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INSTITUTIONAL RESPONSES TO GENOCIDE AND MASS ATROCITY

Introduction

The twentieth century enjoys the macabre distinction of experiencing the highest number of state-sponsored murders and mass killings in the history of humanity. The numbers are sobering: nearly 170 million dead by genocide, massacres, extrajudicial killings and other state actions not including warfare, and about 40 million directly through war (Rummel, 1997). Perhaps in response, during the last century a global human rights discourse has developed and matured, espousing fundamental ideals of human dignity and respect not subject to the whims of state actors. Yet its development has been neither even nor incremental. The Nuremberg and Tokyo trials and the UN Genocide Convention established the principle that perpetrators of crimes against humanity should be tried and punished for their actions, but the Cold War put human rights concerns in a deep freeze for nearly 40 years. In the Soviet-American bipolar world, human rights rhetoric was manipulated for political purposes, and was rarely if ever the motivating force behind foreign policy (Ball, 1999).

Human rights law is today the weakest component of international jurisprudence, certainly much weaker than international business or trade law. Still, there is no doubt that with the end of the Cold War, human rights discourse has gained strength. The nineties witnessed the establishment of two international war crimes tribunals, for Rwanda and the former Yugoslavia, and efforts are underway to create tribunals for Sierra Leone, Congo, East Timor and an International Criminal Court. "Retributive" justice has become a guiding norm for human rights supporters around the world.

But tribunals have not been the only institutional response offered by human rights

advocates. Over the past twenty years, there have been increasing calls for the establishment of truth commissions to compile official histories of oppression and to offer fora for survivors to recount their personal stories. Nations in South America, Asia, Africa and Eastern Europe have adopted truth commissions as a way to come to terms with painful pasts. Generally eschewing formal trials (because of political constraints), commissions have focused on restoring the dignity of victims and survivors and producing a definitive account of the past, espousing what advocates call "restorative" justice.

This chapter will consider how nations moving in a positive normative direction -- that is, from a repressive to a more democratic state of affairs -- have attempted to come to terms with their violent history. Specifically, it will consider the viability of tribunals and truth commissions (TCs). The chapter is divided into two parts. Part one, "Theoretical Issues," briefly discusses the normative underpinnings of tribunals and truth commissions, retributive and restorative justice, respectively. I will consider the justifications, promises and limits of both models. Part two, "Empirical Considerations," identifies factors that affect the viability of commissions and tribunals, and emphasizes the importance of contextual constraints on their implementation and use.

Theoretical issues

There are at least four normative criteria that any complete theory of post-atrocity justice must address:

a) how are perpetrators held accountable?

b) how are the needs of victims addressed?

c) how much emphasis does each theory place on constructing an accurate report of past

crimes?

d) how does each theory further the rule of law, democratic politics and reconciliation?

These four normative criteria will guide my assessment of the strengths and weaknesses of restorative and retributive justice and commissions and tribunals. I will refer to these criteria throughout this initial section, using them as a measuring stick to evaluate the viability of both forms of justice.

Retributive justice and tribunals

Proponents of retributive justice privilege the importance of trying and punishing perpetrators. This approach, rooted in classical notions of justice, is the moving force behind criminal prosecution in domestic courts and the establishment of international tribunals. Nevertheless, retributive justice is sometimes considered no more than an excuse for vengeance. Vengeance may imply proportionality in punishment, but runs the risk of degenerating into reciprocal and unending violence. Retributive justice distances itself from vengeance by tempering the demand for swift retaliation with substantive and procedural protections for the accused, and replacing the victim's desire for immediate reprisal with the rule of law. Retribution in this chapter will be used in this sense, as a type of institutionalized, punitive response based on the rule of law. This formulation serves as an important heuristic device and moral ideal to orient our discussion of post-atrocity justice.

Following Minow (1998, p. 25), there are at least three criteria that retribution must satisfy if it is to remain within the bounds of the rule of law and not degenerate into vengeance: (1) a commitment to redress past abuses using generalized, codified, preexisting standards, (2) the use of a formal system characterized by impartiality and transparency with due process

protections, and (3) the power to impose a binding sentence on the defendant which amounts to more than public censure lacking coercive force.

Advocates of retributive justice offer several justifications for trials, ranging from non-consequentialist to fully consequentialist. I will address each of these in turn.

