

*Chapter Selection from:*  
*War Crimes: The Legacy of Nuremberg*  
*Edited by Belinda Cooper*  
*Published by TV Books, © 1999*  
*ISBN 1575000091, 9781575000091*  
*350 pages*  
*(Pgs 244-264)*

**When Prosecution Is Not Possible:  
Alternative Means of Seeking Accountability for War Crimes**

Timothy Phillips and Mary Albon

Without determining accountability for politically motivated atrocities, a society that is emerging from a period of violent repression or civil conflict will remain in thrall to the past. Seeking justice through the institutions of the law is the best means of determining responsibility for acts of genocide, war crimes and other politically motivated violations of human rights. Criminal prosecutions of crimes of this magnitude not only punish the individuals who committed them, demonstrating that impunity does not exist, but also help to restore dignity to their victims. They can provide a cathartic experience not only for individual victims, but also for society as a whole. By holding individuals responsible for their misdeeds, criminal trials may also deter the commission of abuses in the future. Moreover, if conducted in strict accordance with legal due process, criminal prosecutions of war crimes can help to strengthen the rule of law and establish the truth about the past through accepted legal means.

But practical realities, particularly during an unstable transition from war to peace, may hinder the pursuit of justice. For example, the perpetrators of human rights abuses or their allies may remain in positions of power, making effective prosecution impossible. In such a situation, principles must be balanced with reality. Nevertheless, determining responsibility for the crimes may still be possible, even if punishing the perpetrators is not.

This chapter explores alternative means of seeking accountability for politically motivated human rights violations and rehabilitating their victims that may help societies which have been brutalized by genocide or other atrocities to come to terms with their experience and move forward. The task is to find ways to condemn criminal acts and the political and social structures that encouraged them without returning these societies to violence. However, this should not be understood as implying that criminal prosecutions should be replaced by another mechanism. Rather, whereas some of the approaches discussed here (particularly truth commissions) may be especially beneficial if a country is not able to conduct criminal trials, they can also be implemented in tandem with criminal prosecutions and thus enhance the catharsis and healing process. Moreover, all of these approaches to dealing with past crimes, including prosecutions, should be part of a broader process of institutional reform that will help prevent future abuses from occurring.

### **Limitations on Criminal Prosecutions**

There are numerous factors that can make criminal prosecutions of war crimes and acts of genocide ineffective or extremely difficult, if not impossible, to carry out.

The scale of the crimes may be overwhelming. In Rwanda, within the short span of three months in the spring of 1994, well over 500,000 people, mainly members of the Tutsi minority, were brutally massacred, and countless thousands more were raped or wounded, by majority Hutus. Upwards of 100,000 individuals have subsequently been imprisoned, accused of participating in the genocide, with little likelihood of ever coming to trial. The Rwandan courts simply do not have the human or financial means to prosecute so many people.

This is not an uncommon scenario in the case of war crimes. Moreover, since intellectuals and professionals are often among the first targets of genocide, the ranks of the judiciary and the legal profession may end up decimated and in disarray. Alternatively, the courts may have been

in alliance with the forces of repression, and thus cannot be trusted to serve as impartial arbiters of justice in the prosecution of alleged war criminals.

Under these various limitations, the choice may be made to prosecute selectively, condemning paradigmatic behavior in an effort to demonstrate that impunity does not exist and to deter the commission of similar violations in the future.

Yet even selective prosecution of war crimes may be difficult or even impossible to carry out in accordance with the rule of law and the principles of legal due process. There may be evidentiary problems: the passage of time may make it difficult to locate witnesses, or witnesses may refuse to testify out of fear of retribution. Evidence linking specific individuals to crimes may have disappeared. Access to the scene of a massacre or the site of a mass grave may be blocked, or the site may have been altered. Alleged perpetrators and/or the leaders who incited them to action may have gone into hiding or fled abroad. The higher in the hierarchy of leadership one looks, the more difficult it may become to determine who was actually responsible for criminal actions. In many cases, orders may have been destroyed, or they may have been given orally and not documented. In other cases, minions may have acted in anticipation of what they thought their superiors would want, but without their request or command. For these reasons it may be particularly hard to pin convictions on the top officials who bear both criminal and moral responsibility for crimes that were committed under their leadership.

It also may be difficult to guarantee a fair trial, operating on the presumption of the defendant's innocence, when the public is clamoring for justice—or revenge. Justice is malleable, and criminal prosecutions of war crimes can easily become politicized. Especially after one side has lost power, there is the risk of “victor's justice”: prosecutions may be politically motivated, and may devolve into a search for vengeance rather than justice. This can exacerbate existing divisions within a country, and perhaps even lead to a new outbreak of violence.

The situation grows more complicated when the perpetrators of gross violations of human rights or their allies remain in positions of

influence. This circumstance alone may make it impossible to prosecute alleged war criminals.

### **Alternatives to Criminal Prosecutions**

Alternative means of dealing with past crimes that aim to move away from confrontation and toward reconciliation include amnesties, screening and disqualification measures, official acknowledgment of past crimes and investigative commissions, often called “truth commissions.” Each of these methods has been introduced in countries emerging from repression or violent civil conflict, with varying effects. Each option has its limitations, and may not be appropriate in all instances. In the case of amnesties, critics argue that they are never an appropriate means of dealing with the past, but only serve to push the old tensions beneath the surface, and that it will only be a matter of time before they re-erupt, with potentially devastating consequences. Disqualification measures have been criticized for the ease with which they can be used as political weapons and tools of revenge rather than reconciliation. Official acknowledgment of the past, if not broadly publicized or not carried out in conjunction with institutional changes that will lessen the likelihood of new abuses in the future, will have little or no positive impact. Truth commissions also have their critics, but if a commission is established with great care in such a way that the broad public considers it to be a trustworthy, neutral body and its findings to be well documented, it may offer a given country one of the brightest hopes for coming to terms with a violent past and fostering national reconciliation.

