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# Impunity- Inertia, Inaction, and Invalidity: A Literature Review

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# IMPUNITY — INERTIA, INACTION, AND INVALIDITY: A LITERATURE REVIEW

Mary Margaret Penrose\*

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## I. INTRODUCTION

*How [does] rehabilitation proceed? One place to start a consideration  
of this question is with the initial scream welling out of the torture*

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*chamber. An old man, a teenage boy, a young woman five months pregnant, is screaming in agony. And what is the torturer saying?*

.....

*[H]e is saying, "Go ahead, scream, scream all you like, scream your lungs out — nobody can hear you, nobody would dare to hear you, nobody cares about you, no one will ever know.*

*It is essential to the structure of torture that it take place in secret, in the dark, beyond considerations of shame and account. When the torturer assures his victim that "No one will ever know," he is at once trying to break the victim's spirits and to bolster his own. He needs to be certain that no one will ever know; otherwise the entire premise of his own participation in the perverse encounter would quickly come into question.*

*That is the primordial moment which has desperately to be addressed — and as desperately by the torture-society as by the torture victim: Who was there? Who was screaming? Who were those people standing by the screamer's side, and what were they doing? Who, even now, will dare to hear? Who will care to know? Who will be held accountable? And, who will hold them to account?<sup>1</sup>*

Impunity is the torturer's most relished tool. It is the dictator's greatest and most potent weapon. It is the victim's ultimate injury. And, it is the international community's most conspicuous failure. Impunity continues to be one of the most prevalent causes of human rights violations in the world. As we near the new millennium, we must find effective ways to combat this vexing predicament.

Impunity knows no territorial bounds and speaks no specific language. It is not unique to any religion or race, and is not limited to any particular geographical region. Impunity remains a world wide problem. The end of the Cold War and the rise of nascent democracies throughout Latin America and Eastern Europe have brought much needed attention to this pervasive problem. Accordingly, the amount of literature and scholarly attention devoted to impunity continues to grow. This paper attempts to familiarize the reader with a broad range of information relating to impunity. The approach taken is mainly international,<sup>2</sup> although one section will be devoted solely to the history of impunity in the Asian-Pacific region. Further, due to the limited scope of this review,

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<sup>1</sup> Lawrence Weschler, *Afterword*, in *STATE CRIMES: PUNISHMENT OR PARDON* 91-92 (The Aspen Institute ed., 1989) [hereinafter *STATE CRIMES*] (emphasis added).

<sup>2</sup> This literature review analyzes international treaties, United Nations Resolutions, books and scholarly articles in an effort to provide a practical, yet global, approach to the subject of impunity. *See supra* note 1 and accompanying text; *see generally infra* notes 3-260 and accompanying text (providing citations, review and analysis of various international sources covering impunity and impunity-related topics).

only impunity relating to gross violations of human rights<sup>3</sup> will be considered.

The first section of this paper reflects upon the definitions utilized in the impunity vernacular. Impunity itself does not appear to be a contested matter, yet no single definition encompasses the term and its many variations. Examples of impunity are much easier to uncover than precise definitions of what the term "impunity" truly means. Nonetheless, several definitions have been proffered and provide a solid foundation on which to build.

The second portion of this paper focuses on the history of impunity dating back to World War I. This paper references several international treaties and presents a discussion regarding the Inter-American regional system to provide the reader with sufficient background materials to recognize impunity. While impunity as a political tool and legal concept cer-

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<sup>3</sup> See Human Rights Watch, *Policy Statement on Accountability for Past Abuses*, in TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES VOL. I 217 (Neil J. Kritz ed., 1995) [hereinafter TRANSITIONAL JUSTICE] (providing one of the most complete surveys regarding impunity and transitional justice, and containing an array of documents and articles relating to transitional justice for reference as a research starting place and as a source of substantive information). According to the December 1989 *Policy Statement on Accountability for Past Abuses*, Human Rights Watch considers the following acts or events as constituting gross violations of human rights:

- 1) genocide;
- 2) arbitrary, summary or extrajudicial executions;
- 3) forced or involuntary disappearances;
- 4) torture or other gross physical abuses and violations of personal liberty;
- 5) prolonged arbitrary deprivations of liberty.

*Id.*

In addition to the delineation provided by Human Rights Watch, the Restatement (Third) of the Foreign Relations Law of the United States is a credible source for further review of those rights that are considered fundamental under customary international law, and provides that:

A state violates international law if, as a matter of state policy, it practices, encourages, or condones:

- (a) genocide,
- (b) slavery or slave trade,
- (c) the murder or causing the disappearance of individuals;
- (d) torture or other cruel, inhuman, or degrading treatment or punishment,
- (e) prolonged arbitrary detention,
- (f) systematic racial discrimination, or
- (g) a consistent pattern of gross violations of internationally recognized human rights.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 702 (1987).

tainly precedes World War I, many scholars delineate the omissions at Leipzig as the starting place of modern impunity.<sup>4</sup>

The third section considers specific cases of impunity in the Asian-Pacific region. Due to the limited scope of this paper, only the cases of Cambodia, the Philippines and the Japanese treatment of "Comfort Women" have been examined. These three examples are frequently cited in scholarly literature and are generally illustrative of the Asian impunity dilemma.

Although the focus of this review is impunity, another term will be utilized throughout this survey, and it is important to present this term in the introduction. The term is "accountability." Accountability, it has been suggested, "is the antithesis of impunity."<sup>5</sup> While impunity remains a focus of debate and international efforts, the human rights community is moving toward a culture of accountability. Essentially, accountability is the effort aimed at curtailing impunity. Readers in this field will undoubtedly come across the term accountability as it permeates modern writing and as human rights scholars and activists use it more frequently.

This survey and the case studies presented herein focuses on three main types of legal accountability:

- (1) the use of prosecutions, both national and international, in an effort to combat impunity;
- (2) the resort to non-criminal sanctions, such as lustration laws and political purgings that aim to remove human rights violators from positions of power and influence; and,

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<sup>4</sup> See ARIEH J. KOCHAVI, *PRELUDE TO NUREMBERG: ALLIED WAR CRIMES POLICY AND THE QUESTION OF PUNISHMENT* at 1-2 (1998).

<sup>5</sup> M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, *LAW & CONTEMP. PROBS.*, Autumn 1996, at 9, 18 (representing one of several articles included in one of the more thorough and significant impunity-related publications to date that includes articles by many of the most prominent scholars in this subject area such as: Madeline H. Morris, Michael Scharf, W. Michael Reisman, Stephen Landsman, Naomi Roht-Arriaza, Jennifer L. Balint, Neil J. Kritz, Christopher C. Joyner, Priscilla B. Hayner, Mark S. Ellis and Douglass Cassel, and that also includes separate reports of two United Nations Special Rappourteurs (Louis Joinet and Theo van Boven) on the issue of impunity); *see also* Yael Danieli, *Justice and Reparation: Steps in the Process of Healing*, in *REIGNING IN IMPUNITY FOR INTERNATIONAL CRIMES AND SERIOUS VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS: PROCEEDINGS OF THE SIRACUSA CONFERENCE 17-21 SEPTEMBER 1998* 305 (Christopher C. Joyner ed., 1998) [hereinafter *REIGNING IN IMPUNITY*] (representing one of the articles included in one of the more thorough and significant impunity publications to date, that includes writings by numerous participants in the 1998 Siracusa Conference on Impunity, which took place in Siracusa, Italy in September 1998, including noteworthy articles prepared by M. Cherif Bassiouni, Priscilla Hayner, Naomi Roht-Arriaza, Luc Huyse, Diane F. Orentlicher, Juan E. Méndez, Jason Abrams, Madeline Morris, and Theo van Boven).

- (3) the use of truth commissions as a substitute for, or in addition to, other accountability mechanisms.

In describing each of these mechanisms, the common thread is a determination to combat impunity. While there is no "one-size-fits-all" approach to impunity *or* accountability, it is hoped that this literature review will provide pertinent information on the options available when governments are confronted with gross violations of human rights.

## II. DEFINITIONS

*Accountability means recognizing the moral responsibilities that arise from the past, even if little can be done at a given moment to enforce those responsibilities.*<sup>6</sup>

Impunity, much like accountability, is a term with a distinct legal meaning. Yet it is rare to find either phrase adequately defined in a particular work. Rather, these terms have become so ubiquitous that their respective meanings are deemed obvious.

However, it is important for any study on impunity to provide a clear description of what this phrase implies. Black's Law Dictionary defines impunity as simply the "[e]xemption or protection from penalty or punishment."<sup>7</sup> This characterization coincides with the meaning ascribed by Amnesty International, an international non-governmental organization ("NGO") based in London, England.

Amnesty International explains that "[l]iterally, impunity means exemption from punishment."<sup>8</sup> Amnesty International further expounds upon this definition:

More broadly, the term [impunity] conveys a sense of wrongdoers escaping justice or any serious form of accountability for their deeds. Impunity can arise at any stage before, during or after the judicial process: in not investigating the crimes; in not bringing the suspected culprits to trial; in not reaching a verdict or convicting them, despite the existence of convincing evidence which would establish their guilt beyond a reasonable doubt; in not sentencing those convicted, or sentencing them to derisory punishments out of all proportion to the gravity of their crimes; [and,] in not enforcing their sentences.<sup>9</sup>

Amnesty International's approach seemingly fleshes out the mundane definition provided by Black's Law Dictionary and indicates a certain awareness of the factual parameters of impunity.

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<sup>6</sup> Aryeh Neier, *What Should Be Done About the Guilty?*, N.Y. REV. BOOKS, Feb. 1, 1990, at 32 (emphasis added).

<sup>7</sup> BLACK'S LAW DICTIONARY 758 (6th ed. 1990).

<sup>8</sup> AMNESTY INTERNATIONAL, "DISAPPEARANCES" AND POLITICAL KILLINGS: HUMAN RIGHTS CRISIS OF THE 1990's 158 (1994) [hereinafter DISAPPEARANCES].

<sup>9</sup> *Id.*

In a similar vein, Professor Christopher C. Joyner writes that “[i]mpunity . . . means exemption or freedom from punishment and connotes the lack of effective remedies for victims of crimes. Within the context of human rights law, impunity implies the lack or failure to apply remedies for victims of human rights violations.”<sup>10</sup>

Certain scholars have attempted to further develop the term to encompass its modern implications. Professor Cherif Bassiouni posits that “[w]hile amnesty is a deliberate positive action (the act of amnesty), impunity is an act of exemption, an exemption from punishment, or from injury or loss.”<sup>11</sup> Others have merely observed that impunity is a “*de facto* situation of no punishment” that may result from amnesties or pardon.<sup>12</sup> In an anthology entitled, *IMPUNITY: AN ETHICAL PERSPECTIVE*, the editor, Charles Harper writes from a social science approach and suggests a particularly useful working definition of impunity:

Impunity is the means by which persons accused of crimes against humanity escape being charged, tried and punished for criminal acts committed with official sanction in time of war or dictatorial rule. Impunity can be achieved through amnesty laws passed or decreed by governments under whose authority the crimes were committed or by a successive government. It can result from presidential pardons given convicted criminals who thus remain unpunished. Impunity can also occur by default — the deliberate lack of any action at all.<sup>13</sup>

Another contributor to this volume qualifies that:

Impunity may mean failing to do justice where human rights are being violated, or it can be permitting crimes against creation or letting jobs be cut for thousands of men and women because they are not competitive in the free market. Impunity can take various forms in society, but in the last analysis it always involves legitimizing falsehood.<sup>14</sup>

Still, another perspective can be garnered from considering the medico-psychiatric viewpoint. In the most extensive description uncov-

<sup>10</sup> Christopher C. Joyner, *Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability*, 26 *DENV. J. INT’L L. & POL’Y* 591, 595–96 (1998).

<sup>11</sup> Bassiouni, *supra* note 5, at 19.

<sup>12</sup> See Luc Huyse, *To Punish or to Pardon: A Devil’s Choice*, in *REIGNING IN IMPUNITY*, *supra* note 5, at 79, 80 n.2; see also E. Muller-Rappard, *A Culture of Impunity: Rethinking the Implications for International Crimes*, in *REIGNING IN IMPUNITY*, *supra* note 5, at 91, 91.

<sup>13</sup> Charles Harper, *From Impunity to Reconciliation*, in *IMPUNITY: AN ETHICAL PERSPECTIVE* viii, ix (Charles Harper ed., 1996) [hereinafter *IMPUNITY*].

<sup>14</sup> Raul Soza, *The Church: A Witness to the Truth on the Way to Freedom*, in *Impunity*, *supra* note 13, at 60, 66.

ered in this review, Paz Rojas Baeza elucidates impunity in the following manner:

Impunity is a human decision, an action, a behaviour, an act of denial of concrete reality: it is an act of violence. It is an instance of human aggression which, in addition to not being fully revealed, is also to be left unpunished.

