

International Criminal Justice Then and Now

The Long Road from Impunity to (Some) Accountability

The Norms of Impunity

The mass atrocities that we would now label crimes against humanity have been committed since the dawn of humankind but have virtually never elicited criminal sanctions. The mid-nineteenth century saw efforts to articulate and codify rules governing the conduct of armed conflict, but these early codification attempts were aimed at the conduct of states.¹⁸ In response to the horrors of World War II, however, the victorious allies established international tribunals at Nuremberg and Tokyo to prosecute the leaders of the defeated Axis powers. The tribunals had jurisdiction over three crimes: crimes against the peace, war crimes, and crimes against humanity,¹⁹ and the convictions they imposed on German and Japanese leaders were considered a watershed in the nascent movement to hold individuals responsible for mass atrocities. Consequently, efforts were made to consolidate these advances. The Genocide Convention²⁰ was concluded in 1948 to prohibit what has been described as the most heinous international crime, and the entry into force of four Geneva Conventions in 1950 significantly developed and clarified the laws of war and effectively criminalized certain conduct committed during armed conflict.²¹ Efforts were made to develop a comprehensive code of international crimes and to establish a permanent international court in which to prosecute those crimes, but these became mired in Cold War politics.²² The following thirty years did see some codification advances, however, through the conclusion of human-rights treaties, which clarified and strengthened existing prohibitions and established new ones. Widely ratified conventions on slav-

ery,²³ torture,²⁴ and apartheid,²⁵ for instance, require states to criminalize these offenses as part of their domestic criminal law.

Despite these advances in codification, the twentieth century saw countless international crimes, resulting in tens of millions of deaths, yet virtually no prosecutions. Stalin's purges, for instance, resulted in as many as twenty million deaths, which have not only gone unpunished, but largely unacknowledged.²⁶ Idi Amin's regime murdered and expelled hundreds of thousands of Ugandans,²⁷ yet he died a free man in 2003 after spending twenty-five years in luxurious exile in Saudi Arabia. Former Ethiopian leader Mengistu Haile Miriam presided over a "red terror" in which many thousands of political opponents were killed,²⁸ yet he lives in high-security comfort in Harare, Zimbabwe. Hissène Habré of Chad, similarly, is considered responsible for tens of thousands of political murders,²⁹ yet he continues to live freely in Senegal after feeble efforts to bring him to trial collapsed.³⁰

That neither these leaders nor their many thousands of accomplices have been brought to justice should come as no surprise. Mass atrocities are typically perpetrated by state actors or undertaken with their complicity; thus, no domestic prosecutions will take place while the repressive regime remains in power. Prosecutions are difficult to initiate even after the old regime gives way because most transitions do not come about through comprehensive military victories but through negotiation processes. During such negotiations, the promise of amnesty and even continued involvement in the successor government are often vital components of the transfer of power; that is, they are crucial carrots used to persuade embattled rulers to relinquish control through a peaceful transition. Further, the new governments of states that transition to democracy through negotiated transfers tend to be politically and militarily weak. They are often under constant surveillance and pressure from military forces, pressure that prevents them from initiating proactive and controversial measures such as criminal prosecutions. As Carlos Nino put it, politicians in these new governments are "so content with the respite from direct authoritarianism that they d[o] not risk debilitating confrontations."³¹

The wave of democratization that swept the countries of Latin America during the past twenty-five years highlights the impunity that is likely to result when amnesties abound³² and repressive elements of the former government remain entrenched following ostensibly democratic transitions. In Chile, for instance, Augusto Pinochet and the high command of the Chilean armed forces violently

