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EDITORIAL COMMENT

Closing the Accountability Gap: Concrete Steps Toward Ending Impunity for Atrocity Crimes

*By Theodor Meron**

I. Introduction

When the International Criminal Tribunal for the former Yugoslavia (ICTY) was established by the UN Security Council in 1993 to try individuals accused of war crimes, crimes against humanity, and genocide (or, as I shall refer to these international crimes herein, atrocity crimes), it marked in many ways a turning point in international law and relations. The creation of the ICTY reflected an effort not simply to address cries to bring an end to the horrible violence then ongoing in the Balkans but also to answer a groundswell of demands to end impunity for violations of international law more generally.

In the years that followed, the ICTY demonstrated in concrete terms that accountability for international crimes was possible, in full compliance with norms of fairness and due process, and it showed practically how this could be done. During the quarter-century since the ICTY's creation, a number of other international or internationalized courts were established, including the ICTY's sister court, the International Criminal Tribunal for Rwanda (ICTR), as well as the International Criminal Court (ICC), each one proof of an emerging consensus at the international level that—with sufficient political will and resources—principled accountability for violations of international law could be achieved.

During this same period, and after a half-century of virtual inaction, an increasing number of authorities in national jurisdictions have undertaken domestic criminal trials of individuals alleged to have committed atrocity crimes. We see this in the Balkans (thanks in part to the completion strategy of the ICTY, which called for that Tribunal to support national judicial systems[1]) as well as in a great many other jurisdictions, from Guatemala to Canada and from Sweden and Germany to Rwanda.

Taking stock of all the developments in the twenty-five years since the establishment of the ICTY, there is much that one can be heartened by. Indeed, I have referred to these developments as the dawning of a new era of accountability, an era in which accountability is

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[1] *See* SC Res. 1503, UN Doc. S/RES/1503 (Aug. 28, 2003).

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increasingly the expectation, rather than the exception.[2] Notwithstanding the evident positive momentum toward ending impunity for violations of international law, the fact remains that there is a huge gap between the actual accountability efforts undertaken, on the one hand, and the far larger number of individuals who are believed to be responsible for atrocity crimes, on the other.

Why is this? First, and most simply, we must recall that international justice—by which I refer in this context to the pursuit of accountability for international crimes—is still a relatively new field in its current incarnation, and one that, for all that it is built upon well-accepted humanitarian norms and principles of criminal responsibility, reflects fundamental changes in our understanding of international law. It takes time and, perhaps, targeted and sustained advocacy at a myriad of levels for any new paradigm to be fully accepted and for international norms to be internalized and implemented effectively.

A second reason for the accountability gap is the matter of capacity. At present, the great majority of those who are alleged to have perpetrated violations of international law will never be brought to justice at the international level because doing so is simply not practically or financially possible. For accountability to truly take hold, it will necessarily fall to officials in national jurisdictions to take on the lion's share of this work. Yet, even where national jurisdictions may have the will to act, they may nonetheless lack the resources and infrastructure to do so, especially where they are emerging from armed conflicts and rebuilding their judicial and prosecutorial systems. That leaves better resourced third states as well as regional bodies to step in to fill the void—something they have, for the most part, failed to do to date.

The third reason for the continuing accountability gap stems from a variety of legal hurdles. Courts—whether international, regional, or national—must have jurisdiction over the alleged crimes and over the alleged perpetrator for any investigation or trial to take place. Yet, in many states, the penal laws do not enable the prosecution of international crimes, or do not do so in a manner in keeping with international law, and traditional jurisdictional limits often circumscribe the degree to which extraterritorial crimes may be considered in national courts. What is more, for there to be true accountability, the accused must be afforded a fair trial, requiring states to ensure that the full panoply of due process rights guaranteed under international law will be observed. And even if all of these factors are adequately addressed, prosecutors and courts may be faced with evidentiary deficits or other challenges as they seek to meet the legal standards applicable to atrocity crimes.

The fourth reason for the gap is undoubtedly political. Whether at the national, regional, or international level, political decisions often dictate when accountability efforts are undertaken—and when they are not. States may prioritize the self-interest of senior officials and alliances among governments over adherence to other principles; we see this in the UN Security Council, which has thus far been unwilling or unable to refer the situations in Syria or Myanmar to the ICC, and arguably in the failure of states to execute the ICC arrest warrant for Omar Al-Bashir. The decisions of states to either grant or withhold resources, support, and cooperation for existing accountability mechanisms at the international or national levels are political as well.

[2] *See* Theodor Meron, *A New Era of Accountability*, INTERSECTIONS MAG., Autumn/Winter 2016, at 7. *See also* Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AJIL 551, 577–79 (2006).

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A final reason for the accountability gap may come down to paralysis, or at least inertia. In effect, international organizations, regional bodies, and states can do more to strengthen and support accountability efforts, and simply do not. Importantly, this is not necessarily because they reject the principle of accountability. Rather, it would seem to result from competing priorities, a lack of perceived political benefit, and perhaps even a desire not to overreach or otherwise interfere with events outside a state's borders.

The challenges I have just outlined are not insignificant—but they are also not insurmountable. And surmount them we must. We insist on accountability for violations of international law because that is how we defend the law and demonstrate our insistence on respect for the law going forward. If we fail to ensure accountability across the board, we risk undermining the very beneficial effects to which the nascent accountability drive that has built over the past quarter-century has given rise. We risk telling states and individuals that the requirements set forth in international law—whether customary or conventional in nature—are not actually binding. That is the last message we would wish to send.

What is more, a failure to close the accountability gap reflects, in essence, acceptance of selectivity in the enforcement of the law. Such selectivity or uneven enforcement of the law is anathema to the rule of law. Those of us who wish to see international law strengthened and those of us who wish to make every effort to ensure that egregious violations of that law will never happen again should not accept such a state of affairs, nor should any of us who understands the value of the rule of law.

The urgency underlying the need to close the accountability gap is not simply a matter of principle. It is increasingly a matter of practicality as well. Today, with the novelty of international justice having worn off, international courts are under increasing scrutiny. At the same time, globalism itself is coming under growing pressure and some Cold War divisions appear to be reemerging, exacerbating the already highly politicized nature of international decision-making around accountability. If we are not to lose the momentum toward greater accountability developed over the last twenty-five years, the time to act is now.

My aim in this essay is to set forth concrete steps that can and should be taken to close or at least reduce the accountability gap when it comes to atrocity crimes.[3] The suggestions here are far from novel. My treatment of the different topics below is also, and admittedly, limited in scope, and it may well overlook still other avenues for enhancing accountability beyond those explicitly addressed. I nonetheless believe that setting forth these proposed tools and ideas in a single essay may help to facilitate greater and more focused dialogue and attention—and, fundamentally, action—when it comes to closing the accountability gap.

II. Concrete Steps Toward Bridging the Divide

A. Comply with and Ensure that Domestic Law Reflects Existing Obligations and Norms

The first and simplest step toward closing the accountability gap is for states to meet their existing treaty obligations—and to take steps to encourage other states to do likewise.

