Nothing but the Truth? Transitional Regimes Confront the Past

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NOTHING BUT THE TRUTH? TRANSITIONAL REGIMES CONFRONT THE PAST


Reviewed by Joan Fitzpatrick*

Nowhere is the divide between law and politics more painfully apparent to human rights scholars than when newly democratic societies confront gross human rights violations committed by previous authoritarian regimes. The legal rules can be stated simply — crimes against humanity should be prosecuted and every victim of a fundamental human rights violation is entitled to an adequate remedy.1 In the transition following the total defeat of a rights-abusing regime, criminal punishment may be swift and extensive. Where human rights violations are aberrant abuses of power within a society otherwise committed to the rule of law, domestic remedies will typically be available to the victims.

Neither of these scenarios applies to the wide array of states profiled by Naomi Roht-Arriaza and her co-authors in Impunity and Human Rights in International Law and Practice. The challenge of optimizing redress for past horrors is not confined to the Southern Cone of Latin America. It is simultaneously being confronted in Europe, Asia and Africa, each state facing unique risks and constraints. Wrestling with issues of impunity can be the most dangerous and most defining task for a transitional regime. Vengeance against those who still hold substantial power can imperil a fledgling democracy. Willful amnesia, on the other hand, stymies the development of civic virtues indispensable to democracy and perpetuates the culture of corruption and privilege that facilitated the past violations.

Recognizing that “the dilemma seems insoluble,”2 Impunity and Human Rights in International Law and Practice nevertheless provides

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2. IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 300 (Naomi Roht-Arriaza ed., 1995) [hereinafter IMPUNITY]. All citations simply to IMPUNITY will refer to those chapters of the book written by Prof. Roht-Arriaza. Chapters written by other contributors will be cited using the contributors’ names.
a thoughtful if inconclusive framework for approaching transitional justice. The book's general chapters, authored by Roht-Arriaza, draw upon both penological theory and international legal doctrine. The major portion of the book, however, is devoted to detailed case studies illustrating the successes and failures of recent transitional regimes. Roht-Arriaza's admirable effort to define a consistent legal framework for optimizing justice during democratic transitions is partially undermined by her co-authors' dissection of the practice of transitional regimes. The stories are of pragmatism and compromise, some even of dismal failure. Few ironclad rules can ultimately be deduced.

While the concept of "impunity" generally suggests exemption from criminal punishment, this study examines five forms of potential redress. In addition to prosecution, these include investigation (including truth commissions), purges, commemoration and compensation. The least traditional remedy — institutionalized "truth-telling" — receives much attention due to its rather dubious prominence in recent transitions.

The central policy prescription offered by Roht-Arriaza is that, whatever form it takes, redress must be "victim-centered." She finds unhelpful the traditional utilitarian and retributivist models of punishment, favoring either a "denunciation" model, stressing "symbolic and norm-creating qualities of punishment for the larger society," or "goal-oriented retributivism" whose focus is upon the victim. Roht-Arriaza notes that a victim-centered view of punishment blurs the distinction between criminal and civil redress, a distinction not clearly made in all legal systems and eroding even in Anglo-American practice, where recent trends favor victim impact statements and court-ordered restitution.

Drawing upon psychological studies, Roht-Arriaza describes the isolation and powerlessness felt by victims of state-sponsored terror, especially those whose victimization was random. Creating a sense of control and providing systematic explanations may help heal this psychological trauma. Victims deserve to "tell their story fully before a decision maker who is perceived as neutral, honest, and attentive."
Zalaquett\textsuperscript{9} and Thomas Buergenthal\textsuperscript{10} have written movingly of the experience, as truth commission members, of taking the testimony of traumatized but dignified survivors. A "victim-centered" approach may place more emphasis upon official monuments to the victims than on criminal or civil sanctions on the victimizers.\textsuperscript{11}

Whether international law imposes a mandatory duty to punish gross human rights violations remains a difficult question. Roht-Arriaza and Diane Orentlicher\textsuperscript{12} have been leading proponents of the view that international law mandates accountability for gross human rights violations and crimes against humanity. After the thorough canvassing of state practice in this volume, however, it seems that the obligation to investigate and compensate can be stated only at a very high level of generality. As Roht-Arriaza vaguely notes:

This [statement of the illegality of the Uruguayan amnesty] does not mean that a society may never, under any circumstances, choose not to investigate or prosecute. But such choices are constrained, both by international obligations of the state itself and by the rights of individual victims.\textsuperscript{13}

Absolute obligations to cease gross violations, and to provide necessary remedies to free victims from on-going violations, certainly exist, but obligations to prosecute or to provide specific reparations after the repression has ceased are more difficult to locate.

