

## TRANSITIONAL JUSTICE IN PRACTICE: THE IMPORTANCE OF CONTEXT IN CONFRONTING LEGACIES OF MASS ABUSE

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In the aftermath of war, violent upheaval, and repression, domestic justice systems are unable to address the large-scale violations of criminal law and human rights law that might have been perpetrated. In many cases those crimes have been overlooked and relegated to footnotes in some history books. The immensity of the number of deaths wrought by wars during the twentieth century are reflected in the grim statistics: about 10 million civilians killed in World War I;<sup>1</sup> 1.5 million civilians killed in the 1915 Armenian Genocide;<sup>2</sup> approximately 45 million civilians killed in World War II;<sup>3</sup> 2 million civilians

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1. NADÈGE MOUGEL, REPERES, WORLD WAR I CASUALTIES 1 (Julie Gratz trans., 2011), <http://www.centre-robert-schuman.org/userfiles/files/REPERES%20-%20module%201-1-1%20-%20explanatory%20notes%20-%20World%20War%20I%20casualties%20-%20EN.pdf>.

2. See 1 DAVID P. FORSYTHE, ENCYCLOPEDIA OF HUMAN RIGHTS 98 (2009).

3. REPERES, WORLD WAR II CASUALTIES 5 (Julie Gratz trans., 2011), [www.centre-robert-schuman.org/userfiles/files/REPERES%20%E2%80%93%20module%201-2-0%20-%20explanatory%20notes%20%E2%80%93%20World%20War%20II%20casualties%20%E2%80%93%20EN.pdf](http://www.centre-robert-schuman.org/userfiles/files/REPERES%20%E2%80%93%20module%201-2-0%20-%20explanatory%20notes%20%E2%80%93%20World%20War%20II%20casualties%20%E2%80%93%20EN.pdf).

killed in the Vietnam War;<sup>4</sup> 800,000 killed in the Rwanda genocide of 1994;<sup>5</sup> 4.7 million estimated killed in consequence of the civil war that raged in the Democratic Republic of the Congo between 1999 and 2003.<sup>6</sup>

In South Africa, the Apartheid system was not planned to kill black South Africans; its goals were racial oppression and enforced segregation.<sup>7</sup> However, hundreds of black South Africans were murdered by the Apartheid police and army.<sup>8</sup> In 1973, the U.N. Convention on the Crime of Apartheid, with every justification, declared Apartheid in South Africa to constitute a crime against humanity.<sup>9</sup>

Atrocity crimes continue to be committed. In Syria, the number of civilians killed at the time of this writing exceeds 500,000 and growing.<sup>10</sup> In Yemen it is 50,000 and growing,<sup>11</sup> and in Myanmar many hundreds of Rohingya people have been killed and some 700,000 forced to leave their homes and flee to Bangladesh.<sup>12</sup>

No one has attempted to estimate the number of perpetrators who committed the atrocity crimes to which I have just referred. As an illustration, in Rwanda, where the killing was accom-

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4. Ronald H. Spector, *Vietnam War*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Vietnam-War> (last modified Feb. 15, 2019).

5. *Rwanda Genocide: 100 Days of Slaughter*, BBC (Apr. 4, 2019), <https://www.bbc.com/news/world-africa-26875506>.

6. James Astill, *Conflict in Congo Has Killed 4.7m, Charity Says*, GUARDIAN (Apr. 7, 2003, 9:21 PM), <https://www.theguardian.com/world/2003/apr/08/congo.jamesastill>.

7. See *A History of Apartheid in South Africa*, SOUTH AFR. HIST. ONLINE (May 6, 2016), <https://www.sahistory.org.za/article/history-apartheid-south-africa>.

8. *South African Major Mass Killings Timeline 1900-2012*, SOUTH AFR. HIST. ONLINE (Jan. 8, 2013), <https://www.sahistory.org.za/topic/south-african-major-mass-killings-timeline-1900-2012>.

9. International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243.

10. See Megan Specia, *How Syria's Death Toll Is Lost in the Fog of War*, N.Y. TIMES (Apr. 13, 2018), <https://www.nytimes.com/2018/04/13/world/middleeast/syria-death-toll.html>.

11. Kareem Fahim, *The Deadly War in Yemen Rages On. So Why Does the Death Toll Stand Still?*, WASH. POST (Aug. 3, 2018), [https://www.washingtonpost.com/world/the-deadly-war-in-yemen-rages-on-so-why-does-the-death-toll-stand-still-/2018/08/02/e6d9ebca-9022-11e8-ae59-01880eac5f1d\\_story.html?utm\\_term](https://www.washingtonpost.com/world/the-deadly-war-in-yemen-rages-on-so-why-does-the-death-toll-stand-still-/2018/08/02/e6d9ebca-9022-11e8-ae59-01880eac5f1d_story.html?utm_term).

12. *Rohingya Genocide Is Still Going On, Says Top UN Investigator*, GUARDIAN (Oct. 24, 2018, 3:42 PM), <https://www.theguardian.com/world/2018/oct/24/rohingya-genocide-is-still-going-on-says-top-un-investigator>.

plished by violent acts perpetrated by individuals, there must have been at least 200,000 murderers.<sup>13</sup>

Victims always seek justice. What they are asking for is a form of public acknowledgement and, with it, at least for some victims, the means to bring closure to their suffering. I would emphasize that criminal justice is not designed to bring solace or acknowledgement to more than a handful of individual victims. That explains why, in the past three decades, there has been a growing consensus that justice for victims should be sought in forms of transitional justice.<sup>14</sup>

It should be recognized that international criminal justice is not able, and is not designed, to bring appropriate acknowledgement to the victims of mass atrocities. Granting victims the right to intervene in criminal proceedings in the International Criminal Court (ICC) has thus far proved to be of limited value.<sup>15</sup> Criminal justice has been unsuccessful in meaningfully achieving or aiding peace.<sup>16</sup>

A recent case before the ICC illustrates the problematic relationship between justice and human rights. Jean-Pierre Bemba is a war lord from the Democratic Republic of the Congo and its former vice president.<sup>17</sup> As the commander of his rebel army, he was alleged to have been responsible for unspeakable atrocities committed during 2002 and 2003 in the Central African Republic.<sup>18</sup> Bemba had been invited by the former president of the Central African Republic to come to his country to fight against an attempted coup.<sup>19</sup> The crimes included

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13. See Scott Straus, *How Many Perpetrators Were There in the Rwandan Genocide? An Estimate*, 6 J. GENOCIDE RES. 85, 95 (2004) (estimating 175,000 to 210,000 perpetrators).

14. See, e.g., Simon Robins, *Failing Victims? The Limits of Transitional Justice in Addressing the Needs of Victims of Violations*, 11 HUM. RTS. & INT'L LEGAL DISCOURSE 41, 43 (2017).

15. Liesbeth Zegveld, *Victims as a Third Party: Empowerment of Victims?*, 19 INT'L CRIM. L. REV. 321, 322 (2019).

16. See *Criminal Justice*, INT'L CTR. FOR TRANSITIONAL J., <https://www.ictj.org/our-work/transitional-justice-issues/criminal-justice> (last visited May 20, 2019).

17. *Profile: Jean-Pierre Bemba, DR Congo's Ex-Rebel and Vice-President*, BBC (June 8, 2018), <https://www.bbc.com/news/world-africa-35845556>; see *Background: Jean-Pierre Bemba Gombo*, INT'L J. MONITOR, <https://www.ijmonitor.org/jean-pierre-bemba-gombo-background/> (last visited May 20, 2019).