### ***Amnesties: The Decision to Forget***

When perpetrators of human rights abuses retain significant military and/or political power at the end of a civil conflict or after a repressive regime has fallen, the new government may be too weak to prosecute those who committed atrocities. Under pressure from the elites of the previous regime (often including the military or secret police), the new government

may institute an amnesty for human rights abuses or political crimes on the grounds that it will allow society to start over with a clean slate.

Amnesties have been enacted in many countries victimized by human rights abuses. Uruguay is one case in point. In 1984, after years of military dictatorship, Uruguay negotiated a return to democracy. The Uruguayan people expected that the military would be prosecuted for their crimes, which included illegal imprisonment and torture as well as “disappearances,” but the document that codified the political transition did not address the military's responsibility for human rights violations committed under the previous government. As a result, when attempts were made to prosecute, the military pressured the new government to enact an amnesty law, which it did in 1986. Enormous popular indignation erupted over the amnesty, and the families of the victims launched a petition campaign for a plebiscite on the law. In spite of tremendous institutional opposition, the petition campaign was successful. However, by a narrow margin, the people of Uruguay voted to uphold the amnesty law, and as a result, there were no further investigations into human rights abuses and all trials then under way were canceled. The main argument given for upholding the law was that it was necessary for national reconciliation and to preserve the peace.

Although it did not prevent the introduction of an amnesty for human rights violators, Uruguay's referendum campaign brought attention and sympathy to the victims and greater regard for human rights—no one, not even the defenders of the amnesty law, denied that the crimes had been committed. This heightened awareness may pose some sort of obstacle to future authoritarian temptation.

In Spain, by contrast, the idea of an amnesty received broad support from all political parties and groups during the transition from dictatorship to democracy, and, by many accounts, it proved to be a very successful means of achieving national reconciliation. During the bloody Spanish civil war and the more than 40 years of the repressive Franco regime, both sides committed great violence in Spain. To allow the country to move forward and strengthen its fledgling forces of democracy, in 1977 the Spanish parliament passed a general amnesty law for all politically based crimes

committed during the civil war and the Franco era. The law pardoned both individuals who had opposed the dictatorship and the civil servants and police who had been in charge of repression under Franco. In addition, all police files from the Franco period were sealed indefinitely.

In the view of the international human rights community, amnesty laws give the perpetrators license to repeat their crimes. Instead of establishing reconciliation, amnesties may deeply divide society and pervert the rule of law. Through “official forgetting,” amnesties can make second-class citizens of the victims by eliminating their legal recourse. If there is the appearance of impunity for past crimes, people may not trust in the rule of law, and some may return to vigilante justice. Yet in the case of Spain, the amnesty contributed to national reconciliation. Social consensus on the decision to seal off the past and the strong commitment to democracy of the post-Franco government likely helped to prevent a resurgence of violent political conflict. The worst atrocities had been committed decades earlier, and the passage of time may have blunted the Spaniards’ desire to stir up painful memories. Instead, they chose to forge ahead together toward democracy.

### ***Screening and Disqualification Measures***

Another alternative to criminal prosecutions is the introduction of laws and administrative measures designed to bar former elites, security agents and their collaborators from holding influential public positions. Often called “lustration,” from the Latin word meaning purification, screening and disqualification measures of this sort have been introduced in many of the formerly communist countries of Eastern Europe, several former Soviet republics, as well as in Bosnia via the Dayton peace agreement, which prohibits individuals indicted by the International War Crimes Tribunal from holding or running for public office. Advocates of these policies usually present them as necessary to hasten the transition from war to peace or from repression to democracy. Their expressed aims are to seek justice for the victims by removing their oppressors from positions of influence, and to express the moral disgust of society toward the abuses committed under the old regime.

Yet screening and disqualification measures, which tend to be implemented by administrative rather than judicial means, are vulnerable to accusations of abuse. The legal objections to lustration laws that have been enacted or proposed in the formerly communist countries are legion. These measures have been criticized for running counter to efforts to institute and uphold the rule of law by circumventing legal due process (e.g., not giving the accused access to their state security files or other evidence used against them, or even refusing to inform them of the allegations against them), accepting the principles of collective guilt and guilt by association, and utilizing the often unreliable files of the communist security apparatus as primary evidence.

Moreover, the stated rationales for disqualification measures may not match the actual motivations for these policies. Lustration, at least in principle, should not be retributive, but should instead help to support the transition to peace and democracy. But a search for justice can easily turn into a campaign for revenge: lustration can be used as a means to settle accounts, disguised in a legal form. It can also be manipulated in the pursuit of personal advantage; in the political realm in particular, the past can be used as a weapon against rival parties or personalities in the competition for office and influence.

