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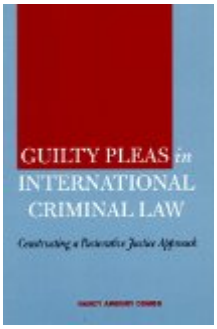

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The Moral and Material Costs of International Justice

"Following mass atrocity," writes Martha Minow, an expert on transitional justice, "there are no tidy endings."[1] For societies torn apart by war, genocide, and state-sanctioned violence, the international community possesses no adequate response to offer its survivors. All attempts at judicial reckoning will fall short of our best hopes for the imposition of punitive measures against the offenders, the clarification of the historical record, and the fostering of social reconciliation between victims, perpetrators and bystanders. Still, since it would be a greater injustice to do nothing in the aftermath of such crimes, the international community must confront the challenge of doing something, no matter how insufficient and unfulfilling the results may be.

In her book *Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach*, Nancy Amoury Combs addresses the delicate balance between what is morally desirable and what is practically achievable in international criminal law. Much of the scholarship on transitional justice models have focused on the laws and processes devised to restore justice following mass atrocity. Indeed, these questions push beyond the boundaries of traditional jurisprudence and raise philosophical, ethical, and sociological issues such as: how to define international crimes, who has the authority to prosecute them, what measure of punishment is commensurate with the murder, rape, displacement, exploitation, and starvation of thousands upon thousands of human beings, and what role the law can play in helping societies come to terms with their traumatic and contested histories? However, the laws and structures created to deliver justice are either aided or constrained by factors which–in comparison to these proceedings' lofty goals–may seem rather coarse or mundane. But if international tribunals are to function, they require courtrooms, staffs, jurists, jails, technology, transportation, and so on. Who pays–how, and for how long? These latter issues receive comparatively less attention in public and academic discussion of international justice. In this work, Combs attempts to draw the two sets of concerns closer together.

In the first three chapters of her book, Combs explains the current climate in international criminal law and posits a strategy to contend with some of its most pressing challenges. With the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994, the United Nations ended what Combs describes as a culture of impunity which prevailed during the fifty years since the Nuremberg trials. Although Nuremberg was intended to usher in a new era of international criminal accountability, no similar proceeding was prosecuted in the decades that followed. It was not for lack of crime. The genocide in Cambodia, the offenses related to Argentina's "Dirty War" and the destruction of the Maya in Guatemala are only three examples from a long list of atrocities whose judicial reckoning has only recently been undertaken. Still, the ICTY, ICTR, "Special Chambers" and various truth

commissions represent a remarkable step forward in the enforcement of international criminal law. However, actual results have been less inspiring, with only a tiny minority of perpetrators being brought to the bar. Much of this traces back to finances. Combs counts out some dispiriting math in her introduction. The ICTY and ICTR, the best funded of our most recent transitional justice enterprises, together employ over 2000 people and spend about $200 million per year to try roughly a dozen defendants. Alternative processes have received much humbler budgets. Even the Rome Statute for the International Criminal Court (ICC) implies that the court's average prosecutorial capacity translates to six cases per mass atrocity (p. 35).

The number of convictions is important. These legal processes serve many extra-legal ends, such as the formation of public memory and the discussion of fundamental questions about a nation's identity, which can promote healing and reconciliation. Research has shown that these goals are better served when a substantial number of prosecutions is initiated, and inversely, that they can be undermined by too meagre a judicial effort (p. 56). It is within this context–the high cost of trials only precariously funded, in combination with the moral, social, and political imperatives calling out for substantial numbers of trials–that Combs formulates a legal strategy to maximize the number of criminal convictions by international courts.

While emphasizing the critical importance of any judicial effort to arrest and detain a large number of suspects at the outset, and to maintain the appearance of being willing to try them, Combs argues that using plea bargaining (typically offering reduced charges and/or reduced sentences in exchange for guilty pleas) can greatly increase the number of convictions of offenders who otherwise may never have been held to account. She supports her argument through the last seven chapters.

In chapters 4, 5, and 6, Combs describes the use of plea bargaining at the ICTY, the ICTR, and the Special Panels for East Timor. In detailed descriptions of individual cases she shows how all three tribunals exhibited a similar pattern in their use of plea bargaining. At first, guilty pleas were unsolicited and prosecutors offered no guarantees of charging or sentencing concessions. Only under pressure to complete their work did tribunals take the initiative in seeking guilty pleas, fully aware that the practice is second-best to a full trial. With time the practice devolved in certain cases into an aggressive and factually distortive tool. Combs contrasts this ugly side to plea bargaining with several instances when judges resisted the plea agreement, and, with an eye on public opinion, insisted on stronger indictments and longer sentences. As it stands, tribunals continue to show a strong functional need for plea bargaining, warts and all. Accordingly, Combs concludes that "guilty pleas are apt to become a pervasive feature of any international criminal justice system that seeks to prosecute more than a miniscule number of offenders" (p. 126).