[3] There are, of course, a great many other prohibitions arising in international law that could be the subject of criminal proceedings, including most notably violations of international human rights guarantees. I will limit my focus in this piece to those violations of international law to which I have referred as atrocity crimes.

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This means, as an initial matter, that states must fully transform into domestic law the relevant provisions of the principal conventions setting forth norms of humanitarian and criminal law. Thus, for example, the Genocide Convention of 1948, the Geneva Conventions of 1949, and the UN Convention Against Torture of 1984 all include obligations on states to enact implementing legislation[4]—obligations that have been satisfied to varying degrees. Of the 123 states that have signed on to the Rome Statute of the International Criminal Court, meanwhile, many have not enacted the complementarity and cooperation legislation necessary to ensure that the Rome Statute takes full effect.[5] And of those states that have enacted such legislation, many have enacted legislation that has been deemed incomplete or flawed.[6] For the complementarity system envisaged by the Rome Statute to work, it is essential that those states that have ratified the Rome Statute enact all necessary legislation.[7]

Enacting legislation addressing atrocity crimes enables a state to pursue cases itself and to accept cases transferred from other jurisdictions or entities. But even where states have incorporated the provisions of international law related to atrocity crimes into their domestic legal frameworks, there is more to be done. Very few states parties to the Geneva Conventions have taken steps to abide by their obligations under the provisions requiring them to extradite or punish those accused of perpetrating grave breaches of the Conventions. Even in countries that have complied with these provisions, it has been a matter of only a handful of cases per jurisdiction.[8] Robust public, political, and diplomatic pressure can and should be brought to ensure that states take action to implement their obligations under the principle of *aut dedere, aut judicare*.[9]

The 1948 Genocide Convention likewise envisages that states shall enact legislation to give effect to the Convention and provides that states shall undertake prosecutions in national courts in the territory where the crime took place.[10] In recent years, Bosnia and Herzegovina, Croatia, Kosovo, and Rwanda have all tried cases arising under the Convention, as have the Extraordinary Chambers in the Courts of Cambodia. Other countries where genocide has been alleged to have occurred have been conspicuously inactive, reflecting perhaps the challenge inherent in the Convention's requirement that the crime of genocide is to be tried in the courts of the territory where it took place (or in an international court), a challenge about which I shall have more to say below.

[4] *See* Convention on the Prevention and Punishment of the Crime of Genocide, Art. V, Dec. 9, 1948, 78 UNTS 277 [hereinafter Genocide Convention]; Geneva Convention [No. IV] Relative to the Protection of Civilian Persons in Time of War, Art. 146, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Arts. 2, 4, Dec. 10, 1984, S. Treaty Doc. No. 100–20 (1988), 1465 UNTS 85.

[5] Parliamentarians for Global Action, *Implementing Legislation on the Rome Statute*, *at* http://www.pgaction.org/campaigns/icc/implementing-legislation.html. *See also* Parliamentarians for Global Action, *Parliamentary Kit on the International Criminal Court*, at 6–9 (June 2018).

[6] *See* Parliamentarians for Global Action, *Implementing Legislation on the Rome Statute*, *supra* note 5.

[7] *See generally* Rome Statute of the International Criminal Court, pmbl., Art. 88, *opened for signature* July 17, 1998, 2187 UNTS 90.

[8] *See* Ward Ferdinandusse, *The Prosecution of Grave Breaches in National Courts*, 7 J. INT'L CRIM. JUST. 723, 725–29 (2009).

[9] *But see*, *e.g.*, Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT'L L. 11 (1995) (discussing vulnerabilities in the *aut dedere*, *aut judicare* requirements).

[10] *See supra* text accompanying note 4.

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When it comes to the Rome Statute, adopting adequate implementing legislation is, of course, essential—but actually giving effect to that legislation and abiding by obligations arising under the Statute, such as by executing arrest warrants and orders to produce evidence, are steps that are no less important. Regrettably, state cooperation with the ICC remains imperfect[11] and is, perhaps, one of the biggest obstacles to that Court's effective conduct of its mandate.

Even for those states that are in full compliance with their treaty obligations, there are steps that they can take when it comes to encouraging other states to meet their own treaty obligations, such as by sharing model legislation, urging states that have adopted legislation that only partially reflects international norms to revise their approach, and, whenever appropriate, conditioning aid and other actions on compliance with international obligations. And all states can and should consider to what degree their laws are fully consistent not just with treaty obligations but with customary international law, particularly in light of the elucidation of customary humanitarian law principles and requirements by international courts over the last quarter-century.

B. Encourage and Invigorate Prosecutions Under the Principle of Universal Jurisdiction

Typically, states do not prosecute persons alleged to have committed crimes abroad, even if the persons are present in their territories, in the absence of a strong nexus with the accused, the victim, or the place in which the crime was committed. There is, however, a compelling case to be made—and, indeed, that has already been made—for making an exception to this traditional practice when it comes to the treatment of atrocity crimes and for states to adopt and implement legislation enabling them to prosecute individuals alleged to have committed atrocity crimes regardless of the nationality of the accused, the nationality of the victim, or where the crime is alleged to have been committed. The exercise of such jurisdiction in the absence of the more traditional jurisdictional requirements is referred to as universal jurisdiction.

The rationales underlying the adoption and deployment of universal jurisdiction vary.[12] Whatever the reasoning, it is clear that by adopting and implementing universal jurisdiction, states could greatly contribute to reducing the accountability gap.

Estimates vary as to how many states have adopted universal jurisdiction over atrocity crimes depending on the interpretation of existing legislation and variations between the definitions used in certain national legislation and those in international law.[13] By

[11] *See generally, e.g.*, ICC, *Report of the Court on Cooperation*, Delivered to the Assembly of States Parties, ICC-ASP/16/16 (Oct. 26, 2017). *See also* Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09-267, Decision on the Non-compliance by the Republic of Uganda with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute (July 11, 2016); Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09-266, Decision on the Non-compliance by the Republic of Djibouti with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute (July 11, 2016).

[12] *See, e.g.*, Christopher Keith Hall, *Universal Jurisdiction: New Uses for an Old Tool, in* JUSTICE FOR CRIMES AGAINST HUMANITY 47, 55–56 (Mark Lattimer & Philippe Sands eds., 2003); International Justice Resource Center, *Universal Jurisdiction*, *at* https://ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction.

[13] *Compare, e.g.*, Amnesty Int'l, *Universal Jurisdiction: Strengthening this Essential Tool of International Justice*, IOR 53/020/2012, at 23 (Oct. 9, 2012) *with* Ryan Goodman, *Counting Universal Jurisdiction States: What's*

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some accounts, universal jurisdiction is being increasingly and effectively deployed in recent years—including by states such as France, Germany, the United Kingdom, and Argentina that may set a salutary example for other states.[14] Nevertheless, the use of universal jurisdiction continues to raise questions and concerns.

