Confronting the Past: The Elusive Search for Post-Conflict Justice

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CONFRONTING THE PAST: THE ELUSIVE SEARCH FOR POST-CONFLICT JUSTICE

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INTRODUCTION

At the end of the Second World War, many nations sought ways to prevent a repeat of the devastating international conflicts that marked the first half of the 20th century, and of the widespread human rights abuses that had left tens of millions of people injured, dead or displaced. In order to achieve their first goal, 51 states joined together in 1945 to create the United Nations, an organisation they hoped would provide a forum for them to discuss and resolve international disputes before they resulted in armed conflict. If that was not possible, the states hoped that the collective will of the member states would give the international body the strength to intervene in conflicts in order to limit their destructive consequences and to prevent them from spreading. As part of the goal of protecting human rights, the United Nations General Assembly in 1948 adopted the Universal Declaration of Human Rights. Although the Declaration itself is not legally binding, it marked the beginning of modern international human rights law.

Despite the optimistic goals, institutions, and agreements of the immediate post-war period, the second half of the 20th century (and the first decade of the 21st century) saw the continuation of wars and human rights atrocities on the

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international, as well as the national, level. In a study published in 2010, Professor Christopher W. Mullins identified 313 armed conflicts between 1945 and 2008 and estimated that between 92 and 101 million people died during those conflicts. The World Health Organisation projects that twice that number died from disease, starvation, and maternal and infant mortality as a consequence of those conflicts. These figures do not include the countless millions of additional persons who did not lose their lives but who were subjected to human rights abuses such as arbitrary arrest, beatings, detention without trial, rape and torture, or who lost their property and livelihoods in the conflicts. The figures also do not include the millions of people who were made homeless by the conflicts or who were forced to seek refuge in other countries.

The realisation that national and international conflicts are going to continue has led many people to focus on methods to confront the human rights violations that result from those conflicts in order to bring about reconciliation and some form of justice for the victims. Advocates of post-conflict justice view it as an essential element in helping to repair the personal, physical, psychological, and institutional damage caused by a conflict. They also see it as necessary to establish the legitimacy of the post-conflict government and to build an economy that will support a sustainable peace. In his study, Professor Mullins found that some form of post-conflict justice mechanism had been attempted in 171 of the 313 conflicts (55 per cent). This figure shows that there is now considerable experience with efforts to bring about post-conflict justice. This experience can be invaluable for other countries in deciding which mechanisms to pursue and how to implement them. However, given the

4. Political violence and human rights atrocities, and their effect on societies and power structures in Haiti, the former Yugoslavia, and Iraq, are the subject of Danner, Stripping Bare the Body (New York: Nation Books, 2009).
Confronting the Past

importance of post-conflict justice to nations and to individuals, what explains the failure to use any of the mechanisms in almost half of the conflicts?

Part of the answer to this question lies in the long and on-going debate between those who want to confront the past and produce a full and open account of the crimes that took place and those who take a realpolitik approach and want to focus on the future rather than relive the past.11 In recent years, a number of scholars and authors have addressed the importance of accounting for what happened in the past and creating an official public memory of it.12 The German law professor, judge and author Bernhard Schlink has pointed out that the past does not affect just individuals or organisations; it infects the entire generation that lives through an era and, in a sense, the era itself.13 Thus, even after a conflict is over, it continues to cast a long shadow over the present and imposes on subsequent generations a sense of guilt, responsibility and self-questioning. Schlink has pointed out that the ways in which a particular society deals with its past are shaped by a number of factors: How recently did the conflict take place? Has the government changed since the conflict took place? Is there an "other" that insists on remembrance, redress, restitution, criminal prosecutions? How many members of the society were involved with the conflict?14

If a society is willing to undertake the process of confronting the human rights atrocities in its past, there are three practical questions they must consider in determining what post-conflict mechanism is appropriate.

What was the type of conflict and how did it end?
Conflicts can take a wide range of different forms: declared wars between nations, such as the Second World War, which ended not only with clear winners and clear losers but also with the "unconditional surrender" of the losers; civil wars, such as those in Central America during the 1980s, which often end with a negotiated settlement and no clear winners or losers; sectarian

11. In his novel, Austerlitz (New York: Random House, 2002), the late German author W.G. Sebald explored the silence that pervaded German society after the Second World War. For Sebald, there was a silence both about the atrocities committed by the Nazis and about the suffering of Germans in the fire-bombings of their cities by the Allies. The conflict between overlooking the past for the sake of peace and the catharsis of confronting the truth in the context of post-Amin Uganda is examined by Andrew Rice in his book, The Teeth May Smile but the Heart Does Not Forget (New York: Macmillan, 2009). For a discussion of the nature of memory and the politics of the struggles over memories in the Southern Cone countries of Latin America since the end of the military dictatorships, see Jelin, State Repression and the Labors of Memory (Minneapolis: University of Minnesota Press, 2003).

12. For examples of works stressing the importance of memory, see Sebald, On the Natural History of Destruction (New York: Hamish Hamilton, 2004); Schlink, Guilt About the Past (Toronto: Anausi, 2010); Havel, "In Search of Public Memory: The State, the Individual, and Marcel Proust" (2005) 80 Ind. L.J. 605.


struggles, such as in Northern Ireland or in Sri Lanka, which end with a peace agreement or with a military victory, and in which both sides continue to live together after the conflict; genocide, as in Rwanda in 1994 and in the former Yugoslavia in the 1990s; repression by authoritarian regimes, such as those in Argentina, Brazil, Cambodia, Chile, Iraq and the former communist countries in Eastern Europe; a system of apartheid, such as in South Africa; economic exploitation, as in Liberia, Nigeria and Sierra Leone involving diamonds, oil, timber and other natural resources; or the occupation of one “country” by another, such as East Timor.

Although it may be possible to classify the type of conflict, it is not always clear when a conflict has entered the post stage. In many countries, those who actively participated in the conflict and were responsible for the human rights atrocities remain in prominent positions or behind the scenes after the actual conflict has ended. They are able to influence how the government remembers the past and the steps it takes to deal with what happened.

How does the individual state or the international community characterise the human rights violations that occurred during the conflict and the persons who engaged in them?

Just as conflicts can take a variety of forms, so can the human rights atrocities that result from them. Are the crimes and their perpetrators viewed as examples of what Hannah Arendt called the “banality of evil”, i.e. bureaucrats doing their work? Were the persons who committed the crimes, in the metaphor of Bernard Schlink, “illiterate”, i.e. they did not understand fully how they got into the situation or their involvement in it? Or are those who committed human rights atrocities seen as “willing executioners”, the phrase Daniel Goldhagen has used to describe those who co-operated with the Nazi government in Germany? Were the persons following the orders of superiors, as was allegedly the case with the lower-level military officers in the case of the “dirty-war” in Argentina? Does the explanation for the violation of human rights lie in “structural” forces such as poverty and inequality, population growth, the “youth bulge”, ethnic nationalism and climate change, as some Canadian and American scholars claim?

What constitutes justice?
How a state or the international community defines the conflict, characterises the causes of the human rights crimes for which justice is sought and defines those who were responsible for them, are crucial to answering a final question: What do we mean by justice? Justice may refer, among other things, to retribution (i.e. punishing specific individuals who committed or who were complicit in human rights crimes), to taking steps to ensure that the conflict and the violations do not reoccur, to making reparations to the victims of the atrocities and their families, or to some form of memorialisation of what happened and of the victims. Without a clear definition of justice as the goal, the work of the national or international community may be inconsistent or incomplete.

The answers to these three questions are different for every post-conflict situation and country. Because of the different needs of states and victims, the international community and individual states have developed a number of mechanisms to try to bring about post-conflict justice. In 2008, the Chicago Principles on Post-Conflict Justice “restated” the mechanisms into seven principles. These mechanisms operate at two overlapping levels: the societal and the individual. For example, the Chicago Principles require states to prosecute “alleged perpetrators of gross violations of human rights and humanitarian law”. This mechanism serves both the societal need to punish and to deter those who violate national and international norms, as well as the basic individual desire for retribution. Another post-conflict mechanism is the investigation of human rights violations by “truth commissions and other bodies”. These commissions may be used in lieu of prosecutions or the information they gather may be turned over to prosecutors for subsequent criminal proceedings. The reports of these commissions are also a means of accounting for the past, creating an official record, and informing the public of the details of what often was concealed by those involved in the conflict. Post-conflict justice may also focus on bringing about institutional reform as a way

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20. Bassiouni, Rothenberg, Higonnet, Hanna, The Chicago Principles on Post-Conflict Justice (“The Chicago Principles”) (Chicago: The International Human Rights Law Institute, 2008). The seven principles are: (1) states shall prosecute alleged perpetrators of gross violations of human rights and humanitarian law; (2) states shall respect the right to truth and encourage formal investigations of past violations by truth commissions and other bodies; (3) states shall acknowledge the special status of victims, ensure access to justice, and develop remedies and reparations; (4) states should implement vetting policies, sanctions and administrative measures; (5) states should support official programs and popular initiatives to memorialise victims, educate society regarding past political violence, and preserve historical memory; (6) states should support and respect traditional, indigenous and religious approaches regarding past violations; and (7) states shall engage in institutional reform to support the rule of law, restore public trust, promote fundamental rights, and support good governance. See Matwijkiw, “Justice Versus Revenge: The Philosophical Underpinnings of the Chicago Principles on Post-Conflict Justice” in Bassiouni (ed.), The Pursuit of International Criminal Justice: A World Study of Conflicts, Victimisation, and Post-Conflict Justice (Portland: Intersentia. 2010), Vol.1, p.173.
of ensuring that the conflict and its crimes do not reoccur. Thus, some states have enacted lustration laws that disqualify those involved in the conflict or human rights atrocities from public positions for a specific period of time. At the individual level, post-conflict justice can provide closure for the victims. This can be done by the prosecution of those persons responsible for their losses, by remedies and reparations for the victims and their families, by memorialisation of what happened, and by traditional or religious approaches. Finally, although widely criticised, amnesty for those involved in the conflict can bring, in some situations, an end to the conflict, help in the rebuilding of the society, and thus play a role in achieving post-conflict justice.