1. *Following severe social trauma, basic notions of justice demand that violators be punished for their actions*. This notion of retribution is non-consequentialist; it places no emphasis on the social consequences of its actualization and appeals instead to notions of "just desserts" (Nozick, 1981, pp. 363-399; Kant, 1980, pp. 102-118);
2. *Victims regain self esteem and dignity* by seeing their violators punished publicly for their crimes. Trials acknowledge victims by showing the world that their demands for justice are legitimate and compelling (Neier, 1998);
3. *Identifying and punishing leaders of crimes against humanity places individual guilt on key actors, organizers and institutions*. By identifying individual leaders as perpetrators, claims of collective guilt that associate crimes with an entire ethnic or national group are avoided (Prunier, 1997, p. 342);
4. Trials may also *temper and reroute demands for vengeance into institutionalized and fair proceedings for assessing guilt,* reducing the likelihood that victims will "take justice into their own hands" and engage in vigilantism (Shklar, 1986, p. 158);
5. A *public record* of crimes is established by amassing and interrogating evidence in a procedurally fair setting (Bass, 2000, pp. 302-304);
6. Tribunals *foster the domestic rule of law*, the basis for a democratically stable and peaceful society (Robertson, 2000, pp. 243-285);
7. There exists *a duty deriving from international law* (both treaty-based and customary) to

prosecute grave breaches of fundamental human rights (Orentlicher, 1991);

8. *Tribunals deter future tyrants*, serving as a warning about what may befall leaders who terrorize their populations (Roth, 1999).

Employing the four normative criteria listed above, we can identify the strengths and weaknesses of tribunals and their justifications.

Accountability: Trials are created first and foremost to assess and assign culpability. Tribunals focus on punishing perpetrators rather than recognizing victims, and thus are driven by the importance of establishing accountability. They achieve a decision of culpability based on higher standards of evidence and due process protections for defendants than TCs (which are not, after all, judicial organs). Furthermore, by identifying specific persons and agencies as violators, tribunals avoid indicting an entire ethnic group (for example, all Serbs or Germans). Nevertheless, tribunals suffer from the opposite problem: the issue of *selectivity*. At best, they can prosecute only a select number of violators, a significant problem in the face of massive human rights violations like genocide, crimes against humanity, and similar abuses that depend on the participation of a large number of perpetrators and coordinated efforts by the state. Confronted by this limitation, they are best used to prosecute high-level intellectual authors of crimes and their immediate subordinates.

Victim recognition: Though powerful agents of accountability, trials are not as successful as commissions when it comes to acknowledging the suffering of victims. Certainly, trials provide a public forum for victims to recount their stories, and following a successful prosecution it becomes more difficult to dismiss past crimes as hyperbole or fabrication. Nonetheless, victim recognition is not the primary goal of tribunals, and most tribunals allow testimony only as a means of furthering prosecution, not of directly acknowledging victims. To

the extent that victims may regain their dignity through the trial of their tormentors, this is achieved through the satisfaction of seeing them punished; but trials do not directly address the psychological and material needs of victims. In this sense, a public truth commission designed specifically with their interests in mind becomes an invaluable complement to the work of trials.

Truth: Trial records also serve as a public record of past atrocity. The Eichmann trial produced a wealth of information on the organization of the Final Solution, and the Auschwitz trials identified the gruesome process of extermination that was paradigmatic of the Holocaust (Douglas, 2001). More recently, the Raboteau trial in Haiti unearthed significant information on the internal organization and operation of the US-backed FRAPH death squad (Concannon, 2001). Prosecutions of intellectual authors of crimes must include investigations of the bureaucracies and agencies they head, and this, in turn, provides a window into the hierarchical organization of state terror. In this way, tribunals contribute to the larger project of creating a factual account of the past. Still, it is important to note that tribunals (ideally) seek evidence to prosecute individuals, not entire collectives or institutions. Thus, it is not categorically the case that tribunals will identify the systemic dimension of repression and terror. Because truth commissions are not procedurally limited to individual prosecutions, their capacity to investigate past atrocities may be broader in scope, offering another important complement to trials.

Rule of law: Trials offer a means of publicly condemning past violence and, consequently, promoting the rule of law and consolidation of democracy. Transitional regimes that fail to prosecute or purge human rights abusers inherit a political arrangement with potentially dangerous authoritarian enclaves which may undermine a fragile transitional democracy. Holding perpetrators accountable for their actions eliminates these enclaves of impunity -- a crucial goal if societies are to rebuild on solidly democratic grounds.

