnia. Second, unlike the international tribunals for the former Yugoslavia and Rwanda, which were given primacy of jurisdiction that trumps the ability of any domestic court to pursue a prosecution, the statute of the new International Criminal Court (ICC) correctly shifted that primacy. The ICC is complementary to national justice systems and can assert its jurisdiction only over a case of genocide, war crimes, or crimes against humanity when the national system is incapable of or unwilling to do so.[30]

Similarly, there is a growing recognition that the rule of law requires local ownership. Outsiders can and should provide substantial levels of assistance, but they cannot descend upon a country for a year or two and magically impose a viable system and culture of respect

for the rule of law. "While the international community is obliged to act directly for the protection of human rights and human security where conflict has eroded or frustrated the domestic rule of law, in the long term, no ad hoc, temporary or external measures can ever replace a functioning *national* justice system."[31] As noted earlier, meaningful reforms related to the rule of law will require the development of significant local capacity and political will. This is often a painstaking and drawn-out process that does not jibe with the funding and program cycles and political attention span of international donors. As a consequence, while the rhetoric of "the importance of local ownership" is on the rise, these other factors often still result in the imposition of foreign-driven priorities and timetables for rule-of-law reform efforts. In various countries, after an international postconflict mission spends a few years directing affairs or deciding priorities, well-meaning international staff depart the country, leaving little in place in the way of changed capacity or attitudes and wondering why their efforts have not produced more significant results. Part of the answer lies in the degree of real local dissemination and local ownership of rule-of-law reform.

Practice, however, seems to be moving in the direction of rhetoric. The role of the international community in building the rule of law in postconflict societies is expanding, as noted earlier. As our collective understanding grows, however, of the relationship between the rule of law and postconflict stabilization and of how to facilitate the sustainable entrenchment of the rule of law, the place of local ownership is becoming more central, meaning that different approaches will be adopted based on local decisions informed by outside advice.

CONCLUSION

New challenges to peace require new tools. As war in all parts of the globe changes its complexion, becoming preponderantly international, establishing the rule of law plays an increasingly critical role, particularly in the immediate postconflict construction of peace.

There are those who, even today, imply that emphasis on the establishment of the rule of law is irrelevant, or at best tangential, to the real work of conflict resolution and postconflict peacebuilding—an exercise naively engaged in by those who believe that the simple imposition of legal regulations and institutions will promptly erase deep-seated resentments, hatreds, and power struggles. Nothing could be less accurate. The rule of law has at its core a hard-nosed and not particularly optimistic assessment of human nature and the prospects for conflict. It assumes that pacific pledges and conciliatory rhetoric are obviously important to peacebuilding but can be too tenuous. In the worst case, the rule of law imposes a network of institutions, mechanisms, and procedures that check sources of tension at an early phase, constrain the ability of any party to engage in violent or abusive action, and force an open process and a relatively level playing field. In the best case, when diligently nurtured, this system of accountability, conflict resolution, limits on power, and the airing and processing of opposing views—all undertaken through nonviolent channels—becomes habit forming, reducing the likelihood of another civil war.

NOTES

1. Lotta Harbom and Peter Wallensteen, "Patterns of Major Armed Conflicts, 1990—2004" in *SIPRI Yearbook 2005: Armaments, Disarmament and International Security* (Oxford: Oxford University Press, 2005), 121. The SIPRI study defines a major armed conflict as "the use of armed force between the military forces of two or more governments, or of one government and at least one organized armed group, resulting in the battle-related deaths of at least 1,000 people in any single year and in which the incompatibility concerns control of government and/or territory." The study found that during the period

1990–2004, only four of fifty-seven conflicts (7 percent) were wars of the classical interstate variety.

2. "The proclamation of this constitution . . . not only did not stop lawless and arbitrary rule, but also served to camouflage it, allowing the torture and killing of innocent people while praising Stalin's law for all the people." Aleksandr Iakovlev, "Constitutional Socialist Democracy: Dream or Reality," *Columbia Journal of Transnational Law* 28 (1990): 117.

3. "Concluding Document of the CSCE Copenhagen Conference on the Human Dimension, June 29, 1990," *International Legal Materials* 29 (1990): 1305, 1306. The CSCE member states explained that "the rule of law does not mean merely a formal legality which assumes regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression."

4. See, for example, Theodor Meron, "International Criminalization of Internal Atrocities," *American Journal of International Law* 89 (1995): 554.