deposed Salvador Allende's democratic government in 1973 and established a harsh police state characterized by widespread human-rights violations. Following the worst of the abuses, Pinochet granted himself and his government a blanket amnesty covering all acts committed since the coup that brought him to power.³³ Although Pinochet later lost the presidency,³⁴ he nonetheless remained commander in chief of the army, and, before relinquishing control, he passed several last-minute laws designed to protect his position, shield the military from prosecutions, and limit the powers of the new government.³⁵ Given the circumstances of Chile's transition, criminal prosecutions were never seriously considered. The most that Pinochet's successor, Patricio Aylwin, had hoped he could accomplish was to hold trials that would be followed up with pardons, but Pinochet's self-granting amnesty initially was an insuperable obstacle even to that limited form of accountability. Not only did Pinochet continue to command the army, but the new government lacked complete control over the Senate because nine of that body's thirty-five members were appointed by Pinochet or institutions that he continued to control pursuant to the Constitution. Further, Aylwin could have little hope that the Supreme Court would invalidate the amnesty law since Pinochet had appointed almost all of the justices.³⁶ Aylwin did create a truth commission, but even with respect to this less-threatening form of accountability, Aylwin's "tenuous position . . . relative to the Chilean armed forces" prevented him from framing its mandate in terms antagonistic to the former government.³⁷ The tide has recently begun to turn, however. Now, nearly thirty years after many of the crimes took place, Chilean courts are sidestepping the amnesty and allowing prosecutions against former military officials to go forward.

Guatemala provides a more recent example of a state unable to prosecute its own international crimes. Succumbing to international pressure, Guatemala agreed to prosecute gross human-rights violations after its thirty-six-year civil war left two hundred thousand dead or disappeared and as many as a million and a half displaced.³⁸ Five years after the war ended, however, prosecutions have occurred with respect to only one massacre out of more than 422, and that case featured only low-level perpetrators.³⁹ Guatemala's dismal statistics result largely from the fact that the government took no significant steps to remove those responsible for the atrocities from their positions of power.⁴⁰ Consequently, intimidation and corruption have stalled most of the prosecutions that have been undertaken, leading to unjustifiable delays, the dismissals of cases, and the disappearance of key evidence.⁴¹

By the early 1990s, then, impunity appeared to reign. No international forum had been created to prosecute international crimes, and states largely ignored their international obligations to initiate domestic prosecutions of alleged offenders. It was not until the Cold War had ended and the brutal Bosnian war brought images of starving concentration-camp inmates and tales of systematic rape to television sets around the world that the international community took the first steps in fifty years to bring international criminals to justice.

Tentative Steps: Establishing the Ad Hoc Tribunals and Other Institutions to Prosecute International Crimes

Bosnia-Herzegovina's declaration of independence in March 1992 gave rise to a bloody, three-year war that killed approximately two hundred thousand people and dislocated more than two million others, virtually all through the commission of international crimes (see Chapter 9 for more detail on the Bosnian war). The culture of impunity that had so characterized the fifty preceding years seemed initially also to prevail with respect to the Bosnian conflict. Certainly, the international community had no desire to involve itself militarily in the war. Although the U.N. and human-rights organizations began to document the atrocities in 1992 and 1993, the international community made no attempt to use military might to stop the bloodshed.⁴² The Security Council did adopt several resolutions and imposed an economic embargo on Serbia, but these had little practical effect.⁴³ The Security Council also imposed a no-fly zone over Bosnia when Bosnian Serb aircraft began to attack civilian targets by air;⁴⁴ but, at the urging of the United Kingdom and France, the clause providing for enforcement of the no-fly zone was omitted from the resolution, and, over the next six months, more than 465 violations of the no-fly zone were documented but ignored.⁴⁵

While the international community was unwilling, until the very end of the war, to exert the military force necessary to end the atrocities, it did take a path-breaking step to put an end to the impunity that has typically followed such crimes. Specifically, in 1993, the Security Council established the ICTY to prosecute those accused of genocide, crimes against humanity, and war crimes in the former Yugoslavia. And a politically improbable step it was. The Security Council first adopted Resolution 780, which established a commission of experts to investigate violations of international humanitarian law.⁴⁶ The negotiations leading to Resolution 780 were acrimonious, and the work of the commission itself was

viewed with much suspicion by those who believed that the commission's work would undermine efforts to achieve a political settlement.⁴⁷ Indeed, fear that the commission's investigations would disrupt the settlement under negotiation led the Security Council to starve the commission of funding and to terminate it prematurely.⁴⁸ The subsequent proposal to create an international tribunal to prosecute those responsible for the atrocities also generated considerable opposition, with many arguing that the tribunal would obstruct peace negotiations and others objecting to its establishment by means of a Security Council resolution.⁴⁹ It was consequently considered to be "[a]gainst great odds" that the Security Council did eventually create the ICTY.⁵⁰