Nevertheless, transitional regimes are often constrained by amnesties. Consequently, the ideal of the "rule of law" is best expressed in international humanitarian law, where amnesties are not recognized and the retributive impulse is most clearly articulated. The UN tribunals for the Former Yugoslavia and Rwanda and the incipient International Criminal Court are the best expressions of this. With a mandate to prosecute the most heinous violations of human rights law, these courts are not shackled by the exigencies of domestic politics, and can focus on holding perpetrators accountable for genocide, war crimes and crimes against humanity (Deschenes, 2000)**.**

In general, then, we can say that retributive justice, as actualized in trials, focuses on accountability and creating an accurate and credible record of past violations, as well as contributing to the rule of law through a fundamental rejection of impunity. Restorative justice, articulated through truth commissions, shifts the focus to victims and offers a broader account of the past than that found in trials, providing an important complement to the retributive impulse driving prosecutions.

Restorative justice and truth commissions

In the past three decades, outgoing elites have sought amnesties to protect themselves from prosecution for human rights violations. In Latin America alone, numerous amnesties have been enacted: Chile (1978), Brazil (1979), Guatemala (1982, 1996), Argentina (1983), Uruguay (1986), El Salvador (1993), Nicaragua (1990), and Peru (1995). Where amnesties were passed, truth commissions have been established as viable moral alternatives to prosecutions.

Commissions construct an official account of past abuses over a certain period of time in a specific country or in a particular conflict. They encourage victims, relatives, bystanders and

perpetrators to participate, and in some instances offer them a public forum to do so. Furthermore commissions may include a series of institutional reform and reparations recommendations. Behind all of these measures is a commitment to acknowledging victims and restoring their sense of dignity and moral worth. Thus, truth commissions are seen as paradigmatic examples of restorative justice.

There are several differences between truth commissions and tribunals. First, truth commissions generally, though not always, lack subpoena powers. Second, commissions do not follow proof of guilt with a sentence for the guilty. In this sense, justice understood as state-authored punishment is eschewed for the production of an accurate account of the past, seeking to explain human rights violations against the backdrop of broader social and political processes. Third, truth commissions operate for a specific period of time (normally six months to two-and-a-half years), at the end of which they produce a report of their findings for public dissemination. The commission is then dissolved.

Over the past two decades, truth commissions have become respected alternatives to traditional criminal trials. Over twenty commissions have been established. The more successful commissions are composed of prestigious citizens (authors, public intellectuals, lawyers, and so forth) not holding public office and representing a wide range of the political spectrum. Truth commissions occupy a unique space between the state and civil society. Although they are sponsored by the state, the inclusion of non-governmental members as well as broad relations with the NGO community result in a body that, optimally, is open to greater input from civil society actors than tribunals.

Supporters offer several justifications for assembling truth commissions and pursuing restorative justice. The primary purpose of such commissions is *to produce an accurate public*

record of a country's past crimes, through archival and forensic truth-seeking complemented by interviewing survivors and perpetrators (Boraine, 2000). Advocates also point to the *therapeutic benefits* of truth commissions. By providing victims with a sympathetic public platform to present their stories, commissions contribute to their personal healing, and offer a phenomenological or experiential truth that complements archival and forensic truth (Krog, 1998). Concomitantly, the public airing of survivors' stories *incriminates perpetrators,* offering a kind of punishment akin to that found in a trial and achieving a powerful symbolic punishment through the shaming and public stigmatization of violators (Kiss, 2001). Public testimonies contribute to societal reflection and, ideally, *healing in society itself*, helping restore and affirm the democratic values of respect and tolerance, and repair the torn social fabric (Tutu, 1999). Lastly, because of their unique position in cataloguing and analyzing systemic abuse and violence, commissions are well situated to *provide policy recommendations for institutional reform and restructuring, and reparations programs for victims* (Crocker, 2000).

Truth: Truth commissions aim at constructing an accurate report of past crimes. Argentina's truth commission documented the disappearances of nearly 9,000 persons, providing a fuller picture of the atrocities committed during that country's 'dirty war'. (Argentine National Commission on the Disappeared, 1986). These reports complement tribunal records by identifying broader patterns of violence and abuse that may fall outside the purview of prosecutions. In some instances, commissions do not uncover crimes so much as *publicize* what is known but considered taboo for public discussion, and thus play a critical role in breaking the discourse of denial, contributing to the public's knowledge of human rights abuses and helping undermine the culture of impunity -- itself based on secrecy -- of the armed forces.