Given that plea bargaining–a common feature of domestic criminal trials–has been roundly condemned by victims' groups as a crass dilution of justice in favor of the bottom line, how is it that one could advocate its use internationally? Combs answers this question in chapter 7. She argues that the different context and needs of international justice provide adequate justification for the use of plea bargaining. Regarding international crimes, there is usually a vastly larger pool of defendants to contend with. Like South Africa's Truth and Reconciliation Commissions (TRC), a much-lauded alternative to retributive justice models which grants amnesty to perpetrators in exchange for their confessions, a much greater proportion of the guilty could be held to account. Unlike the TRC however, plea agreements would still impose some measure of punishment. Therefore, while individual sentences might appear slight in comparison to the gravity of the crime, the cumulative whole of criminal accountability for any given atrocity would be greater than could be imposed using traditional processes. In addition, plea bargaining could serve the needs of a society recovering from national trauma by emphasizing truth-telling and acknowledgment, the foundation of any restorative justice approach. She elaborates on the specifics of these benefits in the following chapters.

Chapter 8 proposes a model of plea bargaining that combines retributive and restorative aspects of transitional justice processes. Here, victim needs are a guiding factor. First, Combs recommends that the accused fulfill certain restorative obligations in order to have a plea accepted, such as providing a full and complete confession. This would benefit the prosecution by potentially implicating other perpetrators, particularly planners and instigators. It could also offer comfort and closure to victims, for example, by detailing their loved ones' last moments, or final resting places. Secondly, Combs emphasizes the need for victim-offender interaction to promote reconciliation and ideally, a change in attitudes about the conflict and the victim group. Thirdly, punishment would involve material reparations, the tangible counterpart to societal reconciliation. For example, the guilty might be

compelled to rebuild the school or church he destroyed.

In the following two chapters, using examples drawn from the judicial efforts surrounding events in Argentina, Bosnia, Rwanda, and East Timor, Combs explores how various cases might benefit from the plea bargaining model advocated here, and what lessons might be drawn from the implementation of various features of her proposed model. What emerges is that there is no "one size fits all" judicial solution to mass atrocity. In some cases, such as where crime has long been denied by the perpetrator class, acknowledgment of wrongdoing might benefit a society more than the imposition of punishment against an aging and largely untraceable defendant group. In other cases we see that the effort to solve one problem (for example, the attempt to relieve overcrowded jails and the overburdened ICTR by enacting the traditional community-based conflict resolution process known as Gacaca in Rwanda) has in fact presented additional concerns, such as the absence of sufficient legal representation for the accused, and the specter of witness intimidation. Nonetheless, the evolution of transitional justice models, particularly grassroots, indigenous efforts, has shown the need for and benefit of prominent victim participation, and that some justice is better than none–two issues Combs's model proposes to address. In view of the inevitable shortcomings of any judicial effort, Combs concludes that her plea bargaining strategy will at best only narrow the "chasm [that] divides what should be done to redress the harms caused by international crimes and what will be done" (p. 226). The chasm remains.

Although Combs emphasizes the central role practical concerns must play in the formulation of any transitional justice effort, what remains unclear is the threshold for the appropriate number of prosecutions. If six per atrocity is what the ICC can afford, but a "substantial" number is required to maintain the integrity of the effort, how many more prosecutions (permitted, it is assumed, by plea bargaining) satisfy the demands of justice? Combs does state that the finer points of the process must be attuned to the different circumstances of the atrocity in question, but one may still question who will decide, and how, on the number of prosecutions, and how this decision itself avoids being defined by budget.

Further, one wonders if Combs concedes too much by resigning the judicial enterprise to strained budgets and short staffs in perpetuity. In the confrontation between justice and politics/finances, is it wise to sacrifice the former and re-design judicial processes to suit these poor circumstances? While it is clear that politics have the upper hand, is there really no prospect for improvement? Might tailoring the judicial enterprise to current conditions remove the incentive for a change in political will?

Although Combs's work is finely researched and eloquently delivered, one is still left morally dissatisfied at the book's end. It is clear that the author is as well. The feeling is not attributable to any particular failing of the work, despite the questions I have raised here. Rather, it is to be traced to the knowledge that our best and continuing efforts still fall so far short of what ethics demand to secure justice for the world's most heinous crimes. The laws and processes of international criminal law have come a long way in the sixty years since Nuremberg. Combs shows us how much further we still need to go. To be sure, her advice to ground future judicial efforts in their material reality offers greater potential for the pursuit of justice than moral concerns alone.

Note

[1]. Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998), x.