18. *Background: Jean-Pierre Bemba Gombo*, *supra* note 17.

19. *Id.*

murder, rape and other gender-related crimes, and plunder.<sup>20</sup> It was not alleged that he personally committed any of the crimes. He was indicted on the basis that, as the commander of his rebel army, he failed to prevent those crimes from being perpetrated and also failed to punish those who committed them.<sup>21</sup> During 2008, Bemba was arrested in Belgium and surrendered for trial before the ICC in The Hague.<sup>22</sup> His trial began in 2010.<sup>23</sup> In March 2016, Bemba was found guilty by a unanimous trial chamber of war crimes, including murder, rape, and plunder.<sup>24</sup> The trial lasted forty-eight months.<sup>25</sup> More than seventy witnesses were heard by the Court.<sup>26</sup> Bemba was sentenced to eighteen years in prison.<sup>27</sup> In the aftermath of the conviction, over 5000 victims of atrocities committed by troops under the command of Bemba called for individual reparations.<sup>28</sup> Imagine their horror and shock when, in June 2018, the appeals chamber of the ICC, by a majority of three to two, held that the case against Bemba had not been proven beyond a reasonable doubt.<sup>29</sup> He was acquitted.<sup>30</sup> He has now returned to his native Democratic Republic of the Congo where he sought, unsuccessfully, to run in the presidential election of December 2018.<sup>31</sup> It

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20. *Id.*

21. *See id.*

22. Owen Bowcott, *Jean-Pierre Bemba's War Crimes Conviction Overturned*, *GUARDIAN* (June 8, 2018, 12:03 PM), <https://www.theguardian.com/global-development/2018/jun/08/former-congo-leader-jean-pierre-bemba-wins-war-crimes-appeal-international-criminal-court>.

23. *Id.*

24. *Id.*

25. *See id.*

26. *Id.*

27. *Id.*

28. *International Courts to Seek Reparations for Thousands of African War Crimes Victims*, *CHARLESTON CHRON.* (Nov. 29, 2017), <https://www.charlestonchronicle.net/2017/11/29/international-court-to-seek-reparations-for-thousands-of-african-war-crimes-victims/>.

29. *See* Bowcott, *supra* note 22.

30. *Id.*

31. Benoit Nyemba, *Congo's Top Court Excludes Opposition Leader Bemba from Presidential Election*, *REUTERS* (Sept. 3, 2018, 4:01 PM), <https://www.reuters.com/article/us-congo-politics/congos-top-court-excludes-opposition-leader-bemba-from-presidential-election-idUSKCN1LJ20Y>.

was held by the domestic courts that his conviction by the ICC for witness tampering disqualified him from doing so.<sup>32</sup>

The decision of the appeals chamber of the ICC was greeted with dismay by most human rights organizations.<sup>33</sup> Some of them described the decision as a violation of the rights of the victims.<sup>34</sup> Some accused the judges in the majority of betraying their duty to the victims.<sup>35</sup> These unfortunate criticisms ignored the primary duty of the Court—to hold fair trials for those who appear before it. That is what the majority judges did. They were most certainly aware of the unfortunate effect of their decision on many thousands of victims. As emphasized by the trial and appeal judges, it was established beyond reasonable doubt that the horrendous crimes had been committed.<sup>36</sup> That was not the main issue in the trial or in the appeal proceedings. The question was whether Bemba, as a commander, was responsible for the crimes.<sup>37</sup> The three appeal judges in the majority did not deviate from their duty and felt compelled to reverse the conviction. Their reasoning left them no other option. After all, the record of any criminal justice system must be measured by acquittals and not convictions. The Bemba case also succeeded in authoritatively recording the massive crimes that were committed in the Central African Republic from 2002 to 2003.

I am not suggesting that international courts are not crucial in withdrawing impunity from those who commit atrocity crimes. They are also important to the extent that they encourage

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32. *Id.*

33. *See, e.g., CAR: Acquittal of Bemba a Blow to Victims*, AMNESTY INT'L (June 8, 2018, 11:15 AM), <https://www.amnesty.org/en/latest/news/2018/06/car-acquittal-of-bemba-a-blow-to-victims/>.

34. *See, e.g., Nadia Carine Fornel Poutou & Lucie Boalo Hayali, A Belief Shattered: The International Criminal Court's Bemba Acquittal*, JUST SECURITY (June 25, 2018), <https://www.justsecurity.org/58386/belief-shattered-international-criminal-courts-bemba-acquittal/>.

35. *See, e.g., Statement of ICC Prosecutor, Fatou Bensouda, on the Recent Judgment of the ICC Appeals Chamber Acquitting Mr. Jean-Pierre Bemba Gombo* (June 13, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=180613-OTP-stat>.

36. *Prosecutor v. Gombo*, ICC-01/05-01/08 A, Judgment, ¶ 102 (June 8, 2018).

37. *Id.* ¶ 120.

domestic investigations and prosecutions.<sup>38</sup> Those courts have significantly advanced international humanitarian law and especially in recognizing the criminality of systematic mass rape and other gender-related crimes that have so frequently been used as intentional weapons of war.<sup>39</sup>

The Bemba Case can be compared with the more successful 1945 Nuremberg trial of the Nazi leaders.<sup>40</sup> A number were convicted and some of them executed.<sup>41</sup> Others were acquitted.<sup>42</sup> The trial brought little solace to the millions of Nazi victims. But importantly, it created a record of evidence that has stood in the way of many would-be Holocaust deniers.<sup>43</sup> The evidence also brought home to the people of Germany the enormity of the crimes that had been committed in their name. Few individual victims were touched personally by the evidence or convictions.

It is largely in light of these limitations that victims have sought alternative forms of transitional justice. They were compelled to recognize that full justice—trial, conviction, sentence—was beyond the ability of a State to provide. They caviled at the thought of being ignored, whether by the State turning a blind eye to the atrocities, or by the granting of some form of immunity to the perpetrators.

The most common form of transitional justice has been truth and reconciliation commissions.<sup>44</sup> The victims are provided with a platform to speak about their experiences and, in that

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38. See Mark Kersten, *The ICC's Impact on National Justice: Can the ICC Prosecutor Catalyze Domestic Cases?*, J. CONFLICT (Dec. 6, 2018), <https://justiceinconflict.org/2018/12/06/the-iccs-impact-on-national-justice-can-the-icc-prosecutor-catalyze-domestic-cases/>.

39. Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288, 346–49 (2003).

40. See *The Nuremberg Trials*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/the-nuremberg-trials> (last visited May 20, 2019).

41. See *id.*

42. See *id.*

43. See *Combating Holocaust Denial: Evidence of the Holocaust Presented at Nuremberg*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/combating-holocaust-denial-evidence-of-the-holocaust-presented-at-nuremberg> (last visited May 20, 2019).

