



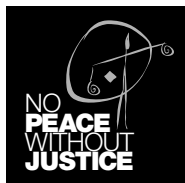
# Closing the gap

The role of non-judicial mechanisms  
in addressing impunity



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# Preface

For more than thirty years I have had the privilege of witnessing the work of the rapidly evolving humanitarian field as it confronts poverty and human rights abuses across the world. Along with everyone who has made these goals their own, this period has also forced me to share in the anger and frustration of a world that has not changed for the better. From political office in Italy and Europe, where I have worked on international issues along with the Transnational Radical Party, and as European Commissioner responsible for the European Commission's Humanitarian Aid Department, we have witnessed crises after crises becoming shameful monuments to the evils of which humans are capable through the violation of human rights and international humanitarian law, sometimes on a massive scale.

No one visiting Sierra Leone in 1998 could fail to be struck by the scale of the tragedy that saw this beautiful country transformed in to a living monument to our acceptance of and capacity for evil. The same can be said of so many other places in the world; from the killing fields of Cambodia to the shameful tragedy at Srebrenica, and of the thousands of Darfurians who today are still the target of death and destruction. How much more will we be willing to accept? For how much longer will the architects and implementers of these plans to destroy the lives of ordinary men, women and children go unchallenged?

One lesson that shines through all that we have had to witness is that if we are to change the world for the better, we must begin by confronting the past. Too often we have seen the authors of crimes and atrocities emerge unscathed

from the violence they have caused, and too often there are no consequences for perpetrators and no justice for victims. This pattern serves only to leave the rule of law trampled and torn, with those who would profit from violence emboldened and surer still in their impunity from the reach of justice.

The majority of people who have committed crimes under international law in Cambodia, in the former Yugoslavia, in Rwanda, in Latin America and in a host of other places too numerous to mention, remain untroubled by the consequences of their actions to this day. The majority of perpetrators are not held to account, their victims are denied redress, and the rule of both international and domestic law is left unenforced and weakened. Eventually the countries they have devastated are bumped from the front pages of the newspapers, leaving the seeds that started conflict in the first place to fester in the dark recesses of history; until next time.

One thing therefore is certain. If we are to confront escalating violence and tear down once and for all these monuments to human barbarity, it must be through a comprehensive solution that includes a commitment to accountability and an end to impunity.

There is a new determination to finding this solution, matched by a growing recognition that criminal prosecutions are not the only item in the accountability toolbox. We are still at the early stages of this process, and there is much innovation still to be done. Increasingly however, we are seeing countries weighed by years of violence look to solutions that have worked elsewhere, searching for that elusive “model” that can solve all their ills. This will not happen. Each situation is different, and so each solution must also be different. But what we can ask – what the victims of violence can demand – is that those searching for solutions articulate clearly what they are trying to achieve and consider carefully how they intend to do so.

This Report is intended to help in this endeavour by examining and analysing the goals of accountability mechanisms, and by considering how different approaches have both succeeded and failed in achieving each of their stated objectives. In recognising that no single mechanism can hope to meet a country’s accountability needs, we also hope that this Report will provide impetus for a more rigorous consideration of the interplay between different mechanisms

and their potential contribution to integrated and more effective accountability for war crimes, crimes against humanity and genocide.

Above all, our hope is that the monuments of the future will no longer stand testament to our brutality and willingness to look the other way, but to innovative approaches and an unwavering commitment to accountability, justice and redress. If we are to make the world the better place we want it to be, there is no better place to start than by ensuring that there are consequences for our actions.

**Emma Bonino**

Vice President of the Italian Senate;  
Founder of No Peace Without Justice

## List of Abbreviations

<b>AC</b>	Amnesty Committee (South Africa)
<b>AFRC</b>	Armed Forces Revolutionary Council (Sierra Leone)
<b>ANC</b>	African National Congress (South Africa)
<b>AZAPO</b>	Azanian Peoples Organisation (South Africa)
<b>CAVR</b>	Comissão de Acolhimento, Verdade e Reconciliação Commission for Reception, Truth and Reconciliation (East Timor)
<b>CCDH</b>	Conseil Consultatif des Droits de l'Homme Consultative Council for Human Rights (Morocco)
<b>CDF</b>	Civil Defense Forces (Sierra Leone)
<b>CONADEP</b>	Comisión Nacional sobre la Desaparición de Personas National Commission on the Disappearance of Persons (Argentina)
<b>CRA</b>	Community Reconciliation Agreement (East Timor)
<b>CRP</b>	Community Reconciliation Procedure (East Timor)
<b>CTF</b>	Commission for Truth and Friendship between Timor Leste and Indonesia
<b>DDR</b>	Demobilisation, Disarmament and Reintegration
<b>ECOWAS</b>	Economic Community of West African States
<b>FMLN</b>	Frente Farabundo Martí para la Liberación Nacional Farabundo Martí National Liberation Front (El Salvador)
<b>FRG</b>	Federal Republic of Germany
<b>GCIS</b>	Government Communication and Information System (South Africa)
<b>GDR</b>	German Democratic Republic
<b>HRVC</b>	Human Rights Violations Committee (South Africa)
<b>ICC</b>	International Criminal Court
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICTR</b>	International Criminal Tribunal for Rwanda
<b>ICTY</b>	International Criminal Tribunal for the former Yugoslavia



<b>IER</b>	Instance Equité et Réconciliation Justice and Reconciliation Authority (Morocco)
<b>IFP</b>	Inkatha Freedom Party (South Africa)
<b>IRA</b>	Irish Republican Army (Northern Ireland)
<b>JSMP</b>	Judicial Systems Monitoring Programme (East Timor)
<b>MOU</b>	Memorandum of Understanding
<b>NCTR</b>	National Commission on Truth and Reconciliation (Chile)
<b>NGO</b>	Non-Governmental Organisation
<b>NP</b>	National Party (South Africa)
<b>NPA</b>	National Prosecuting Authority (South Africa)
<b>OGP</b>	Office of the General Prosecutor (East Timor)
<b>QC</b>	Queen's Counsel (UK)
<b>RPF</b>	Rwandan Patriotic Front
<b>RRC</b>	Reparation and Rehabilitation Committee (South Africa)
<b>RUC</b>	Reconciliation and Unity Commission (Fiji)
<b>RUC</b>	Royal Ulster Constabulary (Northern Ireland)
<b>RUF</b>	Revolutionary United Front (Sierra Leone)
<b>SBZ</b>	Sowjetische Besatzungzone Soviet Zone of Occupation (Germany)
<b>SCSL</b>	Special Court for Sierra Leone
<b>SCU</b>	Serious Crimes Unit (East Timor)
<b>SED</b>	Socialist Unity Party of Germany
<b>SLA</b>	Sierra Leone Army
<b>SPSC</b>	Special Panels for Serious Crimes (East Timor)
<b>TRC</b>	Truth and Reconciliation Commission
<b>UNDP</b>	United Nations Development Programme
<b>UNHQ</b>	United Nations Headquarters (Geneva, Nairobi, New York and Vienna)
<b>UNTAET</b>	United Nations Transitional Administration in East Timor
<b>UNHCR</b>	United Nations High Commissioner for Refugees



# Foreword

Reflecting on the tragedy of war, from the Second World War to the conflict in the former Yugoslavia, poet Wislawa Szymborska wrote “reality demands we also state the following: life goes on”. When rebuilding lives and livelihoods, reality has however also shown that it is our actions in the wake of war, conflict, and atrocity that can have the most significant impact on the form these lives take. Where firm and decisive action has been taken, conflict-ridden societies have recovered to transcend past divisions and reclaim their stability. Where such action has not been taken, societies have too frequently slid back towards conflict, punctuating the lives of their citizens once more with violence. Since the aftermath of the Second World War, States have therefore increasingly recognised that simply turning their backs on the past will not provide for a transition to peace and stability, but will instead only maintain conditions conducive to a repetition of the wrongs of the past.

A full recovery from conflict consists of many steps. Security must be restored, infrastructure rebuilt, and economies restored to provide livelihoods for victims and perpetrators alike. Political development might also be necessary, including democratic and institutional reforms providing opportunities for the non-violent expression of grievances and concerns. Before these objectives are viable however, history suggests that a society must confront the crimes that plagued its past and hold those responsible to account.

Before life goes on then, reality also demands that we account for the past. It demands that we acknowledge what has happened and attribute responsibility

for wrongs that have been committed. Only when this has been done can we properly honour victims and, in so doing, provide a solid foundation for a guarantee that the past will not infect and poison the future.

This is not an unfamiliar argument. Almost all societies include a criminal justice system designed to hold perpetrators of crimes accountable for their actions. When crimes and human rights abuses occur on a large scale however, a special problem presents itself. Where the timeframe in question is very long, or the number of victims and perpetrators is very high, the criminal justice system will, in most cases, be unable by itself to provide satisfactory levels of accountability. It will simply not be possible for criminal courts to consider each and every suspected crime. Under such conditions, an impunity gap can easily emerge, either by accident or by design, as those cases not considered by criminal courts are ignored and left to undermine the process of accountability and so threaten progress towards long-term peace and stability.

In order to close this impunity gap, a broader process of accountability is needed. Criminal prosecutions must play a central role, but further measures and institutions might also be necessary if accountability is to be sufficiently broad to reach all relevant victims and perpetrators. It is these non-judicial mechanisms, working to complement the efforts of the criminal justice system, which are the subject of this report.

The ways in which States have sought to provide a broader and more inclusive form of accountability have varied: they include, in addition to criminal prosecutions at both at the national and international level, truth commissions; commissions of inquiry; restitution or reparations; vetting or lustration; institutional reform; and other less structured or institutionalised types of approaches, including national days of memory, apologies and the construction of monuments to memory or peace. The scope through which accountability can be sought is therefore wide, and includes judicial, namely court proceedings; quasi-judicial, such as commissions that have the power to subpoena witnesses but no power to enforce such subpoenas, for which a court order is necessary; non-judicial, such as some forms of reparations or institutional reform; and neo-traditional, where traditional processes and mechanisms are adopted and adapted to situations that include the commission of human rights violations or crimes under international law.

The specific aims of States seeking accountability also vary, but generally include one or more of the following: to come to terms with a legacy of large-scale past abuses; to ensure accountability; to serve justice; to achieve reconciliation; restoration of a society's confidence in State institutions; mending relationships between individuals, countries, the region, or within the international community more generally; or, indeed, simply being able to say "something was done" and thereby closing (or attempting to close) a chapter on the past. These kinds of judicial and non-judicial mechanisms and processes that are set up to serve one or more of these aims have, for several years, been called "transitional justice" initiatives.

Since the establishment of such broader accountability processes, and in particular those of a non-judicial nature, a central question has been the extent to which these are capable of meeting the demands of justice. The obligation of States to investigate and, where appropriate, prosecute those suspected of committing crimes under international law has been recognised for decades, but has attained heightened significance in a context of the Rome Statute for the International Criminal Court (ICC) which is premised on the principle of complementarity. This principle holds that investigation and prosecution will only proceed at the ICC if the relevant State is unwilling or unable to do so domestically. The question that is increasingly being asked is whether non-judicial mechanisms can satisfy the principle of complementarity, such that a case before the ICC would be considered inadmissible pursuant to article 17 of the Rome Statute.

This is not a new question: the drafters of the Rome Statute discussed this issue at some length in 1998, with strong arguments appearing in support of both "yes" and "no" answers. Most delegations, however, appeared to fall on the side of "maybe", partly because "the very purpose of the ICC was ... to prompt States to overcome the considerations of expedience and *realpolitik* that had so often led them to trade away justice in the past."<sup>1</sup> The final decision was to omit any reference to non-judicial mechanisms, in whatever guise, and leave it to the ICC to develop its own policies and responses to this issue.<sup>2</sup>

This report seeks to contribute to the question of the potential role of non-judicial mechanisms during periods of transition, and specifically their contribution to

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1 D. Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 2003, Vol. 14(3), *European Journal of International Law*, 481 at page 483

2 *Ibid*

the process of accountability. It does not intend to do so by arguing that there are certain mechanisms, structures, or institutions that will always achieve certain goals when recreated across circumstances, as though the challenge of transitional justice is in reality merely one of replicating structures imported from elsewhere. Rather, this report is premised on the view that the success of any given transitional justice package will depend a great deal on the political, economic, and cultural context in which it is applied. Progress is therefore best secured by examining each of the elements of a transitional justice process in turn, considering which factors have contributed to their success and failure across varying conditions, and asking how their work can most effectively be coordinated. As a number of case studies will illustrate, a mechanism that has furthered a particular goal under one set of circumstances might fail to do so under even slightly different conditions. This report will therefore centre on an analysis of the components and objectives of these non-judicial initiatives themselves, as well as a consideration of how these relate to the various external political, social, and economic factors that make each situation unique.

To inform this analysis, NPWJ conducted roundtable discussions with local partners in several countries, including Fiji, Iraq, Morocco, Pakistan and Sierra Leone,<sup>3</sup> each bringing together individuals with direct and practical experience of specific non-judicial accountability measures. The results of these discussions have aided the compilation of the discrete case studies, as well as the framing of more analytical considerations of the questions of whether, how, and to what extent non-judicial accountability measures have, could or should contribute to narrowing the impunity gap and promoting the rule of law.

This report does not view non-judicial accountability mechanisms as an alternative or rival to judicial means of accountability. Non-judicial mechanisms are instead considered as a complement to judicial institutions, able to extend the reach of accountability beyond that which is available to the courts, and thus play their own distinct role in bridging the impunity gap. This report therefore intendeds also to promote a more rigorous consideration of the interplay between different judicial and non-judicial mechanisms and their potential to contribute to a more integrated process of accountability.

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3 Fiji Women's Rights Movement (Fiji); the International Alliance for Justice (Iraq); and the Kawakibi Democracy Transition Center (KADEM) (regional organisation for the event in Morocco); Pakistan Institute of Legislative Development and Transparency (PILDAT, Pakistan); and Manifesto 99 (Sierra Leone).

The report is divided into two main sections. The first section, the Analysis section, explores a number of non-judicial transitional justice mechanisms distinguished by the objectives they are typically set up to serve. Chapter I examines various mechanisms set up in pursuit of disclosure and clarification, sometimes said to be the primary objectives of any transitional justice process. Chapter II focuses on efforts of accounting for the past, specifically on strategies of identification and public acknowledgement. Chapter III considers various forms of reparations, and explores alternate forms of reparations for a transitional justice process with insufficient resources to financially compensate all victims. Chapter IV examines the question of immunity from prosecutions, including the contentious issue of amnesties, arguing that the broader cost of such strategies are too often neglected. Chapter V explores attempts to formally structure the relationship between judicial and non-judicial accountability mechanisms. Finally, Chapter VI provides an overall assessment.

This thematic structure is adopted for purposes of clarity and ease of reference, but in many respects represents an artificial delineation, since these themes are often overlapping and sometimes inter-dependent. What emerges unmistakably, however, is the need for a clearer articulation of the objectives and expectations of a particular transitional justice process, together with a clearer articulation of the social, political and economic constraints facing the State enacting these processes. None of the questions raised in the Analysis section can be answered without a clear view of the objectives and resources available to a particular process. As Henry Steiner has observed of truth commissions, but no less applicable for other non-judicial accountability measures:

Although the general purpose and methods of truth commissions properly figure in a critical discussion of what they have achieved, what rapidly becomes apparent is that concrete examples drawn from different countries must inform abstract description. No architect of these institutions has proceeded by deduction from general principles.<sup>4</sup>

Given that the success of any transitional justice process depends so heavily on the thoughts and efforts of its architects, it is intended that this report will assist them in this difficult undertaking by considering how these questions might be answered with respect to transitional justice processes that have

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<sup>4</sup> H Steiner, *Introduction to Truth Commissions in International Human Rights in Context: Law, Politics, Morals* (H J Steiner, P Alston and R Goodman eds) 2008 at page 1344.

gone before. By considering both the successes and failures of prior attempts to close the impunity gap and secure transitional justice, architects of future processes will be better positioned to consider what mechanisms and objectives might be adapted to their own unique contexts.

The second section of the report provides a more details account of twelve countries' experiences with non-judicial accountability mechanisms in the context of transitional justice. The case studies are organised both thematically and chronologically: the first set of case studies examines those countries in which truth commissions were an integral part of transitional justice initiatives, namely Argentina, Chile, El Salvador, South Africa, Sierra Leone, East Timor, Morocco and Fiji. In some cases, such as Morocco, the truth commission was the only vehicle through which accountability was sought; in others, prosecutions were also part of the package, whether they had an explicit link with the work of the truth commission, as in South Africa or East Timor, or not, as in Sierra Leone. The second section of case studies – Rwanda, East Germany, Northern Ireland and Spain – canvasses those countries that did not make use of truth commissions during their transitional process. These countries either adopted some alternative approach, such as the commission of inquiry in Northern Ireland; attempted adaptation of traditional community settlement procedures, as in Rwanda; a process of lustration, as in Germany; or simply did very little, as in Spain.

Admittedly this diverse list of experiences conceals many fundamental differences. Nevertheless, the study of the goals and mechanisms examined in this report, as well as of the various strategies pursued in response to the problems it identifies, does yield useful food for thought for other countries working towards their own unique process of transitional justice.



# Analysis

# Introduction

There is no “one size fits all” approach to transitional justice. The success and failure of the various components of such a process will depend to a great extent on the nature and dynamics of the State and situation in question. Each State must therefore articulate its own accountability needs and determine for itself which mechanisms and processes can best help fulfil its objectives.

Nevertheless, most States will not be alone in facing at least some of the problems central to their transitional justice needs. As the second section of this report illustrates, there are now a considerable number of prior experiences upon which the architects of transitional justice can draw, with sufficient commonality to allow for a comparison of some important aspects of such a process. This commonality includes a number of goals and objectives that are likely shared by many transitional and post-conflict societies, as well as experience of some of the means that have been employed in pursuit of these goals.

The case studies examined in the second section of this report identify a number of potential goals a State may have when embarking on an accountability process, including coming to terms with a legacy of large-scale past abuses; serving justice; achieving reconciliation; reforming the State and its institutions; mending relationships between individuals, countries or within the region or the international community more generally; or, indeed, simply being able to say “something has been done” and thereby closing a chapter on the past. More often than not, multiple goals will be identified and pursued across several mechanisms and institutions.

This report is premised on the view that although no State can hope to resolve all its problems by importing a single model for transitional justice, its own tailored process can, from the very start, be given a better chance of success if there is a clear articulation of objectives and expectations, and if serious thought is given to how these goals might be pursued in a coherent and consistent fashion. This is the stage at which architects of transitional justice processes can most fruitfully draw on prior experiences, and it is this process the report aims to support. This first section hopes to do so by identifying some of the aims, mechanisms, and challenges that are common to the case studies examined later, and by considering how these have been implemented and solved under various political, economic, and cultural conditions.

The first chapter will consider some of the questions and problems that surround efforts to articulate a complete historical record of past events. The second will present some of the means by which non-judicial mechanisms have attempted to move beyond a truthful account of the past and provide also a measure of accountability for those responsible for the events they uncover. Shifting the focus to the victims of these crimes, chapter three will consider how non-judicial mechanisms might take a leading role in providing reparations and restitution. Chapter four will consider the controversial question of amnesties and immunity, arguing that although they may be tempting means of pursuing short-term gains, such as perpetrator engagement, their long-term costs must not be ignored. Finally, chapter five will consider the important issue of structuring the relationship between non-judicial and judicial mechanisms, a task too often neglected given the interdependence of these two aspects of transitional justice.

Many of the States emerging from armed conflict or periods characterised by massive human rights violations are developing States. They are likely to have experienced years, if not decades, of underdevelopment, exacerbated by periods of extended atrocity and/or conflict that significantly impair or destroy infrastructure, institutions and the rule of law. In most cases, the process of transition has not resulted in a complete defeat of the powers that perpetrated atrocities. The new political leadership often represents an uneasy coalition of the victims of atrocity and those largely responsible for the perpetration of this atrocity. Further, those responsible for International Criminal Court” atrocities often continue to occupy powerful positions in the society, or in

neighbouring countries, and may attempt to destabilise the peace if they felt threatened. These political and economic factors, as well as legal, cultural and social factors, all have an impact on the type and mix of mechanisms and processes a State may require in order to address its accountability needs.

Among the most important legal factor that must be taken into account is the obligation of all States to investigate and, where appropriate, prosecute those suspected of committing crimes under international law. This is not a new obligation, but it has attained heightened significance in a context of the Rome Statute of the International Criminal Court, premised on the principle of complementarity.

Increasingly, efforts are being made at specifying the conditions under which mechanisms or processes that do not amount to criminal prosecutions may nevertheless demonstrate a State's attempts to provide justice. For example, Darryl Robinson suggests that the following considerations should condition any determination as to whether the ICC should defer to a national transitional justice process:

- Was the measure adopted by democratic will?
- Is the departure from the standard of criminal prosecution of all offenders based on necessity, i.e. irresistible social, economic or political realities?
- Is there full and effective investigation into the facts?
- Does the fact-finding inquiry name names?
- Is the relevant commission or body independent and suitably resourced?
- Is there at least some form of punishment of perpetrators (are they identified, required to come forward, required to do community service, subject to lustration)?
- Is some form of remedy or compensation provided to victims?
- Does the national approach provide a sense of closure or justice to victims?

- Is there a commitment to comply with other human rights obligations?<sup>5</sup>

Although formulated as a kind of “checklist” by which external actors might evaluate non-judicial mechanisms and their capacity to implement the principle of complementarity, these questions also provide useful guidance when formulating the aims and objectives sought by a domestic accountability process. This list of questions also highlights some of the main challenges that have been faced by national transitional justice mechanisms, including political manipulation of *ad hoc* national commissions and chronic underfunding, which has led some commentators to propose the establishment of a permanent international truth commission, such as Professor Michael Scharf, who has written:

[...] the truth commissions that have been established thus far have been plagued by a host of problems. Most of the truth commissions have been woefully underfunded. They have also been vulnerable to politically imposed limitations and manipulation: Their structure, mandate, resources, access to information, willingness or ability to take on sensitive cases, and strength of final report have been largely determined by the political forces at play in their creation. In addition, most have lacked the power to impose sanctions on perpetrators or provide compensation to victims, have not provided those named as perpetrators with the basic rights available to a criminal defendant, and have lacked the transparency necessary for a credible proceeding. These problems could be avoided by the creation of a permanent institution.<sup>6</sup>

Professor Scharf lists the advantages of a permanent institution as greater and more stable funding; a greater perception of neutrality; less susceptibility to domestic influences; and greater speed in launching investigations.<sup>7</sup> However, even if it were accepted that these advantages would exist given the current international political system, a claim that is far from evident,<sup>8</sup> the price to be paid for adopting an international commission would be the loss of any sense of local ownership of the process. This would entail also a loss of the attendant

5 D. Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court* in Steiner *et al.*, *supra* Note 1 at page 1341

6 M P Scharf *The Case for a Permanent International Truth Commission* 7 Duke J. of Comp. & Int'l L. 375-403, at page 376

7 *Ibid* at page 380

8 For example, while international truth commissioners may be less susceptible to national political influences, a lack of independence is not a common complaint against modern truth commissions. Further, it is always possible to bring international commissioners in to work with local commissioners, as happened in Sierra Leone, or to use only international commissioners, as in El Salvador.

benefits a sense of local ownership can bring, not least that of achieving goals a community has set for itself.

There are further reasons for locating discussions about how non-judicial accountability processes should work within national discourse. In the domestic context, transitional justice processes generally represent a compromise – an attempt to approximate what otherwise might be provided based on the needs and aspirations of a variety of stakeholders. As Kader Asmal, a South African official, succinctly explains, there are gains to be had in that compromise, the negotiation for which can form part of the accountability process itself:

[...] when the time to negotiate was upon us, our international friends and allies inspired in us the courage to achieve the seemingly impossible. But the achievement is ours and the benefits accrue to our children and future generations of South Africans. [...]ou have to own the process. We argued over every word of every clause through countless drafts. Though we often didn't agree, even arguing is a way of cementing a bond and deepening the commitment to the process.<sup>9</sup>

What stands out clearly then is that every State's experience of transitional justice is different. What has been highly successful in one country can fail miserably in another. One example of this is the howls of outrage heard in Fiji and Algeria when attempts were made to transplant South Africa's system of conditional amnesties in to their own proposed transitional justice process. The choice and combination of mechanisms must be a matter for the negotiators and decision-makers who lead a country through its transition from war to peace, or dictatorship to democracy.

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<sup>9</sup> K Asmal *Stopping Crimes through Negotiations: the Case of South Africa*, Guest Lecture Series of the Office of the Prosecutor, ICC, 14 March 2006, at page 16

## Chapter I

# Clarification and disclosure

Almost without exception, accountability mechanisms are established with at least one of their explicit aims being that of providing clarification and disclosure about past events. This objective is commonly pursued by establishing a specific body charged with investigating and documenting some period of atrocity, and truth and investigative commissions are now a common feature of the transitional justice processes. Their aims have been articulated in various ways, including:

“to clarify events relating to the disappearance of persons in Argentina and investigate their fate or whereabouts”<sup>10</sup> (Argentina)

“to draw up as complete a picture as possible of the most serious human rights violations”<sup>11</sup> (Chile)

“that the public should know the truth”<sup>12</sup> (El Salvador)

“to work through the history and the consequences of the SED”<sup>13</sup> (East Germany)

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10 *Nunca Mas: Report of CONADEP* (National Commission on the Disappearance of Persons) 1984 at Part IV: Creation and Organization of the National Commission on the Disappeared (unpaginated); available at [http://web.archive.org/web/20031013222809/nuncamas.org/english/library/nevergain/nevergain\\_002.htm](http://web.archive.org/web/20031013222809/nuncamas.org/english/library/nevergain/nevergain_002.htm)

11 Report of the Chilean National Commission on Truth and Reconciliation, Introduction

12 *Mexico Agreements*, signed at Mexico City 27 April 1991, at paragraph 2

13 Law creating the commission of inquiry on “working through the history and the consequences of the SED dictatorship” Act No. 12/2597 (May 14 1992)

“to provide for the investigation and establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights”<sup>14</sup> (South Africa)

Some commentators have made it clear that they consider these aims of historical clarification and disclosure the main purpose of a truth commission. For example, according to Thomas Buergenthal, one of the members of El Salvador’s Commission on the Truth:

“My experience on the Truth Commission has convinced me that the most important function such a body can perform is to tell the truth. That may sound obvious and trite but it needs to be said because it has tended to get lost in the discussion about national reconciliation.”<sup>15</sup>

Mark Freeman agrees, writing that the primary focus of truth commissions should be providing a measure of impartial historical clarification that countervails false or revisionist accounts of the past.

“This is, arguably, what truth commissions do best. Indeed, if a commission fails in the mission of historical clarification, it is almost sure to have failed in the parallel or subsidiary missions such as to bolster accountability, reform or reconciliation.”<sup>16</sup>

The importance that is attached to this task of investigating and clarifying the truth behind past events is unsurprising given the range of objectives such accounts might serve.

First, a thorough documentation of past abuse and atrocity is an important means to a number of ends. It has often been argued, for example, that a complete and truthful account of such a period can provide a basis on which a country or society can ‘move on from the past.’ In Northern Ireland, the purpose of the Bloody Sunday Inquiry was explicitly framed not as aiming to “accuse individuals or institutions, or to invite fresh recriminations, but to establish the truth about what happened on that day [in order to] close this painful chapter once and for all”.<sup>17</sup> Similarly, it was hoped in South Africa that a complete and truthful historical picture would provide “a secure foundation

14 Promotion of Reconciliation and National Unity Act, 1995, Preamble

15 The United Nations Truth Commission for El Salvador *Vanderbilt Journal of Transnational Law* October 1994 Volume 27 No. 3, 497-544.

16 M Freeman *Truth Commissions and Procedural Fairness* Cambridge University Press (2007), at page 39

17 Prime Minister’s Statement to the House of Commons, Hansard, 29th January 1998, Column 501



for the people of South Africa to transcend the divisions and strife of the past”,<sup>18</sup> and the Sierra Leone Truth Commission was mandated to “get a clear picture of the past in order to facilitate genuine healing and reconciliation”, although it was also mandated to “create an impartial historical record” as a separate and independent aim.

The historical accounts of truth and investigative commissions are also often valued because these institutions are in a unique position to offer an account of the past that is broader and more inclusive than those offered by the criminal justice system or accountability mechanisms charged primarily with investigating individual responsibility. Truth and investigative commissions are free to focus on broader questions of what happened in the past, regardless of where responsibility lies. This is why many societies in transition appear to turn to non-judicial accountability mechanisms, particularly where institutions and organisations, as well as individuals, have been key actors. As non-judicial bodies, truth and other investigative commissions have the scope and flexibility to scrutinise institutional responsibility in a way that usual criminal justice processes cannot.<sup>19</sup> Their inquiries may include a focus on institutions such as the judiciary, the church and the media, as well as the military and the government. They can examine the legal, political and social dynamics of the period under assessment, as well as provide an analysis of the ideologies or belief-systems animating violations. It is this wide lens, and their ability to receive and consider a variety of sources, including both individual testimony and information gathered from collective sources, that make truth and investigative commissions well suited to providing a uniquely comprehensive account of the past.

This capacity to articulate a complete and coherent narrative has also enabled truth and investigative commissions to play an important role in countering and repudiating the single self-justifying narratives often spun by those responsible for atrocities. Their work can thereby make a substantial contribution to the accountability process simply by documenting and articulating a genuine account of the truth, thereby countering the lies of the past, and mitigating the threat revisionist histories pose to the process of accountability.

18 Constitution of the Republic of South Africa Act 200 of 1993, Epilogue National Unity and Reconciliation accessed at <http://www.info.gov.za/documents/constitution/93cons.htm>

19 The Nuremberg trial was notable for its assignment of criminal responsibility to institutions such as the SS. This has not been repeated in modern trials of crimes under international law.

In addition to serving these goals, and as will become increasingly clear in subsequent chapters, a comprehensive and historically accurate account of a period of atrocity also serves as an indispensable resource for many of the other non-judicial accountability mechanisms this report considers. Such a record can, amongst much else, help ensure all relevant victims are identified and consulted, paint a more accurate picture of the kinds of crimes committed, and help both judicial and non-judicial investigators better understand where ultimate responsibility for crimes and violence rests.

An investigation and documentation of the truth can, however, also be much more than a means to an end. The significance practitioners of transitional justice have invested in the work of truth and investigative commissions is also in part explained by the fact that this work is an important end in itself. For the individual participating in a truth-seeking mechanism, be it formal or informal, the act of giving testimony and so helping to shape a comprehensive account of the past can be an important part of their own efforts to deal with the past; to fulfil the desire to recall experiences that were previously denied or untold, to learn about the full extent of crimes committed and the fates of their loved ones, to identify perpetrators, and for an acknowledgment of wrongs done to them. This is of course not the case for everyone who participates in such a process, but the potential value of a forum that allows victims to speak freely of crimes that have long been denied or suppressed should not be neglected.

Any given accountability process is likely to attach different weights to these various goals identified. A number of local factors are likely to influence which goals are important to a given process, as well as the priority these goals are assigned. It is likely, however, that most accountability processes will identify at least some of these goals as significant. A truth and or investigative commission of some form is therefore always likely to constitute part of a broader accountability process. For this reason, it is important to consider some of the challenges and obstacles that are common to the work of such commissions, and to appreciate that the architects of transitional justice have a great deal of discretion with respect to the powers, resources, and mandates they grant their commissions in an effort to confront these challenges.

# 1

## **Challenges to constructing a comprehensive historical account**

Institutions established to construct a record of past events are likely to encounter numerous challenges. The most severe of these challenges will often take the form of institutional constraints – the time and resource limitations that face these institutions frequently hamper their ability to examine thoroughly the vast number of individual incidents relevant to the period of time they are asked to consider. The scale of events commissions are mandated to investigate often stand in stark contrast to the human, financial and institutional resources at their disposal following a period of strife and destruction.

Some truth commissions have tried to deal with this problem by limiting the number of people who can give evidence. Where this strategy has been employed without careful planning, it that has often given the impression that lines are drawn in a way that is somewhat arbitrary. For example, some commissions simply run out of time to hear from all the people wishing to tell their story. Some have therefore opted to detail the general history of events before examining in more detail a number of incidents deemed representative. In El Salvador, for example, the Commission on the Truth limited detailed examination to a selection of individual cases or acts it considered representative of the atrocities as a whole. Where such a strategy is pursued, it is important that victims whose testimony is not selected understand why their stories are not told. As noted above, the act of providing testimony will for many victims be an important act in itself. Efforts must therefore be made to ensure victims are not left feeling as though they are unfairly or arbitrarily denied this opportunity.

Even with unlimited time and resources, a comprehensive historical record may still prove elusive. The Bloody Sunday Inquiry in Northern Ireland has faced no time limit to its mandate, and no shortage of resources. As of June 2008, some ten years after it had been established and before it had delivered its long awaited judgement, costs were already estimated at between £200 million and £400 million (between about 400 million USD and 800 million USD). It was required only to investigate events of a single day, the most notable of which – the shootings – occurred over a period of about 10 minutes. Almost 2,500 witnesses gave oral or written evidence.

Yet, even prior to publication of the Bloody Sunday Inquiry's final report, it became obvious that the main questions before the Inquiry – who fired the fatal shots and why – would not elicit any clear, unambiguous answers. In his closing speech, counsel for the Inquiry explained why:

What happened on that day was, and has remained, controversial in almost every respect. What led up to the day, almost equally so. The critical events were witnessed by a very large body of people, both civil and military. Many gave contemporaneous accounts, others did not. Over the years thereafter a sizeable quantity of accounts has been given by civilians and soldiers alike, sometimes casting new light on what happened, sometimes casting doubt as to the accuracy of previous accounts.<sup>20</sup>

This is to be expected: individuals' testimonies – informed by different perspectives (the role they played, their ideologies, etc.) and sometimes distorted by the passage of time – are likely to conflict, and where so many individuals have testimony to share, the potential versions of a complete record may be numerous. Nonetheless, this underlines the difficulty, and also the importance, of attempting to construct a comprehensive and congruent historical record when so many viewpoints are to be considered and, if possible, reconciled.

Further, some of the challenges faced by investigations conducted for prosecutorial purposes in the aftermath of large-scale human rights violations or conflict are also likely to be encountered by truth and investigative commissions. In Argentina, the truth commission (CONADEP) was faced with the fact that large amounts of documentation concerning the disappeared had been deliberately destroyed. There was also a failure among members of both the armed forces and judiciary to respond fully, or even at all, to CONADEP's enquiries. Their work hampered further when they were barred access to detention facilities.<sup>21</sup> Unsurprisingly, those guilty of crimes often do not wish to participate in the disclosure of their crimes, whatever the forum.

Despite these difficulties, and as the case studies in the second part of this report suggest, truth and investigative commissions have nevertheless often been able to achieve many of the goals identified above. They have made it possible to strip away some of the uncertainties and lies associated with past

<sup>20</sup> Closing statement of Christopher Clarke QC, Counsel to the Inquiry, 22 November 2004, at page 3

<sup>21</sup> *Nunca Mas*, *supra* Note 1 at Part IV

conflict and repression, even where time and resources have been insufficient to interview the full range of relevant victims, or where perpetrators have been engaged with only limited success. In addition, even where no single comprehensive narrative emerges from a body of testimony and evidence, the fact that a plurality of voices has played a role in proceedings can be an important repudiation of the authoritarian and undemocratic character of a previous regime, as well as their preferred interpretation of the past. The impact of public proceedings will also be examined further in the chapter titled “Accounting for the past”.

## **2** **Testimony**

Individual testimonies are among the most important resources for a truth or investigative commission. They are not only one of the most significant sources of information allowing a commission to provide historical clarification, the opportunity to provide testimony has also been identified as an important and substantive aim in and of itself. Engaging individual testimony is however one of the most problematic aspects of a truth or investigative commission’s work.

While there is often every inducement for victims to participate in a commission’s proceedings, this is not true of perpetrators. This raises the question of whether a historical record that does not reflect the experiences of perpetrators can be said to provide full clarification about events of the past. Where it is obvious that an account is incomplete in a way that is detrimental to the objectives of a transitional justice process, a commission must consider how best to address this limitation by engaging perpetrators more effectively.

Thus far, few perpetrators have appeared before truth commissions: no perpetrators testified before CONADEP in Argentina and the truth commissions in Sierra Leone and East Timor both found it difficult to obtain testimony from the perpetrators of serious crimes, as did many others. Even if a commission has subpoena powers, many have found it difficult to employ this power effectively. In many cases, if the perpetrators do not identify themselves, it will be difficult even to know against whom a subpoena should be issued.

The South African TRC sought a novel solution to this problem by devising a strong incentive for perpetrators to testify: the award of individual amnesty was made conditional upon a perpetrator's testimony meeting certain standards, including full disclosure. This approach did undoubtedly elicit information from some perpetrators that otherwise would not have been obtained. The majority were however only lower-level perpetrators, many of whom were already facing long prison sentences. While the overall issue of amnesties and the question of whether the so-called "trade off" between truth and justice really meets the goals it is trying to achieve are examined in a later chapter, the South African experience suggests that if high-level perpetrator participation is a desired part of an accountability mechanism, amnesties are unlikely to secure that aim.

Other non-judicial processes have also experienced some measure of success in increasing perpetrator participation. Community reconciliation procedures in East Timor, although limited to less serious crimes such as theft, minor assault, arson (other than that resulting in death or injury), the killing of livestock, and the destruction of crops, are widely thought to have been an effective mechanism for allowing victims and perpetrators to tell each other the truth about what had happened. Similar successes were reported from initiatives of this kind in Sierra Leone.

Experiences from East Timor do, however, emphasise the importance of balancing efforts to obtain perpetrator involvement against the objectives of a transitional justice process. The Commission on Friendship and Truth between East Timor and Indonesia (CTF) achieved high levels of perpetrator participation. Of the 56 people who gave public testimony, only 13 were victims. Nevertheless, it has been widely criticised for adding nothing new to the process and so appearing as little more than an attempt to circumvent accountability.

There have also been few reliable accounts emerging from the gacaca courts of Rwanda. Here, the non-judicial process has all the powers of a judicial one, but with virtually none of the safeguards. People are not encouraged to speak freely. In particular, there is no question of any truth-telling with regards to the crimes of the RPF military, which is protected through its links with the government. There are also reports of people using gacaca as a way of obtaining property to which they are not entitled and to settle old scores.

Indeed, an accusation in gacaca that a person was a member of the Hutu *Interahamwe* militia and had committed crimes against an individual may well bring significant benefits to his or her accuser.

As one commentator notes:

The easiest way to get rid of a troublesome neighbour or a neighbour whose property is coveted is to accuse her of genocide in gacaca.<sup>22</sup>

There is also an incentive for perpetrators of atrocities to confess in gacaca courts, in the form of shorter sentences for those who do. A large number of confessions have resulted from these incentives, many of which are almost certainly false. Those who confess are given priority in gacaca courts; in a country where 120,000 people have been incarcerated for many years, and where many have already served their maximum sentences but have yet to be released from custody, confession is often the easiest way to secure release. The incentive to lie or distort the truth can therefore be compelling in such circumstances, making its findings of little value with regards to a search for the truth.

The experiences of these courts, as well as of the CTF in East Timor, demonstrate the dangers of considering “perpetrator participation” a goal in and of itself, as opposed to a means of pursuing some of the broader goals identified earlier in this chapter. Before a commission takes drastic and potentially costly steps to engage high-level perpetrators, it is crucial that it ask whether engaging these individuals is genuinely necessary for it to achieve the objectives it has been set.

### **3**

## **The role of criminal prosecutions**

This chapter has focused on the contribution non-judicial mechanisms can make to the historical record and to the process of uncovering the truth. Disclosure and clarification are however not obtainable only through non-judicial proceedings; prosecutors at international courts often speak of contributing to such a history. The role of such trials in informing the historical record should therefore not be forgotten, and where appropriate, their work

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<sup>22</sup> L. Waldorf *Mass Justice For Mass Atrocity: Rethinking Local Justice As Transitional Justice*, Spring 2006 79 Temp. L. Rev. 1, at page 21

should be integrated with that of truth commissions. At the Nuremberg trial, the US Chief Prosecutor, Robert Jackson, frequently remarked that the trial would prove an essential historical record of the Nazi regime. In his closing address, he spoke of:

[...] this Trial's mad and melancholy record, which will live as the historical text of the twentieth century's shame and depravity.

Of one thing we may be sure. The future will never have to ask, with misgiving, what could the Nazis have said in their favor. History will know that whatever could be said, they were allowed to say. They have been given the kind of a Trial which they, in the days of their pomp and power, never gave to any man.<sup>23</sup>

The ability of criminal prosecutions to contribute to the historical record is demonstrated most clearly when the subject of the trial is a major political or military figure. In these circumstances, charges often cover a broad range of acts encompassing wide geographic and chronological frameworks, and are often the subject of more intense public interest than the trials of “smaller fish”. The ICTY Prosecutor, opening the trial against Milošević, said:

[...] this trial will make history, and we would do well to approach our task in the light of history. [...] The history of the disintegration of the former Yugoslavia and the fratricidal conflicts of another age which it brought about is a complex process which must be written by many people. This Tribunal will write only one chapter.<sup>24</sup>

Even in the trials of those lower down the chain of command, such as the Tadić trial at the ICTY, the need to prove “context elements” for crimes under international law means courts adjudicating these crimes have to look further than the specific events charged. For example, proving that a crime had a nexus with an armed conflict, or that it happened as part of a widespread or systematic attack against a civilian population, requires a court to look beyond the actions of the defendant in the dock. This examination of the broader facts that constitute the context in which crimes were committed can be an important factor in the overall establishment of the historical record.

