Reconstruction through Accountability

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In post-conflict situations the question regularly comes up as to whether the call for criminal prosecution may be compromised in the interest of reconstruction. Justice and reconciliation are often considered as competing concepts. The author argues that there is not necessarily such a dichotomy. Whether there is, in fact, a duty to prosecute should be answered on the basis of international human rights law. The question ultimately depends on how human rights can be effectively guaranteed in the long run. A survey of contemporary jurisprudence and international practice shows that prosecution is increasingly viewed as an indispensable measure of human rights protection. But criminal justice is not to be achieved at all costs. Mixed forms of accountability are a potential model for the future including that of Iraq.

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I. Introduction

Confronting serious human rights violations in the aftermath of armed conflict has been the subject of intense discussion for several decades. The allies of WW II, with the establishment of the Nuremberg and Tokyo Tribunals, opted for a system of criminal prosecution. This idea was adopted by the Genocide Convention of 1948, which relied on both international and domestic prosecution. The UN Torture Convention also requires criminal prosecution and further incorporates the principle of aut dedere aut judicare.

However, when it came to the question of how to deal with South American dictatorship, the question arose as to whether there were alternative modes which could foster a process of reconciliation after extended periods of civil unrest. It has been argued that there was a need to abstain from criminal prosecution for the sake of re-establishing peace. For example, the government of Uruguay argued before the UN Human Rights Committee in 1994 "that notions of democracy and reconciliation ought to be taken into account when considering laws on amnesty and on the lapsing of prosecutions." It elaborated that "to investigate past events ... is tantamount to reviving the confrontation between persons and groups. This certainly will not contribute to reconciliation, pacification and the strengthening of democratic institutions." Similarly, El Salvador maintained before the Inter-American Commission on Human Rights that the release, under the Law on General Amnesty for the Consolidation of Peace, of those responsible for

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3 For this issue see e.g. Leila Nadya Sadat, International Criminal Law and Alternative Modes of Redress, in INTERNATIONAL CRIMINAL LAW AND THE CURRENT DEVELOPMENT OF PUBLIC INTERNATIONAL LAW, 159 (Andreas Zimmermann ed. 2001).


5 Id. para. 8.5.