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Book Review

Laurel E. Fletcher
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Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence

MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY
AFTER GENOCIDE AND MASS VIOLENCE (1998).

By
Laurel Fletcher*

I.

INTRODUCTION

History may remember the 1990s as the turning point in the fight against impunity for gross human rights violations. In response to the war in the former Yugoslavia and the genocide in Rwanda, in 1993 and 1994, respectively, the United Nations Security Council established the first international criminal tribunals since World War II to hold accountable those responsible for mass atrocities.¹ The establishment of these ad hoc criminal tribunals in turn breathed new life into the movement to create a permanent international criminal tribunal.² Moreover, in 1998, former Chilean President Augusto Pinochet was arrested in London and faced extradition to Spain on charges of torture and other crimes against civilians that occurred during his reign.³ Although the British court declared him unfit to stand trial and he returned home, the former head of state now faces new charges for human rights abuses in Chilean courts. Emboldened by the Pinochet case, human rights activists have sought to initiate criminal trials against other former dictators and torturers in national courts.⁴

* Associate Director, International Human Rights Law Clinic; Acting Clinical Professor of Law, University of California, Berkeley School of Law (Boalt Hall); B.A., Brandeis University, 1986; J.D., Harvard Law School, 1990. I gratefully acknowledge Carolyn Patty Blum and Jeffrey Selbin for their helpful comments on earlier drafts of this review. Any shortcomings in the application of their advice are my own.

1. The United Nations Security Council created the International Criminal Tribunal for the Former Yugoslavia in May 1993, U.N. Doc. S/RES/827 (1993) and created the International Criminal Tribunal for Rwanda in November 1994. U.N. Doc. S/RES/955 (1994).

2. The Rome Statute of the International Criminal Court was adopted on July 17, 1998. U.N. Doc. A/CONF. 183/9 (1998); ILM, vol. 37(5).1998 at 1002-69 [hereinafter ICC]. Currently only 31 more countries need to ratify the ICC to create this new institution. See, e.g., www.un.org/law/ICC/Statute/Status.htm (last visited Mar. 5, 2001).

3. See *Regina v. Bow Street Magistrate, Ex parte Pinochet*, [1992] 2 W.L.R. 827 (H.L.)

4. For example, in February 2000, human rights activists filed suit in Senegal against Hissène Habré, the former dictator of Chad, on behalf of a torture victim. Habré had been living in Senegal following the fall of his dictatorship in 1990. Unfortunately, in July 2000, an appellate court dis-

These efforts are significant because they raise the possibility that one day it will be the rule rather than the exception to see those responsible for horrific state-sponsored violence answering for their misdeeds before a judicial body.

At the same time that war crimes trials have gained prominence, international and national truth commissions remain a viable option to help countries face the past when trials are not a realistic alternative. For example, during the last decade, truth commissions in El Salvador, Guatemala and South Africa sought to expose the horrors of systemic state-sanctioned terror and to help strengthen support for newly-established democracies in those countries.⁵ In particular, the South Africa Truth and Reconciliation Commission (“TRC”) has captured the attention of international scholars and human rights activists. The TRC is empowered to grant amnesty for certain categories of crimes provided that the applicant makes a full disclosure of the facts surrounding the misdeeds committed.⁶ The “truth for amnesty” trade is the cornerstone of the TRC model and is the subject of much study and debate.

The dominant view among transitional justice scholars is that trials and truth commissions are state-sanctioned models to heal the wounds of mass violence.⁷ Yet as countries explore methods appropriate to reconstruct civil society after such horrors, these efforts give rise to a new series of questions about what are the most effective vehicles societies may employ to move beyond these destructive episodes. Given the various goals, audiences and mechanisms relevant to the task of social recovery after mass violence, world leaders, human rights activists and scholars must continue to search for answers to the question of what works best. What are the most effective ways for countries to account for the past and move forward? How should societies prioritize the identified goals and needs? Are the needs of victims for justice privileged over the needs of citizens to strengthen democratic institutions? Are these values necessarily in conflict? Who will determine the process for accountability and social reconstruction?

In her book, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* [hereinafter *Between Vengeance and Forgiveness*],

missed the indictment after the new Senegalese government removed the investigation judge and promoted the head of the judicial chamber that issued the reversal ruling. Human Rights Watch, *Special Issues and Campaigns*, available at, <http://www.hrw.org/hrw/wr2k1/special/icc.html> (last visited Mar. 15, 2001). Also in February 2001, Mexico authorized the extradition to Spain of Ricardo Miguel Cavallo, a notorious Argentine torturer under that country’s military dictatorship. Cavallo was discovered living in Mexico and lawyers succeeded in serving him with an arrest warrant issued by the same Spanish judge prosecuting Pinochet, Balthazar Garzón, while Cavallo’s plane was en route to Argentina. *Id.*

5. See, e.g., PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY (2001) (discussing the truth commissions in several countries, including Guatemala, El Salvador and South Africa).

