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TRENDS TOWARD TRANSNATIONAL JUSTICE: INNOVATIONS AND INSTITUTIONS

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I. The Changing Global Context

Significant changes in the global setting over the course of the last few decades resulted in an increasing prominence for the pursuit of transnational justice and individual accountability. The aftermath of the terrifying attacks on America on September 11th seems likely to halt this trend, at least temporarily, but not necessarily. If winning this new war against terrorism is understood to depend on addressing its roots in deprivation and grievance, then the indirect effect of the attacks could be to strengthen awareness that the promotion of justice is integral to global security rather than a matter of generosity or empathy.

Six developments in the global context have encouraged the pursuit of global justice, and provide a background for an appreciation of the institutional and substantive innovations that

have taken place in response: (1) the end of the ideological rivalry that accompanied the cold war; (2) the focus of attention on world economic policy within a market-oriented framework; (3) the relevance of international human rights standards to a series of peaceful transitions from authoritarian rule to constitutional democracy; (4) the heightened influence of transnational social forces and networks of activists in a wide array of normative (ethical, legal) arenas of decision; (5) the anti-colonial movement as an implementation of the right of self-determination; and (6) the geopolitics of ambivalence with respect to the conduct of humanitarian diplomacy either under the auspices of the UN or on some other basis. Each of these developments deserves some brief explanation.

(1) End of cold war. The strategic rivalry between East and West tended to give an ideological edge to all discussions of normative issues, including human rights. Despite this atmosphere of tension and conflict in the realm of values and ideas, remarkable progress was made during the cold war in establishing an impressive foundation for human rights in

international law. The United Nations provided the auspices for this notable achievement, realized principally through the medium of a series of inter-governmental negotiated texts that evolved from legal documents encompassing human rights as a whole to a focus on such specific sectors of concern as racial discrimination, treatment of women and children, and the prohibition of torture.

Since the fall of the Berlin Wall in 1989, these developments were largely freed from polemical instruments of international propaganda, and failures of governments to respect fundamental human rights acted to erode the underpinnings of political legitimacy. A consensus emerged among states that legitimate governance at the national level depended upon constitutionalism, a robust private sector, and respect for human rights, including especially property rights and electoral procedures to determine political leadership.

In this regard, it is important to take account of changes in the development approaches of countries in the South. With disappointments associated with foreign economic assistance,

the collapse of the leading socialist country, the impressive success of the East Asian market-oriented economies, and the failure of the 1970s movement for a New International Economic Order, there was a widespread abandonment by countries in the South of Marxist-oriented, and even distinctively "Third World" development perspectives. One expression of this new climate of opinion was a shift in emphasis by capital-importing countries from attempts to expropriate foreign owned properties to efforts to attract maximum private investment, which presupposed the stability of alien property rights, minimal regulation, low rates of taxation, and non-interference with the repatriation of profits. Obviously, the leading international financial institutions played a huge role in promoting this reorientation of national economic policies, including making the availability of capital and credit conducive to the establishment of conditions favorable to private investment.

(2) An era of globalization. These factors associated with the disappearance of strategic rivalries, with their recurrent threats of major warfare, along with the shared preoccupation

around the world with the dynamics of rapid economic growth, led to a new phase of world politics, most widely labeled as "globalization." The economistic emphases on growth, especially given the accompanying opposition to interferences with the efficient use of capital, created some of the discontents associated with emergent patterns of global economic governance. [For one depiction among many see Richard Falk, Predatory Globalization: A Critique (Cambridge, UK: Polity, 1999)]

Part of the enthusiasm for such an unabashed embrace of neo-liberal ideas by dominant forces around the world also resulted from a new attitude toward the relationship between conditions favoring economic success and preferred political arrangements. At least rhetorically, and to some extent behaviorally, there was a shift in leadership circles from the view that authoritarian rule, disciplining labor and protecting entrepreneural interests, was best for growth and investment to an endorsement of *liberal models* of democracy and respect for human rights. This shift mainly focused on the establishment of conditions allowing free, multi-party elections, and rights of

political opposition, but was also generally supportive of efforts at the international level to respect human rights, especially those of civil and political character. The establishment of an Office of the High Commissioner of Human Rights within the UN System was an institutional response in 1993 to the growing role of human rights in international life.

