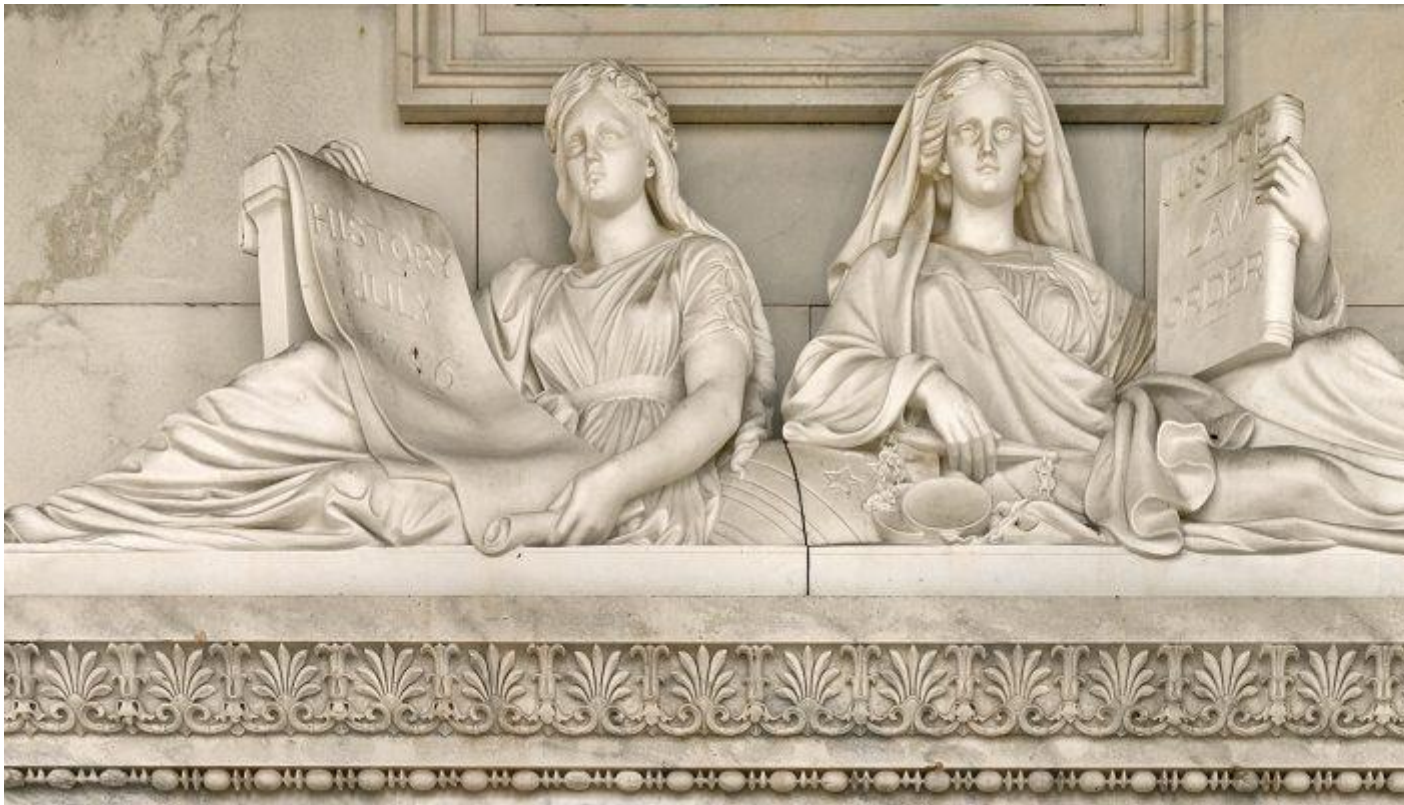


Criminal regimes are never soft on history

Antoon De Baets argues that states that sacrifice their citizens first, sacrifice their history next.



The sculpture Justice and History is located above the Senate bronze doors on the U.S. Capitol's East Front (Creative Commons Attribution) Image link: <http://bit.ly/2ZhSxAJ>.