6. Promotion of National Unity and Reconciliation Act, No.34 (1995) (SA), at § 3(b).

7. See generally Carla Hesse and Robert Post, *Introduction*, in HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA 13-36 (Carla Hesse and Robert Posts eds., 1999). *But cf.* Michael Ignatieff, *The Warrior’s Honor: Ethnic War and the Modern Conscience*, 164-190 (1998) (questioning, as “articles of faith,” the assumptions that truth, justice and reconciliation are linked and capable of healing a nation).

Martha Minow canvasses the prevailing theoretical frameworks and practical consequences of the choices countries make in addressing the past. Chapter 1 consists of a brief survey of various ways in which countries have sought to grapple with the past. In Chapter 2, Minow suggests an alternate understanding of the motivations that animate societal response to mass violence, substituting a dyad of vengeance and forgiveness for the traditional notions of truth and justice. In Chapters 3 and 4, Minow applies this framework to evaluate trials and truth commissions as mechanisms for transitional justice. The thrust of her argument is that societies must find a way to confront the past that neither repeats the cycle of violence (vengeance) nor leaves victims unhealed (forgiveness).

Specifically, in Chapter 3, Minow provides a refreshing reevaluation of the conventional claims regarding the purposes of criminal trials. She draws on the critique of the Nuremberg and Tokyo trials—that they suffered from the retroactive application of legal rules, the politicization of the institutions and the selectivity of prosecutions—in pointing to the current weaknesses of the *ad hoc* tribunals for the former Yugoslavia and Rwanda.⁸ Despite these shortcomings, she advocates the use of trials, but suggests that their proponents scale back their claims of what these proceedings can accomplish. Instead of expecting trials alone to create “an international moral and legal order, prevent genocide, or forge the political transformation of previously oppressive regimes,”⁹ Minow believes that trials can fulfill the more circumscribed role of creating a credible record that condemns past atrocities and producing a measure of individual accountability. Criminal trials appropriately temper calls for vengeance, but may not provide the measure of societal healing needed to achieve community repair.

In Chapter 4, which is devoted to truth commissions and uses the TRC model as a case study, Minow revisits the conventional wisdom that trials are the preferred societal response to mass violence. She asserts that truth commissions in general, and the TRC in particular, may enable victims and perpetrators to reconcile in a way that trials cannot and thus the TRC is a legitimate, if not preferred, alternative to trials.¹⁰ Evaluating the efficacy of the TRC by reference to the therapeutic needs of victims, Minow argues that the TRC provides a more sympathetic forum for victims and witnesses to tell their stories and thus is better suited than trials to producing a full account of the past.¹¹ In this framework, the completeness of the official account is measured not just by evidence of the actions of the perpetrators, but by capturing the harm done and injuries suffered through the words of those victims and witnesses who lived through the horrors. Thus, enabling victims fully to tell their stories becomes critical to achieving a holistic record of the past. In addition, she asserts that their explicit focus on promoting the narrative truth of victims—with the attendant therapeutic gains for those individuals—allows truth commissions to pursue a goal of

8. MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 29-47 (1998).

9. *Id.* at 49.

10. *Id.* at 57.

11. *Id.* at 59-60.

restorative justice rather than retributive justice and thus are more suited to achieving social reconciliation than trials.¹²

In Chapter 5, Minow explores the issues of reparations, restitution and public apologies as forms of compensation to victims of gross human rights violations. She asserts that no form of compensation can ever undo the harm suffered. Yet Minow advocates for societies to search for alternate ways to acknowledge and repair the injury suffered by victims. By so doing, she points out that countries not only may provide some measure of healing to the victims and their families, but also may serve broader goals to educate society about what occurred and to encourage social repair.¹³ In the final chapter, Minow reevaluates the primary societal responses to mass violence of trials, truth commissions and reparations as well as alternatives like commemoratives and memorials as mechanisms to rebuild communities.

The book grew out of the author's participation in an educational project to teach high school students about the Holocaust.¹⁴ The genesis of Minow's work can be seen in the approach she takes to the topic. Her discussion of societal responses to mass violence is sufficiently general to be informative and accessible to students, scholars and activists seeking a primer on transitional justice. This is the primary strength of the book and it is sure to become standard reading for those seeking an introduction to this important topic in international law.