The road to the creation of an international tribunal for Rwanda featured similar obstacles. In the span of three months, Rwandan Hutu massacred approximately eight hundred thousand Rwandans, most of whom were Tutsi (see Chapter 9 for more details). The international community made no effort to stop the killings, even though it has been estimated that as few as a thousand troops could have brought the violence to an end.⁵¹ Indeed, a U.N. peacekeeping force was stationed in Rwanda when the killings began, and rather than enlarging it, the Security Council reduced it from 1,515 troops to 270.⁵² The international community was likewise reluctant at first to become involved in bringing the perpetrators of the bloodshed to justice. In May 1994, the U.N. Commission on Human Rights issued a report stating that "the authors of the atrocities . . . cannot escape personal responsibility for criminal acts carried out, ordered or condoned,"⁵³ but it stopped short of calling for prosecutions before an international tribunal. The Security Council was equally reluctant to consider establishing an international tribunal for Rwanda and, indeed, was loathe at the outset even to use the term "genocide" to describe the massacres for fear of triggering the obligations under the Genocide Convention.⁵⁴ Once additional facts became available, the Security Council was forced to acknowledge that a genocide was indeed taking place, and, over the objection of some members, it also felt compelled to establish a commission of experts, similar to the one it had established for the former Yugoslavia.⁵⁵ Only after several months of inaction, during which the new Tutsi-led Rwandan government vacillated about whether or not it wanted an international tribunal, did the Security Council eventually adopt Resolution 955 providing for the creation of the ICTR.⁵⁶

The creation of the ad hoc tribunals for Rwanda and the former Yugoslavia helped to restart the on-again, off-again negotiations regarding a permanent

international criminal court. In July 1998, 120 states voted to adopt the Rome Statute of the International Criminal Court,⁵⁷ and the ICC opened its doors in July 2002. Likewise, the establishment of the ad hoc tribunals led to the creation of three hybrid domestic-international tribunals, that is, tribunals that have significant international input but that are in one measure or another grafted onto the judicial structure of the states in question. The U.N. and the government of Sierra Leone agreed in 2002, for example, to establish a Special Court for Sierra Leone to prosecute those most responsible for violations of international criminal law and Sierra Leonean law during Sierra Leone's brutal civil war. Similarly, massive violence following East Timor's secession referendum in 1999 led the U.N. to establish Special Panels in the Dili District Court to prosecute those responsible. Finally, Cambodia and the U.N. agreed in 2003 to establish Extraordinary Chambers in the Cambodian judicial system to prosecute leaders of the Khmer Rouge.

The past decade, then, has witnessed a revolution in the then-nearly dead field of international criminal law. The advances, particularly in attitudes about the need and desirability of criminal accountability following international crimes, are nothing less than extraordinary. Criminal accountability is not the only end worth pursuing, however, and the following section will examine certain non-prosecutorial mechanisms, such as reparations schemes and truth-telling commissions, that can also offer vital benefits to societies emerging from large-scale violence.

Nonprosecutorial Mechanisms: Reparations Schemes and Truth-Telling Commissions

In the past few decades, reparatory and truth-telling mechanisms have emerged as common responses to mass atrocities. Occasionally accompanying criminal prosecutions but most often serving as alternatives thereto, reparations schemes and truth commissions seek—in tangible and intangible ways—to assist victims in moving beyond the violence.

Reparations Schemes

Reparations seek to redress victims' suffering through such measures as financial compensation, restitution, symbolic tributes, and apologies. Although monetary payments can never truly compensate for the grave harm inflicted by

an international crime—for the rape, the torture, the disappeared child—many victims of gross human-rights abuses have suffered financially as well as physically and emotionally, so compensation, even if only in token form, has traditionally constituted a primary element of many reparations schemes.