44. Yasmin Sooka, *Dealing with the Past and Transitional Justice: Building Peace Through Accountability*, 88 INT'L REV. RED CROSS 311, 313 (2006).

way, to receive public acknowledgment of what they suffered.<sup>45</sup> It also has the benefit of compelling the public to “look the beast in the eye” as Desmond Tutu put it.<sup>46</sup> I hasten to add that a truth and reconciliation commission is not inconsistent with selective criminal prosecutions whether before, during, or after the life of the commission. That happened in both South Africa<sup>47</sup> and Sierra Leone.<sup>48</sup> Apart from truth and reconciliation commissions there is a system called lustration which denies perpetrators their positions in public office.<sup>49</sup>

At the other end of the spectrum of approaches to the commission of atrocity crimes is the grant of blanket amnesty, whether by design or by neglect.<sup>50</sup> This option is frequently the easy political way out of the dilemma. It can avoid violence and the destabilization of a new government.<sup>51</sup> However, it is a complete denial of justice for the victims. Not surprisingly, it leads to deep resentment on the part of many of them. More often than not, that resentment leads to further spirals of violence. For generations, crimes against humanity were

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45. See *id.* at 318.

46. DESMOND MPIOLO TUTU, NO FUTURE WITHOUT FORGIVENESS 28 (1999) (“Unless we look the beast in the eye we find it has an uncanny habit of returning to hold us hostage.”).

47. See *South Africa*, INT’L CT. TRANSITIONAL J., <https://www.ictj.org/our-work/regions-and-countries/south-africa> (last visited May 20, 2019).

48. See *Sierra Leone*, INT’L CT. TRANSITIONAL J., <https://www.ictj.org/our-work/regions-and-countries/sierra-leone> (last visited May 20, 2019).

49. See Maria Popova & Vincent Post, *What Is Lustration and Is It a Good Idea for Ukraine to Adopt It?*, WASH. POST (Apr. 9, 2014), [https://www.washingtonpost.com/news/monkey-cage/wp/2014/04/09/what-is-lustration-and-is-it-a-good-idea-for-ukraine-to-adopt-it/?utm\\_term](https://www.washingtonpost.com/news/monkey-cage/wp/2014/04/09/what-is-lustration-and-is-it-a-good-idea-for-ukraine-to-adopt-it/?utm_term).

50. Office of the United Nations High Comm’r for Human Rights, *Rule-of-Law Tools for Post-Conflict States*, U.N. Doc. HR/PUB/09/1, at 8 (2009) (“[B]lanket amnesties exempt broad categories of serious human rights offenders from prosecution and/or civil liability without the beneficiaries’ having to satisfy preconditions, including those aimed at ensuring full disclosure of what they know about crimes covered by the amnesty, on an individual basis.”).

51. See, e.g., *The Question of Amnesty: Balancing Truth and Justice*, SYRIA J. & ACCOUNTABILITY CTR. (Aug. 12, 2015), <https://syriaaccountability.org/updates/2015/08/12/the-question-of-amnesty-balancing-truth-and-justice/> (“Parties in conflict sometimes agree to blanket amnesty in order to negotiate an immediate end to violence.”).

ignored in both the former Yugoslavia<sup>52</sup> and Rwanda.<sup>53</sup> That neglect was a primary cause of further rounds of fresh violence in both parts of the world.<sup>54</sup>

It should also be noted that prosecution of the perpetrators and truth and reconciliation commissions are not mutually exclusive. Indeed, in both South Africa and Sierra Leone, prosecutions and hearings of a Truth and Reconciliation Commission proceeded simultaneously.<sup>55</sup>

All transitional justice mechanisms require compromises. Victims are denied full justice by way of prosecution and punishment of the guilty and have to be content with wide public acknowledgement of heinous crimes that were committed.

One of the problems with all forms of justice, whether criminal prosecutions or the mechanisms of transitional justice, is that expectations are set at a level too high to attain.<sup>56</sup> When those expectations are not met, there is disillusionment and disappointment.<sup>57</sup> This is inevitable in the best of circumstances

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52. See Tim Judah, *Yugoslavia: 1918–2003*, BBC, [http://www.bbc.co.uk/history/worldwars/wwone/yugoslavia\\_01.shtml](http://www.bbc.co.uk/history/worldwars/wwone/yugoslavia_01.shtml) (last updated Feb. 17, 2011) (recounting history of crimes against humanity in the former Yugoslavia).

53. See *Rwanda: A Brief History of the Country*, UNITED NATIONS, <http://www.un.org/en/preventgenocide/rwanda/education/rwandagenocide.shtml> (last visited May 20, 2019) (recounting history of crimes against humanity in Rwanda).

54. For theorizing violence as behavior that breeds cycles, see SEYOM BROWN, *THE CAUSES AND PREVENTION OF WAR* 15 (1987). To understand participation in cycles of violence from a perspective of political psychology, see generally Rebecca Littman & Elizabeth Levy Paluck, *The Cycle of Violence: Understanding Individual Participation in Collective Violence*, 36 *ADVANCES POL. PSYCHOL.* 79 (2015). There is also empirical evidence suggesting that exposure to war-related trauma positively correlates with aggression and community and family violence. Tobias Hecker et al., *The Cycle of Violence: Associations Between Exposure to Violence, Trauma-Related Symptoms and Aggression—Findings from Congolese Refugees in Uganda*, 28 *J. TRAUMATIC STRESS* 448, 449, 452 (2015).

55. See Kader Asmal, *Truth, Reconciliation and Justice: The South African Experience in Perspective*, 63 *MOD. L. REV.* 1, 12–13 (2000); Alexander Dukalskis, *Interactions in Transition: How Truth Commissions and Trials Complement or Constrain Each Other*, 13 *INT'L STUD. REV.* 432, 442–43 (2011); see also Nahla Valji, *Trials and Truth Commissions: Seeking Accountability in the Aftermath of Violence*, *CTR. FOR STUDY VIOLENCE & RECONCILIATION* (2009), [https://www.csvr.org.za/images/f\\_e\\_s.pdf](https://www.csvr.org.za/images/f_e_s.pdf) (“Some truth commissions have had judicial powers such as the South African TRC . . . and others ran alongside judicial bodies such as in Sierra Leone . . .”).

56. Marieke de Hoon, *The Future of the International Criminal Court. On Critique, Legalism and Strengthening the ICC's Legitimacy*, 17 *INT'L CRIM. L. REV.* 591, 591 (2017).

57. See *id.*



and can be fatal if the context is not taken into account in designing such mechanisms.<sup>58</sup>

### *Transitional Justice in Context*

In analyzing context, regard should be had to the politics, the economy, and the human and economic resources available to the State. Every situation of transitional justice is unique. After World War II, justice for the millions of victims in Europe and Japan was limited to the prosecution of some of the leaders responsible for the commission of atrocity crimes.<sup>59</sup> In South Africa, there were too few prosecutions of the Apartheid leaders.<sup>60</sup> The principal mechanism adopted by the legislature was the Truth and Reconciliation Commission.<sup>61</sup> In the former Yugoslavia there were international and domestic trials for some of the perpetrators.<sup>62</sup> In my view, it was unfortunate that there was no form of truth and reconciliation commission. In Rwanda, in the aftermath of a horrendous genocide, there was both the U.N. International Tribunal for Rwanda (ICTR) and later a tribal form of justice called “gacaca.”<sup>63</sup> In the case of Sudan, the U.N. Security Council, relying on its peremptory powers under Chapter VII of the U.N. Charter and Article 16 of the Rome Statute, referred the situation to the ICC.<sup>64</sup> The arrest of President Omar Al-Bashir of Sudan, on charges including

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58. See *id.* at 594–96.

59. See *Prosecuting War Crimes After the Second World War: The Nuremberg and Tokyo Trials*, INT’L COMMITTEE RED CROSS: CROSS-FILES (May 22, 2018), <https://blogs.icrc.org/cross-files/prosecuting-war-crimes-after-the-second-world-war-the-nuremberg-and-tokyo-trials/>.