Those who expect a blueprint for rebuilding communities, however, will be disappointed. Minow proposes some general considerations to keep in mind when evaluating possible societal responses to mass violence, but the book breaks no new theoretical ground in this regard. However, that is not its intended purpose. Her rather modest goal is to provide a vocabulary for discussing various societal responses to mass violence. Measured against this criteria, she succeeds admirably and provides teachers, scholars and students alike with a useful tool to continue to debate and discuss these timely issues.

The first part of this review examines the way in which *Between Vengeance and Forgiveness* addresses the goals of transitional justice. The second part discusses how Minow's framework of analysis applies to the four primary audiences for a societal response to mass violence: perpetrators, victims and witnesses, bystanders and the international community. The final part critiques the author's analysis of the efficacy of trials, truth commissions and compensation mechanisms which societies have employed to confront the past.

II.

WHY COUNTRIES ADDRESS PAST EPISODES OF MASS VIOLENCE

Several motivations inform efforts of countries to address past episodes of mass violence. These goals, to which Minow subscribes, may be described as: (1) discovering and publicizing the truth; (2) making a symbolic break with the

12. *Id.* at 70.

13. *Id.* at 93-94.

14. *Id.* at 4-7.

past; (3) promoting the rule of law and strengthening democratic institutions; (4) deterrence; (5) punishment of perpetrators; and (6) healing victims and achieving social reconstruction.

The need for an accurate report about past atrocities is acute for countries striving to recover from gross human rights abuses. Often the methods of state terror are designed to hide or obscure the responsibility of state agents. Victims are abducted off the streets or from their homes, taken to secret prisons and tortured or killed. Bodies appear on the side of roads, but no one is held responsible. In fact, state-sponsored violence often involves official denials or partial disclosure of incidents like torture and disappearances. Thus, disclosure by the state about the policies of the past regime, and, in particular, who was responsible for ordering atrocities, as well as what happened to the victims, is thought to help a country come to terms with the past. Public disclosure of abuses also serves to combat public denial about what happened.

Similarly, Minow agrees that disclosure of the past by the state is part of a process by which a new government marks the end of mass violence.¹⁵ Explicit condemnation by a new regime of the atrocities committed by a predecessor government serves to reestablish and reinforce desired social norms and signals to citizens that the state respects human rights. State acknowledgment of the truth about and condemnation of past atrocities signals the beginning of a new era in which human rights and democratic principles will be promoted and respected. Thus, coming to terms with past periods of mass violence is part of the project of (re)establishing the rule of law in fledging democratic states.

In addition to these goals of truth-telling, making a symbolic break with the past and promoting the rule of law, Minow and other scholars argue that governments grapple with their violent pasts as a way to ensure history is not repeated, to sanction the perpetrators of crimes and to heal the victims.¹⁶ Deterrence, while lofty as a long-term goal, is a practical necessity for a new democratic regime. Past violators who still wield power (such as the military) must be held in check, lest they seek to reassert their prior tactics and undermine, if not destroy, the democratic efforts of the present regime. Punishment of perpetrators of mass violence is needed to disable offenders and prevent them from repeating their crimes. Punishment of wrongdoers also satisfies the desire of victims and the larger community for retribution against those who have raped, murdered, tortured and destroyed entire communities. States implement a societal response to mass violence to address the needs of victims for healing, to restore their human dignity and honor their experiences.

The final motivation for countries to address the past is to promote social reconstruction. Mass violence affects the entire society. Victims and their families have been brutalized, and the scars they carry may never be erased. Entire communities may have been destroyed through ethnic cleansing, forced resettlement or massacre. Those who were not directly touched by the violence never-

15. *Id.* at 2-3.

16. *Id.* at 118-33.

theless silently bore witness to or may have believed in or supported the state propaganda that justified the former regime. States attempt to respond to the past as part of the task of reconstructing a society that has been deeply affected and fractured by wide-scale atrocities. The stability of countries emerging from periods of mass violence depends on the success of the project of social reconstruction since the presence of groups in society that do not accept the terms of the new social contract may renew violence to achieve their objectives.

Minow suggests that governments address the past in a manner consistent with each of these goals.¹⁷ This admonition is a virtuous aspiration, but may be frustrating to those seeking specific principles, frameworks or methods to use in implementing these objectives. In particular, Minow acknowledges but does not address questions about how to prioritize the goals or how to resolve conflicts among them. For example, a conflict may exist between achieving the goal of ending the conflict and preventing future violence and the goal of repudiating perpetrators. Particularly, when perpetrators maintain power or have the ability to destabilize the country, a newly-formed government may be reluctant to initiate action to shame the predecessor wrongdoers. How should these trade-offs be resolved? Minow does not provide a satisfactory answer.