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The families had refused to allow the previous government authorities to see them cry as they searched for their loved ones. But now they were being received with respect and offered a seat and a cup of coffee. The Chilean flag was on the desk as befits an official commission. They often broke down, because now they could allow themselves that measure of relief. . . .

The relatives of the victims showed great generosity. . . . Most of them stressed that in the end, what really mattered to them was that the truth be revealed, that the memory of their loved ones not be denigrated or forgotten, and that such things never happen again.


11. For example, Kathleen Smith provides an interesting description of the work of Russia’s All-Union Historical-Enlightenment Society "Memorial" and notes the importance of capturing control over the writing of history in the transition away from communism. Kathleen E. Smith, \textit{Destalinization in the Former Soviet Union, in IMPUNITY, supra note 2, at 113, 118–23.

12. See supra note 1.

13. \textit{IMPUNITY, supra note 2, at 150 (discussing the failed referendum to repeal the Uruguayan amnesty law).
A growing number of human rights treaties do adopt the principle *aut dedere aut judicare.* The Committee Against Torture stated in dictum that Argentina's "due obedience" and "punto final" laws breached the spirit and the purpose of the Convention Against Torture.\(^4\) In 1992, the Inter-American Commission on Human Rights ruled that amnesty laws immunizing military offenders in El Salvador, Uruguay and Argentina violated the American Convention on Human Rights.\(^5\) The Committee on the Elimination of Racial Discrimination found the Netherlands in breach of its obligation to punish advocacy of hatred due to its failure to prosecute acts of violence that drove an immigrant family from public housing.\(^6\) The landmark *Velasquez Rodriguez* opinion by the Inter-American Court of Human Rights identified an affirmative obligation to "carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, impose the appropriate punishment and ensure the victim adequate compensation."\(^7\)

Yet, human rights treaties also acknowledge the place of clemency in the criminal justice system.\(^8\) Roht-Arriaza draws a valid distinction between individual grants of clemency or pardon, following a finding of guilt, and blanket amnesties that extinguish the offense entirely.\(^9\) The 1992 Declaration on the Protection of All Persons from Enforced Disappearances\(^10\) supports this distinction, forbidding amnesties but not pardons, where the latter do not denigrate the seriousness of the violation.

"Amnesty," meaning the release of political prisoners held by a dictatorial regime, is an indispensable prerequisite for transition to

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20. *Impunity,* supra note 2, at 22.

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democracy.22 Such amnesties possess a powerful symbolic and emotive value,23 conveying a sense of hope for the future and the triumph of democratic values over the old despotism.

As noted in Kathleen Smith's study of destalinization in the former Soviet Union,24 the release of political prisoners is the sine qua non of liberalization. Yet, magnanimous gestures of forgiveness, if extended to the agents of state repression, perpetuate the culture of impunity. Such "bargain[s] with the devil"25 are frequent, and this study can offer no conclusive answers as to when they are justified.

Roht-Arriaza suggests that plea bargaining may serve as a useful tool in the truth-finding process and that prosecutorial discretion may be legitimate where it is sufficiently transparent.26 She acknowledges that even in the Velasquez Rodriguez case the Inter-American Court of Human Rights refused to order the state to prosecute, limiting itself to an award of damages from the state to the survivors of the disappeared.27 If human rights law does not mandate criminal prosecution of all offenses, then punishment must be weighed against other legitimate objectives. Striking the proper balance is morally and politically difficult, and even clear-minded thinkers like Roht-Arriaza cannot provide an unwavering compass for transitional regimes.