At the heart and origin of impunity is a crime, which is the first thing that is to be concealed. This crime has one or several victims, and one or several authors. It was perpetuated at a particular place, in a precise geographical location, at a given time, on a particular day and date. In the minds of the victims, recollections of place and time sometimes seem a certainty and sometimes a figment of the imagination.

With impunity, the crime and its circumstances remain anonymous, shrouded in the silence of the unknown.

The crime is committed in a national and international historical, social and political context. If crimes against humanity were committed under a legal system of "State terrorism," the impunity guaranteed by the State during such a period would be a component factor which aided and abetted the crime. In such a case, the authors are the very persons who ordered or carried out the crime.

Impunity that extends into democracy or into a period of transition to democracy is different and, perhaps for that very reason, is experienced even more dramatically by its victims. In such a case, the human decision no longer resides in a tyrannical but in a democratic power, in which all the branches of State participate at different levels and with different degrees of involvement, approving and permitting it. It is the institutional structure that is compromised by the continuation of impunity.

The attitude of an apathetic, indifferent civil society seemingly disposed towards forgetting is perceived as equally aggressive. Conversely, a responsive attitude marked by commitment and receptivity does engender hope.

Also part of impunity, though at a more peripheral level, are the actions of regional or universal human rights institutions. What they do or fail to do, say or fail to say, what they reject or accept in the face of various impunity mechanisms such as amnesty laws, laws of *Punto Final*, expiry and the use of military courts also play a part in the hopes, wishes, frustrations and despair of the persons and families affected.<sup>15</sup>

In this regard, impunity may be considered either the inability to prosecute and/or punish due to limited financial resources and a minimally-

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<sup>15</sup> Paz Rojas Baeza, *Breaking the Human Link: The Medico-Psychiatric View of Impunity*, in *IMPUNITY*, *supra* note 13, at 73, 75–76.



effective judicial system or simply a lack of political will manifested by the exchange of amnesties or pardons borne out of the complacency of *realpolitik*. Yet as Professor Diane Orentlicher warns:

[W]e would do well to resist the tendency to address the wisdom of amnesties in terms of stark dichotomies, such as 'punish or pardon' and 'amnesty or accountability.' These dichotomies present unduly narrow options, detracting from more constructive efforts to balance the demands of justice against those of reconciliation and, ultimately, to promote reconciliation within a framework of accountability.<sup>16</sup>

As Professor Orentlicher suggests, accountability mechanisms and enforcement options often develop along a continuum and are not cleanly disposed of merely by labeling one as impunity and the other accountability.<sup>17</sup>

The most authoritative definition to date, however, has arguably been proffered by the United Nations ("U.N.") Special Rapporteur, Mr. Louis Joinet. In his Report to the General Assembly regarding the problem of impunity, Mr. Joinet summarized impunity as:

[T]he impossibility, *de jure* or *de facto*, of bringing the perpetrators of human rights violations to account whether in criminal, civil, administrative or disciplinary proceedings since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, convicted, and to reparations being made to their victims.<sup>18</sup>

Mr. Joinet's characterization acknowledges that impunity may signal the breakdown of enforcement mechanisms necessary to apply the securities and protections afforded every individual through the numerous U.N. conventions and agreements.

As this section has demonstrated, there are few, but varied, definitions ascribed to the term impunity. And while the international community has not selected a single definition for reference purposes, each of the explanations recorded above offer insight into the assorted facets of impunity. This paper began with the premise that impunity is rarely defined due to its ubiquitous nature. This remains true. Still, each of the works cited in this section offer guidance on the profound meaning of impunity. From the malleable descriptions presented above, govern-

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<sup>16</sup> Diane F. Orentlicher, *Swapping Amnesty for Peace and the Duty to Prosecute Human Rights Crimes*, 3 ILSA J. INT'L & COMP. L. 713, 714 (1996).

<sup>17</sup> See *id.*

<sup>18</sup> *Sub-Commission on the Prevention of Discrimination and Protection of Minorities, On the Question of Impunity for Perpetrators of Human Rights Violations*, Louis Joinet, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1993/6 19 July 1993, revised by E/CN.4/Sub.2/1994/11, revised by E/CN.4/Sub.2/1996/18 (final report), reprinted in LAW & CONTEMP. PROBS., Autumn 1996, at 250, 265.

ments and NGOs faced with impunity should be able to formulate a suitable definition regardless of the situation encountered.

### III. THE HISTORY OF IMPUNITY — INTERNATIONAL LAW AND TREATY OBLIGATIONS

#### A. *A Brief Primer on International Law*

*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*<sup>19</sup>

*A credibility problem has long plagued public international law, born of the gap between written law and practice and exacerbated by its display on the grand stage of international affairs.*<sup>20</sup>

The international legal system is a peculiar, and often ineffective, system. This may be due in part to the fact that international law is not “law” in the traditional legislative or penal sense. Rather, the essential format governing international treaty relations, the primary source of international law, is consensual — states either agree or refuse to be bound by a particular set of rules.<sup>21</sup> Despite modern attempts to discredit a system based purely on principles of state sovereignty, sovereignty remains the cornerstone of modern international law.<sup>22</sup>

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<sup>19</sup> *The Universal Declaration of Human Rights*, U.N. GAOR 3d Sess, art. 1, U.N. Doc. A/217 (III) (1948) (emphasis added). This renown and oft-repeated quote in international human rights law is found in a document that, while lacking the inherent force of law, was the first in a series of treaties and covenants that would become the basis of human rights law between states and among individuals. Much of what was originally included in the Universal Declaration of Human Rights has since been subsumed into later documents that have the force and effect of law.

<sup>20</sup> Robert O. Weiner, *Trying to Make Ends Meet: Reconciling the Law and Practice of Human Rights Amnesties*, 26 ST. MARY'S L. J. 857, 857 (1995) (emphasis added).

<sup>21</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES §102 (1987) (describing sources of international law including custom and general principles of law). See also Robert O. Weiner, *Trying to Make the Ends Meet: Reconciling the Law and Practice of Human Rights Amnesties*, 26 ST. MARY'S L.J. 857, 857 (1995) (stating that public international law has never compared well with domestic law, because domestic law, theoretically, enjoys the ready availability of the state's machinery to enforce its dictates).

<sup>22</sup> See JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS at 152 (2d ed. 1998) (remarking that “[a] state-centric, sovereignty-based conception of international order dominates international human rights as well. Most states still jealously guard their sovereign human rights prerogatives”). See generally JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS (2d ed. 1998) (providing a thorough study of impunity from a social science perspective). Hurst Hannum devotes an entire chapter to the concept of sovereignty in his book, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION. See HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMODATION OF CONFLICTING RIGHTS 14 (1990).

No where has the drawback of sovereignty been more evident than in the case of combating impunity for gross violations of human rights.<sup>23</sup> Antonio Cassese, the former President of the International Criminal Tribunal for the Former Yugoslavia, emphasized this point by acknowledging that “[t]he reluctance of states regarding international penal enforcement is hardly surprising, given that international criminal tribunals intrude on one of the most sacred areas of state sovereignty: criminal jurisdiction.”<sup>24</sup>

When national governments and members of the international community are faced with the delicate decision of whether to prosecute those suspected of committing gross violations of human rights, the decisions are often ensconced with questions of political stability, public support for democracy, and, most frequently, military presence in governmental affairs.<sup>25</sup> As Professor Madeline Morris has observed, there are three fundamental reasons that governments fail to achieve full accountability:

- (1) political constraints borne out of the continued need to live and work together in a particular society;
- (2) limited resources (i.e. financial, human and judicial resources); and,
- (3) a lack of political will at the national and/or international level.<sup>26</sup>

To believe that a system based largely on consensual relations can coerce the compliance of other resisting nations is at times naive. Only when violations rise above a certain egregious level will the international system attempt to intervene. Even when they do rise to that level, as they have continued to do in places like Afghanistan, China and Cambodia, the presence of international law will not penetrate (or *attempt* to penetrate) every border.<sup>27</sup>

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<sup>23</sup> See Diane F. Orentlicher, *Addressing Gross Human Rights Abuses: Punishment and Victim Compensation*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 425, 431–32 (Louis Henkin & John Lawrence Hargrove eds., 1994) (stating that the hesitancy to enforce international criminal law may be partially explained by acknowledging that it “is a lesser intrusion on sovereignty for an international body to enunciate a norm than to insist on its enforcement — particularly when the norm asserts duties in an area traditionally left to the broad discretion of states”).

<sup>24</sup> Antonio Cassese, *On the Current Trend Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT’L L. 2, 11 (1998).

<sup>25</sup> See Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2537, 2544–49 (1991).

<sup>26</sup> See Madeline Morris, *International Guidelines Against Impunity: Facilitating Accountability*, in REIGNING IN IMPUNITY, *supra* note 5, at 359, 360–61.

<sup>27</sup> See Payam Akhavan, *Enforcement of the Genocide Convention: A Challenge to Civilization*, 8 HARV. HUM. RTS. J. 229 (1995).

However, beyond the treaty-based obligations that states accept, there is the further obligation borne out of customary law. The Restatement of the Foreign Relations Law of the United States suggests that a state is obligated to respect the human rights that it has accepted under treaty or "that states generally are bound to respect as a matter of customary international law."<sup>28</sup> As many scholars have argued, certain actions are punishable regardless of state consent, as these obligations constitute peremptory norms of international law.<sup>29</sup> Professor Steven R. Ratner provides one of the most comprehensive descriptions of customary law obligations in his recent article, *New Democracies, Old Atrocities: An Inquiry in International Law*.<sup>30</sup>

Professor Cherif Bassiouni also attempts to isolate those obligations from which no state may derogate in his article, *International Crimes: Jus Cogens and Obligatio Ergo Omnes*.<sup>31</sup> Professor Bassiouni explores the notion that certain egregious crimes require a state to either prosecute or extradite without exception.<sup>32</sup> Professor Bassiouni acknowledges however, that:

The practice of states does not conform to the scholarly writings that espouse these views. The practice of states evidences that, more often than not, impunity has been allowed for *jus cogens* crimes, the theory of universality has been far from being universally recognized and applied, and the duty to prosecute or extradite is more inchoate than established, other than when it arises out of specific treaty obligations.<sup>33</sup>

Consensus on these issues is far from solidified. In addition to the disparity between state sovereignty and customary law obligations, there is a lingering assertion that culture (and not universal regard for human rights) dictates the parameters of international criminal obligations.<sup>34</sup>

<sup>28</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 (1987).

<sup>29</sup> See Cassese, *supra* note 24, at 6 (asserting that states should not be permitted "to enter into international agreements or pass national legislation foregoing punishment of [gross violations of human rights]"). See also Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 GEO. L. J. 707, 725-27 (1999) (providing one of the most comprehensive descriptions of customary law obligations).

<sup>30</sup> Ratner, *supra* note 29.

<sup>31</sup> M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, LAW & CONTEMP. PROBS., Autumn 1996, at 63.

<sup>32</sup> See *id.* at 65-66.

<sup>33</sup> *Id.* at 66. Professor Bassiouni defines the term *jus cogens* as "the compelling law." *Id.* at 67. Bassiouni also explains that these norms hold "the highest hierarchical position among all other norms and principles," and that "as a consequence of that standing, *jus cogens* norms are deemed to be, 'peremptory,' and non-derogable." *Id.*

<sup>34</sup> See INTERNATIONAL HUMAN RIGHTS IN CONTEXT 192-225 (Henry J. Steiner & Philip Alston eds., 1996).

This school of thought asserts that cultural relativism delimits the scope of international law.<sup>35</sup> The international community's approach to gender relations in certain African and Middle-Eastern countries most aptly demonstrates this uncertainty despite the fact that many of the actions challenged in these regions can be deemed to violate fundamental and non-derogable human rights. The importance of cultural relativism in accountability and impunity cannot be sufficiently underscored.<sup>36</sup> Judge Antonio Cassese dedicates an entire chapter to the issue of cultural relativism in his book, *HUMAN RIGHTS IN A CHANGING WORLD*.<sup>37</sup> Likewise, there is a section devoted to the polarities of cultural relativism in Jack Donnelly's work, *INTERNATIONAL HUMAN RIGHTS*.<sup>38</sup>

Three recent comments on cultural relativism worthy of review are:

(1) *Towards a New Universalism; Reconstruction and Dialogue*,<sup>39</sup> (2) *Human Rights and Real Cultures: Towards a Dialogue on 'Asian Values,'*<sup>40</sup> and (3) *Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values*.<sup>41</sup> In addition to these three articles,<sup>42</sup>

<sup>35</sup> See *id.* The term "cultural relativism" refers to the tendency to base decisions on whether to honor certain rights and whether to require the enforcement of certain rights on cultural notions of propriety or acceptability. Those who would advocate a system based on cultural relativism consider the demands of culture (often including religious and political approaches as well) to be more vital than a system built around individual rights and universal norms. See *id.* at 192-93. As noted by the editors of this text, the relativist position "can be understood simply to assert as an empirical matter that the world contains an impressive diversity in views about right and wrong that is linked to the diverse underlying cultures." See *id.* The countries comprising the Asian region have frequently resorted to cultural relativism when challenged on human rights practices.