Disqualification measures pose political dangers as well. Many opponents of lustration are concerned that the manipulation of society through fear—in much the same fashion as under communism and other repressive systems—will continue to control and divide society, and they contend that democracy cannot be established by resorting to police-state methods. Particularly during a period of vast political, social and economic upheaval, such as the former Soviet bloc is now experiencing, there is also the risk that by ostracizing a group from society, whether by legal, administrative or even informal means, these people may turn against democracy. This is an even greater threat when human rights violators are the object of disqualification measures. In their case, if the new government is strong enough to enforce lustration measures, it should be strong enough to carry out criminal prosecutions of human rights abusers—and should do so.

### ***Official Acknowledgment***

Particularly when there are obstacles to criminal prosecution of war crimes, acts of genocide and other politically motivated atrocities, official acknowledgment of the truth about the past can achieve a sense of justice for the victims, restoring their dignity by recognizing their fates, and can help smooth the way for national reconciliation. Telling the truth about the past responds to the psychological need of people to try to make sense of what their society and they themselves endured. And even without criminal punishment, truth-telling may help deter future violations of human rights and acts of genocide.

In countries where there are no independent media and atrocities have been committed in only certain regions, the broad public may not know about, or may not believe in, their occurrence. This appears to have been the case in Serbia during the Bosnian conflict. In other cases of genocide, such as in Cambodia and Rwanda, the massacres and atrocities were so widespread that no one could not know what was going on. Yet general knowledge of the crimes is not sufficient, in their aftermath, to allow society to put the past behind it and move forward into a peaceful future; what is necessary is some form of official recognition or sanctioning of the truth.

Official acknowledgment of genocide, war crimes and other politically motivated human rights violations can be achieved in a variety of ways. Heads of state may make public announcements about the past, or even apologize, on behalf of the state, to the victims. For example, over the years, a number of postwar German leaders have made such statements about the Holocaust. Or the government may offer monetary or other forms of restitution to the victims or their families as another means of officially acknowledging past wrongs and returning dignity to the victims. Even if the perpetrators are not punished, the government has recognized the wrong done to the victims. Or the government may authorize an independent commission to investigate the abuses of the past, the findings of which will

then be officially recognized as the truth. This latter option is discussed in greater detail in the following sections.

### **Truth Commissions**

Particularly when criminal prosecutions of alleged war criminals and perpetrators of genocide are not feasible, officially sanctioned, independent commissions of inquiry that uncover and evaluate the motivations for past atrocities can offer another way to address society's need to know the truth without jeopardizing a fragile peace. These so-called "truth commissions" can have the same kind of cathartic effect that criminal prosecutions offer by presenting and officially acknowledging the truth about the past, making an official moral condemnation of the abuses that occurred, and contributing to the construction (or reconstruction) of civil society and the institutional mechanisms of democracy that protect human rights and can prevent new abuses from being committed in the future. In a growing number of examples from all over the world, the findings of many of these commissions have had a tremendous moral impact that has contributed to national reconciliation.

Truth commissions are usually established at a point of political transition to emphasize the break with the past, to foster national reconciliation and/or to strengthen the political legitimacy of the new government. Of course, as with all approaches to dealing with past abuses, there is a risk that truth commissions will be manipulated politically. Critics also argue that truth commissions aggravate divisions within a country, reopening old wounds and perhaps spurring a return to violence; however, the experience of truth commissions to date has generally not borne out this prediction.<sup>1</sup>

A truth commission can determine what happened to individual victims, analyze the mechanisms and institutions that enabled the abuses to occur, or undertake both tasks, investigating the fate of individuals and of the nation as a whole. In contrast to criminal prosecutions, which focus on

---

<sup>1</sup>For an excellent examination of truth commissions and their impact, see Priscilla Hayner, "Fifteen Truth Commissions—1974 to 1994: A Comparative Study," *Human Rights Quarterly* 16 (1994): 598–655.

specific individuals and their alleged crimes, truth commissions look at the broad pattern of abuses.

In the 1980s and 1990s, truth commissions of various types have operated in over a dozen countries, including Argentina, Chile, El Salvador, Germany, Ethiopia and South Africa. Not all have been deemed successful. While there is no single model that will guarantee that a commission charged with investigating genocide, war crimes or other past abuses will have a positive influence on national reconciliation, there are certain features that lend greater likelihood of success. How a truth commission is perceived by society—which in turn depends on its mandate, how it is structured and administered, as well as how its findings are publicized—affects its impact. These issues and other critical aspects of truth commissions will be examined in greater detail following brief discussions of the operation and impact of truth commissions in Chile, El Salvador and South Africa.

### ***Chile: The National Commission for Truth and Reconciliation***

In Chile, during the authoritarian military dictatorship of General Augusto Pinochet, who controlled the country from 1973 until 1989, 3,000 Chileans were killed or disappeared, and tens of thousands were imprisoned or exiled. Even after the democratic election of President Patricio Aylwin in 1989, General Pinochet retained control of the military and remained a powerful political force. Before President Aylwin's election, General Pinochet had instituted an amnesty for all human rights violations committed between 1973 and 1978, which significantly restricted the possibility of pursuing criminal prosecutions against the perpetrators.

President Aylwin had three moral objectives during the transition from dictatorship to democracy: (1) to publicly establish as soon as possible an official truth about the past that could be commonly accepted; (2) to begin to rebuild institutional mechanisms in order to prevent the repetition of the abuses in the future; and (3) to use truth-telling as a starting point for healing society. Soon after assuming office in March 1990, he established an eight-member National Commission for Truth and Reconciliation charged with investigating the fates of those who had been killed or had

disappeared at the hands of both the Pinochet regime and the opposition,<sup>2</sup> and how the military dictatorship had maintained its hold over Chilean society.

