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SPEECH

AFTER ATROCITY: OPTIMIZING UN ACTION TOWARD ACCOUNTABILITY FOR HUMAN RIGHTS ABUSES

John P. Humphrey Lecture in Human Rights
McGill University
17 September 2014

*Steven R. Ratner**

It is a great honor for me to be here to deliver the John Humphrey Lecture. Humphrey led one of those lives within the UN that shaped what the organization has become today—as one of the first generation of UN civil servants, he was to human rights what Ralph Bunche was to peacekeeping, or Brian Urquhart to UN mediation. To read his diaries, so beautifully edited by John Hobbins, is to see a world that has in many ways vanished, a nearly entirely male club, mostly of Westerners, that hammered out new treaties and mechanisms over fine wine and cigars in many a European tourist destination—as well as lesser sites like Lake Success, New York—but also where the foundations were laid for projects still central to the UN's work.¹ For without Humphrey's Division of Human Rights, there would be no Centre for Human Rights, and then High Commissioner for Human Rights, with his vast secretariat in Geneva and now field office presences around the world.

Yet at the same time, I'm here today to talk about a topic that was not the targets of John Humphrey's energies – the UN's role in holding individuals accountable for human rights atrocities. Individual accountability is a broad concept. It encompasses a range of processes that put the spotlight on individuals for human rights abuses they have committed, mete out consequences to them, and address in some meaningful way the legacy of the abuses on victims. Humphrey's cause, from the drafting the Universal Declaration on, was to create norms and mechanisms for holding *states* responsible for violations of human dignity. Even though the Nuremberg trials had recently concluded, indeed some of the lower-level trials were being held while the UHDR was being negotiated, creating norms and mechanisms for holding individuals accountable was not the priority, probably because it was seen as both less important and far more challenging

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1. A.J. Hobbins, *On the Edge of Greatness: The Diaries of John Humphrey, First Director of the United Nations Division of Human Rights 1950-1951* (A.J. Hobbins ed. 1996).

than holding states accountable. In reviewing his many writings about the UN and human rights, I found that he barely wrote on the subject. His 1989 book *No Distant Millennium* had a brief treatment of the treaties on slavery, genocide, and torture, each of which makes the banned conduct a crime for which individuals must be prosecuted, but he really focused on those treaties for their new obligations on states.² Professor McDonald's long tribute to Humphrey in the 1991 *Canadian Yearbook of International Law* mentions it only once, citing a 1988 speech in which Humphrey called for the creation of a court of international criminal justice.³ So my talk today is about a project whose importance for the UN became apparent only in Humphrey's final years and in the two decades since his death.

Other than a few reports and resolutions in the aftermath of the Nuremberg trials, both the member states and the Secretariat have focused on individual accountability only since about 1992. In December of that year, the Security Council passed a binding resolution, under Chapter VII of the Charter, most famous for its authorization to a coalition of 26 states to deliver food to starving Somalis. That resolution included a clause that condemned violations of international humanitarian law in Somalia, but, significantly, it also stated that "those who commit or order the commission of such acts will be held individually responsible."⁴ It's hard to know what the Security Council's members had in mind given the absence of any Somali or international mechanisms for accountability. Yet from that rather obscure starting point, we have seen the UN emphasize individual accountability both as violations occur and in their aftermath. Accountability's entrenchment in the UN today can be seen through institutional expertise within the various organs and many NGOs, routine references to it in Security Council resolutions, reports of numerous UN commissions of inquiry, millions of pages of court documents from UN criminal tribunals, and enormous scholarship.

With a topic so imposing, the subject of my talk today is relatively modest—to ask what the United Nations can realistically do to foster processes of individual accountability in states that are unaccustomed to seeing their leaders and generals held to account for their crimes. I will approach this topic by asking and answering four questions:

- first, should the UN be in the business of pushing the project of individual accountability at all?;
- second, what are the modes of advancing accountability on which the UN should focus?;
- third, what conditions are necessary for successful involvement in furtherance of this goal?; and

2. JOHN HUMPHREY, *NO DISTANT MILLENNIUM: THE INTERNATIONAL LAW OF HUMAN RIGHTS* (1989).

3. R. St. J. MacDonald, *Leadership in Law: John P. Humphrey and the Development of the International Law of Human Rights*, in 29 *CANADIAN YEARBOOK OF INT'L L.* 3, 83 (1992).

4. S.C. Res. 794, ¶ 5, U.N. Doc. S/RES/794 (Dec. 4, 1992).

- fourth, what are the key pitfalls for the UN along with way?