Accountability: Because truth commissions are not juridical bodies with the capacity to

formally punish human rights violators, they use symbolic forms of punishment, namely shaming and humiliating perpetrators publicly by identifying them in the course of the commission's work. Shaming, particularly in conjunction with a report which identifies actual violations (thus implicitly connecting the individual to specific actions, rather than merely to a political ideology), should not be underestimated. South Africa's final report not only gave incontrovertible evidence of the state's machinations to protect apartheid; it also morally condemned those persons associated with the abuses, providing a kind of accountability that resonated deeply with the public. Moreover, commissions can contribute to accountability by forwarding their files to tribunals (international or domestic) and recommending prosecution.

Victim Recognition: Recent scholarship emphasizes the social healing dimension of victim testimony, both for victims and society as a whole. A key component of the South African commission's work, advocates argue that testimony achieves "restorative justice," the restoration of personal dignity to survivors by publicly acknowledging their suffering, and contributes to general societal reconciliation by reviving social bonds that were destroyed during the period the violence (Krog, 1998; Miller, 1997).

Commissions may also recommend reparations for victims and their dependents, including personal and familial *rehabilitation* through access to medical, psychological and legal services, *compensation* for financially calculable losses, *restitution* of lost or stolen property, and remedies aimed at the *prevention* of future violations (Van Boven, 1990). Though reparations cannot return lost loved ones or erase the traumas of torture, they can have a positive impact on destitute victims, and, more broadly, serve as an acknowledgement by the state of its responsibility for past crimes. In Argentina and Chile, reparations were provided with precisely these goals in mind (Hayner, 2001, pp. 170-183; Kritz, 1995, Vol. 3, pp. 683-695; Loveman &

Lira, 2000, pp. 525-528). Nevertheless, to be considered legitimate, reparations must be tailored and put forth as truly moral responses to the past, and must find some resonance with the psychological and material needs of victims in order to contribute to their recognition.

Rule of law, democracy, and reconciliation: Commissions can contribute to the rule of law through policy recommendations on institutional reform of the armed forces, national police, judiciary, and other state actors. They may recommend prosecution -- domestic or even international -- for perpetrators; removal of military, police or judges from active duty; social and educational programs fostering human rights principles; and constitutional safeguards against impunity.

More broadly, truth commissions seek to foster reconciliation. Advocates argue that unearthing the past is the initial step to social reconciliation, for erstwhile enemies cannot repair broken bonds without first knowing what happened *to whom* and *at whose hands*. The past must be openly discussed before a nation can move on, lest resentments and tensions continue to poison social relations. The strength of this argument is difficult to gauge, since reconciliation is a long, uneven process that may benefit from a truth commission, but also requires reconciliatory efforts at political, social and personal levels. Nevertheless, the position between the state and civil society that most commissions enjoy may allow them to function as facilitators for longterm reconciliation.

Tribunals and truth commissions, and retributive and restorative justice more generally, share a number of goals: they seek to uncover past atrocities, hold perpetrators accountable, acknowledge victims, and promote the rule of law and reconciliation. They differ, however, in emphasis: the retributive approach promotes accountability over victim acknowledgement, while restorative justice endorses the importance of recognizing victims rather than prosecuting

perpetrators. This difference is also manifested in empirical terms, as discussed below. The following section highlights a number of factors that constrain the use of commissions and tribunals.

Empirical considerations

The previous section identified the theoretical issues at stake in employing truth commissions and tribunals in post-atrocity societies. But the options available to transition architects are not so extensive; they must work within specific political, social and economic parameters that constrain their choices (Zalaquett, 1992). In this section, I discuss seven factors that play a critical role in assessing the viability of commissions and tribunals.

1. Degree of institutionalization and legitimacy of previous regime: The degree of institutionalization and legitimacy of the perpetrating regime affects the likely success of efforts to seek legal recourse for political crimes. Institutionalization means at least three things: the regime rules through the use of formal and bureaucratic mechanisms, so that different aspects of governance are managed and coordinated by various departments; it has penetrated civil and political society systematically and deeply; and it seems stable and durable.[1] Institutionalized perpetrator regimes are essentially Janus-faced: they assemble complex legal justifications for their actions, bureaucratize violence, and generally rationalize all forms of repression, yet also engage in extra-legal terror against political opponents and the broader population, particularly through the use of secret police, death squads, disappearances and massacres.