<sup>23</sup> *Trial of the Major War Criminals Before the International Military Tribunal, 26 July 1946, Closing Address*

<sup>24</sup> *The Prosecutor v Slobodan Milosevic* Prosecutor's Opening Address 12 February 2002, at pages 8-10



Professor Richard Wilson, in an article devoted to this subject, criticises the view that rendering justice in trials and providing historical clarification are necessarily contradictory,<sup>25</sup> pointing also to what he characterises as the “surprising number of monumentally poor histories contained in truth commission reports.”<sup>26</sup>

Turning to international courts, he writes:

Tribunals in the United Nations system, while not without their faults, have demonstrated both an adherence to due process and an ability to produce historical accounts which are often superior to either truth commissions or national courts.<sup>27</sup>

He gives the Tadić case as an example:

The judgment starts in a way that would be inconceivable for a national court with 69 pages of commentary on Balkans history and the place of Bosnia within wider regional conflicts. It deals with the Ottoman and Austro-Hungarian Empires, the Second World War, the collapse of Communism and death of Tito, the rise of ethno-nationalism in multi-party elections and in the media, and the subsequent violent fragmentation of Yugoslavia along nationalist lines. [...]<sup>28</sup>

He quotes with approval an expert witness who says the histories contained in judgments are “indispensable to understanding the origins and course of the 1990s conflicts in the former Yugoslavia.”<sup>29</sup> While not serving as a complete history, which will likely be written and re-written for years to come, the judgments of international courts and tribunals like the ICTY can nevertheless make an important contribution to that history. As such, their achievements should not be overlooked, and where appropriate, also these histories should be employed in pursuit of the broader objectives of transitional justice.

Nevertheless, the main function of criminal trials is to examine a particular incident or set of incidents with the aim of finding one or more accused guilty or not guilty of one or more crimes. This means that trial records and judgments

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25 R A Wilson *Human Rights Histories: Historical Debates at International Tribunals and Truth Commissions* (unpaginated); accessed at [http://www.cgpac.uci.edu/research/working\\_papers/tribunal\\_forum/wilson\\_human\\_rights\\_histories.doc](http://www.cgpac.uci.edu/research/working_papers/tribunal_forum/wilson_human_rights_histories.doc)

26 *Ibid*

27 *Ibid*

28 *Ibid*

29 *Ibid*

do not necessarily have the same capacity to write a complete historical record as the findings of a truth or investigative commission. As noted above, non-judicial accountability mechanisms can also examine different types of liability. In addition to dealing with the experiences of particular individuals, CONADEP in Argentina was able to investigate the institutional responsibility of bodies such as the church and the judiciary, an approach that was subsequently followed in other jurisdictions, albeit not in criminal trials since Nuremberg. Further, criminal verdicts are not unambiguous in a historical sense. A not guilty verdict means only that guilt has not been proved in a legal sense, that is, beyond reasonable doubt. A historian might still consider many of the key facts in question as likely true. These considerations should not be taken to suggest criminal trials have no role to play in the articulation of a complete historical record. As with most of the objectives of transitional justice, what these considerations demonstrate is instead the importance of identifying and effectively coordinating all the resources at a process' disposal, using the strengths of each component to address the weaknesses of others.

## **4 Conclusion**

This chapter has identified a number of important functions a truth or investigative commission can serve within a broader accountability process. It would be wrong to suggest that such commissions have been uniformly successful in providing historical clarification and in achieving these objectives, and a number of common challenges to their work have been identified. As has been noted, despite their ability to distil a large amount of information, the charge often levelled against truth or investigative commissions is that they generally tend to hear only one side of the story. This is for a number of reasons, including time and resource constraints, and the fact that they often lack access to complete information or documentation. Argentina's CONADEP, for example, was only able to rely on victims' accounts, and thus offers only a partial account. In East Timor, Sierra Leone and many other countries, commissions were unable to persuade significant numbers of perpetrators to give evidence, and in Morocco, witnesses had to sign an undertaking not to name perpetrators in their testimony before the commission. Even commissions like South Africa's, with significant amounts of perpetrator testimony, were unable to access large amounts of very significant documentation, since this

had been destroyed by the previous regime, and were unable to engage the perspectives of those at the highest levels of the apartheid regime.

However, each of these commissions were able to put on the record a version of the truth that had previously been hidden. Their work did much to clarify the events of the past and uncovered a truth that had previously been denied. As such, they provided victims and society as a whole with a more complete picture of the past than had been previously available.

This chapter has not suggested that investigative or truth commissions seeking to provide clarification or establish the truth are to be preferred to prosecutions, as if societies addressing the past confront a stark either/or choice. Nor does it suggest that trials cannot make a contribution to the historical record. Each process serves different functions and ends, many of which are complementary and mutually reinforcing. Truth and investigative commissions, for example, may be structured and resourced in a way that enables them to provide a more comprehensive historical record than individual prosecutions. They will therefore likely have an important role to play within a transitional justice and accountability process, though the precise nature of this role can only be determined with a clear statement of objectives and priorities.

The question this chapter has brought into focus is therefore the question of why a given accountability process seeks to establish a historical record – which objectives is this record meant to serve? Only when a clear answer to this question is identified will it be possible for the architects of a truth or investigative commission to consider how to confront the various obstacles identified in this chapter, including which sources of information to priorities and pursue, and how best to allocate their inevitably finite resources.

# Acknowledging and accounting for the past

The very process of establishing a transitional justice process involves at least implicitly recognising that wrong was done in the past. This form of recognition is however an abstract and impersonal one. It will be necessary, in most cases, to extend this recognition to an acknowledgement of the wrong that was done to individual victims. This may even involve acknowledgements by perpetrators themselves, or an official acknowledgement of the wrongs committed by a state or political system.

The previous chapter examined the extent to which various truth and investigative commissions have contributed to this process through explanation and documentation. Building a detailed and accurate historical account of past crimes and atrocities is, as has been emphasised, an important component of an accountability process that will satisfy and speak to individual victims. As Thomas Nagel has explained however, there is an important difference between this process of constructing knowledge of past events and the process of *acknowledgement*. Acknowledgement, he suggests, “is what happens to knowledge and can only happen when it becomes officially sanctioned, when it is made part of the public cognitive scene.”<sup>30</sup> Acknowledgement goes beyond knowledge – it involves transferring a body of knowledge from the personal or private sphere to the public sphere; communicating it in a way that implies

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<sup>30</sup> T. Nagel, quoted in L. Weschler, *A Miracle, A Universe: Settling Accounts with Torturers*, 1998, at page 4.

a commitment to its truth and encourages the public as a whole to recognise and accept it as the truth.

This chapter examines the contribution non-judicial, quasi-judicial and neo-traditional accountability mechanisms can play in promoting this process of acknowledgement. This will in many cases involve replicating, to a certain extent, the process by which liability is ascertained and satisfied through the criminal justice system. Where the criminal justice system is unable to process all suspected cases of criminal behaviour however, it becomes crucial that non-judicial mechanisms are also available to extend some form of accountability and justice to all perpetrators and victims, and so to close the impunity gap. The kind of acknowledgement considered in this chapter is therefore not intended to take the place of prosecutions, but rather to complement this judicial process in an attempt to ensure all crimes are acknowledged, not only those which reach a court of law.

This chapter will consider a number of mechanisms associated with non-judicial accountability and acknowledgement, and will address a number of questions that arise when establishing such mechanisms. This will include questions of how they should be structured, the nature of their composition, and whether their hearings should be public. Much of the discussion will however be dedicated to the question of identification, particularly perpetrator identification, as this is one of the key questions faced by many non-judicial accountability mechanisms.

## **1**

### **Identification**

One of the first questions that will confront truth and investigative commissions is whether they should publicly identify, by name, those individuals they, or others, suspect of having committed crimes. There are a number of reasons why a commission may be inclined to do so.

Many non-judicial mechanisms have as a stated purpose the bringing of an end to impunity. In two examples considered in the second part of this report, these words are used expressly: in El Salvador, the Chapultepec Agreement emphasised that one role of the Commission was to “put an end to any indication of impunity on the part of officers of the armed forces, particularly

in cases where respect for human rights is jeopardised”<sup>31</sup> and Sierra Leone’s Truth and Reconciliation Commission was established in part “to address impunity”.<sup>32</sup>

The El Salvadoran Commission on the Truth identified by name more than forty military officers and eleven members of the FMLN, assigning varying degrees of responsibility for abuses it investigated. In so doing, it stated that:

[...] not to name names would be to reinforce the very impunity to which the Parties instructed the Commission to put an end.<sup>33</sup>

The Commission of Inquiry in Chad went even further and, in 1992, published photographs along side the names of the principal members of President Hissène Habré’s secret political police who were implicated in crimes.<sup>34</sup>

Addressing impunity is difficult without some form of public identification of those suspected of having committed crimes, at least in situations where the criminal justice system cannot hope to consider all those suspects a commission identifies during the course of its investigations. Public identification in a commission’s report may, in such cases, be the only form of accountability such suspects face, and so be all that separates them from complete impunity.

Disappointment has therefore regularly been expressed by victims at the failure of truth commissions to name publicly those who are believed to be responsible for crimes. The sense of injustice is felt particularly keenly when criminal prosecutions are unlikely. The suggestion is sometimes made that public naming might compensate for limitations in the legal system by affording at least some sense that justice has been served to the victims of crimes.

Other objectives may also require the naming of persons suspected of human rights violations. It is for example difficult to imagine how an oppressive State apparatus might be dismantled, or a process of lustration completed, if the names of perpetrators are not publicly disclosed. Such objectives, as well as many others, may depend on a commission sharing the names of its suspects with other instruments of the transitional justice process.

31 The Chapultepec Peace Agreement Article 5 “The End to Impunity”, cited in *From Madness to Hope: the 12 year war in El Salvador: Report of the Commission on the Truth for El Salvador*; at Part VII

32 Truth and Reconciliation Commission Act 2000 February 2000, Article 6(1).

33 *From Madness to Hope: the 12 year war in El Salvador: Report of the Commission on the Truth for El Salvador* Part II C The Mandate – Methodology

34 Human Rights Watch *Chad: The victims of Hissène Habré still awaiting justice*, July 2005 Vol. 17, No.10(A), accessed at <http://www.hrw.org/reports/2005/chad0705/index.htm>

Even with these arguments in its favour however, the public naming of suspected perpetrators has proved at best a controversial policy. Many commissions have taken the view that the evidence at their disposal is insufficient to justify the public naming of individuals as those responsible for particular acts. The Chilean NCTR was established with the explicit direction that it would “not have the power to take a position on whether particular individuals are legally responsible for the events that it is considering”.<sup>35</sup> Nevertheless, it did consider this issue, deciding in the end not to identify perpetrators’ names publicly, and instead submitting evidence that appeared to implicate various persons in criminal activity to the courts, concluding in its final report that:

To name culprits who had not defended themselves and were not obliged to do so would have been the moral equivalent to convicting someone without due process.<sup>36</sup>

One member of the Chilean NCTR has said that:

Official truth commissions may investigate moral responsibilities of governments, concentrating on victims, which is usually the case. [...] When they do concentrate on moral responsibilities, their official character, the solemnity of the whole exercise, etc., means that if they name names, the person so named would be painted with a brush of guilt, outside due process.

He goes on to argue that the possibilities of making erroneous determination, without recourse to due process standards, are high and that the principle that “both sides have to be heard, is a sacred one”:

[I]n reconstructing a society after a major trauma, human rights must be upheld. This means that justice must be sought through just means. It is important that the lesson given by the precedent of truth commission work is that rights were scrupulously respected, despite the fact that others might not have respected them in the past.<sup>37</sup>

Jorge Correa, the Chief of Staff to the Chilean NCTR, explained:

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35 Supreme Decree No. 355, Executive Branch, Ministry of Justice, Undersecretary of the Interior, *Creation of the Commission on Truth and Reconciliation* Santiago, 25 April 1990 (reproduced in Report of the Chilean National Commission on Truth and Reconciliation, Introduction to the English Edition, at Article 2

36 Report of the Chilean National Commission on Truth and Reconciliation, Introduction to the English Edition

37 Quoted in P Hayner *Unspeakable Truths: facing the Challenge of Truth Commissions*, Routledge (2002) , at page 128

The question that the commissioners put to me was, do we have enough information to say publicly that such-and-such person is the perpetrator of a specific act? That question was a strong argument: I would have needed another three years of investigations to name with certainty.<sup>38</sup>

The Chilean NCTR was, however, restricted by a Decree to complete its work within 9 months of being established. As such, it had neither the time nor resources to undertake those additional investigations that may have allayed the NCTR's concerns about naming alleged perpetrators publicly.

The Moroccan IER provided even greater protection. Not only were no perpetrators named by the Commission in its conclusions, but during public hearings, all victims who wished to testify were required to sign a formal agreement stating that they would not disclose the names of any individuals whom they alleged had committed the abuses about which they were testifying.<sup>39</sup>

Given this controversy, some commissions have attempted to steer a middle course. CONADEP in Argentina did not identify any persons as responsible for the abuses investigated in the public version of its report. However, it also did not redact the names of alleged perpetrators as given by victims in the course of their testimony which was cited in the report. Only a fraction of the names of the more than one thousand perpetrators who were referred to by witnesses were however included in the selection of testimony reproduced in the report, and CONADEP took the decision not to publish a list of all 1,351 names.

The South African TRC was under a statutory obligation to afford those implicated in crimes an opportunity to submit representations or to give evidence.<sup>40</sup> The provision was the subject of litigation culminating in an Appeals Court judgment, which held:

In a case such as this, procedural fairness demands not only that a person implicated be given reasonable and timeous notice of the hearing, but also that he or she is at the same time informed of the

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38 *Ibid*, at page 112

39 V Oppenhaffen and M Freeman *Transitional Justice in Morocco: A Progress Report* International Center for Transitional Justice November 2005, at page 18

40 Promotion of National Unity and Reconciliation Act, Act No. 34 of 1995 Section 30



substance of the allegations against him or her, with sufficient detail to know what the case is all about. What is sufficient information would depend upon the facts of each individual case.<sup>41</sup>

The case arose from a challenge made by two individuals who received notice from the TRC on a Saturday that evidence affecting them could be given the following Monday. The court found that such information was not “reasonable or timeous”.<sup>42</sup> The TRC contested the case, but following the adverse ruling it introduced operating procedures whereby written notice was given to relevant individuals at least 21 days in advance of their anticipated naming in a public session.<sup>43</sup>

When considering this question of due process it is, however, worth noting that if non-judicial initiatives depart from ordinary criminal justice processes, it is in part because they are not ordinary criminal justice processes. The same potentially severe consequences – such as the deprivation of liberty – do not attend on them. As Levinson observes, there may be costs associated with such compromise, but the costs “may especially be worth paying if the result is significantly greater political legitimacy for the findings themselves.”<sup>44</sup>

The central question, as illustrated by the above considerations is therefore that a determination of whether or not to publicly identify perpetrators must be made in light of the process’ overall objectives. In some instances, objectives may require the naming of persons responsible for human rights violations. In such cases, concerns of due process must not be ignored, and so one point from the Chilean experience stand out. If objectives do require public identification of individuals, the mechanism or process in question must be afforded sufficient time and financial resources to enable it to do so in a manner that is consistent with human rights standards, particularly those relating to due process. To meet the standards of due process in such cases, those who will be or have been identified can be afforded a right to reply, as in South African. If individuals who do not avail themselves of the opportunity, a commission could simply proceed with its findings.

41 *Du Preez and another v Truth and Reconciliation Commission* (426/96) [1997] ZASCA 2; 1997 (3) SA 204 (SCA); [1997] 2 All SA 1 (A) (18 February 1997) at paragraphs 41-2

42 *Ibid* at paragraph 41

43 Hayner (*supra* Note 7), at page 125

44 Levinson, *supra* Note 16 at page 224

In other instances, however, the objectives of a process may not require the public identification of individuals. Its aim may, for example, simply be to catalogue and acknowledge crimes committed by the State, rather than by individuals. Where this is the case, the costs associated with publicly identifying suspects may not be outweighed by the gains of such a policy.

## **2**

### **Process**

Although a commission's decision of whether or not to name suspected perpetrators will be one of the focal points of its work, it is by no means the only aspect that speaks to the question of acknowledgement. It must also make a number of other decisions, all of which will affect its ability to bring about effective public acknowledgement of its findings.

#### **2.1**

##### **Public proceedings**

Before knowledge becomes acknowledged it must be “made part of the public cognitive scene”. Thus, the question of how, when, and in what way information is communicated to the public domain has a significant impact on whether acknowledgement is achieved effectively. Regardless of the information a commission uncovers, if this information is not communicated to the general public effectively, transparently, and credibly, victims may still be left feeling as though the crimes committed against them were never publicly acknowledged. Many truth commissions have attempted to address this issue by conducting their work in open and public forums. This decision in turn introduces further challenges of security and anonymity for both witnesses and perpetrators.

Mark Amstutz notes that when “South Africa’s TRC began its task of gathering data about the crimes of the apartheid era, it did so through highly publicised open forums. And when Chilean president Aylwin made public the country’s truth commission report in 1991, he did so in a televised ceremony.”<sup>45</sup> In that ceremony, President Aylwin announced: “It is Chilean society that owes a debt to the victims of human rights violations.”<sup>46</sup>

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45 M Amstutz, *The Healing of Nations: The Promise and Limits of Political Forgiveness*, 2004, at page 29.

46 *Ibid.*

Conducting proceedings in public has in many cases had the effect of rejecting the secrecy and covertness that characterised the past, and has played a significant role in effectively communicating a commission's work to the general public. It is perhaps for this reason that so many truth commissions have taken measures to broadcast their proceedings publicly: a public report, proceedings broadcast over television and radio, media reports, and documentaries all contribute to knowledge of wrongdoing becoming part of the public cognitive scene.

Argentina set the standard early on: its report, *Nunca Mas*, was summarised and published in book-form, eventually becoming a best-seller. Although the 1992 Commission on the Truth in El Salvador held its proceedings in closed session for fear of reprisals against victims, subsequent truth commission's hearings are more likely to take place on camera than *in camera*. In Morocco proceedings were broadcast on the *Al Jazeera* television network.

In more recent years, Sierra Leone's Truth and Reconciliation Commission demonstrated commendable effort in publicly engaging citizens in its proceedings, many of whom are illiterate and without the resources to travel. From March to August 2003 it held public weeklong hearings in each of the twelve districts of Sierra Leone. Four days of public hearings were held, with one day allocated for closed hearings. In the capital, Freetown, hearings were aired live on radio, and a half-hour summary was presented on television every night. In a conflict where use of children was a signature horror, the Sierra Leone TRC also made special versions of its Report that were accessible to children, with the support of UNICEF.

By contrast, although the South African TRC's proceedings were well publicised, with hearings unfolding nightly on people's television screens, the dissemination of its final report did not appear intended to reach the largest possible number of South Africans. The needs of those with fewest resources, those who were also most likely to have suffered the impact and effects of apartheid, seem not to have informed the strategy of dissemination. Its five-volume report was released coincident with its public presentation, but it was published by an outside printer rather than by the government press. As a consequence, the report was priced well beyond the means of most South Africans. The Truth Commission also placed the full text on an open web site, but only for a limited period of time. Its agreement with its publisher, CTP Book Printers, precluded

a long-term posting on the Internet because it would have decreased sales for the print version. The original plan was to have a writer or journalist prepare a one-volume summary of the report for the general public, but eighteen months after the submission of the official report, this popular version has yet to surface.<sup>47</sup>

Although efforts must be made to protect those participating in a truth-seeking process, these examples suggest that in most cases, such accommodations can be made compatible with transparent and public proceedings. What they also show is that in order to be successful, a commission must be pro-active in making its findings available to the general public. This must involve carefully considering the conditions and limitations of those it is trying to reach, and where necessary, exploring innovative and creative solutions to meeting these challenges.

## 2.2

### Apologies

Some transitional justice mechanisms are structured in such a way that individual perpetrators are encouraged to apologise to those victimised by their crimes, expressing sorrow and contrition and, in turn, allowing victims to respond with compassion and even forgiveness. Obviously apologies will not necessarily prompt such a response, but apologies do not depend on any particular response to serve as a form of acknowledgement. As apologies represent an acknowledgement on the part of the perpetrator that a wrong was done, the act of apology can itself have a significant impact on a public consciousness.

Apologies need however not be restricted to personal acknowledgement from perpetrators. Official apologies expressed on behalf of a collective – the former government, for example – by people who were not themselves involved in the wrongdoing can also play an important role in the acknowledgement process, in particular where wrongs are committed by institutions rather than individuals. The apology to the Aboriginal people for the Stolen Generations, namely the systematic removal of Aboriginal children from their families and their placement with white families between 1869 and the 1970s, by the then

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<sup>47</sup> A R Chapman and P Ball, The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa and Guatemala, *Human Rights Quarterly* 23 (2001) 34.

newly-elected Australian Government on 13 April 2008, had a tremendous impact on Australia's indigenous people, particularly since the previous Government had officially refused to apologise for over a decade.<sup>48</sup>

Similarly, when the final report of Chile's process was delivered, President Aylwin accompanied the presentation with an apology to victims and their families on behalf of the State. In addition, individual letters of apology were sent to each family.

Amstutz notes that personal and official apologies – the public expression of remorse or regret for wrongdoing – are more demanding forms of acknowledgement than communication or dissemination. Their symbolic impact is however such that they should not be overlooked as a potentially central component of the acknowledgement process. Apologies might also serve as a form of reparation, a possibility that is canvassed in the next chapter.

## 2.3

### Composition of commissions

The process of acknowledging past crimes is closely tied to the work of an investigative or truth commission. Sanford Levinson elaborates on how acknowledgment might be accomplished in the context of such commissions, placing emphasis on the importance of the composition of the commission itself:

“Composition counts. The actual identity of decision makers, including those charged with deciding the truth of the contested matters and the consequences that should follow, matters.”<sup>49</sup>

In the case of the Chilean commission, four of the eight commissioners had supported General Augusto Pinochet's regime. The variety in outlook was thought to insure against the prospect of a single person or a group of similar ideological mind dominating the investigation process, or the drafting of the final report.<sup>50</sup>

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48 Remarks by Jack Beeton, indigenous Australian educator, at the Pacific Roundtable Discussion on Non-Judicial Accountability Mechanisms in Fiji on 24-27 June 2008

49 S Levinson, *Trials, Commissions and Investigating Committees: the Elusive Search for Norms of Due Process in Truth v Justice: The Morality of Truth Commissions* (eds. R I Rotberg and D Thompson) Princeton 2000 at page 223

50 *Ibid* at page 222.

Where commissions are representative of a broad section of the community they have also been more likely to have their findings received credibly, avoiding the charge that the views expressed are merely those of a group of persons advancing a particular political or ideological agenda. Many recent truth commissions have therefore attempted to provide such broad representation, with varying degrees of success. In Morocco, the 17 members of the Instance Équité et Réconciliation (IER) were chosen and appointed by the King, on the recommendation of the Conseil Consultatif Des Droits de l'Homme (CCDH). Nine of those appointed were however members of the CCDH, prompting some criticism of the process. In Fiji, the proposed Reconciliation and Unity Commission would consist of 3 to 5 commissioners, all appointed by the President on the advice of the Prime Minister, who need only consult with the leader of the opposition, which also prompted some criticism. By contrast, the President appointed South Africa's TRC commissioners after consultation with his cabinet, which, as a cabinet of the Government of National Unity, included representatives of all main parties.

El Salvador chose a different route. Its Truth Commission was composed of three non-Salvadoreans, appointed by the UN Secretary-General after consultation with the parties – an approach that sought to secure greater neutrality and objectivity. Arguably it also forfeited the legitimacy and local ownership that goes with having representatives with diverse views from within the country in question conduct the process and reach common findings through their report. Sierra Leone attempted to secure both: its seven-member TRC was composed of four commissioners from Sierra Leone and three commissioners from abroad.

## **4**

### **Conclusion**

This chapter has argued that the work of a truth or investigative commission cannot be restricted simply to that of uncovering the truth. Although this is an important first step, thought must also be given to the process by which this body of knowledge is acknowledged publicly by being made part of public consciousness. Consideration of this question must begin already when considering the composition of a truth or investigative commission, and should also form part of the body's mandate and working methodology.

The benefits of public hearings must be weighed against the importance of security and privacy, and the right of suspected perpetrators to a fair hearing must be balanced against the importance that is often attached to the public identification of those suspected of crimes. Perhaps most importantly, as the cases of Sierra Leone and South Africa suggest, thought must be given to how a commission's findings are articulated and communicated to the general public.

Other institutions should of course also not be neglected as part of the acknowledgement process. The criminal justice system, for example, may play an important role in holding individuals accountable, and so obviate the need for them to be named as part of a non-judicial process. Similarly, institutions charged with reparations may also offer perpetrators an opportunity to acknowledge their wrongdoings, as will be discussed in the next chapter.

As in the previous chapter, there is no single answer to how these competing concerns are best balanced. What emerges is instead that those involved in planning a transitional justice process have many options available to them, each of which have proved themselves suitable to different contexts and objectives. The specific objectives and constraints of each transitional justice process must therefore ultimately inform their choices and determine how the various questions identified in this chapter are best answered. We can note therefore, once more, that among the most important aspects of planning a transitional justice process is a clear and considered articulation of its goals and objectives, as these will serve as the starting point for many of the deliberations that follow.

## Chapter III

# Reparations

The previous chapters have focused on the process of uncovering and acknowledging the truth behind past crimes and atrocity. At least as important as this, certainly from the point of view of the victims, is however the task of repairing some of the harm done by such crimes. A process that fails to make an effort to facilitate reparations is unlikely to be viewed as a success, even where the goals of truth-seeking and acknowledgement are achieved. Meaningful reparations are therefore an important part of genuine attempts to address violations of the past and acknowledge wrongdoing.

In 2005 the UN General Assembly adopted the “UN Basic Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law” which provide that victims of such abuses have a right to prompt, adequate and effective reparation.<sup>51</sup> The Guidelines are premised on the realisation that reparation is especially important to those sections of the population most marginalised and vulnerable – a section of the population that also suffers disproportionately from crimes and atrocity. Meaningful reparation, if not capable of providing complete restitution, can help ensure against continued vulnerability and victimisation. The establishment of the Victims Trust Fund within the Rome Statute, designed to provide support through reparations and material assistance, such as rehabilitation for victims of crimes committed

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<sup>51</sup> Adopted and proclaimed by General Assembly Resolution 60/147, 16 December 2005. Accessible at: <http://www2.ohchr.org/english/law/remedy.htm>



within the jurisdiction of the International Criminal Court, is another telling affirmation of this right.

Despite this recognition of a clear duty to provide reparations, there is no clear guidance, at least within international legal instruments, on the content of this obligation, or how fulfilment of the obligation is to be measured, unlike in domestic legal jurisdictions.<sup>52</sup> This is further complicated by the context in which non-judicial accountability mechanisms seek to make reparations: the sheer scale of atrocity and the number of victims typically make adequate compensation, at least as understood in a domestic setting, impossible for even the best resourced process. Further, sustained and systematic abuses may damage not only individuals, but also a whole community or an entire society. As many of the societies required to address these questions are among those most underdeveloped – underdevelopment exasperated by decades of conflict – they may also be among the least capable of addressing these challenges, not only in the sense of having insufficient financial resources to do so, but also in that many of the State institutions needed to oversee such a process may have collapsed.

When considering questions of reparations in the difficult circumstances that are common to transitional societies, it is useful to distinguish various forms of reparations. In particular, the difference between individual and collective reparations is an important one. Individual reparation – predicated on an acknowledgement of harm done to a particular individual – is consonant with the understandings of rights and the rule of law in contemporary democratic legal systems. This form of reparation recognises the individual's worth as a value not subordinated to the collective. However, individual reparations, when offered through a process that may not be able to compensate all those injured, carry with them the risk of selectivity and, as such, run the risk of deepening rather than narrowing divisions between people and the parts of a society.

Collective reparations are therefore well suited to contexts in which particular communities or groups – like women, children or specific villages – have been targeted. Collective reparation involves the recognition that specific redress is owed members of a group that was singled out for violation or which suffered disproportionately from violations. Collective reparations can thereby allow

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52 De Grieff, *Supra* (Note 1)

for redress in a context where all have suffered some violation, albeit differently, and guard against seemingly arbitrary or selective determinations of eligibility when this runs the risk of deepening divisions.

In this chapter different forms of reparations are examined in more detail with reference case studies examined in the second section of this report. Differences in country contexts, resource availability, and institutional infrastructure may seem to make instructive comparison unlikely. Yet despite these context-specific variables, many similar challenges persist: how to clearly and realistically frame objectives and expectations; how to respond fairly and in a way that can be justified to a large number of victims who have suffered a wide range of violations; how to address the needs of the most vulnerable victims; how to link reparations to acknowledgement of wrong-doing; and how to devise policy measures aimed at advancing victims' rights and preventing further abuse.<sup>53</sup> By considering how various responses to these questions have succeeded and failed in different contexts, framers of future transitional justice processes may be better informed about what strategies can further their own objectives given their own specific circumstances.

This report does not suggest that reparations should stand alone in the place of broader accountability efforts. Victims should not be asked “to trade away their right to justice in order to receive the support that is also their due.”<sup>54</sup> Instead, this chapter seeks to examine ways in which reparations can be approached as part of a broader accountability process.

## **1**

### **Financial compensation**

Most accountability mechanisms address the issue of reparations by making provisions for financial compensation to the victims of atrocities. One reason for this is that this form of compensation is often the best means of addressing the harm or damage a crime has caused. Crimes often involve the destruction of property or the means of livelihood, increased care costs, and in some cases, even the loss of a family's primary breadwinner. In such cases, financial compensation can help ensure a crime does not continue to cause suffering to its victims well beyond the time at which peace is secured.

53 See International Center for Transitional Justice, Reparations. Accessible at <http://www.ictj.org/en/tj/782.html>

54 P de Grief, *The Handbook of Reparations* 2006 at page 13

A further reason to consider financial compensation is the high expectation that many victims have that their participation in a transitional justice mechanism will result in some form of financial compensation. This is typically the case even where every effort is made to explain the limitations on financial compensation, or even where no financial compensation will be possible.<sup>55</sup>

There are several examples where financial reparations have been awarded by non-judicial accountability mechanisms. In Morocco, the commission had the power to award compensation directly to victims and it had the means to do so handsomely. A total of \$100 million USD was handed out to the 3,681 successful applicants as compensation for the wrongs they had suffered. This is often cited as its greatest success. In Chile, a law passed after the NCTR Report was published, provided almost 5,000 relatives of those who had disappeared with a lump sum payment, as well as a pension for life and other welfare benefits.<sup>56</sup> The pension was set at a sum a little above the national minimum wage. These 5,000 recipients were however considered by many to be relatively fortunate, as victims of crimes such as torture or illegal imprisonment received nothing. This illustrates the potential dangers of awarding individual compensation to only a select group of victims.

In other examples, recommendations for reparations have not been implemented as quickly. In Argentina, there was a lapse of 10 years after the publication of the commission's report before the State provided financial compensation. When it did so however, it made financial compensation available to those who had suffered a range of crimes, from the families of those who had disappeared to those interned under the former military regime.

When the systematic human rights violations being addressed are attributed to the State, it is the State that must fulfil the obligation of making reparations. However, while many accountability mechanisms make recommendations for financial compensation, resource limitations often mean these recommendations are never carried out. Most post-conflict societies simply do not have the financial resources to award financial compensation to all victims, nor the institutions necessary to implement an extensive compensation scheme.

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55 See, for example, P Hayner *Unspeakable Truths: facing the Challenge of Truth Commissions* Routledge (2002), at page 172

56 Law Creating the National Corporation for Reparation and Reconciliation Law No. 19, 123, 31 January 1992

In South Africa, amounts given in reparation following the recommendations of the TRC were considered “token” compared to the harm suffered, as even with help from international donors the money to provide proper compensation was simply unavailable. In Rwanda, the judgements of the courts were to be forwarded to the Compensation Fund for Victims of the Genocide and Crimes against Humanity. The administrators of the fund would then consider these judgements and allocate compensation accordingly. As of the time of writing, however, this fund has not been established. Similarly, the fund recommended by the Commission on the Truth in El Salvador, and the fund for war victims in Sierra Leone referred to in the Lomé Peace Accord, have never materialised.

Beyond a simple limitation on resources, there are further problems associated with providing financial compensation to the victims of large-scale atrocity. Even if there is funding available, it can seldom be fairly apportioned in a way that meets all demands and expectations. In many cases, suffering will have been massive and widespread; compensation of a financial nature will therefore almost inevitably appear partial. As already noted, many victims of serious crimes in Chile were left with nothing, while others were reasonably compensated. As Czech President Vaclav Havel wrote: “If everyone suffered, why should only some be redressed?”<sup>57</sup> This sentiment highlights one of the central problems of awarding financial compensation where one of the goals of the non-judicial mechanism is to provide redress and a restoration of dignity – the perception or reality of re-victimisation, particularly where awards are based on seemingly arbitrary criteria. Financial reparations can then quickly become a cause for further resentment among those who are not eligible to receive them. A Chilean woman who received no compensation is reported to have lamented:

The tragedy of my family is that they didn’t kill my father. He’s destroyed, but they allowed him to live. It would have been better if they had killed him.<sup>58</sup>

Financial compensation, when not properly administered, can also be controversial for other reasons. In Argentina, the famous Mothers of the Plaza de Mayo were divided on the issue of whether to accept compensation. The founding members urged acceptance of compensation as a symbol of the

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57 Quoted in R Teitel *Transitional Justice* Oxford University Press 1999, at page 132

58 Quoted in Hayner (*supra* Note 5), at page 174

State's acknowledgement of its crimes, while others refused the compensation, considering it to be 'blood money'.<sup>59</sup>

If financial reparations are to contribute to meeting the goals of transitional justice, peace and stability, it is important that they be administered as sensitively and as transparently as possible. Given inevitable limitations, financial reparations must also be coordinated with other forms of reparation, ensuring no affected community is entirely excluded, and ensuring that, as far as possible, the award of financial reparations is not at odds with the broader goals of the transitional justice process. In this context it can be important to consider also community-based reparations. When coordinated with individual awards, these might help the architects of transitional justice extend the reach of reparations and combat the perception of arbitrary exclusion. Non-financial forms reparation might serve a similar purpose, and it is these that will now be considered.

## 2 Restitution

Given the financial and institutional constraints that often exist on financial compensation, it is important to consider also alternate forms of reparations that may be available. Where property has been seized or confiscated, for example, this can sometimes be addressed through a process of restitution. Restitution of stolen property and artefacts was a common remedy in Eastern European countries after the fall of the Berlin Wall. In East Germany, the Unification Treaty provided for property that had been confiscated after 1949 to be restored to its original owner.<sup>60</sup>

Restitution of property in this way is, however, unfortunately not always possible. In many conflicts property is not simply stolen, but destroyed. In East Timor it was estimated that 70% of the country's buildings were destroyed during the Indonesian "scorched earth" retreat. In cases such as these, it is implausible to speak of restitution in the sense of a return of property, as there is simply nothing left to return.

59 G Lois and M Lacabe *In Search of Vindication: Reparations for Human Rights Violations in Argentina* May 1999 Derechos Argentina <http://www.derechos.org/koaga/vii/lois.html>

60 However, property lost before this date was originally not included at all, and even in the end, was only partly compensated. This apparently arbitrary unfairness caused considerable resentment among those who had lost property to the Nazi regime.

Other forms of restitution may however still be possible. Although these do not involve the restitution of property, they may nevertheless address issues of profound importance to victims, and thereby make a significant contribution to the process of acknowledgement and reconciliation. Restitution can, for example, also take the form of clearing a person's name, or the name of a deceased family member. In Northern Ireland, the original report into the Bloody Sunday shootings was critical of the victims, who had taken part in an illegal march. It stated that in many cases there was a "strong suspicion" that they had been in possession of firearms or had been handling bombs. In 1992 then British Prime Minister John Major announced that "those shot should be regarded as innocent of any allegation that they were shot while handling firearms or explosives."<sup>61</sup> That conclusion is likely to be confirmed by the Inquiry Report. If so, this will be a form of restitution for people who were victims twice over; first as victims of the shootings; then as victims of the original report in which it was suggested that they were to blame.

Similarly, the report of the Chilean NCTR included a section titled: "Publicly Repairing the Dignity of Victims". It provided that the State should "publicly restore the good name of those who perished".<sup>62</sup> At the instigation of President Aylwin of Chile, the names of those who had disappeared were recited publicly in a moving ceremony in stadiums across the country as part of a very public retraction of the crimes that had been alleged against them.

Restoring a victim's good name and reputation goes beyond merely acknowledging a wrong on the part of the State, and even beyond restitution to the individual victim. It can play an important part not only in the ability of the mechanism to restore the dignity of those who were wronged in the past, but also in setting straight the historical record.

The restitution of the reputation of a victim accused of being a criminal is different from an apology. It is important to note, however, that this process can often work effectively in tandem with an apology. The previous chapter noted that apologies are often encouraged as part of transitional justice processes as a means to achieving forgiveness and reconciliation. They may however also serve as forms of reparation.

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61 Prime Minister's Statement to the House of Commons, Hansard, 29<sup>th</sup> January 1998, Column 502

62 Report of the Chilean National Commission on Truth and Reconciliation, Part IV Chapter I B 1

One form of apology is official: a successor regime may apologise for the crimes of its predecessor. In Chile, after the fall of the Pinochet regime, President Aylwin introduced the Truth Commission's Report with an apology to victims and their families on behalf of the State, but also directed individual letters of apology to each family. It should be noted, however, that this symbolic gesture was accompanied by a material act – a commitment to pay pensions to family members of Pinochet's victims. Other symbolic gestures to similar effect can include public rites and ceremonies, the establishment of memorials and the renaming of streets.

Symbolic overtures can be effective in establishing public trust and in integrating victims back into society, and compelling broader society to recognise the violations and those who were victims to these violations.<sup>63</sup> This was partly the case with the apology of Australian Prime Minister Kevin Rudd to the Stolen Generation of Aboriginal Children shortly after taking office in 2008, although there had been considerable public demand from both indigenous and non-indigenous Australians for such an apology for many years. On the day of the apology, echoing sentiments expressed by many, including members of the Stolen Generation, Brian Butler, a member of the Stolen General Alliance, said: "I think that, as a result of the apology, we can feel that we are part of Australia. We are part of society."<sup>64</sup>

### **3 Community services**

Another means of addressing the limitations common to a financial compensation processes, as well as integrating the reparations process more effectively with the broader goals of transitional justice, is involving low-level perpetrators directly in reparations through community service. This may be particularly effective where a form of collective reparation is suitable, perhaps because a crime has been committed against an entire town, village, or community.

In many cases, after a conflict has ended, the victims of crimes still live in close proximity to the perpetrators. Communities that have been decimated by atrocity are often thus soured by further distrust and resentment well beyond

63 L. Magarell, *Reparative Justice Series: Reparations in Theory and Practice*, International Center for Transitional Justice. Accessible at: <http://www.ictj.org/static/Reparations/0710.Reparations.pdf>

64 J Irvine, Day for healing: Aboriginal leaders, *Sydney Morning Herald*, 13 February 2008. Accessed online at <http://www.smh.com.au/news/national/day-for-healing-aboriginal-leaders/2008/02/13/1202760361894.html>.

the end of formal hostilities. While reparations cannot undo the crimes that victims have suffered, appropriate reparations in the form of some kind of community service performed by perpetrators, can in some cases help improve their present quality of life and ensure they are not left suffering further injustice. Community service initiatives also offer perpetrators an opportunity to acknowledge publicly the wrongs they have committed, and make efforts to address those wrongs through their community service. When managed effectively therefore, such initiatives might simultaneously address multiple objectives of transitional justice.

Community services are examined here not as substitute for criminal processes but rather as fulfilment of the victim's separate right to reparations. The reconciliation procedures in East Timor provide one example: these involved both restitutive personal services for the victim, such as rebuilding a house that had been destroyed, and symbolic and practical services to the community, such the building of a flagpole for independence day, the provision of valuable livestock, and the weekly cleaning of churches. This appeared to work successfully as a means of providing reparation for minor crimes, partly because they involved significant community engagement.

The success of community service initiatives of this kind is clearly dependent on a community's willingness to accept the services they are offered. If such reparations are to mitigate the economic effects of conflict, and be accepted as an indication of a desire to make amends, it is therefore crucial that the communities in question are given an opportunity to articulate their needs and indicate what kind of services they consider appropriate given the injustices they have suffered.

## **4 Conclusion**

As this chapter illustrates, reparations can take several forms, and what form reparations can take is often dictated by context-specific constraints. Cases studies suggest that if a process of reparations is to be successful, it cannot be viewed simply as a matter of transferring funds or resources to the victims of crime. The reparations process must be structured carefully and in such a way that victims can receive reparations as genuine forms of reparation. This requires that they are appropriate to the needs of the victims, sensitive to the



nature of the losses they have suffered, and administered in such a way that avoids the risk of further injustice through the perception that reparations are awarded arbitrarily or unfairly.