History's most sweeping compensatory effort to date has been Germany's payment of tens of billions of dollars for World War II atrocities.⁵⁸ Post-Nazi reparations schemes have been smaller in scale; many provided only token sums, and some distinguished arbitrarily among victim classes. Until recently, Chile's compensation scheme, for instance, granted pensions, educational benefits, and exemptions from military service to the families of those killed or disappeared, but it failed to extend compensation to the thousands who were wrongfully detained and tortured but who survived their ordeals.⁵⁹ Argentina's reparations scheme cast a broader net, compensating not only for deaths and disappearances but also for unlawful detentions and torture,⁶⁰ but payments had to be stopped in 2002 when the government suspended all payments of interest and principal on its foreign and domestic debts, leaving recipients feeling revictimized.⁶¹

The South African Promotion of National Unity and Reconciliation Act charged the country's Truth and Reconciliation Commission with recommending reparations for those who suffered "a gross violation of human rights."⁶² Compensation was thereby excluded for the vast majority of black South Africans who had not been specifically targeted for torture, detention, or the like but who suffered daily the humiliation and degradation, not to mention the economic privations, that apartheid imposed on blacks. The government initially rejected the commission's recommendation of cash payments and indicated that only symbolic reparations would be forthcoming.⁶³ Succumbing to intense political pressure in April 2003, however, President Thabo Mbeki announced that his government would pay reparations totaling \$85 million to the more than nineteen thousand victims who had testified before the Truth and Reconciliation Commission. The sum promised was less than a quarter of the \$360 million that the commission had recommended, so some victims deemed the amount insulting.⁶⁴

Other states, particularly those in Eastern Europe, have placed restitution at the center of their reparations schemes. Czechoslovakia, for instance, enacted a law in 1991 that required the return of property that had been obtained by coercive means.⁶⁵ Similarly, the unification treaty unifying East and West Germany provided for the return of most confiscated properties to the former owners or their heirs.⁶⁶ South Africa likewise enacted the Restitution of Land Rights Act of

1994, which allowed a Land Claims Court to purchase or expropriate a piece of property from its current owner in order to restore the property right of a person wrongfully dispossessed.⁶⁷

Vexing practical problems complicate efforts to provide monetary reparations. Determining which victims should receive compensation and how to quantify their injuries are only the most obvious. Questions relating to the quantity of reparations are particularly thorny because states emerging from collective violence are especially unlikely to possess the financial resources necessary to make even a credible attempt at compensation. Indeed, establishing reparations schemes in depressed economies such as South Africa and the Eastern European countries raises worrisome questions about whether it is appropriate to grant backward-looking remedies such as financial reparations when doing so may impede the state's ability to carry out current, vitally necessary functions. Other value-laden issues concern whether compensation should be paid in cash or its equivalent or rather should take the form of services, such as health care, education, or psychological assistance. Should individual need be considered, with more impoverished victims receiving greater sums, or should classifications be made solely on the basis of injury? Difficult questions of intergenerational justice arise as well when considerable time has elapsed between the injury and the provision of compensation. In particular, when is it just to require those innocent of wrongdoing to assume the financial burden of past wrongs?⁶⁸ The United States faced such questions in 1988 when it established a reparations scheme to redress the wrongs visited upon the Japanese Americans who were interned, more than forty years before, during World War II. For a wealthy country like the United States, the scheme was inexpensive, providing only \$20,000 for each surviving individual and totaling an estimated \$1.2 billion;⁶⁹ hence, it was relatively uncontroversial. More recent calls to provide reparations for the injuries inflicted more than one hundred years ago by slavery and the Jim Crow regime give rise to far more heated debates both because the reparations envisaged are typically of a grander scale and because so much time has elapsed that compensation seems less an effort to remedy specific harms and more an attempt at wealth redistribution. Restitution may seem on the surface a more straightforward way of redressing past wrongs, since returning the particular thing wrongfully taken avoids many of the difficult line-drawing problems associated with compensation schemes; but restitutionary measures too can spark controversy, particularly when considerable time has passed and intervening owners are innocent of wrongdoing or when restitution-

ary schemes, such as those established in Eastern Europe, seek to advance other goals, such as the transition to a market economy.