Institutionalization is normally accompanied by an increase in legal justifications for crimes through the emergence of a large body of state-security law, and in this sense we can say

[1] Precisely how long is an issue for case study, and cannot be ascertained a priori. In large part, it concerns the degree to which the state has succeeded in convincing the population as a whole that it is institutionalized and

that a perverted "rule of law" exists. Here, rules, edicts, statutes, executive orders, administrative decrees and legislation all work to justify what is essentially a terroristic regime, giving a kind of legal patina to an otherwise despotic state. Concomitantly, the state employs its military and security apparatus to violent ends, often working outside (but in harmony with) the established legal framework. The upshot is a large body of law and archival evidence identifying the organization and systematization of state-sponsored violence. The more institutionalized and centralized the terror, the more likely it is that a significant body of documentation delineating the coordination of bureaucracies and security forces will exist. Of course, the peculiarities of a negotiated transition may make acquiring this information difficult, particularly if the perpetrating institutions manage to retain some degree of autonomy. In Chile and Argentina, the armed forces were fairly successful at retaining control of records on their "dirty wars," though what has emerged indicates that in both instances the state's violence was highly rationalized and bureaucratized. In South Africa, the armed forces and national police destroyed many of their records of death-squad activity, and the militaries of Central America have simply refused to hand over damning internal documents.

Nevertheless, systematized state terror complemented by a robust body of documentation can facilitate the truth-seeking and prosecutorial goals of tribunals, and thus institutionalized regimes make good candidates for trials of lead perpetrators. The more rigorous a link can be made between superiors and material authors of crimes, the greater the likelihood of successful prosecution because a strong hierarchy of legal (and moral) responsibility can be identified (Osiel, 1999).

But institutionalization poses obstacles as well. Where a regime has promulgated a wide array of laws condoning state violence, prosecution of perpetrators must deal with *ex post facto*

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permanent, and thus not likely to disappear anytime soon.

considerations (Hart, 1958; Fuller, 1958; Rosenberg, 1996). Following the collapse of communism, Hungary passed legislation allowing prosecutions for crimes related to the brutal Soviet suppression of the 1956 uprising, extending the statute of limitations for serious crimes and treason and thus justifying its investigation of the past. The Constitutional Court, however, ruled that the treason law was unconstitutional because it violated retroactivity protections. Only after parliament passed legislation permitting the prosecution of "war crimes" (not subject to retroactivity claims because of the Nuremberg precedent) did trials begin (Teitel, 2001, pp. 35-51). Retroactivity poses a problem in a strictly legal sense, since prosecuting someone for an abuse that was technically legal when committed is a violation of due process. Nevertheless, crimes against humanity, war crimes and genocide are all violations of international law and thus non-derogable, so the salience of the retroactivity problem is somewhat dulled. Though domestic legislation may have existed permitting, or at least not condemning, certain forms of violations (under a state security doctrine, for example), retroactivity will become less of an issue as international human rights norms gain greater traction, trumping its legitimacy (Roberston, 2000, pp. 243-284).

An additional difficulty arises with complex, multi-layered systems of repression, which complicate the criminal-legal understanding of responsibility (normally understood as predicated on individuals, not institutions). If the perpetrator regime was highly institutionalized, with a wide web of repression implicating numerous bureaucracies and agencies (as in South Africa and Eastern Europe) and enjoying widespread support or at least acquiescence -- and thus arguably legitimacy -- then prosecution of individuals can be vulnerable to charges of selectivity: only some violators face prosecution, while the majority (normally the higher-echelon violators) will escape justice. Where these considerations hold, truth commissions offer an important

complement to prosecutions by illuminating how repression entails the cooperation of numerous institutional actors coordinated and directed from above.

2. Independence and fairness of the judiciary: In some transitions, the judiciary remains an enclave of the past regime, significantly limiting the ability of victims to obtain redress. In these instances, trials are unfeasible, and truth commissions may be the only viable domestic institutional response. Nevertheless, there are alternatives: regional or international fora, such as the Inter-American Court of Human Rights and the coming permanent International Criminal Court (ICC), and, under certain conditions, case-specific tribunals assembled by the United Nations. This latter approach requires UN Security Council support, which in turn poses numerous practical obstacles. The apprehension of some major powers, particularly the US, towards the expansion of universal criminal jurisdiction impedes the proliferation of UN tribunals.