Those processes that seem to have worked most efficiently are those that do not make a choice between individual and collective reparations, and which do not restrict themselves entirely to financial forms of reparation, but have considered also alternate ways of addressing the needs of victims. When suffering has been widespread, it will in most cases be impossible to reach all relevant victims through the award of individual financial reparations. As with other aspects of transitional justice therefore, the challenges of reparations can only be met when the architects of a process make full use of all the resources at their disposal. This can be achieved effectively only when victims themselves are made part of the reparations process, and given an opportunity to articulate their needs and expectations. Most importantly, the stated policies of a reparations process must be met with real implementation: where victims' legitimate expectations are not met, the costs are often high – they are often alienated not only from the reparations process, but from the accountability process as a whole.

# Immunity from prosecution

Non-judicial accountability mechanisms do not have the power to conduct prosecutions, nor initiate civil proceedings. The question of amnesty – immunity from criminal prosecutions or civil action – is therefore not one that arises directly. Given that non-judicial accountability mechanisms commonly confront a number of actions that are punishable under criminal law however, questions of prosecution and immunity cannot be ignored. As noted in the first chapter for example, a truth or investigative commission’s capacity to engage perpetrators is likely to depend a great deal on its perceived relation to the criminal justice system, as the threat of criminal prosecution provides a strong disincentive to perpetrators considering participation. Almost all transitional justice systems must therefore consider the question of amnesty. This chapter is devoted to considering some of the various ways this has been done, as well as the costs and potential benefits of these approaches.

The notion of an amnesty should be carefully distinguished from a number of related mechanisms that may also form part of a transitional justice process. As its etymology suggests, an amnesty is a conscious decision not to confront or remember a past period or set of actions. In the context of transitional justice, it is a decision not to seek accountability for a certain kind of crime, or crimes committed during a certain period. This can be done explicitly through the proclamation of an amnesty, as has frequently been done upon the collapse of dictatorships and other authoritarian regimes, or it can be allowed to take hold implicitly, if no serious effort is made to hold perpetrators accountable for their actions.

This notion of an amnesty should therefore be distinguished from a decision to pardon someone after they have been found guilty of a crime, or a decision to show leniency when sentencing someone found guilty by a court of law. Unlike an amnesty, pardon, leniency, as well as other forms of prosecutorial discretion, are consistent with the justice system holding someone accountable for their actions. The notion of an amnesty is controversial therefore because it explicitly abandons the prospect of individual accountability of this kind. This puts it at odds with many of the objectives of a transitional justice process. No modern State would suggest publicly that immunity from prosecution is an aim of their accountability process, particularly for the leaders and planners of massive human rights abuses and crimes under international law. Unlike a number of other mechanisms this report has considered therefore, amnesty is not an end in itself. The question of amnesty arises only because some transitional justice processes have considered it a potentially valuable tool. Objectives such as a complete and truthful account of the past, advocates might argue, are achievable only if those in possession of vital information are given an incentive to share it. As long as they fear their participation might lead to criminal prosecution, they are unlikely to participate in the work of a truth or investigative commission, and so conditional amnesties are arguably the only way of securing their participation. Much of this chapter will be devoted to considering the merits of this argument, as well as weighing the gains of such a strategy against its considerable costs.

International law is also clear in its stance on amnesties. Particularly in the post-ICC world there is a firm principle that States have international legal obligations to investigate and, where appropriate, prosecute the perpetrators of “the most serious crimes of concern to the international community as a whole.”<sup>65</sup> The prohibition against amnesties for crimes of this kind is now no longer limited to blanket auto-amnesties granted by the dictators of failing regimes or military commanders of long-fought wars to themselves and their subordinates.<sup>66</sup> No type of amnesty for serious crimes under international law can now be considered acceptable. This section will therefore also consider the international legal framework within which the question of amnesties must be framed.

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65 Rome Statute of the International Criminal Court, Preamble

66 D Orentlicher, *The Future of Universal Jurisdiction in Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (ed. Stephen Macedo) 2004 at page 237.

Finally, this section will consider what alternatives there may be to the use of amnesties. As its proponents generally accept amnesties strictly as a means to an end, it is instructive to consider what alternate means may be available to serve these same objectives, given the high cost of even conditional amnesties in the context of transitional justice.

## 1

### **Amnesties and international law**

In the post-ICC world, no transitional justice process can be considered apart from a State's international legal obligations. These obligations are particularly clear with respect to amnesties: granting amnesty for serious crimes is a clear violation of the international legal obligation to prosecute and punish the perpetrators of "the most serious crimes of concern to the international community as a whole".<sup>67</sup> Under the principle of complementarity enshrined in the Rome Statute, the ICC may be able to find that a State invoking amnesty, whether conditional or otherwise, for crimes under international law, is "unwilling or unable" to prosecute, and so would be able to intervene.

The UN position on amnesty for crimes under international law is similarly clear: it can never be granted, and if it is granted, it can never bind international courts. This was made explicit in the Security Council Resolution agreeing the establishment of the Special Court for Sierra Leone. Its preamble states that it is:

*Recalling* that the Special Representative of the Secretary-General appended to his signature of the Lomé Agreement a statement that the United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law<sup>68</sup>

This interpretation of the law is not new. The District Court of Jerusalem in the Eichmann case stated:

The abhorrent crimes defined in this law are not crimes under Israeli law alone. These crimes which struck at the whole of mankind and

67 Rome Statute of the International Criminal Court, Preamble

68 UN Security Council Resolution On the situation in Sierra Leone S/RES/1315 (2000) 14 August 2000

shocked the conscience of nations, are grave offences against the law of nations itself. Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is universal.<sup>69</sup>

This position has been reaffirmed time and again by courts in recent years, notably by the UK House of Lords in the Pinochet case.<sup>70</sup> Similarly, the Special Court for Sierra Leone has held:

A State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty. It is for this reason unrealistic to regard as universally effective the grant of amnesty by a State in regard to grave international crimes in which there exists universal jurisdiction. A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember.<sup>71</sup>

It can therefore be stated, without further discussion, that it is no longer possible for a transitional justice process to offer amnesties for the most serious crimes under international law. Amnesties of this kind will not be respected by the international community, and as such, can offer no reassurance to their recipients.

Despite this clear prohibition against amnesties for serious crimes under international law, it is too often raised as a serious possibility on the grounds of “*realpolitik*”, with some recent efforts to examine the position of amnesties reflecting a somewhat ambiguous stance. For example, principle 7 of the so-called Princeton Principles on Universal Jurisdiction, drafted in 2001, states that: “Amnesties are generally inconsistent with the obligation of States

69 Attorney-General of the Government of Israel v Eichmann, (1961) 36 ILR 5, at paragraph 12

70 Regina v. Bartle and the Commissioner of Police for the Metropolis and others (appellants) ex parte Pinochet (respondent) (on appeal from a Divisional Court of the Queen’s Bench division); Regina v. Evans and another and the Commissioner of Police for the Metropolis and others (appellants) ex parte Pinochet (respondent) (on appeal from a Divisional Court of the Queen’s Bench division) UK House of Lords, 25 November 1998, available online at <http://www.parliament.the-stationery-office.co.uk/pa/ld199899/djudgmt/dj981125/pino01.htm>.

71 Prosecutor against Morris Kallon, Brima Bazzy Kamara (Case No.SCSL-2004-15-PT, Case No.SCSL-2004-16-PT) Decision on Challenge to jurisdiction: Lomé Accord Amnesty 13 March 2004, at paragraph 67

to provide accountability for serious crimes under international law.”<sup>72</sup> yet the commentary to principle 7 points out that some participants felt they may be acceptable in some cases, “as a second best alternative to criminal prosecution”, at least in difficult periods of political transition.<sup>73</sup>

The next sections will consider some of the costs that would count against such a position in support of the clear international legal prohibition. It is worth stressing, however, that there are also additional reasons international law focuses on those who bear the greatest responsibility for the crimes as a whole, including maximising the impact and deterrent effect of such prosecutions.<sup>74</sup>

## 2

### **Amnesty for truth: the trade off**

Those who favour amnesties in certain situations generally view them as a means to an end. One of their principal arguments is that they can play a valuable role in furthering the broader objectives of a transitional justice or reconciliation process. In Sierra Leone it was hoped they might “consolidate peace” and “promote the cause of national reconciliation”. In Fiji it was claimed they would ensure perpetrators would “contribute to the knowledge about the past.” Their potential contribution to a complete and inclusive historical account of a past period of atrocity is in fact one of the most common arguments employed in favour of amnesties. The first chapter of this report considered a number of reasons why such an account might be valuable to a transitional justice process, offering amongst much else a clear account to victims of what happened to their loved ones, allowing them to grieve appropriately and move towards closure.

A complete and truthful account of the past can be almost impossible to compile without the direct involvement of many of those complicit in the crimes in question. Written records are often rare, and in many cases they are destroyed, and witnesses to a given crime may often be themselves complicit in other related acts of criminality. Further, a historical account that does not include

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72 The so-called Princeton Principles are the result of a project conducted by a number of universities and human rights organisations to develop guiding principles in relation to the exercise of universal jurisdiction

73 *Commentary in Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (ed. S Macedo) 2004 at page 32.

74 See NPWJ International Criminal Justice Policy Series No. 1, *Prosecuting Violations of International Criminal Law: Who should be tried?*, 23 November 2005, available from [http://www.npwj.org/\\_resources/\\_documents/Uploaded-Files/File/NPWJProsecutorialPolicy4thASP.pdf](http://www.npwj.org/_resources/_documents/Uploaded-Files/File/NPWJProsecutorialPolicy4thASP.pdf).

the perspective of perpetrators can appear incomplete and one-sided to many of those who are meant to find closure in its account of the truth.

While perpetrators continue to face the threat of criminal prosecution however, they are unlikely to be willing to share information with any investigative body or commission. They simply have no incentive to risk incriminating themselves, their friends, or others who may potentially incriminate them in return.

Advocates of amnesties argue that this deadlock can only be broken when perpetrators are offered an incentive to engage fully with the truth-seeking process. As criminal prosecutions are their main concern, the offer of immunity from criminal prosecution, conditional upon their full participation, may be the only way of providing the necessary incentive. Although amnesties are not in themselves desirable, they may provide the best means of obtaining fuller disclosure, and so a more balanced and accurate record of the past.

The South African TRC is widely regarded as one of the most successful examples of amnesties being used in this way. One of its virtues was that rather than being used in the way its origins suggest – as a means to forget – amnesties were to be used for the opposite effect: to have people remember. One commentator writes:

One of the major innovations of the TRC was an amnesty procedure that had as its major purpose revelation. [...It] required that individuals identify themselves through applying and making full disclosure of the activities for which they wanted amnesty.<sup>75</sup>

This was the result of a deal made during negotiations conducted to end the apartheid regime. The incumbent government in particular wanted blanket amnesties as part of the agreement. This was not acceptable. Judge Goldstone has written:

The decision to opt for a Truth and Reconciliation Commission was an important compromise. If the ANC had insisted on Nuremberg-style trials for the leaders of the former apartheid government, there would have been no peaceful transition to democracy, and if the former government had insisted on blanket amnesty then, similarly,

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<sup>75</sup> R C Slye, Reflections on the South African Amnesty Process in R I Rothberg and D Thompson (Eds) *Truth v Justice: The Morality of Truth Commissions*, Princeton University Press 2000, at page 172

the negotiations would have broken down. A bloody revolution sooner rather than later would have been inevitable. The Truth and Reconciliation Commission is therefore a bridge from the old to the new.<sup>76</sup>

If the arrangement seemed the result of considered compromise, it was in fact compelled:

[Deputy President Thabo] Mbeki made it absolutely clear, in a private interview with Nelson Mandela, that senior generals of the security forces had personally warned him of dire consequences if members of the security forces had to face compulsory trials and prosecutions following the elections. According to Mandela, they threatened to make a peaceful election totally impossible.<sup>77</sup>

If there was to be immunity from prosecution, something was to be offered in return: amnesty would be granted in exchange for truth. The conditional amnesty was designed as a way to provide the perpetrators of crimes with a strong incentive to tell the truth: they would receive an amnesty if they were deemed to have made full disclosure, but would be vulnerable to a criminal prosecution if they did not. As Justice Mahomed DP observed in a case challenging the lawfulness of South Africa's amnesty process:

The amnesty contemplated is not a blanket amnesty against criminal prosecution for all and sundry, granted automatically as a uniform act of compulsory statutory amnesia. It is specifically authorised for the purposes of effecting a constructive transition towards a democratic order. It is available only where there is a full disclosure of all facts to the Amnesty Committee and where it is clear that the particular transgression was perpetrated during the prescribed period and with a political objective committed in the course of the conflicts of the past.<sup>78</sup>

The only limitation placed on the nature of the crimes eligible for amnesty was that they had to be crimes committed with a political objective. There was no disqualification based on the degree of severity or the extent of the crime in

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<sup>76</sup> Quoted in A Boraine *Truth and Reconciliation in South Africa: the Third Way*, in R I Rotberg and D Thompson (Eds) *Truth v. Justice* Princeton University Press 2000, at page 143

<sup>77</sup> *Ibid* at page 143

<sup>78</sup> *AZAPO v President of the Republic of South Africa* 1996 (4) SA 671 (CC), at paragraph 32



question. Even those acts that could be defined as crimes against humanity were subject to amnesty.

This concept of a conditional amnesty was a new one. In the face of much criticism, proponents argued that the intended point of the conditional amnesty was that perpetrators would not escape accountability: they were forced to account for their crimes in relentless detail in order to secure the amnesty.

This process did successfully engage large numbers of perpetrators, although their attitudes varied:

[...] from taking pride in their past actions, to disavowing any further support for their earlier attitudes, to expressions of deep remorse. Often they had to experience the humiliation of public exposure of their shameful pasts. Others said that they would probably repeat what they had done in similar circumstances.<sup>79</sup>

Conditional amnesties of this sort can of course be made conditional also on other features of the crimes in question. An amnesty arrangement could for example explicitly exclude crimes considered especially serious, as well as those excluded by international law.

Such restrictions were considered in East Timor, and were the subject of a Memorandum of Understanding between the Office of the General Prosecutor (OGP) and the CAVR. It was determined that CAVR would use Community Reconciliation procedures only in cases of “ordinary crimes”. Serious crimes, which included crimes against humanity, war crimes and some crimes whose legal basis was not international law, such as murder, were left squarely within the responsibility of the OGP. The CAVR could not use alternative accountability methods as a way of dealing with these crimes, nor could it prevent the OGP from using statements made to the CAVR in criminal proceedings.

This strategy met with limited success. Unsurprisingly, perpetrators were not enthusiastic about the prospect of testifying before the CAVR unless the crimes they had committed were unambiguously understood as “ordinary” crimes. There was no incentive for people to confess to serious crimes; indeed,

<sup>79</sup> Truth and Reconciliation Commission of South Africa Report, 21 March 2003, Volume 6 Section 1 Chapter 5, at paragraph 36, accessed at [http://www.info.gov.za/otherdocs/2003/trc/1\\_5.pdf](http://www.info.gov.za/otherdocs/2003/trc/1_5.pdf)

there was every disincentive, as it was likely that any confession would later be used against them in a trial.<sup>80</sup>

Even in Sierra Leone, where a blanket amnesty had already been granted as part of the Lomé Peace Agreement before the TRC was established, and where there was no attempt to challenge that amnesty in the domestic courts, perpetrators were unwilling to testify at the TRC. This may have been in part because they feared prosecution by the Special Court, but it may also have been because they saw no reason to participate, or saw no reason to reveal that they had committed crimes.

What the South African experience shows is that perpetrators are more likely to participate in a truth-seeking process if there is a well-defined incentive for them to do so. Even in the South African case however, this proved true only of low-level perpetrators. A great number of high-ranking apartheid era officials chose not to engage with the TRC, despite its amnesty provisions, and the failure to prosecute or hold these individuals otherwise accountable is undoubtedly one of the most serious shortcomings of the South African process.

If those who favour amnesties can point to some cases in which they have served well the pursuit of truth, these limited gains must be weighed against their costs before they can be endorsed as a reasonable strategy. There is for example no benefit to be derived from conditional amnesties if their provision alienates the very victims that are meant to find closure in the truth they help uncover. The next sections will therefore consider the costs of amnesties, including their impact on some of the other transitional justice mechanisms discussed in this report. In the context of these costs, the final section of this chapter will consider what alternatives there may be to amnesties.

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<sup>80</sup> It should be noted that in East Timor, immediately after independence in May 2002, there was a serious attempt by the President, the popular ex-guerrilla leader Xanana Gusmão, to grant a general amnesty in respect of crimes which that occurred during the Indonesian occupation. This foundered in Parliament, where there was little enthusiasm for it. Since then, however, the friendly relationship developed between East Timorese political leaders and the Indonesian government, which led to the establishment of the Commission of Truth and Friendship, indicates that there will be no serious attempts to prosecute Indonesian leaders who were indicted by East Timor's UN-led Serious Crimes Unit.

### 3

## The cost of amnesties

International law clearly prohibits amnesties in the most serious cases. Conditional amnesties for less serious crimes are however occasionally cited as useful in the pursuit of the truth. Beyond their violation of international law however, amnesties come with significant costs, which more often than not offset their limited gains.

Amnesties are a decision not to seek criminal accountability for some body of crimes, but to proceed, literally, as though no crime ever happened. Particularly during transitional periods following war, atrocity, or oppression, such a decision sends a dangerous signal. Amnesties effectively renounce the rule of law at the very time when its affirmation is most needed. Far from signalling a new legal order in which the rule of law and respect for human rights prevail, amnesties are more likely to further entrench cycles of violence and impunity by suggesting that exceptions are made for those who commit acts that are sufficiently egregious. Strengthening the rule of law is frequently cited as one of the most important objectives of a transitional justice process, but this objective, as well as confidence in new judicial institutions, is seriously undermined when the rule of law is suspended to accommodate the perpetrators of crimes still very much alive in the memory of their victims.

Amnesties of this kind also set a dangerous precedent. When someone's crime is amnestied they are effectively permitted to retain ill-gotten gains without consequence. Rewarding violence in this way creates expectations of impunity that work in direct opposition to the promotion of long-term peace and stability. Although amnesties may make a short-term contribution to the pursuit of the truth, the memory of amnestied crimes is likely to remain strong in victims and perpetrators alike. It should not come as a surprise therefore, if at the next juncture of conflict, members of a population again resort to violence in pursuit of gains, with every expectation that their crimes, as crimes before, will be amnestied.

Encapsulating all these concerns, South African Judge Albie Sachs points out:

Prosecution and sending people to jail is not a principle, it is a mechanism for accountability. Principles and objectives are much broader. They create a sense of responsibility, of acknowledgement, of preventing these things from happening again in the future, of installing the rule of law.<sup>81</sup>

Finally, if the purported aim of conditional amnesties is an accurate historical narrative in which it is hoped the victims of atrocity will find closure, the effect amnestying crimes may have on the victims of these crimes should not be neglected. Amnesties, after all, represent a decision literally to ignore the crimes in question. This goes beyond leniency and forgiveness, implying in a sense that as far as the state is concerned, the actions in question were not, given the context in which they occurred, crimes. As a number of the case studies considered in this report demonstrate, victims are often engaged in the truth-seeking exercise in part because they expect some form of accountability will follow. There is therefore no guarantee that victims will not be left reeling from a sense of further injustice if they are forced to trade a truthful account of the crimes they suffered for the accountability of the perpetrators who committed these crimes. If one of the principal arguments for amnesties is that it engages perpetrators, its potential to alienate victims must not be forgotten. The Fijian experience aptly demonstrates how a policy of amnesty can quickly turn large segments of a population against a transitional justice process, and ultimately bring it to a complete halt.

## **4 Alternatives to amnesty**

If amnesties are primarily proposed as a means to an ends, but come with costs that are often too high, it is important to consider what alternate means might further the ends in question. This section therefore examines how non-judicial accountability mechanisms that have not sought to make use of amnesties have approached decisions about prosecutions in a way that seeks to attract similar participation and disclosure, while avoiding the costs of amnesties and without compromising the principle of legality.

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<sup>81</sup> Albie Sachs, *Four Sayings and a Denouement* in Institute for Justice and Reconciliation, *The Provocations of Amnesty: Memory, Justice, and Impunity*, at page 19

Witnesses before the Northern Ireland” Bloody Sunday Inquiry in Northern Ireland included 245 members of the military, 35 members or former members of paramilitary groups and 39 politicians and civil servants, all categories of persons who might be suspected of having committed crimes in relation to the events of Bloody Sunday. The Tribunal was conscious that in order to ensure maximum disclosure, there would need to be some reassurance and protection for those who might subsequently be at risk of prosecution. Although the Tribunal decided at the outset against granting immunity from prosecution, its Chair recognised that such a course may have had the potential to “encourage people to come forward and to speak frankly with no inhibitions”.<sup>82</sup>

Instead, the decision was made to keep the question open throughout investigations for possible determination at a later stage as to “whether the grant of immunity in any given case, or group of cases, is necessary for the purpose of carrying out the object of the Inquiry.”<sup>83</sup> No such recommendation was made. Instead, the Attorney-General provided an undertaking that no evidence provided to the inquiry would be used against the person providing that evidence in any criminal investigation or proceeding: The undertaking guaranteed to:

[A]ny person who provides evidence to the Inquiry, that no evidence he or she may give before the Inquiry relating to the events of Sunday 30 January 1972, whether orally or by written statement, nor any written statement made preparatory to giving evidence, nor any document produced by that person to the Inquiry, will be used to the prejudice of that person in any criminal proceedings (or for that purpose of investigation or deciding whether to bring such proceedings). [...] I should say, for the avoidance of doubt, that, although the undertaking is cast in terms which preclude the use of evidence given by a witness as the basis of criminal investigation into the conduct of that witness, this does not amount to any form of immunity.<sup>84</sup>

The reason this undertaking does not amount to a form of immunity is that it does not rule out future prosecution of a person giving testimony to the Inquiry, but only rules out the use of the witness’ own evidence against him or her in any future proceedings. The undertaking does not, however, exclude

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82 Opening Statement of Lord Saville 3 April 1998

83 *Ibid*

84 Attorney General Press Notice 25 February 1999

witness testimony before the Inquiry from being used against other potential suspects, or witness testimony or evidence from other sources being used against witnesses giving testimony at the Inquiry. There exists, therefore, the possibility of future prosecutions, which means that the crimes in question are not extinguished as in the case of amnesty.

Steps were also taken to provide protection for military witnesses who might be in danger if their identities were revealed to the public. After a decision by the UK House of Lords, anonymity was granted to all soldiers whose names were not already in the public domain. In addition, hearings that occurred between September 2002 and October 2003 were moved from Ireland to central London because of fears for the safety of soldier witnesses attending the Tribunal. Screening was provided for some witnesses where the Tribunal deemed it appropriate that members of the public and media should be able to hear the evidence being delivered but not see the witness.

In Sierra Leone, the TRC was authorised to hear information in confidence, and it could not be compelled to disclose any information received, except by order of the Special Court.<sup>85</sup> Although the Sierra Leone Government had recommended the early conclusion of an agreement establishing a formal relationship and co-operative arrangement between the Prosecutor of the Special Court and the TRC,<sup>86</sup> which was supported by many to include “the use of the Commission as an alternative to prosecution”,<sup>87</sup> no agreement was ever reached. Thus, the question of protection from self-incrimination for those who testified before the TRC was never specifically addressed. However, even without such a guarantee, the vast majority of perpetrators had little to fear: the Special Court’s jurisdiction was limited to those who bore the greatest responsibility for the violations committed only from 30 November 1996, and the amnesty granted in the Lomé Peace Accord meant that domestic courts could only prosecute for acts committed after 7 July 1999, not that there was any indication that political will supported such a course.

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85 Truth and Reconciliation Commission Act, February 2000, section 7(2); Special Court Agreement, 2002, (Ratification) Act 2002, section 21(2)

86 Office of the Attorney-General and Ministry of Justice Special Court Task Force, Briefing Paper on “*Relationship between the Special Court and the Truth and Reconciliation Commission*”, 7 January 2002, available from [http://www.specialcourt.org/documents/PlanningMission/BriefingPapers/TRC\\_SpCt.html](http://www.specialcourt.org/documents/PlanningMission/BriefingPapers/TRC_SpCt.html).

87 Report of the Secretary General on the Establishment of a Special Court for Sierra Leone 4 October 2000 UN Doc S/2000/915, at paragraph 8

The absence of a clear statement of the relation between the relevant judicial and non-judicial instruments is however likely to have limited perpetrator engagement. Similar experiences are recorded in the case of East Timor, where again, a clear statement of the relationship between the various judicial and non-judicial instruments operation was not provided sufficiently early in the process to set the tone for participation.

Practices, like guarantees of anonymity or assurances that evidence given before investigative commissions will not be used for trial, can be devised to induce participation, disclosure, and certainty of consequence for those participating in a process. These can be especially effective when jurisdiction is carefully delineated, as was the case when East Timor, albeit belatedly, distinguished serious from non-serious crimes. Moreover, where truth or investigative commissions exist alongside criminal prosecutions or a publicly stated commitment to prosecute for past crimes, prosecutorial discretion such as a decision to show leniency in sentencing or not to prosecute those deemed low-level offenders might provide some inducement for participation and disclosure on the part of perpetrators.

It is important to note that these measures do not equate to amnesty or a promise of immunity. They do not guarantee that there will be no future prosecution, for example, if new evidence comes to light. As such, they do not share the consequence of amnesty: they do not seek to expunge the crime in question.

## **5**

### **Conclusion**

Amnesties, whether explicitly granted by law or simply allowed by circumstance, whether blanket or conditional, are a clear violation of international law when serious crimes are in question. In addition, the cost of amnesties is very high: victims who continue to suffer the consequences of amnestied crimes may feel they have become victims of injustice once more; the new legal order and new legal institutions may be undermined as perpetrators attempt to re-enter society without having acknowledged or made efforts to make amends for their crimes; and perhaps most seriously, by rewarding and legitimising violence, amnesties maintain expectations of impunity which threaten the goals of

long term peace and stability. Amnesties then, are in almost all their forms antithetical to the very principles of justice.

While the South African process demonstrates that amnesties will likely engage some perpetrators and can even lead to confessions of the most brutal of crimes, perpetrator involvement is rarely the objective in and of itself of any accountability process. Architects of transitional justice must therefore never lose sight of the purpose perpetrator involvement is meant to serve, and remain mindful of the possibility that the costs of engaging perpetrators might easily undermine the more fundamental objectives of their process. Even the amnesty process in South Africa was not designed to encourage involvement as such; it was a condition of those running the apartheid regime to relinquish power, and met only with limited success when it came to engaging high-level perpetrators.

Admittedly, the reports of many truth commissions can seem one-dimensional when compared to that of the South African TRC where the voices of those perpetrators were so clearly engaged. However, alternative sources of information will almost always be available, and a complete and multi-faceted account may not be the primary objective of a transitional justice process. Indeed, if the process is intended as the basis for further criminal investigation and sanction; as a means to dismantle an authoritarian power structure; or to achieve lustration; the active participation of perpetrators, while desirable, may not be necessary at all.

The detrimental effects amnesties can have on the overall objectives of a transitional justice process also mean that it is unlikely amnesties will ever recoup their cost when examined this broader light. This chapter has therefore highlighted the importance of considering the alternatives offered by coherent policies of prosecutorial discretion and leniency which, when clearly articulated and communicated from the beginning of a process, can secure many of the same gains as amnesties, without incurring their substantial costs.



# Transitional justice and prosecutions

The previous chapters have explored non-judicial accountability mechanisms as a means of closing the impunity gap and pursuing the objectives of transitional justice. Although the impunity gap has been characterised as the accountability need that remains after criminal prosecutions have been concluded, one of the lessons that has emerged most clearly from the preceding chapters is that although non-judicial mechanisms are independent of the criminal justice system, their success often depends on the way in which their work is coordinated with judicial accountability mechanisms. The objective of this chapter is therefore to consider some of the ways in which the work of these two forms of accountability can be integrated and coordinated in a way that is mutually reinforcing, rather than undermining.

The main trend this chapter will plot is one where non-judicial accountability mechanisms are increasingly considered a substitute for prosecutions. This trend is an unfortunate one, as the preceding chapters have all demonstrated how these two forms of accountability complement one another. Non-judicial mechanisms can make space for meaningful trials of those suspected of the most serious crimes by meeting demands for justice in less serious cases, and the threat of criminal prosecution can both strengthen and underpin non-judicial accountability.

# 1

## Linking truth commissions and prosecutions

In the pioneering high-profile example of the Argentinean Commission, the work of the truth commission and criminal prosecutions were intended to act as complementary parts of a broader accountability strategy. Immediate and high-level criminal prosecutions and convictions followed the publication of the CONADEP report. Although the story thereafter is a protracted chronicle of pardon, release, the institution of fresh proceedings, challenges to the validity of the pardons granted and, many years later, the eventual reinstatement of convictions and punishment, after a 20 year battle for accountability, it is the initial trials and convictions that remain embedded in public perception of the Argentine process.

Crucially, CONADEP was never envisaged as an alternative to prosecutions. It was a stated requirement of its work that any information gathered would be passed to the courts for the purposes of prosecution. The additional value of the information it provided to subsequent prosecutions is debatable. Those prosecutions that did take place might well have been possible at the practical level without the work of CONADEP, although the political impetus for prosecutions that the Commission built was undoubtedly critical. The fact that the Argentinean accountability process was not limited to clarification and disclosure, but that it integrated its work with other justice mechanisms, contributed to CONADEP being perceived as a success.

The South African process was also structured in such a way that its link with prosecutions was very clear: the offer of individual and conditional amnesties was dependent on the prior prospect of criminal prosecution.<sup>88</sup> However, while the process claimed to include a credible threat of prosecutions, very few actual prosecutions materialised, prompting the observation that “the last 10 years has seen really no commitment to prosecuting those who didn’t meet the conditions [for amnesty]”.<sup>89</sup> This has resulted in substantial disappointment with the process, vindicating also the actions of the large numbers of perpetrators who chose not to engage with the process, devaluing not only the actions of those who did make applications, but perhaps more

88 A Sachs ‘Four Sayings and a Denouement’ in C Villa-Vicencio and E Doxtader (Eds) *The Provocations of Amnesty: Memory, Justice and Impunity* (2003) David Philip Publishers, at page 19

89 South Africa: 10 years after the Truth Commission: survivors are frustrated *IRIN News* 19 June 2008, accessed at <http://www.irinnews.org/InDepthMain.aspx?InDepthId=7&ReportId=59489&Country=Yes>

importantly, the expectations of the many victims who were convinced to put aside calls for prosecution in favour of what they were told would be an integrated process of acknowledgement and accountability. It should be added, however, that this lack of follow-up is not something for which the TRC itself was responsible but rather reflects an absence of political will on the part of South Africa's executive, even if the existence of the TRC appeared to be an excuse not to prosecute those who did not apply for amnesties.

Another case where serious thought was given to the relationship between the disclosure process and prosecutions is the CAVR in East Timor. While the process was a sophisticated one, involving careful planning over a number of years by national and international participants, it was not without shortcomings.

The relationship between CAVR and the prosecution process was addressed in the Memorandum of Understanding (MOU) between the Office of the General Prosecutor (OGP) and the CAVR. The MOU was very clear that with regard to serious crimes – crimes against humanity and war crimes, as well as murders and sexual offences – the Prosecutor reserved the right to initiate prosecutions against any person alleged to have committed those acts, with no restrictions. The CAVR was required to submit all statements it obtained to the OGP, which would then consider whether to prosecute; and although the CAVR could receive information confidentially, it was obliged to provide this information to the Prosecutor if so requested. Thus, in the most serious cases, prosecutions were privileged, with CAVR being engaged primarily to extend the scope of accountability beyond these prosecutions.

By the time the CAVR was established, prosecutions of serious crimes were well under way. Although the achievements of the Serious Crimes Unit (SCU) were limited by the fact that many defendants were either no longer in East Timor or could not be found, it prosecuted some 101 defendants for crimes committed during the pre- and post-referendum violence in 1999. This was in itself a remarkable achievement, although it must be qualified by the acknowledgement that there seemed to be no coherent strategy, at least at the outset of the process, as to who should be prosecuted. Consequently, many of those tried were in fact low-level militia members charged only for single incidents.

In part this was because insufficient attention was given to clarifying the contribution each mechanism was expected to make to the accountability process as a whole. Unlike in Sierra Leone, where the mandate of the Special Court was clearly stated to be that of prosecuting “those who bear the greatest responsibility” for the violence, the mandate of UNTAET, like the ICTY, was simply to prosecute “those responsible”.<sup>90</sup> This absence of discrete prosecutorial directive meant that the East Timor Serious Crimes Unit in its early years of operation prosecuted in a piecemeal and disorganised manner. Many low-level militia members were prosecuted, while others higher up the command structure were ignored. By the time a more coherent strategy had been developed in 2002, it was too late to reverse the effect of the earlier failure in strategic planning. It is therefore questionable whether the work of the CAVR in fact benefitted from the careful thought initially went in to structuring their relationship with the OGP.

When CAVR reported in November 2005, prosecutions for serious crimes were winding down. In any event, the prosecution strategy was unlikely to have been influenced by the report: the Office of the General Prosecutor had a well funded unit that had conducted its own investigations in greater depth than the CAVR was likely to have done.

Nonetheless, East Timor illustrates the important relationship that exists between truth and prosecutions. There was a realistic fear that lower level offenders who gave evidence to the CAVR would themselves be indicted, in particular during the period when the prosecution strategy was less clearly and coherently formulated, and not enough was done to clarify this process during the crucial early phases when fears and expectations are formed. It is not known whether anyone was indicted as a result of evidence they provided; the Office of the General Prosecutor undertook not to initiate investigations solely on this basis, but that qualification was hardly likely to reassure those who gave evidence, even in the unlikely case that they knew that such qualification had been made. In fact, as elsewhere, perpetrators of crimes of any magnitude tended to steer well clear of the CAVR, although it is unclear whether this is due to a fear of prosecution or not.

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<sup>90</sup> Security Council Resolution 1272 S/RES/1272 (1999) of 25 October 1999 On the Situation In East Timor, at paragraph 16

In the case of Sierra Leone, there was no formal relationship between the Special Court and the TRC, despite encouragements from the parties to the Special Court Agreement and many others that the two institutions conclude such an agreement as a matter of priority.<sup>91</sup> In its briefing paper on the Relationship between the Special Court and the TRC, the Government of Sierra Leone urged both institutions to consider how they might cooperate in sharing the burden of accountability, noting:

“It would be useful to build into any relationship between the Special Court and the TRC a mechanism by which the Prosecutor or the Court may refer such cases for the consideration of the TRC or to other relevant national institution. Consideration could also be given by the TRC to whether it will wish to bring specific cases to the attention of the Prosecutor of the Special Court. Specifically, if the TRC has grounds to believe that such cases would fall within the jurisdiction of the Special Court, then as a matter of policy those cases should be referred so that vital information is not withheld from the investigators.”<sup>92</sup>

As it turned out, no formal agreement was ever concluded between the two institutions, on referrals or any other matter, so the opportunity to provide a fully integrated accountability process for Sierra Leone was lost.

A number of transitional justice processes have clearly recognised the importance of coordinating the work of their judicial and non-judicial components. As the cases of East Timor and Sierra Leone demonstrate however, effectively integrating the work of non-judicial accountability mechanisms with the work of courts is not simply a matter of sharing information. To date, judicial and non-judicial mechanisms that have been operational at the same time in the same country have not worked within an integrated accountability process; instead they have worked independently and sometimes at odds with one another. The cases considered above all demonstrate the costs of such shortcomings, most notably in the way of limited perpetrator involvement. Certainly independence is an important feature of any accountability mechanism, but this can be safeguarded through the accurate delineation of respective spheres of autonomy

91 See the previous chapter on “Immunity from Prosecution”

92 Office of the Attorney-General and Ministry of Justice Special Court Task Force, Briefing Paper on “Relationship between the Special Court and the Truth and Reconciliation Commission”, 7 January 2002, available from [http://www.specialcourt.org/documents/PlanningMission/BriefingPapers/TRC\\_SpCt.html](http://www.specialcourt.org/documents/PlanningMission/BriefingPapers/TRC_SpCt.html), section 4.

and authority, which must then be fully and transparently shared with the public. Only when this message is communicated clearly do the various judicial and non-judicial facets of the accountability process have the best chance of reaching their respective and ultimately shared goals.

## 2 Replacing prosecutions

Since the conclusion of the Argentinean commission, there has been an unfortunate tendency to move the work of non-judicial accountability mechanisms away from that of the courts, severing the link so important to the perceived success of the CONADEP. In Chile, prosecutions were explicitly excluded from the NCTR's remit:

In no case is the Commission to assume jurisdictional functions proper to the courts nor to interfere in cases already before the courts. Hence it will not have the power to take a position on whether particular individuals are legally responsible for the events that it is considering [...].<sup>93</sup>

In El Salvador, the question of whether subsequent prosecutions would be pursued was left open during the operations of its Commission on the Truth. This Commission was a departure from both the Chilean and the Argentine models in a number of ways. It was not established by a new government, but by the incumbent government as part of the peace agreement to bring an end to twelve years of civil war. The use of international commissioners was intended to ensure both the independence and the impartiality of the commission itself and strict confidentiality agreements were put in place to provide participating witnesses with a sense of security.

Although El Salvador's Commission on the Truth was not specifically mandated to identify perpetrators, it was instructed to "put an end to any indication of impunity."<sup>94</sup> It interpreted this directive to require the identification of those individuals responsible for the acts investigated by the Commission. It also issued wide-ranging recommendations as to punitive measures to be taken

93 Supreme Decree No. 355, Executive Branch, Ministry of Justice, Undersecretary of the Interior, Creation of the Commission on Truth and Reconciliation Santiago, 25 April 1990 (reproduced in *Report of the Chilean National Commission on Truth and Reconciliation*, at Article 2)

94 The Chapultepec Peace Agreement, Article 5 "The End to Impunity", cited in *From Madness to Hope: the 12 year war in El Salvador: Report of the Commission on the Truth for El Salvador*, at Part VII

against individuals named in the report and suggested stringent reform proposals. Although agreement had been reached that the Commission's work would not in any way prejudice or prevent prosecutions, a subsequent amnesty ensured that none followed. The fact that no prosecutions were even recommended by the Commissioners was, however, an additional source of disappointment to many.

The case of East Germany in 1992 has certain similarities with El Salvador. The investigation of the East German regime was conducted, if not by complete foreigners, by West Germans who had not personally experienced the GDR regime. A limited number of prosecutions were conducted, but there is no evidence that these proceedings were linked in any way to the operations or findings of the Commission.

It is clear from the closing submissions in the case of the Bloody Sunday Inquiry that it is highly unlikely that the Inquiry will be able to identify those who fired the fatal shots. Without this information, successful prosecutions will be difficult.

In Sierra Leone, addressing impunity was one of the stated aims of both the TRC and the Special Court. However, there was no link made to the prosecution process and while the institutions themselves declined to clarify their relationship in any formal sense, by the time the TRC began its hearings, the Special Court had already mostly completed its investigations and the SCSL Prosecutor had already given assurances he would not use evidence collected or heard by the TRC.<sup>95</sup> It was never anticipated that further prosecutions might follow from the TRC's work, at least not at the Special Court, and a blanket amnesty had already been granted in the Lomé Peace Accord for acts committed prior to 7 July 1999. Despite the high-profile operation of the Special Court, this was therefore an example of a truth commission set up in place of criminal trials, although some perpetrators were identified publicly in its report, which goes some way to meeting the aim of addressing impunity.

In Morocco it was even clearer that the IER was not meant to lead to criminal sanctions. There was no question of accusations being made; on the contrary,

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95 SCSL Press Release, "*TRC Chairman and Special Court Prosecutor Join Hands to Fight Impunity*", 10 December 2002, in which the Prosecutor is quoted as saying "Victims, perpetrators, and witnesses who testify before the TRC should do so without fear of having their statements subpoenaed by my office."

those responsible for crimes were not in any circumstances even to be named, either by those giving evidence or in the final report.

### **3 Prosecutions without a separate truth-seeking mechanism**

The genocide and other serious crimes committed in Rwanda fall within the jurisdiction of the International Criminal Tribunal for Rwanda and are being prosecuted before that court. However, Rwanda itself has opted for no truth commission at the national level. That may be because it believes that gacaca proceedings deliver outcomes approximate to truth commissions, but gacaca proceedings more closely resemble prosecutions than they do a truth commission.

The gacaca process does not draw on any other model implemented by any other country. It was proposed as an answer to the pressing problem of a massive prison population and no possibility of trials in the ordinary criminal justice system for the vast majority of accused. The gacaca process makes no pretence at excavating any overriding historical truth. The trials take place in local cells and there is no systematic process of historical record and clarification beyond the evidence given in individual cases. Moreover, there is little written record of the evidence given in gacaca trials.

In any event, there is little official interest in providing fora for historical record and clarification. The official history of the 1994 genocide has been written into Rwanda's constitution and it is a criminal offence to question that account. A truth commission would have no attraction for the Rwandan government unless it was guaranteed to reinforce the accepted narrative.

The former Yugoslavia has also had no truth commission, apart from an inquiry that reported into the massacre at Srebrenica. A truth commission set up by President Kostunica of Serbia in 2001 was dissolved two years later without producing any results. Nor, despite some initial interest from the Coalition Provisional Authority, has there been a truth commission established for Iraq, although interest in this issue is beginning to grow in Iraqi society,



particularly among its parliamentarians and political leaders.<sup>96</sup> In all cases, there has been a significant commitment to prosecutions, with assistance from the international community, before the International Criminal Tribunal for the former Yugoslavia and the Iraqi High Tribunal.