I aim to address all four in part through the lens of my academic work on accountability, but also in light of two personal experiences I have had as part of UN accountability mechanisms—the Secretary-General’s Group of Experts for Cambodia and the Secretary-General’s Panel of Experts on Accountability in Sri Lanka. The first of these, which worked in 1998 and 1999, made recommendations for holding Khmer Rouge leaders accountable for their atrocities in the mid-1970s; the second, which operated in 2010 and 2011, made recommendations for steps Sri Lanka should take in the aftermath of atrocities by the government and the Tamil Tigers in the final six month of that state’s civil war.⁵

I.

So let me turn to the first question—should the UN be in the business of promoting individual accountability at all? With the immense obstacles to fulfilling its primary goals—prevention of armed conflict and fostering respect for human rights—why should it take on a role that is not mentioned in the Charter, to achieve something for victims that is not listed as part of their human rights in the Universal Declaration, and to ask states to take action that is not included among their duties in the International Covenant on Civil and Political Rights? More than two decades after that resolution on Somalia, with billions spent on the two ad hoc tribunals and accountability now “normalized” within the UN, I think it’s still a fair question.

For even as I’ve written about and participated in UN accountability processes, I have always been pulled toward seeing prevention and termination of human rights violations as a far greater priority. I spent two years working for international institutions aimed at getting states and non-state actors to follow the rules *ex ante*, with little emphasis on accountability *ex post*. One was the High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe—a senior European diplomat who, along with his staff, mediates tensions between governments and minority groups in Eastern Europe.⁶ The other was the International Committee of the Red Cross, the large Swiss-based NGO with missions all over the world’s conflict zones, whose officials quietly try to persuade governments and armed groups to follow the laws of war.⁷

5. For the final reports of these two panels, see U.N. Secretary-General, Letters dated Mar. 15, 1999 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council, U.N. Doc. A/53/850, S/1999/231, Annex (Mar. 16, 1999); Marzuki Dariusman, Steven Ratner & Yasmin Sooka, *Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka* (Mar. 31, 2011) (hereinafter “POE Report”), available at http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf.

6. Steven R. Ratner, *Does International Law Matter in Preventing Ethnic Conflict?*, 32 N.Y.U. J. INT’L L. & POL. 591, 651 (2000).

7. Steven R. Ratner, *Law Promotion Beyond Law Talk: The Red Cross, Persuasion, and the Laws of War*, 22 EUR. J. INT’L L. 459 (2011).

Neither spends much time pointing fingers at individuals but seeks to prevent and terminate abuses first and foremost. Indeed, it is safe to say their missions would be severely undercut if they focused on accountability.

The key to answering this question about the UN lies in another inquiry—what is the point of individual accountability at all? We hear so many answers, from the UN High Commissioner for Human Rights, from victims, from NGOs: it's about meting out criminal justice to the perpetrators; it's about so-called closure for the victims; it's about reparations; it's about national reconciliation. But all these arguments are incomplete for me. For instance, my own experiences with victims reinforces the truism that their claims are extraordinarily heterogeneous—some want a trial of their abuser, some a confession, some a government acknowledgment of responsibility, some an apology, some a summary execution of their abuser, some their homes back, some reparations in the form of money, and some the body, alive or dead, of a loved one. How can holding individuals accountable, whether judicially or not, fulfill all these inconsistent demands? It cannot.

For me, the point of holding individuals responsible for human rights abuses, and ultimately the point of UN involvement, is more basic. It's about prevention – prevention of further human rights abuses and thus, in the end, domestic tranquility.

The person who first made this connection clear to me was Thomas Hammarberg, a Swedish human rights defender who was the UN's Special Representative for Cambodia in the mid-1990s. Hammarberg sensed that one of the root causes of Cambodia's continued tragedy of human rights violations by the government – at the time, and to this very day, led by the extremely effective Hun Sen – was a culture of impunity. That culture signaled to governmental leaders that they could violate rights without fear of personal consequences of any kind, not even public criticism. Hammarberg traced that pathology to the lack of any accountability for Cambodia's Khmer Rouge leaders, those who, from 1975–78, killed a fifth of Cambodia's population. Though ousted from office by Vietnam, the Khmer Rouge leadership, as of the late 1990s, remained at large; and the full truth had never been told either. Hammarberg wanted to end that impunity, ultimately ginning up the gears of the UN to create the Group of Experts on which I served, beginning a process that eventually led to trials of the handful of remaining leaders through a Cambodian-UN tribunal operating in Phnom Penh.⁸

And I saw this connection a decade later in the aftermath of Sri Lanka's civil war. From late 2008 to May 2009, the government, intent on ending Sri Lanka's twenty year civil war, squeezed the Tamil Tigers in the northeast part of the island in a relentless military barrage that probably killed tens of thousands of innocent civilians. In the months afterwards, the government denied that its actions had led to any civilian deaths. Why

8. On the development and operation of the Khmer Rouge tribunal, *see generally* JOHN CIORCIARI & ANNE HEINDEL, *HYBRID JUSTICE: THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA* (2014).