(3) <u>Transitional Justice.</u> A closely related development concerned the manner with which constitutional democracy emerged in various national settings that had been previously brutally governed in an authoritarian manner. This process of transition raised serious questions about the degree of scrutiny that should be directed at Crimes Against Humanity, torture, and other abuses of state power. On the side of maximal scrutiny were those who argued in favor of individual accountability for past crimes of state. On the side of minimal scrutiny were those who were either associated with or supportive of the former government or those who believed it was necessary to give up the quest for "justice" so as to sustain "peace." This choice usually reflected pragmatic calculations, and especially the

realization that military and political forces from the old order retained varying degrees of influence within the armed forces, security and intelligence services, and other structures of power. The most common formula for compromise in this context was to opt for "truth" by establishing truth and reconciliation commission with varying mandates, whose members were respected for their integrity and professional competence. In exchange, efforts to pursue a strict accounting and retributive justice were renounced. The widespread adoption of such an approach, especially in Latin America, caused complaints about the emergence of a "culture of impunity." In response, supporters of truth and reconciliation commissions in these circumstances argued that this was as far down the path of legality and deterrence that the political realities would allow. [For a series of valuable interpretations of the dynamics of transitional justice, see Robert I. Rotberg and Dennis Thompson, eds., <u>Truth v. Justice</u> (Princeton, NJ: Princeton University Press, 2000).]

As earlier indicated, the change in the global setting of the 1990s opened the way toward more ambitious approaches on

these matters. Later transnational efforts to establish special tribunals (former Yugoslavia, Rwanda, Cambodia, and possibly Sierre Leone, East Timor) and the ICC gave rise to an impressive coalition of governments and NGOs seeking to push in the direction of accountability as an integral dimension of global governance.

In this respect, the truth commission mechanism gathered material about the criminality of certain governments and their leader, and thereby expressed some concern that past misdeeds be repudiated, that victimization be acknowledged, and that the new political order provide reassurances about repetition. But such commissions also fell short, and exhibited the inability and unwillingness to impose accountability on those responsible for such abuses in the past, or in most instances, to identify even the main perpetrators. It is a matter of conjecture as to whether reconciliation can occur in the absence of some retributive mechanism that both punishes and takes away ill-gotten gains. Some anthropologists have argued that without this retributive dimension, the disclosures associated with "truth" do not protect

the society from a recurrence of violence, especially in setting where past abuses were associated with ethnic cleansing. [See John Borneman, "Reconciliation after Ethnic Cleansing: Listening, Retribution, Affiliation," to be published in Public Culture, 2002; compare more delinked approaches favored in Rotberg & Thompson, note -, especially chapters of Alex Boraine and Dumisa B. Ntsebeza.]

(4) Activist Networks. The unexpected impact of international human rights came about largely through the efforts of voluntary associations of citizens acting on the basis of transnational values and goals. Amnesty International and Human Rights Watch, particularly in relation to civil and political rights, developed extremely effective means to exert influence on governments. Linkages were established between these transnational NGOs, local activists, and individuals and groups that were the targets of governmental abuse. Information became an instrument of "soft power" as most governments were reluctant to have their image tarnished by the publication of objective reports that could not be dismissed as hostile

propaganda. [A useful assessment of this emergent transnational activism can be found in Margaret E. Keck and Kathryn Sikkink, Activists Beyond Borders: Advocacy Networks in International Politics (Ithaca, NY: Cornell University Press, 1998) esp. 79-120; for a pioneering study of the emergence of global civil society see Mary Kaldor, Global Civil Society: A New Phenomenon (forthcoming 2002).]

This activism in civil society also encouraged governments, especially those of a liberal democratic persuasion, to take human rights more seriously in the formation of their foreign policy. Western governments also realized that they enjoyed a definite advantage if compared to communist governments with regard to civil and political rights. As a result, Western governments tended to put human rights increasingly on their foreign policy agendas, and gave such issues prominence in East/West negotiations, perhaps most saliently in the Helsinki Accords of 1975. This agreement that stabilized the borders of Eastern Europe in exchange for an annual accounting of human rights adherence turned out to be historically relevant, both

discrediting oppressive regimes and mobilizing domestic opposition around the assertion of legitimate demands. In the 1980s the peaceful transition of Eastern European countries (with the partial and notable exception of Romania) and of the Soviet Union was greatly facilitated by civic activism that rested on demands for patterns of governance that respected international human rights standards.

Such activism also gave rise to the anti-apartheid movement, and especially led such governments as the United States and Great Britain to abandon their support of the South African government as a strategic ally in the cold war. This movement also involved the whole of the United Nations in an effort to exert pressure via sanctions on the racist regime in South Africa. The success of these pressures in producing a multi-racial democracy without accompanying bloodshed was one of the political miracles of the 1990s, and demonstrated the degree to which grassroots activism with respect to linked to inter-governmental pressures can produce dramatic societal changes.

Of course, it is notable, and a matter of controversy, that "human rights" in this activist transnational sense gave almost no attention to economic, social, and cultural rights. There have been recent attempts in both North and South to rectify this imbalance. The Center for Economic and Social Rights, founded by a group of young American law school graduates in the mid-1990s, is an NGO explicitly dedicated to the implementation of these neglected international standards. Initiatives associated with opposition to certain aspects of economic globalization, including resistance to the imposition of structural adjustment programs and anti-debt coalitions, have moved toward a recognition that economic and social rights often are accorded primacy, and at least equivalance, in the life experience of economically disadvantaged countries seeking to cope with the poverty of a significant portion of their population.