She criticizes “idealists”—those who argue that governments have a duty to prosecute perpetrators of gross human rights violations—for their failure to recognize the limits of criminal trials.¹⁸ Yet Minow does not adequately respond to the idealists’ critique, an analysis of international law that provides a moral as well as legal framework to evaluate efforts at transitional justice and to chose among alternatives. For example, acknowledgement of the state’s legal obligation to initiate a judicial process to hold perpetrators of the most egregious crimes accountable enables rejection of amnesties or other state-sponsored measures that ignore or eviscerate this duty.¹⁹ Minow resists providing an alternate approach, choosing instead to examine the traditional societal responses of trials, truth commission and reparations with reference to how well they achieve the various goals societies seek to achieve when grappling with the past.²⁰ However, the contribution of the book would be greater if she had gone beyond evaluating how well these mechanisms meet the goals of transitional justice and offered new ideas about how countries could reconcile or reconceptualize the goals.

Although not stated explicitly, Minow’s emphasis on the goal of psychological healing for victims of gross human rights violations suggests that, in her view, this aim should be privileged above the other purposes of societal responses to mass violence. Adopting what has become a familiar approach among those writing about transitional justice issues, Minow largely accepts the

17. *Id.* at 87-90.

18. *Id.* at 29.

19. See, e.g., Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *YALE L. J.* 2537, 2551 (1991); Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 *CAL. L. REV.* 451, 505-506 (1990).

20. MINOW, *supra* note 8, at 136.

Western medical model of trauma to define and identify the needs of victims for recovery. Thus, her analysis of how well transitional justice mechanisms serve the needs of victims is framed in therapeutic terms. She praises the TRC for its ability to mirror the structure of the relationship between patient and therapist better than criminal trials. In particular, Minow postulates that victims who testify before the TRC receive healing benefits by narrating their stories unimpeded by the strictures of due process and in the presence of sympathetic witnesses, a process appropriately similar to that which individuals experience by recounting their experiences to a psychological counselor.²¹

Conversely, Minow devotes no serious consideration to the importance of economic factors or community-based needs in the recovery of individual victims. Yet for some victims, returning to their homes, resuming meaningful work and providing for their families may be more significant to their ability to lay the past to rest than testifying before truth commissions or at trials. For others, who understood their victimization as part of a larger political project designed to eliminate their calls for social change, it may be that nothing less than the complete implementation of the political project for which they suffered will satisfy their need for closure. In other words, some anti-Apartheid activists brutalized by the state police may feel that winning the liberation battle achieved the personal and political vindication they needed to heal. Individual criminal sanctions may be irrelevant to their process of recovery.

Although Minow explicitly brackets the question of whether the therapeutic needs of victims can be extrapolated to society as a whole, the thrust of the book creates the impression that employing a model of psychotherapy is the natural starting point for an inquiry regarding what societies need to recover from mass violence. Thus, Minow's approach unnecessarily restricts the range of models to study social reconstruction. By emphasizing the psychological aspects of trauma and its treatment and excluding consideration of the social, political and cultural dimensions of suffering and recovery, Minow telescopes the response of victims to their experiences and their priorities for recovery through an unnecessarily narrow lens.

III.

TARGET AUDIENCES FOR ATTEMPTS TO ADDRESS PAST EPISODES OF MASS VIOLENCE

The various goals of addressing the past have distinct audiences that can be categorized into four groups: (1) perpetrators; (2) victims and witnesses; (3) bystanders; and (4) the international community. In order for social reconstruction to solidify, the state needs the cooperation of these various groups, each of which has a distinct relationship to the country's violent past and to the other groups. These groups also may have aspirations for the future that are in conflict. Yet central to the process of social reconstruction is the commitment of past enemies to overcome enmity and embrace a future together. Thus, a regime

21. *Id.* at 70-72.

emerging from mass violence must confront its past in a manner that responds to the needs of victims and neutralizes the threat of perpetrators while attempting to conform the priorities of bystanders and the international community to those of a fledgling democracy.

A principal strength of the book is the clarity with which Minow defines the complex issues a society must confront when addressing these various audiences. She provides a compelling description of the challenges the state confronts vis-à-vis these groups. One criticism of the book in this respect is that a more direct inclusion of the way in which the international community is implicated in a country's effort to address the past would have enriched her work further.

Principles of justice require a state response to perpetrators of gross human rights violations. Indeed, as Minow recognizes, to assert otherwise would be tantamount to condoning the atrocities committed.²² The question is whether and how a society is prepared to pursue justice in the wake of atrocities. Thus, the action (or inaction) a government takes in the aftermath of mass violence to deal with the past dictates the terms on which the perpetrators will participate in social life.