For example, is invocation of universal jurisdiction permissible where genocidal acts are alleged to have taken place in a state other than the one that wishes to prosecute? If, as the text of the Genocide Convention suggests, genocide may only be prosecuted in the territory in which it occurred or by an international tribunal,[15] the accountability gap when it comes to that crime might never close. Importantly, however, the prohibition of genocide has become a norm of *jus cogens*, allowing and perhaps requiring every state to take steps to prosecute accused persons present in its territory.[16]

A strong argument can also be made to the effect that customary law recognizes a norm giving a third state a right—and perhaps an obligation—to prosecute the crime of genocide even when the accused is not present in the prosecuting state's territory. The counterargument is that by prosecuting persons not in the territory of the prosecuting state, and thus resorting to trials in absentia, the door is open to politically motivated prosecutions as well as to prosecutions lacking in guarantees of fairness or adequate evidence. While in absentia trials are anathema to principles of criminal justice in common-law countries, they are generally recognized in civil-law jurisdictions.[17] Should they be *a priori* excluded in genocide cases where a nexus between the crime and the prosecuting state is lacking?

Other barriers to greater acceptance of universal jurisdiction include the fact that states may not wish to expend resources in investigating and prosecuting crimes without a tangible connection to their own territories or citizens or may be guided by a degree of diplomatic caution and a desire to avoid actions that could be seen as interfering with the affairs of another state—actions that could, in turn, lead to retaliatory actions against the prosecuting state's own nationals. There are also undeniable difficulties in accessing evidence when dealing with crimes committed outside of a state's own territory.

These obstacles and concerns are not insignificant, and must be addressed, including by some of the means discussed below. Notwithstanding these challenges, I remain encouraged by the growing number of countries prosecuting atrocity crimes under the principle of universality of jurisdiction, as the use of this tool is essential if the accountability gap is to be closed.

C. Review Laws and Practices to Curtail Impunity for Atrocity Crimes and Ensure Due Process, Fair Trials, and Judicial Independence

Enacting legislation to reflect the principal international humanitarian and criminal law conventions and underlying norms will go a long way toward enabling greater accountability

Wrong with Amnesty International's Numbers [Updated], JUST SECURITY, *at* https://www.justsecurity.org/4581/amnesty-international-universal-jurisdiction-preliminary-survey-legislation-world.

[14] *See* Trial International, *Make Way for Justice #4: Momentum Towards Accountability. Universal Jurisdiction Annual Review 2018*, at 5, *available at* https://trialinternational.org/wp-content/uploads/2018/03/UJAR-Make-way-for-Justice-2018.pdf.

[15] Genocide Convention, *supra* note 4, Art. VI.

[16] *See, e.g.*, Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, 2006 ICJ Rep. 6, 32, at para. 64 (Feb. 3).

[17] Ryan Rabinovitch, *Universal Jurisdiction in Absentia*, 28 FORDHAM INT'L L.J. 500, 526 (2004).

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for atrocity crimes, as will adoption of legislation allowing universal jurisdiction where criminal proceedings for atrocity crimes are at issue. As important as these steps may be, however, these are not the only legislative steps that can be taken at the domestic level to enhance accountability efforts related to atrocity crimes.

States can review existing extradition treaties and immigration laws and procedures with a view toward ensuring that these states do not become (or do not remain) a safe haven for those alleged to have committed atrocities elsewhere. States may look to where bottlenecks or other impediments in the court system arise and institute reforms, such as by establishing specialized courts to hear sensitive cases or revising remedies available during proceedings or investigative and prosecutorial units dedicated to addressing atrocity crimes. States may also do well to consider revisiting territorial jurisdiction limits where such limits may preclude accountability for citizens accused of committing atrocity crimes abroad. Even matters as seemingly mundane as statutes of limitations warrant attention where those statutes may stand in the way of seeking accountability for some of the most grievous crimes.[18]

It is also important to recall that while calling an accused to account for atrocity crimes in a domestic court may appear to be an important step in the fight to end impunity, such a step is meaningless—if not outright problematic—if the trial and all related activities are not conducted in accordance with fundamental principles of fairness and internationally recognized human rights guarantees. Indeed, atrocity crime trials conducted with inadequate attention to fair trial requirements and trials conducted in violation of basic and commonly recognized principles of criminal law (such as *in dubio pro reo*) may do far more damage than good when it comes to broader accountability aims.

What is needed when it comes to ensuring what I refer to as *principled* accountability? International and regional human rights instruments and their authoritative interpretations on matters of due process and conditions of detention offer vital guidance, as does the large corpus of jurisprudence addressing fair trial guarantees at international courts such as the ICTY and ICTR. Complementarity analyses under the Rome Statute and the jurisprudence of the ad hoc tribunals in their consideration of what cases may be transferred for trial to national jurisdictions can also be informative, as can assessments conducted by national courts themselves when considering matters such as extradition.[19]

Whatever the reference point, it is important to recognize that some variation will be inevitable across jurisdictions. For example, countries following the civil-law tradition will, in many instances, address the investigative process differently than their common-law counterparts. Such differences, however, are not problematic so long as basic defense rights are respected and protected, including when it comes to the ability of the defense to prepare effectively for trial.

[18] *See, e.g.*, Andrew Hudson & Alexandra W. Taylor, *The International Commission Against Impunity in Guatemala: A New Model for International Criminal Justice Mechanisms*, 8 J. Int'l Crim. Just. 53, 68–69 (2010); David Scheffer, *Closing the Impunity Gap in U.S. Law*, 8 Nw. J. Int'l. Hum. Rts. 30, 37 (2009).

[19] *See, e.g.*, R v. Bow St. Metro. Stipendiary Magistrate, *ex parte* Pinochet Ugarte (No. 1), [2000] 1 A.C. 61 (H.L. Nov. 25, 1998) (holding that Pinochet was not entitled to immunity from criminal proceedings and could be extradited in a decision subsequently set aside on the base of an undisclosed conflict of interest); *In re* Extradition of Demjanjuk, 612 F. Supp. 544 (N.D. Ohio 1985) (the decision certifying the extradition of John Demjanjuk, a Nazi war criminal, to Israel). *See also* Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 ICJ Rep. 422 (July 20).

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It is likewise important to recognize that it is not sufficient to review and, as necessary, reform procedures in the courtroom to satisfy the requirements of principled accountability. In some national systems, new approaches will need to be taken to ensure that there is a means to provide for an effective legal defense in the absence of a robust legal aid system. In others, witness protection and support offices will need to be put in place or, if in place, provided with sufficient resources to enable meaningful services. In still other national systems, it may prove necessary to revisit basic provisions related to judicial selection and, as applicable, reappointment or reelection criteria and processes so as to ensure judicial independence. Without the protection of judges from political or other interference and without adherence by judges to the highest judicial ethics and standards of independence, principled accountability is not possible, in either national or international jurisdictions.[20]

D. Invest in Justice Infrastructure

It is undeniable that, for many states, taking steps to ensure accountability for atrocity crimes such as those outlined above may remain difficult, if not impossible, in the absence of significant investments in judicial, prosecutorial, and investigative infrastructures. This is particularly true for developing countries and countries that have recently emerged from armed conflict—these latter being the very countries most likely to have had atrocity crimes committed.