It is unclear why in these cases, prosecutions were considered to be sufficient to address the broad range of accountability needs. It may be because prosecutions were not thought to need any supplements to meet their goal of ending impunity. However, the fact that issues of accountability and responsibility continue to be the source of division and debate in each of these situations suggests that criminal prosecutions, like non-judicial mechanisms, are unlikely to meet the many and varied aims that societies have following periods of conflict or massive human rights violations.

#### **4 Conclusion**

Although prosecutions are frequently pitted against truth commissions, the two processes are more complementary than this ostensible divide allows. As each underpins the other, it is only when judicial and non-judicial mechanisms work effectively in tandem that each is given the best chance of promoting the aims of transitional justice. Criminal courts require non-judicial mechanisms to close the impunity gap and allow their work to focus on the most serious perpetrators, while the success of non-judicial mechanisms frequently depends both on the accountability provided by criminal prosecutions and the threat of such prosecutions. Although many of the examples studied have recognised this fact, none so far have achieved this level of coordination with any unequivocal success.

When it comes to designing truth or investigative commissions, consideration must therefore be given to both the objectives of the non-judicial mechanism itself and the accountability process as a whole. What has emerged most clearly in this chapter is that success on these two fronts depends on careful consideration being given to the relationship between non-judicial and judicial accountability mechanisms. To encourage participation of the communities affected by their work,

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96 Discussions and Outcome Document from the Seminar on "Practical Federalism" in Erbil, Iraq, from 10 to 16 July 2007: <http://www.npwj.org/No+Peace+Without+Justice/MENA+Democracy/Iraq+Project/Iraq+Project+Activities/Erbil+Seminar+2007>

the relationship between each mechanism must be clear, and those who participate should be left in no doubt as to how their contributions will be used.

Judicial and non-judicial accountability mechanisms frequently have overlapping aims and objectives, yet there has not really been a situation in which those mechanisms have fully complemented one another in their operations. More often, as highlighted by the example of Sierra Leone, the potential for an integrated accountability process has been lost due to a misconception that to be independent, judicial and non-judicial mechanisms must hold one another at arms length. It is to be hoped that future processes take a more holistic view of accountability, coordinating the work of its various elements and delineating areas of responsibility so as to most effectively harness the gains available from a fully integrated accountability process.

# Assessment

Most of the non-judicial mechanisms discussed in the Analysis section of this report have sought in some way to extend the reach of justice beyond that secured by criminal courts. They have done so in various forms, ranging from truth and accountability to reparations and restitution. These ends are ordinarily served by the criminal justice system. In the wake of mass atrocity it is, however, often simply not possible to prosecute all those suspected of crimes. An attempt to do so is likely only to occasion a failure of the sort seen in Rwanda, where up to 120,000 people languished in jail without trial six years after the genocide had ended. Even 14 years on, many still remain in detention without trial. Alternatively, if a transitional justice process limits itself to ascribing only the accountability its courts can manage, an impunity gap is likely to emerge, threatening long-term peace and stability by rewarding violence and disappointing victims. This report has therefore sought to consider how non-judicial mechanisms can support the criminal justice system by extending the reach of justice and bridging the impunity gap.

It is evident from the cases considered that some non-judicial initiatives have achieved their goals more successfully than others. This analysis has however not suggested that the transitional justice process is simply one of identifying models that have been successful elsewhere. As the political, social and economic variables facing States will have a major impact on how non-judicial accountability mechanisms work, and as each process is likely to identify its own aims and objectives, such a one-size-fits-all approach could never hope to succeed. It is hoped that by examining a number of different non-judicial

accountability mechanisms operating within a number of different contexts, this report can instead provide policy makers with some of the information necessary to design a comprehensive process suitable to their own needs and constraints.

Difficult choices are inevitable when establishing transitional justice mechanisms. What this report has suggested so far is that among the very first issues to be considered must be the objectives that are to be pursued and the prioritisation of these aims. It is the objectives of a process that will ultimately determine how a State responds to the various challenges that arise during the process of transitional justice, and how it must adapt to the various constraints and challenges imposed by social, political, and economic realities. Where objectives are not clearly articulated well in advance, a process cannot hope to coherently respond to such challenges, nor can it hope to avoid raising false expectations and so inevitably disappoint at least some of those it is attempting to serve. This final chapter of the analysis section summarises some of the main elements of each of the preceding chapters.

## **1**

### **Clarification and disclosure**

In marking the transition from an old order, characterised by the violation of human rights or international humanitarian law, to a new order, transitional justice mechanisms often seek to defeat past secrecy and denial by providing clarification and disclosure. Many have suggested that this is the most important function of any transitional justice initiative, serving both as means to a number of important ends, and representing an important achievement in and of itself.

Truth and investigative commissions are often able to provide a historical narrative that is broader and more inclusive than that provided by institutions focused on questions of individual responsibility and guilt. As non-judicial bodies, these initiatives often have the scope and flexibility to scrutinise institutional and collective responsibility in a way that does not comport with general criminal liability. The comprehensive work of historical record that emerges can therefore often serve an important role in repudiating previous histories of denial and justificatory rationales for repression, and offer individual

victims, as well as society as a whole, an opportunity to move on from a past period of atrocity.

While engaging victims can be relatively straightforward once they are identified, the participation of perpetrators is often difficult to achieve without further incentives. In South Africa these included amnesties in exchange for truth, a solution that has proved costly and unsuccessful elsewhere, as well as now running contrary to international law. Other forms of prosecutorial discretion leaving open the possibility of prosecution if certain conditions are breached, or lesser sentences in return for truth – a device commonly employed in domestic courts where credit – have however proved successful across a broader range of cases considered. Before such measures are taken however, the contribution perpetrator engagement can make to the objectives of a process must be carefully weighed against their cost. There are also other ways of accessing the truth. The opening of the Stasi files in East Germany, for example, exposed the secrets of the regime more effectively than any investigation could. If information can be accessed in other ways, or if perpetrator participation is not necessary to further the objectives of a given process, there may be no need to consider costly incentives.

It would be wrong to suggest that truth or investigative commissions have always managed to provide complete clarification or a full historical record. Even commissions like South Africa's were unable to access large amounts of very significant documentation that was destroyed by the apartheid regime, and despite the possibility for amnesty, it failed to engage high-level perpetrators.

Nevertheless, truth and investigative commissions may be structured and resourced in such a way that enables them to provide at least some form of historical clarification that goes beyond that available from individual prosecutions. This can be especially valuable when combined with the investigations conducted by both domestic and international criminal courts. The cases examined suggest that successful commissions are structured in a way that allows them to access significant individual testimony from a wide-range of actors, some of whom may be unwilling; that allows them to make considered and meaningful, selections as to whom or what should be the focus of their inquiry; and that allows public information and communication of the process itself and of the results of the inquiry. This requires, among other

things, consideration for inducement and incentive to testify; search, seizure and subpoena powers; and means of publicly disseminating the proceedings and report. Most importantly, it requires that the work of a truth or investigative commission be carefully coordinated with the work of other instruments, both judicial and non-judicial, such that each supports, rather than undermines, the work of the others.

## 2

### **Securing individual accountability**

Ideally, a judicial mechanism will oversee prosecutions of all those suspected of having committed crimes. International law requires at the very least that efforts be made to prosecute those bearing the greatest responsibility for the most serious offences. As Diane Orentlicher has noted, “by laying bare the truth about violations of the past and condemning them, prosecutions can deter potential lawbreakers and inoculate the public against future temptation to be complicit in state-sponsored violence ... If law is unavailable to punish widespread brutality of the recent past, what lesson can be offered for the future? A complete failure of enforcement vitiates the authority of law itself, sapping its power to deter prescribed conduct.”<sup>97</sup> The challenge that faces many transitional justice processes is that of providing accountability of this kind without the realistic possibility of prosecuting all suspected perpetrators. It is in this context the work of non-judicial accountability mechanisms becomes particularly relevant.

Where perpetrators are tried, it goes without saying that they must be tried fairly and before an independent judicial body. In many cases, this will require a new *ad hoc* internationalised structure, though this does not necessarily require the enormous budgets that have previously been allocated to the two UN *ad hoc* tribunals. Since the establishment of the Special Court for Sierra Leone in 2002, there has been a move away from spending vast sums on justice mechanisms. Internationalised courts now have more limited budgets financed by donor States and are not supported by the UN’s general operating budget. The new Lebanon tribunal has been given a budget of \$120 million for its estimated three-year operation. Experience shows that it is likely to exceed its budget by some margin. Still, it is worth noting that its entire projected

<sup>97</sup> D Orentlicher, “Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime”, (1991) 100 *Yale Law Review* 2537 at page 2542

budget is smaller than a single annual budget for the ICTY, as was the case with the Special Court for Sierra Leone.

If there is a real prospect of domestic criminal trials, these are in most cases to be preferred, as they affirm the independence and credibility of the domestic judicial system and allow greater access and participation in the proceedings to those most directly affected by the crimes in question. This preference is underlined in the Rome Statute for the International Criminal Court, wherein the principle of complementarity affirms that the primary responsibility to prosecute crimes under international law lies with States, and that the ICC will only step in if the States is unwilling or unable to investigate and prosecute. In Argentina, the leaders of the junta were tried before the ordinary courts. Similarly, trials for war crimes, other than those taking place before the ICTY, are also happening in the courts of Belgrade and in other places in the former Yugoslavia.

Non-judicial accountability mechanisms can also address matters of justice, and can therefore complement judicial accountability efforts. They can do so by investigating and recommending prosecutions, as was done by the truth commissions in Sri Lanka, Liberia, and by the Waki Commission into the post election violence in Kenya. Of these, the Kenyan example is the most decisive: in its final report, the Waki Commission states that unless Kenya establishes a special tribunal to investigate and prosecute those responsible for the post-election violence, the Commission will give the list of perpetrators it has compiled to the ICC with a recommendation that the ICC prosecute.

Alternatively, non-judicial accountability mechanisms can themselves address the question of accountability. They can do so by, for example, attributing individual responsibility in reports, and by working with reparations and community service initiatives. Unfortunately, one of the most notable examples is that of the *gacaca* courts of Rwanda. These traditional courts have tried large numbers of people for crimes committed during the genocide, but have been widely criticised as partial, as only Hutus are tried for crimes. There have been additional accusations of corruption and incompetence, as well as serious questions regarding the right to due process. These concerns are serious as these “courts” have the power to impose sentences up to and including life imprisonment. However, both East Timor and Sierra Leone have offered better

examples of community procedures as a means of extending accountability beyond that which is possible through criminal courts.

### **3 Immunity from prosecution**

Engaging perpetrators has been identified as one of the main challenges to non-judicial accountability mechanisms. Some processes have argued in response that conditional amnesties are one of the only ways of engaging significant numbers of perpetrators, and so one of the only ways to compile a comprehensive and inclusive historical record of past atrocity.

Despite the potential value of such a record, this report has emphasised that amnestying serious crimes is no longer possible under international law, and that even in less serious cases, amnesties are a mechanism that seldom repays their significant cost. A decision not to seek accountability for past crimes undermines the rule of law and the credibility of new legal institutions at the very time they most need a State's consistent commitment. They also reward violence and create expectations of impunity that pose a real threat to long-term peace and stability and, perhaps most significantly, they alienate the very victims meant to find closure and solace in the truth amnesties are meant to help uncover.

Given these costs, this report has argued that there are many alternatives to conditional amnesties that must be given serious consideration by transitional justice mechanisms. With careful planning and clear communication, it is entirely possible for a transitional justice process to engage perpetrators, particularly those of a lower level, without violating international law, and without incurring the costs described above.

Foremost among these alternatives is a clear prosecutorial strategy that allows prosecutors the scope to exercise discretion when engaging low-level perpetrators in exchange for their involvement. In Sierra Leone, the prosecutorial directive was that those who bore the greatest responsibility for the crimes would be prosecuted. In East Timor, the policy was that those guilty of specified "serious crimes" would be prosecuted. Neither proved an unqualified success, largely due to delays in articulating and communicating these policies. Articulating a clear prosecutorial strategy and communicating clearly the links that exist



between the various judicial and non-judicial institutions, must therefore be one of the first questions a transitional justice mechanism considers.

## **4 Reparations**

Reparations for victims are often thought to be the principal aim of accountability procedures. Before financial reparations can be made however, there must be sufficient funds available. This is often simply not the case. In South Africa, reparations paid were negligible. In Rwanda, they were non-existent. In many developing State contexts therefore, non-financial initiatives such as apologies, public acknowledgement, and restitution are equally important forms of reparations, as often they will be all that is available. This is an important consideration to take into account during the design of accountability mechanisms, and one it is important to explain clearly to victims and the general public. False and unrealistic expectations a State cannot hope to meet are one of the principal dangers to be avoided by architects of transitional justice processes working with significant political and economic constraints.

Even when extensive financial reparations are available, their distribution is seldom uncontroversial. In Morocco, Chile and Argentina, reparations were paid to victims of atrocities. In all three cases however, reparations were greeted with claims that they were distributed unfairly. In the wake of mass atrocity, almost everyone will have suffered a loss of some kind, begging the question of why some should be compensated while others are not. Some commentators suggest that in these circumstances, funds might be better spent on collective reparations, such the general reconstruction of society, or on facilities such as road, schools and hospitals of benefit to everyone. A number of mechanisms have also met with success under such circumstances by involving low-level perpetrators in the reparations process through, for example, community service.

## 5

### Conclusion

What has emerged clearly from this analysis section is that no transitional justice process will be unproblematic. The nature of the conditions in which they operate means obstacles will always be present and that they will rarely be able to realistically pursue all the objectives that might characterise such a process. One of the most important prerequisites of success is therefore a careful consideration of which objectives are important, and in what order of priority they fall. This determination will then enable a process to offer a coherent response to the various obstacles and questions that arise during the course of its work, many of which have been identified in this report.

The cases considered also suggest that mechanisms that have been imported from other situations, without regard for differences in objectives and social, economic, and political conditions, are unlikely to succeed. For example, as successful as the South African experience proved within its unique set of conditions, efforts to replicate this model elsewhere have seldom met with much success. The challenge of transitional justice is therefore not one identifying suitable models to replicate, but one of drawing on the full range of experiences available so as to construct a comprehensive solution suited to the particular history, objectives, and socio-economic realities in question.

Designing a suitable process requires more than careful reflection on behalf of political leaders. It is the ordinary citizens of a society that are the ultimate judges of a transitional justice process. Before they are willing to participate in such a process and accept its compromises and outcomes, they must trust its institutions and its leaders. Many of the cases considered therefore emphasise the importance of involving and consulting with the general public from the very beginning of the transitional justice process, and ensuring at all times that decisions, findings, and compromises are communicated clearly and effectively to the entire population. Whatever objectives an accountability process chooses to pursue, these goals are far more likely to be achieved where the general public understand both the ends and the means, as well as what it has been decided is not a priority, or not a realistic target.

The analysis section has repeatedly stressed that no single mechanism can hope to meet all of a society's accountability needs. Criminal prosecutions

are the cornerstone, providing criminal accountability, a demonstration of the return of the rule of law, and redress for victims. Criminal prosecutions face challenges in providing a full historical record however, and under difficult conditions, cannot always hope to consider all suspected of crimes. Working in parallel with the criminal justice system therefore, non-judicial mechanisms can extend the reach of accountability and so make a substantial contribution to the goals of transitional justice. Through careful planning and coordination they can articulate a truthful historical record; overcome denials and revisionism about past wrongs; foster community reconciliation; support a reparations process and, perhaps most importantly; promote long-term peace and stability by bridging the impunity gap and ensuring all involved with the commission of crimes and human rights abuses face some form of accountability.



# Case studies

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The information contained in this section is to the best of the authors' knowledge accurate as of July 2009. As several of the case studies considered are ongoing processes, the reader should note that developments that have taken place since this date will not be reflected in the text below.

## Case Study A

# Argentina

Latin America is considered the birthplace of the modern truth commission. It is largely thanks to the work done in the 1980s by the National Commission for Disappeared Persons in Argentina, and then subsequently by the National Commission on Truth and Reconciliation (NCTR) in Chile, that the concept of the truth commission exists as we know it today. Certainly, the South African TRC was strongly influenced by its Latin American predecessors.

In 1983 Argentina was the first country to set up a mechanism we would now recognise as a truth commission. There had previously been commissions of inquiry into specific incidents, particularly in countries of the Commonwealth, but a truth commission mandated to consider a historical period comprising many incidents was something new. The establishment of The National Commission on the Disappearance of Persons (known by its Spanish acronym, CONADEP) was an inspired approach to the problem of finding out what had happened to the *desaparecidos* – those who had disappeared during the “Dirty War”.

The novelty of this approach is not the only reason why CONADEP deserves a special place in the history of non-judicial accountability mechanisms. It was also remarkably successful. It not only produced a comprehensive report; it resulted in a number of prosecutions. The fact that laws were later passed to reverse the results of these prosecutions does not diminish the value of this initial achievement, which also ensured that sufficient amounts of compensation were paid to the victims of State crimes.

If South Africa is the model by which all new truth commissions are measured, however incorrectly, it should not be forgotten that had it not been for Argentina, the South African TRC might not have existed at all, or at least not in the form that it did, particularly since some of those engaged with the Argentine process were consulted by the architects of the South African TRC. CONADEP can be seen as the trailblazer of a new form of accountability that is now easily and readily taken for granted.

## **1**

### **Background**

Argentina has a long history of military interference with democratic rule. On 24 March 1976 President Isabel Perón, who had succeeded her husband Juan Perón to the presidency upon his death in 1974, was deposed by a military junta led by General Jorge Videla, and the first of a series of military dictatorships was established. Thereafter Argentina would be subject to military rule until 1982, when internal economic pressures, as well as defeat by Great Britain in the Falklands War, forced the failing military regime to cede power. Democratic elections followed, and in 1983 Raúl Alfonsín was inaugurated as President.

Claiming the justification of fighting left-wing terrorist opposition, the military junta engaged in tactics that were to become known as the “Dirty War”. Enforced disappearances were endemic, (estimates of the numbers seized range between 10,000 and 30,000) and those abducted suffered appalling violations ranging from extra-judicial killing to extended arbitrary detention, systematic torture and sexual abuse. Those seized included pregnant women and young children, who were often given to military families to be brought up as their own.

Before ceding power, the junta passed amnesty legislation entitled ‘The Law of National Pacification,’ which prevented the prosecution of any member of the military for crimes committed between 25 May 1976 and 17 June 1982.<sup>99</sup> This attempt to circumvent accountability proved ineffective, as the National Commission on the Disappearance of Persons was established by Decree as one of President Alfonsín’s first acts upon taking office. Not long after, prosecutions were launched and successful convictions were obtained

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99 Law No. 22,924 accessed at <http://www.nuncamas.org/document/nacional/ley22924.htm>

against a number of individuals for a range of crimes committed during the years of the “Dirty War”.

The results of these convictions were however short-lived. The threat of a military uprising led President Alfonsín in 1986 to enact legislation that imposed a deadline for the commencement of any fresh proceedings against members of the previous regime. This became known as the *Ley de Punto Final*, or “Full-Stop Law,”<sup>100</sup> and was followed in the following year with provisions granting a full amnesty for any crimes committed during the relevant period by army personnel including and beneath the rank of colonel. The amnesty was founded on the premise that personnel of the lower ranks were simply following orders,<sup>101</sup> and thus the law was known as the *Ley de Obediencia Debida*, or, “Due Obedience Law.”<sup>102</sup> It has been estimated that these two laws either terminated or prevented the prosecution of approximately 400 identified perpetrators.<sup>103</sup>

Impunity escalated further when, two years later, new President Carlos Menem issued general pardons to most of those who had been prosecuted for crimes committed under the previous regime. The sense of a return to justice that had marked the early years of civilian government had by this time evaporated.

This culture of impunity was sustained further by the subsequent government when, in 2001, President de la Rúa issued a Decree which protected Argentines from prosecution abroad for crimes relating to human rights violations.<sup>104</sup> However, and in the same year, the Full-Stop and Due Obedience laws passed by Alfonsín in the 1980’s were held by the courts to be unconstitutional. In 2005, the Supreme Court upheld A 2001 Federal Court of Appeals decision on this point.<sup>105</sup>

100 Law No. 23,492, accessed at <http://www.nuncamas.org/document/nacional/ley23492.htm>

101 Law No. 23,521, accessed at <http://www.nuncamas.org/document/nacional/ley23521.htm>

102 R Lichtenfeld *Accountability in Argentina: 20 years later, transitional justice maintains momentum* August 2005, International Centre for Transitional Justice, at page 3; accessed at <http://www.ictj.org/en/where/region2/509.html>

103 J Mendez *Argentina*, in *The Encyclopedia of Genocide and Crime against Humanity*, MacMillan reference USA, 2004, Vol 1, at page 65; accessed at <http://www.ictj.org/en/where/region2/509.html>

104 Lichtenfeld (*supra* Note 4), at page 6

105 *Ibid*, at page 5



## 2

### **The National Commission on the Disappearance of Persons**

The establishment of CONADEP in December 1983 was one of President Alfonsín's first acts upon coming to power.<sup>106</sup> He required CONADEP to "clarify events relating to the disappearance of persons in Argentina and investigate their fate or whereabouts",<sup>107</sup> and report its findings to the President.

The Commission was divided into four departments: the Depositions Department; the Documentation and Data Processing Department; the Legal Affairs Department; and the Administrative Department.<sup>108</sup>

The Commission was under an obligation to pass any information relevant to prosecution to the courts. It compiled more than 50,000 pages of documentation, and published a summary of its findings in 1984.<sup>109</sup> These were later translated from Spanish into a number of other languages, and were also published in book form.

The report sets out detailed findings on crimes committed under a number of subject headings, including: "Abduction," "Torture," "Secret Detention Centres" and "Extermination." In a separate section, it presents an analysis of the victims who disappeared. It categorises them by age and sex, as well as the features of various groups, including children and pregnant women, adolescents, the sick and disabled, journalists, trade unionists and members of the clergy and religious orders. Further attention was devoted to "the family as a victim".

The report also addresses broader topics, such as the coordination of repression in Latin America, the doctrine behind the repression, and the attitudes of some members of the Church. It devoted an entire section to the role of the judiciary during the period of repression, concluding that:

[...] instead of acting as a brake on the prevailing absolutism as it should have done, the judiciary became a sham jurisdictional structure,

106 Decree No. 187 of 15th December 1983 cited in *Nunca Mas: Report of CONADEP* (National Commission on the Disappearance of Persons) 1984 at Part IV: Creation and Organization of the National Commission on the Disappeared (unpaginated) accessed at [http://web.archive.org/web/20031013222809/nuncamas.org/english/library/nevagain/nevagain\\_002.htm](http://web.archive.org/web/20031013222809/nuncamas.org/english/library/nevagain/nevagain_002.htm)

107 *Nunca Mas Report* (*supra* Note 8) at Part IV: Creation and Organization of the National Commission on the Disappeared

108 *Ibid*

109 *Ibid*

a cover to protect its image. [...] people came to feel that it was useless to appeal to the judiciary for protection of their basic rights.<sup>110</sup>

The report also strives, where possible, to produce clear statistics. It states for example that following the military coup of 1976, tens of thousands of individuals were illegally deprived of their liberty, and that of those, 8,967 never reappeared.<sup>111</sup> It refers to 340 secret detention centres located throughout the country,<sup>112</sup> and provides what it describes as a 'partial list' of some 1,300 people who had been held in detention centres.<sup>113</sup>

The Commission responsible for the report was clear that it viewed its task as investigative, not judicial:

Our Commission was set up not to sit in judgment, because that is the task of the constitutionally appointed judges, but to investigate the fate of the people who disappeared.<sup>114</sup>

Indeed, the Commission was afforded no subpoena powers and it made plain in its report that it encountered great difficulties in obtaining all the information it sought. Apart from documentation that had been purposely destroyed by the military regime before it ceded power, the Commission was also faced with the failure of official agencies to cooperate with its requests. The report notes that the Commission's work was:

[...] hindered by the destruction and/or removal of a vast amount of documentation containing detailed information on the disappeared.  
[...] many questions remained unanswered.

It further records that both the armed forces and certain members of the judiciary were among those who failed to respond satisfactorily to the Commission's enquiries.<sup>115</sup> In addition, access was apparently barred on occasions to military bases and other detention facilities.<sup>116</sup>

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110 *Ibid* at Part III: The Judiciary

111 *Ibid* at Part I: The Repression; B: Abduction

112 *Ibid* at Part I: The Repression; D: Secret Detention Centres

113 *Ibid* at Part II: The Victims

114 *Ibid* at Prologue

115 *Ibid* at Part IV: Creation and Organization of the National Commission on the Disappeared

116 S Logan and S A Garrett *Truth Commissions in Latin America: An Analysis of Truth Commissions in Argentina, Brazil and Chile*, at page 13; accessed at [http://sand.miiis.edu/research/documents/logan\\_truth.pdf](http://sand.miiis.edu/research/documents/logan_truth.pdf)

Aside from the burden posed by a lack of official cooperation, members of the Commission faced personal danger in undertaking their tasks. The Commissioners note in its report that:

[...] in the course of our investigations we have been insulted and threatened by the very people who committed these crimes.<sup>117</sup>

Despite these obstacles, the Commission was tireless in its efforts to gather material during the nine months it was given to complete its work. Commission representatives travelled to fifteen provinces and collected more than 1,400 depositions. Testimony was also taken outside Argentina, either by Commission members or diplomatic representatives acting on their behalf. In addition, the Commission conducted exhumations, inspected secret detention centres and, where feasible, checked prison and police records in order to build up as complete a picture as possible.<sup>118</sup>

It is however the testimony of victims themselves that is at the heart of the report. From the outset individuals were keen to cooperate. The Report notes that:

The Part played by released prisoners was decisive. [...] They came forward from the start despite having themselves suffered terrible deprivation and torture. [...] civic values and unquenchable ethical considerations overcame the fear they still felt. [...] They provided concrete information about other disappeared persons, gave details of camps and identified the places used for imprisonment and torture.<sup>119</sup>

The Commission's recommendations are set out in the report's conclusion. They urged referral of cases to the courts with "the utmost urgency". Other recommendations include the passing of appropriate laws to provide economic assistance to the children and/or relatives of the disappeared; instituting the teaching of human rights standards in all State educational establishments, including those of the military and the police; and the repeal of all repressive legislation still in force.<sup>120</sup>

Following the conclusion of the Commission's work and the publication of its report, prosecutions were in 1985 brought against the heads of the three

117 Nunca Mas Report (*supra* Note 8), at Prologue

118 *Ibid* at Part IV: Creation and Organization of the National Commission on the Disappeared

119 *Ibid*

120 *Ibid* at Part VI: Conclusions and Recommendations

military juntas that had held power between 1976 and 1982. General Jorge Videla and Admiral Emilio Massera were both convicted and sentenced to life imprisonment.<sup>121</sup> Further proceedings resulted in a total of nine of the top Junta leaders being brought to trial, five of whom were convicted. Many further prosecutions were launched before being curtailed by the subsequent impunity legislation.

### 3

## Assessment

CONADEP is often heralded for putting truth commissions on the global political agenda as a mechanism for providing a form of accountability for past atrocities. In 1983 the concept of a truth commission was innovative and, at the time of its creation, there were no comparable bodies from whose experience Argentina was able to draw.

It is interesting to note that CONADEP's establishment in 1983 was unpopular not only with those who feared its investigations, but also among many of those who supported the idea of accountability, but who viewed an unelected Commission as an inappropriate means of investigating the past. Fearing a whitewash, many opposed the Commission's establishment and favoured a parliamentary investigation instead.<sup>122</sup>

Few people were prepared for the power of CONADEP's report. It is clear from the individual accounts relayed to the Commission and summarised in the report that victims were extremely forthcoming in recounting their experiences. Comprehensive accounts of the suffering occasioned by severe beatings, electric shock treatment and sexual abuse provide a powerful record of the levels of inhumanity that prevailed under the military regime. Statistics alone could never have had this effect. Graphic descriptions are provided of the inhumane means by which individuals were tortured: some were buried in earth up to their necks for days at a time, exposed to the elements, deprived of food and water and often plagued by ant and insect bites. Others endured having the skin of the soles of their feet flailed off by razor blades.<sup>123</sup>

121 Mendez (*supra* Note 5), at page 64; accessed at <http://www.ictj.org/en/where/region2/509.html>

122 *Nunca Mas Report* (*supra* Note 8) at Part IV: Creation and Organization of the National Commission on the Disappeared

123 *Nunca Mas Report* (*supra* Note 8) at Part I: The Repression; C: Torture

Such harrowing accounts from doctors, teachers and ordinary citizens provided a strong rebuttal to claims by the military junta that they has only taken necessary steps against dangerous dissidents who threatened the interests of the State. This evidence enabled the Commissioners to declare in the body of their report that:

We can state categorically – contrary to what the executors of this sinister plan maintain – that they did not pursue only the members of political organisations who carried out acts of terrorism.<sup>124</sup>

Unlike many truth commissions that succeeded it, CONADEP also conducted its work in the expectation that the results of its investigations would be handed over to the courts so as to enable effective prosecutions. Therefore, the weight of expectation on the Commission alone to provide some kind of redress for the crimes it investigated was not present in the way that is common to similar bodies that have followed. This may have been the secret of CONADEP's success, as it was able to focus its efforts on a more limited but crucial mandate, without carrying alone the entire burden of accountability.

The report's findings were also summarised and published in the form of a book which would go on to become a best-selling publication in Argentina. A television documentary based on CONADEP's findings also found a large audience.<sup>125</sup> Neither the book nor the television documentary provided the names of identified perpetrators; these were given to the President in secret, but efforts to maintain confidentiality were fruitless, as the list was eventually leaked to the press and published.

It is through the accounts of individual suffering set out by CONADEP that many people came:

[...] face to face perhaps for the first time – with the horrifying vision of what had happened in Argentina.<sup>126</sup>

However, the impact of CONADEP's work went much further than its report. Criminal proceedings were quickly launched and, in some cases, successfully concluded against members of the military regime. This was a great, if short lived, achievement. It struck an immediate blow to the culture of impunity

124 *Ibid* at Part VI: Recommendations and Conclusions

125 Logan and Garrett (*supra* Note 18), at page 13

126 *Nunca Mas Report* (*supra* Note 8) at Part IV: Creation and Organization of the National Commission on the Disappeared

that had prevailed in Argentina throughout previous years. Argentina was distinct from some of its Latin American neighbours in that society appeared to retain a faith in the ability of the judicial system to deal appropriately and honestly with prosecutions of members of the previous regime. This faith was vindicated by the decisions of the courts; it was the legislature, not the judiciary, in post-transition Argentina that succumbed to pressure from the military to halt prosecutions.

In spite of the amnesty and pardon provisions that later undermined the achievements of the courts, trials and convictions against officials of the former regime are finally being sustained. In 2006, a former police commissioner was tried and convicted on charges of illegal arrest and torture during the “Dirty War” years. He had previously been convicted on similar charges in 1986, but his conviction and sentence were vacated under the Due Obedience Law of 1987. Human rights groups heralded the new trial as marking “the end of 20 years of impunity”.<sup>127</sup> A second police officer was convicted on charges of illegal arrest and torture later the same year.<sup>128</sup>

CONADEP’s recommendations on reparations were also acted on in a timely fashion. In 1985, legislation was passed that provided the families of the disappeared with provisional benefits,<sup>129</sup> and in 1991 the grant of reparations was extended to political prisoners of the former regime.<sup>130</sup> Further legislative provisions were put in place in 1994, catering to the families of the disappeared by providing legal recognition of the status of disappeared individuals, thereby resolving many practical and legal difficulties for their relatives.<sup>131</sup> In addition, financial compensation was provided to the families of those who had been killed or disappeared.<sup>132</sup> Finally, in 1999, a fund was established to help family members search for and recover children who had been kidnapped, or babies born in captivity, who were given to families close to the military.<sup>133</sup>

The CONADEP report was published under the name *Nunca Mas* – “Never Again”. Unfortunately, such crimes continue to take place across the world, as

127 *Argentina: ‘Disappearances’ Trial Breaks Years of Impunity*, Human Rights Watch press release, Washington 19 June 2006; accessed at <http://hrw.org/english/docs/2006/06/19/argent13580.htm>

128 *Argentina: Court Convicts ‘Dirty War’ Torturer* Human Rights Watch, 4 August 2006; accessed at <http://hrw.org/english/docs/2006/08/04/argent13919.htm>

129 Law 23.466 cited in G Lois and M Lacabe *In search of vindication – Reparations for Human Rights violations in Argentina* KO’AGA RONE’ETA vii (1999) unpaginated, available at <http://www.derechos.org/koaga/vii/lois.html>

130 Law 24.043/91 cited in *Ibid*

131 Lichtenfeld (*supra* Note 4), at page 8

132 Law 244.11/94 cited in Lois and Lacabe (*supra* Note 31)

133 Historical Reparation Fund for the Location and Restitution of Children Kidnapped or Born in Captivity cited in *Ibid*

evident by the current demand for accountability mechanisms. Nevertheless, the spirit of optimism and accountability that motivated the establishment of CONADEP has undoubtedly informed and inspired other States to use similar means to address their past. As such, CONADEP undoubtedly deserves its recognition as the forerunner of modern non-judicial accountability.

## Case Study B

# Chile

Unlike CONADEP in Argentina, the Chilean National Commission on Truth and Reconciliation (NCTR) did not attribute personal accountability to perpetrators of abuses, and no trials were held as a result of its work. It did, however, make significant achievements in providing an alternative to the official military account of what had happened under Pinochet's dictatorship and in assisting the families of victims and the disappeared. It also provided a number of recommendations for the government to help prevent the recurrence of abuses. The fact that it was able to do so at a time when accountability for the human rights abuses of past regimes was far less common than it is today is significant.

### 1

#### **Background**

In 1973 General Augusto Pinochet came to power in Chile by way of a coup d'état, toppling the elected President Salvador Allende. A military dictatorship was established, which would remain in place until democratic elections in 1990. All political opposition was swiftly barred, Congress was dissolved and thousands of Chileans were killed and tortured. About 30,000 were forced to flee the country, though not necessarily to safety, as the intelligence service also engaged in targeted assassinations abroad. As in Argentina, thousands of Chileans joined the ranks of the disappeared.



The most indiscriminate repression took place during the mid-1970s. In the first six months after Pinochet took office, at least one thousand people were summarily executed. In later years, State violence continued but became more selective.<sup>134</sup>

In 1978, an amnesty law was passed, barring any prosecution of those who committed human rights abuses during the period from 1973 to 1978.<sup>135</sup> The preamble to the legislation declared that it was intended:

[...] to strengthen the ties that bind Chile as a nation, leaving behind hatred that has no meaning today, and fostering all measures that consolidate reunification of all Chileans.<sup>136</sup>

Domestic and international pressure led to a 1988 referendum in which the nation was asked to vote on General Pinochet's candidacy for the Presidency. He was defeated, and a general election followed in 1989, and won by the Christian Democrat Patricio Aylwin. This regime change was perhaps less significant than it might have seemed at first, as constitutional reforms made by the regime prior to the election left the new government with only limited control over the military and restricted its legislative freedom. The majority of the judiciary and Senate continued to consist of Pinochet appointees or supporters, and the General himself remained Commander in Chief of the army until 1997.<sup>137</sup>

The blanket amnesty law of 1978 was observed for many years, but more recent challenges have successfully been brought against its applicability in respect of 'disappearance' cases. In 2004 the Chilean Supreme Court backed prosecutions that had been taking place in the lower courts since the late 1990s, holding that:

[...] it would not seem reasonable to invoke the application of an amnesty [...] when in practice the crime has not been carried out with finality.<sup>138</sup>

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134 Human Rights Watch *Accounting for the Past: The lessons for South Africa from Latin America* 23 October 1992 Volume 4 Issue 11; accessed at <http://www.hrw.org/reports/1992/southafrica/index.htm>

135 Decree Law 2.191 of 1978

136 *Ibid*, Preamble

137 *Ibid*

138 P A Barcroft *The slow demise of impunity in Argentina and Chile ASIL Insight*, January 2005 (unpaginated) and Chile: Secret Police convictions upheld – Supreme Court declares Amnesty inapplicable Human Rights Watch, Santiago November 17 2004; accessed at <http://www.hrw.org/english/docs/2004/11/17/chile9689.htm>

The court was of the view that in order for an amnesty to apply, it would be necessary to determine whether the date of commission of the crime in question fell within the period covered by the amnesty. As it was not known definitively whether disappeared individuals were alive or dead, the amnesty could not apply.<sup>139</sup> Numerous prosecutions and convictions have since taken place as a result of this approach.<sup>140</sup>

In a broader challenge to the legitimacy of the amnesty legislation as a whole, the Inter-American Court of Human Rights ruled in September 2006 that this form of “self-amnesty” was incompatible with the American Convention on Human Rights. In March 2007, the Chilean Supreme Court’s Criminal Chamber held that the amnesty law was inapplicable in cases of war crimes or crimes against humanity, and that any such crimes cannot be subject to a statute of limitations. However, human rights groups are concerned that a subsequent decision of the court seems to overturn this earlier decision by applying a statute of limitations in a murder case.<sup>141</sup>

## 2

### **The National Commission on Truth and Reconciliation**

The NCTR was created by executive decree of President Aylwin (“the Decree”) within one month of his assuming power in 1990.<sup>142</sup> The NCTR (also known as the Rettig Commission after the name of its Chair) was made up of nine members chosen to represent a mix of Pinochet supporters and opponents.

The preamble of the Decree states:

That the moral conscience of the nation demands that the truth about grave violations of human rights committed in our country between September 11 1973 and March 11 1990 be brought to light;

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139 Barcroft (*supra* Note 5)

140 As of July 2007, 458 former military personnel and civilian collaborators were facing charges for enforced disappearances, extrajudicial executions and torture; 167 had been convicted and 35 were serving prison sentences. See Human Rights Watch *World Report 2008*; accessed at <http://hrw.org/englishwr2k8/docs/2008/01/31/chile17766.htm>

141 *Ibid*

142 Supreme Decree No. 355, Executive Branch, Ministry of Justice, Undersecretary of the Interior, Creation of the Commission on Truth and Reconciliation Santiago, 25 April 1990 (reproduced in NCTR Report *infra* Note 11); see also M Ensalaco *Truth Commissions for Chile and El Salvador: A Report and Assessment* Human Rights Quarterly 1994, Volume 16, at page 656

That only upon a foundation of truth is it possible to meet the basic demands of justice and to create the necessary conditions for achieving true national reconciliation;

That only the knowledge of the truth will restore the dignity of the victims in the public mind, allow their relatives and mourners to honour them fittingly, and in some measure make it possible to make amends for the damage done.<sup>143</sup>

The NCTR's task was multifold:

to draw up as complete a picture as possible of the most serious human rights violations that resulted in death and disappearances which were committed by government agents or by private citizens for political purposes;

to gather evidence that would make it possible to identify individual victims and determine their fate or whereabouts;

to recommend such measures of reparation and restoration of people's good name as it regarded as just,

to recommend measures that should be adopted to hinder or prevent new violations from being committed.<sup>144</sup>

The Commissioners were given nine months to complete their investigations and present a report. The NCTR had no judicial powers. Its Decree states:

In no case is the Commission to assume jurisdictional functions proper to the courts nor to interfere in cases already before the courts. Hence it will not have the power to take a position on whether particular individuals are legally responsible for the events that it is considering [...].<sup>145</sup>

The NCTR was unable to subpoena witnesses or compel testimony. It was however:

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143 Supreme Decree No. 355, Executive Branch, Ministry of Justice, Undersecretary of the Interior, Creation of the Commission on Truth and Reconciliation Santiago, 25 April 1990 (reproduced in NCTR Report *infra* Note 11)

144 Report of the Chilean National Commission on Truth and Reconciliation, Introduction

145 Supreme Decree No. 355, Executive Branch, Ministry of Justice, Undersecretary of the Interior, Creation of the Commission on Truth and Reconciliation Santiago, 25 April 1990 (reproduced in NCTR Report *supra* Note 11), at Article 2

[...] empowered to carry out whatever inquiry and measures it judged appropriate, including requesting reports, documents, or evidence from government authorities and agencies.<sup>146</sup>

Government officials and bodies were obligated to offer their full cooperation within their own specific area of competence.<sup>147</sup> However, the reality fell short of this goal. For example, the Chilean Army failed to respond to the NCTR's request to produce copies of the war tribunal records; and all the armed services asserted that they were legally prohibited from providing information relating to intelligence activities.<sup>148</sup> Other omissions included failures to provide internal investigation reports, to provide the names of individuals only known by rank or number, and to detail the functions undertaken by particular individuals at a relevant time.

Through registration by family members and information presented by a variety of groups, the NCTR was however able to identify approximately 3,400 cases that it would examine.<sup>149</sup> Testimony was received from over 4,000 complainants, as well as some members of the military. Each person who wanted to present their case was interviewed, whether they were located in Chile or abroad.<sup>150</sup> The NCTR also "sought relevant information from national and international bodies,"<sup>151</sup> including Chilean human rights groups and the Catholic Church.