Because no single post-conflict mechanism will work in every case, this article examines six broad models of post-conflict justice mechanisms: (1) criminal prosecutions, (2) truth commissions, (3) institutional reform, (4) reparations, (5) memorialisation, and (6) amnesty. Through examples of when and how these mechanisms have been used, the article analyses their strengths and weaknesses and the situations in which each can help states to confront human rights abuses in their past and achieve some form of post-conflict justice for the victims.

CRIMINAL PROSECUTIONS

Criminal prosecutions can play an important role in helping societies confront the human rights atrocities in their past and in bringing about some measure of post-conflict justice for the victims and their communities. At their most basic level, prosecutions can fulfill the desire of the victims for retributive justice by punishing those who were responsible for their suffering or that of their families. By institutionalising retribution, the state also can prevent individuals or groups from seeking private revenge. Prosecutions may also help victims

21. For a discussion of the role that criminal prosecutions can play in helping societies deal with serious human rights violations, see Osiel, Making Sense of Mass Atrocity (Cambridge: Cambridge University Press, 2009).

22. The importance of retribution to victims is illustrated by a 2010 case in Cambodia. On July 26, 2010, the Extraordinary Chambers in the Courts of Cambodia, a hybrid tribunal established by the United Nations and Cambodia to try members of the Khmer Rouge, found Kaing Guek Eav guilty of crimes against humanity and war crimes and sentenced the 67-year-old former prison commandant to 19 years in prison. However, many people who had been victims of torture under the Khmer Rouge were angry at what they saw as a lenient prison sentence for someone responsible for more than 12,000 murders. They also were upset that, with his sentence reduced for good behaviour, Kaing could be released from prison before he died. The victims argued for a life sentence for Kaing. "Prison Term for Khmer Rouge Jailer Leaves Many Dissatisfied", The New York Times, July 27, 2010, at A4.

23. For examples of the retribution against collaborators in Western Europe following the end of the Second World War, see Judt, Postwar: A History of Europe Since 1945 (New York: Penguin Press, 2005), pp.41-43.
of human rights atrocities and their families deal with the psychological effects of their abuse and loss. In addition to meeting individual needs, prosecutions serve a number of societal functions. Prosecutions require investigations, leading to the indictment of specific individuals, trials in which the state must present detailed evidence, and often an opportunity for victims to face their abusers and to tell their stories in a public forum. Like truth commissions, criminal trials generate a great deal of information that can create a permanent record and inform the public about who was victimised by whom, and how the atrocities occurred. By finding those who were responsible for human rights crimes guilty and imprisoning them, tribunals signal an end to impunity and, hopefully, deter future violations. Finally, the decisions of criminal tribunals can contribute to the development and implementation of national and international law and institutions.

Criminal prosecutions have become the most visible mechanism for dealing with the aftermath of repressive regimes and international and domestic conflicts since 1945. These prosecutions have been conducted in a number of different forums: international tribunals, domestic tribunals, hybrid international/domestic tribunals, traditional courts and, using the doctrine of universal criminal jurisdiction, courts in states other than where the conflict occurred. This section focuses on the judicial approaches to post-conflict justice and examines why, in practice, they have been less than successful in enabling states and individuals to confront and punish violations of human rights.

International criminal tribunals
The first modern international criminal tribunals were established by the victorious Allies after the Second World War in Nuremberg, Germany and Tokyo, Japan. Because the quantum of physical, personal and institutional destruction inflicted upon (and caused by) those two countries was unprecedented in the history of war, Germany and Japan lacked the ability to investigate and document the human rights atrocities that occurred during the periods of Nazi and military rule. In addition, there were no functioning courts in either country that could prosecute those responsible for the wars and crimes.

24. For an attempt to analyse the "scattered bits of primary evidence and informed speculation" about the psychological effects of trials on victims, see O'Connell, "Gambling with the Psyche: Does Prosecuting Human Rights Violators Console their Victims?" (2005) 46 Harv. Int'l L.J. 295.
27. The origins of international criminal law and international criminal courts are the focus of Bassiouni, "Perspectives on International Criminal Justice" (2010) 50 Va. J. Int'l L. 269.
Finally, since both countries had surrendered “unconditionally”, the four Allied powers were determined to restructure their societies and to punish those responsible for the war and for the human rights violations.

Because the Nuremberg trials were the first of their kind,28 two crucial questions had to be answered by Britain, France, the Soviet Union and the United States: “Who would be prosecuted?” and “with what offences would the defendants be charged?” These questions, and a number of others, were the subject of a conference in London during the summer of 1945 that produced the Charter of the International Military Tribunal (the “London Charter”).29 Article 6 of the London Charter called for “the trial and punishment of the major war criminals of the European Axis countries”.30 However, because the Nuremberg tribunal could prosecute only a limited number of “major war criminals”, the trials were limited to 22 political, military and economic leaders of Nazi Germany who, the Allies felt, bore greatest responsibility for the war and the violation of human rights.31 As to the second question, art.6 of the London Charter formulated three categories of crime for the trial: crimes against peace; war crimes; and crimes against humanity.32

The Nuremberg trials have been criticised by some as victors’ justice based on an ex post facto law, since the categories of crime for which the defendants were tried had not been offences under German law.33 However, charging the defendants with those crimes represented a feeling that some offences are so serious and hostile to accepted standards of behaviour in all societies that they should be prohibited and punished, not just by individual states but by the international community as well. Thus, the Nuremberg trials established the use of international tribunals to prosecute claims of human rights atrocities in

30. Article 1 of the London Charter provided for “the trial of war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of organisations or groups or in both capacities”
32. The Nuremberg trials followed the civil law tradition of criminal procedure in which the defendants were tried before a panel of judges without a jury. Allied officials examined hundreds of thousands of documents, primarily created by the Nazis themselves, and used approximately 1,000 documents as evidence. The trials featured very few witnesses and relied instead on those documents. See Mendelsohn, Trial by Document: The Use of Seized Records in the United States Proceedings at Nurnberg (New York: Garland, 1988).
Confronting the Past

situations where the countries in which the acts occurred either are unable or unwilling to prosecute those accused of the crimes. An equally important legacy of the Nuremberg trials for post-conflict justice was the formulation of the concepts of "war crimes", "genocide" and "crimes against humanity". These offences were adopted for use by subsequent international tribunals: the International Military Tribunal for the Far East in Tokyo, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court.

Two other aspects of the Nuremberg trials also made them an effective mechanism for confronting human rights crimes and beginning the process of post-conflict justice. First, the prosecution began in November 1945, only six months after the end of the war, and concluded less than a year later in October 1946 with the conviction of 19 of the defendants. Secondly, it is uncertain, given the difficulties of daily survival in the immediate post-war period, how much attention ordinary Germans paid to the Nuremberg trials. However, there was important symbolism in holding the trials in the country where the atrocities had been planned and where many of them had occurred and in the city that had given birth to the anti-Semitic Nuremberg Laws in 1935. As will be seen, the temporal and geographic proximity of the Nuremberg trials to the crimes has been absent in subsequent international criminal prosecutions. The distance in time and place has a significant impact on the ability of victims and others affected by human rights atrocities to learn the details of what is revealed during the trials and to gain a sense that the prosecutions are providing them with justice.

After the Nuremberg and Tokyo trials, there was a gap in the use of international criminal tribunals until 1992, because of the divisions of the Cold War. However, in the 1990s, the United Nations established two tribunals: the International Criminal Tribunal for the former Yugoslavia35 (the "ICTY") in 1993 to prosecute the war crimes in the former Yugoslavia, and the International Criminal Tribunal for Rwanda36 (the "ICTR") in 1994 to deal with the aftermath of the genocide in that country. Unlike post-war Germany and Japan, the conflicts in the former Yugoslavia and Rwanda had been "civil" wars in which there had been no "unconditional surrender" by one side. International

34. According to Tony Judt, the Nuremberg trials had an impact on people's lives since "[t]he main Nuremberg Trial was broadcast twice daily on German radio, and the evidence it amassed would be deployed in schools, cinemas and education centres throughout the country", Judt, Postwar: A History of Europe Since 1945 (New York: Penguin, 2005), pp.53–54. See Burchard, "The Nuremberg Trial and Its Impact on Germany" (2006) 4(4) J. Int'l Crim. J. 800.
tribunals were necessary because neither the countries of the former Yugoslavia nor Rwanda had the political ability, the personnel or the institutional resources to carry out their own prosecutions in the immediate aftermath of the respective conflicts involving "ethnic cleansing" and genocide. Like the tribunal in Nuremberg, the ICTY and the ICTR were given the jurisdiction to hear charges of war crimes, genocide and crimes against humanity. As a result, the ICTR became the first tribunal to find individuals guilty of genocide under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.\(^{37}\)

Given that the ICTY and ICTR, like the Nuremberg tribunal, have the resources to prosecute only a limited number of people, both courts have focused on persons considered to bear the greatest responsibility for the human rights crimes.\(^{38}\)

As with the Nuremberg trials, the ICTY and ICTR show that the international community is not willing to permit the destruction of a country’s legal infrastructure to result in impunity for those who committed human rights atrocities. Even so, a number of aspects of the tribunals have made them less than successful in confronting those crimes and in providing justice to the victims. First, unlike the Nuremberg and Tokyo tribunals, neither the ICTY nor the ICTR sits in the countries of the former Yugoslavia or Rwanda. The proceedings of the ICTY are held at The Hague while the ICTR sits in Arusha, Tanzania. Although Rwanda and Tanzania are neighboring countries, the expense and difficulties of travel make it impossible for ordinary Rwandans to attend or to participate in the proceedings. According to one study, the Rwandan population regards the ICTR as largely irrelevant and as not contributing to the establishment of the truth about what happened in that country in 1994.\(^{39}\)

Secondly, because the ICTY and ICTR are located in foreign countries, staff from the affected countries are not used for the trials. The failure to involve judges or prosecutors from the former Yugoslavia and Rwanda places a further distance between the tribunals and the human rights atrocities and the victims. Third, the ICTR and ICTY are very expensive to operate. However, since the millions of dollars allocated for the courts have gone to The Netherlands and to Tanzania, the tribunals have been limited in their ability to enable the countries of the former Yugoslavia and Rwanda to rebuild their own legal and institutional capacity for dealing with human rights


\(^{38}\) As of 2010, more than 160 persons have been charged by the ICTY, of whom about 60 have been convicted. "ICTY" available at: http://www.icty.org/sections/AbouttheICTY [Last Accessed September 13, 2010]. Approximately 100 cases have been handled by the ICTR, "International Criminal Tribunal for Rwanda", available at: http://www.unictr.org/Cases/tabid/204/Default.aspx [Last accessed September 13, 2010].