While closing the accountability gap depends on the involvement of individual states, this does not mean that each state can or must act in a vacuum. Rather, it is incumbent upon all states and key actors and influencers to do all that we can to facilitate that engagement in each state, including by, wherever possible, more developed and wealthier nations participating directly in strengthening the national justice infrastructure in less fortunate states through investment, aid, capacity-building trainings, and other means. Such other means may include the creation of specialized judicial chambers and prosecutorial or investigative units composed of national as well as international judges and staff,[21] practices by which capacity building and norm accretion may be accelerated through practical engagements and collaboration. Reinforcing national capacity in these ways will go a long way toward helping states improve their capability to try atrocity crime cases while, at the same time, paying dividends for the judicial, prosecutorial, and investigative infrastructures—and society and the rule of law—more generally.

But what can be done about those states that are unwilling rather than unable to invest in improving their capacity to investigate, prosecute, and try atrocity crimes? There, I see room

[20] *See generally, e.g.*, Theodor Meron, *Judicial Independence and Judicial Impartiality*, *in* THEODOR MERON, THE MAKING OF INTERNATIONAL CRIMINAL JUSTICE: A VIEW FROM THE BENCH. SELECTED SPEECHES 255 (2011).

[21] *See, e.g.*, Courts of Kosovo, UN Interim Admin. Mission in Kosovo, Reg. No. 2000/64 on Assignment of International Judges/Prosecutors and/or Change of Venue, UNMIK/REG/2000/64 (Dec. 15, 2000); Special Panels for Serious Crimes in East Timor, UN Transitional Admin. in East Timor, Reg. No. 2000/11 on the Organization of Courts in East Timor, UNTAET/REG/2000/11 (Mar. 6, 2000); War Crimes Chamber for Bosnia and Herzegovina, Agreement Between the High Representative for Bosnia and Herzegovina and Bosnia and Herzegovina on the Establishment of the Registry for Section I for War Crimes and Section II for Organised Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and the Special Department for War Crimes and the Special Department for Organised Crime, Economic Crime and Corruption of the Prosecutor's Office of Bosnia and Hercegovina, Official Gazette of BiH, No. 12/04 (Dec. 1, 2004).

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for targeted and strategic leverage being brought to bear by other individual states or groups of states (such as the European Union). The conditionality related to prospects of entrance into the European Union together with U.S. aid were undeniably responsible for many of the improvements in the cooperation received by the ICTY from Balkan states over the lifespan of that tribunal. A similar carrot and stick approach might prove effective elsewhere as well.

E. Enhance Cross-Border Cooperation

Even with the necessary domestic infrastructure, investigating and prosecuting atrocity crimes remains a labor- and resource-intensive task, one that can be all the more challenging where some or all of the events at issue took place beyond the state's borders. There are a number of steps and, specifically, types of cross-border cooperation that can be taken to facilitate progress and increase states' ability to actively seek accountability.

To begin with, relevant state agencies and actors can and should leverage existing bilateral or multilateral networks, protocols, processes, and cooperation agreements to facilitate their work on atrocity crimes. In some regions, such networks are already in place.[22] Elsewhere, however, this could mean using the same or adapting investigative and prosecutorial cross-border networks and collaborative arrangements established to support the investigation and prosecution of transnational crimes such as trafficking or financial crimes or, where no such arrangements exist for a given state, actively seeking out models that could be adapted as necessary. This could also mean leveraging existing institutions and seeking new pathways, as appropriate, to proactively share information, such as in circumstances where immigration or deportation proceedings have identified evidence relevant to a possible atrocity crime. States need not be actively investigating or trying atrocity crimes to take these various steps, and indeed, they and their counterparts may be well served if they take action to institute or enhance cross-border collaborations related to atrocity crimes even before any investigations or trials commence.

In addition to sharing substantive information about alleged atrocity crimes, state agencies and officials would also do well to seek out or offer expertise exchanges. Such knowledge-sharing exercises by the staff of international tribunals such as the ICTY and the ICTR have been sought after in the past two decades and have no doubt played an important part in helping to enhance the capabilities of national actors, including judges, prosecutors, defense counsel, and investigators, working to address atrocity crimes. The Organization for Security and Co-operation in Europe has likewise made significant contributions when it comes to assisting states with capacity building related to accountability for atrocity crimes.

For all that states can do on their own, they also can and should be able to rely on existing regional and international institutions designed to foster cooperation among law enforcement entities to support their efforts. In this regard, it is worth noting the expansion of the scope of action of institutions such as Europol and Eurojust from transnational crimes to atrocity crimes.[23] Indeed, institutions such as these are presumably very well placed to develop

[22] *See, e.g.*, Council Decision 2002/494/JHA, Setting Up a European Network of Contact Points in Respect of Persons Responsible for Genocide, Crimes Against Humanity and War Crimes, 2002 OJ (L 167/1) (June 13); Council Decision 2003/335/JHA, On the Investigation and Prosecution of Genocide, Crimes Against Humanity and War Crimes, 2003 OJ (L 118/12) (May 8).

[23] The new Europol Regulation, which came into effect in May 2017, lists atrocity crimes as those that Europol should prevent and combat. *See* Regulation (EU) 2016/794 of the European Parliament and of the Council of

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pathways to share time-sensitive information about possible atrocity crimes and those alleged to be responsible with national police and intelligence officials. Insofar as this is not already being done, we would also do well to ask whether other agencies and institutions such as Interpol and the UN Office on Drugs and Crime can, and should, be mandated to do more to facilitate activities pertaining to accountability for atrocity crimes.

F. Consider and Support Regional Accountability Initiatives

When the African Union (AU) adopted the Malabo Protocol, some commentators expressed concern that this effort to provide for a regional court to address, inter alia, atrocity crimes undermined the aims of the ICC.[24] I disagree. The establishment of regional bodies with jurisdiction to try cases related to atrocity crimes is, in my view, a welcome innovation that complements rather than detracts from the aims underlying the Rome system, provided that such regional bodies ensure due process and adhere to the tenets of international law.[25]

Regional courts do not simply multiply the number of fora in which accountability can flourish. They also, and importantly, allow for judicial processes to be more tailored to those applicable in the region itself (so long as such tailoring conforms to international norms), to be conducted in languages more relevant to the region, and to take place in locations closer to the communities affected by the alleged crimes.[26] At the same time, regional courts offer the beneficial possibility of justice at some remove from the affected communities—allowing greater perceived impartiality in the adjudication of the often highly politicized cases concerned—and they permit the pooling of resources among wealthy and less wealthy states to ensure that a consistent approach is applied in all such cases. All in all, I believe that initiatives aimed at enhancing accountability at the regional level are to be welcomed.

To date, the Malabo Protocol represents a unique example of measures taken to endow an existing regional human rights court with jurisdiction over atrocity crimes. There is no reason, however, that following Malabo, consideration could not be given to establishing regional criminal courts elsewhere in the world or to establishing criminal chambers within existing regional human rights courts. To be sure, the resources necessary to adequately support criminal trials are not inconsiderable, and for human rights courts designed to hear cases after the exhaustion of national remedies, serving as a venue for first-instance (and subsequent) proceedings may represent a dramatic and perhaps even difficult shift. On the other hand, as the examples of the ad hoc tribunals and other courts established at the international level suggest, creating new courts from the ground up can be an expensive and time-consuming proposition

11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and Replacing and Repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, 2016 OJ (L 135) 53, Art. 3 (1), Annex I. With respect to Eurojust, *see supra* note 22.