was it so important to figure out a way to look into who was responsible, on both sides, for what happened? Because it seemed as if Sri Lanka's contemporary history had revealed again that prior impunity simply lays the groundwork for the next round of atrocities. For earlier governments had never been held to account for violent tactics against Tamils and moderate Sinhalese, giving the current government a green light for its final assault. A failure to look into what happened in the end of that war was merely laying the seeds for more violence in the future.⁹

So the ultimate purpose of accountability is not, for me, truth, retribution, reparation, or even national reconciliation, though those are ingredients of it—it's rather about prevention of future conflict, within and between nations. It offers a strategy that merely holding states responsible cannot do. International relations scholars have developed many theories for why states violate or comply with international rules. But I don't think we need to study much of that theory to know that, when an individual leader or soldier believes that he will face consequences for breaking the rules, he is less likely to do so. If we can pierce the veil of the state—break down its structure—by identifying which institutions and individuals within it oversaw and committed the abuses, we have introduced a new dynamic of both deterrence and internal reform. In a way, it's the flip-side of the notion of subsidiarity—just as decisions and rules should be made the closest level possible to those affected by them, so violations of rules should be identified and rectified at the closest level possible to those responsible for those violations.

I suppose my view makes me fundamentally a consequentialist or utilitarian when it comes to accountability. It is not that I think the victims do not deserve justice or the perpetrators deserve punishment—the essence of a more Kantian approach to accountability. I myself have never been the victim of a serious crime, so I cannot put myself in their shoes. But I do think the preventive argument is the most powerful reason among them. In that respect, promoting individual accountability is central to the mission of the UN when it comes to promotion of peace and not marginal to it.

My position does not mean that individual accountability is sufficient or necessary to prevent future internal or interstate conflict. It is not sufficient, for certainly much else goes into conflict prevention. States like Canada and international organizations like the UN concerned about promoting respect for human rights abroad have only so much diplomatic and monetary capital to invest, and in some situations individual accountability may not be the top priority as a preventive strategy. And I would argue that I am not even convinced that it is always necessary; I would not rule out the possibility that a state that does not engage in that process can have a peaceful future. But in many situations, where a culture of impunity is a cause of past conflict or a potential cause of future conflict, accountability is part of the solution. And if the state itself will not begin the pro-

9. POE Report, *supra* note 5, ¶¶ 429–42.

cess, then the UN has a responsibility under the Charter to get them to do so – a responsibility that derives from the consequences of impunity for internal peace.

II.

If individual accountability fits within the UN's conflict prevention and human rights mandates, what is the right role for the UN as an institution in particular? Since that resolution on Somalia back in 1992, we have seen the UN try three approaches. One, typified by that resolution and dozens after it, is to remind the parties to a conflict, or a government repressing its population, that individuals should, or even will, be held responsible for atrocities. But of course such reminders or promises are fairly worthless if the UN and member states do nothing to actually jumpstart a process of accountability.

The second has been the creation of ad hoc international criminal tribunals—those for the former Yugoslavia and Rwanda—and of hybrid tribunals—in Sierra Leone, Cambodia, East Timor, and Lebanon. As much as the tribunals for the former Yugoslavia and Rwanda have brought many violators to justice, they are a very limited option for the UN for a few reasons. Criminal courts are expensive—especially the full UN courts; and, in addition, these procedures deal with only one aspect of accountability and not the range of issues that need to be addressed as a conflict prevention strategy.

Most important, as I will discuss more, conditions often do not make trials of former officials remotely realistic in the short term. The very elements that give individual punishment some added value over state responsibility as a response to human rights abuses create huge resistance when the UN proposes prosecuting governmental officials. The same resistance comes up in the case of universal jurisdiction, where one state proposes to prosecute the officials of another. To see the difference between state accountability and individual accountability, one particularly poignant example is the outcome of the 1985 Rainbow Warrior episode, where France blew up a Greenpeace vessel in New Zealand, killing a Greenpeace member. France and New Zealand were able to agree on the terms of compensation by France, but they sparred at length over the punishment of two French agents responsible, ending in their extrication by France.¹⁰ In a word, when justice becomes personal, so do the reactions to it.