5. United Nations, "Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, between 1 January 1994 and 31 December 1994," UN Doc. S/RES/955, annex (New York: United Nations, 1994). Even though the war in the former Yugoslavia was treated as international in nature, the international criminal tribunal created to address the abuses of that conflict stated its conviction that its jurisdiction also extends to crimes perpetrated in both internal and international conflicts. United Nations, *Annual Report,* UN Doc. A/49/342-S/1994/ 1007, par. 19 (New York: United Nations, 1994).

6. Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, Articles 6–8.

7. Boutros Boutros-Ghali, *An Agenda for Peace* (New York: United Nations, 1992), 32–34.

8. See, for example, Melvin Small and J. David Singer, "The War-proneness of Democratic Regimes," *Jerusalem Journal of International Relations* 1, no. 4 (Summer 1976): 50–69; Rudolph J. Rummel, *War, Power, Peace*, vol. 4 of *Understanding Conflict and War* (Newbury Park, Calif.: Sage Publications, 1979); Rudolph J. Rummel, "Libertarianism and International Violence," *Journal of Conflict Resolution* 27, no. 1 (March 1983): 27–71; Bruce Russett, *Grasping the Democratic Peace: Principles for a Post–Cold War World* (Princeton, N.J.: Princeton University Press, 1993); Zeev Maoz and Nasrin Abdolali, "Regime Types and International Conflict, 1815–1976," *Journal of Conflict Resolution* 3 (1989): 3–35; and William J. Dixon, "Democracy and the Peaceful Settlement of International Conflict," *American Political Science Review* 88, no. 1 (March 1994): 14–32. Much of the research on the "democratic peace" finds its roots in the theory propounded nearly two hundred years ago by Immanuel Kant. But see, for example, Edward D. Mansfield and Jack Snyder, "Democratization and War," *Foreign Affairs* 74, no. 3 (May–June 1995): 79–97. They suggest that although fully democratized nations are less likely to go to war with one another, the process of transition to democracy exacerbates instability and thereby enhances the possibility of entry into conflict in the short term.

9. "Concluding Document of the CSCE Copenhagen Conference on the Human Dimension." In 1994, to reflect a series of structural changes as the Helsinki process moved from a series of periodic meetings to a permanent organization with several institutional components and full-time staff, the name of the Conference on Security and Cooperation in Europe was formally changed to the Organization for Security and Cooperation in Europe.

10. See, for example, Rachel Kleinfeld, "Competing Definitions of the Rule of Law," in *Promoting the Rule of Law Abroad*, ed. Thomas Carothers (Washington, D.C.: Carnegie Endowment for International Peace, 2006).

11. As one observer of rule-of law-assistance has noted:

> Assistance in this field has mushroomed in recent years, becoming a major category of international aid. . . . Russia's legal and judicial reforms, for example, have been supported by a variety of U.S. assistance projects, extensive German aid, a $58 million World Bank loan, and numerous smaller World Bank and European Bank for Reconstruction and Development initiatives, as well as many efforts sponsored by Great Britain, the Netherlands, Denmark, and the European Union. . . .
>
> Almost every major bilateral donor, a wide range of multilateral organizations—especially

> development banks—and countless foundations, universities, and human rights groups are getting into the act. In most countries, U.S. rule-of-law assistance is a small part of the aid pool, although Americans frequently assume it is of paramount importance. They mistakenly believe that rule-of-law promotion is their special province, although they are not alone in that. German and French jurists also tend to view their country as the keeper of the flame of civil code reform. British lawyers and judges point to the distinguished history of the British approach. Transitional countries are bombarded with fervent but contradictory advice on judicial and legal reform.

Thomas Carothers, "The Rule of Law Revival," *Foreign Affairs* 77, no. 2 (March–April 1998): 95, 103–104.

12. Organization for Security and Cooperation in Europe, *Kosovo: A Review of the Criminal Justice System* (Vienna: Organization for Security and Cooperation in Europe, October 18, 2000).

13. As UN secretary-general Kofi Annan has noted, "experience in the past decade has demonstrated clearly that the consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in the long term, cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for peaceful settlement of disputes and the fair administration of justice." Kofi Annan, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. No. S/2004/616 (New York: United Nations, August 23, 2004), 3, par. 2.

