

Introduction

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In the twenty-first century, fighting impunity has become both the rallying cry and a metric of progress for human rights. Criminal prosecutions are central to this fight. Whereas in an earlier era, criminal punishment had been considered one tool among many, it has gradually become the preferred and often unquestioned method not only for attempting to end human rights violations, but for promoting sustainable peace and fostering justice. The new emphasis on anti-impunity represents a fundamental change in the positions and priorities of those involved in human rights as well as transitional justice – even as it has brought these two fields together, in part through the rapid development of international criminal law. With this shift, it has become almost unquestionable common sense that criminal punishment is a legal, political, and pragmatic imperative for addressing human rights violations. This book challenges that common sense. It does so through chapters that document and critically analyze the trend toward an anti-impunity norm in a variety of contexts.

As Part I of the book demonstrates, a number of scholars before us have noted aspects of this shift toward anti-impunity. They have, however, primarily lauded the trend. For them, prosecutions are considered to be an unalloyed good: they deter future abuses, promote the rule of law, restore the confidence of citizens in government, guarantee respect for human rights, and ensure justice for victims of atrocious crimes. Even those who criticize the traditional criminal justice model or the practice of international criminal law suggest that the problems lie chiefly in efficiency and enforcement rather than in conceptualization.

Importantly, we do not contend that the anti-impunity norm has led to the consistent punishment of even traditionally acknowledged human rights violations throughout the world, nor that impunity has disappeared. To the contrary, while we generally agree that there has been a surge in attempts to

criminalize and prosecute certain human rights violations in at least some parts of the world, as well as a significant increase in anti-impunity talk, we are less sanguine about a commensurate increase in justice.

In various ways, the chapters in this volume suggest that a dominant emphasis on anti-impunity has qualitatively transformed human rights and transitional justice discourses, and in turn practices, particularly by narrowing their gaze to certain types of impunity. Contrary to what is suggested by the trend in scholarship, activism, and politics, we contend that the turn is not the logical, necessary, nor preferred outcome of a linear process of maturation in either field. Rather, the chapters demonstrate how this laser focus on anti-impunity has created blindspots in practice and scholarship that result in a constricted response to human rights violations, a narrowed conception of justice, and an impoverished approach to peace.

The book is structured as follows. Part I of the volume contains three chapters – authored by Karen Engle, Samuel Moyn, and Vasuki Nesiah – that trace in broad strokes a relatively unreflective turn to anti-impunity discourse among human rights and international criminal law advocates, scholars, and practitioners. While Engle and Moyn offer critical accounts of the genealogy, framing, and rhetoric of anti-impunity in human rights and international criminal law and discourse in the twenty-first century, Nesiah analyzes how the very drive against impunity has for some time functioned to facilitate and produce impunity for those countries and actors who are powerful enough to impose criminal sanctions on others. She cautions us against suggesting that there is in fact less impunity in the world, given not only its persistence, but the specific role that anti-impunity plays in supporting unequal structures of global governance.

The chapters in Part II look more specifically at the experiences and histories of particular countries. Authored by D.M. Davis, Zinaida Miller, Fabia Fernandes Carvalho Veçoso, Helena Alviar García and Karen Engle, and Natalie R. Davidson, these chapters describe and critique the operation of anti-impunity discourse in, respectively, South Africa, Rwanda, Brazil, Colombia, and Paraguay and the United States. They do so with an eye toward the ways in which some of the international trends analyzed in the first set of chapters are either contested or pursued in national contexts.

Finally, in Part III, Dianne Otto and Mahmood Mamdani explicitly offer models for approaching transition, justice, and violence that differ from the standard anti-impunity approaches critiqued in other chapters. Albeit in different ways, both Otto, through an examination of historical and contemporary people's tribunals, and Mamdani, by bringing renewed attention to the political negotiations that facilitated the South African transition, suggest the

possibility of reinserting a critical politics into a realm now dominated by individualized criminal justice.