So I turn to the third, and in my view, most promising role for the UN in terms of added value—the preliminary investigation of serious human rights violations, accompanied by the development and advocacy of options for the state to advance individual accountability. Whether done through formal commissions of inquiry, groups of experts, or otherwise,

10. For an account, see JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH* 16–22 (4th ed. 2015).

this process builds on a long tradition within the UN. It traces its legal pedigree to Article 36 of the Charter, which authorizes the Security Council to engage in something called “enquiry,” a fancy term for the determination of facts when they are contested by parties to a dispute. Building on the experience of the League of Nations, the drafters of the Charter understood that the mere clarification of facts can pave the way for two warring sides to negotiate the settlement of a dispute.¹¹ In addition, Dag Hammarskjold asserted the Secretary-General’s inherent authority to engage in fact-finding under Article 99 of the Charter.¹² And the General Assembly recognized the importance of fact-finding in a key resolution in 1991.¹³ As a result, the Secretary-General and various commissions of the Security Council have done precisely this in numerous inter-state disputes since the UN’s founding. Just as figuring out the facts contributes to the possibility of solutions to interstate disputes, so, in the aftermath of human rights atrocities, the mere clarification of facts is a huge step forward. This is particularly true if one party simply offers a narrative that denies any responsibility for atrocities.

And indeed as Hammarskjold first demonstrated decades ago, the UN has a special credibility when it comes to fact-finding. The internationalized Secretariat helps rebut charges by the individuals or states being investigated that the UN is doing one state’s bidding. Yet that credibility does not come solely from the Secretariat, and in fact relying on the Secretariat alone for such projects is not wise. For the Secretariat is by its nature extremely cautious and will not want to offend powerful member states. More important, the Secretary-General and interested member states will have greater leverage to work with the report’s conclusions if they can say that they in no way influenced the content of the report. Thus, fact-finding bodies, at least in the area of human rights, have been, and need to be, headed by outsiders not beholden to the UN or its members. Their independence creates distance between the report and those who will use it, permitting the SG or others seeking to promote accountability to take a sort of political cover behind the reputation of the commissioners.

With that credibility, however, comes a responsibility. It means that UN investigations must be impartial and thorough. It means that mandates of investigative bodies must be even-handed, addressing the violation of both sides, that commissioners must be chosen to avoid even the appearance of partiality, and that investigators must be chosen who have open minds and specialized skills. Even with all those ingredients, some states may not find the UN to be a credible agent to gather facts. But, unlike the investigation by another government or even a well-respected NGO (typically funded by Western sources), in the case of UN involvement, the burden will be on the state to show that the UN is biased.

11. See UNITED NATIONS, HANDBOOK ON THE PEACEFUL SETTLEMENT OF DISPUTES 1 (1992).

12. THOMAS M. FRANCK, NATION AGAINST NATION: WHAT HAPPENED TO THE U.N. DREAM AND WHAT THE U.S. CAN DO ABOUT IT 124 (1985).

13. GA Res. 46/59, U.N. Doc. A/RES/46/59 (Dec. 9, 1991).

But fact-finding itself is only one facet of that third UN approach. The UN's credibility and expertise also give it the ability, and indeed I would say the responsibility, to do more—to explain whether and how the abuses violate international law, and, most important, to explain what response is expected of the actors involved in the wake of such atrocities. Explain to whom? First and foremost to the state—its citizens and its government—to guide and nudge them in a direction that will be to the state's long-term advantage. But also to other actors—foreign states and civil society—who can use their influence to get the government to do what it must.

And the UN has indeed made huge strides in explaining to states what is expected of them in terms of responses. The Office of the High Commissioner for Human Rights and outside experts have canvassed treaty law and best practices to come up with a set of international standards. From the so-called Joinet principles on impunity¹⁴ to the OHCHR toolkit on transitional justice,¹⁵ the UN has elaborated on what states need to do if they want an effective process for truth-telling, reparations, criminal justice, disqualification from office, or other strategies. These standards do not represent a one-size-fits-all requirement for all states, and much of them are more what international lawyers call soft law rather than binding rules. But they nonetheless give a sense of what a responsible state in today's world is expected to do regarding accountability in the aftermath of mass atrocities.¹⁶

III.

Having described why the UN should be a leading player on promoting individual accountability and what I believe to be its most promising role, I now want to offer what I regard as the necessary conditions for successful UN engagement. This is a tricky task. The UN's experience in human rights fact-finding now encompasses about two dozen panels in the last few decades, depending on how one counts.¹⁷ Not all of these have addressed or been aimed at promoting the responsibility of individuals. At this stage, neither the UN nor academia has done a comprehensive evaluation of the results of each of these missions. So I propose to look at the question in more strategic and structural terms—to offer, based on my own observations of the processes that I have followed, what I would re-

14. U.N. Comm'n on Human Rights, Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005).

15. UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions, 3.10 Transitional Justice, http://www.unssc.org/web2/free_resources/UNDP-OHCHR_Toolkit/chapter3/3-10.html.

16. See POE Report, *supra* note 5, ¶¶ 262–77.

17. For a list of 50 missions based on a broader definition, see OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, COMMISSIONS OF INQUIRY AND FACT-FINDING MISSIONS ON INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW: GUIDANCE AND PRACTICE 114-141 (2015), http://www.ohchr.org/Documents/Publications/CoI_Guidance_and_Practice.pdf.

gard as the most important variables affecting the success of fact-finding missions.