The membership of the National Commission for Truth and Reconciliation was broadly drawn, even including people with links to the military so that it could not be accused of bias. The commissioners were supported by a staff of sixty and provided with sufficient financial resources to carry out their investigations thoroughly during the commission's nine-month term.

The commission had no power to subpoena witnesses or to pass judgment. It based its work on the findings of previous investigations by independent human rights organizations, the church and others, and on the voluntary testimony of victims and past collaborators with the secret police. The commission did not name the perpetrators of human rights abuses because this would have violated their right to due process, but it did send any evidence of crimes to the courts.

The findings of the National Commission for Truth and Reconciliation were compiled in a two-volume, 1,800-page report. When President Aylwin presented the report to the Chilean public, he also offered a formal apology on behalf of the state to the victims and their families, and called on the military to take responsibility for its role in the violence.

The report presented an analysis of the political and doctrinal content of Chile's military dictatorship. It documented the acts of violence committed by both sides, and the details of the fates of each victim of the crimes covered by the commission's mandate. According to this official

---

<sup>2</sup> Of the 3,400 cases brought to the commission, 2,920 were deemed to fall within its mandate. Of these cases, the state security forces were found responsible for 2,025, and the armed opposition was determined responsible for ninety. Of the remaining cases, 164 had fallen victim to shootouts and other violent political confrontations, and 641 were unresolved. It is also important to note that international human rights organizations criticized the commission's mandate for not including in its investigations victims of torture and other abuses who did not die from their mistreatment. See Hayner, "Fifteen Truth Commissions—1974 to 1994," p. 621.

truth, torture and disappearances had a systematic, institutional character, and there had been no internal war that justified the excesses of the Pinochet regime.

The report had a tremendous moral impact in Chile. It was widely disseminated within the country, given away for free. Families of the victims and human rights groups publicly acknowledged it as the truth. However, the Right rejected the report's conclusion that there had been no internal war in Chile, and in the weeks immediately following the report's release, several retributive assassinations were carried out. Although these developments significantly muted public discussion of the commission's findings, they did not prevent the Aylwin government from acting on the report's recommendations. The government's most important step was to establish the National Corporation for Reparation and Reconciliation, which was charged with implementing the report's recommendations, which included locating the remains of the disappeared, resolving those cases that the commission had not closed, archiving the commission's files and instituting reparations for the families of victims, including awarding pensions and providing health care, scholarships and other forms of social support.

Chile's National Commission for Truth and Reconciliation helped bring about national reconciliation when punishment of the violators was not possible. The commission's efforts served as a starting point for the moral revitalization of Chilean society and helped rebuild the institutions of democracy and reestablish the rule of law without jeopardizing the transition process.

### ***El Salvador: The Commission on the Truth***

The April 1991 United Nations-brokered peace accords that ended El Salvador's twelve-year-long civil war included in their terms the establishment of a truth commission charged with investigating serious acts of violence that had been committed by both the leftist guerrillas of the Farabundo Martí National Liberation Front (FMLN) and the rightist government. Unlike the Chilean commission and all prior truth commissions, the Commission on the Truth for El Salvador was not to be a

domestic body directed and staffed by Salvadorans. The civil war had radically polarized Salvadoran society, making the formation of a truly neutral and universally respected truth commission comprised solely of Salvadorans all but impossible. Thus the United Nations, which oversaw the implementation of the peace accords and had peacekeeping forces on the ground in El Salvador throughout the transition, not only funded the truth commission, but also appointed three internationally prominent individuals as commissioners and hired the commission's international staff. Special care was taken to ensure that none of the staff had previously worked on Salvadoran human rights issues so as to avoid putting into question the commission's neutrality.

The UN sponsorship of the Commission on the Truth for El Salvador not only helped to ensure its impartiality,<sup>3</sup> but also demonstrated the strong support of the international community for the commission's work, and, by focusing international attention on El Salvador, increased the pressure on the new government to adhere to the commission's recommendations. Moreover, the lack of any Salvadoran participation in the commission's investigation, combined with the presence of UN troops, gave the commission much greater latitude to confront even the most powerful sectors of society without fear of reprisal. Nevertheless, many Salvadorans believed that, while international participation in the commission was critical, excluding Salvadoran citizens from both its panel and its staff prevented them from having a say in the commission's final report and thus from having a stake in its findings.

The Commission on the Truth for El Salvador was given six months (later extended to eight) in which to conduct its investigations and produce a report of its findings. It was left to the commissioners to determine the parameters of their investigation; they chose to investigate in depth a number of representative cases that would illustrate the kind of violence that

---

<sup>3</sup>This rationale was broadly accepted within El Salvador until the release of its report, when certain sectors of Salvadoran society criticized the commission on the grounds that it represented foreign meddling in El Salvador's domestic affairs. Other criticisms of international sponsorship and staffing of truth commissions include the staff's lack of knowledge about the country's history and culture, which can limit the effectiveness of their efforts; and that international sponsorship does not strengthen indigenous democratic institutions or civil society. For a more detailed discussion of the issue, as well as the pros and cons of international sponsorship, see Hayner, pp. 642–644.

had occurred during the civil war.<sup>4</sup> Their aim was to determine as fully as possible what had happened in these cases, who had perpetrated the crimes, and who had been the victims.