The European case studies in particular illustrate the dangers of relying upon selective prosecution to redress criminal acts of prior regimes and the due process pitfalls of resorting to lesser remedies such as deprivation of office or pensions. Roht-Arriaza briefly surveys the post-World War II accounting, including the "ineffectual and easily corrupted"28 West German boards charged with purging those accused of complicity in Nazi policies. With respect to French action against Vichy collaborators, she concludes that punishing thought as well as acts creates a counterproductive sense of victimization in those sanctioned,

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22. Hence, the name Amnesty International signifies the imperative to cease on-going violations of the rights of prisoners of conscience.

23. For example, the concluding scenes of Ludwig van Beethoven's opera FIDELIO movingly depict the release of political prisoners by government minister Don Fernando, seeking to redress persecution by the repressive prison governor. The story of FIDELIO was strongly influenced by the historic liberation of the Bastille in 1789.

24. Smith, supra note 11, at 115–18. Describing how seven to eight million political prisoners were eventually released after review by three-person commissions, Smith observes "[t]he time and form involved in the reversal of a sentence often paralleled the manner of its imposition — ten minutes in front of a commission with extralegal powers." Id. at 115.

25. IMPUNITY, supra note 2, at 300.

26. Id. at 287, 301.

27. Id. at 32.

28. Id. at 74–75.
and that redress is especially difficult where large portions of the population share some degree of complicity.\textsuperscript{29}

More recent experiences in Western Europe illustrate how unique factors shape the form of redress. In Greece, for example, a tradition of civilian control over the military, the existence of a functioning civil court system, the weakening of the military as a result of the failed Cyprus adventure, and the ability to isolate a small core of renegade officers all contributed to a relatively successful experience of transitional justice following the restoration of democracy in 1974.\textsuperscript{30} In contrast, no serious effort was made to confront the past in Spain, where the most egregious abuses had occurred decades before in the context of a hard-fought civil war and where the transition to democracy was negotiated by a king who symbolized "reconciliation and moderation."\textsuperscript{31}

Kathleen Smith's\textsuperscript{32} profile of Czechoslovakia's "velvet revolution" emphasizes how the pervasive influence of the Communist Party in the prior life of the nation created special difficulties for the transitional regime:

\begin{quote}
[J]ust as it is problematic to identify who is responsible for the many "evils of communism," it is equally difficult to decide who should be considered a victim . . . .\textsuperscript{33}
\end{quote}

The fact that many injustices committed under communism were technically lawful (in contrast to the gross violations of physical integrity committed by officials of the Latin American autocracies) shifted attention to non-penal sanctions such as purges of bureaucrats and loss of pensions.

Transitional Czechoslovakia enjoyed many advantages in having a well-known cadre of dissidents, many connected with the Charter 77 movement, possessing recognized moral authority and capable of assuming power free of taint. Even so, playwright Václav Havel, elected president of newly democratic Czechoslovakia, discovered that his early hope for a clean break with the past\textsuperscript{34} was impossible to realize. The "lustration"\textsuperscript{35} of former secret police operatives was particularly "partial

\textsuperscript{29} Id. at 76-77.
\textsuperscript{30} Id. at 78-80.
\textsuperscript{31} Id. at 80.
\textsuperscript{32} Kathleen E. Smith, Decommunization after the "Velvet Revolutions" in East Central Europe, in IMPUNITY, supra note 2, at 82-98.
\textsuperscript{33} Id. at 87.
\textsuperscript{34} Id. at 88.
\textsuperscript{35} Id. at 91.
and painful.⁴⁶ Providing adequate due process during the vetting procedure and the "remedy" of depriving those in complicity with the old regime of the right to participate in political life have proven especially vexing, leading to a wearying and socially disruptive prolongation of the purge. In Poland, a serious misstep was taken in June 1992 when secret police files were examined in order to determine whether parliamentary deputies had been compromised by prior association with the security forces, and no distinction was drawn in the ensuing disclosure between those who were "objects of surveillance" and those who had been agents.⁴⁷ "Lustration" in Czechoslovakia was sometimes taken to absurd lengths, extending even to school cooks.⁴⁸

The relatively mild penalty of purging bureaucrats carries risks, as the economic fragility of new democracies creates strong incentives to avoid transferring management tasks to "incompetent amateurs."⁴⁹ Cleansing the judiciary likewise poses a serious challenge, not only in Europe but in Latin America and Africa as well, as the sacrifice of experienced specialists may be too costly, or not sufficiently justified by the degree of their complicity in past injustice. As Owen Fiss observes,⁵⁰ the task is to optimize, not to maximize, the independence of the judiciary, so that judicial independence promotes the protection of fundamental rights without creating a dangerous, undemocratic power center. This delicate task is neither easily nor quickly accomplished, especially in states lacking a democratic tradition.