Confronting the Past

abuses. Although the tribunals have made efforts at capacity building by developing procedures to help the countries to prosecute international crimes, it is not clear whether the countries of the former Yugoslavia or Rwanda will have the ability to use or to build on the legacy of the tribunals. Finally, like the Nuremberg tribunal, the ICTY and the ICTR were established shortly after the end of the conflicts in the two countries. However, unlike the Nuremberg trials, which lasted for less than a year, the ICTY and ICTR continue to deal with cases more than 15 years after they were established. In part, this delay has been due to a desire to avoid the criticism of a lack of due process made after the Nuremberg trials. The delay has been due also to the difficulty in conducting investigations in the former Yugoslavia and Rwanda, in arresting those indicted for war crimes and crimes against humanity, in identifying witnesses to testify against them, and in protecting witnesses from harm if they agree to testify. Although these delays are a necessary part of providing the defendants with procedural protection, it is inevitable that the greater the distance in time, as well as in geography, that a trial takes place from the crimes, the less attention it will receive from the victims and their communities and thus there will be less of a sense that it is leading to justice.

The International Criminal Court (ICC) represents the culmination of the development of international tribunals and is intended to be a permanent court for dealing with international crimes. Although the ICC has its headquarters at The Hague, the Statute of Rome provides that its proceedings can take place anywhere. This flexibility in where the court can sit gives it the potential to avoid the limitations of the ICTY and ICTR, which do not conduct their trials in the countries where the crimes occurred. Like the ICTY and ICTR, the Rome Statute charges the ICC with trying individuals for genocide, crimes against humanity, war crimes, and (since July 2010) aggression. However, the Statute


43. Statute of Rome, art.3.

44. Rome Statute of the International Criminal Court, art.5(1). However, the ICC’s
of Rome places a number of restrictions on the court’s jurisdiction and procedure that have limited its effectiveness in dealing with human rights atrocities. In addition, the ICC prosecutor has the power to investigate only crimes committed after the court’s creation and in countries that have ratified the treaty. Also, the ICC can act only when a national court lacks the capacity or the ability to do so.\(^4\) As a result, in its eight years of existence, the ICC Prosecutor has undertaken investigations in only five cases (arising in Uganda, the Democratic Republic of the Congo, the Central African Republic, Darfur and Kenya) which have resulted in the indictment of 16 individuals.\(^4\) Of these, only five trials had begun as of December 2010 and none had been completed.\(^4\) One reason for this is that art.16 provides that the ICC cannot begin and proceed with an investigation or prosecution for a renewable period of 12 months if requested not to do so by a UN Security Council resolution. Thus, prosecutions may be deferred for political reasons while the UN negotiates peace agreements. Some critics, however, have argued that the fear of prosecution by the ICC, even if amnesty has been granted as part of the peace process, disrupts peace negotiations and prolongs human rights abuses.\(^4\) Since all of the persons indicted by the ICC have been from Africa, more than 50 leaders from that continent have criticised the court as unfairly focusing on Africa to the exclusion of other regions. They have also refused to arrest Africans who have been indicted by the court.\(^4\) This has led to a broader and

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46. The limited number of investigations has been undertaken despite language in the Preamble to the Statute of Rome stating, “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured”.

47. The most recent trial to open at the ICC in The Hague was that involving Jean-Pierre Bemba, a former Congolese vice-president, which began on November 22, 2010. It is alleged that a militia under his command was involved in rape, murder and torture in the Central African Republic in 2002 and 2003. Mr Bemba is the most senior government official to be tried by the court.

48. However, Professor Payam Akhaven has concluded, based on a study of three African situations, that the ICC is more likely to prevent human rights atrocities. Akhaven, “Are International Criminal Tribunals a Disincentive to Peace? Reconciling Judicial Romanticism with Political Realism” (2009) 31(3) Hum. Rts. Q. 624.

49. In 2009 and 2010, arrest warrants were issued by the ICC for Sudanese President Omar al-Bashir for genocide, war crimes and crimes against humanity. In August 2010, al-Bashir visited Kenya, a country that has signed the ICC. Although Kenya was obligated by the Rome Statute to arrest al-Bashir, it refused to do so. See Cowell, “Sudan Leader Travels...
Confronting the Past

continuing debate about the role of the ICC in general and, specifically, whether sitting heads of state should be liable for prosecution.50

Domestic prosecutions

A second forum for prosecuting human rights atrocities are the courts in the country where those crimes occurred.51 The importance of domestic prosecutions is recognised by the Preamble to the Statute of Rome creating the ICC which states that, “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”. This duty arises because domestic prosecutions have the potential to be a more effective mechanism for confronting human rights crimes and providing citizens with a sense of justice than are international tribunals. Because domestic prosecutions take place in the country where the crimes occurred, it is more likely that victims and members of the community will be able to attend the proceedings. The attention that domestic prosecutions receive can educate the public about the extent of the human rights violations and about the involvement of specific individuals in those crimes. Finally, by using local judges and prosecutors, domestic prosecutions can improve the judicial capacity of a country and strengthen the consistency and reliability of its own laws. This increased institutional and jurisprudential capacity may be able to sustain the society in future conflicts.

During the first decade of this century, a few governments indicted a small number of former officials for human rights crimes. However, few of them have been tried.52 Some post-conflict governments have been prevented from


50. “Prosecuting Presidents” was the topic of a conference held in London on March 27, 2009. Some speakers at the conference stated that African countries should be able to call on the international tribunals for assistance, as in Rwanda, but should be free to use other post-conflict mechanisms, such as truth commissions, amnesty and traditional dispute-resolution methods. See Conference Report, “Prosecuting Presidents: The Challenges of International Indictments of African Leaders”, available at: http://www.spiked-online.com/index.php/site/printable/6410/ [Last accessed September 13, 2010]. See Lutz and Reiger (eds), Prosecuting Heads of State (Cambridge: Cambridge University Press, 2009).


52. Bernaz and Prouveze, “International and Domestic Prosecutions” in Bassiouni (ed.), The Pursuit of International Criminal Justice: A World Study of Conflicts, Victimisation, and Post-Conflict Justice (Portland: Intersentia, 2010), Vol.1, pp.365–380; Lutz and Reiger (eds), Prosecuting Heads of State (Cambridge: Cambridge University Press, 2009). One domestic tribunal that convicted a former head of state was the Supreme Iraqi Criminal Tribunal, which tried Saddam Hussein and other leaders of his government for genocide, crimes against humanity and war crimes. For a discussion of the tribunal, see Bassiouni,
undertaking any prosecutions because of amnesty laws that either were enacted by out-going regimes, were part of the negotiated peace, or were adopted soon after the end of the conflict. The failure to prosecute those who committed human rights atrocities in Brazil and El Salvador, for example, is the result of amnesty laws in those two countries. Even when amnesty laws are not enacted, many post-conflict governments have been prevented from undertaking prosecutions because they lack the “power, popular support, legal tools or conditions necessary to prosecute effectively”.

The reason for this lack of political will and capacity is that, after conflicts end, governments often inherit a legacy of corruption, a lack of adequate resources and trained personnel, and a public distrust due to the prior regime’s conduct during the conflict.

Some countries that have tried to prosecute persons accused of human rights abuses have found opposition from powerful elements still in the government or behind the scenes. That was the case in Argentina, where threats of a military coup brought prosecutions to an end in the 1980s and led to an amnesty law. Other countries have used prosecutions selectively. South Africa used the threat of prosecution to persuade persons who committed human rights abuses to appear before the Truth and Reconciliation Commission (TRC) and to make a full disclosure of their actions during the period of apartheid. Those who did so were granted immunity from prosecution.

Some critics have argued, however, that the focus of “truth” at the expense of the failure to prosecute persons who committed human rights abuses during the period of apartheid in South Africa denied the victims “justice”. Finally, some countries have undertaken criminal prosecutions for human rights violations, but only decades after the crimes occurred. Andrew Rice has written of the prosecution of former Major General Yusuf Gowon, who had served as Chief of Staff during Idi Amin’s regime, for the kidnap and murder of an official. Although the crimes for which Gowon was accused occurred in 1972, the difficulty in locating information about the murder, evidence and witnesses, along with the desire in Uganda not to discuss the events during the Amin regime, meant that the trial did not begin until late 2002. However, prosecutors withdrew the indictment in September 2003.


54. For a discussion of the prosecution of the military leadership, the threat of a coup, and the amnesty law, see Nino, Radical Evil on Trial (New Haven, Connecticut: Yale University Press, 1996).


57. Rice, The Teeth May Smile but the Heart Does Not Forget (New York: Macmillan, 2009). The Kenyan prosecutors withdrew the indictment because the judge found that some of the confessions used in the state’s case were coerced. It is not likely that Gowon
When post-conflict governments do undertake criminal prosecutions, they face further problems that hinder their effectiveness. It is impossible to try everyone who committed human rights crimes during a war or repressive regime. The decision about whom to prosecute can be complex and the selection of a limited number of people often does not satisfy the demands of victims. In addition, in almost all conflicts the responsibility for human rights crimes can be placed on government officials, military officers, ordinary soldiers, police, paramilitary personnel and guerillas. Victims often feel that the failure to prosecute those involved in their individual case indicates a lack of commitment from the post-conflict government or that their suffering has not been legitimised through public acknowledgment. On the other hand, defendants such as ordinary soldiers or police may see their prosecution as using them as scapegoats for more influential perpetrators. These defendants often raise the defence of “due obedience”, based on the premise that war is “conducted by armies, and armies necessarily follow a special type of discipline which requires absolute obedience”.

Finally, as with the Nuremberg trials, domestic prosecutions of human rights crimes can raise questions of legality if there are “discrepancies between the law existing at the time of the violations and the laws that are deemed a necessary basis for punishment”. Because such prosecutions inevitably occur only after a period when the domestic law was unstable and the concept of human rights was ignored, it is difficult to convict persons accused of human rights crimes.

