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**In international criminal law does the prosecutor have a responsibility to ensure that the facts forming the historical context in which large-scale human rights abuses occurred are adjudicated at trial? Why or why not?**

Tyler Portner

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CASE WESTERN RESERVE UNIVERSITY  
SCHOOL OF LAW

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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**Issue: In international criminal law does the prosecutor have a responsibility to ensure that the facts forming the historical context in which large-scale human rights abuses occurred are adjudicated at trial? Why or why not?**

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Fall Semester, 2017

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## **BIBLIOGRAPHY OF SOURCES**

### **Law Review and Articles**

1. Tom A. Adami and Martha Hunt, *Genocidal Archives; The African Context--Genocide in Rwanda*, 26 J. of Soc. of Archivists 1 (2005), pp. 105-121.
2. Onur Bakiner, *One truth among others? Truth commissions' struggle for truth and memory*, 8 Mem. Stud. 3 (2015), pp. 345-360.
3. Gordon N. Bardos, *Trials and Tribulations: Politics as Justice at the ICTY*, World Affairs (2013), pp. 15-24.
4. Mark S. Berlin and Geoff Dancy, *The Difference Law Makes: Domestic Atrocity Laws and Human Rights Prosecutions*, 51 Law & Soc. R. 3 (2017), pp. 533-566.
5. Elizabeth Borgwardt, *Re-examining Nuremberg as a New Deal Institution: Politics, Culture and the Limits of Law in Generating Human Rights Norms*, 23 Berkeley J. of Int'l. L. 2 (2005), pp. 401-462.
6. Derek Croxton, *The Peace of Westphalia of 1648 and the Origins of Sovereignty*, 21 Int'l. Hist. Rev. 3 (1999), pp. 569-591.
7. Vivian Grosswald Curran, *The Politics of Memory/Errinerungspolitik and the Use and Propriety of Law in the Process of Memory Construction*, 14 Law and Crit. 3, pp. 309-323.
8. Antoon De Baets, *DOES INHUMANITY BREED HUMANITY? INVESTIGATION OF A PARADOX*, History and Theory 51 (October 2012), pp. 451-465.
9. Mark S. Ellis, *Coming to Term with its Past--Serbia's New Court for the Prosecution of War*, 22 Berkeley J. of Int'l. Law (2004) pp. 165-194.
10. Abel Escrib -Folch and Joseph Wright, *Human Rights Prosecutions and Autocratic Survival*, Int'l. Org. 69 (2015), pp. 343-373.
11. Andr a Ford, *A Brief History of Genocide*, Time. December 9, 2008. Retrieved from: <http://content.time.com/time/world/article/0,8599,1865217,00.html>.
12. Eugene Garver, *Euthyphro Prosecutes a Human Rights Violation*, Phil. and Lit. 38 (2014), pp. 510-527.
13. James Gow, Milena Michalski, and Rachel Kerr, *Pictures of Peace and Justice from Nuremberg to the Holocaust: 'Nuremberg: Its Lesson for Today', 'Memory of the Camps', and 'Mjajdanek: Cemetery of Europe'-- Missing Films, Memory Gaps and the*

- Impact beyond the Courtroom of Visual Material in War Crimes Prosecutions*, J. of the Hist. Ass. (2013), pp. 548-566.
14. Manuel Mario Guzman, *The investigation and documentation of events as a methodology in monitoring human rights violations*, Stat. J. UN ECE 18 (2001), pp. 249-257.
  15. Eric A. Heinze, *Humanitarian intervention: morality and international law on intolerable violations of human rights*, 8 Int'l J. of H. Rts. 4 (2004), pp. 471-490.
  16. Steffen Jensen, Tobias Kelly, Morten Koch Andersen, Catrine Christiansen, Jeevan Raj Sharma, *Torture and Ill-Treatment Under Perceived: Human Rights Documentation and the Poor*, 39 Human Rights Q. (2017), pp. 393-415.
  17. Joseph Yav Katshung, *Prosecution of Grave Violations of Human Rights in Light of Challenges of National Courts and the International Criminal Court: The Congolese Dilemma*, Human Rights Review (2006), pp. 5-25.
  18. Bartłomiej Krzan, *International Criminal Court Facing the Peace vs. Justice Dilemma*, Int'l. Comp. Juris. 2 (2016), pp. 81-88.
  19. Daniel Levy and Natan Sznaider, *The institutionalization of cosmopolitan morality: the Holocaust and human rights*, 3 J. of H. Rts. 2 (2004), pp. 143-157.
  20. David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*. Georgetown University Law Ctr. (2008), pp. 1-26. Retrieved from:  
[http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1069&context=fwps\\_papers](http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1069&context=fwps_papers). Retrieved on: 23 November 2017.
  21. Erasmus Masitera, *Creating a Culture of Impunity in Zimbabwe: A Case for Philosophical Input in Development Issues*, 5 Africana 2 (2011), pp. 98-122.
  22. Bernard D. Meltzer, *The Nuremberg Trial: A prosecutor's perspective*, 4 J. of Genocide Research 4 (2002), pp. 561-568.
  23. Bernard D. Meltzer, "WAR CRIMES": THE NUREMBERG TRIAL AND THE TRIBUNAL FOR THE FORMER YUGOSLAVIA, Valparaiso Un. L. Rev. 30 (1996), pp. 895-912.
  24. Juan E. Méndez, *Accountability for Past Abuses*, 19 Human Rts. Q. 2 (1997), pp. 255-282.

25. Martha Minow, *Making History or Making Peace: When Prosecutions Should Give Way to Truth Commissions and Peace Negotiations*, *Journal of Human Rights* 7 (2008), pp. 174-185.
26. Martha Minow, *What the rule of law should mean in civics education: from the following 'Following Orders' defence to the classroom*, 35 *J. of Moral Ed.* 2 (2006), pp. 137-162.
27. Dieter Misgeld, *Ultimate Self-Responsibility, Practical Reasoning, and Practical Action: Habermas, Husserl, and Ethnomethodology on Discourse and Action*, *Human Studies* 3 (1980), pp. 255-278.
28. Bruce P. Montgomery, *Archiving Human Rights: A Paradigm for Collection Development*, *The J. for Academic Librarianship* (1996), pp. 87-96.
29. Robin Perry, *The Commission of Truth and Friendship and Justice for East Timor*, 34 *Alt. Law J.* 3 (2009), pp. 199-200.
30. Michael H. Romanowski, *Problems of Bias in History Textbooks*. Retrieved from: <http://www.socialstudies.org/sites/default/files/publications/se/6003/600310.html>. Retrieved on: 24 November 2017.
31. Valérie Rosoux, *Human rights and the 'work of memory' in international relations*, 3 *J. of H. Rts. Rights* 2 (2004), pp. 159-170.
32. William A. Schabas, *Amnesty, The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 11 *J. of Int'l. L. & Pol.* 145 (2004), pp. 145-169.
33. Kshitij Kumar Singh, *Human Rights in Information Age: Emerging Issues and Challenges* (2015). <http://ssrn.com/abstract=2606863>.
34. Rupert Skillbeck, *Funding Justice: The Price of War Crimes Trials*. *Human Rights Brief* 15, no. 3 (2008): 6-10.
35. Göran Sluiter, *The Law of International Criminal Procedure and Domestic War Crimes Trials*. *Int'l. Crim. Law Rev.* 6 (2006), p. 605-635.
36. Sofia Safonova, *Relevance of the Westphalian System to the Modern World*. 15 January 2012. Retrieved from: [https://www.academia.edu/24957231/Relevance\\_of\\_the\\_Westphalian\\_System\\_to\\_the\\_Modern\\_World\\_By\\_Sasha\\_Safonova](https://www.academia.edu/24957231/Relevance_of_the_Westphalian_System_to_the_Modern_World_By_Sasha_Safonova).
37. Pamela Smith and Keryn Walshe, *Oral testimony of an Aboriginal massacre now supported by scientific evidence*. October 30, 2017. Retrieved from: [theconversation.com/oral-testimony-of-an-aboriginal-massacre-now-supported-by](http://theconversation.com/oral-testimony-of-an-aboriginal-massacre-now-supported-by)

scientific-evidence-85526?utm\_source=fb\_messenger  
&utm\_medium=fb\_messenger\_button&.

38. Giorgia Tortora, *The Mechanism for International Criminal Tribunals: A Unique Model and Some of Its Distinctive Challenges*, 21 Am. Soc. of Int'l. Law 5 (2017).
39. Claude E. Welch Jr., *Human rights NGOs and the Rule of Law in Africa*, 2(3) (2003), pp. 315-327.
40. Joan Zaleski and Vera Zimmel, Who Writes History? Developing a Social Imagination with Third Graders. 25 Soc. Studies and the Young Learner 3 (2013), 23-26.

### Books

1. B.F. Skinner, *Beyond Freedom & Dignity*. New York: Bantam/ Vintage. 1971. Print.
2. Aleksandr I. Solzhenitsyn, *The Gulag Archipelago, 1918-1956: An Experiment in Literary Investigation*. New York: Harper & Row, 1974. Print. Excerpt received from:  
<https://www.opendemocracy.net/article/alexander-solzhenitsyn-the-line-within>.
3. William Irwin Thomas, *Evil and World Order*. New York: Harper Colophon Books. 1976. Print.