When the evidence pointed to an individual who might bear responsibility for crimes, the NCTR asked that person to give testimony with a view to taking into account their version of events. Requests of this sort were made to 160 members of the armed forces and police. Except in a very few cases, those on active duty refused to offer testimony to the NCTR, while some of those who were outside the armed forces or who were now retired agreed to testify.<sup>152</sup>

The report does not name those responsible for the crimes it describes, but, in accordance with Article 2 of the Decree, the NCTR submitted to the courts "evidence [received] about actions that appear to be criminal." The evidence which was sent to the courts by the NCTR fell broadly into two categories:

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146 NCTR Report (supra Note 11), Part I Chapter I A

147 *Ibid* Part I, Chapter I A

148 *Ibid* Part I Chapter I B

149 *Ibid* Part I Chapter I B

150 *Ibid* Introduction

151 *Ibid* Introduction

152 *Ibid* Part I Chapter I B

evidence gathered relating to what appeared to be an illegal burial, in order to help determine the fate or whereabouts of those who disappeared after arrest; and evidence gathered that seemed “new, useful or relevant for judicial investigations.”<sup>153</sup>

The NCTR interpreted its mandate “to draw up as complete a picture as possible of human rights violations” as encompassing the effect of these events on the victims’ families. This was a matter the NCTR specifically discussed with the relatives in each interview or testimony session, and the results of these enquiries are set out in the report.<sup>154</sup> In addition, the NCTR consulted with victims’ families, as well as relevant experts who could offer guidance, on proposals for suitable reparations and the prevention of future violations. The final report includes the NCTR’s proposals for reparations, which include legal and administrative assistance, financial support for education, medical care, psychological services and symbolic reparations.<sup>155</sup>

The NCTR also made recommendations for proposals to prevent future human rights violations, including the creation of a Corporation for Reparation and Reconciliation to continue the search for the disappeared, and a human rights ombudsperson to adjudicate future violations.<sup>156</sup> Further recommendations included the creation of a public law foundation and the application of sanctions for concealing information on illegal burials.<sup>157</sup>

Finally, the NCTR addressed “some of the legal, political and social features of the period that are more directly related to human rights violations” and sought to take into account “some characteristics of the climate in Chile before and after September 11, 1973 that may have contributed to such violations”. It also considered the main legal institutions that made such violations possible and those which proved most effective in countering them, noting that “the purpose of these observations is to help prevent them [the violations] from ever occurring again.”<sup>158</sup>

The report was formally presented in February 1991. President Aylwin accompanied the presentation of the report to the nation with an apology to

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153 *Ibid* Part I Chapter I C

154 The impact of the most serious human rights violations on families and social relations is set out at of the NCTR Report (*supra* Note 11) Part III Chapter IV. Section headings include: Loss and grief; Torture; Prolonged uncertainty; Damage to personal integrity; Family life disrupted; and Being stigmatised and outcast.

155 *Ibid* Part IV Chapter I

156 *Ibid* Part IV Chapter II

157 *Ibid* Part IV Chapter III

158 *Ibid* Part I Chapter I E

all victims and their families on behalf of the State. In addition, individual letters of apology were sent to each family.

### **3 Assessment**

The Chilean NCTR has been characterised as purely “an information gathering exercise”,<sup>159</sup> yet there were also complaints that “no new information about those responsible for the past crimes was made available by the Commission’s work.”<sup>160</sup> The key complaint was directed at the failure to name perpetrators publicly and attribute personal responsibility for the most serious violations the NCTR was mandated to address. Arguably, this crucial omission severely undermined the credibility of the NCTR. How could a complete and truthful picture of the most serious violations investigated by the NCTR be achieved without specific reference to the perpetrators of the relevant acts?

In addition, the fact that the NCTR was only mandated to address human rights violations resulting in death meant that an estimated 200,000 victims of gross human rights violations, such as torture, were effectively ignored and denied the opportunity to provide testimony to the NCTR and contribute to the complete picture of events.<sup>161</sup> These limitations on what could be achieved by the NCTR are rooted in the Decree that gave it such limited powers, and to this extent, represented something of a missed opportunity.

Such limitations must however be viewed in context: it should be remembered that although the country was no longer under the control of a military junta, General Pinochet and his supporters still wielded great power and influence, both within the government and the country as a whole. Furthermore, the constitutional and legislative landscape had been shaped by the departing regime in such a way as to impose severe limitations upon the ability of the new government to effectively address the impunity for human rights violations that had been the norm in Chile since the early years of the Pinochet regime.

The establishment of the NCTR was not the product of joint negotiations to which both parties signed up in order to ensure the investigation of atrocities on both sides. The military had nothing to gain by cooperating with the NCTR and potentially everything

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159 *Strategic Choices in the Design of Truth Commissions: Chile* (unpaginated); accessed at <http://www.truthcommission.org/commission.php?lang=en&cid=1&case.x=33&case.y=4>

160 *Ibid*

161 *Ibid*

to lose. The fact that 95% of crimes investigated were attributed to the military has therefore been hailed by some as a major achievement in that it refuted the official claim of the military that it was responding reasonably to an internal war.

In spite of its failure to apportion personal responsibility, and the limitations upon its remit and capacity, the NCTR's work was also welcomed as it put an end to the "macabre legal and administrative limbo"<sup>162</sup> suffered by the families of the disappeared, mainly by making official findings that individuals were dead. These findings enabled surviving family members to resolve property and inheritance claims, and to apply for social security and other benefits. It also clarified the position of surviving spouses.<sup>163</sup> In purely practical terms this meant that approximately 5,000 people came into receipt of a monthly pension as family members of those killed or disappeared.<sup>164</sup>

Some commentators place great weight on the symbolic value of the process and the participation of victims' families in giving testimony. Within the body of its report the NCTR remarks with a tone of surprise that:

[...] the families were amazingly willing to put their trust in our group [...] for many of them, this was the first gesture made by the Chilean government to acknowledge their situation.<sup>165</sup>

The Commissioners also considered the taking of testimony to be "a critical part of helping victims to reclaim their faith in the State."<sup>166</sup> The importance of naming each of the victims in the report should therefore not be underestimated.

Finally, the fact that the presentation of the report was accompanied by a public apology from President Aylwin has been described by one commentator as:

[...] a turning point in gaining respect for victims and advancing public understanding of the country's past.<sup>167</sup>

The NCTR's recommendations for the provision of reparations were extensive and reasonable, and many were acted on following the publication of its report. A follow-up body, the National Corporation for Reparation and Reconciliation, was created in

162 M Ensalaco Truth Commissions for Chile and El Salvador: A Report and Assessment, *Human Rights Quarterly* 1994 Volume 16, at page 663

163 *Ibid* at page 663

164 E Brahm *The Chilean Truth and Reconciliation Commission* July 2005 (unpaginated) [http://www.beyondintractability.org/case\\_studies/Chilean\\_Truth\\_Commission.jsp?nid=5221](http://www.beyondintractability.org/case_studies/Chilean_Truth_Commission.jsp?nid=5221)

165 NCTR Report (*supra* Note 11) Part I Chapter I B

166 *Strategic Choices in the Design of Truth Commissions: Chile* (*supra* note 26)

167 P Hayner *Past Truths, Present Dangers: The Role of Official Truth Seeking in Conflict Resolution and Prevention* International Conflict Resolution after the Cold War National Academy Press (2000) at page 252; quoted in Brahm (*supra* Note 31)

January 1992 and helped press forward the recommendations for two years.<sup>168</sup> A 1992 law provided significant financial support to the families of all victims named in the report. In addition, a fund was created for children of the disappeared to support their continuing education, and the Ministry of Health established teams that offered general medical and mental health care to victims' families. These were also made available to victims of gross human rights violations and the families of the disappeared. The government undertook a thorough review of constitutional and legal provisions with respect to human rights.<sup>169</sup>

The fact that more than two decades have elapsed since the Chilean experience also allows for appraisal of its consequences in the longer term. One writer describes a visit to Chile in 1996, where she:

[...] found many Chileans insisting that national reconciliation had been achieved. [...] Yet even while insisting that national reconciliation had taken place, many Chileans described personal relationships that remained strained by past events. Former victims and supporters of the regime of Augusto Pinochet worked and lived side by side, but with an unspoken agreement never to bring up the past or their strong differences of opinion. When issues about the past did arise, it was with considerable discomfort.<sup>170</sup>

One human rights organisation, writing in 2001, held up the Chilean experience as one that contributed extensively to the development of the justice system and society as a whole:

In Argentina, Chile, and Guatemala, [...] truth commissions have played a crucial role in improving the judiciary's capacity to handle human rights cases. Not only have they presented new evidence necessary for prosecutions, they have also helped these societies to understand and to address the failings of the judicial institutions that allowed these crimes to go unpunished. The Chilean and Argentine commissions dedicated whole chapters of their final reports to explaining how their judicial systems had failed to handle abuse cases. To ensure that these lessons are acted upon, truth commission reports

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168 P Hayner Commissioning the Truth: Further Research Questions, *Third World Quarterly* 17(1) 1996

169 Ensalaco (*supra* Note 29), at page 656

170 P Hayner *Unspeakable Truths: facing the Challenge of Truth Commissions*, Routledge (2002), page 159



typically include comprehensive recommendations on how to reform and strengthen weak or ineffective state institutions.<sup>171</sup>

Perhaps the NCTR's real achievement is therefore not tied to the nature of the job it did, but the fact that it was done at all. For the NCTR to have been established and able to function in the way that it did is remarkable when viewed in the light of the prevailing circumstances. It provides evidence of the possibility of addressing, at least to some extent, a history of abuse and violence even while those responsible for such crimes retain some form of power and influence. As such, it was a crucial milestone both in the ending of human rights abuses in Chile and in the building of a wider global movement towards accountability.

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171 Letter to President Fox of Mexico from Human Rights Watch 21 August 2001

## Case Study C

# El Salvador

The Commission on the Truth in El Salvador was unusual in a number of ways: it was set up to investigate the alleged crimes of, among others, a government which was still in power; it had only international members; it took evidence in closed proceedings; and it chose to name individuals whom it considered responsible for atrocities which took place during a long and bloody civil war.

Despite its considerable authority and international backing, its clear attributions of accountability to named individuals were undermined by the national parliament, which passed a law immediately following the release of its report granting amnesty to all those involved in the civil war. As a result, no prosecutions were brought against the named individuals.

However, the report's findings did go a considerable way towards clearing out corruption in both the military and the judiciary through the removal of those involved with the commission of crimes, or in the cover-up of crimes committed by others, and it is consequently viewed as having been at least a partial success.

### **1**

#### **Background**

Originally a Spanish colony, the Central American country of El Salvador has been an independent republic for 170 years. Its economy is almost entirely dependent on coffee production, and a large rural population was governed

for most of the 20<sup>th</sup> century by an undemocratic military and landowning oligarchy. The civil war in El Salvador, which lasted from 1980 to 1992, has been characterised as a peasant uprising against the military backed government. The uprising was brutally suppressed by the government, with extrajudicial executions, torture and disappearances becoming commonplace.

The El Salvadoran civil war was fairly typical of 1980s Cold War politics: the conflict pitted the US backed Salvadoran military government against the Farabundo Martí National Liberation Front (FMLN), an umbrella organisation of left-wing insurgency groups backed in turn by Cuba, Nicaragua and the Soviet Union. The end of the Cold War, and the consequent loss of financial and military support for both sides, paved the way for a UN mediated peace agreement.

Peace was negotiated over a three-year period between 1989 and 1992. A number of agreements were negotiated and signed, including the Mexico Agreements, which laid the foundations for the establishment of the Commission of the Truth, and the New York Agreement, which laid the foundation for purging the armed forces. These culminated in the signing of the Chapultepec Peace Agreement in 1992.<sup>172</sup>

At its end, the civil war had lasted 12 years and claimed approximately 75,000 lives from a population of little more than five million.<sup>173</sup> The conflict was characterised by atrocities on both sides, although the majority of violations were carried out by government forces and its agents. The violations themselves were compounded by the inability and unwillingness of the justice system to hold perpetrators accountable, and a widespread belief amongst the population that the judicial system could not be trusted. The Commissioners noted in their report:

[...] the glaring inability of the judicial system either to investigate crimes or to enforce the law, especially when it comes to crimes committed with the direct or indirect support of State institutions.  
[...] The inability of the courts to apply the law to acts of violence committed under the direct or indirect cover of the public authorities

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172 *Chapultepec Peace Agreement*, signed at Chapultepec, Mexico on 16 January 1992

173 T Buerghenthal, *The United National Truth Commission for El Salvador* *Vanderbilt Journal of Transnational Law* October 1994 Volume 27 No. 3, at page 502

is part and parcel of the situation in which those acts took place and is inseparable from them<sup>174</sup>

The deep mistrust of the country's judicial mechanisms and the prevailing culture of impunity were thought to pose significant threats to the brokering of any lasting peace agreement. As such, a series of "confidence building measures" were agreed with the aim of both laying the foundations for a lasting peace and rebuilding a fractured society.<sup>175</sup> Two separate bodies were established: the Commission on the Truth, and the Ad hoc Commission charged with the purging of the armed forces. These were integral parts of a long-awaited settlement that was intended to bring peace to El Salvador and contribute to the rebuilding of its society. They will be examined separately in this chapter.

## 2

### **The Commission on the Truth**

The 1991 Mexico Agreements<sup>176</sup> required the establishment of a Commission on the Truth for El Salvador ("the Commission"), which was formally established on 15 July 1992.

The Mexico Agreements provided that the Commission should be composed of three non-Salvadoran individuals, appointed by the UN Secretary-General after consultation with the parties. The Commissioners designated by the UN Secretary-General and accepted by the Parties were; Belisario Betanur, former President of Colombia; Reinaldo Figueredo, former Foreign Minister of Venezuela; and Thomas Buergenthal, former President of the Inter-American Court of Human Rights. The Commissioners themselves chose President Betanur to act as chairman of the Commission.

The Commissioners were entrusted with the task of:

[...] investigating serious acts of violence that have occurred since 1980 and whose impact on society urgently demands that the public should know the truth.<sup>177</sup>

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174 *From Madness to Hope: the 12 year war in El Salvador: Report of the Commission on the Truth for El Salvador*

175 Buergenthal (*supra* Note 2), at page 503

176 Mexico Agreements signed at Mexico City 27 April 1991

177 *Ibid* at paragraph 2

By way of emphasis, the Chapultepec Agreement highlighted the Commission's role in respect of impunity within the armed forces, underscoring that:

[...] the Parties recognize the need to clarify and put an end to any indication of impunity on the part of officers of the armed forces, particularly in cases where respect for human rights is jeopardised. To that end, the Parties refer this issue to the Commission on the Truth for consideration and resolution.<sup>178</sup>

Following its investigations the Commission was also mandated to make recommendations as to the:

[...] legal, political or administrative measures which can be inferred from the results of the investigation. [...] These] may include measures to prevent the repetition of such acts, and initiatives to promote national reconciliation.<sup>179</sup>

Both the investigations and the recommendations were to be completed within a period of six months from the date of the Commission's establishment, following which it would be dissolved.<sup>180</sup>

The Commission investigated two types of case: a selection of individual cases or acts which:

[...] by their nature, outraged Salvadorian society and/or international opinion;

And a series of cases with similar characteristics which tended to reveal:

[...] a systematic pattern of violence or ill-treatment which, taken together, equally outraged Salvadorian society, especially since their aim was to intimidate certain sectors of that society.<sup>181</sup>

It was a specific requirement of the agreement that the Commission would not "function in the manner of a judicial body".<sup>182</sup> By way of confirmation of its non-judicial status, the Commission's proceedings were to be conducted on "a confidential basis".<sup>183</sup> Furthermore, the Commission had no powers

178 The Chapultepec Peace Agreement Article 5 "The End to Impunity", cited in *From Madness to Hope* (*supra* Note 3) at Part VII

179 Mexico Agreements (*supra* Note 5) at paragraph 3

180 *Ibid* at paragraphs 11 and 12

181 *From Madness to Hope* (*supra* Note 3) Part II A The Mandate

182 Mexico Agreements (*supra* Note 5) at paragraph 5

183 *Ibid* at paragraph 7

either to summon witnesses or seize material, but was instead accorded a wide discretion to “use whatever sources of information it deems useful and reliable”,<sup>184</sup> and to “interview, freely and in private, any individuals, groups or members of organizations or institutions.”<sup>185</sup>

The exercise of this discretion was reliant upon access to relevant material and, although the parties had undertaken to extend to the Commission whatever cooperation it might request,<sup>186</sup> in practice cooperation from both the Salvadoran government and the FMLN proved to be less than satisfactory. The final report of the Commission sets out several instances where its work was hindered or delayed by the Salvadoran government and where the government refused the Commission access to its records. It also cites “partial” responses from the FMLN and other forms of interference with its work.<sup>187</sup>

After a slow start and initial distrust, the response from the public was more forthcoming. An extensive publicity campaign was conducted, explaining the purpose of the Commission and inviting participation under the guarantee of strict confidentiality. The Commission received direct testimony in the capital San Salvador, as well as in three regional offices. By the conclusion of its investigations the Commission had received direct testimony relating to more than 7,000 cases.<sup>188</sup> This testimony was complemented by extensive documentary evidence from both domestic and international sources.

The confidentiality provision was particularly important in the El Salvadoran context due to a continuing climate of fear and the need to provide protection against both the real and perceived danger of reprisals facing those who cooperated with the Commission. It was acknowledged that witnesses had previously refused to give information to other investigatory bodies because their identity would be divulged. In the absence of any witness protection powers, a guarantee of confidentiality was all the Commission could offer.<sup>189</sup> This guarantee of confidentiality was also enjoyed by foreign governments and international bodies who provided reports and other information to the Commission that might otherwise not have been made available.<sup>190</sup>

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184 *Ibid* at paragraph 8a

185 *Ibid* at paragraph 8b

186 *Ibid* at paragraph 11

187 *From Madness to Hope* (*supra* Note 3) at pages 42, 64, 75, 118, 124-125

188 *Ibid* at Annex I

189 *Ibid* Part II C The Mandate – Methodology

190 *Ibid*, at page 17

At the same time, this lack of openness brought with it an immediate and fundamental challenge to the Commission’s credibility. The Commission explains in its report that it was:

[...] aware that accusations made and evidence received in secret run a far greater risk of being considered less trustworthy than those which are subjected to the normal judicial tests for determining the truth and to other related requirements of due process of law. [...]

Accordingly, the Commission felt that it had a special obligation to take all possible steps to ensure the reliability of the evidence it used to arrive at a finding. In cases where it had to identify specific individuals as having committed, ordered or tolerated specific acts of violence, it applied a stricter test of reliability.<sup>191</sup>

The Commission took it upon itself to cross-check and verify all statements as to facts against a large number of sources “whose veracity had already been established” and, as a matter of practice, treated no single source or witness alone as sufficiently reliable to establish the truth on any issue of fact. The Commission then categorised its findings depending upon the evidence available to it as being either founded upon:

1. Overwhelming evidence – conclusive or highly convincing evidence to support the Commission’s finding;
2. Substantial evidence – very solid evidence to support the Commission’s finding;
3. Sufficient evidence – more evidence to support the Commission’s finding than to contradict it.<sup>192</sup>

To put this in terms familiar to criminal lawyers, categories 1 and 2 represent degrees of the standard of proof “beyond reasonable doubt”; category 3 represents proof “on the balance of probabilities”. In all other instances the Commission declared that it was in possession of insufficient material to enable it to come to a conclusion on the matter.

191 *Ibid* Part II C The Mandate – Methodology

192 *Ibid* Part II C The Mandate – Methodology

### 3

#### **Naming names**

Given the absence of due process guarantees to individuals accused by the Commission, the question of whether to name perpetrators was a matter of careful consideration. After all, these were individuals who had been investigated in secret by the Commission, and who had been afforded no opportunity to challenge the evidence upon which the Commission ultimately based its conclusions and recommendations.

In spite of this acknowledged unfairness, the Commissioners concluded that:

[...] not to name names would be to reinforce the very impunity to which the Parties instructed the Commission to put an end. [...] the report is not a judicial or quasi judicial determination as to the rights or obligations of certain individuals under the law. As a result, the Commission is not, in theory, subject to the requirements of due process which normally apply, in proceedings which produce these consequences.”<sup>193</sup>

On this basis the Commission proceeded to name over 40 military officers and 11 members of the FMLN whom it held responsible for ordering, carrying out, or covering up the abuses investigated. It also apportioned institutional responsibility where appropriate.

### 4

#### **Recommendations**

Following the presentation of the conclusions of its investigations, the Commission made a number of both specific and general recommendations. These included:

dismissal from the armed services for those officers named in the report as personally implicated in the perpetration or cover-up of serious acts of violence, or who failed to fulfil their professional obligation to initiate or cooperate in the investigation and punishment of such acts;

.....  
193 *Ibid* Part II C The Mandate – Methodology



dismissal from the civil service for those officials who “covered up serious acts of violence or failed to discharge their responsibilities in the investigation of such acts”;

disqualification from holding public office for a period of not less than 10 years as well as permanent disqualification from any activity related to public security or national defence for all those individuals named in the report as responsible for serious acts of violence; and

judicial reform, including reform of the Supreme Court of Justice, providing for the election of Judges following the resignation of the current members of the Supreme Court which the Commission recommended should occur without delay.

The Commission made further recommendations for structural and institutional reform, including reforms to the armed services and the system of administration of justice, measures for public security, the investigation of illegal groups, the protection of human rights, and the establishment of a national civil police force. It also outlined steps to be taken towards national reconciliation, including material compensation, moral compensation and a forum for truth and reconciliation.<sup>194</sup>

## **4**

### **Prosecutions**

It had been agreed by both parties that the investigations and recommendations of the Commission would not:

[...] prevent the normal investigation of any situation or case, whether or not the Commission has investigated it, nor the application of the relevant legal provisions to any act that is contrary to law.<sup>195</sup>

Yet to the disappointment of many, the Commission stopped short of recommending the prosecution of individuals named, and instead focused upon the continuing inadequacy of the El Salvadoran criminal justice system and the urgent need for judicial reform, noting that:

.....  
<sup>194</sup> *Ibid* Part V Recommendations

<sup>195</sup> Mexico Agreements (*supra* Note 5) at paragraph 14

[...] these considerations confront the Commission with a serious dilemma. The question is not whether the guilty should be punished, but whether justice can be done. Public morality demands that those responsible for the crimes described here be punished. However, El Salvador has no system for the administration of justice which meets the minimum requirements of objectivity and impartiality so that justice can be rendered reliably. This is a part of the country's current reality and overcoming it urgently should be a primary objective for Salvadorian society.<sup>196</sup>

In fact, no prosecutions ever took place, because within days of the publication of the Commission's report, the Salvadoran Legislative Assembly approved legislation granting a "broad, absolute and unconditional amnesty" for "all those who participated [...] in criminal acts which occurred before January 1 1992".<sup>197</sup> When this was challenged in the courts, the Supreme Court ruled that the decision to grant amnesty was a political question that was not subject to judicial review.<sup>198</sup> Consequently, those identified by the Commission as being responsible for acts of violence during the years of the civil war were never tried in El Salvador's courts and those who had already been convicted of such crimes were released from prison.<sup>199</sup>

## 5 The Ad hoc Commission

In addition to the Truth Commission, the New York Agreement had also provided that:

[...] a process of purification of the armed forces is agreed upon, on the basis of a vetting of all personnel serving in them by an Ad hoc Commission.<sup>200</sup>

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196 *From Madness to Hope* (supra Note 3) Part V Recommendations

197 The law did not include crimes carried out with a view to profit, or those related to kidnapping, extortion and drug trafficking. The Law of General Amnesty for the Consolidation of Peace March 1993 referenced in *El Salvador: Accountability and human rights: The report of the United Nations Commission on the truth for El Salvador* Human Rights Watch 10 August 1993 Vol. V Issue No. 7, at page 24 (relying on American Embassy translation of Salvadoran Amnesty Law); accessed at <http://www.hrw.org/reports/pdfs/e/elsalvdr/elsalv938.pdf>

198 Ignacio Ellacuria, S.J. *Otros v. El Salvador* Case 10.488, Report N° 136/99, OEA/Ser.L/V/II.106 Doc. 3 rev. at 608 (1999) paragraph 73; accessed at <http://www1.umn.edu/humanrts/cases/136-99.html> and Constitutional Affairs Chamber of the Supreme Court of Justice of El Salvador 20 May 1993 cited in *El Salvador: Accountability and human rights* (supra Note 25), at page 25

199 Buergethal (supra Note 2), at pages 41-42

200 New York Agreement 25 September 1991

The details of the Ad hoc Commission were left for the “compressed” negotiations.

The Ad hoc Commission was charged with responsibility for purging the armed forces of corrupt officers. Like the Truth Commission, the Ad hoc Commission was also composed of three individuals nominated by the UN Secretary General. However, and in contrast to the Truth Commission, the nominees were of Salvadoran nationality.

Human Rights Watch notes that:

The New York Accord – the final intermediate agreement before the comprehensive peace settlement was signed in January 1992 – indicated that the ad hoc commission’s review of the officer corps would be based on: respect for human rights, professionalism and democratic commitment.<sup>201</sup>

It was provided that after a three-month review, recommendations would be made to the Secretary General and the President for the transfer or dismissal of individual officers. It was agreed that these recommendations would be acted upon within sixty days.

The Commission delivered its report in September 1992. It called for the dismissal or transfer of 103 officers, including both the Minister and Deputy Minister of Defence. However, senior members of the military resisted the dismissal proposals and the government initially took measures against only some of the officers named by the Commission. The UN Secretary General declared that the government’s failure to act upon the Commission’s recommendations was “not in conformity with the Peace Accords”,<sup>202</sup> and a Security Council resolution expressed its concern on the same point.<sup>203</sup> However, it was only after the report of the Commission on the Truth named some of the same officers as being responsible for the “serious acts of violence” it had investigated that the relevant officers were removed. The work of the Commission on the Truth is therefore regarded by many as having far greater weight than that of the Ad hoc Commission, though notice should also be given

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201 *El Salvador: Accountability and human rights* (supra Note 25), at page 9

202 Letter from the United Nations Secretary General to the President of the Security Council 7 January 1993 S/25078 9 January 1993, at pages 2-3

203 Security Council Welcomes El Salvador’s Request to United Nations to Verify March 1994 General Elections UN Security Council Resolution SC/5553 9 February 1993

to the way in which the work of these two independent processes supported one another in the pursuit of a shared goal.

## **6 Assessment**

The Commission on the Truth for El Salvador and the Ad hoc Commission must be considered in the context of previous investigative commissions conducted in Latin America following the dismantling of the military regimes that had dominated the region. Elsewhere, such mechanisms had been established by new civilian governments following the demise of their military predecessors. El Salvador was unique in that its Commissions were established by a regime that not only retained power, but whose members were also to be among those investigated. This in itself is a remarkable feature of the El Salvadoran experience.

In addition, it was the first time that the international community had taken such an active role in an endeavour of this nature. It was the first time since the Nuremberg trials that foreigners, rather than nationals, had investigated past acts of violence at the request of the government, and had been given the power to make binding recommendations.<sup>204</sup>

It was perhaps the involvement of the international community that led to one of the most important features of the Commission for the Truth's operations: a manifestation of independence and refusal to bow to political or military pressure in a country which had been terrorised by both. The most vivid demonstration of this autonomy was the Commission's refusal to capitulate to pressure to change its decision to name those individuals it held responsible for the acts it had investigated. The Commissioners stood firm on this decision despite a series of direct and indirect efforts by both the military and the government to prevent such a step. The vehemence of the objections against the naming of individuals by those most concerned is perhaps some indication of the impact that the naming strategy alone had upon those implicated, even without subsequent prosecutions.

Understandably, some were critical of the Commission for:

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204 Buergethal (*supra* Note 2), at page 505

[...] failing to articulate an important principle: that the Salvadoran government has an obligation, under domestic and international law, to prosecute those responsible for grave abuses.<sup>205</sup>

Others pointed out the inherent lack of due process involved in apportioning responsibility for serious crimes to individuals who had not been afforded the opportunity to challenge, or indeed even to hear, the evidence against them.<sup>206</sup>

At the time of the report it was also noted that the effect of the Commission's investigations might have been to raise false expectations among those who participated that criminal prosecutions would follow.<sup>207</sup> In the wake of the government's blanket amnesty provisions this did not happen.

One member of the Commission, Thomas Buergenthal, argues that the amnesty did not undermine the Commission's work, or even have a serious effect on it. He points out that as the Commission had not recommended the trial of those it named, the amnesty could not be said to violate its recommendations. He also notes, with some sense of achievement, that all military officers named by the Commission in its report were indeed retired from the service within a short time of its publication.<sup>208</sup>

Despite this achievement, in Buergenthal's view, the real impact of the Commission's report was psychological:

My experience on the Truth Commission has convinced me that the most important function such a body can perform is to tell the truth. That may sound obvious and trite but it needs to be said because it has tended to get lost in the discussion about national reconciliation.<sup>209</sup>

By telling the truth with legitimacy and credibility it "put the country on the road to healing the emotional wounds that continued to divide it".<sup>210</sup> In the same vein, Human Rights Watch commented that:

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205 *Ibid*, at page 28

206 Report of the Secretary-General on the United Nations Observer mission in El Salvador, 25 May 1993 S/25812/Add.3, at page 3

207 *El Salvador: Accountability and human rights* (*supra* Note 25), at page 28

208 Buergenthal (*supra* Note 2), at page 538

209 Buergenthal (*supra* Note 2), at page 544

210 *Ibid*, at page 543

[...] one contribution was completely unprecedented: that of giving *official* acknowledgement to the truth, a way of affirming as the report's preamble states, that "all these things happened among us."<sup>211</sup>

In the same vein, Buergethal concludes that:

The efforts of the Truth Commission to get at the truth and the release of its Report had a cathartic impact on the country. Many of the people who came to the Commission to tell what had happened to them or to their relatives and friends had not done so before [...]. Finally, someone listened to them, and there would be a record of what they had endured [...]. One could not listen to them without recognizing that the mere act of telling what had happened was a healing emotional release, and that they were more interested in recounting their story and being heard than in retribution.<sup>212</sup>

On a more practical level, recommendations were made in the report for:

[...] an autonomous body with the necessary legal and administrative power to award appropriate compensation to the victims of violence in the shortest time possible.<sup>213</sup>

However, this fund was never created and there have been no reparations at all for the victims of the atrocities. Further, while the parties had agreed in advance to carry out the Commission's recommendations,<sup>214</sup> the Government's response fell far short of full implementation.

It has however been argued that many of the basic reforms implemented in El Salvador following the conclusion of the peace accords would never have happened without the Commission's recommendations,<sup>215</sup> many of which were implemented through more circuitous routes. After some initial resistance, the named military officers were largely retired from service, rather than dismissed. Although the members of the Supreme Court defied the Commission's recommendation to resign, constitutional reform in 1994 led to elections for a new Supreme Court. Some commentators have stressed

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211 *El Salvador: Accountability and human rights* (supra Note 25), at page 28

212 Buergethal (supra Note 2), at page 543

213 *From Madness to Hope* (supra Note 3), at page 186

214 Mexico Agreements (supra Note 5), at paragraph 10

215 P Hayner *Unspeakable Truths: facing the Challenge of Truth Commissions*, Routledge (2002), at page 166

that the Commission's report was instrumental in ensuring that an entirely new set of judges was elected.<sup>216</sup>

The accountability mechanisms in El Salvador therefore enjoyed considerable success in reaching its aims: the removal of corrupt individuals from positions of power is an important way of limiting impunity. It also proved that there are a number of ways in which alternate forms of accountability can be achieved, even in the absence of prosecutions.

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216 M Popkin, J Spence and G Vickers *Justice delayed: the slow pace of judicial reform in El Salvador* 1994 Washington DC: Washington Office on Latin America/Hemisphere Initiatives; accessed at <http://lanic.utexas.edu/project/hemisphereinitiatives/hemsreports.htm>

## Case Study D

# South Africa

The South African Truth and Reconciliation Commission (TRC) is arguably the most advanced, and certainly the most well-known, non-judicial mechanism to have been set up following widespread human rights violations. The study of this process is therefore crucial to an understanding of non-judicial accountability mechanisms as a whole.

The key element of the work of the TRC was its innovative use of conditional amnesties: protection from prosecution would be granted, but only to those who offered full disclosure and confessions to their crimes. This innovation has been widely praised as a realistic approach to an impossible political dilemma. It has also been equally widely condemned as a violation of the principle of legality, and for allowing hundreds of people to escape punishment for the most serious human rights violations.

There is no denying that the TRC achieved enormous success in providing an accurate record of what had happened under the apartheid regime of South Africa. Every post-conflict accountability process that has been established since has owed, and often acknowledged, a debt to the South African experiment. Nevertheless, it must be recognised that almost no high-ranking officials of the apartheid era applied for amnesty, meaning their perspectives were lost to the historical record, and that most of those who refused to apply for amnesty were never pursued by the courts. Both factors are important when assessing the extent to which the South African TRC can be said to have met its goals and the goals of transitional justice.



# 1

## Background

The TRC was established to deal with crimes committed during the apartheid era. Its temporal jurisdiction began on 1 March 1960, the month of the Sharpeville massacre, which sparked events culminating in South Africa's withdrawal from the Commonwealth and declaration of its status as a Republic. It ended on 10 May 1994, the day on which Nelson Mandela was inaugurated as President.

Apartheid (literally “apartness”) describes a policy of racial segregation inscribed in South African law, and the brutal repression that was used to maintain white supremacy under the government of the National Party (NP). In the words of Professor Kader Asmal, a leading anti-apartheid activist and later government minister, it “elevated racial discrimination to a constitutional principle.”<sup>217</sup> Laws upheld strict racial segregation, enforced by a policy of forced removals. This happened most notoriously during the 1955 eradication of the black suburb of Sophiatown in Johannesburg, which saw the removal of 55,000 black residents to the new township of Soweto and the building in its place of the new white suburb of Triomf (Triumph).

Political opponents and activists were brutally punished, and protests were crushed. Murders and disappearances of those opposed to the apartheid regime were not uncommon. In the 1980s, a state of emergency was declared, ushering in further crackdowns against the political opponents of the regime. People were detained in their thousands, routinely tortured, and many were murdered. Among anti-apartheid supporters there were also further killings and attacks directed against those suspected of supporting the apartheid regime, as well as bombings and other acts of terrorism.

The apartheid regime was widely condemned by the international community and by the 1980s South Africa had become a pariah State. A combination of international pressure, national unrest and economic instability eventually led the NP to agree to negotiations for a transition to democracy.

On 11 February 1990 Nelson Mandela was released from his 27-year incarceration, and negotiations began between the government and the African

<sup>217</sup> K Asmal *Stopping Crimes through Negotiations: the Case of South Africa* Guest Lecture Series of the Office of the Prosecutor, ICC, 14 March 2006, at page 5

National Congress (ANC). Despite continued hostilities and repeated outbreaks of violence, agreement on an Interim Constitution was reached in 2003. Elections were held on 27 April 2004, which saw the ANC won 62.7 % of the national vote.

## 2

### **The design of the TRC**

The TRC had its roots in the 1993 Interim Constitution, which was the result of difficult negotiations between the NP, the ANC, and several other parties. The agreement that a TRC would be established was a political solution to an apparently intractable problem. Liberation movement leaders wanted to prosecute former apartheid leaders, but it was feared that the prospect of any such trials would irreparably damage the peace process. NP leaders, on the other hand, wanted a blanket amnesty, as did the Inkatha Freedom Party (IFP). This was unacceptable to the ANC. As a means of resolving this stalemate, the TRC offered what its Deputy Chairman Alex Boraine called “the third way”. It provided a means of securing a measure of accountability without criminal penalties.<sup>218</sup>

The Constitution claimed to provide:

[...] the secure foundation for the people of South Africa to transcend the divisions and strife of the past [...].<sup>219</sup>

Its epilogue states that:

[...] amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law [...] providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.<sup>220</sup>

In this way, the people of South Africa would “transcend the divisions and strife of the past” and “open a new chapter in the history of [their] country.”<sup>221</sup>

218 See generally A Boraine *Truth and Reconciliation in South Africa: the Third Way*, in R I Rotberg and D Thompson (Eds) *Truth v. Justice* Princeton University Press 2000, at pages 143-4

219 Constitution of the Republic of South Africa Act 200 of 1993, Epilogue National Unity and Reconciliation; accessed at <http://www.info.gov.za/documents/constitution/93cons.htm>

220 *Ibid* Epilogue

221 *Ibid* Epilogue

The TRC was established by the 1995 Promotion of Reconciliation and National Unity Act (“the Act”), in fulfilment of the Interim Constitution’s provisions.<sup>222</sup> By the time the Act was passed, the aims of the process were more broadly articulated as:

[...] to provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the period from 1 March 1960 to the cut-off date contemplated in the Constitution, within or outside the Republic, emanating from the conflicts of the past, and the fate or whereabouts of the victims of such violations; the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past during the said period; affording victims an opportunity to relate the violations they suffered; the taking of measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights; reporting to the Nation about such violations and victims; the making of recommendations aimed at the prevention of the commission of gross violations of human rights [...].<sup>223</sup>

A key aim for the South African TRC was to write the history of apartheid, providing “as complete a picture as possible”, in the hope that this would have a purgative effect and prevent such violations from recurring in the future. It was also an attempt to promote national unity by creating lasting reconciliation between the perpetrators and victims of crimes. The Act quotes the words of the Interim Constitution:

[...] there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu<sup>224</sup> but not for victimization [...].<sup>225</sup>

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222 Promotion of Reconciliation and National Unity Act 1995

223 *Ibid*, Preamble

224 Ubuntu is a notoriously difficult word to translate. “It can be described as African humanism, involving alms-giving, sympathy, care and sensitivity for the needs of others, respect, patience and kindness. Ubuntu takes seriously the view that man is essentially a social being. African ubuntu thinkers formulate their views in terms of “a person is a person through other persons.” Understanding true meaning of Ubuntu is essential in politics *Cape Times* 17 May 2005. The meaning of that concept is discussed in *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paragraphs 224-7; 241-51; 263 and 307-13.

225 Promotion of Reconciliation and National Unity Act (*supra* Note 6) Preamble

Amnesty for the perpetrators was given a central place in this process. As Justice Mahomed, then Deputy President of South Africa Constitutional Court, remarked in a poignant passage from his judgment in the 1996 *AZAPO* case:

The Act seeks to [... encourage] survivors and the dependants of the tortured and the wounded, the maimed and the dead to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and crucially, to help them to discover what did in truth happen to their loved ones, where and under what circumstances it did happen, and who was responsible. That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons to make the disclosures and to reveal the truth which persons in the positions of the applicants so desperately desire.<sup>226</sup>

The provision of amnesty was intended to induce perpetrators to tell the truth about their crimes without fear of prosecution. Crucially however, this provision went further. It provided protection from prosecution only to those who provided full disclosure. Amnesties were made conditional upon a complete and truthful account of the crimes in question. Amnesty was to be granted under the Act in cases where:

(b) the act, omission or offence to which the application relates is an act associated with a political objective committed in the course of the conflicts of the past [...]; and

(c) the applicant has made a full disclosure of all relevant facts [...]<sup>227</sup>

The key therefore to the grant of an amnesty was a full and public confession of crimes. There was no proviso that amnesty could not be granted with regard to crimes of extreme gravity; indeed it was fundamental to the process that the amnesty could be applied to all types of crime. As the Archbishop Tutu

<sup>226</sup> *AZAPO v President of the Republic of South Africa* 1996 (4) SA 671 (CC), at paragraph 17

<sup>227</sup> Promotion of Reconciliation and National Unity Act (*supra* Note 6) Section 20(1)

put it in his foreword to the TRC's final report: "Amnesty is not meant for nice people. It is intended for perpetrators."<sup>228</sup>

When amnesty was granted it therefore covered all types of liability, criminal, civil and vicarious:

No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and no body or organisation or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offence.<sup>229</sup>

The process was also intended to investigate and report on crimes committed by all sides – the actions of the liberation forces were investigated and reported on as thoroughly as those committed by the apartheid regime, including those of the ANC, which had launched an unsuccessful legal challenge to the publication of the part of the Report which contained findings against it.<sup>230</sup>

Reparations were also a part of the process of the TRC, but they were largely incidental. The dominant aims of the process were truth and reconciliation. It was believed that this could only be achieved using the mechanism of amnesties. As the Interim Constitution shows, amnesties were the starting point – they remained the backbone of the process, and this is crucial to understanding both the vision of the creators and later criticisms of the South African process.

### **3**

## **The workings of the TRC**

Under the Act the TRC was to consist of between 11 and 17 Commissioners, appointed by the President in consultation with his Cabinet of National Unity, which included representatives of all the main parties.<sup>231</sup> There was no stipulation as to what sort of person these Commissioners should be, save that they should be "fit and proper persons who are impartial and who do not

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228 Truth and Reconciliation Commission of South Africa Report 29 October 1998, Volume I Chapter 1 paragraph 49; accessed at <http://www.doj.gov.za/trc/report/>

229 Promotion of Reconciliation and National Unity Act (*supra* Note 6) Section 20(7)(a)

230 The African National Congress v The Truth and Reconciliation Commission Case No. 1480/98 (Cape of Good Hope Provincial Division).