14. For a comprehensive review of this category of rights, see Stanislav Chernichenko and William Treat, *The Administration of Justice and the Human Rights of Detainees: The Right to a Fair Trial—Current Recognition and Measures Necessary for Its Strengthening,* UN Doc. No. E/CN.4/Sub.2/1994/24 (New York: United Nations, June 3, 1994); and William M. Cohen, "Principles for Establishment of a Rule of Law Criminal Justice System," *Georgia Journal of International and Comparative Law* 23 (Summer 1993): 269–287.

15. Radio Free Europe/Radio Liberty, "Britain Sends Special Crime Squad to Kosovo," *Balkan Report* 5, no. 3 (January 12, 2001).

16. "General Framework Agreement for Peace in Bosnia and Herzegovina," annex 7, article I, par. 3, and annex 11, November 21, 1995.

17. Friedrich A. von Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944), 72.

18. Hernando de Soto, *The Other Path: The Invisible Revolution in the Third World* (New York: Harper and Row, 1989), 253.

19. See, for example, Diane F. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," *Yale Law Journal* 100 (June 1991): 2537–2615.

20. Adding to the concern that the gacaca approach will not quickly calm the situation, between April 2005 and March 2006, some 19,000 Rwandans sought asylum in neighboring Burundi, reportedly fleeing persecution under the gacaca system. "Burundi-Rwanda: Thousands More Asylum Seekers Repatriated," IRINnews.org, June 13, 2006; and UN Office for the Coordination of Humanitarian Affairs, http://www.irinnews.org/print.asp?reportid=53896, June 23, 2006.

21. Thomas Buergenthal, "The United Nations Truth Commission for El Salvador," *Vanderbilt Journal of Transnational Law* 27, no. 3 (October 1994): 503.

22. As Thomas Buergenthal, one of the three members of the commission, has noted, the "establishment of the Truth Commission marks the first time that the parties to an internal armed conflict, in negotiating a peace agreement, conferred on a commission composed of foreign nationals designated by the United Nations the power to investigate human rights violations committed during the conflict and to make binding recommendations. . . . National reconciliation is often difficult to achieve in countries trying to overcome the consequences of a bloody, internal armed conflict or an especially repressive regime without an appropriate accounting for or acknowledgment of past human rights violations. To the extent that the Truth Commission as an institution met the demands of the Salvadoran peace process, it has become a model the international community is likely to draw upon in the years to come." Ibid., 501–502. In his article, Professor Buergenthal provides an insightful firsthand description and analysis of the Truth Commission and its relationship to the peace process.

23. United Nations, *Report of the Commission on the Truth for El Salvador: From Madness to Hope*, UN Doc. S/25500, annex (New York: United Nations,

1993), 25; and Buergenthal, "The United Nations Truth Commission for El Salvador," 522.

24. "Agreement between the Government of Guatemala and the Guatemalan National Revolutionary Unity on the Establishment of the Commission for Historical Clarification," June 23, 1994.

25. A multiyear interdisciplinary project on constitution making, peacebuilding, and national reconciliation, organized by the United States Institute of Peace in cooperation with the United Nations Development Programme, conducted case studies of the constitution-making processes of eighteen countries in transition to derive a series of lessons for application in postconflict environments. The analyses developed through the project inform this section of the present essay.

26. Interviews by the author.

27. Government of Eritrea, Proclamation No. 55/1994, March 15, 1994.

28. Bereket Habte Selassie, "Constitution Making as a Historic Moment" (keynote speech to the International Symposium on the Making of the Eritrean Constitution, Asmara, Eritrea, January 7, 1995).

29. "Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935," 1994, 31.

30. Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, Preamble and Article 17.

31. Annan, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 12, par. 34 (emphasis added). A UN-sponsored study on postconflict reconstruction proceeds from the same premise: "Wartorn societies inevitably depend to a large degree on external assistance for reconstruction. . . . The question of the relative role, responsibility and authority of external donors and actors, as opposed to local ones, in bringing about and maintaining peace and in rebuilding the country is one of the most important and most delicate questions. . . . External assistance, rather than being subsidiary to local efforts, tends to become a substitute, and worse, destroys local coping and resistance mechanisms and controls emerging local institutions and solutions. A large-scale foreign presence . . . is obviously not sustainable in the long term, neither politically for the local actors nor financially for the external ones. A policy of 'betting on the local' may in the short term be more laborious, less spectacular, and take more time, but in the long term may be the only realistic option." *Rebuilding Wartorn Societies: Problems of International Assistance in Conflict and Postconflict Situations* (Geneva: United Nations Research Institute for Social Development and the Programme for Strategic and International Security Studies of the Geneva Graduate Institute of International Studies, August 1994), 17.