### Miscellaneous

1. Kevork B. Bardakjan, *Hitler and the Armenian Genocide* (Cambridge, Massachusetts: The Zoryan Institute, 1985). From cf. Akten zur Deutschen Auswärtigen Politik 1918-1945. Serie D, Band VII. (Baden-Baden, 1956), pp. 171-172. Retrieved from:  
<http://www.armenian-genocide.org/hitler.html>.
2. Hannah Beech, *U.S. Stood By as Indonesia Killed a Half-Million People, Papers Show*. October 18, 2017. [https://www.nytimes.com/2017/10/18/world/asia/indonesia-cables-communist-massacres.html?emc=edit\\_th\\_20171019&nl=todaysheadlines&nid=31333729](https://www.nytimes.com/2017/10/18/world/asia/indonesia-cables-communist-massacres.html?emc=edit_th_20171019&nl=todaysheadlines&nid=31333729).
3. Channel News Asia, *Singapore Embassy in Yangon in contact with journalist arrested in Myanmar: MFA*, October 30, 2017. Retrieved from:  
<http://www.channelnewsasia.com/news/singapore/singapore-journalist-arrested-myanmar-embassy-in-contact-9359046> on November 16, 2017.
4. *Collective Responsibility*. Carleton University. Retrieved from  
[https://carleton.ca/philosophy/wp-content/uploads/00437\\_Delta.pdf](https://carleton.ca/philosophy/wp-content/uploads/00437_Delta.pdf).



5. Extraordinary Chambers in the Courts of Cambodia: Organs of ECCC: Office of the Co-Prosecutors. Retrieved from: <https://www.eccc.gov.kh/en/ocp/office-co-prosecutors>. Retrieved on: 27 November 2017.
6. Rick Gladstone and Marlise Simons, *Hague Prosecutor Seeks to Pursue Afghan Case That Could Ensnare Americans*. New York Times. 3 November 2017. Retrieved from: <https://www.nytimes.com/2017/11/03/world/asia/international-criminal-court-afghanistan-united-states.html>.
7. ICTY/Bosnia: Life Sentence for Ratko Mladic: Yugoslav Tribunal's Final Trial Highlights Need for National Justice. Human Rights Watch. 22 November 2017. Retrieved from: <https://www.hrw.org/news/2017/11/22/icty/bosnia-life-sentence-ratko-mladic>. Retrieved on: 26 November 2017.
8. Christopher Koettl, *Twitter to the Rescue? How Social Media is Transforming Human Rights Monitoring*, Amnesty Int'l. H. Rts. Now Blog (2013).
9. Tej Kohli, *A Call for Humanitarian Robotics*, Shift New Co (20 November 2017). Retrieved from <https://shift.newco.co/a-call-for-humanitarian-robotics-dfbbeabaec74>.
10. Secretary-General Appoints Catherine Marchi-Uhel of France to Head International Impartial Independent Mechanism Investigating Serious Crimes in Syria. United Nations: Biographical Note: Secretary-General: Appointments. SG/A/1744-BIO/4979-DC/3720. 2 July 2017.
11. Paul Seils, *Truth and Dignity for All, Even Our Enemies*. Huffington Post. [https://www.huffingtonpost.com/paul-seils/truth-and-dignity-for-all\\_b\\_6925624.html](https://www.huffingtonpost.com/paul-seils/truth-and-dignity-for-all_b_6925624.html). Accessed on 21 September 2017.
12. *UNITED ACTION NEEDED TO PROTECT CIVILIANS IN ARMED CONFLICT, SAYS DEPARTING UNDER-SECRETARY-GENERAL FOR HUMANITARIAN AFFAIRS*. 4 DECEMBER 2006, 5577th meeting. <http://www.un.org/press/en/2006/sc8884.doc.htm>
13. UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: <http://www.refworld.org/docid/3ae6b3a84.html> [accessed 27 November 2017]
14. United Nations Mechanism for International Criminal Tribunals. About the MICT: Functions: Archives. Retrieved from: <http://www.unmict.org/en/about/functions/archives>. Retrieved on 27 November 2017.
15. *UN tribunals crucial for delivering justice for Rwanda, former Yugoslavia, Security Council told*, UN News Centre (June 5, 2014), <http://www.un.org/apps/news/story.asp?NewsID=47968#.Wd2WxmiPI2w>.

## I. Introduction

### A. Scope

This paper explores the role of the prosecutor as an instrument of the international community.<sup>1</sup> The enforcement of human rights law rejects one of the major foundations of international law--absolute state sovereignty. The Westphalian experiment of almost four hundred years earlier has given way to the express needs of the international community.<sup>2</sup> Sovereign nations have united in the wake of human rights abuses to formally condemn the actions of perpetrators through internationally-operated tribunals. In order to discuss the obligations and capacity of the prosecutor at these tribunals, this paper will explore the deeper philosophical goals of international human rights law. It is necessary to establish a complete and accurate historical record and to try to learn from the mistakes of the past to help secure these goals in the future. Learning from the past applies to both the horrors being prevented and the measures taken to prevent them. Although prosecution has customarily been the vehicle by which the international community may hope to accomplish these “abstract absolutes”, tribunals by themselves are ineffective in fully securing *Truth*, *Justice*, and ultimately *Peace*. The prosecutor’s responsibility is to serve the goals of the international community and presently that task is impossible to take on alone. Domestic truth commissions, private citizens and citizen-groups like NGOs, and independent mechanisms ought to work together to fill this peace-seeking role where tribunals have been unable.

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<sup>1</sup> In international criminal law does the prosecutor have a responsibility to ensure that the facts forming the historical context in which large-scale human rights abuses occurred are adjudicated at trial? Why or why not?

<sup>2</sup> Derek Croxton, *The Peace of Westphalia of 1648 and the Origins of Sovereignty*, 21 Int’l. Hist. Rev. 3 (1999), p. 569.

## **B. Summary of Conclusions**

- a. The evolution and philosophy of international human rights law informs the many potential roles and motivations of a prosecutor at a criminal tribunal.**

A necessary concession for the purposes of this paper is that international human rights law was created out of a shared sense of responsibility between sovereign states. Prosecutors at an international criminal tribunal are agents tasked with securing the ideals of a collective of sovereign states. Prosecution after due process exists as a time-honored experiment in benevolence on behalf of victims, perpetrators, and the world at-large. ‘Abstract absolutes’, namely *Truth*, *Justice*, and *Peace*, guide human rights law, and the prosecutor has a responsibility to pursue these within the capacity of their office.

- b. It is absolutely necessary to establish an objective and comprehensive historical context when responding to human rights violations.**

Assuming that it is possible for the whole of society to learn from the past, the lessons of the past are only worthwhile if the account of the past is accurate and unbiased. A state of collective memory could be useful to complement the rapidly emerging philosophy of cosmopolitan morality. Because of a responsibility to victims of atrocities and the world at-large, a full account of the facts that constitute crimes against humanity should be available. A complete historical context might delegitimize voices of revisionists and deniers in a way that conditional free speech has been unable. The responsibility of the prosecutor is to formally identify and condemn the nature of these human rights abuses. This includes a responsibility to establish an accurate and unbiased historical context for the court to consider.

**c. The philosophical aims of international human rights law cannot currently be met through tribunals alone.**

Adjudicated facts may be more legitimate than those unsupported by judicial deliberation. Prosecutors already act on their responsibility to adjudicate the facts of these large-scale abuses by going to extensive lengths to establish context through investigative measures. Even so, practical sureness and quickness of conviction may be favored over completeness of fact; Finite resources, procedural rules and precedence, pre-existing international relations and priorities, and other factors place burdens on tribunals that prevent them from achieving a full historical context.

**d. In order to establish an objective and comprehensive historical context, new mechanisms ought to be explored.**

If it is true that there is a responsibility to establish a complete historical record and that tribunals may not be the best-equipped mechanism to produce such a record on their own, the context must be established through other means. Truth commissions, domestic proceedings, independent mechanisms, NGOs, and private citizens as artists and educators can and should be parties to the collection and distribution of information surrounding these events. In light of potential funding cuts, the international community, and independent members within it, ought to do everything possible to embolden citizen journalists and social scientists to collect information from all available sources and appropriately intervene if these mechanisms find themselves victims of violence or bias.

## II. Factual Background

### A. Sovereignty and Human Rights ‘beyond Westphalia’

For the purposes of this memo, ‘Sovereignty’ can be defined as the right of an autonomous agent to expect non-intrusion by another. It implies ‘the *idea* that there is a final and absolute political authority in the political community ... and no final and absolute authority exists elsewhere.’<sup>3</sup> This has been a maxim of formal international law since 1648. The experiment between sovereign states, referred to as the Peace of Westphalia, seemed to identify three principles of international relations.<sup>4</sup> These are the principle of state sovereignty, principle of the legal equality of states, and the principle of non-intervention of one state in the international affairs of another.<sup>5</sup> “In... [this] system of sovereign states, each recognizes the others as the final authorities within their given territories, and only they can be considered actors within the system.”<sup>6</sup> However, according to philosopher William Irwin Thomas, overcoming the maxim of sovereignty appeared as early as the 6th Century BC.<sup>7</sup> He cites a mystical sentiment that inspired thinkers around the globe, but was abandoned for the ‘walls and battlements’ of localized governments.<sup>8</sup> After the Enlightenment in Western Europe, thinkers

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<sup>3</sup> See, *The Peace of Westphalia of 1648 and the Origins of Sovereignty*, *supra* note 2. p. 569.

<sup>4</sup> *Id.* p. 569. Treaties of Munster and Osnabruck, signed to end a three decade war.