<sup>36</sup> See Diane F. Orentlicher, *International Criminal Law and the Cambodian Killing Fields*, 3 ILSA J. INT'L & COMP. L., 705, 707. As Professor Orentlicher sagely reminds, "[we] surely would not want to defer to cultural-relativist arguments counseling against accountability when the culture in question is one of wholesale impunity. A key aim of trials following sweeping violations of personal integrity is to help dispel the culture of impunity that enabled the crimes to occur. In some respects, then, the demands of universal justice may in fact require some measure of meddling with patterns of national crime." *Id.*

<sup>37</sup> See ANTONIO CASSESE, *HUMAN RIGHTS IN A CHANGING WORLD* at 48-67 (1990). Chapter 3 is entitled *Are Human Rights Truly Universal*. See *id.* at 48.

<sup>38</sup> See DONNELLY, *supra* note 22, at 32-35.

<sup>39</sup> Adamantia Pollis: *Towards a New Universalism: Reconstruction and Dialogue*, 16 NETH. Q. HUM. RTS. 5 (1998).

<sup>40</sup> Michael Freeman, *Human Rights and Real Cultures: Towards a Dialogue on Asian Values*, 16 NETH. Q. HUM. R. 25 (1998).

<sup>41</sup> Michael C. Davis, *Constitutionalism and Political Culture: The Debate Over Human Rights and Asian Values*, 11 HARV. HUM. RTS. J. 109 (1998).

<sup>42</sup> See also R. P. Peerenboom, *What's Wrong With Chinese Rights?: Toward a Theory of Rights with Chinese Characteristics*, 6 HARV. HUM. RTS. J. 29 (1993) (commenting on cultural relativism).

numerous books discuss the subject of human rights from the uniquely Asian perspective. Among the more noteworthy efforts are: *HUMAN RIGHTS AND INTERNATIONAL RELATIONS IN THE ASIA PACIFIC*,<sup>43</sup> *ASIAN PERSPECTIVES ON HUMAN RIGHTS*,<sup>44</sup> and *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS*.<sup>45</sup> Despite constant reference to what “the law” requires, it is important to realize that the international legal system remains an amalgamation of law, politics, culture and the countervailing interests of state-sovereignty. Even if international law is considered merely a goal to be achieved, the norms are developing fortitude. As Professor Diane Orentlicher notes in her seminal work, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, “[i]n the absence of effective enforcement machinery, international law’s power to induce compliance with its prescriptions turns on the strength of the norms themselves.”<sup>46</sup>

### B. *The Governing Treaties*

Despite any apparent flaws in the *enforcement* of international law, there is no shortage of treaties and declarations purporting to establish minimum standards of behavior under international law. In the aftermath of World War II, the victorious Allied forces joined twenty-six other nations in establishing the United Nations.<sup>47</sup> Today this body continues to govern and regulate many of the relations between states by assisting in the formulation and regulation of multilateral treaties.<sup>48</sup> Several such treaties have emerged since the Nuremberg Principles affirmatively

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<sup>43</sup> See *HUMAN RIGHTS AND INTERNATIONAL RELATIONS IN THE ASIA PACIFIC* (James T. H. Tang ed., 1995).

<sup>44</sup> See *ASIAN PERSPECTIVES ON HUMAN RIGHTS* (Claude E. Welch, Jr., & Virginia A. Leary eds., 1990).

<sup>45</sup> See *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS* (Joanne R. Bauer & Daniel A. Bell eds., 1999).

<sup>46</sup> Orentlicher, *supra* note 23, at 2594. Although significant time has passed since the drafting of Professor Orentlicher’s article, it is one of the foundational works on impunity and prosecution in transitional settings, and may provide an important resource for any individual desiring to understand the basics of impunity in transitional settings and the countervailing requirement for prosecution or punishment. See generally Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *YALE L.J.* 2537 (1991).

<sup>47</sup> The term “United Nations” was coined by President Franklin Delano Roosevelt of the United States. See GEOFFREY BEST, *WAR AND LAW SINCE 1945* 67 (1994) (observing that “[t]he establishment of the United Nations Organization in 1945 was the central act of recognition by the war-surviving generation that something striking had to be done to avoid the recurrence of such disasters”).

<sup>48</sup> See *supra* notes 28–29 and accompanying text. The resort to treaties requires that the target state be party to the treaty; however, in certain instances, customary law will be available even against those states who have opted out of a particular treaty. See *id.*

established the prominence of human rights in international relations. Nuremberg, more than any other single event, "marked the beginning of the International Human Rights Movement."<sup>49</sup> Consequently, as Juan Méndez has observed, "[a] strong legal argument can be made for an emerging principle in international law that states have affirmative obligations in response to massive and systematic violations of fundamental rights."<sup>50</sup> This section will briefly describe those treaties and regional agreements underlying this emerging principle.

### 1. The Genocide Convention

When the world community finally realized the true sinister nature of Nazi atrocities committed during World War II, great advancements in international criminal law began to appear. Chief among these was the drafting and adoption of the Genocide Convention.<sup>51</sup> Currently, 129 states are party to the Genocide Convention which condemns genocide "whether committed in time of peace or in time of war, [as] a crime under international law which [each State Party] undertake[s] to prevent and to punish."<sup>52</sup> The Genocide Convention unequivocally requires that "[p]ersons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction . . ."<sup>53</sup> Despite the clarity of this requirement, the Genocide Convention has not adequately protected citizens of countries such as Cambodia, Rwanda and East Timor.<sup>54</sup> Further, the term genocide has a narrow legal definition and [only] encompasses killings and serious physical or mental injuries inflicted "with [the] intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such."<sup>55</sup> Although the Genocide Convention remains only one tool in an assortment of prohibitions against gross violations of human rights, a consideration of genocidal acts must begin by referencing this 1948 document.

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<sup>49</sup> Henry King, Jr., *Commentary: The Modern Relevance of the Nuremberg Principles*, 17 B.C. THIRD WORLD L.J. 279, 279-80 (1997).

<sup>50</sup> Juan Méndez, *Accountability for Past Abuses*, 19 HUM. RTS. Q. 255, 259 (1997).

<sup>51</sup> Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, art. I, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention]. See also generally LEO KUPER, *THE PREVENTION OF GENOCIDE* at 8-22 (1985) (discussing the Genocide Convention).

<sup>52</sup> Genocide Convention, *supra* note 51.

<sup>53</sup> Genocide Convention, *supra* note 51, art. VI, 78 U.N.T.S. at 280-82.

<sup>54</sup> This remains true despite the fact that Cambodia ratified the Genocide Convention on Oct. 14, 1950. See Genocide Convention, *supra* note 51, 78 U.N.T.S. at 278 n.1.

<sup>55</sup> Genocide Convention, *supra* note 5, art. II, 78 U.N.T.S. at 280. The phrase "as such" is not superfluous and has spurred much legal commentary. The nuances regarding this phraseology (and any attempted explanation thereof), however, is far beyond the limited scope of this article.

Several noteworthy articles expound on the Genocide Convention requirements and its applicability or inapplicability in certain situations. Of particular importance are Leo Kuper's *THE PREVENTION OF GENOCIDE*,<sup>56</sup> Michael Scharf's *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*,<sup>57</sup> Hurst Hannum's *International Law and Cambodian Genocide: The Sounds of Silence*,<sup>58</sup> Payam Akhavan's *Enforcement of the Genocide Convention: A Challenge to Civilization*,<sup>59</sup> and, Cherif Bassiouni's *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*.<sup>60</sup> In addition, Steven R. Ratner and Jason S. Abrams provide an excellent description of State obligations under the Genocide Convention in their book entitled *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW*.<sup>61</sup>

## 2. The Convention Against Torture

Another fundamental source of human rights protection is the Convention Against Torture.<sup>62</sup> This U.N. document, ratified by 114 States, officially came into force on 26 June 1987.<sup>63</sup> This Convention, which outlaws torture committed *at any time*,<sup>64</sup> requires that State Parties either prose-

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<sup>56</sup> See LEO KUPER, *THE PREVENTION OF GENOCIDE* (1985) (presenting a solid portrayal of the concept of genocide from a social science perspective).

<sup>57</sup> See Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, L. & CONTEMP. PROB., Autumn 1996, at 41 (discussing the legal obligations to prosecute gross violations of human rights and providing a complete, but succinct, overview of such obligations and their genesis).

<sup>58</sup> See Hurst Hannum, *International Law and Cambodian Genocide: The Sounds of Silence*, 11 HUM. RTS. Q. 82 (1989) (providing a thorough assessment of the Genocide Convention and its potential application to Cambodia).

<sup>59</sup> See Payam Akhavan, *Enforcement of the Genocide Convention: A Challenge to Civilization*, 8 HARV. HUM. RTS. J. 229 (1995).

<sup>60</sup> See M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 199 (1998).

<sup>61</sup> See STEVEN R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW* 24-41 (1997) (offering one of the most outstanding works on accountability and impunity in the Asian context, providing, not only legal advice and analysis, but also the cognizant realities faced by those attempting accountability in Cambodia, and explaining the unique situation posed by the Khmer Rouge regime and its continued legacy).

<sup>62</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) 1465 U.N.T.S. 112 (*entered into force* 26 June 1987) [hereinafter *Convention Against Torture*].

<sup>63</sup> See *id.*

<sup>64</sup> See *id.* Article 2, paragraph 2, of the Convention Against Torture explicitly confirms that "[n]o exceptional circumstances whatsoever, whether a state of war or a



cute or extradite any person, found within its territory, who is alleged to have committed torture.<sup>65</sup>

The Convention Against Torture requires that:

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities.<sup>66</sup>

....

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.<sup>67</sup>

These requirements supplement any national protections afforded.<sup>68</sup> Numerous scholars have emphasized the applicability of this Convention in cases of transitional justice and impunity. Of particular relevance are Anne F. Bayefsky's article, *Making the Human Rights Treaties Work*<sup>69</sup> and Christopher C. Joyner's piece entitled *Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability*.<sup>70</sup>

### 3. The International Covenant on Civil and Political Rights

Further protections for the victims of gross violations of human rights may be found in the International Covenant on Civil and Political Rights ("ICCPR").<sup>71</sup> This broad document protects numerous human rights and is not limited to gross violations as seen in the more specialized treaties referenced above.<sup>72</sup> However, the ICCPR maintains an interpretive body

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threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." *Id.* Further, Article 2, paragraph 3 specifies that "[a]n order from a superior officer or a public authority may not be invoked as a justification of torture." *Id.*

<sup>65</sup> See Convention Against Torture, *supra* note 62, art. 7, para. 1.

<sup>66</sup> Convention Against Torture, *supra* note 62, art. 13.

<sup>67</sup> *Id.* art. 14, para. 1.

<sup>68</sup> *Id.* art. 14, para. 2.

<sup>69</sup> Anne F. Bayefsky, *Making the Human Rights Treaties Work*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 229 (Louis Henkin & John Lawrence Hargrove eds., 1994).

<sup>70</sup> See Joyner, *supra* note 10, at 604–07.

<sup>71</sup> International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171.

<sup>72</sup> See Genocide Convention, *supra* note 51; see also Convention Against Torture, *supra* note 62.

at the U.N. devoted solely to violations of this covenant.<sup>73</sup> In relation to impunity, “[t]he United Nations Human Rights Committee, which is the authoritative interpreter of the ICCPR, has said that blanket amnesty laws and pardons are inconsistent with the Covenant because they create ‘a climate of impunity’ and deny the victims this ‘right to a remedy.’”<sup>74</sup> For a thorough description of a State’s obligation to prosecute individuals suspected of committing torture, extra-legal executions and disappearances, under the ICCPR and customary law, see Diane F. Orentlicher’s *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*.<sup>75</sup>

#### 4. The Geneva Conventions of 1949

Beyond the U.N. documents cited above, the area of impunity is further curtailed by reference to four separate agreements commonly referred to as the “Geneva Conventions of 1949.”<sup>76</sup> These conventions emanate from the World War II atrocities, but have their roots in other pseudo-legal instruments predating Nazi Germany.<sup>77</sup> As Michael Scharf notes, “[t]he four Geneva Conventions were negotiated in 1949 to codify the international rules relating to the treatment of prisoners of war and civilians in occupied territory.”<sup>78</sup> The codification of these principles occurred at the impetus of the International Committee of the Red Cross,

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<sup>73</sup> See International Covenant on Civil and Political Rights, *supra* note 71.

<sup>74</sup> Méndez, *supra* note 50, at 259.

<sup>75</sup> See Orentlicher, *supra* note 23, at 2569–76 (providing a useful reference regarding a State’s duties under the Genocide Convention, the Convention Against Torture, the American Convention on Human Rights, the European Convention on Human Rights and customary law).

<sup>76</sup> See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *adopted* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *adopted* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, *adopted* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *adopted* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (collectively referred to as “the Geneva Conventions of 1949”).