Traditional courts

Principle 6 of the Chicago Principles on Post-Conflict Justice provides: “States should support and respect traditional ... approaches regarding past violations.” One country that has turned to a traditional approach is Rwanda, which institutionalised its traditional Gacaca Courts in an effort to deal with the aftermath of the 1994 genocide.

As a result of the genocide in Rwanda in 1994, at least 800,000 people were murdered in only three months. The two immediate needs for the country were the prosecution of those responsible for the killings and a process of reconciling Tutsis and Hutus so that the violence would not reoccur. However, these goals proved elusive. Of the 785 judges who had been serving in the country, only between 20 and 50 remained alive. Although the United Nations established the ICTR in 1994, it was able to undertake only a very small number of prosecutions. In the meantime, approximately 130,000 people were held in gaols in Rwanda charged with participating in the genocide. By 2002, only

will be tried again, even if new evidence emerges, given his advanced age and the passage of time. Despite this anti-climactic ending to the trial, the victim’s son was able to find his father’s remains, to re-bury his father with a proper funeral, and to discover the truth of his murder. The victim’s son considered the search for truth and the opportunity to re-bury his father to have been worthwhile.

60. See fn.20.
5,000 of those people had been brought to trial in Rwanda’s national courts. In order to expedite the prosecutions and begin the process of reconciliation, the Rwandan government turned to its traditional mechanism for achieving justice.\textsuperscript{61}

As in many countries, the traditional Rwandan conception of justice is not based on individual accountability but on restoring balance to the society. When a dispute arose, reconciliation involved a process of airing grievances before a chief or the community elders. The process took place on a “small lawn” or “gacaca” at which everyone involved had an opportunity to speak. At the end, the chief or elders made a decision and the parties shared beer, indicating that unity had been restored. In 2002, the Rwandan government institutionalised these Gacaca courts by creating over 10,000 of them and allowing people to choose over 250,000 judges. The idea was for these courts to handle the prosecution of those involved in the genocide and to promote social reconstruction by using people in the community and applying its standards.\textsuperscript{62}

In the ensuing eight years, the Gacaca courts have been both successful and unsuccessful in meeting expectations. Their success has been in handling a huge number of prosecutions and relieving the pressure on the national courts. The trials before the courts have also acted like a truth commission, since the accused stand before the community while the victims tell their stories of what happened. This allows the victims to confront the perpetrators and to make public what happened. The failure of the Gacaca courts has been in not achieving the goal of reconciliation between the Hutus and Tutsis. Among the reasons given for this are that only Hutus have been prosecuted and not Tutsi members of the Rwandan Patriotic Front (RPF)\textsuperscript{63}; that the lack of procedural safeguards has led to a lack of fairness and abuse of human rights; that the courts have been subject to corruption and politicisation; and that the courts have been used as a tool of the Rwandan government for its own purposes.\textsuperscript{64} It should nonetheless be appreciated that, given the enormity of what happened in Rwanda in 1994, it is expecting too much of a court system that developed to deal with the types of dispute that arise among neighbours in traditional


villages to believe that it can unite ethnic groups separated by the deep divisions created by genocide. Instead, the decision to use traditional methods of reconciliation must be tested against all of the other mechanisms for achieving post-conflict justice.

**Hybrid tribunals**

Since 1999, a fourth venue for post-conflict criminal prosecutions has emerged: hybrid courts. These tribunals are designed to deal with the limitations of international tribunals by combining the financial and personnel resources of the United Nations with the national institutions in the country where the crimes occurred. They have been established in countries where the national judicial system functions but cannot cope with the complexity or the number of cases: Bosnia, Cambodia, East Timor, Kosovo, Lebanon and Sierra Leone.

In some of these countries, the hybrid courts have operated parallel to the local judiciary, while in other countries they have been grafted on to the local judiciary.

One of the principal advantages of hybrid tribunals is that, like domestic courts, they are located in the country where the human rights abuses occurred and where the victims live. Such tribunals use the language, legal system and some personnel of the affected country. This can make it more likely that, like domestic courts, the prosecutions will receive attention from the affected population and the victims will understand what is being done, why and how. This understanding can give hybrid courts more legitimacy with the victims than international tribunals. The work and decisions of a hybrid court also have the potential to help build capacity by strengthening the local judicial system and improving respect for human rights norms in the country where the atrocities took place.

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The experience of the half-dozen hybrid courts shows that their success or failure depends on a number of factors. First, hybrid courts must have adequate funding, including sufficient funds for defence services, victim counselling, witness protection, and translation services for all parties, witnesses and victims. Secondly, hybrid courts must have competent administration, including skilled international and local judges and an explicit strategy for capacity building or transferring skills to the national judiciary. This also requires that the division of responsibilities between the domestic and international authorities be clearly defined and respected. The international participants must have a supportive and not over-reaching role in the court, or they risk undermining the court’s legitimacy with the local population. Finally, the personnel and structures of hybrid courts must be, and must be perceived to be, free from corruption and undue influence.

Prosecutions in other countries
The final forum in which persons accused of human rights atrocities have been prosecuted is a domestic court in a country other than the country where the crimes took place. The basis for these prosecutions is “universal criminal jurisdiction”, a doctrine that creates a duty on a country to extradite or prosecute persons accused of crimes covered by international Conventions, such as genocide, war crimes, crimes against humanity or torture, regardless of where the crimes were committed or the nationality of the perpetrators or the victims. The most famous example of the use of the doctrine was the 1961

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68. Funding for all of these services has contributed to the relative success of the Special Court of Sierra Leone in comparison to other hybrid courts. See Cohen, “Hybrid Justice in East Timor, Sierra Leone and Cambodia: ‘Lessons Learned and Prospects for the Future’” (2007) 43 Stan. J. Int’l L. 1 at 19–20.


71. Wierda, Nassar and Maalouf, “Early Reflections on Local Perceptions: Legitimacy and Legacy of the Special Tribunal for Lebanon” (2007) 5(5) J. Int’l Crim. Just. 1065. Because the Tribunal for Lebanon is charged with investigating only one political assassination, and has no jurisdiction over the widespread human rights abuses in the country, the court is viewed by the Lebanese as orchestrated by the United States, France and the United Kingdom.

72. The Extraordinary Chambers in the Courts of Cambodia (ECCC) has been viewed as corrupt and inept by the local population and international civil society. For a discussion of the ECCC, see Linton, “Putting Cambodia’s Extraordinary Chambers into Context” (2007) 11 Singapore Book of Int’l L. 195.

73. For a discussion of the doctrine of universal criminal jurisdiction, see Brady and Mehigan, “Universal Jurisdiction for International Crimes in Irish Law” (2008) 43 Irish
trial in an Israeli civilian court of Adolph Eichmann, a German, for crimes he committed in Europe during the Second World War.\textsuperscript{74}

As with international tribunals, universal jurisdiction can provide a forum to prosecute persons who are subject to immunity or amnesty in their home country.\textsuperscript{75} That was the situation in the case of General Augusto Pinochet, the former president of Chile, who was arrested in England in 1998 on a warrant issued by a Spanish judge for human rights crimes committed during the years Pinochet ruled Chile. At the time of his arrest, Pinochet had immunity from prosecution in Chile because of his position as a Senator for Life.\textsuperscript{76} Universal jurisdiction also can complement the work of international and domestic tribunals that are limited resources of limited mandates. An example of this was the conviction in 2001 by a jury in Belgium of two Rwandan nuns for collaborating in the genocide in that country.\textsuperscript{77} Critics of universal jurisdiction fear that it creates a risk that countries will apply the doctrine selectively in high-profile cases, such as those involving political leaders, rather than basing prosecution on the severity or the number of crimes. They also fear that judges will not use universal jurisdiction to provide justice for the victims of human rights violations but will prosecute for political reasons, in order to embarrass a country or its leaders, or to force them to litigate in inconvenient forums.\textsuperscript{78}

A recent study of universal jurisdiction in Europe revealed that it has been the basis for more than 50 investigations and prosecutions and more than a dozen convictions.\textsuperscript{79} One European state that has used the doctrine in a number of cases is Spain. In addition to the Pinochet case, a judge in Spain in January 2009 agreed to prosecute 14 military officers for the killings of six Jesuit priests during the El Salvador civil war. Although the amnesty law adopted by El Salvador's National Assembly after the civil war prevents anyone from being


74. For an account of the life of Eichmann and his trial, see Cesaraní, \textit{Eichmann: Rethinking the Life, Crimes and Trial of a "Desk Murderer"} (New York: Da Capo Press, 2007).
77. "Religion & Genocide: Nuns in Rwanda Convicted of Genocide" \textit{Commonweal} July 13, 2001, available at: \url{http://findarticles.com/p/articles/mi_m1252/is_13_128/ai_76915684/} [Last Accessed September 13, 2010]. This was the first trial under the Belgian law providing for universal jurisdiction for certain international crimes.
prosecuted in El Salvador for acts they committed during the war, the Spanish judge invoked the principle of universal jurisdiction. He considered Spain to be an appropriate venue for a trial since five of the Jesuits were born and ordained in Spain.80 However, in November 2009, Spain enacted legislation that may restrict significantly the country’s ability to prosecute human rights violations that occur in other countries. Although the legislation adds “crimes against humanity” to the list of crimes that may be prosecuted by Spanish courts, the law limits Spain’s universal jurisdiction to cases where the perpetrators are present in Spain, the victims are of Spanish nationality, or there is a relevant link to Spanish interests. In addition, the law provides that Spanish courts do not have jurisdiction if another “competent court or International Tribunal has begun proceedings that constitute an effective investigation and prosecution of the punishable acts” 81

TRUTH COMMISSIONS

Since the early 1980s, truth commissions have become a second method by which countries can confront their past and try to achieve some measure of post-conflict justice. The first truth commissions were set up in Bolivia (1982) and Argentina (1983); since then, they have been established in approximately 40 other countries. Because the context in which truth commissions are created and operate is unique to each country, there is no single model for their structure and mandate.82 Commissions have been established by national governments, by NGOs, by the United Nations or have been mixed national/


international bodies. In some instances, truth commissions have been used in place of criminal prosecutions. In other cases, however, the information gathered by truth commissions has been turned over to prosecutors. Nonetheless, because they frequently “name names”, reveal what many would like to keep secret, and create a public record of what happened during the conflict, truth commissions face resistance from all of the parties involved in a conflict.