Recent problems associated with ethnic violence and encroachments on the survival of indigenous peoples have called attention to the importance of cultural rights. [See Maivan Clech Lam, At the Edge of the State (1999)] The terrorist attacks of

September 11th, including their apparent fanatical expression of religious extremism, is a further dramatic indication of the relevance of cultural rights for the agendas of transnational activist networks. The concern takes on an urgency in this new global context giving a sudden priority to cultural rights as part of the struggle to avoid "the war against global terrorism" turning into "a clash of civilizations."

The emergence of such networks has evolved to the point where it is plausible to posit the emergence of "global civil society" as a constituency of networks committed in various ways to the promotion and attainment of global justice across a wide range of issues. The strength of this new dimension of world politics has been augmented by a flexible capacity to enter into collaborative relationships with governments in the pursuit of shared goals. The most successful expressions of this collaborative process to date are the Anti-Personnel Landmines Treaty and the Rome Treaty seeking the establishment of the ICC. But such collaboration has long been a formal and informal aspect of UN global conferences on such matters as

environmental protection, women, and the resources of the oceans.

(5) <u>The Anti-Colonial Movement</u>. A momentous change in the climate of opinion accompanied the movement of decolonization, bringing into global policy arenas normative ideas about fairness and justice. As well, the legitimation of the struggle against colonialism rested on overwhelming UN support for the right of self-determination to be exercised by all colonized peoples (provided that there result no dismemberment of existing states).

There are two relevant considerations. The first was the acceptance of a right of self-determination as a fundamental human right, which under favorable political circumstances at the end of the cold war was extended beyond the colonial setting to reinforce secessionist movements following the breakup of the Soviet Union and in relation to the disintegration of the former Yugoslavia. The second involved the participation in world politics of a large number of states with demands for

reform, especially in the economic and political spheres, raising questions about the nature of global justice.

(6) Geopolitics of Ambivalence. In the 1990s there arose a new sense that the UN could act even with respect civil strife and breakdowns of internal order in response to impending or unfolding humanitarian catastrophes. The new phase of this process began in relation to famine and disease in Somalia in 1992, generating both an active effort under the UN to alleviate the suffering and a subsequent set of state-rebuilding initiatives. These latter attempts produced a backlash that led to the death of 18 American peacekeeping soldiers in a firefight with forces in Somalia opposed to the political dimensions of the American presence. Such losses led to a reluctance by leading states to pay such costs for future undertakings that could not be explained and justified by governments from the perspective of strategic interests. This reluctance was magnified in response to genocide in Rwanda during 1994, with important UN members refusing to take even small steps to oppose the killing. [See Linda Malvern book] It also deeply altered the UN response to

ethnic cleansing in Bosnia, culminating in the massacres of some 7,000 male Muslims at Srebrenica in 1995. [David Reiff, Slaughterhouse] Against this background, the UN was bypassed in the context of an impending humanitarian catastrophe in Kosovo, inducing "a coalition of the willing" to rely in 1999 on NATO to achieve effective protection for the increasing vulnerable and abused Albanian Kosovar majority population. Such a process attained effectiveness, but at the expense of legality, opening up an undesirable gap between what is permissible according to international law and what is morally and politically legitimate by reference to fundamental human rights, including the prohibition on ethnic cleansing. [See Report of Independent International Commission on Kosovo, Kosovo Report: Conflict, International Response, Lessons Learned (Oxford, UK: Oxford University Press, 2001), esp. 163-98]

The counter-intuitive point here is that this ambivalence in response to these extreme sets of circumstances produced some unexpected outcomes beneficial for the normative order. Such responses were meant partly to camouflage the unwillingness of

major states to take risks or pay the costs of an effective humanitarian intervention. The most important of these was the decision by the UN Security Council in 1993 to establish and fund ad hoc international criminal tribunals for the prosecution of severe crimes of state associated with the breakup of Yugoslavia and later, to deal with genocide in Rwanda. Such an initiative allowed the UN and its members to regain some of the high moral ground without making any controversial commitment to intervene directly. Geoffrey Robertson describes the climate of opinion that led to the establishment of the Yugoslav tribunal as "a fig leaf to cover the UN's early reluctance to intervene in the Balkans." [Geoffrey Robertson, <u>Crimes Against Humanity: The Struggle for Global Justice</u> (New York: New Press, 2001)xvii-xviii.] Such a step also revived the Nuremberg idea in the post-cold war setting, on the basis of a half-century of legal development with respect to international humanitarian law and in view of human rights law generally. This revival triggered further efforts in global civil society culminating in the establishment of an international criminal court, which has

restricted authority, but nevertheless represents a leap forward with regard to individual accountability for severe crimes of state and the extension of the rule of law in a manner that overrides earlier prerogatives of sovereignty. In this ironic regard, it is possible to conclude that in the 1990s this geopolitics of ambivalence led to a failure of the organized international community to protect several peoples exposed to extreme threats and harm, but also to make the perpetrators of such abuse more likely to be brought to justice in some form. The highest achievement to date in this respect is the indictment and apprehension of the former Yugoslavian head of state, Slobodon Milosevic.