Victims and survivors of gross human rights violations have suffered horrors that confound the limits of human comprehension. Minow advocates that despite our necessarily imperfect understanding of what victims have endured and how they have survived, the state has an ethical obligation to address their needs.²³ While no measures can undo the past, the way in which a state looks back and takes account of mass violence will have a significant impact on how victims view the future. To encourage their active participation in rebuilding society, the state needs to demonstrate to victims and their families that the past really *is* past and will not be repeated. Moreover, the state needs to provide an alternate framework for victims to interpret their past suffering in relation to the new state. Particularly, if survivors are to support democratic institutions they need to believe that the state will respect rather than subvert human rights.

Minow specifically addresses the need for a country that seeks to break with a past era of mass violence to confront the issue of how to engender support for transitional justice among those who stood by during the violence.²⁴ Bystanders range from those who were not aware of what was happening to those who knew but did nothing to prevent it, to those who did not commit crimes but supported the larger political project that resulted in the egregious acts. Thus, a regime determined to come to terms with the past needs to convince bystanders of the truth about what happened and to accept as uncontested fact the horrors that were committed in their name. In addition, Minow argues that a government needs to engender a sense of shame or contrition about the atrocities committed.²⁵ Such an ethical stance may be needed to ensure by-

22. *Id.* at 5.

23. *Id.*

24. *Id.* at 74-79.

25. *Id.* at 123.

stander support for the efforts of the state to address the past. Therefore, state-sponsored measures of transitional justice are part of a process of public (re)interpretation of past horrors to create a new national narrative about the past and help frame a new vision for the future of the community.

Minow largely accepts the claim that bystanders need to conform their views of the past consistent with the official record to support the project of rebuilding society. This need is critical for those bystanders who may not have known the acts that were committed in their name but who supported the political aims of the perpetrators. For example, the promise of the Dayton Accords was to end the Bosnian war and defeat the Bosnian Serb goal to create an ethnically "cleansed" state of "Greater Serbia."²⁶ However, the recreation of a multi-national Bosnia requires the political support of Bosnian Serbs who, in turn, must acknowledge that in their name, Bosnian Serb forces ethnically cleansed and massacred thousands of Bosniaks. The question is: How can transitional justice efforts help convince Bosnian Serb bystanders to acknowledge these crimes? In particular, will trials of war criminals conducted by the International Criminal Tribunal for the Former Yugoslavia ("ICTY") convince Bosnian Serb bystanders of the facts regarding the atrocities committed in their name as well as of the need to repudiate the political project of a "Greater Serbia?" Currently, the prevalence of nationalist ideologies in Bosnia discredit the ICTY as a political court that is biased against the Serb people.²⁷ This political climate interferes with the persuasive power of the ICTY record. An official record may be created, but, as Minow points out, its interpretation and the political purposes it will serve depend on local political structures and climate.²⁸

Minow recognizes the shortcomings of an official record standing alone—whether it is a court record or a truth commission report—to awaken the desired response in bystanders. Yet in the case of the TRC, Minow overlooks the possibility that its overtly political project of reconciliation through truth may undermine its ability to convince white bystanders of a new national narrative about the past. The TRC is based on a vision that all of South Africa's citizens—black and white—were victims of Apartheid and are in need of healing. Yet the victimization rhetoric of the TRC actually may be counterproductive to social reconstruction. Constructing everyone as a victim obfuscates the political dimension of the past—after all, the overt purpose of the Apartheid system was to divide society racially into those who received privileges from the state and those who did not—and may send the message to white bystanders that they bear no responsibility to rectify the legacy of Apartheid. Not all South Africans were equal victims. Some were more victimized than others and some are in need of greater healing (and more compensation) than others. Yet white South

26. The General Framework Agreement for Peace in Bosnia-Herzegovina, Dec. 14, 1995, *Bosn.-Herz.*, 35 I.L.M. 75.

27. See The Human Rights Center/UC Berkeley, the International Human Rights Law Clinic/Boalt Hall, UC Berkeley, and the Human Rights Centre/University of Sarajevo, *Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, 18 *BERKELEY J. INT. L.* 102, 129-33 (2000).

28. MINOW, *supra* note 8, at 125-26.

African bystanders may choose to ignore the TRC process and its valuation of victims. Some may do so because they do not feel they bear personal responsibility for the acts of individual agents of the former regime. Others may listen to TRC testimony, but remain unpersuaded that they should support political efforts designed to correct the on-going social and economic inequities produced by Apartheid.