Where transitions are incomplete, as during the periods of liberalization in the former Soviet Union and in the Romanian "revolution" of December 1989, measures of redress may be not only inadequate but perverse. For example, Nikita Khrushchev falsely portrayed the Communist Party itself as Stalin's greatest victim.⁵¹ The National Salvation Front which assumed power in Romania was dominated by apparatchiks of the old regime whose primary act of "redress" was the summary trial and execution of Nicolae and Elena Ceaucescu,⁵² itself a serious breach of human rights. While other officials of the Ceaucescu

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36. Id.
37. Id. at 96.
38. Id. at 98.
39. Id. at 90.
41. Smith, supra note 11, at 122.
42. Edwin Rekosh, Romania: A Persistent Culture of Impunity, in Impunity, supra note 2, at 129, 130–32.
regime were later tried, the pattern was one of "[t]rumped-up charges" of genocide or fiscal crimes followed by "releases on contrived grounds," a pattern that deepened the despair and cynicism of the Romanian populace. In response to demonstrations by supporters of the "Timisoara Proclamation," calling for a purge and temporary ban from office of former communist activists and secret police agents, the National Salvation Front invoked the "Mineriad." This event typifies the "persistent culture of impunity" in Romania, as the new regime unleashed street violence by miners to disperse demonstrators. The violence extended, without investigation or punishment, to neighborhoods in Bucharest populated by the disfavored Roma minority.

Argentina, Chile and El Salvador merit substantial attention in a work such as this, and the case studies devoted to them address key issues. These include: (1) the tendency to focus upon truth-telling as the primary form of transitional reckoning; (2) the legality of amnesty laws, especially as applied to persons guilty of gross violations of physical integrity; (3) whether impunity is justifiable in order to preserve a fledgling democracy and how to assess this risk; and (4) the proper division of authority between national institutions and the international community in facilitating democratic transitions.

While truth commissions have operated for several decades, the publicity accorded the publication in 1993 of the report of the United Nations Commission on the Truth for El Salvador pushed the truth commission concept to the forefront in analyses of transitional justice. The sudden enthusiasm for truth commissions is puzzling, given that exposing gross human rights violations has been the stock in trade of international human rights organizations and the international press for some decades. The United Nations Commission on Human Rights and the Inter-American Commission on Human Rights employ a panoply of

43. Id. at 132.
44. Id.
45. Id. at 141.
46. Id. at 142.
47. Id. at 144.
48. Id. at 142.
49. While Irwin Stotzky makes some interesting observations concerning obstacles to democratization in a political culture marked by patron-client relations and "an oscillation between rule formalism and personal favoritism," his chapter on Haiti is severely handicapped by its having gone to press in the midst of the surprising chain of events in late 1994. Irwin P. Stotzky, Haiti: Searching for Alternatives, in IMPUNITY, supra note 2, at 185–97.
fact-finding devices premised on the idea that exposure of government wrongdoing deters repressive conduct. The U.N.'s burgeoning collection of "theme" mechanisms, such as the Working Group on Enforced and Involuntary Disappearances, have for over a decade sought the truth concerning the fate of those feared to be victims in order to provide closure and solace for family members.

What functions do truth commissions perform that distinguish them from a "rapporteur" or Amnesty International? In post-repressive societies, "the victimized populations are often clear about what abuses took place and who has carried them out." Repressive regimes typically walk a tightrope between the secrecy needed for plausible deniability and the visibility necessary to maintain a hold on power through terror. Juan Méndez suggests that when hard facts about what was suspected or feared become part of the "public cognitive scene," they acquire a "mysterious quality" that "begins to heal the wounds." It is not the truth, but official acknowledgment of the truth, that is perceived as the unique contribution of truth commissions.