Most truth commissions have been established at the end of a period of a repressive regime or as part of the peace process concluding a period of armed internal conflict. A few, however, have been set up years or even decades after the events that led to the human rights abuses. Most truth commissions focus on the period of a conflict or an authoritarian regime. In some countries, truth commissions have been given a broader mandate to serve as a vehicle for “truth and reconciliation” or “historical clarification”. However, most of these commissions have been given only a limited period of time in which to conduct their investigations and to prepare their reports. As a result, a thorough investigation can be difficult because human rights atrocities are often concealed by those responsible for the violence. In Argentina, for example, many of the “disappeared persons” were killed and their bodies were disposed of in unmarked graves or dumped into the ocean.

83. In 1979, Brazil adopted a general amnesty that gives immunity from prosecution both to government officials and those who opposed them. However, in 2010, the country established a National Truth Commission (NTC), despite opposition from the military, to investigate torture and killings during the military dictatorship from 1964 to 1985. “Brazil Prepares to Confront Past”, Radio Netherlands Worldwide, available at: http://www.rnw.nl/international-justice/article/brazil-prepares-confront-its-past#comment-form [Last Accessed September 13, 2010].

84. The National Commission on the Disappearance of Persons (CONADEP) was set up in Argentina in 1983 to focus on abductions, torture, the fate of disappeared persons and other human rights violations by the military dictatorship between 1976 and 1983. The Commission found that approximately 9,000 persons disappeared during those years and that the disappearances, torture and killings were the result of systematic practices ordered by the highest levels of the military. Although the Commission’s report contained the names of victims, its mandate did not include identifying individuals responsible for specific human rights abuses.


85. Chile, the Democratic Republic of the Congo, Ghana, Grenada, Indonesia, Liberia, Peru, Sierra Leone, the Solomon Islands, South Africa and Timor-Leste established Truth and Reconciliation Commissions.

86. Guatemala established a Commission for Historical Clarification.

87. In Argentina, the National Commission on the Disappeared Persons prepared its report consisting of 50,000 pages in only nine months. The report of the El Salvador Truth Commission was prepared in a little over one year. However, in Northern Ireland, the Saville Report took 12 years to prepare and cost £197 million. The Report is 5,000 pages and is based on evidence from 921 witnesses and 2,500 written statements.
The investigation undertaken by a truth commission can play an important role in helping a post-conflict society confront the human rights violations in its past. One way it can do this is by gathering information in order to establish, as objectively as possible, what happened during the period of the armed conflict or the repressive regime. Attempting to clarify what happened in the past and acknowledging the truth of those events is important because, in many cases, the former regime suppressed or destroyed information that would implicate it for human rights violations, leaving victims and their families without definite information as to what happened and who was responsible for it. Obtaining this information can be done by public hearings to take testimony from victims, their families, witnesses, and sometimes from perpetrators as well. Such testimony can satisfy the desire of those victims who are less interested in punishing the perpetrators than in the opportunity to tell their stories to people who will listen to what happened to them and to their families.

Based upon the information and testimonies, the final report of a truth commission can provide a country with an official record of disputed events and can counter the government's prior silence or denials. This report can allow people to discuss openly the practices of the former government, death squads and guerillas. The final report can also recommend policy and procedural changes and propose laws to protect human rights, to ban certain persons from public positions, and to restructure institutions responsible for the crimes, such as the military and the police. The report of Guatemala’s Commission for Historical Clarification (CEH) recommended that the government “prepare and develop an active policy of exhumation”. Based on the recommendations of the CEH, Guatemalan authorities have carried out hundreds of exhumations of the former regime’s clandestine grave sites, even though the Guatemalan government has prosecuted only a very few of those responsible during the

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88. In conducting their investigations, truth commissions follow what Priscilla Hayner has called five basic aims: “[T]o discover, clarify, and formally acknowledge past abuses; to respond to the specific needs of victims; to contribute to justice and accountability; to outline institutional responsibility and recommend reforms; and to promote reconciliation and reduce conflict over the past.” Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York and London: Routledge, 2001), p.24.

89. For a discussion of truth commissions and the procedural requirements for fairness in dealing with victims, their families, witnesses and perpetrators, see Freeman, *Truth Commissions and Procedural Fairness* (New York: Cambridge University Press, 2006).

90. In Argentina, the National Commission on the Disappearance of Persons also made a series of recommendations in its final report aimed at ensuring that human rights violations did not occur again. These included that the courts investigate and verify the allegations of human rights abuse received by the Commission; a programme of economic assistance for the relatives of those who disappeared; and reforms in the legal system.

36-year civil war. Truth commission reports also can make recommendations for reparations for victims, such as those made by Chile’s National Commission for Truth and Reconciliation. Those recommendations were the basis for the law creating Chile’s National Corporation for Reparation and Reconciliation that outlined schemes to distribute compensation and benefits to victims and their families.

The role that truth commissions can play in dealing with the crimes of the past is illustrated by the South African Truth and Reconciliation Commission (TRC), which focused on the victims of human rights abuses during the apartheid era. The goal of the TRC was to confront those abuses, not through criminal prosecutions, but with a process that would reveal what happened and why. In order to achieve that goal, the TRC provided victims with the opportunity to tell their stories, to be heard in public and acknowledged and, eventually, to receive some compensation. Many of the testimonies given by the victims were broadcast publicly. While truth commissions in most countries have been given only limited powers of investigation and have had to rely on victims’ testimony as their main source of data, the TRC was given extensive powers of subpoena, search and seizure. These broad powers were necessary because there are inherent problems in relying on the memories of victims, especially when those memories involved traumatic and temporally distant events. In addition, testimony was often provided by a relative of a victim who had been murdered.


95. For a discussion of the work of the commission, see Boraine, fn.55. The TRC carried out its work through three committees: the Amnesty Committee, which considered amnesty applications from violators of human rights; the Reparation and Rehabilitation Committee, which provided victim support, formulated recommendations for rehabilitation, and oversaw the distribution of reparations to victims; and the Human Rights Committee, which investigated human rights abuses and worked to establish the identity of victims. The Truth and Reconciliation Commission of South Africa Report (TRC Report), available at: [http://www.info.gov.za/otherdocs/2003/trc/](http://www.info.gov.za/otherdocs/2003/trc/) [Last Accessed September 13, 2010], ss.1, 2 and 4. At the height of its work, the TRC had 400 staff members, more than any other truth commission.

96. The Human Rights Committee received testimony from approximately 20,000 persons.
The principal criticism of the TRC was that it granted amnesty to persons who committed human rights abuses in exchange for the full disclosure of their actions. More than 7,000 persons appeared before the Amnesty Committee and provided information about human rights abuses; however, they failed to make a full disclosure of the extent of their crimes. In addition, a far greater number of persons involved in the violation of human rights failed to appear before the Committee. In part, that was because they knew that, because of limited resources and the large number of persons involved, the chances that the South African government would prosecute them were remote. Thus, critics of the TRC contended that, if those involved in human rights abuses failed to make a “full disclosure” of their crimes, they should not have been granted amnesty. In addition, they argued that amnesty allowed crimes to go unpunished and denied victims the right to pursue individual criminal or civil suits, although victims were entitled to pursue reparations from the TRC.

The criticisms of the TRC highlight the need for truth commissions to focus on the three questions set out at the beginning of this article: What type of conflict occurred and is it over? What type of human rights abuses occurred and why? What is justice in this context? The “conflict” of the apartheid era in South Africa ended after years of negotiations and not as the result of a definitive military victory. The post-apartheid government faced the task of integrating white and black citizens, perpetrators and victims, the politically active and the politically passive. However, as Peter Storey pointed out:

“Apartheid may have been defeated, but its minions still dominated the police, army, and civil service. Success in the constitutional negotiations depended to a large degree on making a deal with the previous regime. Nuremberg-type trials were not an option if the country was to reach democratic elections without a coup or chaos.”

Thus, because of the nature of the conflict and the way it ended, a truth commission was a better post-conflict justice option for everyone than criminal prosecutions. In addition, because the identities of many of those responsible for the crimes committed in the name of apartheid were veiled, one of the main tasks of the TRC was to establish who was responsible for the abuses.

South Africa also had to determine what would constitute justice for the victims of apartheid. The TRC seems to have answered that question in its

own name: truth and reconciliation. However, many in South Africa believed that the public testimony exacerbated racial tensions by emphasising the harm suffered and the atrocities committed, and that the reminder of those harms was an obstacle to healing and reconciliation. Since apartheid-era officials rarely took real responsibility for their actions during their testimony before the TRC, a true sense of vindication for the victims was lacking. However, the painful catharsis of racial tension may have been the lesser of two evils since, without the TRC, racial tensions could have been even greater. Thus, those seeking the lessons of truth commissions in general and the TRC in particular should consider whether the justice that the mechanism offers will be equally satisfying whether or not those responsible for human rights crimes take responsibility for their actions.

INSTITUTIONAL REFORM

Most countries have dealt with human rights crimes and attempted to provide post-conflict justice through criminal prosecutions and/or truth commissions. Interestingly, a few states, mainly those in Eastern Europe, have used a third mechanism: the reform of public institutions through the process of lustration. In practice, lustration has been used by post-conflict governments to exclude persons from a wide range of positions in the public service, the judiciary, the military, state-owned companies and banks, the media, and academia. Like a truth commission, the screening process can provide an historical account of human rights abuses and identify those involved with the violations. Removing or disqualifying from public positions, and from the privileges that accompany those positions, individuals found to have been involved in human rights abuses can also give victims a feeling that some "justice" has been done. Although lustration is not punishment in the criminal law sense of a gaol sentence or a fine, public positions are an important source of income for people in many post-conflict societies. In this sense, lustration can have a retributive effect, since barring persons from such employment can inflict a serious financial penalty on them. Lustration is also justified in the name of security and protecting post-conflict governments from those with strong ties to the previous regime who might want to undermine the new government. Finally, lustration can further the goal of restoring trust in positions that were used for purposes of abuse and personal gain. This, in turn, can create a broader legitimacy for the post-conflict government by breaking


with the former regime, transforming the ideology, policies and identity of the new government, and building trust between the state and society and between citizens.