Healing the wounds of Apartheid will take time and involve enormous resources. It is too early to judge whether the rhetoric of victimization—with its implicit entitlement to healing—will be sufficient to create and maintain a new national narrative. Over time whites may not be prepared to compromise further the benefits and privileges of Apartheid, and the TRC report may not solidify white support for the on-going process of social reconstruction. The issue of bystanders is one that deserves greater attention and Minow's examination of some of the complexities involved in addressing this large audience should heighten interest in and awareness of this important dimension of transitional justice work.

The final audience for efforts by states to address the past is the international community. This encompasses an amorphous collection of international institutions, governments, human rights activists, scholars and opinion-makers. At times, Minow makes no distinction between the international community and national governments. This conceals and leaves unexamined the important ways in which the needs and priorities of the international community play into national considerations of transitional justice mechanisms. A country emerging from mass violence needs international support to rebuild. Devastation may be physical if the country suffered sustained armed conflict such as that which occurred in Rwanda, East Timor and Bosnia. Even where no war took place, the country may need to (re)create political and economic institutions, as is the case in Eastern European countries.

Demonstrating to the world community that a country freighted with a legacy of bloodshed has turned away from the past is critical to winning crucial financial and political support from other nations and international institutions for the arduous task of (re)building a legitimate state. It has become a widely-accepted practice among industrialized countries and in multi-lateral regional institutions, as well as the United Nations, to encourage social recovery and democratization in countries emerging from periods of mass violence. This may include financial support, technical and administrative assistance, military personnel to guarantee security or the direct assumption of state responsibilities by international authorities. For example, in the aftermath of direct military intervention in the conflicts, the United Nations has assumed the responsibility for civil administration in Kosovo and East Timor. In these cases, the international community assumes direct responsibility to ensure the period of mass violence is over and to create institutions that will sustain a stable and democratic future. These examples underscore the potential scope and role that the international community is willing to play to end mass violence and foster democracies.

However, even in cases in which the transition to democracy primarily is the result of national efforts, the international community may assert its influence to persuade the new government to seek justice for past horrors. A case in point is the question of surrender of former Serbian President Slobodan Milošević to face charges before the ICTY. This issue is an explicit aspect of negotiations with the United Nations and other international institutions about the reintegration of rump Yugoslavia into the world community.²⁹ Although the international community may not always be the direct or primary target of efforts to address the past, it certainly is an important constituency with which governments need to reckon and a more direct discussion of this issue would have added an important dimension to Minow's work.

IV.

MECHANISMS EMPLOYED TO ADDRESS PAST EPISODES OF MASS VIOLENCE

In the relatively recent period during which transitional justice has become a serious international enterprise, governments have resorted to a rather circumscribed set of mechanisms to help societies come to terms with mass violence. These efforts vary from ones that focus on the acts of perpetrators—like amnesty and criminal trials—to principally investigative bodies like truth commissions—to methods devised primarily to acknowledge and address the harm done to victims such as reparations, restitution, commemoration and official apology. Minow surveys all of these responses, but devotes the most attention to truth commissions.

Grants of amnesty insulate perpetrators from liability for their acts. Frequently, outgoing leaders have granted themselves amnesty or successor regimes have conferred the grant as part of the transition from a period of repression to democracy. Sometimes the transition of power is not conditioned on amnesty, but a newly-elected government may insulate perpetrators from prosecution when they threaten the viability of the new regime, as was the case in Argentina. Minow adopts the consensus view among scholars, advocates³⁰ and international bodies³¹ that blanket amnesty is an unacceptable and illegal form of legal amnesia and rejects the notion that forgetting the past is the best way of moving forward.³²

29. See, e.g., Press Release, The Hague, Milošević and Others Case: Warrants of Arrest Re-Issued to The Federal Republic of Yugoslavia (Jan. 23, 2001) (noting warrant issued for surrender of Slobodan Milošević after the Federal Republic of Yugoslavia's application for membership in the UN on November 10, 2000), available at www.un.org/icty/pressreal/p557-e.htm (last visited Mar. 5, 2001); see also Press Release, The Hague, Statement by Prosecutor, Carla Del Ponte on the Occasion of Her Visit to Belgrade (Jan. 30, 2001), available at www.un.org/icty/pressreal/p558-e.htm.

30. Hesse and Post, *Introduction*, *supra* note 7, at 15-21.

31. See, e.g., Inter-Am. C.H.R. *Report on the Situation of Human Rights in El Salvador*, O.A.S. Doc. OEA/Ser.L/V/II.82, doc. 26 (1992); Inter-Am. C.H.R. *Report on the Situation of Human Rights in Uruguay*, O.A.S. Doc. OEA/Ser.L/V/II.82, doc. 25 (1992); Velásquez-Rodríguez Case, Case 7920, Ser.C., No.4, Inter-Am. Ct. H.R. 35, O.A.S. Doc. OEA/Ser.L/V/III.19 doc.13 (1988).