But we already see a definitional thicket on the horizon, for what is success for the UN when it comes to promoting individual accountability and combating impunity? Success is not putting most abusers on trial; it is not satisfying most victims; and it is not revealing the whole truth. Success varies from state to state, but its minimal core is the initiation of a process that will hold individuals accountable in some way for their actions and lay some seeds for ending a culture of impunity. That should ideally include at least one of the following: investigations of credibly alleged violations, a national dialogue in which victims can speak to the government, a fair public account of the events, or an acknowledgment of wrongdoing and apology. The UN can really do no more than encourage, or, if that fails, push a state to do these, and its success or failure may not be evident for years afterwards. Perhaps in another generation we can define success with a higher set of expectations on the UN, but at this fairly early stage in seeking to get governments to hold individuals accountable, this minimal core seems enough for the UN.

In my view, the success of UN engagement is a product of three factors—transitions, alliances, and creativity. The first factor is the transition—that is, the status of the political transition within the state—the movement, if any, away from the regime that committed the abuses. Tina Rosenberg's observations from her magnificent 1995 book *The Haunted Land: Facing Europe's Ghosts after Communism*, ring as true as ever. As she explained in contrasting the experiences of Latin America and Eastern Europe in dealing with their past, the strength of the successor regime, along with the extent and type of abuses endured by the country, exerts a powerful influence on the course accountability takes.¹⁸ The same holds true regarding the success of UN involvement to promote accountability. Where the former regime is gone and discredited, as was the case with Cambodia's Khmer Rouge or Rwanda's genocidaire regime, both overthrown militarily, the government will typically be quite receptive to accountability.

Where, at the other extreme, the government that committed the abuses is still in power—where, in a word, there is no transition—as with Sri Lanka since 2009, the obstacles to accountability are enormous, maybe even insurmountable for as long as that regime is in power.¹⁹ The same holds true for the recommendations of the UN Human Rights Council's investigatory commission on Syria, or those of the independent commission investigating the 2011 events in Bahrain.²⁰ There are few, if any

18. TINA ROSENBERG, *THE HAUNTED LAND: FACING EUROPE'S GHOSTS AFTER COMMUNISM* (1995).

19. In January 2014, after delivery of this lecture, Sri Lankan President Mahinda Rajapaksa was voted out of office. The position of the new government regarding accountability remains uncertain.

20. Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, Human Rights Council, 27th Sess., Sept. 8-26, 2014, U.N. Doc. A/HRC/27/60 (Aug. 13, 2014); MAH-

precedents for a regime that commits massive violations of human rights to investigate its leaders.

Even where there is a formal transition but the abusers retain informal levers of power, the government will resist accountability. In the case of Cambodia, Hun Sen endorsed the idea of trials of the Khmer Rouge, but also wanted to make sure that any UN tribunal would investigate only those who were old and fully discredited, not other former Khmer Rouge members who were now his allies in government or his partners in business.

In these sorts of cases, the government will refuse to apply the impressive standards developed by the UN under the rubric of transitional justice, and or fulfill the duties it accepted in treaties. But UN can at least lay the groundwork for future accountability, once the people of the state have decided that they have had enough of those who committed atrocities.

Whereas the first factor is internal to the state, the second factor, what I call alliances, is external to it. It refers to the political connections between the elites in the state and those outside of it. Where the government has powerful allies within the United Nations—and here I mean the member states—the possibility that the UN will undertake investigations, let alone step in and create something like an ad hoc tribunal, is significantly reduced. Where the government lacks such allies, the UN will have a freer reign. In other words, alliances help determine the *leverage* of the United Nations—whether it can take the first step of looking into the past atrocities and then later persuade the state to make moves in the direction of accountability.

Alliances will also influence which *part* of the UN will take the lead on fact-finding, or even whether the UN itself will play a role. If a permanent member of the Security Council is a friend of a government committing the abuses, the Security Council is out as a venue for creating an investigatory body; but the Human Rights Council may not be. And the Secretary-General himself may initiate action if those alliances preclude action by any political body, although he may have reasons not to challenge a particular country as well.

In this context, one can contrast the willingness of the Security Council to create commissions of inquiry for Sudan and Lebanon²¹ with the absence of Security Council investigations of Syria in its civil war, of the two sides in the two Gaza wars, or even of something like civilian casual-

MOUD CHERIF Bassiouni ET AL., BAHRAIN INDEPENDENT COMM'N OF INQUIRY, REPORT OF THE BAHRAIN INDEPENDENT COMMISSION OF INQUIRY Dec. 10, 2011) available at <http://www.bici.org.bh/BICIreportEN.pdf>.