In effect, the reluctance of states to regard humanitarian goals as worthy of major sacrifices of lives or resources, while at the same time responding to pressures to put a moral face on foreign policy, has had strange and contradictory effects. Among these has been to lend support to civil society pressures to impose accountability on leaders for crimes of state and to institutionalize the process to the extent possible.

The September 11th Attacks. The impacts of the mega-terrorist attacks of September 11th on the global context and its normative order is uncertain at this point, but it is likely to cause an eclipse, at least temporarily, of efforts to pursue transitional justice, and related preoccupations with global governance and the regulation of the world economy. The most immediate effect of mobilizing governments to engage in a war against global terrorism is to displace and redirect economic and normative concerns, and again allow security issues and geopolitical pragmatism to dominate the global policy agenda. Cooperative relations among governments to carry on "the global war against terrorism" necessarily leads to opportunistic diplomacy that overlooks instances of domestic oppression and human rights abuses in exchange for cooperation in pursuing "terrorists."

The analysis here suggests that the complexity and interconnectivity of world order as a result of technological innovations is likely to make this eclipse a temporary phenomenon. Such an anticipation is also reinforced by the extent to which transnational activism is likely to reassert its

demands for legitimate forms of global governance, which includes the extension of the rule of law and the institutionalization of procedures for accountability at national, regional, and global levels. Furthermore, there may even be unexpected outcomes, including a willingness by countries to participate in the establishment of accountability mechanisms and law enforcement procedures relating to terrorism in exchange for comparable commitments with respect to Crimes Against Humanity, genocide, and international humanitarian law.

Without acknowledgement, there is likely to be a new resolve for reasons now of strategic self-interest of richer countries to address issues of poverty and development among the more economically distressed parts of the world. Such an outcome is not at all assured, as some counter-terrorist analysts have been quick to point out that there has been little or no global terrorism emanating from the most disadvantaged of all parts of the world, sub-Saharan Africa. The more persuasive approach to this issue is to note that *under certain conditions* widespread poverty, despair, humiliation gives rise to extremist

politics, and that such conditions have had such an effect in large portions of the Islamic world.

II. Implementing Accountability Norms: Options and Mechanisms

As suggested, the global context created favorable and diverse conditions, especially starting in the 1990s, for the pursuit of transnational justice. This pursuit was not only directed toward the rectification of present grievances. It also focused, perhaps to a greater extent, on the redress of historic wrongs. This focus can be described as a multi-faceted worldwide phenomenon of responding to perceived examples of acute injustice inflicted on persecuted and victimized collective identities (race, religion, nationality, gender). [A useful overview of the range of restitution claims can be found in Elazar Barkan, The Moral Guilt of Nations: Restitution and Negotiating Historic Injustices (New York: Norton, 2000)]

In gaining an understanding of this pursuit of justice it is useful to consider both the substantive type of injustices that have give rise to the perceived grievance and the mechanism of rectification that is invoked in response. Finally, it will be helpful

to consider institutional and doctrinal developments intended to regularize the process by which victimized collectivities can be protected, either by their own initiative or through the operations of global law enforcement mechanisms.

There are several accounts of the emergence of this global justice movement that should be distinguished: (1) a series of stages that proceeds from the evolution of human rights`to their internationalization, and then further, a range of moves to promote their enforcement; [This line of interpretation is effectively presented by Robertson, note -] (2) the willingness of private sector actors (banks and corporations) and governments to acknowledge their responsibility to offer substantial compensation for past wrongs, what might be described as a restitution ethic; Barkan regards this path of restitution as "a potentially new international morality..a new globalism." [Barkan, note -, ix]; (3) a more synthetic view of this dramatic heightening of global justice as drawing upon a rights discourse, a restitution and accountability ethos, and various impulses to stabilize and legitimize world order (either to soften criticism of corporate

globalization or, now, to ensure success in the war against global terrorism). This paper proceeds on the basis that this third view of transnational justice movement gives the best overall account. It should be noted that none of these overviews does a very convincing job of answering the question raised in the early part of this paper: why in the decade of the 1990s? why not earlier? And why the prediction now of a temporary eclipse?

The Role and Nature of Historic Injustices. The purpose here is to identify the most salient injustices that have been the source of initiatives designed to mitigate their bad memory and to give various forms of relief to victims and their representatives. Often, if not invariably, the dynamic of redress is pursued relentlessly by a particular community of victims, challenging the opposite dynamic of denial that is embraced often unwittingly by the wider societal community, and certainly by the perpetrators and their supporters.