In order to be successful, lustration requires political will on the part of the post-conflict government as well as a firm legal basis. Officials must give careful thought to, and make clear, what positions are subject to the lustration process, who will be vetted, and what time period will be covered by the process. This, in turn, requires a significant commitment of resources by the government to ensure that everyone subject to vetting receives due process. The failure to do so can raise questions and challenges to the legitimacy of the process. Post-conflict governments also must prevent lustration from being used for political purposes. Finally, post-conflict governments must be prepared for disruptions caused by the removal of persons with experience from the public service and other government positions.

The proposal for lustration made by El Salvador’s Commission on Truth provides a brief example of how the process might operate. In its 1993 report, the Commission recommended that the members of the Salvadorian armed forces, civil service and judiciary who were named in the Report as participating in or covering up human rights abuses, or who did not fulfil their professional obligation to initiate or cooperate in the investigation and punishment of such acts, should be dismissed immediately from the positions they held. For those who were retired from the military or no longer held civil service or judicial positions, the Commission recommended that they be barred from holding any public post or office for at least 10 years, and should be disqualified permanently from any activity related to public security or national defence. The same recommendation also applied to former FMLN leaders named in the Report and to a number of specified civilians. Given that the El Salvador National Assembly adopted an amnesty law five days after the Commission on Truth released its report, the recommendations for lustration were never adopted.

Although lustration was not used in El Salvador, such laws have been enacted in most of the former communist countries of Eastern Europe. One reason for this is that human rights abuses in those countries were not random acts of police, military or paramilitary units. Instead, they were part of the systematic policies of the state, formulated and administered by large numbers of officials.


of government officials. Thus, wholesale institutional reform was required. Within this context, the experience of Czechoslovakia provides an illustration of how lustration has worked and some of the problems associated with it. During the communist period, the secret police in Czechoslovakia (StB) was ubiquitous and its members did not disappear with the "velvet revolution". In October 1991, two years after the end of communism, the federal parliament adopted legislation dealing with the former officials and employees of the communist government. The law provided for the screening of individuals and the banning from a wide range of positions in the new government for five years of those who had collaborated with the StB or who held positions in the Communist Party or other specified communist-connected institutions since 1948. The law permitted persons to contest their exclusion before an independent commission. In 1996 and 2002, further legislation was enacted, giving the public access to the files of the secret police and other government agencies. However, the Czech experience also points out some of the problems with the lustration process that have occurred in other countries as well: the names of many collaborators were missing from government lists because documents were destroyed; the names of some people appeared on lists of collaborators when those persons provided only routine information; false accusations of collaboration were made for political revenge; many of those who were lustrated were not fired but were transferred to positions not covered by the lustration law; a lustrated person did not have to reveal his status to the public. What role the lustration process actually played in the Czech Republic's present democracy is the subject of debate.

As a result of the problems with the lustration process, it has been criticised by international organisations such as the Council of Europe, European Union, Helsinki Watch and the International Labour Organisation for violating individual rights, such as allowing public access to confidential, potentially biased information that could be professionally and personally damaging. These institutions contend that the lack of due process in the lustration process threatens to undermine the democratic foundations of the states. An example of this is Albania's lustration law, adopted in 2008, which was alleged to violate almost 30 sections of the country's Constitution. In response to this criticism, in February 2010 Albania's Constitutional Court struck down the law.

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judges ruled that applying the law might hinder the rule of law and threaten fundamental human rights.\textsuperscript{108}

One reason why lustration has not been used in more countries outside of Eastern Europe is that most post-conflict countries are in a state of disorder. Almost all have been through civil wars or had authoritarian regimes in which people disappeared. The records and information necessary to establish the “who, what, when, and how” often are not available. In some countries—El Salvador, South Africa, Northern Ireland—the post-conflict period is one of coalition between the groups that were in conflict. Persons on both sides of that conflict would be subject to lustration if the process was applied equally. Since neither side wants to be the subject of lustration, and since either side would object if the law was applied only to it, lustration is not possible.

REPARATIONS

Although uncovering the extent of human rights atrocities and prosecuting or disqualifying those responsible for the crimes from public positions are important mechanisms for post-conflict justice, they are not enough. It is also necessary, in the words of Principle 6 of The Chicago Principles on Post-Conflict Justice, to “develop remedies and reparations” for those who were the victims of the crimes and the relatives of those who were killed.\textsuperscript{109} Although there are provisions for reparations in a number of international treaties, and reparations are available in international courts as well as domestic legal systems, the ability of victims actually to receive some remedy or form of reparations remains elusive.

The right of victims and their dependents to compensation for torture and other crimes covered by international law has been recognised by a number of states since the adoption of the United Nations Convention Against Torture.\textsuperscript{110}


\textsuperscript{109} For a study of reparation programs, see De Greiff (ed.), The Handbook of Reparations (Oxford: Oxford University Press, 2008).


Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.

Nothing in this article shall affect any right of the victim or other person to compensation which may exist under national law.

States can provide compensation by one of three methods: criminal courts can order reparations be paid to victims; victims can bring civil suits for compensation against their abusers: or the state can provide reparations to victims. In recent years a number of states have instituted compensation programmes. Examples of this include Argentina, Chile, Guatemala, Peru, Ghana, Sierra Leone and South Africa.
Reparations also are available in regional courts such as the European Court of Human Rights and the Inter-American Court of Human Rights. Article 63 of the 1978 American Convention on Human Rights authorises the Inter-American Court to order that “compensation be paid” to persons injured by a violation of a right or freedom protected by the Convention. An example of the Inter-American Court’s award of compensation is its November 2001 judgment in the Barrios Altos case dealing with the massacre in Lima, Peru, of 15 people at the hands of the state-sponsored Colina Group death squad in November 1991. The court ordered Peru to pay US$175,000 to the four survivors and the relatives of the murdered victims, and US$250,000 to the family of one of the victims. It also required Peru to: grant the victims’ families their health care expenses and educational benefits, including scholarships and supplies of school uniforms, equipment and textbooks; to repeal two controversial amnesty laws; to establish the crime of extrajudicial killing in its domestic law; to ratify the International Convention on the Nonapplicability of Statutory Limitations to War Crimes and Crimes against Humanity; to publish the court’s judgment in the national media; to publicly apologise for the incident and to undertake to prevent similar events from recurring in the future; and to erect a memorial monument to the victims of the massacre.

At its establishment in 1998, the International Criminal Court was also given the power to award reparations to a victim or to a victim’s beneficiaries. Under art.75 of the Statute of Rome, reparations can take the form of “restitution, compensation and rehabilitation”. Although, in exceptional circumstances, the ICC can award damages on its own motion, the normal practice is for the victim to file an application with the Court Registry. The court then determines the scope and extent of any damage, loss and injury. The reparations can be paid to an individual victim or to a group of victims. The ICTY and the ICTR provide for restitution of property taken from victims and have stated that a finding of guilt can be used in a suit for compensation in domestic courts. However, the provision for compensation has not been effective, especially in Rwanda, due to a lack of sufficient assets on the part of the perpetrators to pay judgments against them.

Although regional and international Conventions have created an obligation for states to compensate victims of human rights abuses, it is usually impossible for victims to seek or to receive compensation in the country where the abuses occurred. As a result, some victims have turned to foreign courts

115. However, in June 2009, a High Court judge in Belfast, Northern Ireland, awarded $2.6 million to six families who brought suit against members of an Irish Republican Army splinter group responsible for a car bombing in Omagh, Northern Ireland, in 1998. “$2.6
for reparations. One country that recognises universal civil jurisdiction is the United States in the Alien Tort Claims Act (ATCA). Victims of human rights crimes have used the Act to confront their abusers in court and before a jury to hold them legally responsible for their actions, to recover compensatory and punitive damages for the abuse and, by telling their stories in public, to publicise and create an official record of what happened to them.

Although the ATCA was adopted in 1789, it was not until 1980 that the Act became a mechanism for seeking post-conflict justice. In Filartiga v Pena-Irala, a federal court brought violations of human rights under the umbrella of the "law of nations" for purposes of the ATCA. The court also held that actionable violations of the ATCA can take place anywhere in the world and do not have to have any connection with the United States or with United States citizens. In Kadic v Karadzic, a federal court held that "the law of nations", as understood in the modern era, is not limited to state action. Thus, the defendant in an ATCA suit does not have to be a government official. Persons acting under the auspices of a state or persons acting only as private individuals may also be liable for violating certain norms of international law.

In 2004, the United States Supreme Court applied a stricter interpretation to actions that give rise to a claim under the ATCA in Sosa v Alvarez-Machain. In Sosa, the court held that Congress intended to give federal courts jurisdiction to hear "a relatively modest set of actions alleging violations of the law of nations". In 1789, those actionable violations were: offences against ambassadors; violations of safe conduct; and piracy. Although the court did

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116. 28 U.S.C. §1350. The ATCA states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Although the plaintiff in an ATCA action must be an alien, the defendant may be of any citizenship and the tort may have occurred anywhere in the world. According to one court, the ATCA is "of a kind apparently unknown to any other legal system in the world". Kiobel v Royal Dutch Petroleum Co., 2010 U.S. App. LEXIS 19382, *3 (2d Cir. 2010). See Fletcher, Tort Liability for Human Rights Abuses (Portland: Hart, 2008).

117. 630 F.2d 876 (2d Cir. 1980).

118. According to the court in Filartiga: "Whenever an alleged torturer is found and served with process by an alien within our borders, §1350 provides federal jurisdiction." 630 F.3d 876, p.885. Although the court in Filartiga awarded the plaintiffs over $10 million in compensatory and punitive damages, the family has encountered an obstacle faced by many persons who are awarded reparations under the ATCA: they have never been able to collect the money because the defendant was deported to Paraguay prior to the trial.

119. 70 F.3d 232 (2d Cir. 1995).

120. 70 F.3d 232, p.239. Juries later awarded the plaintiffs $745 million and $4.5 billion in damages against Karadzic. However, because Karadzic was a fugitive until his arrest in July 2008 and extradition to the International Criminal Court, the plaintiffs have never been able to collect on the award.


122. 542 U.S. 692 at 720.