Because of the fragility of the peace and the extreme divisions within Salvadoran society, the truth commission conducted its investigations quietly, with only a bare minimum of information about its work made known to the public prior to the release of its report. The rationale was not to keep the commission's existence or its work a secret—on the contrary, the public was well aware of both—but to protect the safety of the witnesses as well as of the accused, and to minimize public pressure on the commissioners and their staff.

When the truth commission's report was released, many were surprised by its unflinching dedication to portraying the full truth, including naming perpetrators of abuses, and by the extent of its other recommendations for reform. While clearly emphasizing that the commission was not a court of law and that its conclusions were not legal judgments but only statements of opinion, the commissioners asserted that, in cases where there was an overwhelming preponderance of evidence implicating specific individuals, it would have been morally wrong to refrain from naming them despite the lack of legal due process. They underscored their conviction that to do so would have granted impunity, which contradicted the commission's mandate, and would have prevented the country from fully confronting its past and from erecting the necessary safeguards to prevent abuses in the future. The commission's report, *From Madness to Hope*, named more than forty individuals, including the minister of defense, the president of the Supreme Court and numerous military officers, as responsible for planning or carrying out political executions and directing mass killings of civilians, or for obstructing

---

<sup>4</sup> Oddly, the commission did not include the activities of the notorious death squads, which had killed thousands of Salvadorans during the war, among the targets of its investigations. The commission was criticized by many Salvadorans and by the international human rights community for this grave omission. See Hayner, pp. 628–629.

investigations into specific actions. The report recommended dismissing these individuals from their positions, prohibiting them from holding any public post for ten years, and barring them for life from serving in either the military or the security forces.

The decision to name names was a controversial one, both within El Salvador and within the international human rights community. Members of the military called the commission's investigations a witch hunt, and claimed that its recommendations were vengeful. International human rights organizations objected to the lack of due process and the inability of the accused to defend themselves.

Although the Salvadoran government was obliged under the peace accords to implement the commission's recommendations, it was slow to purge the individuals named in the report, and several ran for office in the 1994 elections.<sup>5</sup> And within days of the report's release, the Salvadoran legislature passed a general amnesty for abuses committed during the civil war, virtually ensuring that neither the individuals named in the report nor other violators would ever stand trial.

### ***South Africa: The Truth and Reconciliation Commission***

South Africa's racist apartheid regime left behind a bitter legacy of vast social and economic inequalities as well as a culture of violence stemming from years of state-sponsored repression and abuses. Perhaps the central challenge facing the government of President Nelson Mandela is finding ways to bring about national reconciliation that will unite South Africans to work together toward a shared future.

In 1995, in its attempt to deal with the human rights abuses committed during the apartheid era, the South African parliament established a Truth and Reconciliation Commission based on the experiences of previous commissions, including those of Chile and El Salvador. According to Dullah Omar, South African minister of justice and one of the commission's chief architects, the Truth and Reconciliation Commission offers South Africa the best means of establishing

---

<sup>5</sup>See Hayner, p. 649, note 117.

accountability, the rule of law and respect for human rights, and demonstrates a clear break with the country's repressive past. In his words, the commission's objective is to "promote reconciliation in the spirit of understanding which transcends the divisions of the past."<sup>6</sup>

The Truth and Reconciliation Commission, which began its work in December 1995, provides a mechanism and a process for dealing with gross human rights violations committed during the apartheid period. The commission's presidentially appointed membership comprises seventeen highly esteemed South African men and women who represent a broad spectrum of society; its chairman is Desmond Tutu, former Anglican archbishop of South Africa and winner of the Nobel Peace Prize. The commission is expected to conclude its investigations and issue a report of its findings and recommendations to the public within two and a half years; the final report is due at the end of July 1998. The commission's mandate was twice extended in order to accommodate the volume of testimonies and amnesty applications it received. In addition to the final report, the commission is compiling a database and other archival materials (including videotapes of its hearings) that will be available to the public. Like the report of the Commission on the Truth for El Salvador, the Truth and Reconciliation Commission's final report will name perpetrators of abuses.

The Truth and Reconciliation Commission is not a court of law and does not conduct trials or mete out punishment. Its hearings do not replace criminal trials for alleged human rights abusers, and it forwards any evidence of crimes it discovers on to the courts. The commission has three subcommittees: the Committee on Human Rights Violations investigates gross abuses, identifies victims and recommends ways to prevent further violations and to restore dignity to the victims; the Committee on Amnesty holds hearings for individuals who committed politically motivated, gross violations of human rights who have come forward voluntarily to confess and request clemency; and the Committee on Reparation and Rehabilitation provides victims and their families with an opportunity to tell their stories,

---

<sup>6</sup>Abdulah M. Omar, South African minister of justice, remarks at an international conference in Belfast on "Reconciliation and Community: The Future of Peace in Northern Ireland" sponsored by the Project on Justice in Times of Transition, INCORE and the University of Ulster, June 8, 1995.

and considers steps to take to restore their dignity and provide them with appropriate reparation. The commission seeks to understand both the perspectives of the victims and their families, as well as the perspectives and motives of the perpetrators. It also seeks insights into the systemic nature of abuses, and thus, in addition to holding hearings on the fates of individuals, the commission also holds hearings that focus on specific incidents that are illustrative of wider patterns of human rights violations. It has also asked political parties, businesses, the media and other organizations to make submissions to help establish the broad political context in which violations occurred.