In arguing that [self-inculpatory laws do not exist](#), my comment responded to two precise texts – the “[Declaration on Law and Historical Memory](#)” and its [Explanatory Comments](#) – presented in a [column](#) written by Eric Heinze. In his rejoinder, however, Heinze broadens the scope of discussion in three directions: from crimes and atrocities to all forms of wrongdoings, from “self-inculpatory laws” to all forms of apologies, from state succession to all forms of “ethical” and “cultural” continuity. This broader scope does not correspond to one of the two texts to which I initially responded: those focused explicitly on crimes.

It is common knowledge that preambles of declarations reveal the major purpose of their drafters. The preamble of the Declaration under consideration here opens with the following recitals: “*Recalling* global atrocities including genocides, war crimes, crimes against humanity, and other violations of human rights, *Emphasizing* the importance of condemning past crimes, acknowledging victims of atrocities, and holding perpetrators accountable in accordance with internationally recognised human rights law.” The Comments further explain: “For purposes of this Declaration, the phrase ‘human rights’ is assumed to include norms of international criminal law, including but [not] limited to the prohibition of genocide, war crimes, and crimes against humanity.” They concentrate on laws (five mentions) and bans

(seven mentions). This explicit focus is legitimate because the Declaration is not designed to support a critical stance toward an official apology for earthquake damage after gas extraction in a democratic country. The Declaration is primarily meant to help decide in hard cases.

One such hard case is China. Heinze writes that “China has adopted no specific law penalising public outcry against the millions of victims of the Cultural Revolution, the Tiananmen Square massacre, and countless other abuses.” The victims of the Cultural Revolution were hounded to death on the basis of the most spurious accusations (“attacking the CCP, socialism, Marxism-Leninism, and Mao Zedong Thought,” “abandoning the class stand of the workers,” “being an authority of reactionary bourgeoisie”). No specific laws were needed to penalize a public outcry against it because there *was* no public outcry in China against the Cultural Revolution at the material time of its occurrence. Even abroad, only a few courageous intellectuals such as Simon Leys protested. Dealing with the atrocities of the Cultural Revolution had a very slow start. In the wake of the Tiananmen Square massacre, in contrast, scores of laws were applied against its critics almost immediately: dissidents disappeared behind bars on legal charges of “spreading counterrevolutionary propaganda,” “inciting unrest and endangering national security,” “refusing to reform,” “leaking state secrets,” “splitting the country,” “inciting subversion of state power by causing damage to the image of China’s government,” “endangering state security,” “advocating bourgeois liberalization,” and “wantonly attacking Marxism” The full legalistic panoply was [mobilized](#). It is well known that most dictatorships invest much energy in keeping up a semblance of legality in a contorted attempt to enhance their legitimacy. A Declaration that provides a compass for their critics is a vital resource. Designed for hard cases, it can support those who have the courage to peer back into the abyss they escaped or, in Archbishop Desmond Tutu’s words, to look the beast of the past in the eye.

I can live with much of what Heinze says but most of it is not a refutation of my claim that self-inculpatory laws do not exist. He concedes as much, first saying that “history certainly does suggest that the more abusive a regime, the less likely it is to self-inculpate” and then adding for “the leading contemporary model of state self-inculpation,” Germany: “In a purely formal sense, such policy (the German policy on Holocaust commemoration, *adb*) clearly does not amount to state self-inculpation. It has emerged only through post-war governments impugning a regime internally and internationally acknowledged as defunct.” An instrument such as the Declaration should not blur the fundamental distinction between successive regimes or characterize it as a pure formality.

I cannot think of a single regime in history that first kills, then decrees that it is guilty of it. For such a self-inculpatory regime to exist without any rupture explaining it, something unprecedented bordering the inexplicable must have taken place. Even if that is possible in theory, it will always be suspect and in any case exceptional in practice. Bertram [Wolfe](#) once nailed the point down: “Shall the Dictator ... be less harsh with facts and records than with men? More tender with the traditions and men of ... other times than he is with the men of his own ... time?” Clearly, states in which the lives of individuals are weakly protected, cannot be states in which histories about the lives of these individuals are strongly respected.

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Published on: December 23, 2019 [with No Comments](#)