Truth commissions are in many respects troubling innovations, however. The most wrenching issue they pose is whether, in providing "nothing but the truth," they offer an adequate substitute for punishment of the perpetrators. The motto of the Aylwin government during the Chilean transition was "truth, and justice to the extent possible." The report of Chile's Commission on Truth and Reconciliation identified 2,025 cases of fatal human rights violations committed by state agents, but named no perpetrators, failed to clarify the fate of most of the victims, and provided the courts only selected information it designated "new, useful and relevant to judicial investigations." A 1978 self-amnesty by the military remains a vexing legal obstacle to prosecution for the crimes examined by the Commission.

51. For example, a report titled "The Events Speak for Themselves," authored by Honduran Commissioner for the Protection of Human Rights Leo Valladares, drew primarily from press, court, and NGO and IGO reports, and identified 179 cases of disappearances. Valladares' approach was influenced by his prior experience as a member of the Inter-American Commission on Human Rights. IMPUNITY, supra note 2, at 154-55.
52. Hayner, supra note 50, at 607.
53. Id. (quoting Juan Méndez, Review of A Miracle, A Universe, by Lawrence Wechsler, 8 N.Y.L. SCH. J. HUM. RTS. 577, 583 (1991)).
54. IMPUNITY, supra note 2, at 283.
56. Id. at 172-73, 178.
57. Id. at 179-83.
In Argentina, a profound division of opinion about the past impeded transitional justice. President Raúl Alfonsín established the National Commission on Disappeared Persons (CONADEP) which, despite lacking the power to compel testimony, issued the ground-breaking report Nunca Más investigating over 10,000 cases of disappearances. Alfonsín also obtained judicial invalidation of a military self-amnesty and placed junta leaders on trial. The trials, unfortunately, were initially left within the jurisdiction of the military courts, the idea being "to allow the military to cleanse itself." Unlike the situation in Greece where the rogue elements in the military could be excised, the Argentine military continued to assert that the dirty war had been fully justifiable. As the prosecutions dragged on, an increasingly weary public witnessed a demoralizing series of military rebellions, the punto final law imposing a sixty-day time limit on victims' complaints, the "due obedience" law that effectively amnes-tied intermediate ranks, and eventual pardons of the few convicted. In the end, the process of transitional justice in Argentina only aggravated the deep flaws in its political culture.

Another difficulty with truth commissions is the poor definition of their scope of inquiry. The Chilean commission, for example, chose to examine only cases of fatal abuse, ignoring the systematic torture emblematic of the Pinochet regime. Unable to reach agreement during U.N.-brokered negotiations, the warring sides in El Salvador delegated to the Truth Commission the task of selecting the most "important" acts of violence to investigate. The Truth Commission used a variety of criteria — notoriety, severity, accessibility of information, and impact upon Salvadoran society.

Truth commissions generally operate under severe time restrictions, compounded by lack of official cooperation in producing vital information. Commentators agree that rapid completion of the work of truth-finding greatly enhances its impact. Roht-Arriaza suggests an outer limit

59. Id. at 161.
60. Id. at 161–62.
61. Id. at 162.
62. Id. at 165–68.
63. Mera, supra note 55, at 172.
64. Margaret Popkin, El Salvador: A Negotiated End to Impunity?, in IMPUNITY, supra note 2, at 198, 205–06.
65. Buergenthal, supra note 10, at 500, 505–06.
66. IMPUNITY, supra note 2, at 282; Hayner, supra note 50, at 640–41, 652–53. Orentlicher, supra note 1, at 438, emphasizes that prosecutions must also be prompt, as experience in states such as Argentina has revealed that "prosecutions of indefinite duration and scope are likely to destabilize."
of a year, "before the new government loses the widespread legitimacy it enjoys, before the political unity engendered by opposition to the old regime evaporates and apathy sets in, before the old guard can reorganize, and before the new government is overwhelmed by intractable economic and social problems."

Truth commissions are thus necessarily selective in the stories they report. Unfortunately, as a result their reports never record the "whole truth," leaving the stories of many victims untold.