<sup>77</sup> See generally Oren Gross, *The Grave Breaches System and the Armed Conflict in the Former Yugoslavia*, 16 MICH. J. INT’L L. 783, 787–90 (1995) (explaining that the failure of various Geneva Conventions prior to 1949 to establish a strong system for repression of breaches of their provisions, in addition to the horrors of World War II, led to a new system of repression incorporated in the 1949 Geneva Conventions).

<sup>78</sup> Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 TEX. INT’L L. J. 1, 20 (1996). Professor Scharf also notes that virtually every country in the world is party to the Geneva Conventions. See *id.*

and this Committee remains as the most authoritative source for interpretations of the obligations set forth therein.<sup>79</sup>

Parties to the Geneva Conventions have a legal duty to search for, prosecute and punish those individuals suspected of committing grave breaches of the Geneva Conventions.<sup>80</sup> Each Convention delineates the term "grave breaches," which may include such acts as willful killing, torture or inhuman treatment, and willfully causing great suffering or serious bodily injury.<sup>81</sup> The main limitation of these documents, however, is that their jurisdictional scope is largely limited to instances of international armed conflict.<sup>82</sup> "[C]onflicts of a 'non-international character' are regulated . . . by a single article common to all four conventions, common Article 3."<sup>83</sup> While a full review of the Conventions is far beyond the scope of this article, it is important to note that the influence of the Geneva Conventions of 1949 continues to grow. Evidence of this increasing influence may be seen in two recent statutes governing the International Tribunals at the Hague<sup>84</sup> and Arusha.<sup>85</sup>

Oren Gross's article, *The Grave Breaches System and the Armed Conflict in the Former Yugoslavia*,<sup>86</sup> and Cherif Bassiouni's article, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps*

<sup>79</sup> *But see id.* (explaining that the Commentary to the Geneva Conventions is the official history of the negotiations leading to the adoption of these treaties).

<sup>80</sup> *See Scharf, supra note 78, at 20.* The only permissible exception to punishment is extradition. *See id.* Professor Scharf contends that the Commentary to the Geneva Conventions "confirms that the obligation to prosecute is 'absolute,' meaning, *inter alia*, that state-parties can under no circumstances grant perpetrators immunity or amnesty from prosecution for grave breaches under the Conventions." *Id.*

<sup>81</sup> *See Gross, supra note 77, at 797-800.* These three acts, Mr. Gross explains, are the only acts prohibited under each of the four separate documents. *See id.* at 798. In addition, the Geneva Conventions characterize the following acts as grave breaches: the extensive destruction of property not justified by military necessity, compelling a prisoner of war to serve in the forces of a hostile Power, willfully denying a prisoner of war a fair trial, unlawful deportation or transfer of a protected person, unlawful confinement of a protected person, and the taking of hostages. *Id.*

<sup>82</sup> *See Scharf, supra note 78, at 20.*

<sup>83</sup> Bassiouni, *supra note 60, at 202.*

<sup>84</sup> *See generally* Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1159 (1993) (providing additional information regarding the Yugoslav Tribunal at the Hague).

<sup>85</sup> *See generally* S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994) (providing the International Tribunal's statutory response, attached as an addendum to this resolution, to the genocidal acts in Rwanda).

<sup>86</sup> *See Gross, supra note 77, at 783.*

and *Ambiguities*,<sup>87</sup> provide good descriptions of the obligations that the Geneva Conventions impose.

### 5. Regional Instruments

Perhaps the most hopeful aspiration for the enforcement of international obligations under human rights treaties are embodied in the regional enforcement systems. Currently, there are three regional systems of protection: one each in Europe,<sup>88</sup> the Americas<sup>89</sup> and Africa.<sup>90</sup> Conspicuously absent in this arena is a system or sub-system regulating activities in the Asian-Pacific region. This omission discounts the importance of regional systems in protecting the rights of residents within each system. Further, resort to regional systems or sub-systems diminishes the impediment that cultural relativism otherwise presents. In this section, brief attention will be given to the Inter-American system and its exemplary handling of impunity issues in Latin American countries during the 1980's.

Latin America provides some of the more salient examples of both how to respond to gross violations of human rights and how to avoid international obligations for such violations. It is for this reason, perhaps, that much of the literature on impunity focuses on the Latin American countries of South and Central America.<sup>91</sup> This notoriety has not escaped the attention of the Inter-American system. Rather, the Inter-American system should be credited with the most dedicated and progressive approach to combating gross violations of human rights.

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<sup>87</sup> See Bassiouni, *supra* note 60.

<sup>88</sup> See generally THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Francis G. Jacobs & Robin C. A. White eds., 1996) (providing information regarding the European system of protection); see also European Court of Human Rights, *The European Court of Human Rights Home Page* (visited Oct. 10, 1999) <<http://www.dhcour.coe.fr>>.

<sup>89</sup> The Inter-American system covers all of North America, Central America, South America and many of the surrounding island territories. See THOMAS BUERGENTHAL & DINAH SHELTON, PROTECTING HUMAN RIGHTS IN THE AMERICAS: CASES AND MATERIALS (4th ed. 1995) (describing the Inter-American system and including many cases decided by the Inter-American Commission and the Inter-American Court of Human Rights); see also Organization of American States, *The Organization of American States* (visited Oct. 1, 1999) <<http://www.oas.org>> (providing additional information regarding the Organization of American States, the governing body of the Inter-American system, analogous to the United Nations).

<sup>90</sup> See generally EVELYN A. ANKUMAH, THE AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS (1996) (providing additional information regarding the African system and the only coverage to date regarding the African Commission on Human and People's Rights).

<sup>91</sup> See, e.g., AMNESTY INTERNATIONAL, *supra* notes 8-9 and accompanying text; see also Joyner, *supra* note 10 and accompanying text (providing examples of literature discussing impunity and focusing on Latin American countries).

The case of Argentina remains one of the most discussed cases of impunity in transitional justice.<sup>92</sup> Raul Alfonsin was inaugurated as President of Argentina on 10 December 1983, after nearly eight years of “exceptionally cruel” military rule.<sup>93</sup> Although President Alfonsin eagerly approached the issue of accountability by appointing a commission to investigate military atrocities, his human rights policies quickly began to wane.<sup>94</sup> Argentina initially attempted criminal trials for nine upper-level *junta* members while public support was still strong.<sup>95</sup> As time progressed however, the military regained its strength and began to challenge the application of law to military atrocities committed during the “dirty war” against subversion.<sup>96</sup> In response to this clamor, President Alfonsin presented two laws to Congress, the *Ley de Punto Final* (Full Stop Law) and the Due Obedience Law, that effectively insulated most military members from prosecution.<sup>97</sup> Challenges to these laws were presented to the Inter-American Commission on Human Rights.<sup>98</sup>

During this same time period, Uruguay was dealing with its own transition to democratic rule. Utilizing a different approach than Argentina, Uruguay eventually permitted its amnesty law to be resolved by popular vote.<sup>99</sup> The *Ley de Caducidad* was upheld by a vote of 58% to 42%, and military officials were granted full immunity from prosecution.<sup>100</sup> Despite this seemingly “democratic” approach to impunity, there were several people who remained dissatisfied with the amnesties afforded by the government.<sup>101</sup> Accordingly, at least eight individuals filed petitions with the Inter-American Commission on Human Rights challenging the Uruguayan impunity law.<sup>102</sup>

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<sup>92</sup> The discussion of the Argentinean example produced several divergent responses. See, e.g., Orentlicher, *supra* note 23; Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina*, 100 YALE L.J. 2619 (1991); Diane Orentlicher, *A Reply to Professor Nino*, 100 YALE L.J. 2641 (1991).

<sup>93</sup> ARYEH NEIER, *WAR CRIMES: BRUTALITY, GENOCIDE, TERROR AND THE STRUGGLE FOR JUSTICE* 35 (1998).

<sup>94</sup> See *id.* at 35–37.

<sup>95</sup> See *id.* at 35–36.

<sup>96</sup> See *id.* at 36.

<sup>97</sup> See *id.*

<sup>98</sup> See *id.*

<sup>99</sup> See *id.*

<sup>100</sup> See Jose Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints*, in *STATE CRIMES*, *supra* note 1, at 62-3, reprinted in 13 *HAMLIN L. REV.* 623 (1990). It is interesting to note that voting was mandatory for Uruguayans, with the voters being asked to choose green (no amnesty) or yellow (thereby upholding the amnesty law). See *id.* at 658. The yellow votes eventually won. See *id.*

<sup>101</sup> See *id.*

<sup>102</sup> See *id.*

Both cases proceeded to the Commission and separate decisions were rendered on October 2, 1992.<sup>103</sup> In each instance, the Commission found that the respective amnesty provisions violated each country's obligations under the American Declaration of the Rights and Duties of Man ("American Declaration") and the American Convention on Human Rights ("American Convention"). The language in these decisions demonstrates some of the fundamental problems with impunity. In the case involving Argentina, the Commission noted that:

The effect of the passage of the Laws and Decrees was to cancel all proceedings pending against those responsible for past human rights violations. These measures closed off any judicial possibility of continuing the criminal trials intended to establish the crimes denounced; identify their authors, accomplices and accessories after the fact, and impose the corresponding punishments. The petitioners, relatives or those injured by the human rights violations have been denied their right to a recourse, to a thorough and impartial judicial investigation to ascertain the facts.

...

Under Article 1.1 of the [American] Convention, the State Parties are obliged "to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms. . . ."

The Laws and the Decree [of amnesty] sought to, and effectively did obstruct, the exercise of the petitioners' right [to a fair trial].<sup>104</sup>

In a similar fashion, the Commission found that Uruguay had violated the American Declaration and the American Convention by passing an amnesty, notwithstanding the nuance that the Uruguayan amnesty had been "approved" by the voting public. The Commission characterized the amnesty provision in the following manner:

The law in question had the intended effect of dismissing all criminal proceedings involving past human rights violations. With that, the law eliminates any judicial possibility of a serious and impartial

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<sup>103</sup> See TRANSITIONAL JUSTICE, VOL. III, *supra* note 3, at 533 (discussing the case of Argentina), 605 (discussing the case of Uruguay).

<sup>104</sup> *Id.* at 536. The Commission found, in addition to this violation, that Argentina had violated the petitioner's right to judicial protection and right of assembly. *See id.* at 536. The Commission further noted that a state's obligation to investigate certain human rights violations is breached when the state passes an amnesty, foreclosing any need to investigate. *See id.* Without resorting to prosecutions, many instances of disappearances and torture would not be investigated as required by the American Convention on Human Rights. *See id.* Again, it must be emphasized that these decisions were grounded in *regional* requirements to ensure certain fundamental human rights and that the international response has been less forceful. *See id.* at 533-38.

investigation designed to establish the crimes denounced and to identify their authors, accomplices, and accessories after the fact.

The Commission must also consider the fact that in Uruguay, no national investigatory commission was ever set up nor was there any official report on the very grave human right violations committed during the previous *de facto* government.

....

What is denounced as incompatible with the Convention are the legal consequences of the law with respect to the right to a fair trial. One of the law's effects was to deny the victim or his rightful claimant the opportunity to participate in the criminal proceedings, which is the appropriate means to investigate the commission of the crimes denounced, determine criminal liability and impose punishment on those responsible, their accomplices and accessories after the fact.<sup>105</sup>

In both cases, the Commission found that the respective amnesty law violated the right to a fair trial and the right to assembly.<sup>106</sup> Both of these examples provide guidance on precisely *why* impunity is considered by many to be unlawful. As discussed in the introductory section of this paper, silence is the most effective means by which dictators and torturers secure the success of their endeavors. Forced silence, via impunity, is unacceptable and merely serves to perpetuate the cycles of violence infecting our modern world. Even where the issues raised before the Commission were presented in an international setting, many of the same guarantees (the right to a remedy, the right to a fair trial and the right to peaceably assemble) exist in international treaties.<sup>107</sup> The use of torture and extra-judicial killings to quash such rights is prohibited by international law.<sup>108</sup>

Finally, the Honduran case of *Velasquez-Rodriguez* is instructive as it remains one of the few judicial determinations that States owe a duty to individuals to protect them from torture and disappearances.<sup>109</sup> As the Inter-American Court noted:

The State has a *legal duty* to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdic-

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<sup>105</sup> *Id.* at 608-09.

<sup>106</sup> *See id.*

<sup>107</sup> *See* International Covenant on Civil and Political Rights, *supra* note 71.

<sup>108</sup> *See id.*

<sup>109</sup> *See* TRANSITIONAL JUSTICE, VOL. III, *supra* note 3, ¶ 174, at 588; *see also* Organization of American States, *supra* note 89; 1988 ANN. REP. INTER-AM. C. H. R. 35.

tion, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.<sup>110</sup>

This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered *and treated as illegal acts*, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages.

....

The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.<sup>111</sup>

As can be seen from this language, much advancement has occurred in the Inter-American system both in terms of establishing behavioral norms and in providing individual protection for gross violations of human rights. The *Velasquez-Rodriguez* case remains a staple in impunity literature and will likely continue to be the benchmark for judicial determinations in future cases of State-sanctioned impunity.