Victims may also turn to foreign national courts to seek redress. The US *Torture Victim Protection Act* (1991) has served as a vehicle to prosecute foreigners domestically for violations of "the law of nations," and this manner of tort redress is gaining popularity as universal jurisdiction becomes more widely accepted in national jurisprudence (Filartiga, 1980; Kadic, 1995; Doe, 1995). Criminal trials in foreign courts are also gaining acceptance; Belgium recently sentenced four Rwandans (including two nuns) for their role in genocidal killings.

Nevertheless, the reconstruction of the national judiciary remains the best hope for domestic accountability and a crucial prophylactic against future impunity.

3. *Extent of Perpetrator Population*: In some instances, there exist relatively few overt perpetrators and many 'beneficiaries', or persons who benefit from the political circumstances without actively participating politically. In South Africa, for example, apartheid benefited all

white South Africans, regardless of their political affiliations or relations to the state. The apartheid government enjoyed the tacit support of much of the (Afrikaner) white population, but many were not active oppressors.

Other cases are markedly different. The political terror of the Hutu Power regime in Rwanda included the active participation of many Hutu civilians; thus, the perpetrator population was high relative to the number of beneficiaries. The same can be said of Cambodia. Although the Khmer Rouge ruled through terror and did not enjoy wide-ranging support outside its own ranks, there were few beneficiaries of the regime who were not implicated directly in gross human rights violations.

In all of these cases, tribunals can offer an important, though limited, contribution to accountability. Where there are relatively few overt perpetrators and many beneficiaries, the latter cannot be held legally accountable, however it would be misguided to simply ignore their moral responsibility. A truth commission can serve as an important complement to trials by highlighting that complicity and responsibility go well beyond the narrowly understood notions of criminal liability characteristic of criminal prosecutions. In South Africa the commission investigated the role that business, legal, medical, religious and other professional communities played in supporting the apartheid regime. Investigations of this sort underscore the wide support that some terroristic states enjoy, morally implicating beneficiaries and countering claims that the latter were ignorant of the state's violence.

Where the perpetrator population is large, resource restrictions make it unlikely that every violator can be tried. Rwanda holds upward of 110,000 alleged *genocidaires* in its prisons, but does not have the resources to fairly try them all. A useful institutional complement to the prosecution of elites, such as a truth commission, would help to clarify the broader issues of

responsibility and collaboration that are characteristic of large scale political violence.

Truth commissions can also identify key accomplices and collaborators abroad, delineating the role *foreign* governments play in supporting oppressive regimes. The Guatemalan commission (1999) obtained numerous documents from the US government through Freedom of Information Act requests done in conjunction with the National Security Archive, an American NGO. The declassified documents helped identify US support for the military regime, highlighting the otherwise obscure connections between the two governments. The 1992 Commission of Inquiry in Chad provided detailed assessments of the US role in training and funding dictator Hisian Habré's security forces, who murdered at least 40,000 civilians and tortured countless others. An Angolan truth commission, called for after the death of rebel leader Jonas Savimbi, could supply valuable information on the role played by the Soviet Union, Cuba, the United States and South Africa in that country's brutal civil war. These are all broad, systemic issues surrounding perpetrator populations which cannot be addressed solely in trials. Of course, such processes can similarly be constrained by a foreign power's failure to turn over relevant documents and individuals. The U.S. withholding of documents seized from Haitian FRAPH headquarters and its refusal to extradite FRAPH paramilitary leader Emmanuel Constant for trial, as well as Russia's refusal to open its files on its war in Afghanistan, are illustrative of the myriad ways in which foreign powers can undermine domestic efforts at obtaining justice.

4. *Mode of transition*: A key element in assessing what type of institutional response to pursue is the mode of political transition between regimes. Where the transition is achieved through a victory in war or other sharp break with the past, the new government has the political capital to punish defeated elites through trials, with little concern for the opposition's power. The Tokyo and Nuremberg tribunals, as well as the domestic successor trials in Rwanda,

underscore the wide latitude that victors have in pursuing retribution. However, where the transition is tightly "pacted," or negotiated, trials are rarely politically feasible. Previous elites may still enjoy significant political or military power, and can threaten to undermine the new political order if they feel their privileges are in jeopardy. Here, truth commissions may offer an alternative response to the past, investigating elites' actions and shaming them through publication of a truth report identifying their crimes.