60. Mary Kay Magistad, *South Africa’s Imperfect Progress, 20 Years After the Truth & Reconciliation Commission*, PUB. RADIO INT’L (Apr. 6, 2017, 1:45 AM), <https://www.pri.org/stories/2017-04-06/south-africas-imperfect-progress-20-years-after-truth-reconciliation-commission>.

61. See *South Africa*, *supra* note 47.

62. Samuel Tanner, *The Mass Crimes in the Former Yugoslavia: Participation, Punishment and Prevention?*, 90 INT’L REV. RED CROSS 273, 283–84 (2008).

63. *Rwanda: Justice After Genocide—20 Years On*, HUM. RTS. WATCH (Mar. 28, 2014, 6:02 AM), <https://www.hrw.org/news/2014/03/28/rwanda-justice-after-genocide-20-years>.

64. *Prosecutor v. Al Bashir*, ICC-02/05-01/09, Prosecution Response to the Observations of Eleven Amici Curiae, ¶ 1–4 (July 16, 2018).

genocide, has been sought by the Court since March 2009.<sup>65</sup> The failure of some States to execute the international arrest warrant against Al-Bashir enabled him to avoid trial.<sup>66</sup> It is disappointing that those States include South Africa and Jordan, both of which ratified the Rome Statute.<sup>67</sup> The case referred by the Security Council fizzled out in consequence of Sudan refusing to recognize the jurisdiction of the Court and its obligation, under Chapter VII of the U.N. Charter, to cooperate with the Court.<sup>68</sup>

There have been many forms of truth commission, some successful and others not.<sup>69</sup> Most experts rate the South African Truth and Reconciliation Commission (TRC) as the most successful of what is inevitably a flawed process.<sup>70</sup>

South Africa's new democratic leadership, under Nelson Mandela, was, broadly speaking, in favor of public accountability for the crimes of humanity that were perpetrated in the name of Apartheid.<sup>71</sup> For understandable reasons, the former Apartheid leaders, and especially the senior officials of the army and police, were obviously strongly opposed to it.<sup>72</sup>

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65. Prosecutor v. Al Bashir, ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, at 3 (Mar. 4, 2009).

66. Marlise Simons, *South Africa Should Have Arrested Sudan's President*, I.C.C. Rules, N.Y. TIMES (July 6, 2017), <https://www.nytimes.com/2017/07/06/world/africa/icc-south-africa-sudan-bashir.html>.

67. See *id.*; see also *Jordan Defends Non-Arrest of Bashir Before ICC*, TIMESLIVE (Sept. 10, 2018, 4:57 PM), <https://www.timeslive.co.za/news/africa/2018-09-10-jordan-defends-non-arrest-of-bashir-before-icc/>.

68. See Edith M. Lederer, *ICC Prosecutor Says UN Fails to Promote Justice in Sudan*, AP NEWS (June 20, 2018), <https://www.apnews.com/6e83f0e8371648c6bfe683f27c25c14d>.

69. See generally, e.g., Joanna R. Quinn, *Haiti's Failed Truth Commission: Lessons in Transitional Justice*, 8 J. HUM. RTS. 265 (2009) (evaluating Haiti's attempts to implement a truth commission and the resulting difficulties including institutional constraints, lack of capacity, and security concerns).

70. See David Backer, *Evaluating Transitional Justice in South Africa from a Victim's Perspective*, J. INT'L INST. (2005), <http://hdl.handle.net/2027/spo.4750978.0012.207>; Jay A. Vora & Erika Vora, *The Effectiveness of South Africa's Truth and Reconciliation Commission: Perceptions of Xhosa, Afrikaner, and English South Africans*, 34 J. BLACK STUD. 301, 303 (2004).

71. See Fabrice Tambe Endoh, *Democratic Constitutionalism in Post-Apartheid South Africa: The Interim Constitution Revisited*, 7 AFR. REV. 67, 71–73 (2015) (discussing Mandela's goal to correct Apartheid effects and the backlash from the opposing political party).

72. See *id.*

There were three contextual elements that, together, resulted in the establishment of the TRC. The first was allegations of human rights abuses having been committed against members or purported members of the African National Congress (ANC) at their army camps in Tanzania, Angola, and Zambia.<sup>73</sup> The ANC set up its own informal commission of inquiry into those allegations.<sup>74</sup> That commission found that “staggering brutality” had been used in those camps and recommended that reparations be paid by the ANC to the victims.<sup>75</sup> A second commission established by the ANC found that named individuals had been responsible for torture.<sup>76</sup> The response of the ANC was to accept the reports but take no action in consequence of their findings of human rights violations.<sup>77</sup> Those directly involved were thus not held directly responsible for the violations. Whilst this is not the best approach, it was certainly more helpful than a false denial or cover-up.

The second contextual element was the findings by a Judicial Commission of Inquiry I led from the end of 1991 until the first democratic election in April 1994. The Commission established that the violence that accompanied the peace negotiations between South Africa’s leaders was, to a large extent, being instigated by senior elements in the former Apartheid army and police.<sup>78</sup> Our investigations resulted in the dismissal of twenty-three of the most senior members of the army by then President F.W. de Klerk.<sup>79</sup> As emerged during the hearings of the TRC,

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73. Amnesty Int’l, *South Africa: Torture, Ill-Treatment and Executions in African National Congress Camps*, AI Index AFR 53/027/1992, at 2 (Dec. 2, 1992).

74. See Liz Sly, *ANC Admits Torturing Opponents*, CHI. TRIB. (Oct. 20, 1992), <https://www.chicagotribune.com/news/ct-xpm-1992-10-20-9204050027-story.html>; *The Motsuenyane Commission Finds the African National Congress (ANC) Guilty of Abuse in Its Camps*, SOUTH AFR. HIST. ONLINE (Mar. 16, 2011), <http://www.sahistory.org.za/dated-event/motsuenyane-commission-finds-african-national-congress-anc-guilty-abuse-its-camps> [hereinafter *Motsuenyane Commission Findings*].

75. *Motsuenyane Commission Findings*, *supra* note 74.

76. *Id.*

77. *Id.*

78. For an account of the work of the Commission, see generally RICHARD J. GOLDSTONE ET AL., *FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR* (2000).

79. *SADF Officers Dismissed*, SOUTH AFR. HIST. ONLINE (Mar. 16, 2011), <https://www.sahistory.org.za/dated-event/sadf-officers-dismissed>.

our inquiries had done little more than scratch the surface of what Nelson Mandela called “the third force.”<sup>80</sup>

The third contextual element was a visit to South Africa by the former President of Chile Patricio Aylwin, who had been principally responsible for the establishment of the Chilean National Commission on Truth and Reconciliation (the Rettig Commission, named after its chair, Raúl Rettig).<sup>81</sup> That commission investigated the fate of over 2000 people killed for political reasons.<sup>82</sup> Aylwin explained that the Chilean Commission was substantially limited by the demands made by Pinochet, who was not prepared to allow democratic elections to take place unless his demands were accepted by Aylwin. Pinochet insisted that: (1) the Commission could only investigate disappearances, thereby ensuring that there would be no identification of the perpetrators; (2) in any event, there would be no publication of the names of any of the perpetrators; and (3) there would be no public hearings.<sup>83</sup> Aylwin had little option but to accept those conditions.