Further reading regarding the Latin American attempts to deal with accountability can be found in Lawrence Weschler's moving book, *A MIRACLE, A UNIVERSE: SETTLING ACCOUNTS WITH TORTURERS*, which recalls the respective transitions to democracy in Brazil and Uruguay.<sup>112</sup> Additional significant writings regarding Latin American approaches to accountability and the Inter-American system are Jack Donnelly's book *INTERNATIONAL HUMAN RIGHTS*,<sup>113</sup> Douglass Cassel's piece, *Lessons from the Americas: Guidelines for International Responses to Amnesties for Atrocities*,<sup>114</sup> Juan Méndez's article entitled *The Right to Truth*,<sup>115</sup>

<sup>110</sup> TRANSITIONAL JUSTICE, VOL. III, *supra* note 3, ¶ 174, at 588 (emphasis added); see also Organization of American States, *supra* note 89; 1988 ANN. REP. INTER-AM. C. H. R. 35.

<sup>111</sup> TRANSITIONAL JUSTICE, VOL. III, *supra* note 3, ¶¶ 175-76, at 588 (emphasis added).

<sup>112</sup> See generally LAWRENCE WESCHLER, *A MIRACLE, A UNIVERSE: SETTLING ACCOUNTS WITH TORTURERS* (1990) (discussing Latin American approaches to accountability).

<sup>113</sup> See DONNELLY, *supra* note 22, at 39-55 (providing a good survey of the Southern Cone experience from a social sciences perspective).

<sup>114</sup> See generally DOUGLASS CASSEL, *Lessons from the Americas: Guidelines for International Responses to Amnesties for Atrocities*, LAW & CONTEMP. PROBS.,



Robert O. Weiner's *Trying to Make Ends Meet: Reconciling the Law and Practice of Human Rights Amnesties*,<sup>116</sup> and Naomi Roht-Arriaza's influential piece, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*.<sup>117</sup>

### C. Historical Instances of Impunity

Any discussion regarding the historical development of impunity is patently absent at this point. To enable the student of impunity to fully comprehend the depth of this conundrum, this section briefly presents the historical antecedents of modern-day impunity. Ironically, the appearance of impunity and the development of international criminal law coincide in both time and fortitude. The first instance of these all too often complementary doctrines occurred in the aftermath of World War I.<sup>118</sup>

Many are familiar with the term "Nuremberg" and are familiar with its moral and legal legacies. The mere utterance of this name conjures up an assortment of ideas, hopes, disappointments and notions relating to justice. Yet very few people are familiar with Nuremberg's predecessor, Leipzig. For all that Nuremberg represents in terms of success, Leipzig proffers in terms of failure. Immediately following World War I, the victorious Allies assembled to discuss the fate of those most responsible for war atrocities.<sup>119</sup> The two main topics of discussion were what to do about the German Kaiser, Wilhelm II, and what to do about the Turkish

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Autumn 1996, at 197 (offering analysis of the amnesties and transitional reckonings in El Salvador, Uruguay, Chile, Guatemala and Haiti).

<sup>115</sup> See Juan E. Méndez, *The Right to Truth*, in REIGNING IN IMPUNITY, *supra* note 5 at 255 (reminding that:

From the start, those who fought against impunity looked to international law to find supportive arguments. Although the analogies with Nuremberg were not completely satisfactory, it was clear that, since the end of the Second World War, international law has established principles of great utility: the obligation to punish genocide; the obligation to make torture punishable in domestic law; the duty to punish war crimes under the Geneva Conventions; the several references to universal jurisdiction regarding international crimes; the inapplicability of obedience to orders as a defense (in the case of manifestly illegal orders); the non-applicability of a statute of limitations to crimes against humanity; the inapplicability of the political crime defense in the case of extradition for such crimes; and, the obligation to extradite or prosecute).

*Id.*

<sup>116</sup> See Weiner, *supra* note 20.

<sup>117</sup> See Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 451, 467-74.

<sup>118</sup> See generally KELLY D. ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS 40-45 (1997).

<sup>119</sup> See GEORGE CREEL, WAR CRIMINALS AND PUNISHMENT 122-37 (1944).

massacres of numerous Armenians.<sup>120</sup> Despite three separate articles appearing in the Treaty of Versailles addressing the need for an *ad hoc* criminal tribunal and an agreement that charges were to be brought against the Turkish architects of the mass killings, no action was taken against these two key targets of accountability.<sup>121</sup>

Instead, after convening a "Commission on the Responsibility of the Authors of War and On Enforcement Penalties," the Allies submitted a list of eight hundred and ninety-six suspected war criminals to Germany.<sup>122</sup> Germany steadfastly refused to accept such broad prosecutions and threatened the renewal of war.<sup>123</sup> Rather than risk the return to war, the Allies reevaluated their position and sent a second list of suspects that had been narrowed to a mere forty-five suspects.<sup>124</sup> Germany again protested and eventually agreed to prosecute twelve suspects before the German Supreme Court at Leipzig.<sup>125</sup> These domestic prosecutions resulted in only four convictions with sentences ranging from six months to two years.<sup>126</sup>

The events at Leipzig culminated in the withdrawal of Allied Observers in Leipzig.<sup>127</sup> Only a few minor prosecutions continued against the initial target groups in Belgium and France.<sup>128</sup> The experience at Leipzig convincingly demonstrated that the domestic courts of defeated nations could not be entrusted with the difficult task of prosecuting their own war criminals.<sup>129</sup> The ambivalence noted at Leipzig, and its corresponding desire to "keep the peace" rather than seek justice, has been replayed in numerous settings since the initial debacle following World War I.<sup>130</sup> In fact, Hitler himself relied upon the international community's inertia following World War I in proclaiming, "Who after all is today speaking

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<sup>120</sup> See M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 15-17 (1997).

<sup>121</sup> See *id.* at 17-18.

<sup>122</sup> See DONALD A. WELLS, WAR CRIMES AND LAWS OF WAR 69-70 (1984).

<sup>123</sup> See *id.* at 70.

<sup>124</sup> See *id.*

<sup>125</sup> See *id.*

<sup>126</sup> See *id.*

<sup>127</sup> See *id.*

<sup>128</sup> See *id.*

<sup>129</sup> See 2 BENJAMIN FERENCZ, ENFORCING INTERNATIONAL LAW: A WAY TO WORLD PEACE 439 (1983).

<sup>130</sup> See TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 17-18 (1992). Beginning with the Treaty of Lausanne in 1923, the award of amnesty to defeated forces has often been the political price paid for achieving a cessation of hostilities. See *id.*

about the destruction of the Armenians?"<sup>131</sup> Leipzig, Professor Bassiouni notes, is the first instance where political concerns prevailed over justice.<sup>132</sup>

While many would credit the experience at Nuremberg with the creation of an enforceable body of human rights standards, an equally plausible argument exists that the modern approach towards human rights owes its genesis not to Nuremberg, but rather, to the failures experienced at Leipzig.<sup>133</sup> As one scholar notes, "[t]he silence of international law regarding the consequences for government-sponsored abuses of human rights began to change after the First World War, and even more so after World War II."<sup>134</sup>

#### IV. ASIAN EXAMPLES OF IMPUNITY

*Perhaps the challenge [of accountability] is to meet a basic need for balance and wholeness.*<sup>135</sup>

##### A. Cambodia

Nearly every author that speaks of impunity makes reference to the renowned case of Cambodia.<sup>136</sup> Indeed, it would be a gross omission to ignore the legacy of the Khmer Rouge regime. Perhaps more than any other example — Asian or otherwise — Cambodia demonstrates the fragile relation between political will and political casualties.

Three fine articles relating to Cambodia and the Khmer Rouge are Hurst Hannum's *International Law and Cambodian Genocide: The Sounds of Silence*,<sup>137</sup> Craig Etcheson's *The Persistence of Impunity in Cambodia*<sup>138</sup> and Theresa Klosterman's *The Feasibility and Propriety of a*

<sup>131</sup> Bassiouni, *supra* note 120, at 21 n.30 (quoting Adolph Hitler in his speech to the Chief Commanders and Commanding Generals on the Obersalzberg on 22 August 1939).

<sup>132</sup> *See id.* at 17.

<sup>133</sup> *See* CREEL, *supra* note 118, at 138-50.

<sup>134</sup> Steven R. Ratner, *Why Only War Crimes?: De-Linking Human Rights Offenses from Armed Conflict*, 3 HOFSTRA L. & POL'Y. SYMP. 75, 78 (1999). This article appears in a symposium publication entitled *War Crimes and War Crimes Tribunals: Past, Present and Future*, and is one of several articles offering comments and observations on preventing genocide and gender violence in general, while indirectly addressing the subject of impunity. *See generally* 3 HOFSTRA L. & POL'Y SYMP. (1999).

<sup>135</sup> MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 146 (1998) (emphasis added).

<sup>136</sup> *See, e.g.*, LEO KUPER, THE PREVENTION OF GENOCIDE at 14-16 (1985).

<sup>137</sup> *See* Hannum, *supra* note 58, at 82.

<sup>138</sup> *See* CRAIG ETCHESON, *The Persistence of Impunity in Cambodia*, in REIGNING IN IMPUNITY, *supra* note 5, at 231.

*Truth Commission in Cambodia: Too Little? Too Late?*<sup>139</sup> Likewise, Steven R. Ratner and Jason S. Abrams's book, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW*,<sup>140</sup> presents a thorough and meticulous study of the Khmer Rouge's activities and Cambodia's corresponding obligations under international law.

"From the start," Klosterman observes, "secrecy was the modus operandi of the Khmer Rouge."<sup>141</sup> It is a great paradox, then, that secrecy (or simply ambivalent complicity) permitted the Khmer Rouge to hold the Cambodian seat at the U.N. during the 1980s.<sup>142</sup> Today, due in part to vigilant reporting from such organizations as the Yale Documentation Center and the Lawyers Committee for Human Rights, the brutality of Pol Pot and the Khmer Rouge are no longer secret.<sup>143</sup>

The Khmer Rouge regime targeted ethnic Chams (people of Malayo-Polynesian descent who practiced the Islamic religion), Buddhist monks, officials of the prior regime, the educated and any other individual who was not deemed "pure Khmer."<sup>144</sup> As Hurst Hannum notes:

The radical transformation of Cambodia envisaged by the Khmer Rouge required the racial, social, ideological, and political purification of the Cambodian nation, through the sociological and physical liquidation of a variety of groups considered to be irremediably tainted by their association with the old social order or otherwise unsuited to the intended new order. To achieve this goal, the Khmer

<sup>139</sup> See Theresa Klosterman, *The Feasibility and Propriety of a Truth Commission in Cambodia: Too Little? Too Late?*, 15 ARIZ. J. INT'L & COMP. L. 833 (1998).

<sup>140</sup> See RATNER & ABRAMS, *supra* note 61, at 1.

<sup>141</sup> Klosterman, *supra* note 139, at 846.

<sup>142</sup> See RATNER & ABRAMS, *supra* note 61, at 239 (noting that, "[t]his sad development resulted from an effective anti-Vietnam coalition led by China and ASEAN, and supported by the United States (due to the Cold War), as well as many Third World nations who placed a premium on the need to condemn aggression against small states").

<sup>143</sup> See generally FLOYD ABRAMS ET AL., *LAWYERS COMM. FOR HUMAN RIGHTS, KAMPUCHEA: AFTER THE WORST* (1985), *reprinted in* 1989 (providing a report of two separate fact finding missions along the Thai-Kampuchean border in 1984 and early 1985), and JAMES ROSS, *LAWYERS COMM. FOR HUMAN RIGHTS, CAMBODIA: THE JUSTICE SYSTEM AND VIOLATIONS OF HUMAN RIGHTS* (1991) (providing a report of a Cambodian fact finding mission in late 1991).

<sup>144</sup> See ABRAMS ET AL., *supra* note 143, at 234-36; *see also* Hannum, *supra* note 58, at 86-88. Mr. Hannum declares that "[b]y the end of the effective Khmer Rouge rule in 1979, Buddhism had been completely destroyed as an organized religion and its monks substantially destroyed physically." Hannum, *supra* note 58, at 88. Mr. Hannum further estimates that less than one thousand (1,000) monks survived the Khmer Rouge regime, but that prior to the institution of Khmer Rouge proscriptions against religious worship, Cambodia maintained approximately 60,000 Buddhist monks. *See* Hannum, *supra* note 58, at 86-88.

