

The Force of Law and Problem of Impunity

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'But this is a new world – we are trying to establish a global community based in law.'
Luis Moreno Ocampo (interview with CNN)

The storm that has broken out over ICC Prosecutor Luis Moreno Ocampo's decision to file genocide charges against Sudanese president Omar al-Bashir is intriguing for a number of reasons, not least because of what it says about the role of criminal trials in transitional justice.

This essay focuses on why non-judicial approaches to transitional justice are less effective than is often claimed and why prosecutions are an important way of dealing with past injustice. It is often overlooked that arguments in favour of reconciliation have become a useful way to defend amnesty and impunity. Part of the uproar over Ocampo's decision is based on a school of thought that has demonised criminal trials as a way of dealing with the past. There are of course other arguments against the ICC's decision, but what I want to focus on is the prejudice against criminal trials and the dangers of non-judicial approaches.

Non-judicial ways of facilitating political transitions have predominated in recent decades, truth commissions being the most prominent transitional mechanism. More than thirty such commissions have been established since 1990. They are largely non-confrontational and follow in the wake of amnesty for perpetrators. Their main purpose is usually to uncover the 'truth' about the past in a context where criminal trials will not be held.¹

Of these commissions the South African Truth and Reconciliation Commission (TRC), established nearly a year after the country's transition to democracy, has become the dominant global model.² This model manifested two primary features: the enormous emphasis on reconciliation; and the TRC's particular brand of restorative justice. Both of these were strategies to defend the TRC process against claims that, because of the amnesty provisions, it had completely abandoned the notion of justice. Amnesty for perpetrators who had committed acts of gross human rights violations (for example, torture, murder, kidnapping) was the founding reason for the TRC. The amnesty deal was not struck at the multi-party negotiations that decided on other aspects of the transition

¹ For an extensive background on truth commissions, see Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity – How Truth Commissions Around the World are Challenging the Past and Shaping the Future* (New York: Routledge, 2001)

² It should be noted that, according to Alex Boraine, who served as deputy chairperson of the TRC, the South Africa Commission was greatly influenced by those of Chile and Argentina.

but instead behind closed doors between the major political parties, the African National Congress and National Party, that stood to gain the most from an amnesty. Initially the amnesty deal was defended on pragmatic grounds (even by the country's Constitutional Court): it was necessary to ensure a peaceful transition to democracy, lest the apartheid security establishment revolt, and it was the best mechanism to uncover the truth about the past. Yet, what was initially a political compromise became gradually portrayed as a form of forgiveness, typical of the reconciliatory nature of the 'Rainbow Nation'.

Perpetrators had to apply for amnesty individually (which would give them immunity against criminal prosecutions and civil suits) and they had to meet certain requirements. This included making a full disclosure about the acts they had committed. On paper this seemed to add some balance to proceedings and would give victims the opportunity to learn the truth about the past. In reality, perpetrators disclosed the bare minimum in order to gain amnesty. A member of the TRC stated that 99% of victims gained no new information about their cases. The TRC - whose Investigation Unit was quickly overwhelmed - did not, in most cases, have the capacity to challenge perpetrators' version of events and determine whether a full disclosure was made.³ Still, by far the majority of applicants received amnesty and, regardless of the atrocities they had committed, were allowed to slip away into obscurity.

Accused of abandoning justice, the TRC concocted a particular brand of restorative justice. Some of the key assumptions of this approach included that victims valued truth over justice; the choice for amnesty and forgiveness was not a political compromise, but a moral triumph; and virtues such as reconciliation and forgiveness trumped human rights and the rule of law. It demonised criminal trials as a lust for revenge.

The emphasis on reconciliation and disdain for criminal trials marginalised debates about human rights and responsibility. This failure defines the legacy of this allegedly successful truth commission. Nearly a decade after the Commission's final report was released, victims are still angry about the lack of justice (as seen after the farcical trial of apartheid minister Adriaan Vlok⁴). As Dorota Gierycz⁵, who was involved with the Liberian truth commission, noted in a recent interview: 'I have doubts as to whether it is really the people on the ground that want perpetrators of atrocities to be forgiven. Who is speaking on behalf of these people? Did anybody really talk to them?'

³ See for example, Zenzile Khoisan *Jakaranda Time: An Investigator's View of South Africa's Truth and Reconciliation Commission* (Cape Town: Garib Communications, 2001)

⁴ Vlok is a former apartheid era police general and cabinet minister who, among other things, authorised bombing campaigns and assassinations. He was tried in 2007 for his role in the attempt to assassinate Frank Chikane (a former activist, now director general in the Office of the President). He was given a suspended sentence. He made no disclosures. In the plea agreement a great deal of emphasis was once again placed on the importance of reconciliation.

⁵ Gierycz is the former representative of the UN high commissioner for human rights in Liberia.

Amnesty and attempts to redefine justice as a form of restorative justice provide shaky ground on which to build a new society. Richard Wilson, in his book on the South African TRC, makes a crucial point that is often overlooked:

‘The appropriation of human rights by nation-building discourse and their identification with forgiveness, reconciliation and restorative justice deems social stability to be a higher social good than the individual right to retributive justice and to pursue perpetrators through courts. This image of human rights undermines accountability and the rule of law and with it the breadth and depth of the democratization process.’⁶

Furthermore, attempts at redefining justice cannot simply exclude the notion of the law as easily as the proponents of ‘reconciliation’ assume. As Pascal noted, ‘force without justice is tyrannical...justice without force is contradictory, as there are always the wicked’. Justice without the force of law becomes toothless.

For all of their failings and political complexities, the Nuremburg trials at least established the principle that following orders is not an excuse, those who commit genocide will be held accountable, and injustice will not be ignored. However, with the prominence of truth commissions and an emphasis on amnesty-for-reconciliation the world has become comfortable with the notion of impunity. If nothing else, Ocampo’s bold decision is a serious and timely challenge to this.

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⁶ Richard Wilson, *The Politics of Truth and Reconciliation in South Africa* (Cambridge: Cambridge University Press, 2001), p. 26