123. 542 U.S. 692 at 720.
Confronting the Past

not limit the ATCA to those three violations recognised in 1789, it said that "federal courts should not recognise private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when the statute was adopted in 1789".124

The Supreme Court in Sosa left the judicial door open to a narrow class of human rights violations under the ATCA. This has allowed plaintiffs to file lawsuits against multinational corporations125 for direct violations126 and, more commonly, for aiding and abetting the violations of their human rights.127 These suits now are the biggest source of ATCA litigation, even though many of these claims are dismissed because the allegations do not meet the standards for a violation of "the law of nations". In these suits, plaintiffs have sought compensatory and punitive damages for corporate actions arising in countries such as Columbia, Ecuador, Egypt, Guatemala, India, Indonesia, Myanmar, Nigeria, Peru, Saudi Arabia, South Africa and Sudan. As a result of these cases, courts have recognised a number of actions as violating the law of nations: torture, extrajudicial killing; crimes against humanity; cruel, inhuman and degrading treatment; war crimes; and slave trading.128

Future suits against corporations under the ATCA may end as a result of the September 2010 decision of the US Court of Appeals for the Second Circuit in Kiobel v Royal Dutch Petroleum Co.129 In a lengthy opinion, the court in Kiobel held that the jurisdiction provided by the ATCA does not extend to civil actions brought against corporations under the "law of nations".130 Since the ATCA does not authorise suits against corporations, federal courts lack subject matter jurisdiction to hear them. It is anticipated that the plaintiffs will seek review of the decision by the US Supreme Court.

124. 542 U.S. 692 at 725.
125. The first decision in an ATCA suit against a corporation was Doe v Unocal Corp, 963 F. Supp. 880 (C.D. Cal. 1997).
126. For examples of claims under the ATCA for a direct violation of human rights, see Abdullahi v Pfizer, Inc, 562 F.3d 163 (2d Cir. 2009); Flores v Southern Peru Copper Corp, 414 F.3d 233 (2d Cir. 2003).
127. For examples of cases alleging that corporations aided and abetted the violations of human rights, see Romero v Drummond Co., Inc., 552 F.3d 1303 (11th Cir. 2008); Khulumani v Barclay National Bank, 504 F.3d 254 (2d Cir. 2007); Sarei v Rio Tinto, Plc, 456 F.3d 1069 (9th Cir. 2006); Wiwa v Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000).
128. However, some courts have held that cruel, inhuman and degrading treatment does not violate the law of nations. See Aldana v Del Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242 (11th Cir. 2005).
129. 2010 U.S. App. LEXIS 19382 (2d Cir. 2010). The decision applies only in federal courts in the Second Circuit (Connecticut, New York and Vermont). However, the Second Circuit is the federal circuit in which most ATCA suits have been filed.
130. 2010 U.S. App. LEXIS 19382, *17–18 (2d Cir. 2010). The decision applies only to corporations as entities. Corporate employees, officers and directors still can be held individually liable under the ATCA.
As with the other mechanisms for post-conflict justice, there are a number of limitations on the use of the ATCA to secure reparations. In addition to the jurisdictional and pleading requirements of federal courts, plaintiffs must show that they have "exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred" before they can bring suit. Plaintiffs must also bring their claims within the 10-year statute of limitations that courts apply to the ACTA and be prepared to meet any of the potential defences that may be raised: the act of state doctrine, the political question doctrine, comity, or the comment responsibility defence.

MEMORIALISATION

Of all of the mechanisms by which a country and individuals can confront human rights atrocities committed during national and international conflicts, the oldest is through the memorialisation of the victims of those crimes. One reason for this is that it is the only model of post-conflict justice that does not require the judicial system, government commissions, or any official support or approval. Although governments frequently honour victims by constructing monuments and museums, much of the recognition has been undertaken entirely by private individuals, survivors, the relatives and friends of the victims, and religious groups.

The memorialisation of human rights victims has taken a variety of forms over the centuries, including art, literature, motion pictures, museums, music and religious ceremonies. Regardless of the form of expression, the purpose is to commemorate the lives of those who suffered and died, to comfort their relatives and those who survive, and to educate the public so that the crimes will not be forgotten. For centuries, painting and music have been two of the most powerful and permanent means of memorialising the suffering of victims. Examples of this include Francisco Goya's 1814 painting "The Third of May 1808", which depicts Napoleon's soldiers executing Spanish civilians, Pablo Picasso's "Guernica", painted in 1937 to commemorate the suffering of the civilians in the Basque village of Guernica after Germany and Italy bombed it during the Spanish Civil War, and the British composer Sir Michael Tippett's oratorio A Child of Our Time, written between 1939 and 1942 in response to the horrors of the Second World War.

Since the end of Second World War, museums and memorials have become the most prominent mechanism for perpetuating the memory of victims of human rights atrocities. Some of these museums and memorials have been created by governments on the sites where the atrocities occurred. The memorial at Auschwitz, in Poland, is an example of this. However, despite the importance of museums and memorials, it often is difficult for post-conflict

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131. An example of an attempt to explain why the "killing fields" occurred in Cambodia and to provide a memorial to the nearly two million victims of the Khmer Rouge is Rob Lemkin and Thet Sambath's documentary film "Enemies of the People" (2010).
governments to take responsibility for past atrocities and to memorialise the victims in a permanent form.\textsuperscript{133} Thus, it frequently takes many years to gain government support for museums and memorials.\textsuperscript{134} An example of this delay is the Museum of Memory and Human Rights in Chile. Although civilian rule was restored in Chile in 1990, following 17 years of a military dictatorship, the country did not open the museum until January 2010. The museum is dedicated to the 35,000 people who were detained, tortured and murdered after the military coup in September 1973. One reason that the museum became a political issue was that it contains video testimonies from the survivors of the torture, as well as archives to help families find out what happened to their relatives.\textsuperscript{135}

The ways in which human rights atrocities are portrayed by government-sponsored museums and memorials has sometimes drawn criticism both from those who perpetrated the crimes and from the victims. In Germany, the Memorial to the Murdered Jews of Europe was opened in Berlin in 2005, 60 years after the end of the war and almost two decades after it was first proposed. At the opening ceremony, the Memorial, which consists of 2,711 grey concrete slabs of different heights and an underground information centre, was criticised in a speech by Paul Spiegel, the president of the Central Council


\textsuperscript{133} One government leader who has explicitly acknowledged his government’s involvement in human rights violations is Guatemalan President Alvaro Colom. In 2009, he admitted that genocide had taken place during his country’s civil war (1960–1996) and apologised to the victims. A truth commission has also issued a report on the human rights abuses during the war. However, there have been no prosecutions of military officers or government officials for the crimes. “Guatemala President Apologises to Genocide Victims”, Radio Nederland Wereldomroep, available at: http://static.rnw.nl/migratie/www.rnw.nl/internationaljustice/specials/Truthandreconciliation/090226-guatemala-redirected [Last Accessed September 13, 2010].

\textsuperscript{134} The reason for this, according to Professor Elizabeth Jelin, is that: “The matter of past violence and state terrorism becomes a public and political issue when commemorations and memorials are to be established in the public realm, when actors want to establish them in public space, in the public agenda. And they become even more contested when the attempts are to incorporate them in the official or governmentally approved activities.” Jelin, “Memories at Work, or Peaceful Reconciliation? Thirty Years of Activism in the Southern Cone”, Stockholm International Forum, April 23–24, 2002, available at: www.dccam.org/Projects/Affinity/SIF/DATA/2002/page1649.html [Last Accessed September 13, 2010].

\textsuperscript{135} Similarly, it was not until 2007 that Argentina agreed to turn over the Navy Mechanics School, where thousands of prisoners were tortured and killed during that country’s “dirty war” between 1976 and 1983, to human rights groups who converted it into a Museum of Memory. “Argentine Ceremonies Cast Light on ‘Dirty War’”, Los Angeles Times, March 25, 2004, available at: http://articles.latimes.com/2004/mar/25/world/fg-argen25 [Last Accessed September 13, 2010].
of Jews in Germany, for being “an incomplete statement” because it omitted non-Jewish victims and did not provide information on the motives of the Nazi perpetrators, thus sparing viewers any “confronting questions of guilt and responsibility”. According to Spiegel, the Memorial fails to ask the question “Why?”.

Although many countries are reluctant to publicly acknowledge their past crimes, in some countries opposition to memorials has prevented government funding entirely and forced the sponsors to turn to private donations. An example of this is the Civil War Memorial Wall, dedicated in 2003 in San Salvador, El Salvador, containing the names of 25,000 persons killed during the 1980–1992 civil war. Similarly, in the Bugasera district of Rwanda, the Ntarama Church was the site of the massacre of an estimated 5,000 civilians by soldiers and civilian militia in April 1994. Villagers have turned the church into a memorial to the victims.

Earlier in this article, reference was made to Bernhard Schlink’s view that a conflict casts a long shadow over future generations. How governments or private groups memorialise a conflict depends on how they want future generations to characterise the events that occurred. While memorialisation a few years after an event may do little to change public perception of it, memorialisation decades later can shape how entire generations come to view the conflict. One way in which a generation’s view of the past is formed is the way that schools teach about human rights atrocities and their victims. In El Salvador, for example, high school textbooks published in 2009 are used by students who are the first generation with no first-hand memories of the war. The textbooks currently used in El Salvador discuss the civil war, but only some of them put the events of the war in the context of the Cold War.


137. International Centre for Justice, Ethics and Public Life, “Symposium on the Legacy of International Criminal Courts and Tribunals in Africa” (November 29 to December 1, 2007) available at: http://www.brandeis.edu/ethics/pdfs/internationaljustice/Legacy_ofICTR_in_Africa_ICEJPL.pdf [Last Accessed September 13, 2010]. Similarly, in El Mozote, El Salvador, the site of the massacre of over 1,000 villagers by the government military in December 1981, the local church has been turned into a memorial with a mural and the names of the victims. For an account of the killings, see Danner, The Massacre at El Mozote (New York: Vintage, 1994).

138. As part of a study by DePaul University’s Human Rights Law Institute on how states present human rights violations, the authors of this article examined six middle school and high school textbooks published in El Salvador to determine how the civil war (1980–1992) and the human rights violations are portrayed. Of those six, only three mentioned the Cold War. Only one mentioned the total number of dead from the war: 75,000 out of a population of 4.5 million, which was 2 per cent of the population. Four of the six books mention the political killings during the war, including the assassination of Archbishop Oscar Romero and the killing of priests and nuns.
the texts mention human rights abuses and repression by armed groups, they do not mention the brutality of the torture, rape and mutilation of murder victims used to achieve this repression. Instead, the texts tend to emphasise “factors leading to peace”, the truth commission, and the amnesty law. Thus, the textbooks memorialise the war as a past obstacle that has been overcome. However, students may be aware from their parents that El Salvador’s politics remain polarised and the amnesty law remains in place. If so, they may not perceive the civil war to be as distant as the textbooks indicate. In that case, the students will likely continue to seek post-conflict justice methods that go further than the textbooks in acknowledging the past atrocities and present-day realities of El Salvador.