The Truth and Reconciliation Commission's mandate differs from that of previous truth commissions in one significant way: it has the authority to grant amnesty to individuals who voluntarily admit to and accept responsibility for committing politically motivated crimes. The provision for amnesty applies to individuals on all sides in the conflict; according to the commission's June 1996 interim report,

While most people would draw a moral distinction between violence used to maintain an unjust system and violence to oppose that system, the law governing the Commission recognises no such distinction. A person is judged solely on whether that individual has suffered a gross violation of his/her human rights or not. The political affiliation of the perpetrator or the victim/survivor is of no relevance. The Amnesty Committee is by law not required to make any finding about the morality of a perpetrator as a criterion for granting or withholding amnesty.<sup>7</sup>

South Africa chose this approach to amnesty for politically motivated crimes because it takes into account the victims of abuses, their families and their communities, and because it establishes individual accountability for past crimes. Whereas a general amnesty would have sent a message of impunity and may have led to retributive acts of violence, granting clemency on a case-by-case basis addresses the need to restore the dignity of victims and strengthens South Africa's fledgling institutions of

---

<sup>7</sup>*Truth and Reconciliation Commission Interim Report*, June 1996. Available on the Truth and Reconciliation Commission home page: <http://www.truth.org.za>.

democracy as well as its commitment to the rule of law and to upholding the principles of human rights.

The Truth and Reconciliation Commission has not been universally embraced. Among right-wing whites, the commission's investigations are seen as a witch hunt. On the opposite end of the spectrum, some relatives of victims believe that the amnesty provision has deprived them of their right to seek justice through criminal or even civil prosecution of the perpetrators. In 1996, the families of several anti-apartheid activists who had been murdered went to court to attempt to halt the commission's work, but they were unsuccessful.

The commission is making every effort to carry out its mandate as evenhandedly and transparently as possible. The cases it hears involve victims and perpetrators from all sides, and its investigative unit evaluates and substantiates the details of every case, as well as every request for amnesty. Despite accusations that the commission is biased toward the African National Congress (ANC), ANC leaders who testified before the commission were not allowed to claim the defense that in their case the ends justified the means because their struggle was just.

Over 8,000 applications for amnesty have been filed with the Truth and Reconciliation Commission. The applicants include more than 300 members of the African National Congress, including many members of President Mandela's cabinet and Deputy President Thabo Mbeki, Mandela's likely successor. (However, many rank-and-file ANC members who were involved in violent actions have not applied for amnesty, and virtually no one from the Inkatha Freedom Party has applied.) Although only two former high-level officials of the National Party and only a few former military officers have applied for amnesty, a number of former police officers have come forward to confess to some of the most notorious human rights crimes of the apartheid era, including the brutal political murders of prominent anti-apartheid activists like Steve Biko. Moreover, the requirement that applicants for amnesty must make full disclosure, including naming those who gave them their orders, has begun to directly implicate members of the top leadership of the old regime.

As a result, the amnesty procedure, in South Africa's approach to it, is bringing to light details of the truth about the past that matter most to the victims and their families: whether a missing person was killed, who the killer is, where the body is buried. Without the amnesty procedure, the details of many politically motivated crimes of the apartheid era would likely never be known. This public acknowledgment of the truth grants dignity to the victims and their families, validating their memory and their loss. Their stories have become a part of the official record, instilled with a larger historical meaning.

But the amnesty procedure also prevents people from remaining ignorant of the abuses that were committed under apartheid. No one in South Africa can avoid hearing about the findings of the Truth and Reconciliation Commission: commission hearings are open to the public, and they are covered extensively in the media, including on the nightly TV news and in a weekly program that has become the third most watched television program in the country.<sup>8</sup> The confessions of perpetrators of some of the most brutal crimes committed during the apartheid era, particularly those of former police officers and other agents of the apartheid state, leave no room for denial. Moreover, these confessions mark one of the first steps toward establishing accountability for the abuses of the past, and fostering respect for human rights and the rule of law in the new South Africa.

In October 1997, the Truth and Reconciliation Commission announced a series of proposed reparation and rehabilitation policies for victims from the apartheid era that it would recommend to the government in its final report.<sup>9</sup> These measures, the commission emphasized, are needed to counterbalance the amnesty process, for without substantial reparations, the true beneficiaries of the Truth and Reconciliation Commission might appear to be those who committed atrocities rather than their victims. The commission recommended that the South African

---

<sup>8</sup>Ibid.

<sup>9</sup>See "Introductory Notes to the Presentation of the Truth and Reconciliation Commission's Proposed Reparation and Rehabilitation Policies" by Hlengiwe Mkhize, chairperson of the Reparation and Rehabilitation Committee, issued on October 23, 1997, to the Truth and Reconciliation Commission's electronic mailing list (accessible on the commission's website: <http://www.truth.org.za>).

government spend approximately \$650 million over six years to provide annual grants to victims or their surviving families, as well as to fund community rehabilitation programs devoted to health care, mental health care, education and housing. The aim of these measures is to empower both individuals and communities to take control of their lives. An estimated 22,000 individuals, including some whites who were victims of black guerrilla attacks, will qualify for the payments; the total amount represents about 0.25 of the national budget.<sup>10</sup> The commission also recommended a series of legal, administrative and institutional measures that would help to prevent future abuses, as well as a series of symbolic efforts, such as establishing a national day of remembrance and reconciliation, erecting memorials and renaming streets and community facilities in memory of specific individuals or events. Individuals should also be able to receive assistance in obtaining death certificates for family members who were victims of apartheid, clearing their names from criminal records, having the bodies of relatives exhumed and reburied or receiving a tombstone for them.