<sup>5</sup> Sofia Safonova, *Relevance of the Westphalian System to the Modern World*. 15 January 2012. Retrieved from: [https://www.academia.edu/24957231/Relevance\\_of\\_the\\_Westphalian\\_System\\_to\\_the\\_Modern\\_World\\_By\\_Sasha\\_Safonova](https://www.academia.edu/24957231/Relevance_of_the_Westphalian_System_to_the_Modern_World_By_Sasha_Safonova).

<sup>6</sup> See, *The Peace of Westphalia of 1648 and the Origins of Sovereignty*, *supra* note 2. p. 570.

<sup>7</sup> William Irwin Thomas, *Evil and World Order* (1976), p. 6. A “[v]ision... of universal religions. It was not a validation of one’s own tribal god, for that too easily could grow into the civil religion of a conquest state; it was a vision of the aboriginal brotherhood of man that stood before the walls and battlements of civilization had been raised.”

<sup>8</sup> *Id.* p. 6.

again made attempts towards a world society, which were again abandoned for the convenience of non-intervention and political boundaries.<sup>9</sup> The need for international human rights law after WWII sparked the next “mass movement” in recognizing priorities as a global effort.<sup>10</sup>

The Tribunal at Nuremberg was an attempt by the international community to respond to “the murder of millions of Jews, Slavs, gypsies, and dissidents” by the Nazi regime.<sup>11</sup> The “Nuremberg Charter and the Tribunal’s verdict... challeng[ed] traditional ideas about sovereignty.”<sup>12</sup> Because of the nature of international law and the severity of the Nazi abuses, the perpetrators of the Holocaust could still be held responsible for their actions even though crimes against humanity did not technically exist as a crime under international law.<sup>13</sup> International human rights law became a sort of collaboration among sovereign members of the international community that acknowledged the importance of due process (as opposed to summary execution) in the face of atrocity crimes.<sup>14</sup> Nuremberg “precluded any need to balance the demands of peace and justice” because both could be served by the novelty of a facts-driven trial.<sup>15</sup> Even so, the new human rights law did not arise directly from the trials themselves but

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<sup>9</sup> Daniel Levy and Natan Sznaider, *The institutionalization of cosmopolitan morality: the Holocaust and human rights*, 3 J. of H. Rts. 2 (2004), p. 145.

<sup>10</sup> Antoon De Baets, DOES INHUMANITY BREED HUMANITY? INVESTIGATION OF A PARADOX, *History and Theory* 51 (October 2012), p. 452.

<sup>11</sup> Bernard D. Meltzer, “WAR CRIMES”: THE NUREMBERG TRIAL AND THE TRIBUNAL FOR THE FORMER YUGOSLAVIA, *Valparaiso Un. L. Rev.* 30 (1996), pp. 898.

<sup>12</sup> Elizabeth Borgwardt, *Re-examining Nuremberg as a New Deal Institution: Politics, Culture and the Limits of Law in Generating Human Rights Norms*, 23 *Berkeley J. of Int’l. L.* 2 (2005), p. 451.

<sup>13</sup> Bernard D. Meltzer, *The Nuremberg Trial: A prosecutor’s perspective*, 4 *J. of Genocide Research.* 4, (2002), p. 563.

<sup>14</sup> See, *Re-examining Nuremberg as a New Deal Institution*, *supra* note 12. p. 419.

<sup>15</sup> Bartłomiej Krzan, *International Criminal Court Facing the Peace vs. Justice Dilemma*, *Int’l. Comp. Juris.* 2 (2016), p. 81.

from conventions, treaties, and the implications of the judgments that followed.<sup>16</sup> Despite criticisms, the “trial process stood out as a recognized vehicle for collecting factual accounts, building a historical record, and supplying a basis for punishment.”<sup>17</sup> Nuremberg, and the treaties that followed, were seemingly the first connection between a full report of crime and a “moral consensus about human rights.”<sup>18</sup> Nuremberg revolutionized human rights law and its application but it “was the product of a special time and circumstance vastly different from those surrounding the enforcement of humanitarian law today.”<sup>19</sup>

## **B. Tribunals and Human Rights Today**

The Post-Nuremberg international community seemed to gain a heightened sense of obligation to react against human rights violations. A rapid pattern of human rights enforcement followed the end of World War II and within the next 60 years, Tribunal prosecution became more frequent.<sup>20</sup> The international Tribunal model has been used multiple times since Nuremberg, notably in response to mass killings in Rwanda and the former Yugoslavia.<sup>21</sup> The

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<sup>16</sup> See, *The Nuremberg Trial: A prosecutor's perspective*, supra note 15. “Nuremberg made a substantial contribution to the development of humanitarian law, including, for example, the Genocide Convention. It did so by building a compelling record of the horrors of the Nazi system, before and during the war. Some writers have, however, failed to distinguish clearly between (a) the concepts embodied in the Charter and the Tribunal’s Judgment and (b) the evidence presented at trial. As a result, they tend to exaggerate or oversimplify the contribution made by the law declared at Nuremberg to the development of crimes against humanity or humanitarian law.” p. 564.

<sup>17</sup> Martha Minow, *Making History or Making Peace: When Prosecutions Should Give Way to Truth Commissions and Peace Negotiations*, *Journal of Human Rights* 7 (2008), p. 176.

<sup>18</sup> See, *The institutionalization of cosmopolitan morality*, supra note 9.

<sup>19</sup> Mark S. Berlin and Geoff Dancy, *The Difference Law Makes: Domestic Atrocity Laws and Human Rights Prosecutions*, 51 *Law & Soc. R.* 3 (2017), p. 566.

<sup>20</sup> Göran Sluiter, *The Law of International Criminal Procedure and Domestic War Crimes Trials*. *Int’l. Crim. Law Rev.* 6 (2006), p. 605.

<sup>21</sup> *UN tribunals crucial for delivering justice for Rwanda, former Yugoslavia, Security Council told*, UN News Centre (June 5, 2014), <http://www.un.org/apps/news/story.asp?NewsID=47968#.Wd2WxmiPI2w>.

Under-Secretary-General of the United Nations stated in an address in 2006 that armed groups have devolved to treating civilians in ways that he likened to the “darkest Middle Ages,” and called for “united action by all internal actors – the Governments, civil society, all military and armed groups -- and united international action.”<sup>22</sup> “Human rights and humanitarian law treaties, along with customary international law, establish positive duties for states to provide remedy to victims of human rights violations or to punish those responsible.”<sup>23</sup>

Prosecutions at criminal tribunals, born out of “grassroots mobilization and prosecutorial initiative,”<sup>24</sup> were established as one way to punish human rights offenders. The effectiveness of Tribunals has been called into question since Nuremberg.<sup>25</sup> This debate is likely to continue until new mechanisms are adopted altogether. Currently, Tribunals are one of the international community’s preferred mechanisms for responding to large-scale human rights abuses. The current emphasis on human rights seems to broaden their definition. There is a “history of colonialism and slavery, whose legacy continues”<sup>26</sup> across most of the developed world. Accountability for these past and present inhumanities may only be possible if history might be known exactly as it happened.

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<sup>22</sup> *UNITED ACTION NEEDED TO PROTECT CIVILIANS IN ARMED CONFLICT, SAYS DEPARTING UNDER-SECRETARY-GENERAL FOR HUMANITARIAN AFFAIRS*. 4 DECEMBER 2006, 5577th meeting. <http://www.un.org/press/en/2006/sc8884.doc.htm>

<sup>23</sup> See, *The Difference Law Makes*, *supra* note 19. p. 535.

<sup>24</sup> *Id.* p. 539.

<sup>25</sup> See, *Re-examining Nuremberg as a New Deal Institution*, *supra* note 12. p. 402.

<sup>26</sup> Claude E. Welch Jr., *Human rights NGOs and the rule of law in Africa*, 2 J. of H. Rts. 3 (2003), 315.



### III. Substantive Discussion

#### A. The evolution and philosophy of international human rights law informs the many potential roles and motivations of a prosecutor at a criminal tribunal.

##### i. Human rights law is based on a philosophy of collective morality.

A child runs awkwardly, falls, and is hurt; he touches a bee and is stung; he takes a bone from a dog and is bitten; and as a result he learns not to do these things again. It is mainly to avoid various forms of natural punishment that people have built a more comfortable and less dangerous world.<sup>27</sup>

Human rights are a rapidly growing field of law and morality, constantly influenced by new information about the all-too human capacity for inhumanity.<sup>28</sup> Although consensus is and will continue to be elusive, the emergence of human rights law has revealed that the international community shares a common objection to certain types of offenses perpetrated on a large scale. Punishment for these large-scale abuses are a way for the international community to help build a ‘more comfortable and less dangerous world’. The existence of human rights law suggests that there is a global interest in creating a world that maximizes comfort and minimizes danger, on behalf of those victims that were denied the possibility of living in that world. In order to explore the practical obligations of the prosecutor, the theories underlying the practice of human rights law itself are relevant.

I make several assumptions in writing this paper. The first assumption is that morality has been increasingly regarded as a collective social effort. Morality is and has been largely

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<sup>27</sup>B.F. Skinner, *Beyond Freedom & Dignity* (1971), p. 56.