The Rettig Commission completed its work in 1991.<sup>84</sup> It found that 2279 people had been killed by the Pinochet regime for political reasons.<sup>85</sup> Where the victims could be identified, they were named in the report of the Commission.<sup>86</sup> In presenting

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80. See Stephen Ellis, *The Historical Significance of South Africa's Third Force*, 24 J. SOUTHERN AFR. STUD. 261, 262 (1998).

81. For a full account of the Rettig Commission, see *Truth Commission: Chile 90*, U.S. INST. PEACE, <http://www.usip.org/publications/truth-commission-chile-90> (last visited May 20, 2019).

82. U.S. INST. PEACE, REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION 1122 (Oct. 4, 2002), [https://www.usip.org/sites/default/files/resources/collections/truth\\_commissions/Chile90-Report/Chile90-Report.pdf](https://www.usip.org/sites/default/files/resources/collections/truth_commissions/Chile90-Report/Chile90-Report.pdf).

83. See Mark Vasallo, *Truth and Reconciliation Commissions: General Considerations and a Critical Comparison of the Commissions of Chile and El Salvador*, 33 U. MIAMI INTER-AM. L. REV. 153, 165 (2002) (“In most cases . . . even if the commission knew the names of the individuals responsible, they had to refrain from naming those persons because they were still serving in the armed forces and were protected by their leader, General Pinochet. Therefore, implications of the report were generally limited to branches of the military and security forces, or opposition groups believed to be responsible, instead of specific named parties.”).

84. *Truth Commission: Chile 90*, *supra* note 81.

85. U.S. INST. PEACE, *supra* note 82, at 1122.

86. MARK R. AMSTUTZ, THE HEALING OF NATIONS: THE PROMISE AND LIMITS OF POLITICAL FORGIVENESS 152 (2004). See generally *id.* at 185–996 (providing short accounts of each victim on whom the Commission could receive information).

the report to the public on national television, Aylwin, on behalf of the State, made an apology to the victims and the people of Chile.<sup>87</sup> He sent copies of the report to the families of each of the victims named in the report.<sup>88</sup> The publication of the report undoubtedly assisted in bringing about a measure of reconciliation in Chile.

Before Pinochet handed power to a civilian government, he appointed himself a senator for life and, in that way, benefited from an effective amnesty in respect to all the crimes that were perpetrated by his regime.<sup>89</sup> In October 1999 Pinochet was arrested in London where he was undergoing medical treatment.<sup>90</sup> That arrest was sought by a Spanish judge who was investigating the torture of Spanish nationals by the Pinochet regime.<sup>91</sup> Because of his deteriorating health, the U.K. government decided not to send Pinochet to Spain and he returned home.<sup>92</sup> The response in Chile was a resurgence of calls for justice.<sup>93</sup> They resulted in the removal by the Chilean Parliament of Pinochet's immunity.<sup>94</sup> He then faced charges for human rights abuses including murder and torture.<sup>95</sup> However, he died at the end of 2006 before appearing in court to face those charges.<sup>96</sup> The calls for justice so many years after the crimes were perpetrated illustrates that the restrictions placed upon the Rettig Commission met some, but certainly not all, of the

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87. *Id.* at 16; *Truth Commission: Chile* 90, *supra* note 81.

88. AMSTUTZ, *supra* note 86, at 151–52.

89. See *Pinochet in Chile: Guaranteed Impunity*, HUM. RTS. WATCH, <https://www.hrw.org/legacy/campaigns/chile98/chile-justice-anly.htm> (last visited May 23, 2019).

90. David Connett et al., *Pinochet Arrested in London*, GUARDIAN (Oct. 17, 1998, 8:29 PM), <https://www.theguardian.com/world/1998/oct/18/pinochet.chile>.

91. See *id.*

92. See *Pinochet Set Free*, BBC (Mar. 2, 2000, 8:38 AM), [http://news.bbc.co.uk/2/hi/uk\\_news/663170.stm](http://news.bbc.co.uk/2/hi/uk_news/663170.stm).

93. See *Thousands March Against Pinochet*, BBC (Mar. 4, 2000, 2:41 PM), <http://news.bbc.co.uk/2/hi/americas/665342.stm>.

94. *Court Strips Pinochet of Immunity*, BBC, <http://news.bbc.co.uk/2/hi/americas/4246780.stm> (last updated Sept. 14, 2005, 1:49 PM).

95. *Pinochet Held on Murder and Torture Charges*, GUARDIAN (Oct. 30, 2006, 12:29 AM), <https://www.theguardian.com/world/2006/oct/30/chile.pinochet>.

96. For a useful brief history of the rule of General Pinochet, see Jonathan Kandell, *Augusto Pinochet, Dictator Who Ruled by Terror in Chile, Dies at 91*, N.Y. TIMES (Dec. 11, 2006), [http://www.nytimes.com/2006/12/11/world/americas/11pinochet.html?\\_r=0](http://www.nytimes.com/2006/12/11/world/americas/11pinochet.html?_r=0).

claims of the victims for justice and acknowledgment. During 1993, former president Aylwin visited Nelson Mandela and impressed him with his account of the work of the Rettig Commission.

After Nelson Mandela became South Africa's first democratically elected head of state, his government decided to set up the TRC.<sup>97</sup> With what was probably excessive caution, they waited until the Apartheid police and army leaders had been replaced with officers who were loyal to the new government. The strongest support for the TRC came from the many millions of victims of the apartheid system.

The TRC was established by the Promotion of National Unity and Reconciliation Act, No. 34 of 1995.<sup>98</sup> It consisted of seventeen commissioners who were appointed by President Mandela after wide public consultation and public interviews.<sup>99</sup> The legislation made provision for the TRC to consist of three committees.<sup>100</sup> The first was the Human Rights Violations Committee.<sup>101</sup> It was to investigate gross human rights violations that took place between 1960 and 1994.<sup>102</sup> This was to be achieved by inviting the victims of those abuses to provide evidence to the Commission—both oral and written.<sup>103</sup> When victims were identified, they were to be referred to the second committee, the Reparation and Rehabilitation Committee.<sup>104</sup> That committee was to provide support for victims and formulate policy proposals and recommendations on the rehabilitation of survivors, their families, and the affected

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97. See *Truth Commission: South Africa*, U.S. INST. PEACE, <https://www.usip.org/publications/1995/12/truth-commission-south-africa> (last visited May 23, 2019).

98. Promotion of National Unity and Reconciliation Act 34 of 1995 §§ 2–11 (S. Afr.).

99. *Id.* § 7(1), (2); Joanna R. Quinn & Mark Freeman, *Lessons Learned: Practical Lessons Gleaned from Inside the Truth Commissions of Guatemala and South Africa*, 25 HUM. RTS. Q. 1117, 1121 (2003).

100. Promotion of National Unity and Reconciliation Act 34 of 1995 § 3(3)(a)–(c) (establishing the Committee on Human Rights Violations, the Committee on Amnesty, and the Committee on Reparation and Rehabilitation); Desmond Tutu, *Truth and Reconciliation Commission, South Africa*, ENCYCLOPEDIA BRITANNICA (Apr. 6, 2010), <https://www.britannica.com/topic/Truth-and-Reconciliation-Commission-South-Africa>.

101. *Id.* § 12.

102. *Id.* § 14(1)(a)(iv).

103. *Id.* §§ 4(a)–(b), 14(1)(a)(i)–(ii).