21. Int'l Comm'n of Inquiry on Darfur, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to S/RES/1564 (2004) (Jan. 25, 2005), available at http://www.un.org/news/dh/sudan/com_inq_darfur.pdf; U.N. Secretary-General, Letter dated Oct. 20 2005 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2005/662 (Oct. 20, 2005) available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2005/662.

ties caused by drone attacks in Pakistan. With the Council blocked, the Human Rights Council created commissions of inquiry for Syria and Gaza;²² and the Council's thematic mechanisms offer some kind of review, if not a real investigation, of civilian casualties caused by drone strikes.²³

Sometimes member states block action in all the UN's political organs, and here I want to return to Sri Lanka. Despite its size and relatively insignificant strategic position, Sri Lanka has many allies in the UN system. Like talented jazz musicians, the Rajapaksa brothers have played the G77/sovereignty tune in many keys, with many riffs, with many states. China, which sees investment opportunities there, will support it to the hilt. And the states that care most about accountability in the end have little leverage – little more than embarrassing the government by not showing up at a Commonwealth meeting. As a result, while many officials within the UN saw a need to get an accountability process started within Sri Lanka, the writing was on the wall in 2009 that neither the Security Council nor the General Assembly nor the Human Rights Council would initiate any investigation. Nor would Sri Lanka request UN assistance, a hook that had allowed the Secretary-General to create other commissions, such as that investigating the assassination of Benazir Bhutto.²⁴

When Secretary-General Ban saw the impossibility of approval from a political organ for a full commission, he created the Panel of Experts on which I served. Sensing that Sri Lanka's supporters might see the panel as an end-run around the political organs, he deliberately devised a mandate that never used the word investigation, but instead was focused on giving advice to the Sri Lankan government on international standards and best practices regarding accountability. At the same time, officials within the Office of the High Commissioner for Human Rights ensured that the mandate included the phrase that the panel would have “regard for the nature and scope of alleged violations,” a clause that allowed our group to offer detailed views on which allegations were credible enough to merit a full investigation.²⁵

The third necessary condition for success in UN efforts to promote accountability, creativity, is different from the other two, for it is neither internal to the state, nor a matter of inter-state relations, but internal to the UN itself. For accountability is no different from the rest of the UN's

22. Human Rights Council Res. S-17/1, Rep. of the Human Rights Council, 17th Spec. Sess., A/HRC/S-17/2 (Aug. 22, 2011); Human Rights Council Res. S-9/1, Rep. of the Human Rights Council, 9th Spec. Sess., A/HRC/RES/S-9/1 (Jan. 12, 2009); Human Rights Council Res. S-22/1, Rep. of the Human Rights Council, 22nd Spec. Sess., A/HRC/RES/S-22/1 (Sept. 3, 2014).

23. See, e.g., Rep. of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, U.N. Human Rights Council, 25th Sess., U.N. Doc. A/HRC/25/59 (Mar. 11, 2014).

24. U.N. Secretary-General, Rep. of the United Nations Comm'n of Inquiry into the facts and circumstances of the assassination of former Pakistani Prime Minister Mohtarma Benazir Bhutto, http://www.un.org/News/dh/infocus/Pakistan/UN_Bhutto_Report_15April2010.pdf.

25. For the mandate of the Panel, see POE Report, *supra* note 5, ¶ 5.

human rights project in this regard, where progress is slow and new venues and approaches must constantly be invented. Creativity encompasses many virtues, including persistence through short-term defeat, compromise, and diplomacy. In the case of Cambodia, the group of experts recommended in March 1999 a full-fledged ad hoc tribunal to try the Khmer Rouge because we concluded that the Cambodian courts could not mete out impartial justice. Our central recommendation was not, however, accepted by Secretary-General Annan, who instead opened up negotiations between his lawyers and the Cambodian government on a hybrid UN-Cambodia tribunal option. Those talks took four years to complete. The Secretary-General, with some prodding by the General Assembly, compromised along the way. He accepted the key Cambodian demands for a tribunal with a majority Cambodian-government-appointed judges and two co-prosecutors, one from the UN and one picked by the Cambodian government.²⁶ Now, I personally think all these compromises were a huge mistake and wonder whether the effort has been worth it for the conviction by the hybrid tribunal of three very old Khmer Rouge leaders. But I recognize that others see this as a partial success. And most important, I don't object to the notion of compromise for its own sake. Responding to political realities is essential for some process; and I cannot offer any grand theory for when compromise has gone too far.