<sup>28</sup> See, *DOES INHUMANITY BREED HUMANITY?*, *supra* note 10. “Outraged by the repression and torture of Latin American dictatorships in the 1970s, Amnesty International launched its antitorture campaign in 1973.” p. 462.

understood in religious and political terms.<sup>29</sup> For this reason, some resources can not necessarily be embraced as maxims. For the purposes of this paper, I will make the assumption that morality is an “abstract absolute” that exists, and exists objectively for *all* people, outside of any one religion or politic. The concept of ‘human rights’ itself implies the existence of an objective moral good, or *right*.<sup>30</sup>

The second assumption is that the existence of morality suggests the existence of a spectrum that spans from positive (*right*) to negative (*wrong*). The assumption is that every action or non-action exists somewhere on this spectrum, with some being more negative or wrong and others being more positive or right. This is an understatement of the complexity of moral theory however it is necessary for the purposes of this paper. Ultimately, I will try to offer that a collective morality might be theoretically possible. This would mean that, theoretically, all people may be able to agree on some act or non-act’s position along the spectrum. The implications of such an assumption are understood and the assumption seems to hold stronger in fiction than fact. Even so, the international community seemed to place morality in this scope by prosecuting the acts of the Nazis after WWII as objectively intolerable.

The third assumption is that certain ideas (or ‘abstract absolutes’) exist which *inform* potential actions (or non-actions). For example, *Truth* is an intangible idea that exists and *informs* the act of communicating factual information. *Peace* exists as an idea and *informs* the non-act of violence. *Justice* exists and *informs* the decision to engage in the judicial process. For the purposes of this brief, I will define Justice in two ways. The first, *justice*, can be thought of as

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<sup>29</sup> Id. p. 453.

<sup>30</sup>Juan E. Méndez, *Accountability for Past Abuses*, 19 Human Rts. Q. 2 (1997), p. 277.

the resolution of a formal judicial proceeding. The second and more universal, *Justice*, can be defined as the process of ‘righting’ a wrong and refers to the intangible equilibrium between right and wrong. In the same way, certain acts *serve the interest* of each ‘abstract absolute’. For example, the act of communicating factual information *serves the interest of Truth*, the act of being non-violent *serves the interest of Peace*, and the act of responding to perceived ‘wrongs’ through formal judicial proceeding *serves the interest of Justice*.

The fifth and final assumption is that morality can sometimes manifest as law, policy, or practice.<sup>31</sup> While morality may subjectively inform parts of each rational actor’s life, morality can also manifest itself as the behaviors that society will and will not tolerate. Similarly, acts of inhumanity can result in the emergence of new standards of what is decent and right behavior.<sup>32</sup>

Responsibility, for the purposes of this memo, can be defined as: an agent’s motivation to act consistent with their role, capacity, or circumstance. Responsibility has two incarnations: forward-looking--“to see that future action is taken”-- and backward-looking--“to do something because of what has been done.”<sup>33</sup> When states facilitate or fail to eliminate large-scale human rights abuses, these abuses create both the forward and backward-looking responsibility

1. “to investigate, prosecute, and punish the perpetrators;

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<sup>31</sup> Dieter Misgeld, *Ultimate Self-Responsibility, Practical Reasoning, and Practical Action: Habermas, Husserl, and Ethnomethodology on Discourse and Action*, *Human Studies* 3 (1980), p. 255. Theory begets action. It follows that abstract ideals guide the adoption of new doctrine.

<sup>32</sup> See, *DOES INHUMANITY BREED HUMANITY?*, *supra* note 10. p. 464.

<sup>33</sup> *Collective Responsibility*. Carleton University. Retrieved from: [https://carleton.ca/philosophy/wp-content/uploads/00437\\_Delta.pdf](https://carleton.ca/philosophy/wp-content/uploads/00437_Delta.pdf)

2. to disclose to the victims, their families, and society all that can be reliably established about those events;
3. to offer the victims adequate reparations; and
4. to separate known perpetrators from law enforcement bodies and other positions of authority”<sup>34</sup>

The states that commit these crimes do not usually have the capacity to assume such a responsibility and this role is filled by the international community through international Tribunals.<sup>35</sup>

The international community supports three ‘abstract absolutes’ (*Truth, Justice, and Peace*) through their expressed commitment to human rights. Although there may be issues in “relating the universal to the particular<sup>36</sup>,” these ‘universals’ seem to inform the actions of the international community through the enforcement of human rights law. The responsibility of the state in the face of human rights abuses is such that these three ideals are stressed more than others. Investigation, prosecution, and punishment as well as the payment of reparations all imply the importance of the abstract absolute of *Justice*. The first and third responsibility of the state might be satisfied by justice mechanisms like Tribunals and the International Criminal Court. The requirement that the state should separate perpetrators from positions of power is one way that *Peace* can be quickly achieved. If an offender were to be removed from their platform to offend, offenses by that particular offender are probably less likely to occur. The non-

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<sup>34</sup> See, *Accountability for Past Abuses*, *supra* note 30. p. 261.

<sup>35</sup> Abel Escrib -Folch and Joseph Wright, *Human Rights Prosecutions and Autocratic Survival*, Int’l. Org. 69 (2015), p. 347.

<sup>36</sup> Eugene Garver, *Euthyphro Prosecutes a Human Rights Violation*, *Phil. and Lit.* 38 (2014), p. 512.

occurrence of human rights violations is the first step towards achieving *Peace*. Finally, the assurance that the state will disclose “all that can be reliably established” suggests the state’s role in serving the interest of *Truth* on behalf of victims and society at-large.

There are debates about what philosophical absolute should and do drive the practice of international human rights law. “Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives. Advancing all three in fragile post-conflict settings requires strategic planning, careful integration and sensible sequencing of activities”.<sup>37</sup> It “may be suggested to discard such a raw peace-justice binary as it reduces the relationship in question to oversimplified mechanisms neglecting some justice-providing quality of peace and the complexity of prosecuting international crimes.”<sup>38</sup> The traditional formula that justifies criminal prosecution is that without justice there can be no peace.<sup>39</sup> The Secretary-General of the International Criminal Court attempted to consolidate *Justice* and *Peace* as complementary ‘forces.’ He said that “when properly pursued... [*Justice* and *Peace*] promote and sustain one another. The question, then, can never be whether to pursue [J]ustice and accountability, but rather when and how.”<sup>40</sup>

**ii. Tribunal prosecutors ideally represent and execute the philosophical aims of human rights law.**

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<sup>37</sup> See, *International Criminal Court Facing the Peace vs. Justice Dilemma*, *supra* note 15. Statement by the Secretary-General of the International Criminal Court (2004). The ICC is an experiment in justice by the United Nations, similar to Tribunals and established based on identical theories of international human rights law. p. 82.

<sup>38</sup> *Id.* p. 82.

<sup>39</sup> *Id.* p. 82.

<sup>40</sup> *Id.* Secretary-General, 2004, §21, p. 8. Krzan, p. 82.

According to Méndez, there are four rights that must be protected, if not by the state itself then by the international community, in the face of human rights violations. These are first, the ‘right of the victim to see justice done’; second, the ‘right to know the truth’; third, ‘[a]n entitlement to compensation and also to nonmonetary forms of restitution’; and fourth, the ‘right to new, reorganized, and accountable institutions.’<sup>41</sup> These four rights serve *Truth*, *Justice*, and *Peace*. Prosecutions are international mechanisms through which all four have been at least partially satisfied.

Prosecutors strive for these ideals on behalf of victims, perpetrators, and humanity at-large. For the victim, reconciliation and peace of mind for the actual victims is the primary motivation behind prosecution. “Punishing... [on behalf of] the individual victims, and thereby avoiding collective guilt and collective myths of victimhood and eliminating the strife for vengeance, all contribute to the so-called pacifying effect of international criminal justice.”<sup>42</sup> For the perpetrator, there is inherent value in due process. Perpetrators of genocide are arbiters of capital punishment in situations where no due process was afforded to victims. Judicial proceedings and the accompanying precedence and burdens are the mechanism through which the legal and moral enforcement community can counter a present evil with an achievable good. The presumption of innocence is counterintuitive but it is necessary to Justice. Giving due process to Defendants is illustrative of the absolute power and capacity of the moral ‘right’ to carry out patient, careful, and deliberate justice. Finally, the world at-large could benefit from prosecution. Since Nuremberg, Prosecution has seem to create a baseline for acceptable human rights practices according to the international community. Both *Peace* and *Justice* have been

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<sup>41</sup>See, *Accountability for Past Abuses*, *supra* note 30. p. 261.

<sup>42</sup> See, *International Criminal Court Facing the Peace vs. Justice Dilemma*, *supra* note 14. p. 81.

expressly cited as important by members of the international community through their support of either Tribunals, truth commissions, or both. “Prosecutions may be considered generally as serving to instruct or inhibit the possibility of bringing conflict to an end.”<sup>43</sup> Ending conflict serves the interest of and is informed by *Peace*. The Prosecutor cannot compel the judges to reach a certain conclusion or compel the international community to embrace the legitimacy of these tribunals. The prosecutor’s efforts are informed by the ideals that drive human rights law. The ideal prosecutor ought to do everything within the capacity of their position to serve the interest of *Truth, Justice, and Peace*.

**B. It is absolutely necessary to establish an objective and comprehensive historical context when responding to human rights violations, and the prosecutor has a responsibility to add to this context.**

‘Abstract absolutes’ inform the enforcement of human rights law and Prosecutors are practical and ideological agents of that enforcement. At the same time, “human rights are meant to recognize specific and real humans, not simply an abstract ideal.”<sup>44</sup> Beyond philosophical ideals, the practical aims of prosecution are “promoting social reconciliation, giving victims a voice... [and] making a historical record of mass atrocities to help secure the past against deniers and revisionists”.<sup>45</sup>

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<sup>43</sup> Id. p. 82.