The provision of reparations can never wholly repair the lives broken by mass atrocities; reparations can, however, advance healing and reconciliation in a variety of ways. The payment of reparations constitutes an acknowledgment of wrongdoing, which victims may find particularly satisfying if it has been preceded by years of denial. At the same time that reparations assign blame, at least in a general sense, they also serve officially to recognize and rehabilitate victims, many of whom have previously been deemed subversives and enemies of the state.⁷⁰ The provision of reparations further “draw[s] a line on the past,”⁷¹ advancing political transitions by creating a sharp distinction between the past repressive regime that acted outside the law to injure its citizens and the present democratic regime that uses legally established methods to compensate those who have been harmed. Indeed, the provision of reparations gives recognition to the principle that wrongs must be redressed, a principle that is all but unknown in states emerging from mass violence. And when reparations schemes require payments from specific offenders, through restitutionary measures or through civil actions such as those brought pursuant to the U.S. Alien Tort Claims Act,⁷² they also serve retributive goals. Offenders may be forced to relinquish their ill-gotten gains and may be publicly shamed even in cases where they manage to avoid paying the judgments.⁷³

Many of these same goals are furthered as well by symbolic reparations, such as commemorative monuments and days of remembrance, and especially by apologies. As noted above, a government’s decision to pay monetary reparations itself is an acknowledgment of wrongdoing; thus, it can be understood to constitute an implicit apology. Express apologies arguably carry even greater symbolic value and have in recent years become a popular governmental response to human-rights violations. U.S. presidents Ronald Reagan and George H. W. Bush, for instance, apologized to the Japanese Americans interned during World War II,⁷⁴ while President Bill Clinton apologized to the survivors of a U.S. Public Health Service study that withheld proven medical treatment from a group of African American men with syphilis.⁷⁵ Canadian leaders have apologized for the suppression of the Aboriginal language and culture. British Prime Minister Tony Blair apologized for his country’s role in the mid-nineteenth-century potato famine in Ireland, and Pope John Paul II apologized for Catholic atrocities during the Counter-Reformation.⁷⁶ In 1995, Prime Minister Tomiichi Murayama of Japan

offered a general apology for World War II suffering caused by Japan,⁷⁷ and, more recently, Japan offered a specific apology to China after thirty-six Chinese fell sick following contact with chemical weapons that Japanese soldiers had left in China at the end of World War II.⁷⁸

The current popularity of apologies stems in part from their inexpensive price tag. Martha Minow consequently describes as “most troubling” those apologies “that are purely symbolic, and carry no concrete shifts in resources or practices to alter the current and future lives of survivors of atrocities.”⁷⁹ Although apologies linked to tangible efforts to repair the harm are certainly more desirable than apologies alone, pure symbolism, in and of itself, can have tremendous significance, as evidenced by the intense opposition that some apologies generate. Croatian president Stjepan Mesić’s 2003 apology to “all those who have suffered pain or damage at any time from citizens of Croatia who misused the law or abused their positions” was sharply criticized by some Croatian politicians, who deemed the apology “shameful and humiliating for all Croatian citizens.”⁸⁰ Heated debates likewise surround the question of whether the U.S. government should apologize for its nineteenth-century practice of slavery.⁸¹ In Japan, Prime Minister Murayama personally apologized to the so-called comfort women, who were kept in sexual servitude by Japanese soldiers during World War II, but the Japanese government notably did not join in the apology.⁸² In establishing a reparations scheme for the comfort women, the Japanese government kept similar distance. Although the government established an Asian Women’s Fund to provide payments to comfort women as a means of expressing, among other things, the “Japanese people’s atonement,” the government refused to fund the payments; they were instead funded through private donations.⁸³ Only six of the five hundred intended recipients accepted payments, with most refusing them because the funds were not provided by the bodies that were actually responsible for the wrongdoing.⁸⁴ Symbolism, in and of itself, clearly matters.

Apologies carry the greatest weight when they are made by the individual wrongdoers themselves in the context of continued ethnic or political tension. Witnesses to South Africa’s Truth and Reconciliation Commission hearings have described the profound transformations that took place when perpetrators of the most heinous of human-rights abuses apologized to their victims and saw those apologies accepted. Pumla Gobodo-Madikizela, for instance, observed that after Eugene de Kock apologized to the widows of policemen whom de Kock had killed, one widow was “profoundly touched by him” and both “felt that de Kock

had communicated to them something he felt deeply and had acknowledged their pain.”⁸⁵ In a similar vein, Lyn Graybill describes the son of a murder victim who embraced the perpetrator, saying: “You murdered our father. But we forgive you.”⁸⁶ And when Truth and Reconciliation Commission Chairman Archbishop Desmond Tutu heard General Johan van der Merwe’s apology, he deemed it “an incredible moment” and instructed those assembled to “keep quiet a bit and put our heads down for a minute.”⁸⁷ As Elizabeth Kiss put it: “While the amnesty process did not require perpetrators to apologize for their actions, commission hearings created an opportunity for repentance and forgiveness. The most extraordinary, and publicly celebrated, moments of those hearings occurred when individual victims and perpetrators reached out to one another and achieved some measure of reconciliation.”⁸⁸