104. *Id.* § 15(1).

communities at large.<sup>105</sup> The third committee was the Amnesty Committee.<sup>106</sup> Its role was to ensure that applications for amnesty were made in accordance with the provisions of the legislation and to hear and rule on those applications.<sup>107</sup> The TRC was required to produce a final report which would include a detailed account of its work and recommendations on ways to prevent future violations of human rights.<sup>108</sup>

The Human Rights Violations Committee received over 22,000 statements from victims.<sup>109</sup> It held public hearings in which over 2000 of those victims testified on the egregious crimes committed during the Apartheid era.<sup>110</sup> These included murder, disappearances, and torture.<sup>111</sup> There were also those who testified on the human rights violations committed by the liberation organizations.<sup>112</sup> The Commission also received over 7000 amnesty applications.<sup>113</sup> More than 2500 amnesty hearings were held by the Amnesty Committee.<sup>114</sup> Approximately 1500 amnesty applications were granted.<sup>115</sup> To qualify for amnesty, the supporting evidence was required to contain full details of the crimes committed.<sup>116</sup> In addition, the crime for which amnesty was sought had to have been committed for a political motive.<sup>117</sup> The evidence heard by the Human Rights Violations and Amnesty Committees consisted of an outpouring of many thousands of serious violations committed during the years under investigation. The TRC established an efficient investi-

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105. *Id.* §§ 4(f), 25–27.

106. *Id.* § 16.

107. *Id.* §§ 19–21.

108. *Id.* § 3(1)(d).

109. Tutu, *supra* note 100.

110. AMNESTY INT'L & HUMAN RIGHTS WATCH, TRUTH AND JUSTICE: UNFINISHED BUSINESS IN SOUTH AFRICA 4 (2003), <https://www.hrw.org/legacy/background/africa/truthandjustice.pdf>.

111. Tutu, *supra* note 100.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. Promotion of National Unity and Reconciliation Act 34 of 1995 §§ 3(1)(b), 20(1) (S. Afr.).

117. *Id.* § 20(1)–(3).

gation department.<sup>118</sup> It built up an impressive database and the evidence of witnesses was verified, to the extent possible, before it was led in public.<sup>119</sup>

There were daily live radio broadcasts of the hearings of the Human Rights Violations Committee of the TRC and the proceedings were frequently shown on national television.<sup>120</sup> During the period of the TRC hearings, the weekly Sunday prime time television summary of the highlights of the week's proceedings was South Africa's most widely watched television program.<sup>121</sup>

In my opinion, the TRC was substantially successful. It provided all South Africans with a single and comprehensive history of the serious human rights violations that had been suffered by so many South Africans. Without that accounting, broadly speaking, there would have been two histories of the violations committed during the Apartheid era. The black majority knew what they had suffered and their history would have approximated the truth. White South Africans tended to believe the fabricated denials and justifications that had been put out by the Apartheid Government. It would have been more comfortable for them to accept that history rather than to admit to the violations that had been committed in their name and, ostensibly, for their benefit. That history would have survived the end of Apartheid. It also helped remove the moral justification for opposing substantial programs to undo some of the past deprivations—such as upgrading previously neglected black residential areas, upgrading schools in black areas and, importantly, providing water and electricity to some millions of people who had been denied them.

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118. *Id.* § 28.

119. See 1 TRUTH & RECONCILIATION COMM'N, TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 323–25 (1998), <http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf>.

120. Backer, *supra* note 70.

121. See GUNNAR THEISSEN, COMMON PAST, DIVIDED TRUTH: THE TRUTH AND RECONCILIATION COMMISSION IN SOUTH AFRICAN PUBLIC OPINION 7–12 (1999), <http://wiredspace.wits.ac.za/bitstream/handle/10539/8099/HWS-410.pdf?sequence=1&isAllowed=y>. For a full insider account of the establishment of the TRC, see generally ALEX BORAINÉ, A COUNTRY UNMASKED: INSIDE SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION (2000).



I have two major criticisms of the TRC. The first is that its mandate precluded it from examining what was demeaningly referred to as “petty apartheid.”<sup>122</sup> These were the daily human rights violations that every black South African suffered every day of their lives during the Apartheid era. The oppressive and racist laws dictated how they lived from the day they were born in segregated hospitals to the day they were buried in segregated cemeteries.<sup>123</sup> Those violations were not included in the “serious violations” that fell within the jurisdiction of the TRC. In my opinion, this is a matter for regret—it would have been appropriate for white South Africans, the major beneficiaries of a wholly unjust system, to be confronted with that evidence. They were not innocent bystanders.

The second criticism is the tardy and unsatisfactory manner in which the government responded to important recommendations made by the TRC. There were hardly any of the prosecutions of perpetrators that were recommended by the TRC. Even in cases where there was sufficient evidence to justify prosecution, the political will was wanting. Then, the amount of compensation paid to approximately 20,000 victims was considerably less than that recommended by the TRC.<sup>124</sup> And even then, it was paid some years after the TRC had completed its work.<sup>125</sup> I accept that there was a resource problem. Post-Apartheid South Africa had grossly insufficient resources to launch programs to bring meaningful relief to the majority of South Africans who had been deprived by

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122. See William Claiborne, ‘Petty Apartheid’ Cases Seen on Rise in S. Africa, WASH. POST (Mar. 3, 1987), [https://www.washingtonpost.com/archive/politics/1987/03/03/petty-apartheid-cases-seen-on-rise-in-s-africa/3b8337bf-a6cd-4b5c-acf3-68f48df18945/?utm\\_term](https://www.washingtonpost.com/archive/politics/1987/03/03/petty-apartheid-cases-seen-on-rise-in-s-africa/3b8337bf-a6cd-4b5c-acf3-68f48df18945/?utm_term).

123. See generally *id.* (explaining the various ways segregation laws under Apartheid impacted South African).

124. See Ginger Thompson, *South Africa to Pay \$3,900 to Each Family of Apartheid Victims*, N.Y. TIMES (Apr. 16, 2003), <https://www.nytimes.com/2003/04/16/world/south-africa-to-pay-3900-to-each-family-of-apartheid-victims.html> (“The reparations payments [totaling \$85 million] fall far short of the \$360 million requested by the commission.”).

125. See Adam Yates, *Justice Delayed: The TRC Recommendations 20 Years Later*, DAILY MAVERICK (Sept. 5, 2018), <https://www.dailymaverick.co.za/article/2018-09-05-justice-delayed-the-trc-recommendations-20-years-later/>.

Apartheid of so many fundamental rights and privileges.<sup>126</sup> That did not justify the tardy payment of the reparations which had been promised to the victims.

Notwithstanding these criticisms, the TRC played a positive role in helping bring about reconciliation in a bitterly divided nation. That South Africa remains a deeply divided society is much to the discredit of post-Apartheid governments and especially those that succeeded that of Nelson Mandela. The inequalities are drastic, with white South Africans still holding the substantial share of the wealth.<sup>127</sup> Land claims were not sufficiently or efficiently handled and the consequence is the present unpleasant debate on a policy of expropriation of land without compensation.<sup>128</sup> President Ramaphosa has explained that the government's policy is that land will not be taken by the government without compensation, unless it is derelict or had been obtained dishonestly.<sup>129</sup> The Constitution presently only allows expropriation of property for a public purpose and in return for "just and equitable compensation."<sup>130</sup> The legis-

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126. See generally Neva Seidman Makgetla, *The Post-Apartheid Economy*, 100 REV. AFR. POL. ECON. 263 (2004) (examining post-Apartheid South Africa and how its economy struggled to recover).