<sup>44</sup> See, *Making History or Making Peace*, *supra* note 17. p. 182.

<sup>45</sup> David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*. Georgetown University Law Ctr. (2008). Retrieved from: [http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1069&context=fwps\\_papers](http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1069&context=fwps_papers). Retrieved on: 23 November 2017. p. 8.

Revisionists and deniers are sometimes in a position to alter textual history.<sup>46</sup> Educational texts which appear to contain accounts of history may contain incomplete, one-sided, or blatantly inaccurate accounts of these historical events.<sup>47</sup> It is perhaps better to look at the past as something that is not necessarily ‘closed’.<sup>48</sup> In order to combat the nationalist bias that pervades the resolutions after these abuses, historical accounts must be accurate. This would require that they give a complete account of the facts as they happened and not as whichever party may prefer it to have happened. “[S]ocieties will not move on, or protect themselves from, periods of repression and abuse as long as a convenient pall of denial is allowed to obscure what went on.”<sup>49</sup> In what has been deemed a ‘post-truth age,’<sup>50</sup> collective memory could be a unifying force.

The process of creating a collective account of history could contribute to unanimous global understandings of some set of facts or circumstances. This could lead to cosmopolitan morality-- an intangible sense of right and wrong that global society naturally indicates, through rituals like formal and informal punishment.<sup>51</sup> Context ought to rely on facts from the perspective of both victims and perpetrators since “lasting peace is only possible if the process

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<sup>46</sup>Michael H. Romanowski, *Problems of Bias in History Textbooks*. Retrieved from: <http://www.socialstudies.org/sites/default/files/publications/se/6003/600310.html>. Retrieved on: 24 November 2017.

<sup>47</sup>Id.

<sup>48</sup> Valérie Rosoux, *Human rights and the ‘work of memory’ in international relations*, 3 J. of Human Rights. 2 (2004), p. 159.

<sup>49</sup> Paul Seils, *Truth and Dignity for All, Even Our Enemies*. Huffington Post. [https://www.huffingtonpost.com/paul-seils/truth-and-dignity-for-all\\_b\\_6925624.html](https://www.huffingtonpost.com/paul-seils/truth-and-dignity-for-all_b_6925624.html). Accessed on 21 September 2017.

<sup>50</sup> William Davies, *The Age of Post-Truth Politics*, The New York Times (2016) <<https://www.nytimes.com/2016/08/24/opinion/campaign-stops/the-age-of-post-truth-politics.html>>.

<sup>51</sup> See, *The institutionalization of cosmopolitan morality*, *supra* note 9. p. 145.



by which it is attained carefully and honestly addresses human rights and laws of war violations by all sides,”<sup>52</sup>. Of the many elements that form historical context, some include

identifying the acts that cause violations; determining the victims; organizing the acts into events; determining the perpetrators and their levels of involvement in an event; identifying the relationships among events; identifying other roles performed in relation to the event, and the persons or groups who perform these roles; showing relationships of and updates about the various persons or groups; identifying where additional information is needed<sup>53</sup>

I suggest that there are two types of historical context. The first is theoretical, comprehensive and unbiased and relies on a neutral third party inventory of fact. The second is practical and takes the limitations of education and storytelling into account. The practical context will be the focus of this paper, although the ideal does inform and serve the practical. “Not just abstract rational thought about how the world works, but human experience, the experience of catastrophe--which at the same time is the experience of a world where human rights do not exist-- is the basis for new human rights regimes.”<sup>54</sup>

When acts seem to have no negative consequence, it may set an intimidating precedent that these acts are likely to be tolerated in the future.<sup>55</sup> This is a dangerous when those unchallenged events involve large-scale human rights abuses.<sup>56</sup> “The belief that sovereignty

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<sup>52</sup> See, *Accountability for Past Abuses*, *supra* note 30. p. 273.

<sup>53</sup> Manuel Mario Guzman, *The investigation and documentation of events as a methodology in monitoring human rights violations*, Stat. J. UN ECE 18 (2001), p. 250.

<sup>54</sup> See, *The institutionalization of cosmopolitan morality*, *supra* note 9. p. 145.

<sup>55</sup> Erasmus Masitera, *Creating a Culture of Impunity in Zimbabwe: A Case for Philosophical Input in Developmental Issues*, 5 *Africana* 2 (2011), p. 102.

“Leaving abuses unchallenged creates a ‘moral Leviathan’ that ‘rightness’ cannot necessarily defeat on its own.”

<sup>56</sup> Kevork B. Bardakjan, *Hitler and the Armenian Genocide* (Cambridge, Massachusetts: The Zoryan Institute, 1985). From cf. Akten zur Deutschen Auswärtigen Politik 1918-1945. Serie D, Band VII. (Baden-Baden, 1956), pp. 171-172. Retrieved from: <http://www.armenian-genocide.org/hitler.html>.  
“Who, after all, speaks today of the annihilation of the Armenians?”

extends to a state or culture's morality, or *moral relativism*, has been rejected by the international community in the wake of the Holocaust and cosmopolitanism has arisen in its place.<sup>57</sup> Since “[old] culture... [is] a curriculum in the new culture,”<sup>58</sup> the international prosecutor has a unique platform. International human rights law is relatively new<sup>59</sup>, so the old culture has to be carefully and accurately preserved and consulted.

Context might allow people to make sense of the past and to move forward with that knowledge to avoid similar behaviors in light of their consequences. Collective memory and thus collective consciousness might be helping to shape a global culture of higher standards and diminished patience in the face of human rights violations. The arguments for the development of historical context rely on the premise that collective memory can lead to collective responsibility.<sup>60</sup> Collective responsibility<sup>61</sup> might motivate individual members of the international community to respond to human rights abuses within their power every time they happen. Human rights law serves every member of the international community. After these large-scale abuses, there are those who did not themselves commit crimes but may have facilitated crimes by their inaction. Education is not for the global community but primarily for

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These infamous words were issued by Adolf Hitler years before he led the systematic torrent on Jewish people, gypsies, and other groups deemed counter to the nightmarish vision of the Nazi regime. This helps to illustrate the consequence of leaving atrocities unreported and perpetrators unaccountable.

<sup>57</sup> See, *The institutionalization of cosmopolitan morality*, *supra* note 9. p. 143.

<sup>58</sup> See, *Evil and World Order*, *supra* note 7. p. 7.

<sup>59</sup> See, *The Nuremberg Trial: A prosecutor's perspective*, *supra* note 15. p. 561.

<sup>60</sup> See, *Human rights and the 'work of memory'*, *supra* note 48. p. 159.

<sup>61</sup> See, *Collective Responsibility*, *supra* note 33. Collective Responsibility: “the ascription to a group or organization of something to be done, of doing something, or of answering to something done.”

the population of perpetrators that participated as bystanders.<sup>62</sup> These events can be difficult to comprehend for those who may have supported an abusive regime at the time. A historical context might allow for those who were complicitly involved or obedient to orders to move forward with a shared sense of understanding, and a shared sense of growth in response to those mistakes.<sup>63</sup>

“The records related to the investigations and prosecutions provide insight into the motivations and causes that led to these atrocities, thereby having the potential to educate and inform in the interest of preventing the occurrence of future violations of international human rights law.”<sup>64</sup> Capitalizing on the potential to inform and educate is informed by and serves the interest of *Truth*. The prevention of future occurrences is informed by and serves the interest of *Peace*. And it could be said that investigations and prosecutions are informed by and serve the interest of *Justice*. These investigative and prosecutorial records make up the adjudicated historical context. Historical context is necessary for justice under the Tribunal model. *Truth* seems to be essential to the goals of international human rights law. *Truth* can also be said to inform the decision to establish a historical context. As established earlier, the prosecutor has a responsibility to uphold ideals of human rights law. The establishment of historical context ought to be included within the scope of the Prosecutor’s responsibility.

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<sup>62</sup> Martha Minow, *What the rule of law should mean in civics education: from the following ‘Following Orders’ defence to the classroom*, 35 J. of Moral Ed. 2 (2006), p. 156.

<sup>63</sup> Id. p. 155.

<sup>64</sup> United Nations Mechanism for International Criminal Tribunals. About the MICT: Functions: Archives. Retrieved from: <http://www.unmict.org/en/about/functions/archives>. Retrieved on 27 November 2017.

**C. The philosophical aims of international human rights law cannot currently be met through tribunals alone.**

Whatever moral responsibility the Prosecutor can be said to have to establish a complete historical record, they cannot ignore the practical challenges to exercising such a responsibility. The prosecutor already establishes a sort of context within the capacity of their position. Before the international community can object, offenses have been observed. Facts that indicate the systematic nature of these offenses have to be adjudicated at trial in order to provide enough evidence that the court can make an informed decision about whether to convict. Prosecutorial discretion might naturally elect that sureness of conviction is more valuable than exhaustive fact finding. Resources and political relationships make a complete historical record impossible.

**i. Resources and procedure limit the extent of context that can be established at Tribunals.**

Human rights prosecutors are on trial themselves as a symbolic representation of the fiscal and practical efforts of the international community.<sup>65</sup> While *Truth, Justice, and Peace* are undeniably noble goals to strive for, abstractions do not create great arguments supporting the inflated costs of these Tribunals. The International Criminal Tribunal for Rwanda had a budget of 1 billion US dollars, International Criminal Tribunal for Yugoslavia had a budget of 1.2 billion US dollars, meaning the international community paid between ten and fifteen million US dollars per accused.<sup>66</sup> The ECCC began with funds from both Cambodia itself (around 13 million dollars US) and donations from the International community (around 43 million dollars US). In 2007, an additional budget of 115 million dollars US was requested, averaging about 36 million

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<sup>65</sup> See, *Euthyphro Prosecutes a Human Rights Violation*, *supra* note 36. p. 512.