Expert witnesses testifying on behalf of former Bosnian Serb leader Biljana Plavšić at her ICTY sentencing hearing similarly lauded her apology as especially significant to efforts to bring peace and stability to the region.⁸⁹ Martha Minow observes particularly in relation to an individual apology that victims are empowered: they can “accept, refuse, or ignore the apology,” and in this way, they “secure a position of strength, respect, and specialness.”⁹⁰ Even official apologies can resonate with meaning, as occurred when former Chilean president Patricio Aylwin “made an emotional appeal, broadcast on national television, in which he begged pardon and forgiveness from the families of the victims.” Chilean survivors frequently cite that apology “as a powerful moment after having their claims brushed aside for so many years.”⁹¹

Truth-Telling Commissions

Truth commissions—bodies charged with investigating and publicizing human-rights offenses—have become perhaps the most popular response to collective violence in recent years. More than thirty truth commissions have been established during the past few decades.⁹² Many of these, particularly the early ones, were inadequately funded⁹³ and subject to political manipulation and threats of violence.⁹⁴ More recent truth commissions have generally been considered to constitute more-serious attempts to investigate and publicize the truth about the human-rights abuses under their consideration, although some distortions still occur. For instance, although the Guatemalan Truth Commission was able to issue a lengthy and hard-hitting report, concluding that the Guatemalan

government had perpetrated acts of genocide against some Mayan groups,⁹⁵ its work was severely hampered by limited powers, a short period during which to complete its mandate, and a prohibition against attributing responsibility to individual offenders. Commissioner Christian Tomuschat labeled the commission's broad mandate combined with its short life span an "almost incomprehensible contradiction" that Andrew Keller deemed "consistent with the military's goal of creating a weak commission."⁹⁶

The Commission on the Truth for El Salvador generated considerable attention largely because the U.N. administered it and appointed internationally respected non-Salvadorans to serve as commissioners. The commission, therefore, functioned with an independence lacking in many domestically administered commissions.⁹⁷ The most notable feature of the commission's report was the fact that it named the names of those the commission determined to be responsible for the human-rights abuses.⁹⁸ The Salvadoran government made strenuous efforts to prevent the identification of offenders,⁹⁹ but the commission's report explained the commissioners' view that "the whole truth cannot be told without naming names. . . . Not to name names would be to reinforce the very impunity to which the Parties instructed the Commission to put an end."¹⁰⁰ One of the most recent truth commission reports, issued by the Sierra Leone Truth and Reconciliation Commission (Sierra Leone TRC), followed the lead of the Commission on the Truth for El Salvador and likewise named the names of those bearing responsibility for atrocities,¹⁰¹ a number of whom had contemporaneously been indicted by the Special Court for Sierra Leone. The report of the Sierra Leone TRC went on to lay some measure of blame on the U.N. and the international community, which it found had "abandoned Sierra Leone in its greatest hour of need."¹⁰² The report made specific findings with respect to youth, children, and women, and it dispelled some popular beliefs, such as that the desire to exploit diamonds had caused the conflict.¹⁰³ The Sierra Leone TRC also issued the first-ever "Child-Friendly Version" of its report, which was prepared with the assistance of Sierra Leonean child victims.