AMNESTY

The most controversial of all the mechanisms for dealing with the human rights atrocities that occurred during an international or domestic conflict is amnesty. Amnesty can be viewed either as the fullest expression of those who want to focus on the future rather than relive the past\(^{139}\) or as the result of a political deal between the two sides to the conflict. Human rights organisations such as Amnesty International, as well as some national courts and international judicial bodies such as the Inter-American Court of Human Rights, have criticised amnesty laws as providing immunity to those who violated human rights. Although attitudes towards amnesty have been changing in recent years, the fact that Professor Christopher Mullins found that no form of post-conflict justice was attempted in 45 per cent of the international and domestic conflicts between 1945 and 2008 indicates that amnesties were the de facto or de jure result in almost half of the cases.

Traditionally, amnesty has taken the form of legislation, enacted by the military or by civilian leaders at the end of their rule or at the end of civil wars. Such laws were enacted in a number of Central and South American countries which, from the 1960s through the 1980s, saw military-dominated governments or civil wars. When the generals were forced to give up power or peace agreements ended the civil wars, the leaders enacted laws that gave the military, police and other government officials immunity from criminal prosecution\(^{140}\). An example of this are the amnesty laws adopted in Argentina in 1986 and 1987. As a result of the truth commission in that country in 1983, a number of

\(^{139}\) For a discussion of Germany’s desire to focus on the future after the Second World War, see Frei, *Adenauer’s Germany and the Nazi Past: The Politics of Amnesty and Integration* (New York: Columbia University Press, 2002).

\(^{140}\) Argentina, Brazil, Chile, El Salvador, Peru and Uruguay were among the countries in South and Central America that enacted amnesty laws that represented a step back from any form of post-conflict justice. However, Paraguay never enacted an amnesty law for the human rights abuses committed during the 35 years that the country was ruled by General Alfredo Stroessner.
senior military officers were prosecuted and sentenced to life imprisonment. However, when other military leaders threatened a coup, the civilian government adopted two laws that granted immunity from prosecution to officers and their subordinates in the military, police and penitentiary service. The law was based on the idea that the persons in those services were “following orders” from their superiors, the heads of the military government. Similarly, in 1993, the Legislative Assembly in El Salvador adopted a blanket amnesty law that protects all military and guerilla forces from being prosecuted for human rights abuses committed during the war. Although thousands of Salvadoran and human rights advocates have sought to repeal the amnesty law, they have not been successful. Since many of those responsible for human rights abuses became part of the new government and retained enough power to resume the civil war, the failure to enact an amnesty law could have resulted in renewed violence rather than an end to a long conflict.

The amnesty laws in Central and South America are examples of the use of amnesty laws to give impunity to military officers, police and guerillas who participated in crimes against human rights. In some countries, however, amnesty has been used as a tool to try to bring a conflict to an end. An example of this is the Amnesty Act adopted by Uganda in 2000. The Act, which grew out of a conflict between the Ugandan government and the Lord’s Resistance Army dating back to the 1980s, applies to persons who, since 1986, engaged in combat, collaborated with those involved in the rebellion, or committed any other crime furthering the armed rebellion. The Act established an Amnesty Commission responsible for promoting dialogue and reconciliation with those involved in the rebellion, demobilising them, and providing support for their social and economic reintegration into society. The Act appears to have been a success, with more than 15,000 persons receiving amnesty. With the assistance of the World Bank, almost 12,000 of those persons received a resettlement package of financial aid.

141. For an account of the trials by one of their organisers, see Malamud-Goti, Game Without End: State Terror and the Politics of Justice (Norman: University of Oklahoma Press, 2008).
142. Neier, “Accountability for State Crimes: The Past Twenty Years and the Next Twenty Years” (2003) 35 Case W. Res. J. Int’l L. 351 at 353-354. In recent years, the amnesty laws in Central and South America have come under strong criticism and some have been repealed or struck down by courts. In Argentina, the amnesty laws were repealed by Argentina’s National Congress in 2003. In 2005 the Argentine Supreme Court ruled that the amnesty laws were unconstitutional. This has led to the prosecutions of crimes against humanity.
143. The amnesty law remains in force in El Salvador, despite the election of Mauricio Funes, a member of the opposition FMLN Party, as President in 2009. Funes was elected with only 51 per cent of the vote.
The amnesty laws in other South American countries have met a mixed result. In April 2010, the Brazilian Supreme Court, by a 7–2 vote, refused to overturn that country’s 1979 Amnesty Law, holding instead that the crimes committed by the members of the military during the period of military governments from 1964 to 1985 were political acts and thus covered by the amnesty law.\(^{146}\) The Brazilian Bar Association had argued that the law should be interpreted so that officials accused of human rights abuses during the military regime could be prosecuted. Unlike Argentina, Brazil has never prosecuted members of the military for human rights abuses committed during the period of military rule.

In Uruguay, a law enacted in 1986 that gives amnesty to members of the military government for murder, disappearances, and other human rights abuses was supported by 54 per cent of the voters in a 1989 plebiscite. However, in 2009, the Uruguayan Supreme Court declared the law unconstitutional, saying that it violated Uruguay’s separation of powers and had not been passed by the required supermajority. A week later, however, Uruguayan voters again rejected an initiative to end the amnesty law.

Finally, South Africa made use of amnesty as part of its truth and reconciliation programme in an effort to force those involved in human rights abuses during the apartheid period to co-operate with the post-conflict authorities and to admit their actions.\(^{147}\) The Truth and Reconciliation Commission was given the power to grant amnesty to those who committed abuses during the apartheid era, as long as the crimes were politically motivated, proportionate, and there was full disclosure to the Commission by the person seeking amnesty.

In South Africa, amnesty has been effective, in part, because it was not a blanket amnesty for everyone involved in apartheid era crimes. Instead, individuals had to apply for amnesty and their amnesty would be granted only if they provided substantial information about what happened and acknowledged their role. In addition, amnesty was available only for political crimes and did not apply to crimes committed for personal reasons or malice. By conditioning amnesty on total disclosure of political crimes, South Africa secured the truth for its citizens about what happened in the apartheid regime. Although justice at law was not done, truth was provided to the victims. Thus, amnesty was part of the price that South Africa paid for a peaceful transition to democracy.\(^ {148}\)

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\(^ {147}\) For a discussion of the use of amnesty in South Africa, see Boraine, fn.55, pp.258–299.

Because the types of conflict, the range of human rights violations and the persons who engaged in them, and the needs and demands of victims of the crimes are so diverse, no single mechanism can provide post-conflict justice in every case. As this article has shown, all of the mechanisms offer something to victims and to their communities in theory. However, in practice, accounting for the human rights crimes of the past and providing meaningful post-conflict justice to the victims remains an elusive goal. Nevertheless, based on the more than 170 situations in which some attempt has been made to deal with human rights atrocities, four broad conclusions can be drawn.

First, the international community has a role to play when a country is unable or unwilling to deal with the human rights atrocities of a conflict. However, it can play only a limited role in prosecuting those accused of crimes and in providing other forms of justice to the victims of those crimes. While international criminal tribunals and hybrid courts have been created to deal with a few extreme situations in the past, the political and financial limitations on those courts, coupled with the creation of the International Criminal Court, means that ad hoc bodies probably will not be used in the future. In addition, the experiences of the first decade of the ICC have not been encouraging about its effectiveness. The political, statutory and financial restrictions on the court have limited its focus to only a few countries, crimes and individuals. Similarly, courts in countries other than the one where the crimes occurred have been reluctant to undertake prosecutions based on the doctrine of universal criminal jurisdiction out of political concerns and a fear that their own officials may face prosecution. Finally, while international and regional courts have endorsed awarding reparations to victims of human rights atrocities and their families, those courts lack the power to enforce the awards they made.

Secondly, since the international community can play only a limited role in achieving post-conflict justice, it is up to the country that has been through the conflict to do so. However, as with the international community, the search for domestic solutions to human rights atrocities has proved elusive. This is because providing post-conflict justice to victims requires the commitment of political will, as well as financial and institutional resources. The will and resources of a post-conflict government will be tested if it decides to prosecute those who are accused of human rights crimes arising out of the conflict or to bar them from public positions. The population may be tired of the conflict and may want to move on; individuals who were involved in the conflict and in human rights crimes will oppose prosecutions and lustration; and, because prosecutions and lustration are lengthy and expensive processes if done

correctly, they can affect only a limited number of people. Although Rwanda had success in using a modern version of its traditional courts to reduce the backlog of criminal cases involving those accused of participating in the 1994 genocide, those courts were themselves the subject of criticism about their procedures and were unable to accomplish the larger task of reconciling Tutsis and Hutus.

Thirdly, depending on the types of human rights abuse victims and their families may require reparations, which can take a number of forms. A few governments have established compensation schemes while others leave it up to the victims to bring lawsuits against those responsible for their injuries. However, most victims are reluctant to sue in their own country and witnesses fear reprisals. Although the Alien Tort Claims Act allows victims to bring suit in the United States, such litigation is not a practical remedy for the vast majority of victims.

Finally, since most post-conflict governments are either unwilling or unable to undertake criminal prosecutions, lustration or reparations, or have adopted some form of amnesty for those involved in the conflict, the other mechanisms for post-conflict justice assume greater importance. For some victims of human rights crimes and their families the most important thing is the opportunity to tell their stories in public, to receive recognition of their suffering, and to receive an account of what happened to their relatives and friends who disappeared during the conflict. These needs can be met through a truth commission. While a commission can be a lengthy and expensive process, if done correctly, it can create a public record of the past without necessarily imposing sanctions on those who were involved in the crimes. For other victims and their families, the need is for public remembrance of the conflict and the crimes. For them, a permanent memorial of some form may be a much more effective mechanism to create a public record and educate the public about the past. Thus, a full and accurate public account of the past, coupled with memorials to its victims, may be the best hope for confronting human rights atrocities and achieving some form of post-conflict justice.

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