127. Mohammad Amir Anwar, *White People in South Africa Still Hold the Lion's Share of All Forms of Capital*, CONVERSATION (Apr. 24, 2017, 12:00 PM), <https://theconversation.com/white-people-in-south-africa-still-hold-the-lions-share-of-all-forms-of-capital-75510>; see also Jason Beaubien, *The Country with the World's Worst Inequality Is ...*, NPR (Apr. 2, 2018, 5:49 PM), <https://www.npr.org/sections/goatsandsoda/2018/04/02/598864666/the-country-with-the-worlds-worst-inequality-is> (reporting that South Africa ranks first in the world for economic inequality, with 1% of the population controlling 70.9% of the wealth, and the bottom 60% of the population controlling 7%).

128. See Witney Schneidman & Landry Signé, *Land Redistribution in South Africa, Trump's Tweet, and US-Africa Policy*, BROOKINGS: AFR. FOCUS (Aug. 27, 2018), <https://www.brookings.edu/blog/africa-in-focus/2018/08/27/land-redistribution-in-south-africa-trumps-tweet-and-us-africa-policy/>.

129. See *id.*; see also *Land Reform in South Africa Is Crucial for Inclusive Growth*, FIN. TIMES (Aug. 23, 2018), <https://www.ft.com/content/c81543d8-a61b-11e8-926a-7342fe5e173f> (listing the suggestions that have been made as to when expropriation without compensation may be appropriate, including "unused land, derelict buildings, purely speculative land holdings, or circumstances where occupiers have strong historical rights and title holders do not occupy or use their land, such as labour tenancy, informal settlements and abandoned inner-city buildings").

130. Amil Umraw, *This Is What the Constitution Says About Land*, HUFFPOST (Feb. 28, 2018, 5:43 AM), [https://www.huffingtonpost.co.za/2018/02/28/this-is-what-the-constitution-says-about-land\\_a\\_23372955/](https://www.huffingtonpost.co.za/2018/02/28/this-is-what-the-constitution-says-about-land_a_23372955/).

lature is contemplating an amendment that will describe more fully the criteria for the payment of compensation.<sup>131</sup>

The crucial demographic feature of South Africa's transition is often ignored. The vast majority of its people had been oppressed for over 300 years.<sup>132</sup> The new democratic government, largely representing that majority, can determine the pace of change. Many in the white minority had a social conscience and feelings of remorse that were inspired by the evidence heard by the TRC.

South Africa's remarkable transition from Apartheid to democracy and the proceedings of the TRC garnered much international publicity and interest. Other countries were influenced by that experience to follow the South African example. However, it soon emerged that the South African model was not capable of replication in other countries where the context was not dissimilar. South Africa enjoyed the political freedom to have a transparent truth commission. Its economy was able to pay for what were expensive proceedings. It also had the charismatic leadership of Archbishop Desmond Tutu who was revered by a wide spectrum of South African society whether black or white.

The list of countries that have implemented, or are considering, some form of transitional justice, in the aftermath of massive human rights violations, is growing apace. I might mention East Timor,<sup>133</sup> Uganda,<sup>134</sup> Sierra Leone,<sup>135</sup> Colombia,<sup>136</sup>

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131. Schneidman & Signé, *supra* note 128.

132. See *History of Slavery and Early Colonisation in South Africa*, SOUTH AFR. HIST. ONLINE, <https://www.sahistory.org.za/article/history-slavery-and-early-colonisation-south-africa> (last visited May 23, 2019).

133. Taina Järvinen, *Human Rights and Post-Conflict Transitional Justice in East Timor* 5–6 (The Finnish Inst. of Int'l Affairs, Working Paper No. 47, 2004), [https://www.files.ethz.ch/isn/19246/WP47\\_2.pdf](https://www.files.ethz.ch/isn/19246/WP47_2.pdf).

134. Jessica Chirichetti, *Transitional Justice and Its Role in Development in Post-Conflict Northern Uganda* (Spring 2013) (unpublished independent study project), [https://digitalcollections.sit.edu/cgi/viewcontent.cgi?article=2547&context=isp\\_collection](https://digitalcollections.sit.edu/cgi/viewcontent.cgi?article=2547&context=isp_collection).

135. Graeme Young, *Transitional Justice in Sierra Leone: A Critical Analysis*, 1 UNITED NATIONS UNIV. PEACE & PROGRESS 3, 3 (2013), [http://postgraduate.ias.unu.edu/upp/wp-content/uploads/2013/03/upp\\_issue1-YOUNG.pdf](http://postgraduate.ias.unu.edu/upp/wp-content/uploads/2013/03/upp_issue1-YOUNG.pdf).

136. Lisa J. Laplante & Kimberly Theidon, *Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz*, 28 MICH. J. INT'L L. 49, 50 (2006).

Nepal,<sup>137</sup> Liberia,<sup>138</sup> Morocco,<sup>139</sup> Tunisia,<sup>140</sup> the Central African Republic,<sup>141</sup> and most recently, The Gambia.<sup>142</sup> Each has its own pathology and the appropriate design of a mechanism of transitional justice is deeply contextual. In most of these countries, there is an ongoing debate as to whether a prosecutorial process or truth commission should be preferred.

I have earlier referred to my disappointment that there was no truth commission established anywhere in the former Yugoslavia. The religious divides in Bosnia and Herzegovina and the decades of violence between those groups called for a truth commission. There was substantial support for it.<sup>143</sup> A popular non-political figure had been identified as a suitable chair of a commission. However, my successor as Chief Prosecutor of the U.N. International Criminal Tribunal for the former Yugoslavia (ICTY), Louise Arbour of Canada, was strongly opposed to a truth commission being established. She viewed it as antithetical to the work of the investigations of the ICTY. Equally strongly, I disagreed. There was no reason not to give the investigations of the ICTY precedence over the work of a truth commission. The two could have complemented each other. In any event, the investigations of the ICTY related only

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137. Hari Phuyal, *The Struggle for Transitional Justice*, NEPALI TIMES (Apr. 6, 2018), <https://www.nepalitimes.com/here-now/the-struggle-for-transitional-justice/>.

138. THOMAS JAYE, INT'L CTR. FOR TRANSITIONAL JUSTICE, TRANSITIONAL JUSTICE AND DDR: THE CASE OF LIBERIA 4 (2009), <https://www.ictj.org/sites/default/files/ICTJ-DDR-Liberia-CaseStudy-2009-English.pdf>.

139. HUMAN RIGHTS WATCH, MOROCCO'S TRUTH COMMISSION: HONORING PAST VICTIMS DURING AN UNCERTAIN PRESENT 2 (2005), <https://www.hrw.org/sites/default/files/reports/morocco1105wcover.pdf>.

140. Noha Aboueldahab, *Taking Stock: Tunisia's Transitional Justice*, 2017 AFR. Y.B. ON INT'L HUMANITARIAN L. 98, 98.

141. *Conflict Mediation and Support to the Transitional Justice Programme in Central African Republic*, CTR. FOR HUMANITARIAN DIALOGUE, <https://www.hdcentre.org/activities/conflict-mediation-and-support-transitional-justice-central-african-republic/> (last visited May 23, 2019).

142. SAIT MATTY JAW, AFROBAROMETER, GAMBIA'S EXPECT TRUTH, RECONCILIATION AND REPARATIONS COMMISSION TO HEAL THE NATION BUT WANT HUMAN-RIGHTS VIOLATORS PROSECUTED 1 (2018), [http://afrobarometer.org/sites/default/files/publications/Dispatches/ab\\_r7\\_dispatchno249\\_gambians\\_want\\_national\\_healing\\_with\\_justice.pdf](http://afrobarometer.org/sites/default/files/publications/Dispatches/ab_r7_dispatchno249_gambians_want_national_healing_with_justice.pdf).