The Truth and Reconciliation Commission (TRC), established in South Africa following the end of apartheid, built on the experience of predecessor commissions but also introduced innovative features that have led many commentators to consider it the most serious attempt to date to investigate and publicize human-rights offenses.¹⁰⁴ In establishing the TRC, South Africa broke new ground by granting the commission broad subpoena and search and seizure powers and by creating a fairly sophisticated witness-protection program that encouraged

fearful witnesses to come forward. Also exceptional was the public nature of the South African process. Some of the previous truth commissions had held public sessions, but the TRC held vastly more, and these proceedings were the subject of intense media coverage. Indeed, two thousand victims and witnesses appeared in public proceedings, and as Priscilla Hayner describes it:

[M]ost newspapers ran a number of stories on the commission every day, and radio and television news often led with a story on the most recent revelations from the commission's hearings. Four hours of hearings were broadcast live over national radio each day, and a *Truth Commission Special Report* television show on Sunday evenings quickly became the most-watched news show in the country.¹⁰⁵

The most revolutionary feature of the South African TRC was its ability to grant individual amnesties for politically motivated crimes. One of the key demands of the outgoing National Party leadership during the transition negotiations was for an amnesty, and it was widely believed that failing to concede to this demand would have led to a bloody insurrection. The African National Congress (ANC), which led South Africa's liberation movement, held sufficient power, however, to withstand calls for a blanket amnesty of the sort that General Pinochet imposed on Chile. Instead, the new South African government offered amnesty to those suspected of human-rights abuses, but it tied that amnesty to a truth-telling requirement; specifically, the Promotion of National Unity and Reconciliation Act gave to the TRC the power to grant individual amnesties for political crimes, but only to those who provided a complete accounting of their participation in those crimes.¹⁰⁶

It became clear early on, particularly in light of the rigorous disclosure requirements imposed on amnesty applicants, that few offenders would apply for amnesty unless they had reason to fear prosecution.¹⁰⁷ Using the threat of prosecution as a "stick" to motivate offenders to come forward proved only partially effective because the government was unable to conduct enough successful prosecutions to make the threat a credible one. As will be described in greater detail in Chapter 2, the government conducted a few high-profile trials for apartheid-related offenses, and these resulted in convictions and lengthy prison sentences, but the trials were protracted and expensive, so very few were undertaken. Some equally high-profile trials resulted in acquittals, which led many senior-level offenders to discount the risk of conviction and consequently to eschew the amnesty process. Many considered the refusal of high-level political and military leaders to seek amnesty to be a significant failure for the TRC,¹⁰⁸ but the TRC

did receive more than seven thousand amnesty applications,¹⁰⁹ and, if these applicants had not come forward, “a lot of truth and lot of reality of that time would have been lost.”¹¹⁰

Although those amnestied were obviously not subject to criminal sanctions, the disclosures they were required to make did expose them to the punishment of public condemnation. For instance, former president P. W. Botha’s “public support withered” after extensive information came to light of his “knowledge or approval of a long pattern of state crimes.”¹¹¹ A number of police officers reported that their marriages failed after they confessed,¹¹² notorious South African torturer Jeffrey Benzien suffered a nervous breakdown, and other amnestied perpetrators were shunned by their families and friends.¹¹³

In addition to imposing some accountability, the amnesty process also involved and empowered victims by permitting them to cross-examine amnesty applicants. “Reversing roles, then, torturers and murderers faced interrogation by their former victims and family members.”¹¹⁴ This sort of face-to-face confrontation and engagement, along with many of the TRC’s other innovative features, were intended to facilitate reconciliation, one of the TRC’s primary goals. Indeed, the TRC is notable among truth commissions for its focus on reconciliation, on healing, and on forgiveness. TRC hearings did appear to advance these goals in certain cases, but other cases featured recalcitrant perpetrators¹¹⁵ or victims not yet ready to forgive.¹¹⁶

Truth-telling inquiries serve a variety of aims critical to societies emerging from collective violence. Truth commissions first and foremost provide an historical account of the period under question. While many of the early truth commissions sought little more than to detail the bare facts of the atrocities, more recent truth commissions have endeavored in addition to elucidate contextual elements of the violence—the historical underpinnings and the role of various social and governmental institutions, among other things. Thus, the South African TRC, for example, held hearings to illuminate the roles of various sectors of civil society—including business, churches, the media, the medical profession, and the legal system—in supporting and perpetuating apartheid.¹¹⁷ Such an historical account is especially valuable when the crimes themselves have been shrouded in secrecy. The forced disappearances, so widely perpetrated in Latin American dictatorships, for instance, were in particular need of elucidation, since victims were here one minute and gone the next, leaving loved ones with no clue as to their fate or whereabouts. With respect to such clandestine crimes as these, truth

commissions can provide facts of vital consequence to victims' families, including the location of the body,¹¹⁸ the manner of death, and the reasons for targeting that particular individual. In other cases, truth commissions serve less to convey knowledge as to officially acknowledge the violence of which everyone is unofficially aware. Such acknowledgment is critically important to victims, whose injuries may have been denied or ignored, and it also can help to open the eyes of bystanders, who turned willfully blind eyes to the violence taking place around them. Although trials for international crimes are also intended to create an historical record, many believe that truth commissions more effectively serve those ends. Martha Minow, for instance, observes that