Rouge government instituted unremitting, absolute dictatorship over a populace ruled by terror.<sup>145</sup>

While not all of the acts committed by the Khmer Rouge regime amount to genocide, there is more than sufficient evidence that certain groups *were* targeted due solely to their racial, ethnic or religious heritage.<sup>146</sup> The fact that Cambodia ratified the Genocide Convention *without reservation* on 14 October 1950 has had little impact on subsequent legal developments.<sup>147</sup> In fact, the international community's failure to act against the Khmer Rouge regime is a deplorable commentary on the impotency of the Genocide Convention against such forces as political will and apathy.<sup>148</sup>

The most unfathomable aspect of Khmer Rouge impunity is the fact that the regime kept detailed, meticulous records of their executions and torture committed at Tuol Sleng prison and elsewhere.<sup>149</sup> Unlike the evidentiary void confronting the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, Pol Pot's regime left behind a wealth of incriminating information matched only by the architects of Nazi Germany.<sup>150</sup> Further, these records affirmatively demonstrate that the prison, torture and execution centers were "so much more macabre than political prisons or torture centers in other countries that the survivor accounts would be unbelievable were it not for the extraordinary archival documentation."<sup>151</sup>

Only once did Cambodia attempt to bring members of the Khmer Rouge regime to justice, when the people's revolutionary tribunal conducted *in absentia* trials against Pol Pot and his deputy Prime Minister.<sup>152</sup>

<sup>145</sup> Hannum, *supra* note 58, at 85.

<sup>146</sup> *See id.*

<sup>147</sup> *See id.* at 94.

<sup>148</sup> *See* Payam Akhavan, *Enforcement of the Genocide Convention: A Challenge to Civilization*, 8 HARV. HUM. RTS. J. 229, 230 (1995). Akhavan also states that:

[D]espite its preeminent juridical status, this monstrous crime — which world leaders vowed would never happen again — continues to plague mankind. Since the Holocaust, genocidal acts have been permitted against numerous human groups before the passive eyes of the international community. The questions are, therefore, what are the means for the enforcement of the Genocide Convention and why has the international community repeatedly failed to prevent and punish this horrid crime? . . . The failure to prevent and punish genocide betrays a lack of political will to confront effectively the intentional mass destruction of entire human groups. The lack of political will, in turn, betrays a cynical and short-sighted policy on the part of world leaders that fails to comprehend the immense moral and political consequences of inaction against such gross abuses of power.

*Id.*

<sup>149</sup> *See* Hannum, *supra* note 58.

<sup>150</sup> *See* Klosterman, *supra* note 139, at 833, 849–50.

<sup>151</sup> Hannum, *supra* note 58, at 91.

<sup>152</sup> *See* KUPER, *supra* note 56, at 17.

Despite the fact that both were adjudged guilty (with less than full due process), neither was taken into government custody or forced to serve any sentence.<sup>153</sup> Most recently, a full amnesty was provided to Ieng Sary, second in command of the Khmer Rouge.<sup>154</sup>

The only glimmer of hope that impunity might be averted in Cambodia came in 1994 when the United States Congress adopted the Cambodian Genocide Justice Act.<sup>155</sup> The purpose of the Cambodian Genocide Act was two-fold:

- (1) to collect relevant data relating to crimes of genocide committed in Cambodia between 17 April 1975 and 7 January 1979,<sup>156</sup> and
- (2) in circumstances which the President deems appropriate, to encourage the establishment of a national or international criminal tribunal for the prosecution of those accused of genocide in Cambodia.<sup>157</sup>

While no tribunal has been created, and may never materialize, the law did assist in the creation of a Cambodian Document Center originally maintained at Yale University.<sup>158</sup> This important development has permitted the retrieval of numerous incriminating documents, photographic evidence and physical surveys of genocidal enclaves.

Despite the death of Pol Pot and the advanced age of his many collaborators, the Cambodian issue seems far from resolved. As recently as 16 April 1998, a U.N. Special Representative, Mr. Thomas Hammarberg, emphasized the need to establish justice in Cambodia.<sup>159</sup> "Injecting justice and accountability for the Khmer Rouge period," he reminded, "is an important step in breaking the cycle of impunity which even today remains a major problem in Cambodia."<sup>160</sup> For now however, Cambodia stands as one of the preeminent examples of continuing impunity against unredressed crimes.

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<sup>153</sup> See *id.* at 17 (stating that the criminal proceedings conducted by the people's revolutionary tribunal tried Pol Pot and the deputy prime minister *in absentia*).

<sup>154</sup> See RATNER & ABRAMS, *supra* note 61, at 241.

<sup>155</sup> Cambodian Genocide Justice Act §§ 572-74, 22 U.S.C. § 2656 (1994).

<sup>156</sup> *Id.* (indicating that the purpose for collection of this data was the potential use of such information in either national or international trials conducted against Khmer Rouge members).

<sup>157</sup> *Id.*

<sup>158</sup> See *id.*

<sup>159</sup> See *Need to Inject Justice and Accountability for Khmer Rouge Period Remains After Death of Pol Pot, Special Representative of Secretary-General Says*, U.N. PRESS RELEASE HR/98/26 (16 Apr. 1998) (last modified July 6, 1998) <<http://www.unchr.ch/html/press/hr9826.htm>>.

<sup>160</sup> *Id.*

B. *The Philippines*

In 1986, the "People Power Revolution" signaled a hopeful moment in the history of the Philippines because it was seen as an indication that political and civil liberties would be restored.<sup>161</sup> For it was with this Revolution that Ferdinand Marcos relinquished power and was replaced by a more promising candidate, Corazon Aquino.<sup>162</sup> Prior to his departure, Marcos presided over a government that inflicted fierce violations of human rights over an extended period of martial law.<sup>163</sup> Numerous victims perished under the Marcos regime where more than 50,000 individuals were unlawfully imprisoned, more than 1,000 were killed for political reasons, and many more were subjected to torture or were "disappeared."<sup>164</sup> Indeed, "[w]hile numbers and specific cases have been disputed, there is no serious question that for more than a decade military personnel in the Philippines have repeatedly killed [tortured and "disappeared"] persons seized as alleged subversives, as well as other people against whom no particular charges [were ever] even preliminarily formulated."<sup>165</sup>

Beyond the crimes committed against life and physical and mental security, the Marcos regime also inflicted gross violations of human rights by issuing a Presidential Commitment Order ("PCO") permitting "preventative detention" for national security crimes and suspending habeas corpus in national security cases.<sup>166</sup> The Filipino Courts acted in collusion with Marcos by finding that they were incapable of reviewing President Marcos' exercise of power relating to arrest and detention.<sup>167</sup>

The inauguration of President Aquino was broadly welcomed as she was considered to be sympathetic to human rights.<sup>168</sup> Initially, President Aquino held true to her commitments on human rights by releasing a significant number of political prisoners, restoring habeas corpus, ratifying important human rights instruments (such as the ICCPR referenced above), repealing those decrees permitting arbitrary and indefinite detention and instituting a national Truth Commission to investigate past

<sup>161</sup> See *The Philippines: Violations of the Laws of War by Both Sides*, ASIA WATCH, 1990, at 2.

<sup>162</sup> See *id.*

<sup>163</sup> See Marvin E. Frankel, Jack Greenberg & Diane F. Orentlicher, *The Philippines, A Country in Crisis: A Report by the Lawyers Committee for International Human Rights*, 15 COLUM. HUM. RTS. L. REV. 69 (1983).

<sup>164</sup> *Id.* at 71, 84-89.

<sup>165</sup> *Id.* at 84.

<sup>166</sup> *Id.* at 90-91. Beginning in August 1983, PCOs were effectuated pursuant to President Marcos' Preventative Detention Act (PDA). See *id.* at 89-90.

<sup>167</sup> See *id.* at 93-94.

<sup>168</sup> See ASIA WATCH, *supra* note 161, at 2-3. This perceived sensitivity was explained as resulting from the assassination of her husband, Benigno Aquino, by Marcos' forces. See *id.*

human rights abuses.<sup>169</sup> However, no effort was made to prosecute military personnel for the numerous human rights violations committed under Marcos.<sup>170</sup> Speculation suggests that this hesitation was due, in part, to Aquino's fear of losing military support.<sup>171</sup>

Regardless of the reasons for failing to fulfill her initial human rights commitments, the Philippines remains a modern example of impunity. While President Aquino most assuredly grappled with the delicate balance between restoring democracy and punishing military personnel for past human rights abuses, violations should have been prosecuted under numerous international legal theories.<sup>172</sup> The fact that the Truth Commission, created under Presidential Directive, was disbanded without ever issuing a report or findings relating to past abuses is also distressing.<sup>173</sup> The failure to provide *any documentation or official acknowledgement* of military offenses under the Marcos regime only furthers the injury sustained by countless Filipinos.<sup>174</sup> While there may be acceptable reasons *not* to prosecute individuals following a governmental transition to democracy,<sup>175</sup> there are no legitimate reasons to continue to withhold or deny the truth of such pernicious events.<sup>176</sup> Certainly, in the case of President Aquino and the Philippines the threat of military coups were very real and sustainable. Sometimes all that can be expected in such vulnerable communities is that the truth will someday be exposed. These shortcomings, and the continued trepidation toward past military offenders, results in the Filipinos being denied justice or accountability.

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<sup>169</sup> See *id.* at 3.

<sup>170</sup> See *id.*

<sup>171</sup> See *id.*

<sup>172</sup> See *id.* at 7-36 (describing the application of human rights law, including Common Article 3 of the Geneva Conventions).

<sup>173</sup> See Priscilla B. Hayner, *Fifteen Truth Commissions — 1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 620-21 (1994).

<sup>174</sup> See *id.* The seven-person committee, headed by Senator Jose W. Diokno, was created without a staff or a budget, and was quickly overwhelmed by the large volume of complaints, mostly directed at events of the past. See *id.* at 620. The committee's work was cut short, and nothing definitive was ever produced, despite a year of investigation and the filing of a number of high level cases in court, because in January 1987, virtually the entire committee resigned after a military attack on a peaceful demonstration in Manila killed several civilians. See *id.* No governmental efforts to follow up the committee's work, or prosecute past offenders, ever took place. See *id.*

<sup>175</sup> See Orentlicher, *supra* note 23, at 2544-46.

<sup>176</sup> See Roht-Arriaza, *supra* note 117, at 509 (reminding that "Investigation itself, and disclosure of the identities of those involved, can be a form of punishment. So too can loss of rank, dismissal from a government post, loss of pension rights and monetary fines").



### C. *The Case of Japanese "Comfort Women"*

One of the more gripping and still ongoing cases of impunity involves the Japanese government's response to the treatment of former "Comfort Women." The term "Comfort Women" (*jugun ianfu*) describes the more than 200,000 Asian women who were enslaved by trickery, deceit or coercion into forced prostitution by the Japanese military during World War II.<sup>177</sup> Four recent articles discussing the troubling Japanese response to "Comfort Women" are: Karen Parker and Jennifer F. Chew's article, *Compensation for Japan's World War II War-Rape Victims*,<sup>178</sup> Tong Yu's *Reparations for Former Comfort Women of World War II*,<sup>179</sup> Chin Kim and Stanley S. Kim's article, *Delayed Justice: The Case of the Japanese Imperial Military Sex Slaves*,<sup>180</sup> and Etsuro Totsuka's *Commentary on a Victory for "Comfort Women": Japan's Judicial Recognition of Military Sexual Slavery*.<sup>181</sup> In addition, a thorough compilation of survivor testimony may be found in *TRUE STORIES OF THE KOREAN COMFORT WOMEN*, edited by Keith Howard.<sup>182</sup>

The widespread existence of "Comfort Women" was first uncovered in a 1978 exposé prepared by Senda Kako, a prominent Japanese writer.<sup>183</sup> This extensive exposé provided proof of more than 200,000 female sex slaves who were forced to "service" the Japanese Imperial military between 1937 and 1945.<sup>184</sup> Subsequently, in 1991, the issue was thrust to the forefront of Japanese politics when a South-Korean "Comfort Woman" came forward with her personal story<sup>185</sup> and joined two other former "Comfort Women" in lodging suit against the Japanese government for their suffering.<sup>186</sup>

Initially, the Japanese government vehemently denied both the existence of military-run brothels and the claims of the South Korean "Com-

<sup>177</sup> Karen Parker & Jennifer F. Chew, *Compensation for Japan's World War II War-Rape Victims*, 17 HASTINGS INT'L & COMP. L. REV. 497, 498 (1994). Parker & Chew also explain that women and girls as young as twelve were taken from their homes in Korea, China, the Dutch East Indies, Taiwan, Malaysia, Burma, and the Philippines. *See id.*

<sup>178</sup> *Id.*

<sup>179</sup> Tong Yu, *Reparations for Former Comfort Women of World War II*, 36 HARV. INT'L L.J. 528 (1995).

<sup>180</sup> Chin Kim & Stanley S. Kim, *Delayed Justice: The Case of the Japanese Imperial Military Sex Slaves*, 16 UCLA PAC. BASIN L.J. 263 (1998).

<sup>181</sup> Etsuro Totsuka, *Commentary on a Victory for "Comfort Women": Japan's Judicial Recognition of Military Sexual Slavery*, 8 PAC. RIM L. & POL'Y 47 (1999).

<sup>182</sup> *TRUE STORIES OF THE KOREAN COMFORT WOMEN* (Keith Howard, ed. 1995) (English translation).