[24] *See, e.g.*, Chacha Bhoke Murungu, *Towards a Criminal Chamber in the African Court of Justice and Human Rights*, 9 J. INT'L CRIM. JUST. 1067 (2011); Max du Plessis, *Implications of the AU Decision to Give the African Court Jurisdiction Over International Crimes*, INST. SEC. STUD. (Paper No. 235, 2012); Ademola Abass, *The Proposed International Criminal Jurisdiction of the African Court: Some Problematical Aspects*, 60 NETH. INT'L L. REV. 27 (2013); Amnesty Int'l, *Africa: Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, at 35 (Jan. 22, 2016).

[25] While supporting regional accountability initiatives in general, I do not support those that, like the Malabo Protocol, recognize head of state immunity. *See infra* Sec. H.

[26] *See, e.g.*, Miles Jackson, *Regional Complementarity: The Rome Statute and Public International Law*, 14 J. INT'L CRIM. JUST. 1061 (2016).

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in its own right, and there is something to be said for simply expanding the mandate of an existing, proven, and respected judicial institution.

G. Develop Innovative Solutions to Foster Greater Accountability—and Revisit or Recycle Past Approaches Where Appropriate

As the preceding discussion suggests, if the accountability gap is to be closed, we must not shy away from exploring and, indeed, pioneering new approaches.

The UN Security Council did just this when it requested the secretary-general to establish an Investigative Team to support domestic efforts to hold the so-called Islamic State accountable by collecting, preserving, and storing evidence in Iraq of actions that may amount to atrocity crimes.[27] The UN General Assembly took a somewhat similar step when it established the International, Impartial and Independent Mechanism (IIIM) for Syria in the face of political gridlock in the UN Security Council. Notably, the IIIM is not a court but an agency mandated to collect, preserve, and analyze evidence of violations of international law with the aim of ultimately sharing this information with jurisdictions carrying out prosecutions for international crimes committed in Syria. This work is intended to ease the investigative burden on national prosecutors when it comes to case preparation and to preserve evidence for cases that may not be tried for years, if not decades.[28] Unlike the Commission of Inquiry established to investigate violations of human rights in Syria, the IIIM is expected to collect evidence pertaining not simply to violations of international law but also to individual criminal responsibility and is not, unlike the Commission of Inquiry, required to report publicly on all aspects of its work, both significant distinctions in view of the IIIM's mandate.[29]

Importantly, steps to gather, preserve, and present evidence for further action need not be taken only by states or intergovernmental organizations. To the contrary, examples abound of civil society organizations operating either nationally or internationally to collect, preserve, and present evidence in a manner that will ensure its usability in future court proceedings.[30] Indeed, active engagement by civil society organizations operating within a state where crimes are alleged to have occurred may be the key to enabling prosecutions well beyond that state's borders by means of coalitions formed with other civil society actors, as the *Hissène Habré* case demonstrates. Over time, such efforts can even yield important accountability dividends in the state where the underlying crimes occurred, as that case likewise demonstrates.[31]

[27] *See* SC Res. 2379, at para. 2 (Sept. 21, 2017); Letter from António Guterres, Secretary-General, to Mansour Ayyad, President of the Security Council (Feb. 9, 2018) (filed with the addressee), *conveying* Terms of Reference of the Investigative Team to Support Efforts to Hold ISIL (Da'esh) Accountable of Acts that May Amount to War Crimes, Crimes Against Humanity and Genocide Committed in Iraq, Established Pursuant to Security Council Resolution 2379 (2017).

[28] *See generally* GA Res. 71/248, at para. 4 (Jan. 11, 2017).

[29] *See* Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes Under International Law Committed in the Syrian Arab Republic Since March 2011, at paras. 4–12, UN Doc. A/72/764 (Feb. 28, 2018).

[30] The use of evidence collected by NGOs, however, may pose certain difficulties. *See, e.g.*, Human Rights First, *The Role of Human Rights NGOs in Relation to ICC Investigations*, at 3 (Sept. 2004).

[31] *See generally* Reed Brody, *Bringing a Dictator to Justice: The Case of Hissène Habré*, 13 J. Int'l Crim. Just. 209 (2015); Reed Brody, Victims Bring a Dictator to Justice: The Case of Hissène Habré. Updated Edition After the Final April 2017 Verdict 14 (2d ed. 2017).

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The *Habré* case was tried before an internationalized chamber in the courts of Senegal, part of a growing trend to establish special chambers within national courts mandated to try specific types of cases, either with or without international personnel and judges. From Cambodia to Kosovo and from Senegal to Guatemala and, most recently, Colombia, this practice of establishing special chambers to adjudicate politically sensitive and international crimes can—where the work is undertaken with appropriate safeguards and the creation of special chambers is intended to facilitate principled accountability (rather than to limit the procedural guarantees or transparency of the proceedings)—serve as an important new model for how to address atrocity crimes within national courts.

Those committed to pursuing every avenue to ensure greater accountability for atrocity crimes would do well to consider whether and in what circumstances national military courts may also play an important role in this regard. Although there is a general belief that there is greater fairness and due process as well as greater transparence in civilian courts, military courts in a number of states already can try, and have tried, cases involving atrocity crimes, whether they are characterized as such or under more ordinary rubrics.[32] While questions as to who should come within the jurisdiction of such courts and how to enhance their fairness, transparency, and due process still need to be considered,[33] we should not *a priori* rule out the potential of these fora when it comes to expanding accountability efforts at the national level.

These are but a few examples of innovative approaches that seek to enhance states' capacity to ensure accountability for atrocity crimes. We must continue to think strategically and creatively, asking ourselves, for instance, when civil society coalitions are best positioned to use leverage and publicity to bring about a desired result or when and how endeavors aimed at truth and reconciliation may enhance criminal accountability efforts as well. Indeed, efforts aimed at truth and reconciliation and other transitional justice measures need not be in opposition to accountability efforts in criminal courts; they can and should be deployed in a manner that is complementary, such as by taking steps to avoid the contamination of evidence that may be used for possible prosecutions.[34] The work of the International Commission against Impunity in Guatemala offers still another example of an innovative means to develop and influence the adoption of a wide range of reforms aimed at enhancing accountability, reforms expected to have a lasting impact.[35]

At the same time, we should not ignore past approaches if, in a particular circumstance, these older models offer the best solution. We cannot preclude, for instance, the possibility that, in the future, the creation of a new ad hoc tribunal will be deemed necessary to address crimes alleged to have occurred in a given armed conflict. I must underscore that such a move does not detract in any way from the role of the ICC. As should be clear by now, achieving

[32] *See, e.g.*, Niyonteze, Tribunal Militaire de Cassation [Military Court of Cassation], Apr. 27, 2001 (Switz.), *available at* https://casebook.icrc.org/case-study/switzerland-niyonteze-case; R v. Payne, General Court Martial, Apr. 30, 2007 (U.K.); Joshua Kelly, Re Civilian Casualty Court Martial*: Prosecuting Breaches of International Humanitarian Law Using the Australian Military Justice System*, 37 MELB. U. L. REV. 342 (2013).