All of the chapters in the volume, regardless of the Part in which they fall, analyze the interaction between the global and local and suggest important insights into how each constructs the other. Together, they explore the rhetoric, norm, and practice of anti-impunity deployed by national governments, international and regional organizations and courts, and local and international NGOs. In the process, they raise a series of critical questions about the turn to anti-impunity in human rights and transitional justice, and the plausibility of the justifications offered by proponents of this turn. We discuss a number of key issues in some detail in this Introduction, namely: the meaning of anti-impunity and its connection to impunity; the relationship between law and politics; and the extent to which the focus on anti-impunity displaces attention to other harms, affects the histories produced about particular conflicts, and constructs or understands the meaning of victimhood.

1. ANTI-IMPUNITY AS CRIMINALIZATION

Although Engle and Moyn convincingly demonstrate an increase in the use of the phrases “culture of impunity” and “end impunity” over the course of the twenty-first century, the chapters in the book reveal different meanings of the term “impunity” and the fight against it. Thus, questions explored throughout the collection both implicitly and explicitly include: What is anti-impunity and what does it oppose? Does anti-impunity produce justice and, if so, what type of justice and for whom? What is the relationship between impunity and anti-impunity? Nesiah most thoroughly addresses this final question, although several other chapters allude to it.

Most of the chapters in the book see the turn to anti-impunity as an embrace of the idea that criminal law is the necessary and preferred response to a particular set of human rights violations and international crimes. Together, they problematize both aspects of that turn, suggesting that prosecutions might not be the best or most effective response to such harms and that a preference for criminalization might come at the cost of the consideration of other, often more structural, concerns. Several chapters caution against accepting a crude binary between anti-impunity and impunity, particularly if the latter is defined only by the absence of a criminal prosecution.

Moyn observes, largely in the context of the International Criminal Court (ICC), that the thrust of the anti-impunity movement is reflected in a new dream of individual criminal accountability as the crown jewel of international or global justice. Yet proponents of international criminal law persistently fail to justify its utility,

necessity, or efficacy. Engle notes more broadly that the attachment of the human rights movement to criminal law – and the consequent equation of criminal prosecutions, justice, and human rights – has taken place with little systematic deliberation about the aims of criminal law or its pitfalls. Moreover, the turn to criminal law as a model for human rights enforcement has subsumed many earlier debates about the priority of peace or truth in relationship to justice as well as the broader critiques of penal systems that have long been voiced by human rights advocates.

The change in position over the past few years of human rights NGOs and regional and international institutions toward amnesty laws passed in moments of apparent or anticipated transition offers an example of the turn to criminal law in a number of the chapters. Engle offers a genealogy of the treatment of amnesties in the Inter-American human rights system as an illustration of a broader turn toward criminal law in human rights. Veçoso argues that the “Inter-American view on amnesty” has negatively affected contemporary law and politics surrounding amnesty in Brazil by attempting to force the country to revisit compromises reached long ago. Alviar and Engle consider decades of proposed amnesties and pardons that have emerged from peace agreements in Colombia to show that opposition to them only began around the start of the twenty-first century.

The contemporary resistance to amnesties and the related insistence on criminal prosecutions to fight impunity are often presented in contrast to the amnesties that were constitutionally upheld, and arguably granted, in transitional South Africa. Mamdani rejects this binary between Nuremberg-style criminal trials and South Africa’s Truth and Reconciliation Commission (TRC), the institution that processed amnesties, contending that it wrongly assumes that the latter displaced punishment with forgiveness. He argues that the TRC was but a surrogate for the Nuremberg model, in part because it shared the underlying assumptions that responsibility is ultimately individual and criminal in nature. Through a close reading of the Constitutional Court case that unsuccessfully challenged transitional amnesties in South Africa, Davis contextualizes both the amnesties and the Court’s decision in a series of political compromises that were seen as necessary for peace. Like Mamdani, he suggests that the TRC did not in fact represent a clear alternative to criminal adjudication.

Other chapters also examine mechanisms for human rights adjudication or transitional justice that appear to operate outside the retributive criminal framework, but nevertheless end up mimicking aspects of it. Davidson’s chapter on the US Alien Tort Statute and Miller’s consideration of the *gacaca* hearings in her chapter on post-genocide Rwanda demonstrate – in line with

Davis and Mamdani's argument about the TRC in South Africa – that private and customary law processes potentially contain many of the same assumptions and pitfalls as a penal response.