<sup>183</sup> *See* Kim & Kim, *supra* note 180, at 265.

<sup>184</sup> *See id.*

<sup>185</sup> *See* Parker & Chew, *supra* note 177, at 502.

<sup>186</sup> *See* Totsuka, *supra* note 181, at 49.

fort Women.”<sup>187</sup> This attitude was reluctantly modified in 1992 when the government was confronted with official documents confirming the military’s capture and use of “Comfort Women” and the Japanese government’s complicity in the program.<sup>188</sup> Although the Japanese government continued to deny that these women were forcibly enslaved, the existence of the brothels and the government’s participation and support of the “Comfort Women” program was finally conceded.<sup>189</sup>

In 1993, the Japanese government officially acknowledged its shameful role in both instituting comfort stations and forcibly “recruiting” or abducting these women.<sup>190</sup> At the time this concession was made, only 226 South Korean “Comfort Women” were believed to be alive.<sup>191</sup> In fact, only twenty-five percent of the victims are believed to have survived their ordeal of repeated daily rapings.<sup>192</sup> Although the Japanese government instituted a one billion-dollar program purportedly “to undertake cultural and vocational projects as a token of apology for wrongs committed during World War II,” there was no direct compensation offered or reserved for the victims of sexual enslavement.<sup>193</sup> Instead, the Japanese government enlisted the assistance of the Japanese Red Cross in facilitating a privately funded effort to compensate the former “Comfort Women.”<sup>194</sup> The Asian Women’s Friendship and Peace Foundation Fund was established in 1996 to collect sympathy money for these victims of sexual crimes.<sup>195</sup> In this and other disturbing modes, the Japanese government continues to avoid legal responsibility for its horrific system of “Comfort Women.”<sup>196</sup>

These failures culminated in a civil lawsuit brought by three South Korean women, each of whom had been sexually enslaved and suffer the stigma of former “Comfort Women.”<sup>197</sup> The plaintiffs sought monetary compensation for their anguish, official acknowledgment of Japan’s involvement in these military crimes, a formal apology and an accurate revision of Japanese textbooks to reflect the sinister nature of military atrocities committed against women during World War II.<sup>198</sup> While the

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<sup>187</sup> See Yu, *supra* note 179, at 529.

<sup>188</sup> See *id.* The uncovered records included official government documents of conscription, transportation, placement, living conditions, management of comfort stations, and records concerning venereal diseases, income and prices at comfort stations. See *id.*

<sup>189</sup> See *id.*

<sup>190</sup> See *id.*

<sup>191</sup> See Kim & Kim, *supra* note 180, at 226.

<sup>192</sup> See Parker & Chew, *supra* note 177, at 499.

<sup>193</sup> See Yu, *supra* note 179, at 529–30.

<sup>194</sup> See *id.*

<sup>195</sup> See Kim & Kim, *supra* note 180, at 269.

<sup>196</sup> See *id.* at 331.

<sup>197</sup> See TRUE STORIES OF THE KOREAN COMFORT WOMEN, *supra* note 182, at 193.

<sup>198</sup> See Yu, *supra* note 179, at 537.

trial has been extraordinarily successful in establishing a public record regarding Japanese "Comfort Women," the plaintiffs did not fare as well. Each plaintiff was awarded a mere 300,000 yen (approximately \$ 2,270 U.S.) for their suffering.<sup>199</sup> Adding insult to still uncompensated injury, the Japanese government has appealed the paltry awards.<sup>200</sup>

It is arguable that Japan remains liable not only for monetary damages to the "Comfort Women" or their surviving dependents after enduring fifty years of shameful silence, but also for punishment against the surviving perpetrators.<sup>201</sup> War crimes against women, particularly those of a violent sexual nature, are finally being recognized after years of inaction. At the International Criminal Tribunal for the Former Yugoslavia, individual defendants are finally being charged with rape and other forms of sexual violence as war crimes and crimes against humanity.<sup>202</sup> Still, the issue of "Comfort Women" suffers the reticent fate of political will.<sup>203</sup> Much like the inertia demonstrated toward Pol Pot and the surviving members of the Khmer Rouge, the international community's slow response to sexual crimes committed against "Comfort Women" during World War II may simply die out once the few remaining survivors perish. It is for this reason that the "Comfort Women" remains an alarming example of impunity.

#### V. MOVEMENT TOWARDS A SYSTEM OF ACCOUNTABILITY

*[T]he idea of criminal sanctions for violations of international law is both rare, and for the most part, quite recent.*<sup>204</sup>

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<sup>199</sup> Kim & Kim, *supra* note 180, at 263.

<sup>200</sup> *See id.* (explaining that the Japanese government filed an appeal on 8 May 1998, despite previously acknowledging the "Comfort Women" system and the military's role in committing these dishonorable sex crimes).

<sup>201</sup> *See* Totsuka, *supra* note 181, at 51 (explaining that the Committee of Experts of the International Labour Organisation ("ILO") officially noted in 1996 that the "Comfort Women" system should be recognized as "sexual slavery" in violation of the ILO Forced Labour Convention, and recommended that Japan, as a signatory to the Convention, should give "proper consideration" to the matter).

<sup>202</sup> *See, e.g.*, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (Prosecutor v. Furundzija), 1998, Case IT-95-17/1-T10 (Dec. 10); United Nations, *International Criminal Tribunal for the former Yugoslavia* (visited Dec. 20, 1999) <<http://www.un.org/icty/furundzija/trialc2/judgment/main.htm>>.

<sup>203</sup> *See* Parker & Chew, *supra* note 177, at 510-21 (providing a thorough explanation of the illegality, under customary law, of the "Comfort Women" system existing during World War II). Parker and Chew argue that rape as a war crime is *jus cogens* and may not be excused under international law by any government. *See id.* at 540-42.

<sup>204</sup> Steven R. Ratner, *The Schizophrenias of International Criminal Law*, 33 TEX. INT'L L. J. 237, 241 (1998) (emphasis added).

*Above all . . . the case for prosecutions turns on the consequences of failing to punish atrocious crimes committed by a prior regime. . . .*<sup>205</sup>

*The fact that there are strong legal and moral arguments in favor of prosecuting former human rights abusers does not eliminate the enormous political difficulties that such a policy faces in the delicate balance of powers that characterize most transitions.*<sup>206</sup>

The first thing that must be recognized in a modern approach to accountability is that criminal punishment for gross violations of human rights no longer remains the only option. In fact, as the current South African model demonstrates, it may no longer be the most preferred course.<sup>207</sup> While numerous scholars and activists have focused on the many instances where criminal punishment has not been imposed (or perhaps even attempted) following widespread and systematic atrocities,<sup>208</sup> it is encouraging that the outgrowth of this impunity has been the creation of substitute penalties. Accordingly, this final section will address the various approaches to accountability that have been offered in response to impunity.

#### A. *Truth Commissions*

The most vigorously touted option in dealing with past atrocities may well be Truth Commissions or Commissions of Inquiry. These non-adversarial bodies have been offered as an effective solution to many recent calamities. Truth Commissions have been instituted under Presidential Directives,<sup>209</sup> influenced or supported by religious institutions, brokered by U.N. settlement,<sup>210</sup> and more recently, instigated by opposition parties.<sup>211</sup> The seminal piece in this area remains Priscilla Hayner's article, *Fifteen Truth Commissions — 1974 to 1994: A Comparative Study*.<sup>212</sup> In

<sup>205</sup> See Orentlicher, *supra* note 23, at 2542 (emphasis added).

<sup>206</sup> Juan E. Méndez, *In Defense of Transitional Justice*, in TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES 1, 8–9 (A. James McAdams ed., 1997) (representing one of several noteworthy articles in Professor McAdams's country-focused compilation dealing with transitional settings in Greece, Bolivia, Argentina, Chile, Hungary, Poland, East Germany and South Africa) (emphasis added).

<sup>207</sup> See South African Truth and Reconciliation Commission, *South African Truth and Reconciliation Commission* (visited Nov. 29, 1999) <<http://www.truth.org.za>>.

<sup>208</sup> See, e.g., *supra* notes 91-176 and accompanying text (discussing atrocities in Latin America, the case of Leipzig, atrocities in Cambodia and atrocities in the Philippines).

<sup>209</sup> See Mark Ensalaco, *Truth Commissions for Chile and El Salvador: A Report and Assessment*, 16 HUM. RTS. Q. 656 (1994) (providing the case of Chile as an example, like Argentina, of a truth commission created by a Presidential Directive).

<sup>210</sup> See *id.* (providing the case of El Salvador as an example, like Haiti, of a truth commission brokered by an U.N. settlement agreement).

<sup>211</sup> See Klosterman, *supra* note 139, at 837.

<sup>212</sup> Hayner, *supra* note 173.

this celebrated piece, Ms. Hayner aptly sets forth the many advantages that Truth Commissions proffer in dealing with gross violations of human rights.<sup>213</sup> Truth Commissions, she explains, are “official bodies set up to investigate a past period of human rights abuses or violations of international humanitarian law.”<sup>214</sup>

Another proponent of utilizing Truth Commissions in response to gross violations of human rights is Naomi Roht-Arriaza. Professor Roht-Arriaza has written numerous pieces including, *Truth Commissions as Part of a Social Process: Possible Guidelines*,<sup>215</sup> and her influential book, *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE*.<sup>216</sup> As Professor Roht-Arriaza notes, “[i]nformation gained by a Commission in the course of hearing testimony from victims may help point to higher-ups who should be targeted for criminal investigations and prosecution.”<sup>217</sup>

Still another instructive approach to Truth Commissions can be found in Professor Martha Minow’s book, *BETWEEN VENGEANCE AND FORGIVENESS*.<sup>218</sup> Professor Minow explains that “[w]ith the aim of producing a fair and thorough account of the atrocities, a truth commission proceeds on the assumption that it helps individuals to tell their stories and to have them acknowledged officially.”<sup>219</sup> More than most other authors, however, Minow presents a therapeutic approach to Truth Commissions, focusing on the ameliorative effect that purging such experiences can have on victims and survivors of human rights violations.<sup>220</sup>

Even strong advocates of criminal punishment have accepted the restorative qualities of Truth Commissions in certain instances.<sup>221</sup> This has been particularly true in response to the South African Truth and Reconciliation Commission.<sup>222</sup> Unlike many of the Latin American

<sup>213</sup> *See id.*

<sup>214</sup> *Id.* at 598.

<sup>215</sup> Naomi Roht-Arriaza, *Truth Commissions as Part of a Social Process: Possible Guidelines*, in *REIGNING IN IMPUNITY*, *supra* note 5, at 280.

<sup>216</sup> *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* (Naomi Roht-Arriaza ed. 1995).

<sup>217</sup> Naomi Roht-Arriaza, *supra* note 5, at 280.

<sup>218</sup> MINOW, *supra* note 135.

<sup>219</sup> *Id.* at 61.

<sup>220</sup> *See id.* at 80–89.

<sup>221</sup> *See, e.g.*, Diane F. Orentlicher, *International Criminal Law and the Cambodian Killing Fields*, 3 *ILSA J. INT’L & COMP. L.* 705 (1997) (explaining, in a recent reflection regarding the South African Truth and Reconciliation Commission, that:

One of the principle virtues of truth commissions is the extent to which they can potentially engage society in a broadly-gauged and broad-ranging deliberative process about its past. . . . In these and other respects, the process of accountability engendered by truth commissions tends to be more inclusive than that of criminal trials).

<sup>222</sup> *See id.*

examples where full-scale amnesties overshadowed any truth seeking process, the South African approach provides for the use of amnesties on an individual basis under limited circumstances.<sup>223</sup> As Neil Kritz notes:

The price of such amnesty is that individuals must apply and provide full details of their crimes to the Truth and Reconciliation Commission — a powerful incentive to come forward and assist the Commission in its work. . . . Arguably, the only reason that the Truth and Reconciliation Commission has been as effective as it has in eliciting thousands of confessions of apartheid-era crimes is because the threat of prosecution remains real.<sup>224</sup>

But caution is still required. Very few Truth Commissions result in trials of any kind, even when the identity of the violators and the extent of the atrocities are widely known.<sup>225</sup> Mere resort to Truth Commissions may not be sufficient to discharge a State's duties under various instruments of international law. As discussed above, certain international treaties require governments to extradite or prosecute.<sup>226</sup> The use of Truth Commissions, without more, does not fulfill this duty. Juan Méndez acknowledges this limitation in his article, *In Defense of Transitional Justice*. Professor Méndez notes that “[t]he most extreme form of tokenism . . . results when a truth commission is proposed as an alternative to criminal prosecutions and not as a step in the direction of accountability.”<sup>227</sup>

Truth Commissions provide but one tool in a spectrum of accountability mechanisms. In countries where prosecutions are not feasible, due most often to a lack of resources, a recognized threat to democracy or a lack of political will, Truth Commissions may provide supplementary justice until such time as full justice may be achieved. And, as Priscilla Hayner notes:

The most straightforward reason to set up a truth commission is that of sanctioned fact finding: to establish an accurate record of a country's past, and thus help to provide a fair record of a country's history and its government's much-disputed acts. Leaving an honest account of the violence prevents history from being lost or re-written, and allows a society to learn from its past in order to prevent a repetition of such violence in the future. . . . [T]he importance of

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<sup>223</sup> See Amnesty Committee, *The Amnesty Committee of the Truth and Reconciliation Commission* (visited Nov. 29, 1999) <<http://www.truth.org.za>>.