***---the centrality of the Holocaust.* Survivors of the Holocaust that occurred in Nazi Germany had been very active and effective since 1945 in efforts to secure various forms of**

relief. The magnitude of the crimes committed particularly against the Jewish people in Europe exerted a formative impact on the entire post-World War II imagination, especially in combination with the guilt felt by the victorious liberal democracies of Western Europe and North America. Such an interaction to varying degrees was responsible for the Nuremberg Judgment, the criminalization of genocide by treaty, the internationalization of human rights, the global pursuit of Nazi era perpetrators of Nuremberg crimes, a variety of efforts to reverse the confiscation of Jewish property, and more controversially, the establishment of the state of Israel. In this regard, the Asian victims of Japanese injustice and exploitation from the World War II era received far less attention, with the Tokyo Trials of Japanese leaders accused of war crimes receiving scant attention at the time, and subsequently. It remains difficult to obtain the documentary record of the outcomes of these trials, and Japan was never placed under pressure comparable to Germany to renounce its past and restructure its future. As a result, Asian victims of injustice have

been far slower in the pursuit of their rights than were their European counterparts. The story is complex, the explanation of the salience of the Holocaust contested, but the importance of Holocaust-related efforts to rectify Nazi criminality cannot be doubted.

After the years immediately following World War II this activism associated with the victims of the Holocaust also was generally overtaken by the global preoccupations of the cold war. But there were exceptions, the most notable of which was the overseas abduction and subsequent 1961 trial and execution of Adolph Eichmann in Israel. By this undertaking Israel established the right of national courts to prosecute crimes against humanity wherever and whenever they occur, providing the foundation for what has later come to be known as "universal jurisdiction." [There were other prosecutions under varying circumstances associated with punishing those associated with Holocaust crimes. For perceptive portrayal of this activity see Gary Jonathan Bass, Stay the Hand of Vengeance: The Politics of War Crimes Tribunals (Princeton, NJ: Princeton University Press,

2000) esp. 174, suggesting that these post-Nuremberg trials were more effective in focusing on the Holocaust crimes, as Nuremberg had devoted its main attention to Crimes Against the Peace committed by the expansionism of Nazi regime.]

In the 1990s, however, the unfinished economic business of Holocaust claimants gained notoriety, achieving significant success in a number of areas: the recovery of so-called "Holocaust gold" and bank deposits from Swiss and other banks; the pursuit of proceeds from insurance policies issued on the lives of Holocaust victims, but never paid; the recovery of stolen art treasures; compensation for various categories of "slave labor" performed for the benefit of private corporations. Billions of dollars were transferred to victims and their representatives, either on an individual basis or through lump sum arrangements. Criticisms were voiced about the monetization of suffering, alleging even the emergence of "a Holocaust industry." Also, lawyers were criticized for their large fees and many complaints were voiced about the differential success of various categories

of victims. Those from Eastern Europe fared less well, as did the non-Jewish victims of Naziism, especially the Roma.

Despite such criticisms, these moves toward redress did accomplish a number of results that are significant in relation to the overall pursuit of global justice: vindicating the rights of victims, even after the passage of years, to obtain economic redress for the violation of their property rights, including the right to receive compensation for work performed under abusive conditions; inspiring other non-Holocaust claimants to seek comparable forms of redress, especially those victim communities in the Pacific region. The pressures for redress in relation to the Holocaust ordeal were not solely, or perhaps predominantly, associated with the vindication of *legal* rights. Moral suasion and the reputation of governments and private sector actors were also important factors, suggesting both the emergence of a climate of opinion that supported claims by such victims and suggested adverse consequences for alleged wrongdoers that took legalistic refuge on matters of proof and formal right.

---*Asia/Pacific Redress.* There is no doubt that the Holocaust redress experience inspired efforts by a range of other victim communities, but especially on the part of those that arose out of the experience of Japanese expansionism before and during World War II. In part, such a delayed pursuit of redress in the 1990s was explicitly tied to the primacy of the Holocaust as in Iris Chang's widely read book on the 1937 Nanking massacres entitled <u>The Forgotten Holocaust</u>. Aside from the psychological advantage of Eurocentrism and the sheer horror associated with Auschwitz, the Asian/Pacific context was less hospitable to moves toward redress: the Japanese government was far less repentant than the German government; a peace treaty with Japan had waived all individual claims, a legal obstacle that did not exist in the Holocaust setting; Japan had made certain "voluntary" payments to Asian countries, and were excused by treaty from further legal responsibility; there was less of an Asian tradition supporting individual claims or collective responsibility by governmental or private sector actors.