[33] *See generally, e.g.*, David J. R. Frakt, *Applying International Fair Trial Standards to the Military Commissions of Guantánamo*, 37 S. ILL. U. L.J. 551 (2013).

[34] *See generally, e.g.*, William A. Schabas & Patricia M. Wald, *Truth Commissions and Courts Working in Parallel: The Sierra Leone Experience*, 98 ASIL PROC. 189, 189.

[35] *See generally* Hudson & Taylor, *supra* note 18, at 55.

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accountability on a global scale necessarily entails a multidimensional approach, and where such an ad hoc tribunal is needed, it should receive all due support.

Likewise, we should not ignore the potential of more traditional approaches, such as the preparation and promulgation of new treaties or other such legal instruments.[36] In this regard, I note in particular the work of the International Law Commission to develop draft articles for a Convention on the Prevention and Punishment of Crimes Against Humanity, an endeavor that advances accountability efforts as a general matter but also reflects a welcome focus on issues such as enhancing interstate cooperation.[37]

H. Foreswear Amnesties and Targeted Immunities

Speaking of past practice, it bears noting that it has not been uncommon for peace accords concluded over the course of the last half-century to include provisions providing for amnesties for those engaged in the conflict.[38] Such amnesties, and, in particular, their validity when it comes to violations of international law (especially with regard to *jus cogens* norms), remain the subject of considerable debate.[39] While I will not seek to dwell on that debate here, I nonetheless underscore my view that any peace accord that provides for broad amnesties for those who may have committed atrocity crimes undercuts overall accountability efforts. All those involved in peace negotiations should do their utmost to find means to attain peaceful resolution through means other than amnesties.

Efforts to insulate senior political or military leaders from accountability are equally, if not more, problematic. While recognizing a number of promising ideas reflected in the Malabo Protocol, I am thus concerned about the Protocol's Article 46A(*bis*), which provides that no charges may be brought before the African Court of Justice and Human Rights against any serving AU head of state or government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office. This provision would take international criminal law all the way back to before Nuremberg.[40]

[36] A notable example is the Initiative for a New Treaty on Mutual Legal Assistance and Extradition for Domestic Prosecution of the Most Serious International Crimes. *See* Ward Ferdinandusse, *Improving Inter-state Cooperation for the National Prosecution of International Crimes: Towards a New Treaty?*, 18(15) ASIL INSIGHTS (July 21, 2014), *at* https://www.asil.org/insights/volume/18/issue/15/improving-inter-state-cooperation-national-prosecution-international.

[37] *See generally* Sean D. Murphy, *Crimes Against Humanity and Other Topics: The Sixty-Ninth Session of the International Law Commission*, 111 AJIL 970 (2018). The International Law Commission has decided to transmit the draft articles to governments and international organizations, inter alia, for comments. *See id.* at 978.

[38] *See, e.g.*, Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Art. IX, July 12, 1999, UN Doc. S/1999/777 (signed with a caveat by the UN Special Representative in Sierra Leone that the United Nations would not recognize amnesty for atrocity crimes, see UN Secretary-General, Seventh Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone, at para. 7, UN Doc. S/1999/836 (July 30, 1999)). I note that amnesties are called for under Article 6(5) of Additional Protocol II to the Geneva Conventions, which recommends granting the broadest possible amnesty to persons who have participated in the armed conflict or were deprived of liberty for reasons related to the armed conflict. However, that provision, as interpreted by the International Committee of the Red Cross, is understood not to apply to amnesties for atrocity crimes. *See* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW. VOL. I: RULES 612 (2005).

[39] *See, e.g.*, Office of the UN High Commissioner for Human Rights, Rule of Law Tools for Post-Conflict States: Amnesties, at 16, UN Doc. HR/PUB/09/1 (2009). *See also* Murphy, *supra* note 37, at 977.

[40] *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Art. 1, Aug. 8, 1945, 59 Stat. 1544, 82 UNTS 279, 282. *See also* Geoffrey Robertson, *Ending Impunity: How International Criminal Law Can Put Tyrants on Trial*, 38 CORNELL INT'L L.J. 649 (2005).

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I recognize, of course, that the Protocol has not entered into force, that it is still far from obtaining the required number of ratifications, and that it limits the immunities to the period in which the officials concerned are still serving in their official capacities.[41] Nonetheless, it sets a troubling precedent, as does the saga of Omar Al-Bashir.[42]

The rule of law demands equality of all individuals before the law. The more that this principle is made subject to exceptions—and the more that such exceptions benefit those in positions of privilege or power—the weaker the rule of law and the overall imperative to end impunity become.[43]

I. Sustain Support for and Cooperation with Existing Accountability Mechanisms

As I have made clear above, the success of efforts to close the accountability gap turns in very large part on the active engagement by states in accountability efforts and by actions to be taken at the national and at times regional levels. But that should not be read to suggest that international courts are now, or will become in the future, irrelevant to broader accountability goals. It would be an extraordinary and welcome day were we to reach a moment in time when the ICC is no longer needed. But until that day comes, it will remain essential that states continue to lend their support to those international and internationalized courts that are often the most visible representatives of the fight to end impunity for atrocity crimes, and to the ICC in particular.

This must amount to more than simple diplomatic verbiage. Support entails practical and tangible cooperation (such as by executing arrest warrants, facilitating access to witnesses and evidence, and enforcing sentences in national prisons) and active engagement (such as by encouraging cooperation by fellow states and serving as prominent advocates and allies for the courts in diplomatic fora), adequate financial backing (without which courts will struggle to carry out their basic mandates), and, in the context of the ICC, adoption and full implementation of all legislation required under the Rome Statute or necessary to enable complementarity. Support also entails taking affirmative steps to reinforce respect for these courts and their work, including for their rulings, their officers, and the integrity with which the courts and their officers carry out mandated functions. If the ability of these courts to operate as courts of law, responsible for upholding the rule of law, is allowed to be brought into serious

[41] *See* Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Arts. 11(1), 46A(*bis*), June 27, 2014; List of Countries Which Have Signed, Ratified/Acceded to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Feb. 8, 2018), *available at* https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights. *See also* Gerhard Werle & Moritz Vormbaum, *Creating an African Criminal Court*, *in* THE AFRICAN CRIMINAL COURT. A COMMENTARY ON THE MALABO PROTOCOL 3, 13 (Gerhard Werle & Moritz Vormbaum eds., 2017).

[42] See, e.g., the decisions on non-compliance in *Prosecutor v. Al Bashir*, *supra* note 11.