<sup>224</sup> Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, LAW & CONTEMP. PROBS., Autumn 1996, at 127, 143.

<sup>225</sup> See, e.g., Hayner, *supra* note 173 (providing an example of a Truth Commission conducting extensive investigations and filing cases in court, however resulting in a limited number of trials and no punishment).

<sup>226</sup> See, e.g., Genocide Convention, *supra* note 51.

<sup>227</sup> Méndez, *supra* note 206, at 15.

truth commissions might be described more accurately as *acknowledging* the truth rather than finding the truth.<sup>228</sup>

### B. *Lustration Laws and Purgings*

With the crumbling of the Berlin Wall, democracy finally infiltrated portions of Eastern Europe that had been dominated by oppressive rule for several decades.<sup>229</sup> But unlike Latin America where death squads were effectuating “disappearances” and inflicting terror through physical torture, the oppression in Europe seemingly took on a different dimension.<sup>230</sup> It is only appropriate then, that the European communities have turned to distinct measures for addressing their years of communist rule.<sup>231</sup>

Tina Rosenberg fittingly received the National Book Award and Pulitzer Prize for her groundbreaking report on post-Communist Europe in *THE HAUNTED LAND*.<sup>232</sup> The book eloquently recounts the shift to democracy in Czechoslovakia, Poland and Germany.<sup>233</sup> Endemic in these regime changes is the concept of “lustration.” Literally translated, “lustration” refers to “the performance of an expiatory sacrifice or purification rite.”<sup>234</sup> In the former Czechoslovakia, this meant that individuals who were named in secret police files as former government collaborators or informants were involuntarily dismissed from their government positions.<sup>235</sup> Thousands of individuals on the list of collaborators were condemned without trial.<sup>236</sup> Their relationships with colleagues, friends

<sup>228</sup> Hayner, *supra* note 173, at 607.

<sup>229</sup> See TINA ROSENBERG, *THE HAUNTED LAND* 70 (1995).

<sup>230</sup> See *id.* While death was less certain in Europe, there were at least 140,000 people imprisoned for acts against the communist state. See *id.*

<sup>231</sup> While many of the events that occurred in Eastern Europe might not constitute gross violations of human rights, the use of lustration laws and administrative purgings requires explanation. Any discussion of accountability requires details regarding lustration. See generally TINA ROSENBERG, *THE HAUNTED LAND* (1995).

<sup>232</sup> *Id.*

<sup>233</sup> See generally *id.* (recounting Czechoslovakia, Poland and Germany’s shift to democracy).

<sup>234</sup> NEIER, *supra* note 93, at 56; see also Ved P. Nanda, *Civil and Political Sanctions as an Accountability Mechanism for Massive Violations of Human Rights*, in *REIGNING IN IMPUNITY* 313, 318 n.22 (explaining that “[t]he word ‘lustration’ is derived from the Latin *lustrara*, meaning ‘to put light on’ or illuminate. It is also said to be derived from *lustrum*, described as a purifying sacrifice carried on every five years in Imperial Rome, or the Latin *lustratio*, which means purification by sacrifice or purging.”).

<sup>235</sup> See ROSENBERG, *supra* note 229, at 67-121. While there were no criminal sanctions imposed, these individuals were precluded from returning to these positions for at least five years. See *id.* at 98-99.

<sup>236</sup> See *id.* at 106.

and family were unalterably changed.<sup>237</sup> The Czech experience has been sharply criticized because some believe that "lustration went further than the law provided."<sup>238</sup> The Czech laws have been condemned by such prestigious human rights organizations as the United Nations International Labor Organization, the Council of Europe, and Helsinki Watch.<sup>239</sup>

While administrative purges may further democracy by dismissing collaborators and culpable individuals from blossoming democratic institutions, these purgings mandate a modicum of due process to truly reconcile a fractured society. This is particularly important when the evidence against individuals has been obtained by secret police files or military records that may lack credibility.<sup>240</sup>

Nonetheless, lustration and administrative purgings may serve a significant, if not symbolic, purpose in combating impunity. As Professor Naomi Roht-Ariazza notes:

Redressing grave human rights violations may also require reorganization of the state apparatus to prevent recurrence of the violation. This may include disbanding or reforming military or police structures, and dismissing or withholding the pension rights of those in charge. The disbanding of repressive security apparatus and dismissal from office of individuals involved in violations will help ease the fear of victims and their families that they could again be targeted.<sup>241</sup>

### C. *Reparations*

Juan Méndez articulates four principles that should be sought during accountability in his article, *In Defense of Transitional Justice*.<sup>242</sup> First, States should seek to do justice.<sup>243</sup> In this regard, Professor Méndez contends that prosecution and punishment is required for gross violations of human rights.<sup>244</sup> Second, States should grant the victims the right to

<sup>237</sup> See *id.*

<sup>238</sup> See NEIER, *supra* note 93, at 57.

<sup>239</sup> See ROSENBERG, *supra* note 229, at 97-98.

<sup>240</sup> See Ved P. Nanda, *Civil and Political Sanctions as an Accountability Mechanism for Massive Violations of Human Rights*, in REIGNING IN IMPUNITY, *supra* note 5, at 313, 322 (observing that:

A blanket exclusion of all who belonged to a party, or of those whose names are found on some files seen by those now in power, smacks of imposing collective guilt. . . . Due process protections must be ensured. There must be a right to appeal, and there must be transparency. The process must be formal and the proceedings open).

<sup>241</sup> Naomi Roht-Ariazza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449, 482 (1990).

<sup>242</sup> Méndez, *supra* note 206, at 1.

<sup>243</sup> See *id.*

<sup>244</sup> See *id.* at 12.



know the truth.<sup>245</sup> The “right to truth” has been proposed by several scholars as a foundational aspect of accountability.<sup>246</sup> Third, States should grant reparations to victims.<sup>247</sup> These reparations can take many forms, but should attempt to restore the victims to their prior status as much as that remains possible.<sup>248</sup> Finally, Professor Méndez calls for the dismissal of human rights abusers from positions of power in any capacity in the armed or security forces of the state.<sup>249</sup>

Increasingly, scholars and activists are addressing the need for victim reparations.<sup>250</sup> In modern writings, the demand for reparations has increased, perhaps in response to the demonstrated impotency of criminal justice at the international level.<sup>251</sup> Reparations may take a variety of forms. Money damages provide one (often limited) possibility. Modern attempts at reparations have included such acknowledgements as an official day of remembrance, monuments and educational efforts that avoid revisionist history.<sup>252</sup> However, Professor Minow warns:

Reparations, restitution, and apologies present distinct promises and problems as responses to mass atrocity. Each deserves consideration; each belongs in the lexicon of political responses to collective

<sup>245</sup> See *id.*

<sup>246</sup> See, e.g., NEIER, *supra* note 93, at 55 (remarking that “[t]ruth is a powerful weapon”), and Zalaquett, *supra* note 100, at 31 (contending that it is not enough that mass media or other sources disseminate the truth, rather it is important that the truth be established in an officially sanctioned way, allowing the findings to form part of the historical record of the nation and establishing an authoritative version of the events over and above political considerations).

<sup>247</sup> See Méndez, *supra* note 206, at 12.

<sup>248</sup> See *id.*

<sup>249</sup> See *id.* Professor Méndez also suggests that the realization of these four goals should be seen as a process, not simply as a result. See *id.*

<sup>250</sup> See, e.g., MINOW, *supra* note 135.

<sup>251</sup> See *id.* at 50–51, 87. Professor Minow devotes an entire chapter of her recent book to the subject of reparations. See *id.* at 91.

<sup>252</sup> See Yael Danieli, *Justice and Reparation: Steps in the Process of Healing, in* REIGNING IN IMPUNITY, *supra* note 5, at 303, 310. The author observes the healing nature of commemoration as follows:

Commemorations can fill the vacuum with creative responses and may help heal the rupture not only internally, but also that rupture that victimization creates between the survivors and their society.

In contrast to the loneliness, commemoration provides a shared context, with shared pain, mourning and memory. The nation has transformed it into part of its consciousness. What may be an obligatory one-day-a-year ritual to others is experienced by the victims as a gesture of continued support.

There should be general awareness on a high level, including information and education about how the situation arose and its consequences. There should be inter-generational dialogue, and dialogues between children of survivors and of perpetrators. There should be statutes, paintings, scholarships, rooms in colleges and museums, and streets named after heroes and martyrs.

*Id.* at 310–11.

violence. Yet nothing in this discussion should imply that money payments, returned property, restored religious sites, or apologies seal the wounds, make victims whole, or clean the slate.<sup>253</sup>

For these reasons, prosecutions remain the cornerstone of any accountability program. Only prosecutions truly exemplify a respect for and adherence to the law recited in the numerous international treaties governing gross violations of human rights.

#### D. *The International Criminal Court*

As Professor Martha Minow observes, “[i]t is hard not to notice . . . the gap in time between the Nuremberg trials and any comparable effort to prosecute war crimes in international settings.”<sup>254</sup> This lull changed dramatically, however, in 1993 when the U.N. established the International Criminal Tribunal for the Former Yugoslavia.<sup>255</sup> Shortly thereafter, the U.N. followed suit and established a second tribunal in response to the genocidal acts in Rwanda.<sup>256</sup> These two *ad hoc* bodies, and the unspeakable tragedies that culminated in their creation, provided the necessary catalyst for the long-awaited adoption of an International Criminal Court (“ICC”) statute. On 17 July 1998, the international community (comprised of scholars, dignitaries, governmental and NGO representatives) voted to adopt the Rome Statute of the International Criminal Court.<sup>257</sup> This watershed development in international law is arguably the most positive development since Nuremberg. Finally there may be a permanent institution responsible for avoiding the instances of impunity displayed in Cambodia, the Philippines and toward the former “Comfort Women.” However, this Court will not have retrospective jurisdiction. This means that the three instances of Asian impunity discussed above remain the responsibility of individual States or the international community to rectify. Because the ICC is the result of numerous compromises and remains tied to concepts of national sovereignty, there is no assurance that we have at once arrived at a solution. The mirage of justice looms dimly on the horizon, but its full potential has yet to be reached.<sup>258</sup>

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<sup>253</sup> MINOW, *supra* note 135, at 117.

<sup>254</sup> *Id.* at 27.

<sup>255</sup> See Statute of the International Criminal Tribunal, *supra* note 84.

<sup>256</sup> See S.C. Res. 955, *supra* note 85.

<sup>257</sup> See U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/Conf. 189/9, 37 I.L.M. 999 (1998). There were 120 delegations in favor, seven opposed, and twenty-one abstentions, with the United States casting one of the negative votes. See Association of American Law Schools, *Panel Discussion: Association of American Law Schools on the International Criminal Court*, 36 AM. CRIM. L. REV. 223 (1999). In order to take effect, the ICC Statute will require ratification by sixty states. See *id.*

<sup>258</sup> As of October 20, 1999, only four States (Italy, San Marino, Senegal and Trinidad/Tobago) of the sixty states required for entry into force have ratified the ICC

## VI. CONCLUSION

*A policy to deal with human rights abuses should have two overall objectives: to prevent the recurrence of such abuses and to repair the damage they caused, to the extent that is possible.*<sup>259</sup>

Impunity presents one of the most viable impediments to the full achievement of human rights. This literature review has brought together a vast array of writings and authors in an attempt to assist those who work to combat impunity. This work is but a small effort to better the world. In hopefully educating others there is a chance that this work will somehow manage to change the minds of those whose are in a position to effectuate true change.

Impunity is something that we as a world continue to accept, tolerate and implicitly sanction. This does not mean that we cannot change. In closing, this paper leaves you with the thoughts and words of Professor Martha Minow, whose powerful description this author surely could not improve upon:

Mass violence is different. Torture, kidnappings, and murder — regimes of rape and terror — call for more severe responses than would ordinary criminal conduct, even the murder of an individual. And yet, there is no punishment that could express the proper scale of outrage.<sup>260</sup>

...

Living after genocide, mass atrocity, totalitarian terror . . . makes remembering and forgetting not just about dealing with the past. The treatment of the past through remembering and forgetting crucially shapes the present and future for individuals and entire societies.<sup>261</sup>

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Statute. See United Nations, *Rome Statute of the International Criminal Courts* (visited Nov. 29, 1999) <<http://www.un.org/law/icc/statute/status.htm>>.

<sup>259</sup> Zalaquett, *supra* note 100, at 29 (emphasis added).

<sup>260</sup> MINOW, *supra* note 135, at 121.

<sup>261</sup> *Id.* at 119.