<sup>66</sup>Rupert Skillbeck, *Funding Justice: The Price of War Crimes Trials*. Human Rights Brief 15, no. 3 (2008): 6-10.

dollars per accused.<sup>67</sup> Time is also a factor, as the proceedings and sentencing at the ICTY began in the 1990 and are still being resolved over two decades later.<sup>68</sup>

At the ECCC, the co-Prosecutors conduct “preliminary investigations” and “prosecute... cases throughout the investigative, pre-trial, trial and appellate stages, processes victim complaints, and participate... in judicial investigations.”<sup>69</sup> Prosecutors have to decide who to charge and what charges are appropriate however it can be difficult for prosecutors to identify these parties worth prosecuting. Governments may be biased to provide false information about its agents during investigations.<sup>70</sup> Leaders of regimes can be easily identified but sometimes perpetrators are agents within a state and not necessarily agents of the state.<sup>71</sup> Under Article 53 of the Rome Statute, the Prosecutor is discouraged from investigations if such investigation would not allow justice to be served.<sup>72</sup> This rule reveals the tension between collecting observable and recordable information and working towards the ultimate goal of the resolution of the case. Justice may be served in the eyes of the Tribunal, but any such Justice is incomplete

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<sup>67</sup>Id. p. 6-10.

<sup>68</sup> ICTY/Bosnia: Life Sentence for Ratko Mladic: Yugoslav Tribunal’s Final Trial Highlights Need for National Justice. Human Rights Watch. 22 November 2017. Retrieved from: <https://www.hrw.org/news/2017/11/22/icty/bosnia-life-sentence-ratko-mladic>. Retrieved on: 26 November 2017.

<sup>69</sup>Extraordinary Chambers in the Courts of Cambodia: Organs of ECCC: Office of the Co-Prosecutors. Retrieved from: <https://www.eccc.gov.kh/en/ocp/office-co-prosecutors>. Retrieved on: 27 November 2017.

<sup>70</sup>Mark S. Ellis, Coming to Term with its Past--Serbia’s New Court for the Prosecution of War, 22 Berkeley J. of Int’l. Law (2004) p. 165.

<sup>71</sup> Eric A. Heinze, *Humanitarian intervention: morality and international law on intolerable violations of human rights*, 8 Int’l J. of H. Rts. 4 (2004). “there are often antagonistic non-state authorities against whom force may be directed so as to fulfil the humanitarian objective.” p. 474.

<sup>72</sup> UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: <http://www.refworld.org/docid/3ae6b3a84.html> [accessed 27 November 2017]

if victim information is excluded. Tribunals already undergo intensive documentation and archival practices, most of which consist of judicial and legal records to establish precedent, rather than historical records to establish context.<sup>73</sup> Some other party may be necessary to “complement forensic investigation[s] with a historical narrative.”<sup>74</sup>

**ii. Political and legal relationships create other barriers to exercising the responsibility to create a complete context.**

Other factors make it difficult for Prosecutors to act on their responsibility to establish context. First, state sovereignty in an international collective brings with it a strategic political bias and occasional hypocrisy.<sup>75</sup> Since Prosecutors represent this collective, Prosecutors may not represent blameless authority.<sup>76</sup> In some cases the presence of certain countries on a Tribunal “fatally compromise[s] the morality of the trial” when these countries have also been known to commit or facilitate similar crimes.<sup>77</sup>

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<sup>73</sup> Tom A. Adami and Martha Hunt, *Genocidal Archives; The African Context--Genocide in Rwanda*, 26 J. of Soc. of Arch. 1 (2005), pp. 106.

<sup>74</sup> Onur Bakiner, *One truth among others? Truth commissions' struggle for truth and memory*, 8 Mem. Stud. 3 (2015), p. 345.

<sup>75</sup> Vivian Grosswald Curran, *The Politics of Memory/Errinerungspolitik and the Use and Propriety of Law in the Process of Memory Construction*, 14 Law and Crit. 3. Retrieved on: 21 September 2017. “The crime against humanity has not changed in nature, nor has it changed in definition, but its judicial application is at the mercy of the politics of those who interpret it.” p. 322.

<sup>76</sup> Gordon N. Bardos, *Trials and Tribulations: Politics as Justice at the ICTY*, World Affairs (2013), p. 20.

<sup>77</sup> See, “WAR CRIMES”, *supra* note 11. p. 902; Hannah Beech, *U.S. Stood By as Indonesia Killed a Half-Million People, Papers Show*. October 18, 2017. [https://www.nytimes.com/2017/10/18/world/asia/indonesia-cables-communist-massacres.html?emc=edit\\_th\\_20171019&nl=todaysheadlines&nliid=31333729](https://www.nytimes.com/2017/10/18/world/asia/indonesia-cables-communist-massacres.html?emc=edit_th_20171019&nl=todaysheadlines&nliid=31333729). Indonesian prisons were overflowing and officials responded by murdering those suspected of supporting the communist regime. Indonesian military shifted the blame for the murders by citing anti-Communist public sentiment. A human rights lawyer brought the facts arising out of Indonesia in the 1960s to an international tribunal at the Hague, which found that the United States, Great Britain, and Australia were all complicit in the atrocity crimes; Rick Gladstone and Marlise Simons, *Hague Prosecutor Seeks to Pursue Afghan Case That Could Ensnare Americans*. New York Times. 3 November 2017. Retrieved from: <https://www.nytimes.com/2017/11/03/world/asia/international-criminal-court-afghanistan-united-states.html>. The US often claims the role of champions for international justice but may have committed large-scale human rights abuses in Afghanistan over the last 16 years.

Procedural rules limit which types of crimes and offenders can be tried. Most nations outlaw murder however the nations committing these crimes do not account for these large-scale abuses in domestic law.<sup>78</sup> While it can be recommended that all nations create laws that prohibit atrocity crimes<sup>79</sup>, not every objective human rights abuse constitutes a crime under international criminal law. Tribunals have ‘created’ crimes before, meaning they gave a legal name to an unprecedented set of actions.<sup>80</sup> “Situations may arise where the State in which atrocities are occurring is not actively violating its citizens’ rights, but is unable or unwilling to cope with human suffering such as instances of famine or disease”<sup>81</sup> A Tribunal has no precedent or experience in trying these kinds of charges. Finally, victim availability make it difficult for prosecutors to access all the information necessary to create a comprehensive historical context since some victims may be more or less likely to report violations based on various circumstantial factors like economic status.<sup>82</sup>

Additionally, formal justice as it has previously been understood may not account for the power structures that pre-exist prosecutorial involvement. Often, these large-scale abuses occur at the hands of an indoctrinated military under direction of military leaders.<sup>83</sup>

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<sup>78</sup>Joseph Yav Katshung, *Prosecution of Grave Violations of Human Rights in Light of Challenges of National Courts and the International Criminal Court: The Congolese Dilemma*, Human Rights Review (2006), p. 5.

<sup>79</sup> Id. p. 5.

<sup>80</sup> Andréa Ford, *A Brief History of Genocide*, Time. December 9, 2008. Retrieved from: <http://content.time.com/time/world/article/0,8599,1865217,00.html>.

<sup>81</sup> See, *Humanitarian intervention*, *supra* note 70. p. 474.

<sup>82</sup> Steffen Jensen, Tobias Kelly, Morten Koch Andersen, Catrine Christiansen, & Jeevan Raj Sharma, *Torture and Ill-Treatment Under Perceived: Human Rights Documentation and the Poor*, 39 Human Rights Q. (2017), pp. 393-415. #

<sup>83</sup> See, *What the rule of law should mean*, *supra* note 61. p. 141.

Lawyers who are remote from the platoon do not make [as] effective instructors as officers who have earned the respect of their troops. Who brings the message affects how it is heard, and if lawyers are viewed as outsiders, naive or remote from the real demands of the military, their message will not be terribly effective.<sup>84</sup>

If perpetrators believe that the accounts of history are one-sided then condemnations will not be taken as seriously.<sup>85</sup> In fact, the perpetrators of these crimes are sometimes embraced as national heroes by their communities, even after conviction.<sup>86</sup> There is no quick answer to the question of how to limit the re-occurrence of these crimes. Since victims and society-at-large have a right to reliable institutions, potential answers should be openly explored.<sup>87</sup> Tribunals have played a significant role in securing the goals of human rights law, including those of *Truth, Justice*, and ultimately *Peace*.

Though it seems like current political factors impacting Tribunals might delegitimize efforts towards global peace<sup>88</sup>, facts adjudicated at trial may carry a sort of legitimacy, and longevity due to recordkeeping procedures, that non-adjudicated facts lack. It is unclear how much more complete or accessible the record could be. Even in the face of these shortcomings, Tribunals cannot be abandoned altogether. The United Nations Security Council expressed their concern that “impunity for individuals indicted by the Tribunals and still at large would be

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<sup>84</sup> Id. p. 154.

<sup>85</sup> See, Life Sentence for Ratko Mladic, *supra* note 67.

<sup>86</sup> Id.

<sup>87</sup> See, *Accountability for Past Abuses*, *supra* note 30. p. 261.