[43] I note with satisfaction that Draft Article 7 provisionally adopted by the International Law Commission in 2017 lists atrocity crimes in respect of which immunity *ratione materiae* shall not apply. Int'l Law Comm'n, Report on the Work of its Sixty-Ninth Session, at 176, UN Doc. A/72/10 (Sept. 11, 2017). In its commentary on Draft Article 7, the Commission notes that "there has been a discernible trend towards limiting the applicability of immunity from jurisdiction *ratione materiae* in respect of certain types of behavior that constitute crimes under international law." *Id.* at 178–79, *quoted in* Curtis A. Bradley, *Introduction to the Symposium on the Present and Future of the Foreign Official Immunity*, 112 AJIL UNBOUND 1, 2 (2018). Draft Article 7 has nonetheless been the subject of some controversy. *See generally* Symposium on the Present and Future of Foreign Official Immunity, 112 AJIL UNBOUND 1 (2018).

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question by either politically motivated criticism or even basic misunderstandings—and if the courts' orders are not carried out by states or the independence of their judges is made subject to state interference—the capability of the courts to fulfill their mandated role risks being compromised. Simply put, state support remains critically important if international and internationalized courts are to carry out their missions.

This is not to suggest that international and internationalized courts are above reproach—far from it. While these courts have served as important models for how to ensure principled accountability for atrocity crimes during the past quarter-century, setting vital and at times groundbreaking legal, procedural, and practical precedents addressing everything from sexual violence to the parameters of fair trial rights, there are also, undeniably, ways in which the work of international courts could have been, and still could be, improved. Indeed, in recent years there has been an ever-increasing focus on how to enhance the efficiency and effectiveness of these courts, a focus evident both within the courts themselves and among the legislative and other bodies that provide oversight. With the creation of the International Residual Mechanism for Criminal Tribunals (Mechanism) in 2010, the UN Security Council introduced a number of efficiency-inspired innovations as compared to the Mechanism's predecessor tribunals (such as the possibility of using single judges and the use of a roster of judges who typically work remotely, away from the physical seat of their courts, and only receive payment per day of work), and since its establishment, the Mechanism has continued to seek additional ways in which to extend its efficiency and heighten its efficacy.[44] At the ICC, meanwhile, the Court's leadership has announced that enhancing efficiency and effectiveness is a top priority for the Court,[45] and considerable attention has been paid both within the Court and among outside experts to concrete ways that this may be achieved, such as by taking steps to reduce the time and resources needed to investigate and try each case.[46] Efforts such as these aimed at helping international judicial mechanisms evolve are crucial if international courts are to remain a viable option in the long run. Indeed, the introduction of novel features at the Mechanism has already arguably influenced the judicial procedures of the Kosovo Specialist Chambers.[47]

Leaving aside issues of efficiency and cost-effectiveness, the past quarter-century has also provided lessons when it comes to how important it is to make the proceedings at international and internationalized courts more accessible to communities around the world, such as

[44] *See, e.g.*, International Residual Mechanism for Criminal Tribunals, Assessment and Progress Report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the Period from 16 November 2017 to 15 May 2018, at para. 8, UN Doc. S/2018/71 (May 17, 2018). The Mechanism has, for example, adopted a judicial code of conduct in 2015 and, recently, a revision to that code to address alleged violations thereof. *See* International Residual Mechanism for Criminal Tribunals, Code of Professional Conduct for the Judges of the Mechanism, UN Doc. MICT/14/Rev.1 (Apr. 9, 2018).

[45] Silvia Fernández de Gurmendi, President of the ICC, Keynote Remarks at Plenary Session of the 16th Session of the Assembly of States Parties to the Rome Statute on the Topic of the 20th Anniversary of the Rome Statute, New York (Dec. 13, 2017).

[46] *See generally, e.g.*, Panel of Independent Experts, *Expert Initiative on Promoting Effectiveness at the International Criminal Court* (Dec. 2014); ICC Press Release, Enhancing the Court's Efficiency and Effectiveness – A Top Priority for ICC Officials (Nov. 24, 2015). *See also, e.g.*, David Bosco, *Discretion and State Influence at the International Criminal Court: The Prosecutor's Preliminary Examinations*, 111 AJIL 395 (2017).

[47] *Compare, e.g.*, SC Res. 1966, Annex 1, Art. 8 (Dec. 22, 2010) *with* Law on Specialist Chambers and Specialist Prosecutor's Office, Arts. 2, 29, No. 05/L-053 (Aug. 3, 2015) (Kosovo).

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through formal outreach programs, increased use of internet and social media platforms to share information in real time, targeted information-sharing exercises with state authorities, civil society, and community leaders, and translations of key rulings and instruments into local languages. This is not simply a matter of increasing awareness of the work of international courts in national and local communities; it is also a crucial way in which members of the public, civil society, and judicial and prosecutorial officials around the world can be sensitized to accountability efforts more generally, to how principled accountability is ensured, and to the availability of a wealth of useful precedents at the international level that can help to support national efforts to advance accountability for atrocity crimes. International and internationalized courts can and should continue to enhance their efforts in these regards going forward, as, by doing so, they serve overall accountability aims at myriad levels.

J. Tackle Apathy, Intransigence, and the Absence of Political Will

At base, much of the failure or slowness to act to ensure accountability for atrocity crimes comes down not to the inability of states to take such steps (typically, related to resource constraints) but to a lack of political will.

The absence of political will to take action to ensure accountability—whether in the national context or in conjunction with other states, such as in the UN Security Council—may reflect a variety of root causes. There may be no desire to act due to the fact that the violations of international law take place far outside the nation's borders or because competing diplomatic or strategic concerns and allegiances are seen as a higher priority. A state may lack political will to act because the violations at issue are perpetrated by that state or that state's allies or because that state holds the view that accountability efforts are not undertaken solely in their own right but instead reflect geopolitical strategic moves that the state does not support. Political will may also be lacking where there are strongly held perceptions that there is no urgency to developing and implementing accountability frameworks, that there is no actual obligation to act to ensure accountability for international crimes, that the accuracy of the information suggesting the need to act is in doubt, or that existing accountability mechanisms are not reliable. And states or, more accurately, state leaders may not wish to take action where, quite simply, personal self-interest is in play, such as where there is a desire to ensure that national leaders are not subjected to investigation and prosecution, whether now or in the future.

Each of these barriers to action can and must be addressed if the accountability gap is to be closed. Coordinated campaigns by civil society organizations to capture public attention, the deployment of targeted incentives and sanctions by states, and vocal support for accountability initiatives by community leaders and other key stakeholders have all proven effective in the past when it comes to overcoming political intransigence or apathy. These and no doubt many other measures, including high-profile events dedicated to ending impunity,[48] should be deployed in a targeted and nuanced fashion going forward to overcome the continuing obstacle of political inaction.

But we may also do well to consider—or, in some circumstances, reconsider—the appropriate role for political decision-making when it comes to matters of accountability. The UN Security Council, for instance, often seems to serve as something of a gatekeeper, deciding

[48] *See, e.g.*, Eurojust Press Release, 3rd EU Day Against Impunity (May 22, 2018), *at* http://www.eurojust.europa.eu/press/News/News/Pages/2018/2018-05-23_3rd-EU-Day-Against-Impunity.aspx.