32. MINOW, *supra* note 8, at 14-21.

In contrast to grants of amnesty, criminal trials employ a judicial framework to hold individuals accountable for their acts of terror and violence. Minow describes the application and effects of traditional liberal principles of criminal law that govern trials of war criminals and gross human rights abusers. Prosecutors must prove the charges against the accused, and the defendant is afforded due process rights. The state's resort to a legal process to punish perpetrators is a literal as well as symbolic dislocation of violence by law.³³ However, Minow discusses trials without distinction as to whether they are conducted in national courts or international tribunals and thus sacrifices discussion of some of the important differences between the two fora. For example, Minow gives no consideration to whether the location and sponsorship of a criminal trial impacts goals like establishing the rule of law or therapeutic recovery for victims. It is far from clear whether international judges sitting in The Hague or Arusha promote the national judicial systems of Bosnia and Herzegovina or Rwanda in any meaningful sense. Further, there has been little comparative work done to ascertain the importance for or impact on victims if they testify against their abusers on home soil. Omission of critical empirical factors like these limits the value of the author's theoretical assessment of how well trials meet the needs of a country emerging from mass violence.

Nonetheless, Minow raises provocative questions about the relative contribution of trials and truth commissions to social reconstruction in her extensive discussion on truth commissions. Truth commissions are institutions established to review an era of systemic violence and to provide an authoritative account of what transpired. These are primarily investigative bodies, national or international in composition and sponsorship, that collect evidence from victims, witnesses and experts about the causes and effects of the violence. Historically, truth commissions have been created when trials were not possible. Perhaps because such large-scale and dramatic transitions from collective violence to peace often involve political compromises rather than unilateral victory, truth commissions will continue to be a viable mechanism for social reconstruction.³⁴

Minow defends truth commissions, in particular the TRC, as being better than trials in several key respects. For example, Minow asserts that cross-examination of victims interferes with their ability to narrate their stories and so diminishes the therapeutic opportunities that public testimony might otherwise afford.³⁵ In fact, Minow suggests that the TRC may be a more therapeutically appropriate model for victims because it is designed to be a sympathetic forum for survivors wishing to testify.³⁶ But it may turn out that what victims need to recover from their experiences is the knowledge that their torturers are behind

33. *Id.* at 26.

34. Although if and when the International Criminal Court comes into effect, it may affect the ability of countries to shield their citizens from criminal accountability for genocide, war crimes and crimes against humanity. For example, perpetrators of those categories of crimes that take place on the territory of a signatory state will be subject to the jurisdiction of the Court, even if the accused are citizens of a non-signatory state. ICC, *supra* note 2, at art. 12.

35. MINOW, *supra* note 8, at 58-59.

36. *Id.* at 70-72.

bars. If given the choice, victims might choose to endure the discomfort of testifying in court if it meant that perpetrators could serve prison sentences. Under the rules of the TRC, South African police officers who tortured or murdered innocent civilians not only may avoid prison but may continue to serve in the police force.

Other claims of Minow's regarding the superiority of truth commissions to trials do not appear as persuasive under closer scrutiny. She asserts that the TRC is better suited to the goal of truth-telling than trials because the truth as told by a trial record is limited to evidence relevant to the charges and is subverted by the constraints of due process and procedures.³⁷ However, the truth about the Apartheid era, as articulated by the TRC, was a product of the constraints of that forum as well. Limited by the institutional priorities of fact gathering rather than the charges of an indictment, and constrained by the methodology used to investigate claims instead of due process, the truth published by the TRC was shaped by the political and institutional priorities of that truth-finding body. The TRC had to make choices about how to define the crimes for which it had jurisdiction to investigate and how to record the information provided by witnesses. Thus, in assessing the truth-seeking potential of trials and truth commissions the choice may not be, as Minow suggests, between a distorted and undistorted truth,³⁸ but rather, at best, a choice about the type and extent of distortion.