231 Promotion of Reconciliation and National Unity Act (*supra* Note 6) Section 7(1)

have a high political profile<sup>232</sup>; and that no more than two should be non-South African nationals.<sup>232</sup>

The TRC consisted of three committees:

- *The Human Rights Violations Committee (HRVC)* investigated human rights abuses, identified victims and perpetrators, and referred victims to the Reparation and Rehabilitation Committee.
- *The Reparation and Rehabilitation Committee (RRC)* provided support to victims and made proposals for rehabilitation and reparations through a President's Fund.
- *The Amnesty Committee (AC)* considered applications for amnesty made by perpetrators, and had the power to grant amnesty from prosecution.

The Anglican Archbishop Desmond Tutu was chosen to chair the TRC. Under his leadership it held hearings between April 1996 and 31 July 1998. It received testimony from more than 21,000 victims of the apartheid regime, and its 3,500 page Report was published on 28 October 1998.<sup>233</sup> The Report consisted of 5 Chapters, with a further section published on 21 March 2003 as Chapter 6 of the final Report.<sup>234</sup>

### **(a) The Human Rights Violations Committee**

The HRVC was mandated:

to enquire into systematic patterns of abuse; to attempt to identify motives and perspectives; to establish the identity of individual and institutional perpetrators; to find whether violations were the result of deliberate planning on the part of the state or liberation movements, and to designate accountability, political or otherwise, for gross human rights violations.<sup>235</sup>

To this end it was responsible for gathering victim statements, holding hearings and making findings based on this information.<sup>236</sup> It was required to make

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232 *Ibid* Chapter 2 7(2)(b)

233 *Truth and Reconciliation Commission of South Africa Report* 29 October 1998 (*supra* Note 12)

234 *Truth and Reconciliation Commission of South Africa Report* 21 March 2003 Volume 6 Section 4 Chapter 3, at paragraph 1; accessed at <http://www.info.gov.za/otherdocs/2003/trc/>

235 *Ibid* Volume 6 Section 4 Chapter 3, at paragraph 1

236 Promotion of Reconciliation and National Unity Act (*supra* Note 6) Section 14

findings as to whether those giving statements were victims of gross human rights violations, and the standard of proof employed was the civil one based on the balance of probabilities. If it made a positive finding, the relevant victim would be referred to the RRC. During the course of its mandate it collected 21,519 witness statements detailing more than 30,384 violations, and made over 15,000 findings.<sup>237</sup>

## **(b) The Reparation and Rehabilitation Committee**

In the 1998 Report of the TRC the RRC provided recommendations to the President.<sup>238</sup> These were summarised in the 2003 Report as being based on the following internationally accepted principles:

Redress: the right to fair and adequate compensation;

Restitution: the right to the restoration, where possible, of the situation existing prior to the violation;

Rehabilitation: the right to medical and psychological care, as well as such other services and/or interventions at both individual and community level that would facilitate full rehabilitation;

Restoration of dignity: the right of the individual/community to an acknowledgment of the violation committed and the right to a sense of worth, and

Reassurance of non-repetition: the right to a guarantee, by means of appropriate legislative and/or institutional intervention and reform, that the violation will not be repeated.<sup>239</sup>

The RRC was responsible for acting on the findings made by the HRVC. Its mandate was therefore not to consider evidence, but to make recommendations on how reparation and reconciliation should be achieved, and to organise the delivery of the measures that were adopted as a result of its recommendations.

237 *Truth and Reconciliation Commission of South Africa Report 21 March 2003 (supra note 19) Volume 6 Section 4 Chapter 3, at paragraph 4*

238 *Truth and Reconciliation Commission of South Africa Report 29 October 1998 (supra Note 12) Volume 5 Chapter 5*

239 *Truth and Reconciliation Commission of South Africa Report 21 March 2003 (supra note 19) Volume 6 Section 2 Chapter 1, at paragraph 8*

### (c) The Amnesty Committee

Although the work of the TRC was suspended on 29 October 1998, the Amnesty Committee was authorised to continue until it had completed its outstanding work, which it did at the end of May 2001.

All members of the AC, which was initially chaired by Judge Hassen Mall and later Judge Andrew Wilson, had qualifications in law. The AC had 5 members to begin with, but due to the volume of its work, this number was increased, and by the end of its mandate it had 19 members. It received more than 7,000 applications for amnesty, relating to more than 14,000 different incidents.

Applicants were required to apply in writing giving details of their circumstances and details of the acts for which they requested amnesty. After investigation by the AC, a public hearing would take place, presented by lawyers who were known neutrally as “leaders of evidence”. In the event, hearings were highly legalistic and closely resembled hearings in a court of law. Applicants were legally represented, as were victims. Applicants, witnesses and victims testified under oath, and cross-examination was allowed at the Committee’s discretion. Finally, a decision would be delivered, generally at a later stage.<sup>240</sup>

The AC was based in Cape Town, but would sit in different locations so that victims and members of the public local to the incidents in question could attend. At times, up to four different panels of the Committee sat simultaneously at different locations. The Committee was only obliged to hold a public hearing in cases where there had been a “gross violation” of human rights.<sup>241</sup> The majority of the applications (5,489 of 7,115) were therefore dealt with in chambers.

5,392 people were refused amnesty, and about 1,200 were granted amnesty after public hearings. As these statistics show, amnesty was not easily granted. Most refusals of amnesty were made on the basis that the crime in question was not politically motivated, but a belief in the applicant’s honesty was also important. The decision in the case of *Snyman and Others*, the policemen who killed anti-apartheid activist Steve Biko, illustrates this. The policemen gave accounts to the AC of a struggle with Biko while he was in police custody leading, it was claimed, to his accidental death. The AC found:

240 For details see *Truth and Reconciliation Commission of South Africa Report* 21 March 2003 (*supra* note 19) Volume 6 Section 1 Chapter 2

241 Promotion of Reconciliation and National Unity Act (*supra* Note 6) Chapter 4 Section 19 (3)(b)(iii) and (iv)



In our view this application can be decided simply on the version of the Applicants who must satisfy the Committee that their applications comply with the requirements of the Act. On this version Biko's head was accidentally knocked in an attempt to restrain him after he attacked Siebert. This was the sole objective sought to be achieved by the Applicants. There was clearly no political objective being pursued in restraining Biko. None of the Applicants alleged that they were actuated by a political motive in participating in the scuffle with Biko.

[...]

In any event, we are not satisfied that the Applicants have made a full disclosure as further required by the Act. Applicants' version as to the cause of the scuffle and the manner in which Biko sustained the fatal head injury is so improbable and contrary that it has to be rejected as false. Moreover, none of the Applicants has impressed us as a credible witness. They have clearly conspired to conceal the truth of what led to the tragic death of Biko soon after the incident and have persisted in this attitude before us.<sup>242</sup>

The application for amnesty was therefore dismissed on the basis that the applicants had failed to make full disclosure as required by the Act.

However, hundreds of serious criminals were granted amnesty. In 1997 Dirk Coetzee, co-founder and commander of the covert South African Police unit based at Vlakplaas, sought amnesty in respect of twenty three incidents, of which fourteen were crimes or acts involving the gross violation of human rights. These included the brutal (and planned) murder of Griffiths Mxenge, who was intercepted in his car, dragged from it and stabbed to death:

The stabbing continued until he was dead. He had been disembowelled; his throat had been cut and his ears had been practically cut off. His body was found to have 45 lacerations and stab wounds.<sup>243</sup>

Coetzee and two others had been tried and convicted of this offence. They were granted amnesty and it was accordingly found not "necessary for the

242 Amnesty Committee Decision AC/99/0020 in the case of Harold Snyman and 3 others; accessed at [http://www.doj.gov.za/trc/decisions/1999/99\\_snyman.html](http://www.doj.gov.za/trc/decisions/1999/99_snyman.html)

243 Amnesty Committee Decision AC/97/0041 in the case of Dirk Coetzee and 2 others; accessed at [http://www.doj.gov.za/trc/decisions/1997/970805\\_coetzee%20tshikalange%20nofomela.htm](http://www.doj.gov.za/trc/decisions/1997/970805_coetzee%20tshikalange%20nofomela.htm)

Trial Court to proceed with the question of sentence.” He was also granted amnesty for all other incidents.

Eight thousand cases were forwarded to the Director of Public Prosecutions for further investigation, but high profile prosecutions for crimes committed under the apartheid regime were exceptionally rare. Although few high-ranking officials of the apartheid era ever applied for amnesty, the courts never pursued most of those who refused to apply.

Even when the courts did prosecute, convictions were not easy to secure. Dr. Wouter Basson, head of the country’s secret chemical and biological warfare project, Project Coast, was accused of producing chemical weapons for use against anti-apartheid activists. He refused to apply for amnesty and was tried in 1999 on charges including 229 murders. After 30 months of trial, the prosecution collapsed.

It is not anticipated that prosecutions will increase: in January 2006 the National Prosecuting Authority (NPA) issued new guidelines for the prosecutions of alleged criminals of the apartheid era. The guidelines provided that people who had committed crimes arising out of conflicts of the past could enter into “agreements” with the prosecuting authority. Criteria considered by the NPA director, who has wide discretion, would include criteria used by the TRC, such as whether an act was committed with a political motive and whether a person had made full disclosure. This was widely criticised as being an extension of the amnesty policy of the TRC, mistakenly justified perhaps by the perceived successes of the TRC, and a likely blow to the hope of further prosecution of leading figures.<sup>244</sup>

The August 2007 conviction of former Law and Order Minister Adrian Vlok and Police Commissioner General Johann Van der Merwe for their part in the attempted murder of the Reverend Frank Chikane was therefore seen as a significant event. It is interesting to note that it was conducted in a spirit of reconciliation rather than retribution. In one account of the hearing:

After receiving his [10 year suspended] sentence, a visibly relieved Vlok walked over to shake Chikane’s hand. When asked whether he had not felt uncomfortable being in court with Chikane, Vlok looked the

244 S Benton *New Policy on Apartheid Crimes* 18 January 2006; accessed at [http://www.southafrica.info/services/rights/trc\\_prosecutions180106.htm](http://www.southafrica.info/services/rights/trc_prosecutions180106.htm)

reporter in the eye and replied. “He’s my brother.” Chikane did not disagree.<sup>245</sup>

## 4 Assessment

The work of the TRC in South Africa must, by any standards, be considered a remarkable achievement. Judge Goldstone writes:

One only has to imagine what South Africa would be today but for the Truth and Reconciliation Commission in order to appreciate what it has achieved. Few South Africans have been untouched by it. All sectors of society have been forced to look at their own participation in apartheid – the business community, the legal, medical and university communities. A substantial number of white South Africans, all of whom have willingly or unwillingly benefitted from this evil system, have experienced regret or shame or embarrassment.<sup>246</sup>

In terms of documenting the truth of the apartheid regime, the TRC was enormously successful. Not only did it document the roles individuals played in its crimes; it also held hearings into the roles of the professions and other institutions that have played in upholding the system of apartheid, including the media, the medical profession, business, political parties, churches and the judiciary. It created a picture of a criminal regime that permeated all levels of society, from the highest government officials to each and every person who voted for it in whites-only polls.

In terms of providing recompense to the victims of apartheid, the 2003 Report reflects a considerable degree of frustration on behalf of the Committee that its recommendations had by and large not been acted upon. Although it had been able to make interim reparation payments to some victims, the carefully balanced process recommended by the Committee whereby financial payouts were only a part of the overall process of reparation and reconciliation had essentially not been implemented.<sup>247</sup>

245 P Commy South Africa “Tell the truth; Tell Everything”; accessed at [%3B+As+apartheid+South...+a0169826662](http://www.thefreelibrary.com/South+Africa:+tell+the+truth,+tell+everything)

246 R Goldstone, in M Minow *Between Vengeance and Forgiveness*, Beacon (1998), Foreword

247 Truth and Reconciliation Commission of South Africa Report 21 March 2003 (*supra* note 19) Volume 6 Section 2, Chapters 7 and 8

The 2006-2007 Report of the President's Fund, set up to administer compensation payments, reports better results. It states:

As at the end of the financial year under review, 15 610 (93%) of the 16 837 applicants for reparation approved by the TRC had been paid the once-off individual grant. There are 1 227 beneficiaries still to be paid, of which 610 are still being traced by the regional structures of the Government Communication and Information System (GCIS). Some 260 have been traced but have not yet been paid, due to them not having supplied the necessary regulatory requirements, while 357 applicants who had received interim reparations died before the payment of final reparation could be made.<sup>248</sup>

The system of granting amnesties was considered by many to have been highly successful based on its own objectives: it encouraged thousands of perpetrators to confess to their crimes and therefore provided a significant contribution (namely the perpetrator's perspective) to the task of writing the true history of apartheid.

However, the same provisions have also been widely criticised for leaving the perpetrators of crimes unpunished, and the victims without redress. In addition, the only people ever prosecuted were of relatively low-rank – those higher up the chains of command escaped accountability altogether.

The constitutionality of the amnesty provisions was in fact challenged in the Cape High Court on 6 May 1996 by the Azanian Peoples Organisation and family members of noted victims.<sup>249</sup> They argued that amnesties, or alternatively, the fact that they had such broad scope, violated their right under Section 22 of the Interim Constitution to have justiciable disputes settled in a court of law. This argument was rejected by the Court, and also by the Constitutional Court, to whom the petitioners appealed.<sup>250</sup> The Constitutional Court was sympathetic to the position of the Appellants:

Every decent human being must feel grave discomfort in living with a consequence which might allow the perpetrators of evil acts to walk

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248 President's Fund Annual Report 2006-2007, at page 4

249 AZAPO and others v TRC 1996 (4) SA 562 (C)

250 AZAPO and others v President of the Republic of South Africa and others 1996 (4) SA 671 (CC)

the streets of this land with impunity, protected in their freedom by an amnesty immune from constitutional attack [...].<sup>251</sup>

However, it found that amnesty was specifically provided for in the Interim Constitution:

[...] the epilogue to the Constitution authorised and contemplated an “amnesty” in its most comprehensive and generous meaning so as to enhance and optimise the prospects of facilitating the constitutional journey from the shame of the past to the promise of the future.

Parliament was, therefore, entitled to enact the Act in the terms which it did.<sup>252</sup>

This decision to pursue truth through the mechanism of amnesty must be seen in the context of the South African situation: the culture of secrecy which existed during the years of apartheid meant that prosecutions would, in the majority of cases, be difficult if not impossible. The collapse of the case against Dr. Wouter Basson is illustrative of this difficulty. As the Constitutional Court observed, if amnesties were not granted, this would serve only:

[...] to keep intact the abstract right to such a prosecution for particular persons without the evidence to sustain the prosecution successfully [...].<sup>253</sup>

It must also be remembered that in the view of many of those who participated in the negotiations that led to the setting up of the TRC, there was no real choice. The pursuit of trials against the architects of the apartheid regime would have led to reprisals, which would have made democratic elections impossible and broken the fragile peace. To those who complained about the lack of prosecutions, Judge Albie Sachs responded:

Prosecution and sending people to jail is not a principle, it is a mechanism for accountability. Principles and objectives are much broader. They create a sense of responsibility, of acknowledgement, of preventing these things from happening again in the future, of installing the rule of law.<sup>254</sup>

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251 *Ibid*, at paragraph 17

252 *Ibid*, at paragraph 50

253 *Ibid*, at paragraph 18

254 A Sachs *Four Sayings and a Denouement* in C Villa-Vicencio and E Dostxader (Eds) *The Provocations of Amnesty: Memory, Justice and Impunity* David Philip Publishers (2003), at page 19

In any event:

Most amnesties resulted from prosecutions. If it were not for the credible threat of prosecutions, few would have applied for amnesty. It is inconceivable that Jeff Benzien would ever have said “I put a wet bag over the head of Yengeni”, if there was no threat of prosecution. Who would have come forward and said “We burnt the bodies and threw them in that ditch”? Who would have come forward to point out the graves where some people’s bodies have been recovered, or acknowledged having put bullets through their heads, if there wasn’t a credible threat of prosecution?<sup>255</sup>

Professor Asmal is of a similar view, observing that far from amnesty being opposed to personal accountability, the truth-telling that formed the basis of amnesty was itself a form of personal accountability.

[...] our amnesty process, while foreclosing criminal prosecution, retained personal accountability. Indeed, personal accountability was central to the success of the amnesty application.<sup>256</sup>

[...]

The TRC shifted accountability’s centre of gravity away from retributive justice, making it instead a pillar, alongside acknowledgement of apartheid’s criminality and suffering, of our national effort to restore the pride and dignity of the nation. Reconciliation through truth.<sup>257</sup>

In Asmal’s view, prosecutions would not have satisfied the much broader aims stated in the Epilogue to the Interim Constitution:

It is less important to me that P.W. Botha be convicted of crimes against humanity than to see his ideological followers stalled in their quest to perpetuate his socio-economic legacies.<sup>258</sup>

In any event, as the TRC pointed out in its Report, there are social penalties attached to the process even if there are not criminal ones, and these may be severe.

.....  
255 *Ibid*, at pages 19-20

256 Asmal (*supra* Note 1), at page 8, accessed at <http://www.icc-cpi.int/library/organs/otp/Asmal.pdf>

257 *Ibid* at page 17

258 *Ibid* at page 12

[...] the application is dealt with in a public hearing. The applicant must therefore make his admissions in the full glare of publicity. Let us imagine what this means. Often this is the first time that an applicant's family and community learn that an apparently decent man was, for instance, a callous torturer or a member of a ruthless death squad that assassinated many opponents of the previous regime. There is, therefore, a price to be paid. Public disclosure results in public shaming [...].<sup>259</sup>

Other countries have seldom followed the South African example of exchanging amnesties for truth-telling. Where amnesties have been granted, often using the South African "model" as precedent and justification, it has almost invariably been abused by the import of amnesties without any of the conditions imposed by the South African process, in situations where the same conditions do not subsist, and without any consideration of the consequences that might follow.

When considering the new determination to end impunity, the South African example should give pause for thought. In addition to the now accepted illegality of amnesties for serious crimes, a real and lasting criticism of the TRC's amnesty policy is that it was not backed up by a proper programme of prosecution of those who failed to apply for, or did not receive, amnesty. This shortcoming allowed countless perpetrators of serious crimes to escape accountability altogether.

What the South African experience demonstrates most clearly is therefore perhaps that although low-ranking perpetrators might be persuaded to partake in an accountability mechanism in exchange for amnesties, the same does not hold true of those higher up the chain of command. A transitional justice process must therefore think carefully about its aims before seeking to imitate the South African process, and in particular consider what form of perpetrator involvement it needs to achieve its objectives. Given the illegality of granting amnesties for serious crimes, and their limitations as a means of engaging senior perpetrators, other innovative means of prosecutorial discretion might facilitate the same positive results achieved by the South African TRC, without falling foul of the dangers of amnesties.

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<sup>259</sup> *Truth and Reconciliation Commission of South Africa Report* 29 October 1998 (*supra* Note 12) Volume 1 Chapter 1 paragraph 35

# Sierra Leone

The Lomé Peace Agreement of 1999 granted a general and blanket amnesty to all combatants of the Sierra Leonean conflict up to 7 July 1999 – the date of signature of the agreement. This amnesty was not sufficient to protect those who bore the greatest responsibility for serious violations of international criminal law from prosecution before the Special Court for Sierra Leone (SCSL). However, the thirteen people indicted by the SCSL are the only perpetrators of the many atrocities committed during this conflict to have been called to account and, of those, only ten have actually stood trial. No attempt has been made in domestic courts to challenge the amnesty, even though it has clearly been held invalid where crimes under international law are concerned.

The other main attempt at providing accountability was through the Truth and Reconciliation Commission (TRC), which was also a part of the Lomé Agreement. In unveiling the TRC's Report, its Chairman expressed the hope that:

Through attributing responsibility for the different causes of the conflict, and the many violations of human rights committed throughout it, we create accountability and state unequivocally that we reject impunity.<sup>260</sup>

In the long-run, however, it seems that, except for those who found themselves on trial before the SCSL, impunity was exactly what the perpetrators of over a decade of atrocities were accorded.

.....  
260 Bishop Joseph Humper



# 1

## Background

The West African country of Sierra Leone is bounded by Liberia and Guinea to the east, and the Atlantic Ocean to the west. This desperately poor country gained independence from the United Kingdom in 1961, and in 1971 declared itself a republic. The constitution of 1977 made this new republic a one-party State governed by the All Peoples' Congress (APC). In July 1991, a new constitution purported to restore multi-party government.

The same year the Revolutionary United Front (RUF), led by Foday Sankoh, entered Sierra Leone from neighbouring Liberia. He was supported by Charles Taylor, later President of Liberia, who received in return political advantage from the instability in neighbouring Sierra Leone, as well as large quantities of Sierra Leonean diamonds. Over the course of a spectacularly brutal war with the RUF and the Armed Forces Revolutionary Council (AFRC) on the one side, and successive government forces, including the government aligned Civil Defence Force (CDF), on the other, the RUF began to establish control over an increasingly large territory.

This war was characterised by the widespread forced recruitment and brutalisation of child soldiers, and terror tactics including the amputation of limbs with machetes and a variety of degrading, humiliating and cruel treatments. International intervention brought about the Lomé Peace Agreement in July 1999. The RUF, however, swiftly reneged on its terms, and British and other foreign troops were deployed in an effort to protect the country. The war was not officially declared over until January 2002.

During the course of the war about 50,000 people were killed, and more than 2 million – a third of the total population – were forcibly displaced, with many becoming refugees in neighbouring countries.<sup>261</sup>

In a country this ravaged by conflict, it was clear that accountability for the countless atrocities that had taken place could only be possible with international assistance. This was formally requested by then President Kabbah in June 2000. An ad hoc tribunal established by the Security Council was considered, but ultimately rejected on financial grounds. A Security Council Resolution of

<sup>261</sup> For more information, see L A Smith, C Gambette T Longley, *Conflict Mapping in Sierra Leone: Violations of International Humanitarian Law from 1991 to 2002*, NPWJ's report on the Sierra Leone conflict, available from <http://www.specialcourt.org/SLMission/CMFullReport.html>

14 August 2000 requested instead that the UN Secretary General negotiate an agreement with the Government of Sierra Leone so as to create an independent Special Court for Sierra Leone (SCSL). As a result of these negotiations, the Agreement establishing the SCSL, to which its Statute was annexed, was concluded in January 2002. It was mandated to try those who bear the greatest responsibility for crimes under international law, as specified in the Statute, committed since 30 November 1996, as well as selected violations of Sierra Leonean law. It indicted 13 people; three have since died and one remains at large. Trials of eight accused have taken place in Freetown and are completed or nearing completion. The trial of former Liberian President Charles Taylor began in The Hague in June 2007.

## **2**

### **Amnesty**

The Peace Agreement signed in Lomé, the capital of Togo, by Foday Sankoh and President Kabbah, as well as members of ECOWAS, including President Charles Taylor, granted the RUF a role in a government of national unity and gave Foday Sankoh the status of Vice-President of Sierra Leone.<sup>262</sup> It specifically granted a personal amnesty and pardon to Sankoh, as well as to all other combatants:

In order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon.

After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement.

To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organisations, since

<sup>262</sup> Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Lomé 7 July 1999 Article V

March 1991, up to the time of the signing of the present Agreement. In addition, legislative and other measures necessary to guarantee immunity to former combatants, exiles and other persons, currently outside the country for reasons related to the armed conflict shall be adopted ensuring the full exercise of their civil and political rights, with a view to their reintegration within a framework of full legality.<sup>263</sup>

This article was highly controversial; the UN Representative, Francis Okelo, who signed the agreement, was instructed to add a disclaimer to the effect that the UN would not recognise amnesty in respect of genocide, crimes against humanity, war crimes or other violations of international humanitarian law.<sup>264</sup>

The UN Secretary General has stated in this context that:

[...] the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.<sup>265</sup>

The Statute of the SCSL specifically states that amnesty is not a bar to prosecution of crimes under international law.<sup>266</sup> The SCSL Appeals Chamber has ruled:

A State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty. It is for this reason unrealistic to regard as universally effective the grant of amnesty by a State in regard to grave international crimes in which there exists universal jurisdiction. A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember.<sup>267</sup>

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263 *Ibid* Article IX

264 Although the fact that the SRSR was instructed to append a disclaimer to this effect to the Agreement is asserted by the UN Secretary General *Report of the Secretary General on the Establishment of a Special Court for Sierra Leone* 4 October 2000, UN Doc S/2000/915, at paragraph 23, no disclaimer is appended to the agreement in its printed text, which has led to it being questioned in cases before the SCSL.

265 Report of the Secretary General on the Establishment of a Special Court for Sierra Leone (*supra* Note 5), at paragraph 22

266 Statute of the Special Court for Sierra Leone, 16 January 2002 Article 10

267 *Prosecutor against Morris Kallon, Brima Bazzy Kamara* (Case No.SCSL-2004-15-PT, Case No.SCSL-2004-16-PT) Decision on Challenge to Jurisdiction: Lomé Accord Amnesty 13 March 2004 at paragraph 67

### 3

## The Truth and Reconciliation Commission

The Agreement also provides the foundation of a Truth and Reconciliation Commission (TRC). It states:

A Truth and Reconciliation Commission shall be established to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, get a clear picture of the past in order to facilitate genuine healing and reconciliation.

In the spirit of national reconciliation, the Commission shall deal with the question of human rights violations since the beginning of the Sierra Leonean conflict in 1991.

This Commission shall, among other things, recommend measures to be taken for the rehabilitation of victims of human rights violations.

Further details were provided in the Truth and Reconciliation Commission Act of 2000 (“the Act”). Under the Act, the TRC’s mandate is:

[...] to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the Conflict in 1991 to the signing of the Lomé Peace Agreement; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.<sup>268</sup>

While the SCSL was charged with trying those who bore the greatest responsibility for serious violations of international humanitarian law, there was no mechanism for dealing with the thousands of other offenders. For these, the TRC was all that stood between accountability and impunity.

The TRC’s temporal jurisdiction, from January 1991 to July 1999, is broader than that of the SCSL, which is limited to the period after 30 November 1996. The TRC was charged with identifying the “parties responsible”<sup>269</sup> for the conflict, and was also required to report on the antecedents of the conflict and

<sup>268</sup> Truth and Reconciliation Commission Act, 2000 February 2000, section 6(1)

<sup>269</sup> *Ibid*, section 7(1)

address issues of impunity, reconciliation, and the needs of victims. It has therefore inquired into matters both before and after its stated time-frame, as has the SCSL for contextual reasons.

The cost of the TRC was initially estimated at \$10 million, with money provided principally by international donors. However, there was little donor response: contributions made amounted to less than \$4 million. One Commissioner writes:

Throughout its operation the TRC was plagued with financial difficulties. It lacked adequate resources to ensure the necessary professional staff for research and investigation. This was a saga of missed opportunities, due, in large part, to the failure of the international community to put its money where its mouth was.<sup>270</sup>

Under the Act, the TRC had 7 members, of whom 4 were Sierra Leonean and 3 were non-nationals. They were appointed by the President after selection through a consultative process: national nominees were selected by a panel comprising representatives of religious organisations, political parties and civil society groups; the final recommendations were required to take into account gender and regional representation and to recommend a Chair. Non-national nominees were chosen by the UN High Commissioner for Human Rights and the SRSR.<sup>271</sup>

Members were required to be:

persons of integrity and credibility who would be impartial in the performance of their functions under this Act and who would enjoy the confidence generally of the people of Sierra Leone; and

persons with high standing or competence as lawyers, social scientists, religious leaders, psychologists and in other professions or disciplines relevant to the functions of the Commission.

The Chairman was the widely respected Bishop Joseph Humper of the United Methodist Church. The TRC was given powers of search and seizure, subpoena, the power to take statements under oath, to request information from other

270 W Schabas *Alternative Accountability Mechanisms: Sierra Leone*, in C Romano, A Nollkamper and J Kleffner (eds) *Internationalised Criminal Courts* Oxford University Press (2004), at page 159

271 Truth and Reconciliation Commission Act 2000 (*supra* Note 9) section 3 and Schedule

countries, and to request the police to assist it in the exercise of its powers.<sup>272</sup> The TRC was set up around the same time as the SCSL, in the summer of 2002, and began its formal activities in December 2002.

Between December 2002 and March 2003 it took statements from over 6,000 victims and perpetrators. Public hearings followed throughout the country between March and August 2003. Representatives travelled to each of the 12 districts, with each district hearing lasting for a week, with 4 days of public hearings and 1 day of closed hearings. Additional hearings were held in Freetown. The TRC handed its final Report to the President on 5 October 2004, before trials at the SCSL had got under way, but after the majority of indictees had been arrested and transferred to the custody of the SCSL.

## 4

### **Relationship between the TRC and the Special Court**

There is no mention in the Act of the relationship between the TRC and the SCSL, or indeed of the relationship between the TRC and any prosecuting authority. The Statute of the SCSL in turn makes little mention of the TRC, although it does state that in the case of juvenile offenders:

[...] where appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability.<sup>273</sup>

It was anticipated at an early stage that there would be a need for an agreement between the TRC and the SCSL formalising their relationship. In his report on the establishment of the SCSL, the Secretary General stated:

[...] relationship and cooperation arrangements would be required between the Prosecutor and the National Truth and Reconciliation Commission, including the use of the Commission as an alternative to prosecution, and the prosecution of juveniles, in particular.<sup>274</sup>

In the early days there was much talk of a relationship agreement, which would be similar to the MOU signed by the CAVR and the Office of the General Prosecutor in East Timor.<sup>275</sup> Indeed, during the Planning Mission for the Special

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272 *Ibid*, section 8

273 Statute of the Special Court for Sierra Leone (*supra* Note 7) Article 15(5)

274 Report of the Secretary General on the Establishment of a Special Court for Sierra Leone (*supra* Note 5), at paragraph 8

275 See Chapter on East Timor

Court in 2002, the Sierra Leone Government had specifically recommended the early conclusion of an agreement establishing a formal relationship and co-operative arrangements between the Prosecutor of the Special Court and the TRC, stressing that such an agreement had to be concluded by the two institutions themselves.<sup>276</sup> However, no agreement ever materialised. One TRC member writes:

[...] when the two bodies began to work, neither showed any interest in a relationship agreement. The Prosecutor, David Crane, made several public declarations indicating that he had no interest in obtaining information in the possession of the TRC, and he certainly did not ever offer to share information in his possession in the other direction. All the talk, then, about a “relationship agreement” was essentially ignored by the two bodies.<sup>277</sup>

It is scarcely surprising that the Prosecutor was not interested in obtaining information from the TRC. The relatively tiny budget of the TRC when compared to the Prosecutor’s own budget meant that it was unlikely that the TRC would gather evidence unavailable to the Prosecutor. It is perhaps more surprising that the Prosecutor had no interest in formulating a policy with regard to testimony given before the TRC, which, if it came from a witness in an SCSL trial, might well be of importance to a case.

No agreement was ever reached as to the status of evidence given before the TRC. The TRC was permitted to take statements in confidence and was not required to disclose information given to it to the national prosecuting authorities,<sup>278</sup> although it would have been required to provide that information to the SCSL if the Court had so ordered.<sup>279</sup> In practice, but on thin legal grounds, the TRC regularly assured people who gave evidence before it that their statements would not be made available to the SCSL. In the event, witnesses were mostly victims rather than perpetrators. It may be that perpetrators stayed away from the TRC precisely for fear that their statements to the TRC would be used against them at the SCSL, but with an amnesty already granted, and given the widely-disseminated statements by the SCSL Prosecutor that he would

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276 Office of the Attorney-General and Ministry of Justice Special Court Task Force, Briefing Paper on *Relationship between the Special Court and the Truth and Reconciliation Commission*, 7 January 2002, available from [http://www.specialcourt.org/documents/PlanningMission/BriefingPapers/TRC\\_SpCt.html](http://www.specialcourt.org/documents/PlanningMission/BriefingPapers/TRC_SpCt.html)

277 Schabas (*supra* Note 11), at page 166

278 Truth and Reconciliation Commission Act, 2000, (*supra* Note 7) section 7(2)

279 Special Court Agreement, 2002 (Ratification) Act 2002, section 21(2)

not use information provided to the TRC, it is perhaps more likely that there was simply no reason for perpetrators to participate at all.

Former TRC Commissioner Professor Schabas thinks that the belief that witnesses would not wish to give self-incriminating evidence to the TRC without protection was misplaced. He cites the fact that Hinga Norman and others who were on trial at the SCSL requested the opportunity to testify in public before the TRC about what had happened. This request was acceded to by the TRC, but strongly opposed by the Prosecutor and the Trial Judges. It was eventually granted in part by the President of the SCSL, provided evidence was not given in public. In the end, neither Hinga Norman nor any other defendant testified before the TRC.

## **5 Assessment**

The TRC was concerned that its work should be publicised and disseminated as widely as possible in Sierra Leone. Public hearings were considered essential. In a largely illiterate society, public hearings are more accessible and comprehensible to the public at large than a lengthy written report. Holding hearings in the regions was therefore additionally advantageous in that it was an official, public recognition of the extensive suffering endured in areas outside Freetown.<sup>280</sup>

In Freetown, hearings were aired live on radio, and a half-hour summary was presented on television each night. The importance of reaching out to younger Sierra Leoneans, many of whom were brutally affected by the conflict, was also recognised. When published, the Report came with a version for senior schools and a version for younger children, both prepared with the support of UNICEF.

The TRC gathered a large amount of evidence in its relatively short lifespan. It concluded that:

[...] years of bad governance, endemic corruption and the denial of basic human rights that created the deplorable conditions that made conflict inevitable. [...] By 1991, Sierra Leone was a deeply divided

280 B K Dougherty *Searching for Answers: Sierra Leone's Truth and Reconciliation Commission*, African Studies Quarterly Volume 8, Issue 1, Fall 2004 (unpaginated); accessed at <http://web.africa.ufl.edu/asq/v8/v8i1a3.htm>



society and full of the potential for violence. It required only the slightest spark for this violence to be ignited.<sup>281</sup>

It found that war was waged largely by Sierra Leoneans against Sierra Leoneans, with the RUF being the primary violator of human rights during the conflict, although all sides committed atrocities.<sup>282</sup> All factions were also found to have specifically targeted civilians.

While the majority of victims were adult males, perpetrators singled out women and children for some of the most brutal violations of human rights recorded in any conflict.<sup>283</sup>

The late start of the TRC meant that much of the work of rehabilitating combatants had already been done. The Lomé Agreement had provided for a programme of demobilisation, disarmament and reintegration (DDR), which had met with considerable success.

With respect to the ex-combatants, the TRC's delayed start allowed the DDR process to play the leading role in establishing peace and a fragile stability to Sierra Leone. The public hearings did provide willing perpetrators an opportunity to unburden themselves and seek forgiveness, but only a fraction of them availed themselves of this possibility for reintegration.<sup>284</sup>

The Report noted that it had supported and encouraged the use of traditional methods of resolving conflict, a report on which had been prepared for the TRC by a leading Sierra Leonean human rights organisation, Manifesto 99:

[...] most Sierra Leoneans, irrespective of whether they follow the Muslim or Christian faith, still cling to traditional animist beliefs. It also confirmed that most of the ethnic groups have belief systems that promote truth telling and reconciliation. Truth telling, swearing or curse casting (or the threat of it) are essential elements of spiritual justice to encourage voluntary confession. The perpetrator can undergo cleansing or purification, or benefit directly from a pardon by society and thus be in peace with himself and with the community.<sup>285</sup>

281 The Final Report of the Truth & Reconciliation Commission of Sierra Leone Volume 1 Introduction, at paragraph 11

282 *Ibid*, Volume 2 Chapter 2 Findings, at paragraphs 29-31

283 *Ibid*, Volume 2 Chapter 2 Findings, at paragraphs 20 -21

284 Dougherty (*supra* Note 21)

285 Final Report (*supra* Note 20) Volume 3b chapter 7, Reconciliation, at paragraph 32

The TRC was unable to condone traditional methods involving violence towards a repenting perpetrator, but found that:

Many aspects of traditional conflict resolution, such as mediation, purification, token appeasement and the willingness to show remorse, are in harmony with the objectives of the TRC policy and have been sustained by the Commission during its hearings and beyond.

Other violations, such as abductions, amputations, murder and arson, which are rare in the traditional context, were normally referred to the police through the Paramount Chief or District Office. However, given the amnesty established by the Lomé Agreement, traditional methods can be adjusted and applied to those violations too, as a condition for the reintegration of ex-combatants.<sup>286</sup>

The TRC provided for the continuation of reconciliation activities, which was essential given the brevity of its period of operation, and did so by establishing District Reconciliation Committees.

Among the most important recommendations of the TRC were those concerning reparations. These were wide ranging and included measures to deal with health and education, rebuilding, creating memorials and the setting up of a Special Fund for War Victims, which had also been part of the Lomé Peace Agreement. However, as a commentator noted before the TRC reported:

Even if it produces an incisive list of recommendations, there is no guarantee that the political will, financial resources, or administrative capacity will be available to implement them.<sup>287</sup>

The recommendations were in fact received with little apparent enthusiasm by the government. The white paper it issued following the release of the TRC Report made no specific commitments to implement any of the TRC recommendations. A bill dealing with many of the recommendations has been drafted, but has of yet not passed through Parliament.

The TRC expressed concern that during its work:

[...] a perception developed throughout the country that information provided to the Commission would make its way to the Special Court.

<sup>286</sup> *Ibid.*, Volume 3b chapter 7, Reconciliation, at paragraphs 36-7

<sup>287</sup> Dougherty (*supra* Note 21)

A rumour even started circulating that there was an underground tunnel that ran between the two institutions. It did not help in elucidating public perception that both bodies were situated on Jomo Kenyatta Road in Freetown, in close proximity to one another. It is not surprising that many people in Sierra Leone were not able to distinguish between the roles of the two bodies: they both dealt with impunity; they addressed accountability for atrocities committed during the war; and they focused on violations of international humanitarian law.<sup>288</sup>

The poor relationship between the TRC and the SCSL was perhaps the most disappointing feature of the accountability process of Sierra Leone. Instead of having an integrated, or at least harmonised, accountability process, there were two institutions publicly and sometimes embarrassingly at odds with one another. How much this harmed each mechanism is hard to assess, but it certainly did not help either of their work. A considered relationship agreement would have allowed for a more integrated and effective accountability process, which would undoubtedly have gone at least some way towards addressing some of the shortcomings of the actual process.

In the end, the TRC has not added very significantly to the pursuit of peace and reconciliation in Sierra Leone, though in part through no fault of its own. It was chronically underfunded, and the failure of attempts to reach a relationship agreement with the Prosecutor of the SCSL meant that it was unable to dispel fear among former combatants that it was closely linked to the prosecutions of the SCSL. In addition, and unlike in the South African TRC, or the CAVR in East Timor, it had nothing to offer confessing perpetrators other than the relief of their consciences. Further, although it made a number of recommendations, these have largely been ignored by the government. In the end, the TRC therefore provides only a worryingly slender bridge between the high-level prosecutions of the SCSL and complete impunity for the many who never stood trial. In Sierra Leone, for those who were not among the handful bearing the greatest responsibility, there have been few consequences for the crimes they have committed.

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288 Final Report (*supra* Note 23), at paragraph 52

## Case Study F

# East Timor

East Timor had two truth commissions in addition to criminal trials conducted under the auspices of the United Nations Administration in East Timor (UNTAET): the Commission for Reception, Truth and Reconciliation (known by its Portuguese acronym, CAVR), which operated from 2002 to October 2005, and the Indonesia-Timor Leste Commission of Truth and Friendship (CTF), which operated from August 2005 to July 2008.

The CAVR was designed to complement the ongoing process of prosecutions and had two aims: to report on the truth about violations which had occurred, and to attempt to find ways of reintegrating back into the community those guilty of less serious offences.

The CAVR had no power to grant amnesties, but it was able to conduct reconciliation ceremonies between victims and perpetrators, which would result in community penalties for perpetrators. Thereafter, there would be no criminal trials for offences resolved in this way. Its ambitions were therefore necessarily limited to dealing with less serious crimes, and it may well be that this very limitation was the root of what is widely regarded as its success.

By contrast, the CTF, which was intended to promote friendship and cooperation between the governments and peoples of the Indonesia and East Timor, did have the power to recommend amnesties, although it ultimately did not do so. However, the way in which it operated has been branded an “unqualified failure,”<sup>289</sup> with the public reaction to the establishment and findings of the

289 M Hirst *Too Much Friendship, Too little Truth*, January 2008, available at: <http://www.ictj.org/en/where/region3/628.html>

CTF equally critical. Most forcefully, critics have argued that this process amounted simply to a means of extending impunity, rather than as a means of providing justice and accountability.<sup>290</sup>

## 1

### Background

The island of East Timor was granted independence from Portugal on 28 November 1975, but its freedom was short-lived. Its powerful neighbour, Indonesia, invaded nine days later, and claimed East Timor as its 27<sup>th</sup> province.

East Timor remained under Indonesian rule for the next 24 years. In 1999, President Habibie of Indonesia announced a referendum that would allow the population of East Timor to choose between autonomy within Indonesia and independence. Over the ensuing months violence in the province escalated as the Indonesian military and Indonesian militia tried to suborn the East Timorese into voting against independence. When the referendum on 20 August 1999 produced an overwhelming victory for independence, with 78.4% of the vote, the Indonesian military and pro-Indonesian militia responded with violence and destruction. The violence continued until 20 September 1999, when the Australian-led peacekeeping troops of the International Force for East Timor (INTERFET) deployed to the country and brought the violence to an end. Continuing the violence as they withdrew, Indonesian military and militia killed about 1,400 East Timorese and forcibly displaced a further 300,000 by the time they left. An estimated 70% of the buildings in East Timor were destroyed.