Even this, however, can prove difficult. Often, elites will demand severe and debilitating restrictions on the operation of commissions. In Chile, the military maintained sufficient political clout after the transition to demand that the commission's final report not name perpetrators, and the 1978 amnesty -- covering violations from 1973 through to the time of its passage -- effectively ensured that the most egregious abuses would be protected from prosecution**.** The greater the power of entrenched elites, the greater the political constraints on the moral response. Nevertheless, the gradual expansion of democratic values and practices, combined with the erosion of the authoritarian enclaves' power, may allow for future prosecutions. Chile is currently undergoing a reappraisal of the Pinochet era, and there is now more support for trials than there was only a few years ago. A large part of this can be traced to the 1998 detention of General Pinochet in London, an example of how international events can redefine domestic political contours and permit a reconsideration of what negotiated pacts portend for the future.

The UN-backed Sierra Leone Truth and Reconciliation Commission must negotiate its way around the 1999 Lomé peace agreement, which granted a blanket amnesty for all human rights violations committed during the nine-year civil war leading up to the peace accord. At the time of signing, government forces fighting Foday Sankoh's Revolutionary United Front --

infamous for butchering and mutilating civilians -- were in a weak bargaining position, and amnesty was seen as the only way of ending hostilities.[2] The commission is nevertheless faced with a difficult task: identifying and possibly recommending for prosecution major war criminals against the backdrop of a legal system that already recognizes protection for crimes committed before 1999. The UN has indicated that it will ignore the amnesty for genocide, war crimes, and crimes against humanity, and has promised to establish a tribunal to deal with these cases.[3]

This is the proper course to take. International law does not recognize amnesties for grave human rights violations, so amnesties are essentially void and the crimes subject to prosecution in international fora or, through the emerging principle of universal jurisdiction, in foreign national courts. Tightly-pacted transitions which include some form of amnesty may be necessary to remove a despotic regime. But international courts are under no obligation to recognize them; furthermore, amnesties do not in principle protect major foreign accomplices and co-perpetrators from prosecution.

5. Material, financial and personnel resources: The financial resources that commissions and tribunals require make it unlikely that a poor nation undergoing substantial political transformation could provide the necessary funding without significant outside assistance. Tribunals, in particular, are especially costly. A *fair* trial of a high-level perpetrator can cost millions of dollars, making numerous trials difficult to justify from a strictly budgetary perspective, particularly when a country is faced with myriad other pressing humanitarian concerns and some of those funds could be used to alleviate the plight of victims and others. International funding is often difficult to secure, and qualified personnel such as lawyers, judges

[2] Of course, the violence did not end with the peace accord; the civil war has continued at varying levels of intensity.

[3] Assuming funding is obtained, the tribunal will be a mixed domestic-international court, with respected national and foreign jurists.

and legal experts may be in short supply. The Rwandan genocide left only a handful of lawyers in the country, creating a seemingly insurmountable obstacle to formal domestic prosecutions. With hardly any attorneys to prosecute -- much less defend -- suspects, the likelihood of fair trials is seriously diminished. It would be a mistake, of course, to choose a commission over widespread trials simply on budgetary grounds. To do so would make a mockery of the principle of a moral response, delegating the moral calculus to the rather profane level of bean-counting and penny-pinching. Nevertheless, budgetary constraints *are* constraints. South Africa spent approximately $18 million a year on its commission, a sum unmatched by any other similar body, and commissioners nevertheless felt their work was underfunded. So too with the UN sponsored truth commissions in El Salvador and Guatemala (Lester, 2000, pp. 78-110).

Closely related to the above resource factors is political will. Does the successor regime have the will and commitment to actually pursue and sustain a rigorous, institutional response? Human rights advocates have often found a great deal of rhetorical governmental support for their ambitious projects, only to realize later that the regime has no interest whatsoever in matching its words with deeds. The lack of interest is, unsurprisingly, reflected in the lack of money and resources available for commissions and tribunals. Uganda assembled two commissions -- in 1974 and 1986 -- that were duly ignored by the state, and Ecuador's 1996 commission folded after five months, producing no final report on police and military abuses. Zimbabwe's 1985 state-sanctioned commission, investigating state repression in the Matabeleland, never released its report; the government quashed its publication, claiming the findings would unleash "ethnic conflict" (Hayner, 2001, p. 55). Similarly, post-World War One trials to prosecute Turkish perpetrators quickly foundered after the Allies lost interest, and the architects of the Armenian genocide were thus never held accountable. Political will and

sufficient resources are crucial if institutional responses to the past are to succeed. Otherwise, they will remain token gestures and a further insult to the victims.