Creativity and persistence proved critical with respect to Sri Lanka. There Ban Ki-Moon's pivot to create the Panel of Experts in the face of lack of support within the political organs was, in my view, inspired. Indeed, I think it can be a model for future action by the Secretary-General to assert the UN's responsibility regarding accountability even when the member states in the political organs refuse to do so.²⁷ However, after the Panel's report was issued, it very unfortunately became clear that the Secretary-General would not follow our key recommendation to create a full-fledged commission of inquiry on his own. So governments and NGOs turned their energies again to the Human Rights Council. The results: a broad coalition of states in the Council passed resolutions in 2012 and 2013 critical of the government and urging it to do something serious on the accountability front.²⁸ When Sri Lanka still did nothing, OHCHR, member states, and NGOs persisted, and the Council at last authorized OHCHR to conduct a full investigation this past spring which is now under way.²⁹ I am not fully satisfied with either the Secretary-General's passing of the buck to the Council or the Council's ultimate resolution—

26. CIORCIARI & HEINDEL, *supra* note 8, at 34-35.

27. Steven R. Ratner, *Accountability and the Sri Lankan Civil War*, 106 AM. J. INT. L. 795, 797-798 (2012).

28. Human Rights Council Res. 19/2, Rep. of the Human Rights Council, 19th Sess., A/HRC/RES/19/2, (Apr. 3, 2012); Human Rights Council Res. 22/1, Rep. of the Human Rights Council, 22nd Sess., A/HRC/RES/S-22/1 (Sept. 3, 2014).

29. Human Rights Council Res. 25/1, Rep. of the Human Rights Council, 25th Sess., A/HRC/RES/25/1 (Apr. 9, 2014). As this article went to press, OHCHR released its report, which can be found at UN Doc. A/HRC/30/CRP/2 (Sept. 16, 2015).

it's far short of a full-fledged commission, and the funding is not what it needs to be – but I do think it's a major step forward in investigating that which the government will not.

IV.

That takes me to the final issue—the traps that the UN—the Secretariat and the member states—need to avoid in the pursuit of individual accountability. I want to speak here about traps, rather than shortcomings, because I think the latter topic could occupy a whole conference—we know the UN has much to do to improve the internal workings of individual fact-finding bodies. Suffice it to say that these bodies lack sufficient funding from the member states and institutional support within the Secretariat, and often have to re-invent the wheel in their operations.³⁰

As for the traps, in my view there are four of them. First is what I will call the international criminal law trap. Many advocates of accountability, for the very best of reasons, wish to see the atrocities and the perpetrators solely through the lens of criminal law. Because we can legally characterize the perpetrators' actions as war crimes, crimes against humanity, or occasionally even genocide, the first recourse or the best mechanism of accountability becomes criminal trials. And if the state cannot undertake them, then the remedy on which the international community should focus is the International Criminal Court in The Hague. For these advocates, commissions of inquiry may be a useful start, but their key purpose is to gather evidence that will be handed over to a domestic or international prosecutor.

This international criminal law approach strikes me as extremely short-sighted, cutting off one's nose to spite one's face. First, in situations where atrocities are ongoing, termination is more important than accountability. Thus, the Human Rights Council's commission on Syria focused on cessation first, barely mentioning accountability. And the report of the commission on Libya is also very guarded in this respect. In rare cases, criminal accountability can serve as a means to end ongoing violations—the marginalization of Radovan Karadzic after his indictment by the ICTY is a key example—but most of the time, the UN should make ending the abuses the priority.

Second, even after atrocities, the international criminal law approach ignores the reality that accountability is a gradual process, and a consensus must be built for it; one cannot simply move directly to putting a state's leaders or former leaders in the dock, and certainly not at the ICC. A demand by the UN for immediate trials of named individuals when a state has no willingness to do so will merely allow opponents of accountability to accuse the UN of undermining its sovereignty and wanting nothing more than the heads of governmental leaders.

30. The OHCHR review of practices in prior missions, *supra* note 17, is a useful attempt to help avoid the re-invention of the wheel.

Thus, in the case of Sri Lanka, contrary to a number of key NGOs, including the International Crisis Group, our report never recommended criminal trials at the domestic or international level. Rather, realistically, the first step needed to be some kind of full investigation of the atrocities, if not by the government then by the UN. Had we advocated ICC trials, it would have made it extremely difficult for groups within Sri Lanka to support our report without being accused of being traitors. A proposal to have the ICC investigate the Sri Lanka situation would also have been futile because the Court has no jurisdiction over the atrocities there. Sri Lanka is not a party to the ICC Statute, meaning that the only way the Court can legally investigate the events there is through a referral by the Security Council, the possibility for which was, and is, frankly, zero. Certainly, referral to the ICC in some situations can be an important part of accountability, and indeed it may be so in the half-dozen situations that are currently the subject of trials in that Court. But the limited jurisdiction of the ICC and the immense resistance that states often put up to handing people over to it means that even if you believe in criminal justice as the core element of accountability, its utility is still limited.