This “scorched earth” retreat was particularly destructive. Indonesia left behind a country without even the basic components for a civil administration. On 25 October 1999 the UN established a Transitional Administration (UNTAET) under Resolution 1272, which was given the mandate to administer the island until 20 May 2002, when East Timor finally became independent.

The refugee problem remained massive and ongoing: at the time of independence, about 50,000 displaced East Timorese were still living in refugee camps in

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290 See Indonesian and Timorese NGOs reject Truth and Friendship Commission, *Kompas*, 19 March 2005, available from <http://www.etan.org/et2005/march/20/19iandt.htm> and Timor-Leste National Alliance for International Tribunal, An Open letter in response to the CTF report, 15 July 2008, available at <http://www.laohamutuk.org/Justice/TFC/ANTlonCTFEn.pdf>

West Timor. Many were afraid of coming home for fear of being confronted with their past crimes. This has been a continuing issue for the East Timorese government and one that is often raised in connection with the various accountability processes it has attempted.

## 2

### **Transitional justice mechanisms for East Timor**

UNTAET's mandate required it to bring to justice "those responsible" for the violence.<sup>291</sup> This was difficult in a country where the entire court structure had been dismantled by the Indonesian withdrawal. Under Indonesian occupation Indonesian judges, lawyers, and personnel operated the courts. After the withdrawal there were therefore almost no qualified lawyers in East Timor, no functioning courts or court system, and no-one with experience of how such a system should operate.

A UN Commission of Inquiry, reporting in 2000, recommended to the UN Security Council that:

[...] the United Nations should establish an international human rights tribunal consisting of judges appointed by the United Nations, preferably with the participation of members from East Timor and Indonesia. The tribunal would sit in Indonesia, East Timor and any other relevant territory to receive the complaints and to try and sentence those accused by the independent investigation body of serious violations of fundamental human rights and international humanitarian law which took place in East Timor since January 1999.<sup>292</sup>

The Security Council, perhaps by now disillusioned by the slow and costly progress of the two tribunals it had set up in the early 1990s, demurred. Instead the Special Panels for Serious Crimes (SPSC), which were composed of national and international judges, were established by UNTAET to try suspects in Dili, East Timor's capital. Meanwhile, Indonesia established its own national *ad hoc* tribunal in Jakarta to try suspects in Indonesia.

291 Security Council Resolution 1272 S/RES/1272 (1999) of 25 October 1999 *On the Situation In East Timor*, at paragraph 16

292 United Nations Office of the High Commissioner for Human Rights *Report of the International Commission of Enquiry in East Timor to the Secretary General* January 2000, at paragraph 153

This is not the place for an extended review of the success or otherwise of these enterprises. The Jakarta tribunal can be considered briefly: it was created under international pressure; it had a limited mandate and indicted 18 relatively low-ranking military and militia leaders. Twelve were convicted; all appealed, many successfully; sentences were derisory or non-existent, and by 2004 only one defendant, East Timor's former governor Abilio Soares, was still serving his sentence. He was later released and died shortly afterwards, upon which the Indonesian government gave him a hero's funeral.

The SPSC were able to try only those suspects who remained in East Timor; there was no power and little political will to secure suspects from Indonesia. Its trials were of low-ranking East Timorese militia members who had not fled to Indonesia or had since returned. 95 indictments were filed, indicting a total of 391 people. However, only 52 of these were within the jurisdiction of the court, with the other 339 at large, probably in Indonesia. The achievements of the SPSC were therefore necessarily limited.

The prosecution of serious crimes was apparently of little interest to the East Timorese authorities; the government of the newly independent East Timor was intent on fostering friendly relations with its giant neighbour, and there was a general feeling that the eager pursuit of prosecutions for crimes of the past was unlikely to assist diplomatic relations.

In August 2005 Indonesia and East Timor created a Commission of Truth and Friendship (CTF) whose mandate was to investigate human rights violations by Indonesia and its armed forces during the occupation of East Timor, particularly the events and atrocities leading up to and surrounding the 1999 referendum on East Timor's independence, and the subsequent process of independence. The terms of reference of the CTF describe it as a mechanism that has the role of:

[...] further promoting friendship and cooperation between governments and peoples of the two countries, and promoting intra and inter-communal reconciliation to heal the wounds of the past.<sup>293</sup>

The CTF has been criticised by Indonesian and East Timorese NGOs as a strategic tool aimed at pardoning those guilty of serious human rights violations

293 Terms of Reference for The Commission of Truth and Friendship established by The Republic of Indonesia and The Democratic Republic of Timor-Leste 10 March 10, 2005, available at: <http://www.etan.org/et2005/march/06/10tor.htm>

in East Timor, without regard to their degree of culpability.<sup>294</sup> In addition, the United Nations has criticised the commission and declined to participate, citing its principle of not supporting bodies that offer legal impunity for serious crimes and crimes against humanity. The CTF has in fact done little to promote friendship and reconciliation between the people of East Timor and Indonesia, in part due to the lack of participation in its proceedings.

This report will examine a fourth mechanism in depth. In 2001 UNTAET Regulation 2001/10 (“the Regulation”) created East Timor’s CAVR as an alternative to the formal justice system for resolving the thousands of “less serious” crimes committed in the context of political conflicts between April 1974 and October 1999.<sup>295</sup>

### **3**

#### **The aims of the CAVR**

The CAVR was established as an independent authority, with a requirement that it “not be subject to the control or direction” of any cabinet minister or other government official. Its mandate was created by a Steering Committee, which was composed of representatives from East Timorese civil society groups, as well as UNHCR and UNTAET. During its preparations, consultations were held in all 13 districts of East Timor. It was given a two-year mandate, later extended by a further six months, and so functioned from early 2002 until October 2005.

According to its mandate, the CAVR had two principal goals: truth seeking and conducting community reconciliation procedures (CRPs).

### **4**

#### **The relationship between the CAVR and prosecutions**

The CAVR was to inquire into and establish the truth in relation to the nature, causes and extent of human rights violations between 25 April 1974 and 25 October 1999. This was intended as a means of promoting reconciliation. It was charged with compiling a comprehensive report based on its findings; recommending prosecutions, where appropriate, to the Office of the General

294 Hirst, *Supra* (Note 1)

295 *On the Establishment of a Commission for Reception, Truth, and Reconciliation in East Timor* UNTAET Regulation 2001/10 13 July 2001 (later amended by Parliamentary Laws 17/2003, 13/2004 and 11/2005). Upon independence in 2002 the CAVR’s role was included in the Constitution of East Timor at Section 162



Prosecutor (OGP); and making recommendations to the Government concerning reforms and initiatives designed to prevent the recurrence of human rights violations and to respond to the needs of victims.

One of the principal challenges for the framers of the Regulation, UNTAET, was the negotiation of the relationship between the CAVR and the ongoing serious crimes process. Serious crimes were listed in the Regulation setting up the Special Panels for Serious Crimes (SPSC), namely genocide; war crimes; crimes against humanity; murder; sexual offences; and torture.<sup>296</sup> There was therefore a two-tier classification of crimes, all others being classed as “less serious” or “ordinary” crimes, including crimes such as theft, minor assault, arson (other than that resulting in death or injury), the killing of livestock or destruction of crops. It was these less serious crimes that were considered more appropriate for the Community Reconciliation Process.

The Serious Crimes Unit (SCU) of the Office of the General Prosecutor was mandated to investigate serious crimes committed between 1 January and 25 October 1999.<sup>297</sup> Because of the principle of universal jurisdiction, it also had the authority to investigate and prosecute those responsible for crimes against humanity, war crimes and genocide throughout the entire period of the Commission’s mandate, from April 1974 to October 1999.

After much negotiation an MOU was agreed, detailing the relationship between the CAVR and the serious crimes process.<sup>298</sup> The results can be found in the Regulation. The CAVR had a statements committee, which examined all statements and assessed whether they were suitable for a Community Reconciliation Procedure (CRP). It was to “refer matters of serious criminal offences to the appropriate authority.”<sup>299</sup> Following this assessment:

The CRP Statements Committee shall provide a copy of all statements received together with the CRP Statement Committee’s assessment to the Office of the General Prosecutor.

296 UNTAET Regulation 2000/15 6 June 2000 On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences Section 1.3

297 UNTAET Regulation No. 2000/15 defines the category of “serious crimes” as genocide, war crimes, crimes against humanity, murder, sexual offences and torture. The Special Panels for Serious Crimes has universal jurisdiction over murder and sexual offences if they occurred between 1 January 1999 and 25 October 1999; there is no temporal limit applicable for genocide, war crimes and crimes against humanity.

298 Memorandum of Understanding between the Office of the General Prosecutor (OGP) and the Commission for Reception, Truth and Reconciliation (CAVR) Regarding the working relationship and Exchange of Information between the Two Institutions, signed by Longuinhos Monteiro, the General Prosecutor, and Aniceto Guterres Lopes, Chairperson of the Commission for Reception, Truth and Reconciliation, on 4 June 2002; despite extensive enquiries, the document was not available.

299 UNTAET Regulation 2001/10 (*supra* Note 5) Section 38.1

Where the Office of the General Prosecutor within 14 days of its receipt of the statement and assessment notifies the Commission that the Office of the General Prosecutor intends to exercise its exclusive jurisdiction [...], the Commission shall notify the Deponent of its inability to proceed with the Community Reconciliation Process.<sup>300</sup>

The decision as to whether to prosecute a person for serious crimes was left squarely in the hands of the Office of the General Prosecutor. The CAVR therefore had no power to protect a deponent from prosecution. In addition, the CRP panels were bound to stop the proceedings and refer the matter back to the Office of the General Prosecutor if the deponent made admissions of serious crimes. The CAVR was also able to refer cases back to the OGP in circumstances in which the deponent refused to disclose or did not accept a Community Reconciliation Agreement (CRA).

In practice this was not an unqualified success. One experienced observer writes:

This added a significant burden to the existing work of the SCU, which in turn caused frustrating delays for the Commission. [...] Mostly, the name of the CAVR deponent wishing to participate in a CRP was simply fed into an SCU database to see if it matched that of a suspect under investigation, rather than handled through a considered legal analysis of the evidence and the possible criminal characterization. Given the range of extremely common name combinations in East Timor, this was not a particularly reliable method.<sup>301</sup>

A deponent before the CAVR was privileged against self-incrimination and was therefore not required to answer questions that might disclose a criminal offence. He or she was also privileged against incriminating his or her spouse or partner, parents, children, or relatives within the second degree. There was therefore only a limited obligation to tell the truth about any crimes committed.

This privilege was dictated by the relationship between the CAVR and the Office of the General Prosecutor. The OGP had access to any statements taken, and a person's statements could be used in evidence against him or her. Under the

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<sup>300</sup> *Ibid.*, Sections 24.5 and 24.6

<sup>301</sup> C Reiger *Hybrid attempts at Accountability in Timor Leste* in N Roht-Arriaza and J Mariezcurrena (Eds) *Transitional Justice in the Twenty-First Century* Cambridge University Press (2006), at page 154

terms of the agreement, the OGP undertook not to initiate an investigation against a person solely on the basis of evidence he gave before the CAVR,<sup>302</sup> but this would not prevent the OGP from prosecuting a person as a result of his or her evidence, provided it had further evidence in support – a task which would be made substantially easier once the prosecutor was in possession of a full confession from the suspect. In any case, in the unlikely event that it was known, this distinction was probably too fine to be appreciated by a perpetrator afraid of prosecution.

The CAVR could receive information confidentially, but was compelled to release it when requested to do so by the OGP.<sup>303</sup> The right of the OGP to access all information provided to the Commission also meant that no guarantee could be given to witnesses that their evidence and confessions would not be used against them in future legal proceedings.

Clearly this may have prevented the CAVR from receiving relevant information, but according to the Commission, the provisions of the Regulation reflect:

[...] a policy decision that the work of the prosecution service should not be compromised by the truth-seeking function of the Commission. This policy is based on recognition of the importance of establishing strong and clear mechanisms to achieve justice and promote respect for the rule of law in the context of a fragile new nation with a history dominated by injustice.<sup>304</sup>

In any event, about 120, or 8%, of cases dealt with by the CAVR were either vetted by the SCU or suspended during the hearings themselves because they ostensibly related to “serious crimes”.<sup>305</sup> It is not clear, however, whether any indictments resulted from this process.

The CAVR was also responsible for conducting community reconciliation procedures (CRP’s). These were based on traditional “adat” ceremonies, and were to take place in the towns and villages where crimes had occurred. Their objective was to support the reception and reintegration of individuals back in

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302 Information received from former SCU Prosecutor, 4 June 2008

303 UNTAET Regulation 2001/10 (*supra* Note 5) Section 44.2

304 Chega: The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste Part 2 The Mandate of the Commission, at page 6; accessed at <http://www.cavr-timorleste.org/en/cheгаReport.htm>

305 P Pigou, *The Community Reconciliation Process of the Commission for Reception, Truth and Reconciliation*, UNDP Diii April 2004, at page 8

to their communities where they had caused harm through the commission of less serious criminal offences.

Several factors contributed to the development of CRPs: without some achievable mechanism aimed at dealing with perpetrators of less serious crimes, it was feared that unresolved conflicts within communities might lead to violent reprisals. This was of particular concern, as much of the initial violence had been community based, with the majority of perpetrators coming from the same village as their victims.

Moreover, the infant legal system was occupied in dealing with a massive caseload of new crimes and past serious crimes. There was therefore no capacity to deal with less serious cases. Without a new mechanism that was able to act quickly and cheaply, these crimes would go unpunished.

Schedule 1 to the Regulation set out the factors to be taken into account in deciding whether an act was appropriate for a CRP. The Commission was to take into account:

1. The nature of the crime committed by the Deponent: for example, offences such as theft, minor assault, arson (other than that resulting in death or injury), the killing of livestock or destruction of crops might be appropriate cases to form the subject of a Community Reconciliation Process.
2. The total number of acts which the Deponent committed.
3. The Deponent's role in the commission of the crime, that is, whether the Deponent organised, planned, instigated or ordered the crime or was following the orders of others in carrying out the crime.

It also clearly stated that:

4. In no circumstances shall a serious criminal offence be dealt with in a Community Reconciliation Process.<sup>306</sup>

<sup>306</sup> This was subsequently amended as follows: "In principle, serious criminal offences, in particular, murder, torture and sexual offences, shall not be dealt with." See UNTAET Regulation No. 2002/9 Directive on Serious Crimes

## 5

### The working of the CAVR

The CAVR was composed of a national office and six regional offices, with seven national commissioners and 29 regional commissioners. These were appointed by the Transitional Administrator on the advice of a selection panel consisting of representatives of UNTAET, political parties, civil society and the Catholic Church.<sup>307</sup> The Regulation required at least 30% of the commissioners to be women.

#### (a) Truth seeking

The Commission was mandated to inquire into:

- (i) the extent of human rights violations, including violations which were part of a systematic pattern of abuse;
- (ii) the nature, causes and extent of human rights violations, including the antecedents, circumstances, factors, context, motives and perspectives which led to such violations;
- (iii) which persons, authorities, institutions and organisations were involved in human rights violations;
- (iv) whether human rights violations were the result of deliberate planning, policy or authorisation on the part of a state or any of its organs, or of any political organisation, militia group, liberation movement, or other group or individual;
- (v) the role of both internal and external factors in the conflict; and
- (vi) accountability, political or otherwise, for human rights violations.<sup>308</sup>

The Regulation provided the CAVR with substantial quasi-judicial powers. These included the powers of subpoena, search, seizure and confiscation, as well as powers to request information from governments, to question witnesses under oath, and to administer witness protection procedures. In 2003, the

<sup>307</sup> UNTAET Regulation 2001/10 (*supra* Note 5) Section 4; at 4.3(a), the Regulation names four political parties, the NGO Forum, the Women's Network, Presidium Juventude, the Catholic Church, the Political Prisoners Association, the Association of the Families of the Disappeared, the UNTAET Office of Human Rights, and a representative of pro-autonomy groups.

<sup>308</sup> UNTAET Regulation No. 2001/10, Section 13.1(a)

CAVR also established an Indonesia contact group in Jakarta to assist with its research.

During the course of its activities the CAVR collected 7,824 statements from the 13 districts and 65 sub-districts of East Timor. It conducted over 1,000 interviews focusing on identified themes, including famine and forced displacement; the structure, policies and practices of the Indonesian military and police; killings and enforced disappearances; and massacres.<sup>309</sup> It collected large amounts of documentation, held victims' hearings in all sub-districts, and conducted eight national public hearings broadcast on both radio and television.

Based on its findings, the CAVR submitted its 2,500-page Report, "*Chega!*" (Enough!), to the National Parliament on 28 November 2005. It contained a number of significant conclusions and documented the widespread and systematic violations of human rights perpetrated by all parties in East Timor between 1974 and 1999 – immediately before and during Indonesia's occupation of the territory.

Based on painstakingly detailed evidence, the Commission estimated that around 18,600 people were unlawfully killed or disappeared during the conflict.<sup>310</sup> It found that "[m]ost individual East Timorese people alive today have experienced at least one period of displacement." At least 84,200, and possibly as many as 183,000, people died of starvation or illness.<sup>311</sup> The civilian death toll was therefore estimated to be at least 102,800 out of a total population of less than 800,000.<sup>312</sup> There were also numerous non-fatal crimes of detention, torture and ill-treatment, rape and sexual slavery.<sup>313</sup>

Most importantly, it found that the violations of human rights were systematic and that they were organised at the highest levels of the Indonesian government:

[...] senior members of the Indonesian security forces were involved in the planning, coordination and implementation of a programme which included widespread and systematic human rights violations committed against East Timorese civilians amounting to crimes

309 *Chega Report* Part 1 Introduction, at paragraphs 90-91

310 *Ibid* Part 7.2 Unlawful Killings and Enforced Disappearances, at paragraph 887

311 *Ibid* Part 7.3 Forced Displacement and Famine, at paragraph 502

312 *Ibid* Part 6 The Profile of Human Rights Violations, at paragraph 8

313 *Ibid* Part 7.7 Sexual Violence, at paragraph 2

against humanity. These senior commanders hold both direct and command responsibility for the crimes against humanity committed.

[...] The TNI, the police and the Indonesian Government were all involved in protecting the perpetrators from accountability for their actions.<sup>314</sup>

The Report also made several recommendations. It suggested renewing the mandate of the SCU and the SPSC to continue prosecutions for serious crimes in Dili. It asked the international community to assist in bringing the perpetrators of the violence to justice and to make co-operation with Indonesia contingent on this. It also suggested that the Timorese Government implement a national reparations programme for the victims of human rights violations.<sup>315</sup>

The report was widely disseminated within the community, as required by the Regulation, with an outreach strategy conducted not only in East Timor, but also within communities of displaced East Timorese in other countries.

## **(b) The Community Reconciliation Procedures**

A CRP was initiated with the written statement of a deponent, which was assessed by the CAVR's internal statements committee and the OGP. 84 statements were retained by the OGP, but there is no record of any of them proceeding to a prosecution. If the OGP did not intend to proceed with charges of serious crimes, the CAVR was authorised to:

[...] delegate the function of facilitating a Community Reconciliation Process to a Regional Commissioner[...].<sup>316</sup>

The Regional Commissioner was then responsible for creating a panel of three to five persons within the community affected by the crime. The criteria that the panellists had to meet were: independence, neutrality, moral authority and commitment to the reconciliation principles and goals. Panel members had to be representative of the community, with an adequate representation of youth, the church and women.<sup>317</sup>

314 *Ibid* Part 8.1 Responsibility of Indonesian Security Forces for the Mass Violations Committed, at page 115

315 *Ibid* Part 11 Reparations

316 UNTAET Regulation No. 2001/10 (*supra* Note 5) Section 25.1

317 *Ibid* Sections 26.1 and 26.2

The panel itself then determined the format of their hearing. Deponents, victims and members of the local community had the opportunity to express their points of view and opinions. The deponent's written statement was read, and he or she could then be questioned by panellists, community members and victims. A consultation with the deponent and victim was held to decide on an act of reconciliation. The panel had ultimate responsibility for reaching an agreement and, although consensual decisions were preferred, in the absence of a consensus, the Regional Commissioner had the final say.<sup>318</sup>

If the deponent consented to the act proposed, this was recorded as a Community Reconciliation Agreement (CRA). Acts could include community services, reparations, public apology and/ or other acts of contrition.<sup>319</sup> Contrary to the expectations of international observers, they tended not to be unduly onerous.<sup>320</sup> Examples are given in progress reports:

*13 June:* Ermera - Matata: 14 Deponents, 7 Victims and communities.

Reason for Hearing: Militia membership, house burning, theft of livestock, beatings, intimidation.

Community Reconciliation Act: Build new flagpole for Independence Day, Clean land around the village office, apologise, bound not to repeat.

*21- 22 June:* Dili – Suleur: 18 Deponents, community (2 direct victims subsequently identified in the hearing).

Reason for Hearing: Militia membership, threats, intimidation, terrorism of community members.

Community Reconciliation Act: Apologise, bound not to repeat. Deponents gave assurance to be at the service of the local leaders for three months to perform any labour for the community. Deponents contributed money, a goat and fortified wine to allow ceremonies to be performed.

*30 June:* Bobonaro – Odomau: 3 Deponents, Victims and community.

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318 *Ibid* Section 26.3

319 *Ibid* Section 22.1

320 P Burgess *East Timor's Community Reconciliation Process* in N Roht-Arriaza and J Mariezcurrena (Eds) *Transitional Justice in the Twenty-First Century* Cambridge University Press (2006), at pages 193-194



Reason for Hearing: Militia membership, performing ceremonies for militia, involvement in Indonesian police service, house burning, destruction of property.

Community Reconciliation Act: Community service cleaning church 1 day a week for three months, payment of one sacrificial pig. Apologise, bound not to repeat.<sup>321</sup>

Having reached a CRA, the CAVR's regional offices had the responsibility to register it with the appropriate District Court, although this was not always possible, as District Courts were often not operational. The deponent then received immunity from criminal and civil liability with respect to the actions dealt with by the CRA.

The CRP process was hugely popular. 1500 deponents participated in CRPs, and one observer writes:

In some respects, the process became a victim of its own success, as interest from potential deponents grew incrementally, but at the same time fuelled the backlog of cases that needed to be processed through hearings.<sup>322</sup>

By January 2004, the Commission was left with almost 900 cases to process through hearings during its last three months of operations. In the end, many cases were hurried through and many deponents who wished to have a CRP were left disappointed.

## **6 Assessment of CRPs**

CRPs were by their nature limited; they could only deal with less serious crimes. Serious matters are harder to reconcile; as one East Timorese victim whose brother was murdered observed:

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321 CAVR Update, June-July 2003, at pages 8-9 [http://www.jsmp.minihub.org/Reports/otherresources/Update\\_June-July\\_2003\\_27\\_08.pdf](http://www.jsmp.minihub.org/Reports/otherresources/Update_June-July_2003_27_08.pdf)

322 Pigou (*supra* Note 15), at page 95.

The value of a house and buffalo is not the same as the value of a human being. The house and buffalo are still important, I still think about these things. But I first need to resolve the case of my brother.<sup>323</sup>

Within these limitations, CRPs were often successful. According to a study by the Judicial Systems Monitoring Programme (JSMP), which included several interviews with those who had been involved in the CRP process, there was a general expression of satisfaction with the CRP and the results it had achieved among deponents.

The CRP had often provided a catalyst for deponents to ‘explain’ their past involvements to the community and ‘clear their names.’ For several it had been an opportunity to talk as much about what they did not do as what they did.

Some had also felt that despite their apparent acceptance in the community, people continued to be suspicious of them. Several mentioned for example that prior to the CRP they felt that people spoke ‘behind their backs’, or were *laran moras* (lit. sick inside, resentful) towards them.

Several deponents explained, however, that there had been a marked difference in their lives following their participation in the CRP hearing. When asked to describe this, some stated that they felt ‘freer’ or ‘lighter’ when they walked around the community or went to work in their fields. A number felt that community members were no longer suspicious of them or called them ‘militia’. Others believed that their children would now be accepted within the community without discrimination, and were relieved that problems would not be passed down to future generations. Some stated that they could now live like *maun alin* (brothers) in their community. Thus, for many deponents, the reconciliation process represented a sense of ‘closure’ on their case.<sup>324</sup>

However, there was a general feeling that the process was unfinished: many had not come forward, and those who did tended not to be those most responsible. There was continued resentment that those higher in the system were not being prosecuted or giving statements to the CAVR. The widespread feeling in East

323 Quoted in L. Kent, *Unfulfilled Expectations: Community Views on CAVR's Community Reconciliation Process*, August 2004, at page 22; accessed at [http://www.jsmp.minihub.org/Reports/jsmpreports/CAVR\\_Reports/cavr\\_report\\_2004\\_e.pdf](http://www.jsmp.minihub.org/Reports/jsmpreports/CAVR_Reports/cavr_report_2004_e.pdf)

324 *Ibid*, at page 12

Timor that those in charge had escaped punishment was not – and could not have been – assisted by the CRPs.

According to the same report, the perspectives of victims on the CRPs were largely influenced by the type of harm they had suffered. Those who had suffered house burnings or loss of their possessions had a positive perception of the CRP process; those who had been beaten or suffered verbal abuse found reconciliation harder. Victims of serious crimes were even less happy with the process:

For these respondents the overwhelming priority in their life was the resolution of the serious crimes case. For many the reconciliation process has taken on an added symbolism as a ‘stepping stone’ towards the goal of retributive justice.<sup>325</sup>

One former international prosecutor in East Timor says:

In my experience, the willingness to forgive depended not on the seriousness of the crime, but on who had committed it. In the villages people were prepared to forgive some offenders but not others. They were very often prepared to forgive East Timorese who had joined the local militias and committed very serious crimes. But they were not prepared to forgive the militia leaders or the Indonesian military who organised the massacres.<sup>326</sup>

Many victims also felt that deponents did not speak the whole truth. One victim said:

Those who talk as deponents in the [CRP] still have a relationship with those still in Atambua, with the big perpetrators so they don't want to speak the whole truth to us [...].

I feel the process often goes according to the deponents' wishes. The deponents see that the process is not going to harm them and that it is good for them because when they sign something, people can't call them militia any more. So they can come and talk about what they want. This is not reconciliation.<sup>327</sup>

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325 Quoted in *ibid.*, at page 21

326 Information received from former SCU prosecutor for this report, 12 June 2008

327 Kent (*supra* Note 33), at page 25

One district chief summed up the mixed feelings as follows:

The work of the CAVR is good but it is about the small crimes only. It is still important for the small crimes to be resolved too, but we all thought 'Is this process only for the small people?'

[...]

I want to say to the government, reconciliation has started already but justice needs to happen too. How can we find the big crimes and bring them to justice? With which law? <sup>328</sup>

According to one JSMP staff member, there has been a further benefit. The CRP has assisted the repatriation process of East Timorese refugees (including former militia members) from West Timor. The CRP:

[...] has made an enormous contribution not only by its efforts in encouraging the repatriation of the refugees, but also in ensuring that the returnees are accepted back into their community. <sup>329</sup>

However, this assertion is not supported by examples. According to another observer:

This was one of the rationales for establishing the CAVR but I don't think there is any evidence to suggest that anyone returned from West Timor because of the existence of a reconciliation process. <sup>330</sup>

## 7 Conclusion

Within its limitations, the CAVR was able to achieve many of its aims: it did put together a record of what happened in East Timor, and this record was widely distributed, both within the country itself and to the many East Timorese residing abroad. Many who participated in the CRPs were also happy with its results, and so it brought reconciliation between people and within communities, although it dealt only with less serious crimes and not everyone who participated in the process felt it worthwhile.

<sup>328</sup> Quoted in *ibid*, at page 35

<sup>329</sup> B Ximenes, *The Unique Contribution Of The Community-Based Reconciliation Process In East Timor* 2004, at page 19 accessed at [http://www.jsmp.minihub.org/Resources/2004/ICTJ\(e\).pdf](http://www.jsmp.minihub.org/Resources/2004/ICTJ(e).pdf)

<sup>330</sup> Lia Kent, quoted in M Byrne *Roads to Reconciliation* Uniya-JRS Occasional Paper, no.9, September 2005, at footnote 23; accessed at [http://www.uniya.org/talks/byrne\\_sep05.html](http://www.uniya.org/talks/byrne_sep05.html),

However, its limitations were severe. It suffered the same problem as the other justice mechanisms in East Timor: it was unable to access the principal perpetrators of the violence, and therefore left many feeling that there was much left unfinished in the way of accountability. This feeling continues despite the many mechanisms that have been established for East Timor, with Timorese civil society continuing to call for an accountability process that will see those who committed crimes against humanity prosecuted before a court of law.<sup>331</sup> Ultimately therefore, while East Timor attempted a number of different accountability mechanisms, none of them was wholly satisfactory, primarily due to Indonesian authorities protecting the real perpetrators of atrocities. As such, although some important aims of its accountability mechanisms were met, none were wholly satisfactory to the victims and people of East Timor.

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331 *Supra* (Note 1).

## Case Study G

# Morocco

The *Instance Équité et Réconciliation* or “Justice and Reconciliation Authority” (“IER” or “the Commission”) which was established in Morocco in 2004 was unusual in many respects. It was set up without regime change in a State that remained a constitutional monarchy, but was required to look into acknowledged abuses of the past.

The IER was essentially a commission for victims and on those terms was largely successful. Victims of the crimes of the State were encouraged to recount their experiences and were granted significant financial compensation directly by the IER. However, before they gave evidence they were warned not to name individuals in their testimony. There would therefore be compensation for victims, but no accountability for perpetrators.

### 1

#### **Background**

Morocco gained independence from France in 1956 with King Mohammed V assuming the throne as the country’s first post-colonial leader. In 1961 Mohammed V was succeeded by his son, Hassan II, who ruled until his death in 1999.

The rule of King Hassan II was marked by political unrest and repressive governmental tactics aimed at eliminating political opposition. It is estimated that:

[...] the security services were responsible for the ‘disappearance’ of hundreds of political opponents and the torture of thousands.<sup>332</sup>

During the 1960s and 1970s forced disappearances, summary executions, secret internment camps and torture were commonplace.

Following Hassan II’s death, the first years of the reign of King Mohammed VI from July 1999 brought the enactment of a programme of both reform and democratisation. This included the establishment of accountability mechanisms, the roots of which had already begun to develop under his father’s regime.

## 2

### **The development of the IER**

The Moroccan IER was established in 2004 by royal decree. It was the culmination of many years of incremental movement towards some form of meaningful accountability for the abuses of the past. It was created at the behest of and in close consultation with civil society activists. It was a body established not solely to address past human rights violations, but also to promote and assist the process of democratisation.

The first steps towards accountability for past human rights violations in Morocco were taken by the country’s human rights council, the *Conseil Consultatif des Droits de l’Homme*, (“CCDH”) which was established by King Hassan II in 1990. For several years the CCDH focused on legal and administrative reforms,<sup>333</sup> but in 1998 the King asked the CCDH to investigate also pending disappearance cases.<sup>334</sup>

The CCDH considered 112 cases and determined that 56 of the relevant individuals had died, that 12 were alive, and that 44 had suffered an “unknown fate”.<sup>335</sup> These findings were heavily criticised by human rights organisations, which had documented thousands of disappearance cases.<sup>336</sup> However, the CCDH described its findings as only the beginning of its investigations. It asked the King to allow not only a closer examination of the cases in question,

332 P Hazan *Morocco: Betting on a Truth and Reconciliation Commission* USIP Special Report 165, July 2006, at page 2

333 V Oppenhaffen and M Freeman *Transitional Justice in Morocco: A Progress Report* International Center for Transitional Justice November 2005, at page 8

334 CCDH Report at pages 59-61 quoted in Oppenhaffen and Freeman (*supra* Note 2), at page 9

335 Oppenhaffen and Freeman (*supra* Note 2), at page 9

336 *Ibid*, at page 9

but also to consider the establishment of a body mandated to determine the payment of financial compensation to some of the victims.<sup>337</sup>

In July 1999, shortly before his death, King Hassan II approved the CCDH's formal recommendation to establish a body tasked with compensating the victims of certain categories of past human rights violations.<sup>338</sup> Members of an Independent Arbitration Panel ("the Panel") were subsequently appointed by the new monarch, King Mohammed VI. The Panel was charged with determining compensation awards for cases of arbitrary detention and enforced disappearances occurring between 1956 and 1999. It operated under the auspices of the CCDH.<sup>339</sup>

The Panel received more than 11,000 applications, but only the 5,127 received before the set deadline were considered.<sup>340</sup> Testimony was taken from approximately 8,000 people over a four-year period. As a result of these investigations, 3,681 applications were successful and a total of \$100 million was awarded in compensation.<sup>341</sup>

Despite this apparent success, particularly with respect to granting compensation, the Panel's work was the subject of some concern. The shortness of the deadline it set for applications was in particular widely criticised. The panel started its work on 1 September 1999, and set the deadline for applications on 31 December 1999, leaving only four months for applications to be made. It was also accused of a lack of transparency in its method for determining awards; a restrictive and narrow interpretation of the concept of reparations; and it was criticised for assessing individual awards on the basis of a person's income at the time of violation.<sup>342</sup> However, in spite of its shortcomings, the Panel is recognised as having paved the way for the IER that was to follow.<sup>343</sup>

### **3**

## **The IER**

The proposal that was to lead to the eventual establishment of the IER came from a group of human rights organisations in 2001. This proposal was

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337 *Ibid*, at page 9

338 *Ibid* at page 10

339 *Ibid* at page 10

340 *Ibid* at page 11

341 *Human Rights at the Crossroads*, quoted in Oppenhaffen and Freeman (*supra* Note 2), at p. 11

342 Oppenhaffen and Freeman (*supra* Note 2), at page 11

343 *Ibid* at page 11



supported by the CCDH, which prepared a formal submission to the King requesting the establishment of a truth commission.<sup>344</sup> Following the King's approval in November 2003, the IER was established by the royal decree of King Mohammed VI, who announced its establishment in a speech in January 2004.<sup>345</sup>

The IER was comprised of a president and 16 members, all of whom were chosen and appointed by the King on the recommendation of the CCDH.<sup>346</sup> 9 of the members were in fact members of the CCDH, a fact that would later become a cause for criticism.

The preamble to the Statutes of the Equity and Reconciliation Commission states that the Commission's work was to be aimed at the:

[...] equitable settlement of the gross human rights abuses that occurred in the past [...] within the framework of a comprehensive approach which is intended to heal the wounds of the past, compensate for the damage, establish the facts and learn the lessons of the past in order to reconcile the Moroccans with their history and themselves and release their creative energies.

Under the terms of the Statutes, the IER's deliberations were to be confidential.<sup>347</sup> "Gross human rights abuses" were defined narrowly so as to apply only to cases of forced disappearances or arbitrary detention;<sup>348</sup> and the IER was without any power to "call into question the individual responsibility for the violations."<sup>349</sup> However, all State authorities and institutions were required to "bring their support to the IER and provide it with all information and data allowing it to accomplish its missions";<sup>350</sup> and whilst prohibited from the attribution of any individual responsibility, the IER was nonetheless asked to determine "the responsibilities of the state organisms or any other party".<sup>351</sup>

The IER was charged with considering violations that occurred between 1956 and 1999, that is, from the date of independence until the establishment of the

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344 *Ibid* at page 12

345 Hazan (*supra* Note 1), at page 3

346 Opgenhaffen and Freeman (*supra* Note 2), at page 13.

347 *Approving Statutes of the Equity and Reconciliation Commission* Article 4 – available at Annex II of V Opgenhaffen and M Freeman *Transitional Justice in Morocco: A Progress Report* International Center for Transitional Justice November 2005

348 *Approving Statutes of the Equity and Reconciliation Commission* Article 5

349 *Ibid* Article 6

350 *Ibid* Article 10

351 *Ibid* Article 9(3)

IER.<sup>352</sup> It was a challenging remit: as pointed out in the summary of its Report, the IER examined a period of 43 years in the space of only 23 months.<sup>353</sup> With this in mind, Article 9 of the Statute set out the following “missions”:

To establish the nature and the scale of the gross human rights abuses committed in the past;

To continue investigations on the cases of forced disappearances whose fate remains undetermined [...] to reveal the fate of the disappeared persons and propose [...] appropriate measures for the cases in which death is established;

To determine the responsibilities of the State organs or any other party in the violations and facts subject to the investigations;

To compensate for the material and moral damage sustained by the victims or their legal successors by carrying on with the work of the former Independent Commission of Arbitration in charge of compensation;

To formulate recommendations for the psychological and medical rehabilitation and social integration of victims of forced disappearances, as well as settling administrative, legal and professional problems and questions in respect of the restitution of property;

To draft a report setting out their conclusions and containing recommendations to preserve the memory and guarantee the non-repetition of violations [...] and restore [...] respect in the rule of law;

To develop and promote a culture of dialogue and set up the basis of a reconciliation process oriented towards the consolidation of the democratic transition in our country [...];<sup>354</sup>

To provide reparations to victims and families (comprising medical and psychological re-adaptation, social integration, settlement of administrative, legal and professional problems and restitution of property);

352 *Ibid* Article 8

353 Instance Équité et Réconciliation: *Synthèse du rapport final (résumé)* Introduction; accessed at [http://www.ier.ma/article.php?id\\_article=1496](http://www.ier.ma/article.php?id_article=1496)

354 Approving Statutes of the Equity and Reconciliation Commission , Article 9

To recommend measures aimed at preventing future abuses.

The IER was organised into three working groups: investigations; reparations; and studies and research.<sup>355</sup> In addition, two *ad hoc* commissions were established. The Panel had interpreted the direction “to develop and promote a culture of dialogue” as authorising the conduct of public hearings, even though no specific provisions to this effect had been made in the mandate.<sup>356</sup> In September 2004 they therefore established the Public Hearings Commission, as well as the Final Report Committee.

Seven public sessions were held in regions of the country where repression had been particularly prevalent. Attendance was high, and some of the sessions were broadcast live or in highlight on Al Jazeera television and on national radio.<sup>357</sup> Each witness was given 20 minutes to speak, with no questions permitted. Those testifying were chosen by the Panel on the basis of a number of criteria which were intended to ensure “balance” among witnesses. Due to the prohibition against attributing individual responsibility, witnesses were required to sign a form before testifying, agreeing not to mention the names of those who had ordered or carried out human rights violations.<sup>358</sup> Efforts were made to ensure that appropriate emotional and psychological support was provided for witnesses both before and after the sessions.<sup>359</sup>

In addition to public sessions of testimony, the Panel also organised meetings between individual victims and representatives of public institutions, conducted publicity and outreach work, and co-sponsored workshops on transitional justice.<sup>360</sup>

Following the completion of the IER Report in January 2006, the King announced his decision to make it public.<sup>361</sup>

The Report deals with the cases of those “presumed disappeared,” and was able to elucidate 742 cases of forced disappearances.<sup>362</sup> It also documents the practice of arbitrary detention, the systematic use of torture and ill treatment, as well as the excessive and disproportionate use of force to suppress

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355 *Ibid* Articles 15-18

356 Opgenhaffen and Freeman (*supra* Note 2), at page 17

357 Hazan notes that this was a particularly important step in a country where most of the population are illiterate: Hazan (*supra* Note 1), at page 6

358 *Ibid* at page 5

359 Opgenhaffen and Freeman (*supra* Note 2), at page 18

360 *Ibid* at page 19

361 Hazan (*supra* Note 1), at page 10

362 Synthèse du rapport final (résumé) (*supra* Note 22) Part I

demonstrations.<sup>363</sup> Within these categories the Commission was also able to provide some answers with respect to some individual cases. For example, in respect of those deemed “disappeared” during the relevant period, some specific pieces of information were established. These included the burial location and identity of 89 individuals who died while incarcerated at various prisons throughout the country, and the establishment of the fact that 325 of the people who had disappeared were in fact killed during urban riots which occurred in 1965, 1981, 1984 and 1990.<sup>364</sup> However, there were indications that the Commission might not have been entirely free from outside pressure. Pierre Hazan of the United States Institute for Peace (USIP) notes that the 66 disappearance cases which the Report could not “properly elucidate” also happened to be the most politically sensitive ones.<sup>365</sup>

The IER also awarded financial reparations totalling \$50-70 million to approximately 10,000 victims.<sup>366</sup> Finally, the report also recommended constitutional reforms as a means of guaranteeing the respect of human rights in the future, and asked the Prime Minister, on behalf of Morocco, to seek forgiveness from the nation for past human rights violations.<sup>367</sup>

## 4 Assessment

The IER has been described as a significant landmark, not only for Morocco, but for the entire Arab region.<sup>368</sup> Its work undoubtedly represents the culmination of a long struggle within Morocco to secure the acknowledgement and investigation of violations that occurred during the reign of Hassan II. The International Centre for Transitional Justice (ICTJ) has pointed out that during the course of its investigations, the Commission not only compiled a massive archive of information on victims, violations and perpetrators, but also that it compiled information that is:

[...] highly detailed [...] supplying substantial evidence for future accountability and institutional reform efforts. [...The Report has] also created a broad definition of possible remedies for victims [...] which

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363 *Ibid* Parts II to IV

364 *Ibid* Part I

365 Hazan (*supra* Note 1), at page 11

366 *Ibid* at page 12

367 Hazan (*supra* Note 1), at page 12

368 *Human Rights at the Crossroads*, Human Rights Watch 2004, Vol 16, No 6(E), October 2004 available at <http://www.hrw.org/reports/2004/morocco1004/>

sought to address the broader socio-cultural contexts that lump-sum monetary payments cannot sufficiently redress by themselves.<sup>369</sup>

The IER is also the only such commission ever to have possessed the power to grant financial compensation directly to victims.<sup>370</sup>

Many also deem Morocco's role as the first Arab Islamic society to establish this type of commission significant:<sup>371</sup>

One of the most important long-term legacies of the IER process could be its impact on the region. The precedent set by the IER could have a positive ripple effect across the Arab world.<sup>372</sup>

It has also been noted that:

[...] one of the striking peculiarities about Morocco is the absence of dramatic regime change, and the Commission's alternative aim of fostering democratization.<sup>373</sup>

From another perspective, however, there have been many criticisms of the IER. The IER was prohibited from attributing individual responsibility, or even mentioning the names of suspected perpetrators. This in turn led to conditions being imposed upon victims invited to testify at public hearings.