[t]he task of making a full account of what happened, in light of the evidence obtained, requires a process of sifting and drafting that usually does not accompany a trial. Putting narratives of distinct events together with the actions of different actors demands materials and the charge to look across cases and to connect the stories of victims and offenders. Truth commissions undertake to write the history of what happened as a central task. For judges at trials, such histories are the by-product of particular moments of examining and cross-examining witnesses and reviewing evidence about the responsibility of particular individuals.¹¹⁹

Truth commissions are also more victim-centered than criminal prosecutions and consequently can create a more hospitable space for victims to relate their experiences. In particular, truth commissions typically allow victim testimony to proceed in narrative form, without cross-examination. Some experts assert that allowing trauma victims to tell their stories to sympathetic listeners enhances their prospects for healing.¹²⁰ The long lines of victims seeking to testify before many truth commissions evidences the value such testimony must hold for those who offer it. Efforts, like that of South Africa, to encourage perpetrators to acknowledge their offenses in addition enhance the potential for healing and reconciliation between offenders and victims. Many victims say that they cannot forgive their perpetrators, let alone reconcile with them, until the perpetrators, at the least, acknowledge their crimes.¹²¹ Offenders' candid and complete acknowledgments of wrongdoing provide victims with the opportunity to forgive and can in addition transform the offenders themselves, leading to reconciliation and the reintegration of the offenders into the community. Truth commissions can facilitate no-less-dramatic conversions in passive supporters of the oppressive regime who, through the victims' testimonies, must come face-to-face with their own complicity and shame. During the second week of South African TRC hearings,

Chairman Archbishop Desmond Tutu read an anonymous letter in Afrikaans sent to the commission. Translated, it reads:

Then I cry over what has happened, even though I cannot change anything. Then I look inside myself to understand how it is possible that no one knew, how it is possible that so few did something about it, how it is possible that often I also just looked on. Then I wonder how it is possible to live with this inner guilt and shame . . . I don't know what to say, I don't know what to do, I ask you to forgive me for this. . . . It isn't easy to say this. I say it with a heart that is broken and tears in my eyes. . . .¹²²

Truth commissions, many contend, advance not only individual healing but societal healing as well. Indeed, commentators routinely assert that unless a broken society confronts the horrors of the past, there will be no stable foundation upon which to build a lasting democracy.¹²³ Truth commissions can expose the multiple causes and conditions contributing to the atrocities and thereby provide the information necessary to inform structural and institutional reforms aimed at preventing future abuses. To the extent that the “truth” reported by a truth commission is widely accepted, it can provide the basis on which opposing parties can govern together without the latent conflicts and resentment that result from past denials and lies. Even when the “truth” expounded is contested, the very dissension that it creates can prove valuable in exposing subjects that were previously taboo and encouraging a dialogue between those holding opposing viewpoints.

Truth commissions have been described as principled compromises on the question of punishment or impunity. As Ruti Teitel put it: “[T]ruth commission[s] emerged as impunity’s antidote and amnesty’s analogue.”¹²⁴ On this view, truth commissions serve some of the ends of criminal trials and thus are a better response to mass atrocities than no response at all, but they nonetheless stand as a poor second-best to criminal prosecutions. As the above discussion indicates, however, more recent experience with truth commissions has shown them to constitute another, distinctly valuable response to large-scale violence—in many ways a complement to trials.

This chapter has traced the emergence of various responses to mass atrocities. Criminal prosecutions stand at the center of these responses and are now typically thought to constitute the most potent tool in any effort to impose accountability after mass violence. Criminal prosecutions are expensive, however, and the following chapter will show that as costs rise, enthusiasm for imposing criminal accountability wanes.