Despite this, Asian/Pacific concerns with redress picked up considerably in the 1990s, but it placed far less emphasis, for reasons just indicated, on legal rights to obtain economic restitution. It concentrated more on exerting an influence on public opinion, achieving symbolic satisfaction in informal arenas where past criminality could be confirmed and by soliciting formal acknowledgement and repudiation, especially by the Japanese Government. With respect to war crimes in the countries occupied by Japan, public and academic meetings, often with the Japanese participants, reconstructed the criminality alleged to have occurred. In effect, redress was sought by the activation of memory, and through its validation by responsible governmental leaders.

Global civil society also contributed, especially in the form of participating in the organization and conduct of "citizens' tribunals" that confirmed allegations and reached conclusions, which included recommendations. The Japanese wartime practice of "sexual slavery" and "comfort women" was made the subject of a highly publicized proceeding in Japan. [See Christine

M. Chinken, "Women's International Tribunal on Japanese Military Sexual Slavery," American Journal of International Law 95: 335-41 (2001)]

In recent years more direct legal efforts to recover some form of compensation on behalf of various groups of victims, including those abused as prisoners of war by being made to engage in forced labor that benefited private firms and the Japanese war effort, have not succeeded for reasons earlier suggested. At the same time, the presentation of such claims and associated publicity has greatly heightened awareness of such abusive patterns, which itself seems to have a beneficial effect on the healing process even after a lapse of decades.

---*Redress for Indigenous Peoples.* Representatives of indigenous peoples have for the past thirty years or so made various efforts to internationalize their struggle to protect the remnants of their traditional prerogatives with respect to land, resources, and ways of life. There is great diversity of perspective and strategy, but a consensus as to a broad array of normative demands set forth in the Declaration of the Rights of

Indigenous Peoples, and centered on a contested claim of a right of self-determination. The UN has provided a space for the articulation of this consensus in the form of the Informal Working Group on the Rights of Indigenous Populations that met annually for several weeks in Geneva under the auspices of the Committee Against all Forms of Discrimination and Persecution.

The redress being sought was diverse, but mainly future-oriented in the sense of seeking to protect what remained of the patrimony of indigenous peoples against the assaults associated with large-scale modernizing development projects. There was a widespread recognition by governments and by the United Nations that the grievances of indigenous peoples were founded on historic injustices of dramatic proportions, and that some level of response should be encouraged. But what level? Any attempt to rectify past wrongs seemed outside the bounds of political feasibility, and so the focus shifted to preserving the status quo in the face of continuing assaults.

---*Reparations for Slavery.* In recent years there have been more and more serious efforts by descendants of slaves in

America to seek reparations for the suffering associated with their bondage. Prior to the 1990s, such contentions had been dismissed as frivolous, or divisive, but the successful pursuit of Holocaust claims, especially those related to slave labor, lent an aura of credibility to the contention that the victims of slavery, or at least their heirs, should be compensated to some extent.

The UN Conference on Racism, held during 2001 in Durban, acknowledged that slavery and the international slave trade, were crimes against humanity "and should always have been so." The Final Declaration stops short of supporting reparations, and puts its emphasis on states "to honor the memory of the victims" and to call for the universal condemnation of slavery and its "reoccurrence prevented."

---*Political Crimes of State*. The idea that even political leaders can be held accountable under <u>international</u> legal standards for crimes against their own citizenry was given its historic impetus at Nuremberg. Such accountability overrode idea about sovereign immunity, acts of state, and the territorial character of criminal law. After World War II such standards of

accountability were imposed on surviving leaders of Germany and Japan, but the notion of accountability was associated with wartime, and was applied in such a way as to give weight to allegations of "victors' justice." [The best analysis along these lines was directed at the Tokyo War Crimes Tribunal in Richard Minear, Victors' Justice (Princeton, NJ: Princeton University Press, 19); the most respective positive appraisal in the context of the German trials was made by a member of the US team of prosecutors. Telford Taylor, The Anatomy of the Nuremberg Trials (New York: Knopf, 199-).] Despite these criticisms, the imposition of accountability was based on trials in which the defendant was given due process. Those convicted and punished were clearly responsible for waging "aggressive war" and implicated in practices that were grossly inhumane.

At the same time, the governments that had organized these trials, and constructed world order after 1945, were not ready to institutionalize what had been an ad hoc and flawed approach to accountability. The Nuremberg Principles were formulated in an authoritative form by the International Law

Commission, and then endorsed by way of a UN General Assembly Resolution. In this sense, a normative framework for accountability was incorporated into international customary law, and binding on all states. But no institutional implementation was undertaken until after the cold war.

To the extent that the Nuremberg idea of accountability was kept alive during the cold war era, it was a result of activist individuals in civil society, and particularly in the United States during the latter stages of the Vietnam War. In this period various acts of non-cooperation with government policy, whether refusing to serve in the armed forces, pay taxes, and other forms of resistance, relied for justification on the existence of "a Nuremberg obligation." Individuals were obliged to obey international law, not their own government, with respect to fundamental issues relating to recourse to war and its conduct.