Although the chapters largely agree that criminal justice has, problematically, become the focus of the move toward anti-impunity, the authors do not generally abandon the critique of impunity. Some hope, instead, to highlight forms of impunity that are generally not recognized as such. Nesiah is perhaps most explicit in this aim. Through a re-reading of earlier moments in the history of war crimes tribunals, she argues that each historical moment of “anti-impunity” may be more accurately described as one gripped simultaneously by “impunity.” The same victorious powers that supported the construction of war crimes tribunals often perpetrated terrible harms that no powerful individual, state, or organization targeted for punishment.

Miller as well as Alviar and Engle also draw attention to forms of impunity that exist alongside and yet are often overlooked by a strong and broad-based discourse against impunity. For Miller, the push to legitimize anti-impunity efforts against those accused of perpetrating the genocide in Rwanda has been accompanied by the evasion by the ruling party of any prosecution for its actions during and after the civil war. This pattern of partial (anti-)impunity is hardly limited to Rwanda. Alviar and Engle show how twenty-first century Colombian politics have seen the same actors call for amnesties, pardons, and alternative or reduced sentencing with regard to one non-state military group while decrying impunity with regard to another. The reality of shifting power politics and alliances (as well as logistics and pragmatic limitations) make it probable that, particularly in transitional contexts, prosecutions will be selective. The denial of that selectivity, however, has become part of what Moyn describes as a more general avoidance of justification for the anti-impunity agenda.

II. LAW AND POLITICS

There exists a long-running, well-rehearsed set of arguments over the relationship between law and politics. In this era of the “third globalization,” as Duncan Kennedy has labeled it,¹ it is difficult to argue explicitly for a conception of law that altogether eschews politics in any sense of the word. Nevertheless, anti-impunity discourse is often deployed in an attempt to construct a bulwark of law against politics, insisting that it can protect the former from the latter. Much of the contemporary discourse around impunity that we see reflected upon throughout the book reinforces this distinction: international criminal courts will provide an impartial and apolitical answer to

chaotic local politics; some acts are so violent and atrocious as to reach beyond politics; amnesties, at least for certain crimes, are prohibited regardless of the trade-offs in a particular context. Moreover, the argument that the targets of anti-impunity efforts are not chosen but rather universally agreed upon is itself a denial of the politics of selectivity that considers physical violence to be atrocity but economic inequality to be contestable. The people's tribunals that Otto analyzes seek precisely to expose the fallibility of legal neutrality, objectivity, and technocracy by performing justice in ways that foreground politics, struggle, and transformation.

That many of the chapters in this book expose the politics of law (international, regional, and local) in the fight against impunity reminds us of the salience of the law–politics distinction, at least in this domain. Some chapters concentrate on the politics of the very legal institutions they consider. Moyn, for example, contends that the ICC and its role cannot be detached from “great power politics.” Much as Nesiah argues in her consideration of war crimes tribunals beginning in the early twentieth century, Moyn notes that the choices the ICC makes in the instigation of investigations and prosecutions are dependent upon the balance of political forces among powerful nations. Both Moyn and Engle show how support for the ICC translates into participation in extant political agendas, including in domestic struggle within states.

One of the ways in which global governance remains legitimate is by reinforcing the hierarchy between international law and national politics, even while denying it. The ICC, for example, operates on the basis of a complementarity often claimed to reflect a genuine concern for national institutions. In fact, complementarity assumes, even demands, a particular way in which states may prove their commitment to accountability, and in that sense governs the states vulnerable to its intervention. Alviar and Engle offer a concrete example of such governance, by discussing the role that the ICC has played in contemporary peace negotiations between the Colombian government and the Revolutionary Armed Forces of Colombia (FARC), including by intervening in a Constitutional Court case regarding the framework of those negotiations.

Veçoso extends this analysis to the Inter-American Court of Human Rights, by considering the effects of its anti-impunity approach on Brazilian national politics. She criticizes the Court's application of decontextualized doctrinal reasoning to invalidate Brazil's transitional amnesty law, contending that it ignored the political dynamics central to Brazilian politics and national reconciliation. Veçoso's arguments resonate with a counterfactual posed by Davis: would the South African amnesty scheme developed in 1994 be permissible in 2016? In suggesting that international law would make it difficult for

South Africa to make the same decisions today, Davis implicitly reveals the difficulties of an international doctrine that actively ignores local politics. Miller argues that in the Rwandan context, the internationalist justifications for the International Criminal Tribunal for Rwanda (ICTR) contrasted dramatically with the transformative agenda for anti-impunity voiced more frequently by the Rwandan government. Although both international and domestic actors shared a belief in the need for retributive justice, they offered two different justifications for it – one that emphasized its “anti-political” capacity and another that incorporated the fight against impunity into the new government’s efforts to gain legitimacy and consolidate authority.