Though its work is not yet complete, the Truth and Reconciliation Commission appears to be helping South Africa to put the past behind it and to unite its citizens to work together toward a common future. According to Justice Minister Omar, through the work of the Truth and Reconciliation Commission, “[t]he new democratic state will be able to say to victims and victim communities that it is sorry for what happened in the past, that what happened in the past should never be allowed to happen again, and that together we need to build a new order based on respect for human life and human dignity. On the basis thereof South Africa and the victims will be able to forgive but not to forget.”<sup>11</sup>

### **Coming to Terms with History**

---

<sup>10</sup> See Suzanne Daley, “South Africa Panel Recommends Aid for Apartheid-Era Victims,” *The New York Times*, October 24, 1997.

<sup>11</sup> Abdulah M. Omar, South African minister of justice, remarks at an international conference in Belfast on “Reconciliation and Community: The Future of Peace in Northern Ireland” sponsored by the Project on Justice in Times of Transition, INCORE and the University of Ulster, June 8, 1995.

According to José Zalaquett, one of the commissioners of Chile's National Commission for Truth and Reconciliation, the overarching aim during the transition from civil war to peace, or from a criminal regime to democracy, should be to seek "all the truth, and as much justice as possible."<sup>12</sup> If past crimes are not addressed, they will continue to fester beneath society's surface, waiting for an opportunity to erupt. Of greatest importance is conveying the message to society that there should be no impunity for perpetrators of genocide, war crimes or other gross violations of human rights. This can be achieved by legal means such as criminal prosecutions, or by other methods, several of which have been discussed here. The challenge is to find a way that allows the victims—and society as a whole—to heal the wounds of the past and create conditions to prevent these crimes from being repeated.

While criminal prosecutions offer the best way to deal with past crimes, seeking justice through the courts is not always possible. If justice cannot be achieved, the next best alternative is to seek the truth about the past and make it widely known. Both individuals and nations cannot free themselves of the past unless they first understand it and come to terms with it. Without national truth-telling and a shared understanding of the past, memory becomes the guide to the past, and different groups may interpret the past in different ways. Victims of abuses may feel alienated and defeated, or they may harbor a desire for revenge. Perpetrators may consider themselves free to further terrorize society since they have not been made accountable for their past actions. Such different memories and interpretations can feed future conflicts.

---

<sup>12</sup> José Zalaquett, remarks at an international conference on "Democracy and Decommunization: Disqualification Measures in Eastern and Central Europe and the Former Soviet Union" sponsored by the Project on Justice in Times of Transition of the Foundation for a Civil Society with the cooperation of the European Commission for Democracy through Law of the Council of Europe, Venice, Italy, November 14-15, 1993.

Yet knowledge about the past is not sufficient in and of itself to put an end to such poisonous influences; *official acknowledgment* of past abuses is also necessary to help restore dignity to the victims and to help heal society's wounds. Acknowledgment is more than merely remembering: it is a way of remembering that conveys respect for the victims, and condemns those who wronged them. Official truth-telling helps make a clear break with the past, and shows that the new government is trying to earn the respect of its citizens and to strengthen its democratic institutions and commitment to protecting human rights. Truth-telling restores dignity not only to the individual, but also to the nation. However, the truth should not be used as a weapon, for policies whose true aim is revenge will only continue to divide society and prevent old wounds from healing.

As discussed in this chapter, truth commissions, if carefully crafted, can serve as an effective means of officially acknowledging the cruelties of the past in a way that releases society from their consequences rather than binding it to them. With a clear mandate sanctioned by the state and accepted by the public, adequate resources and sufficient time for investigation and evaluation, an independent commission of inquiry can provide a country emerging from civil strife or repression with a means of coming to terms with its past. While there is no single model for an effective truth commission since each country's history, culture and circumstances are different, it is possible to learn from and build on the prior experiences of others while taking into consideration specific political realities. Based on the recent experiences of commissions of inquiry into past abuses in some dozen countries including the three discussed here, a number of recommendations can be made:

- There must be consensus in society that a truth commission is needed. Without adequate public support, the commission will have difficulty conducting its investigations, and its findings will be discounted or ignored.
- The commission must be established as an independent, impartial body. Its mandate can

come from the president or national legislature, or from an international body like the United Nations.<sup>13</sup> This kind of official imprimatur also reinforces the state's respect for the victims.

- The commission should have a very clear mandate, stating its broad aims, what it will investigate, how it will conduct its inquiries, and how its findings will be reported and publicized. The commission's existence and mandate should be made widely known at the outset, which will encourage cooperation with its investigations.
- In order to maintain its independence and to endow its work and its findings with credibility, the commission's membership must be selected with great care. Commissioners should be nationally respected figures who as a group represent a political balance and will be accepted as an impartial moral authority.
- The commission should be given a specific period of time in which its mandate is in effect. Open-ended tenure can undermine the urgency of the commission's work, and the public may lose faith that it will ever report on its findings. However, the commission's term of operation should not be so short that it has insufficient time to organize its work, collect information and conduct investigations, or issue a final report. Based on past experiences, truth commissions can operate effectively within a prescribed period of six months to two years.
- The commission should be allocated sufficient human and financial resources to be effective.
- Although it is not a court of law, the commission should have the power to subpoena witnesses and guarantee their rights and safety. It should also protect the rights of alleged violators by adhering to legal due process.