<sup>88</sup> See, *Trials and Tribulations*, *supra* note 75. “Although the political manipulation of what are meant to be impartial international courts is problematic enough, numerous other problems confronting... [Tribunals] raise important questions about the ultimate reality of such institutions promoting justice and reconciliation in post-conflict society. While prosecuting the perpetrators of serious crimes is inarguably a moral responsibility, the manifold failures of... international tribunals to convince the affected populations, societies, and states of the legitimacy of the “justice” imposed on them suggests the need to consider other methods of promoting stability and reconciliation.” p. 16.



unacceptable”, and also “recognized the critical importance of continuing witness protection, and stressed that the archives of the Tribunals are UN property and should be kept under its control.”<sup>89</sup> While others may be capable of handling these records and could hypothetically embrace a more transparent, accessible, and preservative approach with their record-keeping, no such mechanism is available today. Until such mechanisms can exist independent of the political conglomerate of nations that comprise the United Nations, the United Nations and its mechanisms are the preferred response of the international community. But these barriers to full context suggest that a more complete record may be possible if the international community and concerned individuals within that community pursue other mechanisms that could complement the potential of these Tribunals.

**D. In order to establish an objective and comprehensive historical context, new mechanisms ought to be explored.**

**i. Truth commissions and independent mechanisms can complement the efforts of tribunals**

“If punishment is rendered legally or factually impossible within legitimate conditions, the state is still obligated to investigate and disclose the facts, to acknowledge the wrongs committed in its name.”<sup>90</sup> Truth commissions may have the power to create “the acknowledgment... of harm...[and] the recognition of disregarding the dignity of others that can

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<sup>89</sup>Giorgia Tortora, *The Mechanism for International Criminal Tribunals: A Unique Model and Some of Its Distinctive Challenges*, 21 Am. Soc. of Int’l. Law 5 (2017). #

<sup>90</sup> See, *Accountability for Past Abuses*, *supra* note 30. p. 269.

help to make amends” as well as “restore trust and move societies towards a rights-respecting future”<sup>91</sup>

In other circumstances--when complex and multiparty conflicts persisted over many years , where oppression produced silence and denial about mass atrocity, or where the courts themselves were associated with the oppression--a truth commission may seem more promising than criminal or civil litigation as a means for digging out broad historical causes of human rights violations or for advancing respect and restoration of the human rights of victims.<sup>92</sup>

These commissions may be the most effective way promote an extra-judicial collective memory.

In light of political and financial constraints of Tribunals, truth commissions

may be a more effective mechanism than litigation for devising a new national narrative. A commission can produce an actual document, useful for public education, or could prompt work by historians, curriculum developers, artists, and others to devise cultural resources that acknowledge the sources and details of mass violations of human rights.<sup>93</sup>

Truth commissions are not without their criticisms. The possibility for corruption is high in an organization like this. It has also been said that “truth commissions may be sometimes cynically misused — a perfunctory checking of a box to satisfy a transiently interested international community.”<sup>94</sup> Truth commission narratives should not be viewed as political tools.<sup>95</sup> Truth commissions can only “succeed when they are seen by the public as an effort by a national community to come to grips with its own reality of atrocious behaviors by its members

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<sup>91</sup> See, *Truth and Dignity for All*, *supra* note 49.

<sup>92</sup> See, *Making History or Making Peace*, *supra* note 17. p. 179.

<sup>93</sup> *Id.* p. 179.

<sup>94</sup> See, *Truth and Dignity for All*, *supra* note 49.

<sup>95</sup> See, *One truth among others?*, *supra* note 73. p. 349.

to another.”<sup>96</sup> The names assigned to these commissions indicate the abstract goals of their efforts. The Sierra Leone Truth and Reconciliation Commission<sup>97</sup>, The Truth and Dignity Commission in Tunisia<sup>98</sup> and the Commission of Truth and Friendship and Justice for East Timor<sup>99</sup> imply that, at the very least, these commissions are meant to be perceived as positive for all parties involved.

Independent mechanisms like 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 are both oddly specific and too little too late in areas where human rights abuses have been left unrecorded for sometimes decades.<sup>100</sup> Even so, some efforts are better than none at all in the case of observing and reporting human rights abuses. These mechanisms will ideally function as pre-Prosecutorial investigation mechanisms whose records may be entered as evidence at a potential future Tribunal. This is partially implied through examination of who has been appointed to direct the mechanism. In the case of the IIMAIIPPRMSCUILCSAR, the newly-appointed head has had experience as the Senior Legal Officer at the International Criminal Tribunal for the

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<sup>96</sup> See, *Accountability for Past Abuses*, *supra* note 30. p. 270.

<sup>97</sup> William A. Schabas, *Amnesty*, *The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 11 J. of Int'l. L. & Pol. 145 (2004), p. 146.

<sup>98</sup> See, *Truth and Dignity for All*, *supra* note 49.

<sup>99</sup> Robin Perry, *The Commission of Truth and Friendship and Justice for East Timor*, 34 Alt. Law J. 3 (2009), p. 199.

<sup>100</sup> *Secretary-General Appoints Catherine Marchi-Uhel of France to Head International Impartial Independent Mechanism Investigating Serious Crimes in Syria*. United Nations: Biographical Note: Secretary-General: Appointments. SG/A/1744-BIO/4979-DC/3720. 2 July 2017.

former Yugoslavia.<sup>101</sup> This person may be able to incorporate standards of proof of these Tribunals with the availability of evidence to ensure that a fuller report is secured for the future.

Whichever way these mechanisms come to exist, there is a global need for their objective reliability. In light of the challenges Tribunals face, there is a need for reliable streamlined mechanisms to get indictments plus non-political truth mechanisms through which history can be documented, verified, and circulated. Ideally, these Truth mechanisms might be able to synthesize the information they record and to achieve Justice “[in] many forms, from apologies to punishment to amending educational curricula to acknowledge atrocities and repression.”<sup>102</sup> Then, maybe, Peace can be discussed.

**ii. A socially and technologically-empowered global citizenry will be instrumental towards securing Truth, Justice, and Peace.**

Data multiplies at an unyielding rate every minute of every day.<sup>103</sup> Information and the immediacy of the Internet disseminates reports and documentation without the participation of the prosecutor.<sup>104</sup> This information may lead to “accusations... [which] could prompt deeper isolation and violent reprisals, making conditions worse for the victims and those trying to help them.”<sup>105</sup> Human rights groups, journalists, and investigators are often unwelcome where

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<sup>101</sup> Id.

<sup>102</sup> See, *Truth and Dignity for All*, *supra* note 49.

<sup>103</sup> Kshitij Kumar Singh, *Human Rights in Information Age: Emerging Issues and Challenges* (2015). Retrieved from: <http://ssrn.com/abstract=2606863>. Retrieve on: 21 September 2017. p. 2.

<sup>104</sup> Christopher Koettl, *Twitter to the Rescue? How Social Media is Transforming Human Rights Monitoring*, Amnesty Int’l. H. Rts. Now Blog (2013).

<sup>105</sup> See, *A Brief History of Genocide*, *supra* note 79.

abuses are occurring.<sup>106</sup> Because of continued threats of violence and imprisonment, nations need to assume responsibility for efforts made by their citizens in pursuit of *Truth*.<sup>107</sup> Nations have to be willing to believe in the power of a free press and provide support if they are observing areas where the integrity of a free press may be at risk. If governments are unable or unwilling to protect these individuals, then private organizations ought to pursue technologies that assist in the reporting and recording of these crimes.

Currently, there appears to be a cultural state of flux where the now-informed general public have been liberated to choose aspects of their culture rather than just assume the culture of their geographically-immediate ‘tribe’. Largely, this become possible because of the Internet.<sup>108</sup> “National policies protecting human rights can be implemented far more easily with the creation and expansion of moral consensus for a ‘rights protective society’.”<sup>109</sup> If the public at-large continues to express an emphatic demand for *Truth*, resolutions to global conflicts might become more than temporary masks that obscure the details that fueled these conflicts in the first place. Education has the potential to be an effective tool for both informing and systematically misinforming.<sup>110</sup> Textbook writers and teachers have the platform to incorporate historical context into the classroom.<sup>111</sup> Education could be an effective tool in uniting individuals in a sort

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<sup>106</sup> See, *Twitter to the Rescue?*, *supra* note 103.

<sup>107</sup> Channel News Asia, *Singapore Embassy in Yangon in contact with journalist arrested in Myanmar: MFA*, October 30, 2017. Retrieved from: <http://www.channelnewsasia.com/news/singapore/singapore-journalist-arrested-myanmar-embassy-in-contact-9359046> on November 16, 2017. Lau Hon Meng, a freelance photojournalist, was arrested for recording a meeting of the legislature in Myanmar.

<sup>108</sup> See, *Human Rights in Information Age*, *supra* note 102. p. 2.

<sup>109</sup> See, *Human rights NGOs and the Rule of Law in Africa*, *supra* note 26. p. 321

<sup>110</sup> See, *Problems of Bias*, *supra* note 46.

<sup>111</sup> *Id.*

of global ‘tribe’ of those who critically and creatively incorporate history into a sense of social imagination.<sup>112</sup> This could help develop an entire generation of future leaders, educators, and artists who might value human rights over those rights of political institutions.