Notions of accountability resurfaced with a flourish during the 1990s. First of all, there were international trials before the Hague Tribunal of individuals arising out of alleged crimes committed in the course of the Balkan Wars. And second, there

was the spectacular Spanish indictment and British detention of General Augusto Pinochet for crimes committed during his tenure as head of state in Chile during the period 1976-89. This incident encouraged wider scrutiny that extended to such controversial figures as Henry Kissinger and Ariel Sharon. It also stimulated efforts to provide a more authoritative framework to guide national courts when asked to impose accountability on persons alleged to be responsible for past crimes of state. [See collaborative effort of international law experts resulting in The Princeton Principles on Universal Jurisdiction, brochure published under the auspices of the Program in Law and Public Affairs, Princeton University, 2001.]

II. Modalities of Response

As Martha Minow has observed, "..a century marked by human slaughter and torture, sadly, is not a unique century in human history. Perhaps more unusual than the facts of genocides and regimes of torture marking this era is the invention of new and distinctive legal forms of response." [Minow, Between

<u>Vengeance and Forgiveness: Facing History after Genocide and Mass Violence</u> (Boston, MA: Beacon, 1998) 1.] We need to underscore this realization that the departure from history is not the occurrence of unspeakable mass crimes against people, but the growing resolve to treat such behavior as ruptures of the normative order of world society that needs to be formally repudiated. The essence of this repudiation is to rely on legal mechanisms to render "justice," to avoid endorsing retaliatory violence, and to seek an eventual reconciliation through a compbination of transparency (that is, documenting the evil) and retribution (that is, punishing the perpetrators via a fair procedure). As argued this process gained momentum after the end of the cold war, but now is placed in some jeopardy by the events of September 11th. This section reviews briefly the main lines of response that have been adopted to fit a wide range of national and global contexts.

If the focus here is upon *transnational* justice, then should the role of national institutions in addressing past instances of injustice be included? Given the interpenetration of national and

global, the distinction has become artificial in the extreme for many, but not all, purposes. Here, the initiation of some procedure at least to document past criminality has become part of the rehabilitation process, signifying a rupture with the past, which restores full legitimacy to a government. But also, there is an interactive dynamic working in both directions. The judicial scrutiny of Pinochet in Spanish and, especially, in British courts, appeared to create a new receptivity in Chile, *after* Pinochet was returned due to the British finding that he was not medically fit to stand trial. And the truth and reconciliation process that became so widespread for the past two decades as an integral feature of transitions to democracy at the state level, undoubtedly contributed to the willingness of many governments to support the idea of an international criminal court. The statute of such a court, as embodied in the Rome Treaty, recognized the complementarity of national and international tribunals, giving priority to national prosecution.

---criminal trials: national and international. There is no more dramatic instance of moves toward transnational justice

than the indictment and prosecution of those responsible for the perpetration of unforgivable crimes, especially heads of state. This revival of the Nuremberg idea of accountability for violating fundamental international (and national) norms represents part of a wider process of seeking to limit sovereign discretion, and to establish "responsible sovereignty" as a condition of membership in good standing of a state in international society. Thus allegations and indictments directed at Pinochet and Milosevic have received media attention and are of great public interest.

Beyond this, the trial of perpetrators of such international crimes, even if belatedly, achieves a form of retributive justice. Although the punishment can rarely fit the crime, given its character, it helps with the healing of victims and their families. Such trials also generate a documentary record of criminality that contributes to an ethos of prevention with respect to the future.

Of course, there are problematic aspects, as well. The International Criminal Tribunal for former Yugoslavia has been criticized as "politically" motivated. The indictment of Milosevic

in the midst of a NATO attack on his country is often mentioned in this regard. If not indicted in relation to the Bosnian War where more severe instances of ethnic cleansing occurred, why for his conduct in Kosovo? If only his crimes in Kosovo could be established by available evidence, why not wait until the military campaign had ended? Other criticisms related to the failure to give as much attention to Croatian and Bosniac crimes as to Serbian crimes, the slowness of the process, and the lightness of some of the sentences given the gravity of the allegations in an indictment.

The use of national courts to prosecute international crimes committed by non-national government or military officials invoking principles of universal jurisdiction is also controversial. The discussion of such judicial activism has been stimulated by a Belgian law that allows prosecution of crimes against humanity wherever committed. This has prompted civil society groups to seek indictments against such figures as Henry Kissinger and Ariel Sharon. It has also raised questions as to whether international society is ready for such attempts to

impose accountability. Criticism centers on practicality and the unevenness of international society. In a world of states, such impositions of law disrupt diplomacy in some instances, and if applied widely to current leaders, would likely generate acute international tension. There exist wide disparities as to what constitutes criminality, especially when a government uses violence to deal with radical movements of self-determination. The processes of transnational justice have not yet attained a level where equals can be treated equally. Hence, it is an imperfect justice, but still an advance over widespread circumstances of "im“unity."