143. Nerma Jelacic & Nidzara Ahmetasevic, *Truth Commission Divides Bosnia*, BALKANINSIGHT (Sept. 18, 2007), <http://www.balkaninsight.com/en/article/truth-commission-divides-bosnia>.

to the most serious war crimes. Its investigations would not remotely have been concerned with the many thousands of Bosnians, whether Serb, Croatian, or Bosnian, who had suffered persecution and human rights abuses because of their religious affiliation. The United Nations, which was in control of Bosnia and Herzegovina, was not prepared to act contrary to the wishes of its Chief Prosecutor. In my view, proceedings of a truth commission not only in Bosnia and Herzegovina, but also in Croatia and Serbia, would likely have brought some degree of reconciliation to a part of the world where ethnic and religious divisions and tensions still persist.<sup>144</sup>

It must be recognized that justice mechanisms can sometimes hinder the work of truth commissions. A recent illustration is provided by Kenya. In 2008, Kenya established the Truth, Justice and Reconciliation Commission (TJRC) with the mandate of investigating the violence that followed the national elections in 2007.<sup>145</sup> Over 1200 people lost their lives and over 700,000 were displaced in the violence.<sup>146</sup> The Commission received over 40,000 statements from victims of the violence, and it held numerous public hearings.<sup>147</sup> The TJRC issued a voluminous report in which it held that the causes of the political violence were not solely related to the disputed election.<sup>148</sup> It had its origin in economic marginalization and land acquisition in the period after independence in 1963.<sup>149</sup> As

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144. See HUMAN RIGHTS WATCH, WORLD REPORT 2019: EVENTS OF 2018, at 85–89, 505–07 (2019), [https://www.hrw.org/sites/default/files/world\\_report\\_download/hrw\\_world\\_report\\_2019.pdf](https://www.hrw.org/sites/default/files/world_report_download/hrw_world_report_2019.pdf).

145. See The Truth, Justice and Reconciliation Commission Act (2012) Cap. 6 §§ 3–8 (Kenya), [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TruthJusticeandReconciliationCommissionAct\\_.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TruthJusticeandReconciliationCommissionAct_.pdf).

146. James Dunaway Long VI, *Voting, Fraud, and Violence: Political Accountability in African Elections* 4 (2012) (unpublished Ph.D. dissertation, University of California, San Diego), <https://escholarship.org/content/qt2bs339cm/qt2bs339cm.pdf>.

147. GABRIELLE LYNCH, *PERFORMANCES OF INJUSTICE: THE POLITICS OF TRUTH, JUSTICE AND RECONCILIATION IN KENYA* 105 (2018).

148. See generally 4 TRUTH, JUSTICE AND RECONCILIATION COMMISSION OF KENYA, REPORT OF THE TRUTH, JUSTICE AND RECONCILIATION COMMISSION (2013) [hereinafter TJRC Report Volume 4] (detailing the Commission's findings that Kenyans faced egregious human rights violations in various aspects of life, including illegal land acquisition, looting of property, arson, and "economic crimes and grand corruption").

149. LYNCH, *supra* note 147, at 101.

Professor Gabrielle Lynch points out in her recent book, the TJRC suffered from a credibility problem relating to its chairperson.<sup>150</sup> Its work was not followed by a wide public audience, and it was overshadowed by the ICC,<sup>151</sup> which charged four Kenyans with crimes against humanity relating to the same post-election violence.<sup>152</sup> Two of four charged were leading politicians, Uhuru Kenyatta and William Ruto, who soon after became respectively the President and Deputy President of Kenya.<sup>153</sup>

The report of the TJRC implicated senior officials in the present and preceding governments in the perpetration of serious human rights violations.<sup>154</sup> It recommended that the prosecuting authorities should investigate charges against those most culpable.<sup>155</sup> However, no mechanism recommended by the TJRC to implement its recommendations has been activated and there is little, if any, hope that any of them will ever be implemented. The political will to do so is absent. Indeed, its report has yet to be tabled and discussed by the Kenyan Parliament.<sup>156</sup>

Then, there is the reality that a transitional criminal prosecution mechanism is very constrained in its reach. During a period of more than three decades, the ICTY prosecuted 161 individuals for war crimes committed in the former Yugoslavia after 1991.<sup>157</sup> By way of comparison, the South African TRC, during a period of two years, was able to consider many thou-

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150. *Id.* at 101, 143.

151. *Id.* at 143–44.

152. *Id.* at 25.

153. *Id.*

154. CHRISTOPHER GITARI NDUNGÚ, LESSONS TO BE LEARNED: AN ANALYSIS OF THE FINAL REPORT OF KENYA'S TRUTH, JUSTICE AND RECONCILIATION COMMISSION 4 (May 2014), <https://www.ictj.org/sites/default/files/ICTJ-Briefing-Kenya-TJRC-2014.pdf>.

155. See TJRC Report Volume 4, *supra* note 148, at 134–60.

156. See Parliament of Kenya, Senate, Implementation of the TJRC Report, Parliamentary Debates, at 1–2 (May 16, 2019), <http://www.parliament.go.ke/sites/default/files/2019-05/Thursday%2C%2016th%20May%2C%202019.pdf> (petitioning the Senate to “consider[] and adopt[]” the TJRC Report).

157. *Key Figures of the Cases*, UNITED NATIONS INT’L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA, <http://www.icty.org/en/cases/key-figures-cases> (last updated April 2019).

sands of cases of serious human rights violations.<sup>158</sup> Over 21,000 victims provided written evidence of their victimization.<sup>159</sup> Serious war crimes should, without exception, be prosecuted and the responsible leaders should be brought to trial and, if convicted, suitably punished.

Another contextual feature that must today be taken into account is the current state of customary international law. In the past two decades, the obligation to prosecute genocide, torture, and crimes against humanity has become recognized as a peremptory norm of customary international law.<sup>160</sup> Those norms are binding upon all States whether they have agreed to be bound by them or not.<sup>161</sup> These norms of international criminal law become particularly relevant with regard to pursuing prosecutions and to the grant of amnesties. South Africa was fortunate to get away with the amnesties it offered as part of the truth and reconciliation process. It was in the middle of the 1990s. The international acceptability of the amnesties granted by the TRC at that time would likely be very different today.

I have considered the context of transitional justice mechanisms in a handful of countries. The relevance of context with regard to these countries and others is crucial to the success of such a mechanism. Much will depend on the history and other context elements to which I have referred.

In concluding, I would stress that perhaps the most important element which will determine the success of any transitional justice mechanism is the attention devoted to the interests of the victims. Those interests should be placed in the forefront of any such endeavor. It is the victims who must be recognized as the primary beneficiaries of transitional justice. To that element must be added the political will of the government to fund and

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158. See Tutu, *supra* note 100.

159. *Id.*

160. See Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CALIF. L. REV. 449, 461 & n.56 (1990).

161. See *id.*; William E. Conklin, *The Peremptory Norms of the International Community*, 23 EUR. J. INT'L L. 837, 837 (2012).

support the mechanism and, at the end of its work, to implement its recommendations. Any transitional justice mechanism that neglects these elements will fail to garner public support and be doomed to fail to provide any solace to the many victims of war and oppression.