Exactly whose acts are a proper subject of inquiry is highly contested. The Salvadoran Truth Commission was directed to record the depredations of the FMLN as well as those of security forces and death squads. Given the fact that the Salvadoran transition took the form of a peace agreement to settle a civil war in which humanitarian law constrained the behavior of the insurgents as well as state forces, this is understandable. When the Truth Commission found that only 5% of the "important" incidents reliably reported to it were linked to the FMLN, right-wing elements predictably accused it of political bias.

The Truth Commission also faced criticism for reticence in identifying the civilian financial backers of the death squads and for failing to link any incidents directly to U.S. agents.

The Chilean commission likewise extended the scope of its inquiries beyond human rights violations attributable to state actors. Jorge Mera harshly criticizes the "political considerations" that led to this unwise concept of impartiality. The effect was to mask the reality of "state terrorism" during the Pinochet regime, creating the impression that what had transpired was "merely a skirmish between rival criminal gangs."

A similar false moral equivalence, prompted by political motivations, infected the failed efforts of the Philippine Commission on Human Rights.

While official truth commissions are thus better limited to exposing violations of human rights by state actors, the efforts by the African National Congress to document the excesses of its agents in refugee

67. IMPUNITY, supra note 2, at 282.
68. Buergenthal, supra note 10, at 504, 526–32.
69. Popkin, supra note 64, at 206.
70. Id. at 211.
71. Buergenthal, supra note 10, at 532, explains that "the Commission did not find sufficient credible evidence — there were of course many rumors and allegations that were investigated — tying U.S. military or intelligence officers to any specific act of violence. If we had had that evidence, we would have made it public in the Report."
72. Mera, supra note 55, at 175.
73. Id.
camps in Zambia, Angola, Tanzania and Uganda are intriguing.\textsuperscript{75} Though partly motivated by a desire to stymie the de Klerk government’s proposed amnesty for state security forces\textsuperscript{76} and procedurally flawed,\textsuperscript{77} the ANC reports served as a prelude for a governmental Commission of Truth and Reconciliation established by the Mandela government.\textsuperscript{78} This Commission may recommend amnesty or indemnity for members of the security forces or political movements involved in political crimes, on condition of their disclosure of the details of their crime and its motivation.\textsuperscript{79} In essence a “massive plea-bargaining arrangement,”\textsuperscript{80} this truth commission may prove to be more effective than its predecessors in Chile and Argentina. While South Africa has been cited as an example of a transitional state where trade-offs between justice and democracy would be most acute,\textsuperscript{81} recent developments there are relatively encouraging.

One of the most disturbing aspects of these case studies on transitional justice is the extent to which redress is denied out of fear or prediction of damage to a fledgling democracy. As Jorge Mera notes, the extent of truth and justice that is “possible” can only accurately be assessed after redress is attempted; it is forever unknowable where the transitional government makes an “ex ante prejudgment” that measures of redress will be dangerous or counterproductive.\textsuperscript{82}

The responsibility of the international community for transitional justice also remains problematic. Cogent reasons existed to draw the membership of the United Nations Truth Commission for El Salvador from outside Salvadoran society, given the U.N.’s role in brokering the settlement and the polarization in El Salvador. Harsh reaction greeted the recommendations of the Ad Hoc Commission’s three Salvadoran members to cashier certain guilty officers.\textsuperscript{83}