Whether most leading states will decide to become parties to the International Criminal Court once it is established, remains questionable. There has been some speculation that the cooperative law process associated with the global war against terrorism, is likely to convince governments of the importance of an international criminal tribunal, and may lead to the establishment of a new tribunal with authority to deal only with terrorism as an international crime. Past efforts to include

terrorism among indictable international crimes by an international tribunal have foundered due to a lack of consensus as to how "terrorism" should be defined, and whether capital punishment should be imposed. Such obstacles do not exist at a national level where states legislate their own definitions of terrorism.

---<u>civil litigation and economic reparations</u>. Domestic legislation in several countries, especially in the federal units that constitute the United States, have facilitated class actions for Holocaust-related economic claims arising from past confiscations and thefts of property, slave labor, non-performance of economic duties. Large payments in the billions of dollars have resulted, although due to high legal fees and the large number of claimants, recovery on a per capita basis is still of mainly nominal and symbolic value. The compensation received makes no pretense of full restitution for the losses endured.

Similar initiatives deal with the economic dimensions of Japan's abuses of fundamental property rights have not up to

now succeeded. In part, this is due to the lesser leverage of the claimants, but it is also a result of the treaty waiver of private claims, and the continuing support given to this legal defense in American courts by the US Government in relation to the obligations of the Japanese government and Japanese corporations (accused of using slave labor throughout the Pacific).

American courts have also been used to obtain compensation in "wrongful death" Federal litigation that is based on loss of life resulting from the commission of international crimes. In the celebrated Filartiga case, an American plaintiff was allowed to recover damages for torture endured in Paraguay on the theory that torture was an international crime.

In essence, national courts have been increasingly used to address injustices of the sort that result from crimes against humanity and torture by way of awarding some compensation or restitution to victims and their representatives. Such a role for courts is definitely contributing to the pursuit of transnational justice.

---<u>truth and reconciliation commissions</u>. As earlier discussed, under certain circumstances of peaceful transition to democracy, the criminality of the prior regime, cannot be addressed in a retributive manner for a variety of political reasons. In these settings, the impulse to repudiate the past, to heal the wounds of victims and their families, and to pledge respect for rights in the future, recourse to a truth and reconciliation procedure provides the most satisfactory and effective mechanism. The parameters of a particular commission are negotiated, reflecting the play of forces in each setting, and in some instances, it is possible that criminal prosecutions may complement the truth and reconciliation procedure. As in the South African instance, where amnesty was conditional on a full disclosure of past conduct, the ideas of truth and reconciliation are directly related to retributive justice. Depending on the particular arrangement, perpetrators may be named, as in the case of El Salvador, or merely the offenses described, as in the case of Chile.

---humanitarian diplomacy. In the 1990s one of the most important initiatives to protect abused or suffering peoples involved international undertakings of an interventionary character, preferably under UN auspices. Generally discussed under the rubric of "humanitarian intervention," such actions, if involving military force and a mandate to engage in state-building, were and remain controversial. The main lines of objection were associated with legal arguments based on the UN Charter precluding interventions in matters "essentially within domestic jurisdiction." (Article 2(7)). The fundamental issue here is the balance between international accountability for wrongdoing and sovereign rights to exercise territorial supremacy. Efforts have been made to develop a principled framework by which to strike a balance between these two ordering ideas: implementing international standards to prevent humanitarian catastrophe and respect for territorial sovereignty. [See Kosovo Report, note --, 191-98; for an excellent overview see Nicholas Wheeler, Saving Strangers (Oxford, UK: Oxford University Press, 2000?)]

The contested practice of humanitarian intervention with and without UN authorization seemed a central issue in the 1990s. The controversy and mixed results of the Kosovo War, together with the shift in priorities after September 11th, make the future prospect of humanitarian intervention seem rather remote. At the same time, the global climate could change rapidly in the face of severe instances of suffering, and public pressures mounted to intervene. The blurred domestic/international boundary makes it likely that the challenge of humanitarian intervention, although pushed now toward the background, will reemerge in the years ahead.

III. A Concluding Note

The pursuit of transnational justice was vastly accelerated in the 1990s, but is likely to be sidelined in the early part of the 21st century as a result of the new preoccupation with global terrorism. At the same time, the momentum that underlies the development of international human rights and accountability movements is likely to be sustained even in this period by

transnational social forces operating within global civil society. The move from normative architecture (framing rights and duties) to implementation and enforcement seems irreversible. In this sense, institutional innovations together with public opinion are likely to keep the agenda of transnational justice alive despite the shift in geopolitical mood. And even this shift may have unanticipated consequences, such as creating a more effective framework for combating transnational crime, including terrorism.