Other chapters highlight the relationship between law and politics by closely reading legal decisions for the political choices they betray. Engle’s analysis of the Inter-American Court’s decisions on amnesty shows how they, like other recent international discourses, have come to mediate earlier debates about justice versus truth and justice versus peace, largely by denying that there is any tension between criminal justice and truth or peace. Davidson reads multiple judicial opinions in the first modern case brought under the US Alien Tort Statute, *Filártiga v. Peña-Irala*, in which the family of a Paraguayan victim of torture successfully brought a civil suit against his torturer in the US. She shows how the US courts’ rulings in favor of the Paraguayan plaintiffs presented a decontextualized portrait of a lone torturer and single act of torture, obscuring the systemic nature of torture under the Stroessner dictatorship in Paraguay as well as any role that US policy might have played by supporting that regime. If Engle and Davidson suggest that the effect of litigation is often to mask the political choices of the courts themselves, Davis offers a reading of the South African Constitutional Court’s decision to uphold its transitional amnesty law as more plainly political, dependent upon the immediate context of the conditions confronting the country.

In different ways, then, many of the chapters reveal the dynamic relationships between international law and domestic politics as well as between international politics and domestic law. Whether within legal institutions or in the interactions between them, anti-impunity has become part of an ongoing struggle over the meaning of both law and politics.

III. PRODUCTION AND DISPLACEMENT OF STRUCTURAL AND ECONOMIC HARMS

One of the ways that law functions as politics is by calling our attention to some things while distracting us from others, including the productive or distributive nature of law itself. We discussed above how some of the chapters in this

collection demonstrate that anti-impunity against some is often inextricably intertwined with impunity for others, even for similar offenses. Many of the chapters also argue in one sense or another that the turn to anti-impunity, with its focus on criminal remedies for certain individualized harms, has meant the masking, displacing, or obscuring of many other types of harms, particularly economic and structural ones. Indeed, the concentration on individual perpetrators rather than on the structural bases of inequality and poverty is often considered an almost inevitable consequence of the recourse to trials, even – as in Davidson’s chapter – trials for private law tort claims. In addition, anti-impunity discourse is often seen not only to displace attention from inequality but also to produce it, in part by operating as a pillar of neoliberal global governance.

Engle and Nesiah raise awareness of the productive nature of criminal law practice and rhetoric. Engle, in her analysis of the reformulation of human rights advocacy around criminal law, emphasizes the central role of the strong punitive state in the construction and success of neoliberalism at the end of the Cold War. Nesiah suggests that anti-impunity practices and, importantly, ongoing rhetorical support for them, have been partially constitutive of a drastically unequal world order. Viewing the twentieth-century story as one that culminates in a cascade of justice through the work of burgeoning liberal institutions that enjoy increasing success in pursuing individual perpetrators of atrocity, she contends, obscures the continuing disastrous effects of decades of imperial land grabs, colonial and post-colonial violence, and brutal military interventions, often performed in the name of human rights and humanitarian protection.

Mamdani presents a particularly striking example in the South African context of the dynamic Nesiah identifies. He demonstrates how the TRC, by narrowing its focus to individual victims and bodily harms (as opposed to economic or political harms that were synonymous with the architecture of apartheid itself), achieved the “truly bizarre” result of listing the African National Congress and other anti-apartheid groups as among those most culpable for crimes committed under apartheid. Such a result could only be achieved by working within a framework that accepted the legality of apartheid, and thus by leaving unquestioned the fundamental political and economic violence of the system. In this case, a moment of “anti-impunity” for South African individuals represented simultaneously a moment of impunity for the apartheid system as a whole. Mamdani’s argument exemplifies at the national level what Engle and Nesiah reveal more broadly: what is touted as structural transformation may in fact constitute a project of preservation and perpetuation.