\textsuperscript{75} See Lynn Berat, \textit{South Africa: Negotiating Change?}, in \textit{Impunity}, supra note 2, at 267, 274–75.
\textsuperscript{76} Id. at 272–74.
\textsuperscript{77} Richard Carver of Amnesty International described the procedures of the second ANC inquiry as “weird and ill-thought-out,” Hayner, \textit{supra} note 50, at 633.
\textsuperscript{78} Berat, \textit{supra} note 75, at 278.
\textsuperscript{79} Id.
\textsuperscript{80} Id. at 279.
\textsuperscript{81} Zalaquett, \textit{supra} note 9, at 1429.
\textsuperscript{82} Mera, \textit{supra} note 55, at 183–84.
\textsuperscript{83} While the Truth Commission’s members were non-Salvadoran, the Ad Hoc Committee was made up of prominent Salvadorans because “the military would not accept such a procedure if it were carried out by foreigners.” Popkin, \textit{supra} note 64, at 203. The Ad Hoc Committee’s delicate task was to identify those members of the military whose human rights violations justified their removal from office. Its recommendations were honored only under tremendous pressure from the U.N. and provoked threats of harm to its members. Id. at 203–04.
The verdict is still out on the question whether direct involvement by international organizations tends to enhance or to dilute transitional justice. Michael Vickery trenchantly describes how international politics and the peace-making role of the United Nations blocked retribution against the Khmer Rouge and actually gave it renewed influence despite unredressed crimes of staggering magnitude.\footnote{Michael Vickery & Naomi Roht-Arriaza, Human Rights in Cambodia, in IMPUNITY, supra note 2, at 243–51.} The International Tribunal to try war crimes committed in ex-Yugoslavia has yet to prove that its existence stems from a genuine impulse to overcome the impunity prevailing in the genocidal Bosnian war, rather than from cynical calculations of the optimal means to force a political settlement on the Bosnian Serbs.\footnote{See IMPUNITY, supra note 2, at 303–04. One intriguing innovation adopted by the International Tribunal (IT) is a process for public indictment of war criminals as to whom reliable evidence of guilt exists but whose presence at trial is unlikely to be secured. Id. at 301–02. Rule 61 of the IT’s Rules of Procedure adds a new wrinkle to the debate, previously focused on truth commissions, over naming names. Mera, supra note 55, at 177–78; Popkin, supra note 64, at 207–08.} The failed 1993 Governor’s Island Accord and recent policy by the United States, intervening under U.N. auspices, attempted to discourage President Aristide from taking vigorous action to neutralize the Haitian military.\footnote{See Stotzky, supra note 49, at 188–91; IMPUNITY, supra note 2, at 299; Larry Rohter, Carter Offers to Mediate for Haitians, N.Y. TIMES, Feb. 25, 1995, at A2 (“Since his return to power on Oct. 15, Mr. Aristide has repeatedly deflected suggestions from the Americans that he retain some sort of army, if only one limited in size and duties, and has instead largely dismantled the Haitian armed forces.”).} The United Nations Truth Commission for El Salvador refrained from advising criminal prosecution of the culprits named in its report, out of a deep skepticism concerning the Salvadoran judiciary’s competence and integrity.\footnote{Buergenthal, supra note 10, at 535–37.}

It is rare for a transitional government to attempt mass prosecutions of those guilty of inhuman acts during a preceding period of repression. Where such an attempt is made, the international human rights community may discourage prosecutions out of concern for the due process rights of the accused and the corrosive effect of unfair trials on the transitional regime. For example, the long-delayed efforts by the Special Prosecutor’s Office in Ethiopia to try thousands of participants in the “Red Terror” have been closely monitored by groups such as Human Rights Watch.\footnote{IMPUNITY, supra note 2, at 224–25.}

While Roht-Arriaza and her co-authors approach their subject with moral passion, there is surprisingly little reflection on the nature of
human evil and the optimal means to suppress it.89 Perhaps the emphasis upon "victim-centered" redress unduly shifts attention away from the perpetrators. As Irwin Stotzky points out, those committing crimes against humanity follow a moral compass that is incomprehensible to others, destroying "any possibility of grounding public moral responsibility in consensus because even moral disagreement is foreclosed by conceptual divergence."90 The failures of the transitional states profiled in Impunity and Human Rights in International Law and Practice thus may be traceable to more deep-seated problems than incompetence, indifference or excess pragmatism. Though this volume contains many useful insights gleaned from hard experience, international legal doctrine and institutions remain puny challengers to evil on a mass scale.

89. Irwin Stotzky does include a brief discussion of Immanuel Kant's concept of "radical evil" which cannot be understood by normal processes of moral assessment, and of Hannah Arendt's suggestion that "men are unable to forgive what they cannot punish and they are unable to punish what has turned out to be unforgivable." Stotzky, supra note 49, at 195–96.
90. Id. at 196.