A second and somewhat related pitfall is what I would call the legalist trap. Advocates of accountability fall into that trap when they see accountability, or the UN's role in it, purely in legal terms—getting states to meet their legal duties under treaties, for instance—and not as a fundamentally political process. The result can be NGO reports and recommendations or academic pieces with a remarkably tin ear for the realities of a post-atrocities situation. In fact, one of the key goals for any UN panel investigating the facts and making recommendations—certainly it was for us working on the Sri Lanka report—must be to gain *domestic support* for accountability first and foremost, with international support critical as well. That does not mean ignoring a state's legal obligations and international standards, but a report that speaks only of a state's legal duties, and not, for instance, of the importance to the state of accountability in a way sensitive to the politics of the country, will resonate well with law professors but not with politicians and civil society.³¹ Politics does *and should* affect the interpretation of a commission's mandate, the tone of the report, and the recommendations. Fact-finding, then, demands political expertise and awareness among those undertaking it, and not just legal expertise. And, without doubt, the follow-up to the work of any panel by states and NGOs that wish to promote accountability demands exceptional political skills.

Third, and in contradistinction to the other two, is the selectivity trap. UN fact-finding cannot maintain credibility with the broad membership and, even more important, with the target of the inquiry if it is seen as doing only the bidding of certain groups of states. Decisions to investigate only one side in a war, or to investigate one set of atrocities but not another, over time erode the process of fact-finding.³² Some of this can be

31. Ratner, *supra* note 27, at 802.

32. The most glaring instance was the Human Rights Council's resolution setting up an investigatory panel on Israel's conduct in the 2008-09 Gaza War, which the High Commis-

addressed through the work of the thematic rapporteurs of the Human Rights Council, who address any country's violations that fall within their mandate. But most of them lack the resources for serious investigations. Here I think that the selectivity problem invites a special role for the Secretary-General. If state interests skew the work of the political bodies, the Secretary-General should be prepared to create new mechanisms of some kind.

Fourth, and finally, is the defeatist trap. Those who fall into this see the obstacles to accountability as so insurmountable that they want to wait for a better time, or pass the buck to someone else to do the hard diplomatic work. In the aftermath of our Cambodia report, despite a clear international consensus on the gravity of the Khmer Rouge's crimes, most states did not want to do anything at all about bringing its leaders to justice. Perhaps that could be chalked up to the amount of time that had elapsed since the atrocities, on the theory that it was just as well to let sleeping dogs lie, or to the cost of a new ad hoc tribunal. But how do we justify the same reaction by most states to the more modest call for an international investigation in the immediate aftermath of the Sri Lanka war?

Even after our report placed the UN imprimatur of credibility on the allegations of atrocities and revealed the big lie of the government, many states waited for others to take the lead on action within the UN—even states like Canada that had said they really cared about accountability. In that case, it was the leadership of one individual, Eileen Donahoe, the U.S. Ambassador to the Human Rights Council, who mobilized the State Department juggernaut and eventually persuaded a majority of Council members to pass the first serious resolution on accountability in Sri Lanka. States will need to continue to press the targets of UN inquiries to act on the recommendations in those reports, or they become dead letters over time. A look at the recommendations of many such bodies reveals the gap between them and governmental action. So politics, diplomacy, compromise, yes; but waiting for someone else to act or just allowing time to take its course, it's really just a way of a government convincing itself that something will happen when it will not.

CONCLUSION

Let me conclude by quoting the words of John Humphrey. For despite his orientation toward state accountability, he did recognize the importance of holding individuals responsible. In *No Distant Millennium*, he quoted Lester Pearson's remarks in Parliament in 1952 regarding the 1948 Genocide Convention, the first UN treaty to make a crime out of a human rights violation. Pearson had said "it is possibly the most important source of new international law which has developed since the last war;" and Humphrey added that "insofar as the Convention, like the war-crimes tri-

sioner for Human Rights chose to interpret as allowing the commission to investigate both Israel's and Hamas' conduct.

als after the Second World War, weakens the principle of collective responsibility and strengthens that of personal responsibility, Mr. Pearson's statement was probably true."³³ I am not sure that individual accountability is more important than state accountability; perhaps Pearson's hyperbole was just to get Parliament to ratify the Convention. I think Humphrey certainly had his priorities right at the time.

But there can be no doubt that holding individuals to account is now a highly significant method to promote compliance with international human rights law – even as it is as threatening to some state officials as human rights law remains to some governments. The structure that Humphrey and his colleagues built for holding states accountable now has a sprouted a new wing, in that organic, decentralized, and somewhat disorganized way that the UN has grown in other areas. We now need to think hard about how to shore up that wing and integrate it into the UN's greater missions in the promotion of human rights and the preservation of peace.

33. HUMPHREY, *supra* note 2, at 196-197.