At a more granular level, various chapters illustrate the ways in which a turn to prosecution and punishment displaces attention to inequality, poverty, dispossession, and economic violence, as well as to the actors or structures responsible for them. Miller argues in the Rwandan context, for example, that much of the history and legacy of inequality, structural violence, and linkages between unequal distribution and ethnic tension were eliminated from consideration in the post-genocide justice processes – nowhere more so than at the ICTR. The world of harms narrows in a world centered on retributive and punitive justice. In their analysis of contemporary peace negotiations in Colombia, Alviar and Engle illustrate how debates about criminal accountability for members of the FARC (and nominally the military) have sidelined serious deliberation about truly redistributive land reform, even though both issues will be part of any final accord. In a bit of a push against the anti-impunity trend, the FARC has managed to reach an agreement with the government that will keep its members out of jail. At the same time, FARC negotiators have agreed to an agrarian reform draft that is much less radical than the rebels had hoped and landowners had feared.

Those interested in the Colombian peace process might consider Mamdani's criticism of the South African TRC as a cautionary tale. By concentrating on perpetrators rather than beneficiaries, he contends, the TRC failed to acknowledge, let alone address, the ways in which apartheid-era violence produced and sustained a particular socio-economic order. Beneficiaries of apartheid continue to gain from the underlying socio-economic structure inherited by apartheid.

IV. THE NARRATION OF HISTORY

History, memory, and truth have been perennial sites of debate among transitional justice and human rights scholars, activists, practitioners, and policymakers. In addition to engaging in debates about whether truth creates justice or justice produces truth – debates that were, as Davis discusses, central to the South African Constitutional Court decision upholding the TRC's amnesty-granting capacity – they have also struggled over the question of which institutions and actors are best poised to produce historical accounts of the past. As anti-impunity has developed, with its emphasis on criminal trials, lawyers and judges have been given the heavy burden of narrating history through trials and judicial opinions.

Translating complex histories of conflict or complicated narratives of harm and violation through the narrow language of criminal law almost inevitably distorts them. Davidson demonstrates that this effect is not unique to criminal

law, however, but is in some ways symptomatic of the litigation process itself. The complicated world of Paraguayan politics that sparked the *Filártiga* case she discusses became, through a series of advocacy campaigns and legal judgments, a story about a single, exceptionally bad actor – the enemy of all mankind – likened to the figure of the pirate in international law. For Davidson, traditional forms of litigation, even in the case of tort, promote an individualized rather than structural conception of responsibility for political violence. At all levels of litigation in the *Filártiga* case, the courts failed (albeit in different ways) to offer an accurate account of the political conditions in both Paraguay and the US that underpinned the events giving rise to the murder of Filártiga as well as the subsequent reaction of the Paraguayan government.

Miller, too, cites the limitations of relying on judicial accounts of history. A court's temporal jurisdiction can easily become a significant stricture on the history produced at trial. Even though the ICTR, especially in its first genocide conviction, offered a relatively detailed account of the history of colonialism and its relationship to the construction of ethnic categories in Rwanda, it could not address in detail issues that have been and remain salient to long-term conflict in the country, such as land distribution or historical labor practices.

Davidson, Nesiah, and Engle all reference Hannah Arendt's caution against constructing a story of singular and exceptional bad actors – a warning that applies both to the displacement effects of criminal trials and to their innate inability to tell history. Criminal trials focus by definition on individuals rather than context and on crime rather than politics. They provide little recognition of, or response to, the structural causes of the acts that form the basis of the trial, thereby distorting complex questions of accountability and justice. In her examination of mechanisms that operate outside the realm of the state (or inter-state bodies), Otto reveals their potential for producing a more nuanced history by giving profound voice to the victims. Indeed, she invokes the description of one such hearing as itself creating a “counter-history.”

V. THE FIGURE OF THE VICTIM

The victim plays an ambivalent role in the anti-impunity imagination. The promotion of prosecutions often takes place in the name of the victims, even as their voices might be suppressed, limited, or distorted at trial. Post-conflict governments often claim legitimacy as representatives of prior victims – witness Rwanda or South Africa – even as governmental policy might, as Mamdani argues, marginalize many of those who survived past atrocity. The victim is thus both central and marginal, featured and featureless, a necessary