Perhaps the response moving forward is to incentivize peace and the pursuit of peace-seeking careers. A shifting culture of global cosmopolitanism and self-appointed journalism indicates that these record-keeping roles might be adopted by private citizens and citizen groups.<sup>113</sup> Private Citizens, who have become emboldened as journalists through social media<sup>114</sup>, and citizen-groups like NGOs<sup>115</sup> might fill the gaps left by revisionists. This would be done through fact-finding, education,<sup>116</sup> documentation, conflict mapping<sup>117</sup>, and storytelling<sup>118</sup>. These mechanisms and groups theoretically ought to be motivated by the philosophical goals of human rights law. Ideally, there should be no incentives to create exaggerated or understated accounts of the crimes being committed. These groups should be reliable as objective third-party investigators with incentives, resources, and authority to preserve a neutral protection of the past.

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<sup>112</sup> Joan Zaleski and Vera Zimmel, *Who Writes History? Developing a Social Imagination with Third Graders*. 25 Soc. Studies and the Young Learner 3 (2013), p. 24. Social imagination is a form of critical thinking in which one learns that there are many sides to any issue.

<sup>113</sup> See, *The institutionalization of cosmopolitan morality*, *supra* note 9. p. 145.

<sup>114</sup> See, *Twitter to the Rescue*, *supra* note 103.

<sup>115</sup> Bruce P. Montgomery, *Archiving Human Rights: A Paradigm for Collection Development*, J. for Academic Librarianship (1996), p. 93.

<sup>116</sup> See, *What the rule of law should mean*, *supra* note 61. p. 156.

<sup>117</sup> See, *Archiving Human Rights*, *supra* note 114. p. 89.

<sup>118</sup> James Gow, Milena Michalski, and Rachel Kerr, *Pictures of Peace and Justice from Nuremberg to the Holocaust: ‘Nuremberg: Its Lesson for Today’, ‘Memory of the Camps’, and ‘Majdanek: Cemetery of Europe’--Missing Films, Memory Gaps and the Impact beyond the Courtroom of Visual Material in War Crimes Prosecutions*, J. of the Hist. Ass. (2013), p. 548. Film can provide culturally-relevant historical context.

Robotics and simulated intelligence programs might be the best resource in a non-biased attempt to secure a historical record.<sup>119</sup>

#### **IV. Conclusion**

It is the prosecutor's responsibility to ensure a result consistent with the philosophical goals of human rights law. If this result includes a complete account of history then the prosecutor ought to be empowered to collect information and report regardless of time and money constraints. Adjudicated facts can be reliable but may be subject to skepticism since they are sometimes thought to be the result of politically-tainted judicial proceedings. Adjudicated facts do have a place in establishing context but they may be incomplete. The discovery, maintenance, and preservation of this evidence should not be left to government bodies that may not be in the best position to create a complete context.

Historical context is something that cannot be assigned to wholly to a prosecutor. Rather, the emerging culture of activists and journalists and the ever-growing number of nations and regimes that encourage such enterprises will naturally encourage the adoption of amnesties and truth commissions that will ideally interject themselves into the historical discussion.

Additionally, complete context could be established by apolitical anthropologists, historians, forensic scientists, and may even be something with which advancements in robotics and simulated intelligence could help. These large-scale abuses create observable evidence however third party access to these areas is often restricted. Even in the case of atrocity crimes from over

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<sup>119</sup>Tej Kohli, *A Call for Humanitarian Robots*, 20 November 2017. <https://shift.newco.co/a-call-for-humanitarian-robotics-dfbbeabaec74>. Retrieved on: 20 November 2017.

100 years ago, physical evidence is still available. The following excerpt from the findings of a recent anthropological excavation in Australia illustrates the importance of continued investigations in order to consolidate memories of two distinct cultures to help move towards a state of collective memory.

Scholars of Australian frontier history have argued the deaths of Aboriginal people should be acknowledged without political prejudice as grave injustices. Others have argued the many reported massacre events in Australia were fabricated. The debate is now known as the “History Wars,” and are generally views expressed non-aboriginal people. Aboriginal people, particularly the descendents of those killed, still bear the pain of these past conflicts. They know that grandparents, aunts and uncles were absent when they were children, and deep sorrow took their place. The descendants are also the custodians of oral testimonies recording these events. We believe our research confronts a significant cultural boundary that -- apologies aside -- political leaders have failed to address. We cannot undo the past, but we can acknowledge that these events are part of both. Aboriginal and white histories -- they are real and Aboriginal people still suffer pain from the past.<sup>120</sup>

In the terms of international law, world leaders and interested citizens would benefit immensely from a clear and comprehensive audit of each other’s values. If peace and non-tolerance for human rights violations becomes an apolitical principle upon which the international enforcement community bases its authority, then the continued use of truth commissions and tribunals would not be in vain. However, if the aim of those States with the most powerful voices arise from national political interests alone, there can be no real justice. More research is needed to identify the endemic causes of these violations. As humans continue

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<sup>120</sup> Pamela Smith & Keryn Walshe, *Oral testimony of an Aboriginal massacre now supported by scientific evidence*. October 30, 2017. Retrieved from: [theconversation.com/oral-testimony-of-an-aboriginal-massacre-now-supported-by-scientific-evidence-85526?utm\\_source=fb\\_messenger &utm\\_medium=fb\\_messenger\\_button&](https://theconversation.com/oral-testimony-of-an-aboriginal-massacre-now-supported-by-scientific-evidence-85526?utm_source=fb_messenger&utm_medium=fb_messenger_button&).



to grow socially, we continue grow in our capacity to articulate our desires, motivations, and understandings. It seems far too broad to try to get to the source of *why* people choose to offend, or even whether the choice is their's to make. However, paying closer attention to the psychological and epistemological arena could allow for new understandings of group-think, collective memory, and abstract absolutes like *Truth, Justice, and Peace*.

At the same time, all sides of history should be explored. The understanding that certain groups have hatred for others has been graphically illustrated through reports of genocide and hate crimes throughout history. The reasons that a person or people feel led to adopt such hatred are less understood. Presently, it is a distant hope that questions like “why do people hate” may be addressed, maybe by neuroscientists, evolutionary scientists, sociologists, chemists, philosophers, or historians together. And maybe an answer to this question would result in a departure from the implications of such a deep-rooted emotion. For now, it can only be known that when people grow to hate another group of people, whether it is based on cultural, regional, political, religious, or national differences, groups of people feel justified in criminally violent measures to affect these victims.

Individuals and human rights organizations should continue to pursue research in the field of international human rights law. Understanding what factors lead to these atrocities may provide insight on the types of behaviors that signal human rights violations to the international community. Additionally, research concerning the accelerated incorporation of tribunals and truth commissions could address the respective effectiveness of each of these remedies to crimes against humanity. I believe the increase of tribunals and truth commissions could be theoretically linked to at least three schools of thought, not to be explored further in this paper. These are, first, that more states encourage free press and the free-flow of information, allowing for more

victims voices to be heard than in the past. The second is that more states are committing these crimes than before, which would call the overall effectiveness of both tribunals and truth commissions as deterrents into question. The third possibility is that States are finding that they have lower tolerances for previously accepted, or ignored, behaviors that could be considered a crime against humanity. Whichever the reasoning, or if it is none of the reasons listed above, human rights concerns are beginning to come to the forefront of the global conscience. I believe the threshold for what the collective conscience of international community can tolerate has changed and will continue expand the definition of what actions constitute crimes against humanity. For the purposes of international growth, there is a need for the consolidation of historical accounts from identifiable first-hand sources. There is also the need for a careful recollection of history and thoughtful reflections on its implications in the future.

There is a need for more collaborative discourse on truth commissions and how to incorporate the strengths of these commissions with the strengths of tribunals. In the face of fresh atrocities, a complete context might allow for an extended definition of what might be considered a human right. The goal of the international community ought to be *the most* complete and *the least* biased account of history. Someone, something, or probably several someones and somethings, should be responsible for establishing this account. It is important to determine which mechanisms are currently in place and which may be possible in the future. Primarily, this contextual role has been fulfilled at tribunals, however truth commissions, private citizens, and independent mechanisms are preferable for securing a complete context. Prosecutors could work with these independent mechanisms and international communities of historians rather than in lieu of them. Prosecutors could then honor their primary responsibilities

to carefully choose defendants and judiciously present evidence to secure a result that will reduce the likelihood of similar crimes in the future.

Gradually it was disclosed...that the line separating good and evil passes not through states, nor between classes, nor between political parties either -- but right through every human heart -- and through all human hearts. This line shifts. Inside us, it oscillates with the years. And even within hearts overwhelmed by evil, one small bridgehead of good is retained.<sup>121</sup>

In sum, Prosecutors have the platform and thus the responsibility to adjudicate the facts that constitute the historical record. However, they cannot be alone in this pursuit of Truth, Justice, and Peace. Prosecutors are representative of the philosophical goals of the international community. These goals require a commitment to establishing a complete and unbiased record of the facts surrounding large-scale human rights abuses. A complete and trustworthy factual record might limit misinformation and silence revisionists and deniers. Current financial, procedural, and political barriers guarantee that any historical context the Prosecutor might establish will be incomplete. Prosecutors and Tribunals should not be the only agents with incentives and means to secure a record for education, reflection, and growth. The international community should embrace and empower mechanisms that would promote an account of history only as it happened. This is a responsibility that ought to be assumed by all who are able, on behalf of all who are not.

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<sup>121</sup>Aleksandr I. Solzhenitsyn, *The Gulag Archipelago, 1918-1956: An Experiment in Literary Investigation*. New York: Harper & Row, 1974. Print. Excerpt received from: <https://www.opendemocracy.net/article/alexander-solzhenitsyn-the-line-within>