---

<sup>13</sup> In some countries, nongovernmental organizations or churches have sponsored similar commissions of inquiry into past abuses, but because they have lacked the state's formal support, their findings are not considered "official" history. For an in-depth exploration of one of the most extensive efforts of this sort, the documentation of abuses in Brazil sponsored by the Catholic Archbishop of São Paulo and the World Council of Churches, see Lawrence Weschler, *A Miracle, a Universe: Settling Accounts with Torturers* (New York: Penguin Books, 1990).

- The commission's investigations should be conducted professionally and systematically, and with a maximum degree of transparency. At a minimum, its findings should be made public in a published final report that is widely publicized and disseminated. During the course of the commission's investigations, public hearings, which may also be broadcast on radio or television, are often an appropriate and effective means of informing the public; however, when society is highly polarized and could easily slip back into violence, hearings should not be open to the public, but a final report must still be issued and broadly distributed.
- The commission should not only document the past, but also submit evidence of crimes to the courts for criminal prosecutions. The commission's existence, even when practical realities preclude criminal trials of human rights violators, should not exclude the possibility of eventual prosecution.
- The commission should consider making recommendations about how best to protect human rights in the future, as well as suggestions for providing compensation and rehabilitation to the victims of past crimes.

A caveat is necessary, however: truth commissions are not a magic salve that can be applied to any deeply divided society to heal the brutal, festering wounds of its past. For example, it is unlikely that a truth commission could contribute to reconciliation among Bosnia's three ethnic communities; indeed, it might jeopardize the fragile peace brought about by the Dayton accords. Because the level of distrust among Bosnian Serbs, Croats and Muslims remains high, no commission, including one established by an international body like the Organization for Security and Cooperation in Europe or the United Nations, would be perceived as neutral at this stage in the peace process.<sup>14</sup> Particularly when there is no clear

---

<sup>14</sup> Nevertheless, a proposal to establish a Commission for the Development of Trust in Bosnia has been put forward and has received support from political leaders in the three ethnic communities. The proposal was presented and debated at a November 1996 conference in London which was attended by Bosnian Serb, Croat and Muslim community and political leaders. It was supported by the president of the Republika Srpska Parliament and the president of the House of Representatives of the Muslim-Croat Federation Parliament, among others. The proposal called for a commission that would include representatives of all three communities, and would investigate the unresolved legacy of human rights

winner, the cessation of hostilities alone is not likely to produce the kind of social consensus that is needed to give a truth commission popular legitimacy. Nevertheless, in order to ensure a lasting peace, at some point the roots of the violence, its extent and impact, its victims and perpetrators must be officially acknowledged. A case can be made that the suppression of the full history of the atrocities committed in Yugoslavia during World War II, rather than so-called “ancient ethnic hatreds,” was at the root of the bloodshed in the 1990s; nationalist provocateurs were able to play upon the living memories of World War II to fan the flames of hatred and violence. Similarly, without an official acknowledgment of the truth about the atrocities that have been committed in Bosnia in this decade, peace is not likely to endure. However, until Bosnia has a democratic government that is broadly accepted as legitimate by all three of its communities, the findings of an officially sponsored truth commission would not be perceived as credible.

If there is a conclusion to be drawn, it is that both individuals and societies cannot be free of the past without first coming to terms with it. Toward this end, official truth-telling can help to reestablish a common reality that can serve as a basis for national reconciliation, renewed social cohesiveness and the moral rejuvenation of society. This renovation process includes changing the guiding principles of certain political and social institutions as well as changing people's mindsets, and it encourages the development of popular trust in the public institutions of democracy. Rebuilding—or in some cases, building for the first time—a healthy civil society in which individuals are guaranteed the freedom of independent association and the free exchange of ideas can also support this process. An independent civil society fosters social solidarity and the defense of society by its members, and encourages further exploration of the truth about the

---

violations, genocide and missing persons, as well as the root causes of the war. (See conference report, “Workshop on Reconciliation for Bosnia,” cosponsored by the Project on Justice in Times of Transition and the British Association for Central and Eastern Europe, November 13–16, 1996, London.) The proposal was also endorsed by political and community leaders from the three ethnic groups at an August 1997 follow-on workshop in Bosnia sponsored by the Project on Justice in Times of Transition.

past—all of which may help to guard against a repetition of abuses in the future. Journalists, historians, artists and writers, as well as religious groups and nongovernmental organizations, have the potential to play central, positive roles in the process of exploring old wounds, honoring grief and coming to terms with past wrongs.

While truth commissions and other forms of official acknowledgment may have a greater impact if a country is not able to conduct criminal trials, by no means should they replace criminal prosecutions. National reconciliation cannot be achieved at the expense of morality or human rights standards: perpetrators of genocide, war crimes and other gross violations of human rights must be made accountable for their actions, and to the extent possible, they must be punished within the framework of the law. But truth commissions can conduct their work in parallel to criminal prosecutions. Whereas prosecutions focus on individual accountability for past abuses, truth commissions center their efforts around the victims, giving voice to their suffering, and look for broad patterns within society and an overall truth about the past.

Moreover, both criminal prosecutions and truth commissions should be part of a broader process of institutional reform that will help prevent future abuses from occurring. After a country has emerged from a period of civil war or violent repression, it is critical for the new government to establish and adhere to standards of justice, accountability and the rule of law when dealing with past crimes, whether in the courts or in commissions. If these steps are not taken with respect to the past, there is no guarantee that these protections will be enforced in the future.