6. Salience of specific domestic, cultural, political and religious discourses available for furthering the causes of justice and reconciliation: Truth commissions and tribunals should draw from domestic discourses that can strengthen their legitimacy. Archbishop Tutu, chairman of the South African commission, has often turned to Christian notions of forgiveness as an important virtue in dealing with perpetrators (an admittedly controversial proposition), and local leaders have called for *ubuntu*, roughly translated from Zulu as "humanness," to underscore the importance of rebuilding interpersonal relationships in the construction of a new moral and political order. These notions and others offer a rich discursive fund which can feed broader efforts at reconciliation and coming to terms with the past.

Prosecutions have also taken a decidedly autochthonous turn. In Rwanda, the state has supplemented formal trials with *gacacas* -- essentially popular tribunals rooted in local customs -- for lower-level perpetrators. Though the state has outlined formal criteria for their operation, *gacacas* gain much of their legitimacy from their identification with tradition and their basis on customary notions of responsibility and accountability (Vandeginste, 2001). This and similar cases point to the salience of local and national discourses on justice and reconciliation, for only if the population at large can identify with these the institutions will they have any deep and transformative impact.

7. Possibility of future social unrest through the use of truth commissions and trials: Finally, there exists the very subjective factor of predicting -- reckoning may be a more appropriate term -- whether commissions or tribunals will contribute to the resumption of violence, be it through coup, civil war or revolution. Political elites must engage in a delicate

calculus to ascertain whether certain kinds of institutional responses may lead to a renewal of violence. An assessment of factors two, three and four above offers some direction in ascertaining whether and what type of institutional responses should be employed. Highly-pacted transitions leave authoritarian enclaves in politics, the economy and occasionally the armed forces, creating significant obstacles to the use of trials. This was the case in El Salvador, Guatemala and South Africa, though in the last instance the government employed a novel form of selective prosecution. In general, truth commissions may offer the only possibility of moral response without resulting in renewed conflict, and retributive efforts will have to be pursued in the international arena, with all of the great-power pitfalls that entails.

Conclusion

Institutional responses are an important, though by no means sufficient, element of larger societal efforts to confront the past. Political elites must discuss publicly and frankly past violence by acknowledging injustices and responsibility as a step toward the reconstruction of society, and civil society actors should contribute to reconciliation by providing critical interpretations of past violence more nuanced than elite historical narratives. Individuals, too, must find ways of addressing complex personal issues of responsibility, revenge, forgiveness and moral transformation. All of these concerns point to the fundamentally *disjunctured* and *uneven* nature of reconciliation. Nevertheless, institutional mechanisms *can* make a difference, particularly when the retributive elements of tribunals are paired with the restorative dimension of truth commissions. Rather than seeing them as separate, incompatible bodies, they should be understood as complementing one another. The emphasis in retribution satisfies moral demands for accountability, and through reparations and public survivor testimony commissions

acknowledge victims in ways tribunals cannot. Both institutional responses, moreover, help unearth the truth about atrocities. Though a transition to a more just society will always be fraught with difficulty and pain, institutional responses can serve as important first steps by helping mend a tattered social fabric.

Additionally, we should not lose sight of foreign complicity in human rights abuses; most modern cases of state-sponsored human rights violations have occurred with the support of foreign governments, often the United States or the Soviet Union. Current international law makes it difficult to prosecute leaders for actions committed in other states, though as the current trial of Milosevic indicates, this may be changing. Nevertheless, there is no doubt that political power often trumps law, and justice will not be achieved if foreign accomplices remain unaccountable. Domestic justice will remain stunted if only national actors are investigated and prosecuted. Because of the crucial element of foreign involvement in modern civil wars and domestic atrocities - a phenomenon best captured in the Cold War term "proxy war" - robust international justice mechanisms are required as well. UN ad hoc tribunals and the ICC, as well as regional human rights courts point in this direction, though all are hampered to differing degrees by the machinations of real politik. The balance, then, between domestic imperatives for justice and the international reluctance toward universal jurisdiction will remain the fundamental cleavage in future human rights discourse.

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