Truth-seeking mechanisms, whether they are courts or truth commissions, do not simply determine and transmit the facts, but rather act as *filters* for the truth. The record of what transpired is the product of the rules, procedures and processes utilized to produce the outcome. In fact, the produced quality of these official records is one of their strengths. Because they bear the imprimatur of the state or international community, these are authoritative documents that help establish a new normative perspective on the past. Instead of silence or denials about mass graves, trials and truth commissions provide the opportunity for the bodies to be counted and the deaths to be characterized as "genocide." One of the assumptions about transitional justice, which Minow shares, is that an official account of the horrors of the past is necessary to forge a new national consensus, heal victims and solidify support for a new regime. Yet the Achilles' heel of Minow's argument is that further empirical study is needed to test these theses. Her book points to the need for additional study to help us understand how the power of the truth to achieve these goals is mediated by a variety of factors such as culture, political climate and the mechanisms chosen for a societal response.

Efforts to compensate and acknowledge the wrongs done to victims and their communities are another way which societies seek to rebuild after mass violence. These initiatives may be in addition to other efforts directed explicitly at perpetrators, like criminal trials. Governments may offer financial payments

37. *Id.* at 78-79, 127-30.

38. *Id.* at 57-61.

or other compensation to victims for the harm they have suffered, such as reparation payments by the German government to Holocaust survivors or, as Minow highlights, the payments offered by the United States to Japanese-Americans forced into internment camps during the Second World War.³⁹ Giving back land, mortal remains or artifacts wrongfully taken from a community are other attempts to undo the past harm perpetrated against indigenous peoples by colonizing groups. In addition, Minow points out other ways that a society can act to address the past and seek to restore moral and ethical standards that encourage community-building, including public memorials to victims, commemorative acts that acknowledge the experiences of the targets of mass violence and official apologies to such groups.⁴⁰ The human rights community has focused primarily on the need for accountability for mass violence and has paid less attention to the contribution of civil remedies and memorials to social reconstruction. Minow's inclusion of these mechanisms in her discussion of societal responses to collective violence is a welcome addition, particularly for the legal audience for the book. Societal responses to mass violence are complex and multi-dimensional, and lawyers should consider the full range of public responses that may contribute to the success of transitional justice.

V.

CONCLUSION

A recurrent theme of Minow's work is that there are no simple solutions to the question of how countries rebuild after mass violence. She reminds us that the context in which a societal response to mass violence takes place matters, since context dictates the possibilities and effectiveness of transitional justice efforts. *Between Vengeance and Forgiveness* provides readers with a survey of the traditional societal responses. While she offers some guidelines for evaluating whether trials or truth commissions are more appropriate, Minow reserves for the reader the task of resolving the larger political issues that determine under what conditions the process of reconstruction takes place. The architects of state-sponsored terror may not agree peacefully to relinquish power unless they are sheltered from criminal trials. Yet if trials are indeed the most effective way to achieve the goals of transitional justice, we have to confront hard choices about what we are willing to risk to secure justice. Are we prepared to advocate political or military solutions to a conflict that would enable the international community or a new regime to put the perpetrators of mass violence in the dock?

Complicating the process of determining the most appropriate way to proceed is that the priorities for national recovery change over time. What may appear as a setback today may be acknowledged as a contribution in five, ten or twenty years. The decision of British courts to return Pinochet to Chile may in fact lead to his trial and sentence on home soil. Even if he is never convicted,

39. *Id.* at 94-102.

40. *Id.* at 112-17, 138-45.

efforts to hold him accountable have resulted in new opportunities to combat impunity in Chile and against other perpetrators world-wide. Alternatively, events that seem like progress for victims at the time they are adopted later may leave them feeling diminished rather than healed. Victims who testified before the TRC and reported feeling unburdened of the past may feel their experiences were not appropriately honored if promised compensation does not materialize.

The truth is that we know very little about the impact of various models for transitional justice, much less their long-term effects. The paucity of data can be explained in part by the relatively few situations in which countries have taken action to come to terms with their histories of gross human rights violations. There simply have been few opportunities for sustained study of the effects of transitional justice efforts. Some projects have begun to examine the effect of participation in proceedings before the ICTY and the TRC on victims and witnesses.⁴¹ More work in this area needs to be done. We need to understand and evaluate how well criminal trials, truth commissions and other measures contribute to the needs not just of victims and witnesses, but of bystanders and of the reconstructed society as a whole as well. Minow and other scholars offer theoretical insights regarding the political, legal and moral dimensions of social reconstruction, but their contributions will remain limited and possibly misguided unless supported by empirical evidence about what contributes to the desire of formerly divided communities to (re)cohere. In the meantime, *Between Vengeance and Forgiveness* serves as an important work for a variety of audiences who seek a thoughtful, reflective treatment of questions regarding what is involved and who is affected when society looks back on a fractured and violent past in order to move toward a collective future.

41. For example, the Human Rights Center at the University of California, Berkeley has initiated a multi-year study, "Communities in Crisis," which will include examination of the impact on victims and witnesses of testifying before the ICTY.