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whether a particular situation or conflict shall be made subject to accountability measures, whether through positive actions or, increasingly, through inaction. This role for the Council was, perhaps, necessary, twenty-five years ago. But is it not now time for something of a paradigm shift—one that encourages political bodies to simply and as a matter of course refer possible violations of international law to appropriate judicial actors for further action rather than becoming stymied in debates about whether or not atrocities actually occurred? Doing so would not only enhance accountability—it would also reflect and increase confidence in the ability of the courts to assess evidence fairly and independently when determining whether a case should be tried, enhance the Council's efficiency as well as its credibility through demonstrating a principled consistency in its adherence to international law, and serve to recognize and reify the fundamentally different roles that legislative and judicial bodies can and should play more generally.[49]

In short, ensuring accountability for atrocity crimes should not be seen as a mere political option: one choice among many facing national authorities and diplomats. It should be understood as a political, legal, and fundamentally human and humanitarian imperative.

K. Track and Share Information About Progress Achieved

Information is power, as the adage goes. And collecting and sharing information about accountability efforts—be they legislative, capacity-focused, investigative, or prosecutorial/judicial—can undoubtedly bolster accountability efforts more generally.[50] It can do so by making accessible information about approaches being taken in different jurisdictions on which other states can model their own activities. It can do so by permitting ready comparisons among states by assembling data that civil society, international and regional bodies, and other states can, in turn, use to foster or push for improvements in a given state. Indeed, efforts along these lines have already proven effective.[51]

Collecting and making information available about accountability efforts can also help to show where alleged perpetrators of atrocity crimes may not be genuinely held accountable—such as where their deeds that could otherwise have been characterized as atrocity crimes are adjudicated under more basic rubrics (such as murder, rape, and, in the context of offenses tried before military courts, negligence in the performance of duties). Collecting and making publicly available information about where accountability efforts have failed may also prove useful by highlighting the obstacles encountered and opening the way for a discussion about how those challenges may be remedied. Authoritative indices based on this data, like those used to track corruption perceptions,[52] could also become a useful tool to track and publicize progress or the lack thereof.

[49] I delivered remarks in this same vein in May 2018 at the UN Security Council Open Debate on International Law and the Rule of Law. *See* Security Council Meeting on Maintenance of International Peace and Security, SC, 8262d mtg., at 10, UN Doc. S/PV.8262 (May 17, 2018).

[50] *Cf.* UN Secretary-General, Measuring the Effectiveness of the Support Provided by the United Nations System for the Promotion of the Rule of Law in Conflict and Post-Conflict Situations, at para. 68, UN Doc. S/2013/341 (June 11, 2013).

[51] *See, e.g.*, Parliamentarians for Global Action, *PGA ICC Campaign for Effectiveness and Universality of the Rome Statute*, *at* http://www.pgaction.org/campaigns/europe/campaigns/icc.

[52] *See* Transparency International, *Corruption Perceptions Index 2017* (Feb. 21, 2018), *at* https://www.transparency.org/news/feature/corruption_perceptions_index_2017.

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All of this work necessarily requires not just access to the relevant data but also resources to compile it and the ability to analyze and share it in a manner that can be readily used. Transparency, cooperation, and investment will be essential if these efforts are to bear fruit.

L. Prioritize Prevention

The aim of closing the accountability gap is based in many respects on the premise that, come what may, atrocity crimes will continue to be committed and there will continue to be a concomitant need for justice and accountability. Sadly, this may be true. But that does not mean that we cannot, or should not, do all that we can to reduce the number of such crimes and the need for accountability in the first place.

As attention to accountability initiatives has grown over the past quarter-century, so too have efforts to prevent or otherwise address situations in which atrocity crimes, including genocide, may be committed. From early detection frameworks[53] to invocations of the responsibility to protect, there are a range of steps that may be taken at the local, governmental, and intergovernmental levels with the goal of averting or curtailing atrocity crimes.

While it may be difficult to measure in concrete terms the effectiveness of such steps—much as it can be difficult to measure the deterrent effect of criminal proceedings themselves—the fact that we may never be able to verify their specific impact and what would or could have occurred but for a given intervention is hardly a reason not to pursue them. To the contrary, as Justice Hassan B. Jallow, the former Prosecutor of the ICTR and the Mechanism, noted in a 2014 lecture dedicated to ending impunity, "[o]ur best option must remain a strategy to prevent mass crimes and the conflict that breeds them."[54]

III. Conclusion

None of the suggestions I have set forth above will be sufficient to close the accountability gap on their own. Nevertheless, concerted action on multiple fronts can and will narrow the accountability gap significantly by helping to advance the momentum to end impunity that began in earnest a quarter-century ago and to transform the current ad hoc and piecemeal approach to accountability for atrocity crimes to a synergistic, multileveled, and increasingly comprehensive (if not wholly coordinated) global system.

To be sure, efforts to change the status quo may risk being seen, even now, as a form of tokenism: symbolic steps rather than wholesale improvements. But we should not disparage such symbolic action; indeed, for many, the ICTY's own trials were seen as symbolic—yet they have served to spark, in many ways, a revolution in attitudes and actions when it comes to accountability for atrocity crimes.

It also bears noting that all of the steps described above, while directed toward ensuring accountability for grave violations of international law, will yield important benefits in other areas as well. For instance, increased investment, aid, and capacity building will help

[53] *See, e.g.*, UN Office on Genocide Prevention and the Responsibility to Protect, *A Framework of Analysis for Atrocity Crimes: A Tool for Prevention* (2014), *available at* http://www.un.org/en/genocideprevention/documents/publications-and-resources/Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf.

[54] Justice Hassan B. Jallow, Prosecutor, UNICTR and UNMICT, *Closing the Impunity Gap*, at 6th INTERPOL International Expert Meeting on Genocide, War Crimes and Crimes Against Humanity, Kigali (Apr. 14–16, 2014).

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to strengthen national justice systems in ways that can be expected to help all litigants appearing before them, reifying the rule of law locally. Enhanced information sharing means that standards set in international courts and in the context of their cases (such as with regard to evidentiary issues or witness protection measures) or in national courts and proceedings may serve as models for reforms in national processes and approaches to the adjudication of domestic crimes elsewhere. Steps to ensure compliance with existing international obligations regarding atrocity crimes will help to reinforce international law more generally, and it is difficult to imagine that increased efforts to prosecute atrocity crimes at the national level would not also benefit initiatives aimed at ensuring accountability for human rights violations that do not amount to atrocities, or that both types of efforts would not lead to greater compliance with international law more generally.[55] And efforts to protect judicial independence and to enhance adherence to due process guarantees in civilian and military courts alike will undoubtedly serve the communities in which these judges and courts function as well as the individuals coming before them.

In sum, by taking the steps I suggest above, we will not only be helping to close the accountability gap when it comes to atrocity crimes; we will also be enhancing respect for the rule of law—internationally as well as nationally—more generally, with all the many benefits that greater respect for the rule of law entails.

[55] *See, e.g.*, Kathryn Sikkink & Hun Joon Kim, *The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations*, 9 ANN. REV. L. SOC. SCI. 269, 280 (2013).

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