[...] the 'truth' the witnesses expressed was limited to victimisation, not accusations. They could mention only the locations of their suffering

[...] and the agencies [...] that had mistreated them [...]. [T]he victims were the main characters on the stage.<sup>374</sup>

Many were angry at this restriction, and parallel public hearings were organised in protest. These were referred to as "The Completely Free Testimonies for Truth," during which victims were entitled to name those they believed to be responsible for the violations they had suffered. The mere fact that these alternative hearings were able to take place publicly (albeit without official sanction) was in itself an important consequence of the IER, as Hazan says:

369 Opgenhaffen and Freeman (*supra* Note 2), at page 21

370 *Ibid* at page 2

371 Hazan (*supra* Note 1), at page 2

372 Opgenhaffen and Freeman (*supra* Note 2), at page 23

373 Hazan (*supra* Note 1), at page 13

374 Opgenhaffen and Freeman (*supra* Note 2), at page 6

[...] ironically the establishment of the IER enabled these public hearings to take place, creating a space for expression that surpassed the limits of the official truth commission.<sup>375</sup>

It was widely acknowledged that:

[...] the conditions for an impartial process for the perpetrators and those that gave the orders are not feasible due to the lack of a proper judicial system.<sup>376</sup>

In these circumstances it is perhaps disappointing that the IER did not make more concentrated efforts to investigate and explain the methods and responsibility of State organs.<sup>377</sup>

The IER was also limited in terms of temporal jurisdiction to abuses committed prior to 1999. Its work was however conducted during a period that unfortunately saw decreased State respect for human rights. The impact of its work therefore inevitably suffered when viewed alongside this backslide on behalf of the Moroccan government, as well as the ongoing impunity for contemporary human rights violations.<sup>378</sup> One Commissioner is quoted as saying:

People ask us, how can you investigate the past while the human rights abuses still go on, even if they don't compare with the past?<sup>379</sup>

The alternative public hearings attempted to address these issues where possible.<sup>380</sup> They were accompanied by truth commission monitoring committees and were symptomatic of a fractious relationship between the Commission and civil society.<sup>381</sup>

Additional criticisms of the IER included the over-centralisation of operations (with only one permanent office situated in Rabat); the lack of consultations with the NGO community; the fact that the IER had no ability to compel testimony; and the blurring of boundaries between the roles and personnel of the CCDH and the IER.<sup>382</sup>

375 Hazan (*supra* Note 1), at page 7

376 Interview with Driss el Yazami in Hazan (*supra* Note 1), at page 4

377 Hazan (*supra* Note 1), at page 11

378 Opgenhaffen and Freeman (*supra* Note 2), at page 20

379 Hazan (*supra* Note 1), at page 10

380 *Ibid* at page 7

381 Opgenhaffen and Freeman (*supra* Note 2), at page 20

382 *Ibid* at page 19

In the end, the IER was able to achieve many of its aims, including acknowledging the violations suffered by individuals at the hands of the State, and compensating those wronged in a meaningful way. The extent to which the IER itself was able to develop and promote a culture of dialogue is however questionable given the concerns noted above, though these limitation did in turn prompt further dialogue in a different forum. This is itself is an important result.

## Case Study H

# Fiji

Fiji is seldom mentioned in studies of post-conflict accountability mechanisms. In one sense, this is understandable: the accountability legislation proposed is yet to be adopted, and further to the coup of 2006 and a strong divide among civil society and the general public on the proposed truth commission, it may never be. Nevertheless, Fiji's accountability process deserves attention for at least two reasons.

First, while Fiji's coups have generally been "bloodless" – and hence have largely not registered on the international community's agenda – they demonstrate the very real consequences of a culture of impunity with respect to the stability of a country. It was precisely because of a lack of accountability for the perpetrators of human rights violations during the 2000 coup that the 2006 coup took place. Like Kenya, where impunity for violence perpetrated during previous election cycles set the stage for the outbreak of violence in December 2007, Fiji's cycles of coups without consequence have sent the message that governments can be changed at whim, and that human rights violations will be met with impunity, not accountability, thereby facilitating yet further cycles of violence and instability. The most recent coup of April 2009 therefore serves as a stark reminder of what is likely to happen in the absence of accountability.

Second, Fiji provides an example of a country that attempted to import elements from an accountability processes conducted elsewhere – in this case, South Africa and East Timor –transplanting them into their own situation without



regard for the effects of this altered context. This methodology is seldom successful, and the experience of Fiji is no different: the amnesty provision central to the process in South Africa has been rejected in Fiji simply as a tool by which the government seeks to protect its own wrongdoers rather than as a genuine attempt to reach a negotiated solution.

## 1

### Background

Fiji gained independence from Britain in 1970, but its transition from a colony to a self-governing democracy has not been a smooth one. British rule left a legacy of ethnic strife. Having populated the islands with large numbers of Indian workers, they created the basis for a conflict between the new Indian and the indigenous, principally Melanesian, communities. This conflict has dominated the politics of Fiji for a generation and continues to this day.

In 1987, following two coups, Fiji changed its status from a British Dominion to a Republic. The resulting Constitution, promulgated in 1990, entrenched the political domination of ethnic Fijians. This outraged the majority Indian population and led to significant Indian migration over the following years. Today, the population of Fiji is 37.4% Indo-Fijian and 54.8% indigenous Fijian.<sup>383</sup> The 1997 Constitution Amendment Act<sup>384</sup> (“the 1997 Constitution”) restored a multi-party system and removed an inbuilt indigenous Fijian majority in the House of Representatives, as well as the requirement that the Prime Minister be ethnic Fijian. However, this Constitution maintained native land rights that ensure about 82.5% of the country’s land is designated “native land” and is so owned by ethnic Fijians. These rights cannot be altered except by specially prescribed legislative procedures.<sup>385</sup>

The multi-racial People’s Coalition achieved a decisive victory in the 1999 elections, and Mahendra Chaudhry became the country’s first Indo-Fijian Prime Minister. However, his position was far from secure. On 19 May 2000, a disaffected businessman and Fijian nationalist named George Speight entered the Parliament building and captured Chaudhry and 35 parliamentarians, including most of the Cabinet. He held them hostage for 56 days. Meanwhile the

383 *CIA World Factbook*, accessed at <https://www.cia.gov/library/publications/the-world-factbook/geos/fj.html#People>

384 Constitution (Amendment) Act 1997, accessed at [http://www.pacilii.org/fj/legis/num\\_act/ca1997268/](http://www.pacilii.org/fj/legis/num_act/ca1997268/)

385 *Ibid* Section 185

President, Ratu Sir Kamisese Mara, declared a state of emergency and assumed executive authority himself. Not long after, on 29 May, he resigned. Commodore Josaia Voreqe Bainimarama, commonly known as Frank Bainimarama, appointed an interim military government and declared a state of martial law and appointed Laisenia Qarase as Prime Minister.

Speight also had himself sworn in as Prime Minister, and appointed a President and members of a Cabinet. However, he never achieved any real power outside the Parliament building, and sporadic outbreaks of violence elsewhere in the country led to nothing.

On 9 July 2000, the military government came to an agreement with Speight and the rebels, and Chaudhry and the other hostages were released on 12 and 13 July. The agreement had promised immunity from prosecution for the rebels, as well as a review of the 1997 Constitution. However, as soon as the hostages were released Commodore Bainimarama rescinded the agreement on the grounds that it had been made under duress. Speight and 369 others were subsequently arrested for treason. On 15 November 2000 the 1997 Constitution was reinstated by the High Court, Ratu Josefa Iloilovatu Uluivuda was affirmed as President, and Qarase remained Prime Minister.

A number of trials took place following the coup. The Justice Minister gave the figure of 556 in 2005, but he refused to name defendants, saying that many had been released and to name them would infringe upon their right to privacy. The report of a Parliamentary Standing Committee at the end of 2005 gave the figure of those convicted for offences relating to the coup as “over 700”, with “thousands” yet to be investigated.<sup>386</sup> The police also issued a press release on 5 January 2006 stating that since the coup:

[...] over 2000 people were processed, 782 have been charged and convicted for a total of 28 offence types in the Penal Code. The offences covered and the associated acts read like a comprehensive dissertation on crime and public disorder. I venture to suggest that there has been no incident of such criminal magnitude in the recent history of our region.<sup>387</sup>

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386 Report of the Sector Standing Committee on Justice, Law and Order on the Promotion of Reconciliation, Tolerance and Unity Bill, 2005 Parliament Of The Fiji Islands Parliamentary Paper No. 79 Of 2005 November/December 2005 Section 6.5

387 Fiji Police Force Media Update 5 January 2006

Speight himself plead guilty to treason and was sentenced to death, a sentence that was immediately commuted to life imprisonment. Many of his co-conspirators are also serving sentences up to and including imprisonment for life.

A further coup took place on 5 December 2006. As a result, while Quarase was still officially Prime Minister, acting duties were taken over by Commodore Bainimarama, and Quarase remained confined to his home island.

On 9 April 2009 the Fiji Court of Appeals ruled the 2006 coup illegal, ruling the government installed in January 2007 as invalid, and dissolving Parliament. The following day, President Ratu Josefa Iloilo announced that he had suspended the Constitution, dismissed all judges, and installed Commodore Bainimarama, who had announced he was standing down following the Court of Appeals ruling, as Prime Minister.<sup>388</sup> Following this coup, a new era of repression and fear has been characterised by a crackdown on the media and human rights activists.<sup>389</sup> This evidence of Fiji's ongoing instability bolsters fears that the country has now succumbed to a coup culture.

## 2

### **The Promotion of Reconciliation, Tolerance and Unity Bill**

The Promotion of Reconciliation, Tolerance and Unity Bill of 2005 (“the Bill”) proposed the establishment of a Reconciliation and Unity Commission (RUC). The Bill was proposed by the government in an effort to deal with the events that had occurred during the period of political and civil unrest from 19 May 2000 to 15 March 2001.<sup>390</sup> It was introduced to the Fijian Parliament on 4 May 2005, stating its aims as:

[...] to provide for and regulate the processes of promoting effective reconciliation amongst the people of the Fiji islands following the political and civil unrest and events of 2000; [and]

to establish a reconciliation and unity commission and to provide for its composition, powers, functions and procedures;<sup>391</sup>

388 Fijian president Ratu Josefa Iloilo abolishes constitution, sacks judiciary and assumes power, *The Australian*, 10 April 2009

389 Amnesty International, *Fiji human rights worsening under military rule*, 20 April 2009, available from <http://www.amnesty.org/en/news-and-updates/news/fiji-human-rights-worsening-under-new-military-regime-20090420>

390 Promotion of Reconciliation, Tolerance and Unity Bill 2005 Section 2

391 *Ibid* opening statements

It was hoped this would lead to the permanent cessation of inter-ethnic conflict:

[...] the people of the Fiji Islands are desirous of bridging the past of a divided society characterised by political instability founded principally on a legacy of inter-ethnic distrust and fear of the uncertainties, and a future founded on the recognition of its' adapted principles of human rights, democracy and peaceful coexistence;<sup>392</sup>

However, many of its opponents claim that the real ambition of the legislation is to permanently shield members of the government involved in the 2000 coup from prosecution.

### **3 The Reconciliation and Unity Commission**

The principal proposals of the Bill were as follows. A Reconciliation and Unity Commission (RUC) of between 3 and 5 Commissioners would be appointed by the President “on the advice of the Prime Minister after the Prime Minister has consulted the leader of the opposition.”<sup>393</sup> Commissioners would be given terms of office of three years, though these would be renewable,<sup>394</sup> and a Commissioner could be removed by the President on grounds of “misconduct, incapacity or incompetence” on the advice of the Prime Minister after the Prime Minister had consulted Cabinet.<sup>395</sup> There were no requirements of the persons appointed, but they could not be members of parliament or other holders of public office.<sup>396</sup>

They aim of the Commission was to hold hearings and assess evidence:

[...] relating to the causes, nature and extent of the violations of human rights committed during the designated period, including the antecedents, circumstances, factors and context of such violations as well as the perspectives and motives of both the perpetrators and victims of such violations [...].<sup>397</sup>

It would have the power to grant reparation measures or compensation to:

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392 *Ibid* preamble

393 *Ibid* Section 4(1)

394 *Ibid* Section 4(3)

395 *Ibid* Section 4(6)

396 *Ibid* Section 4(4)

397 *Ibid* Section 5(1)(a)

[...] any person whose claims as victims of gross human rights violations during the designated period are established [...].<sup>398</sup>

It would also have the power to facilitate:

[...] the granting of amnesty by the President to persons who make full voluntary disclosures of all facts relevant to acts or omissions constituting or causing a violation of human rights associated with a political objective committed during the designated period [...].<sup>399</sup>

It was also intended that the Commission would compile reports recommending measures designed to prevent future violations of human rights.<sup>400</sup>

It was envisaged that the Commission would appoint special purpose committees, along the lines of those used by the South African TRC. A Victims and Reparations Committee and an Amnesty Committee are therefore both specified in the Bill.<sup>401</sup> Both Committees would be composed of:

a retired judge or a legal practitioner who is qualified for appointment as a judge, as the chairperson; and 2 members, appointed by the Commission with the approval of the Minister.<sup>402 403</sup>

The Commission itself was intended to have a short life-span: 18 months, followed by a further six months if the Prime Minister so decided.<sup>404</sup> All applications for declaration as a victim, reparation or amnesty were required to be made during a period of three months after the Act came into force, and were to be determined within a further 12 months.<sup>405</sup> There were therefore strict limitations on the length of any operation – perhaps appropriate for a small country with a population of only 900,000 and events covering only a short timescale.

The Commission would have powers of subpoena,<sup>406</sup> and evidence would be taken under oath.<sup>407</sup> Hearings would be public,<sup>408</sup> there was privilege against

398 *Ibid* Section 5(1)(d)

399 *Ibid* Section 5(1)(e)

400 *Ibid* Section 5(1)(f)

401 *Ibid* Section 7(a), and Sections 8 and 9

402 There are several unexplained references in the Bill to the “Minister”; it appears from the context that this means the Prime Minister, therefore the form (Prime) Minister has been used in these instances.

403 Promotion of Reconciliation, Tolerance and Unity Bill 2005 Sections 8(1) and 9(1)

404 *Ibid* Section 10

405 *Ibid* Section 13(2) and (3)

406 *Ibid* Section 13(1)(c)

407 *Ibid* Section 13(d)

408 *Ibid* Section 14

self-incrimination,<sup>409</sup> and witnesses were entitled to legal representation.<sup>410</sup> A court-like environment was therefore clearly envisaged.

There is a strong emphasis in the Bill on reparations for victims. Reparation “includes ex gratia payment, restitution, rehabilitation, recognition or any form of compensation”<sup>411</sup> and a Special Fund would be set up to provide money for compensation payments, which would receive money from parliamentary appropriations and donations.<sup>412</sup>

In the Fijian context, a victim was considered:

[...] a person who suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights as a result of gross violation of human rights or as a result of an act associated with a political objective for which amnesty has been granted.<sup>413</sup>

The meaning of this section is not immediately clear, and it has been understood in some quarters to mean that a victim is only entitled to reparation if amnesty has been granted to the perpetrator. However, if read carefully, it appears that a victim includes any person who has suffered as a result of a gross human rights violations, regardless of the perpetrator. It nevertheless remains curious that a person who has suffered as a result of an act associated with a political objective is reliant on the perpetrator applying for, and obtaining, amnesty before he or she can be compensated.

Section 22 contains lengthy provisions on amnesty, which are obviously modelled on the South African TRC. To be eligible for an amnesty application, an act must be associated with a political objective. Priority was given to the applications of those in custody.<sup>414</sup> According to the Bill, the President “shall” grant amnesty on the recommendation of the Commission.<sup>415</sup> If granted, amnesty would include all types of liability, civil, criminal and vicarious.<sup>416</sup> No limitation was therefore made on what types of act eligible for amnesty.

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409 *Ibid* Section 15

410 *Ibid* Section 16

411 *Ibid* Section 18(11)

412 *Ibid* Section 20

413 *Ibid* Section 19(11)

414 *Ibid* Section 21(2)

415 *Ibid* Section 21(10)

416 *Ibid* Section 21(11)

The Bill went on to establish a National Council on Promotion of Reconciliation, Tolerance and Unity.<sup>417</sup> A Chairman and members of different ethnic, religious and other were to be appointed by the Prime Minister, and its function was to develop and implement a national policy on the promotion of reconciliation, understanding, tolerance and unity. In performing its functions it:

[...] shall have regard and shall give priority to the application of cultural, customary and traditional means of promoting and achieving unity in a spirit of tolerance and understanding.<sup>418</sup>

This is essentially the only indication of how these objectives were to be achieved.

## **4 Criticism of the Bill**

The Bill was introduced to the Fijian Parliament on 4 May 2005. From the beginning it attracted considerable opposition, with the principal source of contention being the amnesty provisions.

This was not the first time that Fiji had used amnesties. A blanket amnesty was granted by the Immunity Decree of 1988 to those who participated in the 1987 military coup. This immunity was protected in the 1990 and 1997 Constitutions.

Many prominent members of Fijian society were outspokenly critical of the Bill, with the Fiji Law Society going so far as to promise a legal challenge to the Bill if it were passed by Parliament on the grounds that the amnesty provisions were unconstitutional.<sup>419</sup> Others suggested the amnesty provisions would tear the nation apart rather than foster reconciliation. Members of civil society criticised the lack of public consultation on the Bill, noting the harmful effects this would have by undermining the public's sense of ownership over the reconciliation process.<sup>420</sup>

A report by the International Commission of Jurists in August 2005 identified two principal respects in which it argued that the Bill was inconsistent with

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417 *Ibid* Part 5

418 *Ibid* Section 24(2)

419 Radio New Zealand International, *Fiji Law Society plans challenge if Reconciliation Bill passed*, 3 July 2005, accessed at <http://www.rnzi.com/pages/news.php?op=read&id=17782>

420 [http://en.wikipedia.org/wiki/Reconciliation\\_and\\_Unity\\_Commission\\_\(Fiji\)](http://en.wikipedia.org/wiki/Reconciliation_and_Unity_Commission_(Fiji))

Fiji's obligations under customary international law: its failure to extend the rights of victims to their dependents and others who have suffered harm; and the amnesty provision, which it incorrectly characterised as "unconditional". On the latter point it stated that:

Fiji has an obligation under customary international human rights law to prosecute and punish gross human rights violations and crimes of private persons that impede the enjoyment of fundamental human rights. An unconditional amnesty provision covering gross human rights violations or serious crimes that impair the enjoyment of human rights would be in breach of Fiji's obligations under international law.<sup>421</sup>

It should also be added that since Fiji ratified the Rome Statute for the ICC on 29 November 1999, it has an obligation under international treaty law to put an end to impunity and exercise criminal jurisdiction over those responsible for international crimes. These would certainly include some of the crimes covered by the amnesty.

A report by the Parliamentary Standing Committee on Justice, Law and Order in November/December 2005 therefore considered the proposals in the Bill. Manasa Tugia, a strong supporter of the Bill, chaired the Committee. Their report considers Fijian concepts of community based restorative justice:

The Fijian word for reconciliation is *soro*, whilst the mutual act of apologizing and accepting the apology is known as *veisorosorovi*. Generally speaking, it can be defined as a form or act of submission involving presentation of food, *yaqona*, and/or valuables, whereby anger is assuaged and *i valu* (war) is transformed into *sautu* (peace), *veimecaki* (enemy) into *veilomani* (friendship), *veisei* (infighting) or *duiyaloyalo* (disunity) into *lomavata* (unity) and so on. It is often followed by the consumption of *yaqona* to underline the renewed friendship. *Soro* and *bulubulu* are serious acts of showing remorse. It involves the two sides in the dispute coming together in an atmosphere of mutual trust and respect. These approaches are highly valued and can be used in different types of dispute settlements and conflicts resolution.

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<sup>421</sup> International Commission of Jurists Fiji: Legal Submission on the Promotion of Reconciliation, Tolerance and Unity Bill, 2005 August 2005, at page 3



This process of reconciliation therefore involves both the process of admission of fault by the wrongdoer and the acceptance of apology by the victims. There is reciprocity between both parties. Both sides come together with a sense of oneness and purpose, and social cohesion and relationships are maintained in a mutually desirable way.<sup>422</sup>

This echoes the considerations given to community justice in places such as East Timor and Rwanda. In both these places, traditional community ceremonies bearing similarities to the ones described were used as transitional justice mechanisms, with mixed results.

The report went on to consider the issue of amnesty:

It was explained to the Committee that under international law, the granting of amnesty for international war crimes, crimes against humanity and genocide, are not permissible. Amnesty for gross violations of human rights including torture, disappearances and extra-judicial executions, may be incompatible with some human rights conventions, and may also undermine principles endorsed in the UN General Assembly.<sup>423</sup>

However, it continues:

The objective behind the granting of amnesty is to enable the applicant's (wrongdoer) story to contribute to the knowledge about the past. Supporters of the amnesty provision say that more truth can be revealed in this process, than through normal court trials. There is the incentive in the restorative justice arrangement through the RUC to tell the entire truth for which amnesty is the incentive. Trials, normal courts of law, often focus on acquittal as a primary goal. The possibility of the truth emanating from the case becomes a secondary matter in this retributive process, unlike in the restorative justice arrangement.<sup>424</sup>

During the course of its review, the Parliamentary Standing Committee on Justice, Law and Order had received 124 formal submissions and another 148 oral submissions obtained during its public hearings around the country. It noted from these that:

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422 Report of the Sector Standing Committee on Justice, Law and Order (*supra* Note 4) Sections 5.4.4 and 5.4.5

423 *Ibid* Section 5.5.4.7

424 *Ibid* Section 5.5.4.11

Whilst there seemed to be overwhelming support for the overall objectives of national unity, reconciliation, tolerance and understanding, there were basically diametrically opposing views on how these objectives are to be achieved, especially in the way the Bill proposes it to be done.<sup>425</sup>

The main concern of opponents to the Bill related again to its amnesty proposals. The Committee considered all views on the Bill and concluded that its recommendation was to “slightly readjust the way in which the Bill is designed, whilst still maintaining the basic objective and the conceptual framework of the Bill.”<sup>426</sup> It strongly recommended the model used in East Timor, which distinguished between serious and less serious human rights violations:

[...] serious human rights violations would include planning and funding the violations, but less serious crime would be crimes such as arson and assault committed by people who are manipulated by money or powerful influences. The serious violations would continue to go through the court processes, whereas the less serious violations would be resolved through a process, which encourages truth telling, reconciliation with victims, reparation and immunity from prosecution.<sup>427</sup>

The Committee presented this as:

[...] a slight revision in the policy direction, so as to ensure there are no doubts about the constitutionality and acceptability of the provisions in the Bill. The ultimate objective or underlying policy of the Bill remains intact.<sup>428</sup>

On 6 October 2005, before this report was published, Prime Minister Qarase was also quoted as saying:

There will be changes particularly in the amnesty provision following good points raised by the public, so that the bill is constitutional and in accordance with the Bill of Rights.<sup>429</sup>

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425 *Ibid* Section 6.4

426 *Ibid* Section 7.3.1

427 *Ibid* Section 7.3.10

428 *Ibid* Section 7.4.1.3

429 “Fiji PM promises changes to coup amnesty bill” ABC News Online 6 October 2005; accessed at <http://www.abc.net.au/news/newsitems/200510/s1475596.htm>

However, to date, no new draft of the Bill has been produced, and following further coups in 2006 and 2009, it can be assumed that the plans for a Commission have been shelved for the present. Commodore Bainimarama, who is currently acting Prime Minister of the interim government, is a committed opponent of the Commission, so the Bill will almost certainly not be revived under his leadership.

## 5 Conclusion

The Fijian experience to date has not achieved any of its aims and is unlikely to do so in the near future. The Bill itself aimed to promote reconciliation and unity. However, due to a combination of flaws in the legislation and ongoing ethnic conflict in the country, it has been impossible for the Bill to receive sufficient support to pass into law.

Opposition to the Bill has been centred on its amnesty provisions and reflects, at least in part, the ethnic strife in Fiji. Prime Minister Qarase, the authoritative Great Council of Chiefs, and many indigenous Fijians support the Bill. Opposition Leader Mahendra Chaudry, Interim Prime Minister Commodore Bainimarama, and most Indo-Fijians are opposed. Politicians outside the government, including Chaudry, see the Bill as a cynical device for providing amnesties to members of the government implicated in the coup.

These stark differences on the best approach to reconciliation in Fiji ultimately led to the December 2006 coup. One of the stated reasons for this coup was the proposed amnesty the Bill would have granted to those involved with the 2000 coup.<sup>430</sup> The fact that Fijian society was so deeply divided by seemingly intractable positions on how to move forward, ultimately made it impossible for a negotiated solution to be found that would satisfy all parties, including those with the military power to overthrow the government. Since the coup, the Bill has essentially been shelved and is unlikely to make a re-appearance in Fiji's legislative timetable.

Perhaps the most important lesson illustrated by the Fijian example is therefore the inherent difficulty of attempting to import, wholesale, a model that has worked elsewhere, without considering how the relevant contexts inevitably

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430 Commander RFMF, *Public Declaration of Military Takeover*, 5 December 2006

differ. In South Africa, amnesty was considered necessary to prevent further bloodshed and instability. In Fiji, the situation was completely different. Here, an insistence on amnesty therefore led only to further instability, setting Fiji's development back several years. Fiji's experience therefore serves also as a stark reminder of the cost of failing to secure accountability for serious human rights abuses. By failing to hold those responsible for one coup accountable, Fiji has created a culture of impunity that can be seen clearly in the subsequent use of violence whenever conflict or ethnic strife again flared. Fiji, perhaps more than any other case considered, therefore illustrates the inherent difficulty in any claim that suggests peace and stability are best achieved without concerted efforts to address the crimes of the past.

## Case Study I

# Rwanda

The Rwandan genocide presents one of the most comprehensive and far-reaching transitional justice challenges considered in this report. In addition to the material and human devastation the genocide caused, the consequent prison population also posed an enormous problem for the Rwandan government. What could it do with 120,000 genocide suspects held in prisons across the country when there was no realistic possibility of conducting trials? Part of the answer was found in the revival of the traditional gacaca process. Lawyer and expert on Rwanda, Lars Waldorf calls it:

[...] the most ambitious experiment in transitional justice ever attempted: mass justice for mass atrocity. While other post-conflict countries have opted for amnesties, truth commissions, selective criminal prosecutions, or some combination thereof, Rwanda decided to put most of the nation on trial. To accomplish this task, the government has adapted a local dispute resolution mechanism (gacaca) to try hundreds of thousands of suspected genocidaires in approximately nine thousand local communities. In each community, perpetrators, victims, bystanders, and rescuers are supposed to come together once a week to make accusations, hear confessions, try cases, and somehow become better neighbours in the process.<sup>431</sup>

While the ICTR was established to try some of the perpetrators deemed most responsible for the Rwandan genocide, this chapter will focus on this

<sup>431</sup> L. Waldorf, *Mass Justice For Mass Atrocity: Rethinking Local Justice As Transitional Justice*, Spring 2006 79 Temp. L. Rev. 1, at page 2

bold experiment of community justice as a means of seeking accountability following a period of human rights abuse and genocide. Despite the international community's enthusiasm for finding local solutions to local problems, the gacaca system has been severely criticised for failing to achieve its stated aims of ending impunity and bringing reconciliation to Rwanda.

## 1

### Background

A former Belgian colony, Rwanda is a landlocked country in the centre of Africa. Its population of about 10 million people is divided into 3 ethnic groups: 84% Hutu, 15% Tutsi and 1% Twa.<sup>432</sup> Despite the 1994 genocide, these proportions have not changed significantly, as the aftermath of the genocide saw the extensive return of Tutsi refugees to the country.

In the years since it gained its independence in 1962, Rwanda has been divided by ethnic strife. Independence for Rwanda meant the abolishment of a Tutsi monarchy by referendum, and the establishment of the first republic under the Hutu leader Grégoire Kayabanda. As a result of the violence that followed this change, many Tutsi refugees fled to Burundi, where they formed a guerrilla army called the Rwandan Patriotic Front (RPF). Meanwhile, Hutus from Burundi fled Tutsi-led massacres there by escaping over the border to Rwanda.

In 1990 the RPF invaded Rwanda and civil war ensued. The Arusha Accords of 1993 signalled a cease-fire that saw the government and RPF sign a power-sharing agreement. However, when Hutu President Habyarimana's plane was shot down over Kigali on 6 April 1994, the touch-paper was lit, sparking the genocide.

Over the next 3 months an estimated 800,000 Tutsis and Hutu moderates were killed in what was probably the most savage genocide in modern times. Simultaneously, RPF forces advanced and slowly gained control of the country. In July 1994 they entered Kigali and seized power. Many thousands of Hutus were also killed in the fighting and in retributive attacks.

The Rwandan genocide was distinguished by its mass participation, and the fact that an overwhelming majority of the victims belonged to a single ethnic group, although many Hutus were themselves victims – either perceived as

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432 *CIA World Factbook*, accessed at <https://www.cia.gov/library/publications/the-world-factbook/geos/rw.html>

moderates or simply mistaken for Tutsis. There was little advanced weaponry in use, and most of the killing was done by machete; the violence therefore appeared to be intensely personal.

## **2**

### **The justice problem**

The international community, which had failed to intervene to prevent the violence, reacted shortly afterwards by setting up the ICTR to try suspects in Arusha in neighbouring Tanzania. The trials are extremely lengthy and are likely to continue for many years despite a UN mandated deadline at the end of 2010. As of May 2008 only 28 cases had been completed.

The ICTR, however, only has the capacity to prosecute a few dozen of the perpetrators most responsible for the violence. By 1999 therefore, an estimated 120,000 suspects remained in prison in Rwanda, a large proportion of whom were yet to be charged. The Rwandan justice system was not equipped to cope with this burden. No national justice system could be. In the 10 years between 1996 and 2006 the national courts were able to try some 10,000 people. During this time there was a rising acquittal rate, from 6% to about 27%, and a falling number of death sentences, from 45% to 3%.<sup>433</sup> In fact, executions occurred only on one well-publicised occasion when 22 people were publicly executed by firing squad in April 1998. In August 2007 Rwanda abolished the death penalty.

From 2001, two other methods of dealing with the judicial backlog were employed: the first and simplest was the provisional release of those against whom there was little evidence, and of those whose alleged crimes were minor. Between 2004 and 2007 almost half the number of prisoners – some 58,000 – were “provisionally” released by the government. The second method was to set up a system of “gacaca” justice to deal with the remaining prisoners.

Gacaca, which translates roughly as “small grass”, refers to the place in the village where the resolution of conflict would traditionally occur. This links it neatly, if coincidentally, with the concept of “grassroots” justice. Traditionally this mechanism was used to adjudicate disputes between families concerning marriage, property and personal injury – local chiefs would deal with more serious matters. Serious crimes such as murder were therefore not traditionally dealt with by gacaca. As

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433 Waldorf (*supra* Note 1), at page 14

with many traditional justice mechanisms, the emphasis was on family, rather than individual, accountability.

For the Rwandan government however, a wholly new form of gacaca that imposed individual accountability for serious crimes appeared to be the answer to the problem of what to do with the genocide prisoners. It could provide a massive nationwide system of community “trials”; it would be quick and it would be cheap. There would be no prosecutors, no defence lawyers and no trained judges. The system would be run by “honest persons” from local communities, and these persons would not be paid or compensated in any way for their work. The financial implications of running a country-wide gacaca system were therefore minimal.

According to the Rwandan government, the gacaca system would achieve the following:

It will enable the truth to be revealed about Genocide and Crimes against Humanity in Rwanda.

It will speed up the trials of those accused of Genocide, Crimes against Humanity and other crimes.

It will put an end to the culture of impunity in Rwanda.

It will reconcile the people of Rwanda and strengthen ties between them.

It revives traditional forms of dispensing justice based on Rwandese culture.

It demonstrates the ability of local communities to solve their own problems.

Helps solve some of the many problems caused by Genocide. [sic]<sup>434</sup>

### **3 The gacaca court system**

Under Rwanda’s Genocide Law, passed in 1996,<sup>435</sup> four categories of genocide crime were established. The Gacaca Law of 2001 maintained these four

434 Official Website of the government of Rwanda

435 On The Organization Of Prosecution For Offences Constituting The Crime Of Genocide Or Crimes Against Humanity Committed Since 1 October 1990 Organic Law No 08/96 of 30 August 1996



categories.<sup>436</sup> Category 1 includes the “planners, organisers, instigators, supervisors and leaders” of the genocide, persons in positions of authority who perpetrated such crimes, “notorious murderers” and sexual torturers.<sup>437</sup> These would not be tried under the jurisdiction of the gacaca courts. Gacaca courts could deal only with the three less serious categories of offender:

Category 2: Persons whose criminal acts or whose acts of criminal participation place them among perpetrators, conspirators or accomplices of intentional homicide or of serious assault against the person causing death.

Category 3: Persons whose criminal acts or whose acts of criminal participation make them guilty of other serious assaults against the person.

Category 4: Persons who committed offences against property.<sup>438</sup>

These distinctions have however been repeatedly modified and gacaca courts have been charged with hearing increasingly serious types of crimes. Changes to the law in 2007 allowed gacaca courts to try “notorious murderers” and pass sentences up to and including life imprisonment.<sup>439</sup> In January 2008, the Rwandan Cabinet went a stage further and proposed that all genocide trials, including Category 1 cases, should be moved to gacaca courts.<sup>440</sup>

Gacaca “courts of cell”, their smallest regional subdivision, which cannot number more than 200 people aged 18 and over,<sup>441</sup> collect evidence from witnesses. Cells elect 24 “honest persons”, of whom 19 (later reduced to 9,<sup>442</sup> then 7<sup>443</sup>) make up the court of cell. A further 5 make up the court of sector, which in turn sends 5 people to the court of district.

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436 Setting Up “Gacaca Jurisdictions” And Organizing Prosecutions For Offences Constituting The Crime Of Genocide Or Crimes Against Humanity Committed Between October 1, 1990 And December 31, 1994 *Organic Law N° 40/2000 Of 26 January 2001*

437 *Organic Law No 08/96 (supra Note 5)*

438 *Ibid*

439 Modifying And Complementing Organic Law N°16/2004 Of 19/6/2004 Establishing The Organisation, Competence And Functioning Of Gacaca Courts Charged With Prosecuting And Trying The Perpetrators Of The Crime Of Genocide And Other Crimes Against Humanity, Committed Between October 1, 1990 And December 31, 1994 *Organic Law N° 10/2007 Of 01/03/2007*, Articles 11 and 14

440 Rwandan Government Plans To Shift All Genocide Cases To Gacaca Courts *Hirondelle News Agency* 22 January 2008; accessed at <http://www.hirondellenews.com/content/view/1470/474/>; As of May 2008, no bill had yet been passed by parliament to this effect.

441 *Organic Law N° 40/2000 (supra Note 6) Article 7*

442 Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide or Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994 *Organic Law No. 16/2004 of 19 June 2004*

443 *Organic Law N° 10/2007 (supra Note 9) Article 1*

Honest persons are defined as:

[...] any Rwandan meeting the following conditions:

- a) to have a good behaviour and morals;
- b) to always say the truth;
- c) to be trustworthy;
- d) to be characterised by a spirit of sharing speech;
- e) not to have been sentenced by a trial emanating from the tried case to a penalty of at least 6 months' imprisonment;
- f) not to have participated in perpetrating offences constituting the crime of genocide or crimes against humanity;
- g) to be free from the spirit of sectarianism and discrimination.

[sic]<sup>444</sup>

The 2007 modification to the law renames these persons “persons of integrity”, without significantly changing the definition.<sup>445</sup> There is no indication as to how a person is to be so adjudged – other members of the cell, to whom these qualities are presumably meant to be evident, make the decision. Police, politicians, military and certain other categories of official are excluded from serving. No person can serve in a case in which they have a family relationship or other interest.<sup>446</sup> Hearings are public,<sup>447</sup> and are held at least once a week.<sup>448</sup> Decisions are by consensus, or failing this, by absolute majority.<sup>449</sup> Appeals, on points of law only, may be referred by the Prosecutor General (not by the defence) to the Court of Cassation.<sup>450</sup> The system therefore has a subsidiary relationship, if not a close one, to the ordinary court system.

Gacaca courts do not have to rely only on evidence taken during hearings. They also have access to prisoner confessions and to the files of State prosecutors. The courts of cell prepare cases which are then distributed to the correct courts: cases deemed to fall within category 1 are sent to the courts of sector and

444 *Organic Law N° 40/2000 (supra Note 6) Article 11*

445 *Organic Law N° 10/2007 (supra Note 9) Article 4*

446 *Organic Law N° 40/2000 (supra Note 6) Article 16*

447 *Ibid Article 24*

448 *Ibid Article 25*

449 *Ibid Article 27*

450 *Ibid Article 89*

district, from where they are referred for prosecution in the ordinary courts; cases in categories 2 and 3 are tried by gacaca courts of district and sector.<sup>451</sup> The courts of cell try those in category 4. Each level of court tries appeals from the courts below, and the gacaca court of province deals with appeals from the court of district.<sup>452</sup> Rather confusingly, the 2004 modification of the law merged categories 2 and 3 into a new category 2, with category 4 becoming category 3. The question of which category an offence falls under depends therefore on the date on which it was subject to prosecution.

Gacaca courts are a complex structure, and involve people from the most local levels and upwards. All such courts now operate under the newly formed Gacaca Jurisdictions Department of the Supreme Court of Rwanda.

Defendants have a right to confess and plead guilty. In contrast with many truth commissions, notably South Africa's, in order to be accepted, a confession has to include the expression of an apology, as well as the identification of co-perpetrators.<sup>453</sup> Persons who take advantage of such a procedure have their sentences substantially reduced.<sup>454</sup>

Sentences for offences in the original category 2 are a maximum of 25 years imprisonment, and in category 3 they are five to seven years imprisonment. In both cases, half the sentence is commuted to community services. Offences in category 4 attract only community penalties.<sup>455</sup> However, changes in 2007 allowed gacaca courts to deal with “notorious murderers”, who would originally have fallen in category 1, and gave gacaca courts the power to impose life imprisonment.<sup>456</sup>

Copies of the rulings and judgments of the courts are forwarded to the Compensation Fund for Victims of the Genocide and Crimes against Humanity for consideration of compensation.<sup>457</sup> However, this fund has yet to be established, so the pressing issue of compensation remains only theoretical at present. Although compensation has been awarded in the vast number of cases dealt with in the national courts, such compensation is also largely theoretical, as most genocide perpetrators are as penniless as the survivors.

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451 Categories 2 and 3 were later merged, see Organic Law No. 16/2004 (*supra* Note 13)

452 Organic Law N° 40/2000 (*supra* Note 6) Article 42

453 *Ibid* Article 54

454 *Ibid* Articles 55 and 68-71

455 *Ibid* Articles 69-71

456 Organic Law N° 10/2007 (*supra* Note 9) Articles 11 and 14

457 Organic Law N° 40/2000 (*supra* Note 7) Article 90

In Waldorf's view, the lack of compensation reduces the incentive for the survivors to participate:

Recognizing that, the government has tried to increase the symbolic reparations that survivors can receive through gacaca: the 2004 law now requires genocidaires who plead guilty to reveal the whereabouts of their victims' remains. [...]t leaves gacaca's community service component as the only remaining mechanism for compensating survivors. Yet, such a policy could exacerbate ethnic tensions as it could be seen as a return to the colonial-era forced labor system under which Hutu clients worked for Tutsi patrons.<sup>458</sup>

Gacaca was started as a pilot project and was originally used in only 106 sectors, or in about 10% of the country. The most recent official report<sup>459</sup> examines the gacaca system until June 2006. Although gacaca had by this stage been launched nationwide, trials had yet to start in the remaining 90% of the country. The report details that a total of 752 courts of cell operated during the pilot phase, and they dealt with 56,789 judicial files during the pilot period, which ran until June 2006.

The original timescale envisaged all trials being completed by December 2007.<sup>460</sup> This was clearly unrealistic. In July 2007 therefore the Justice Minister announced that trials would continue until December 2008.<sup>461</sup> This was subsequently extended again to June 2009.<sup>462</sup>

## 4 Assessment

The gacaca experiment was a bold one. In legal terms, it had several inherent problems. These courts have been given extensive decision-making and punitive powers, yet they are constituted by no legally trained judges or lawyers, and operate without reference to the rule of law. Defence rights are negligible and there is no protection for victims or witnesses. There are no rules of evidence and no guidance as to what is required in order to prove an offence. It is

458 Waldorf (*supra* Note 1), at page 18

459 *Report on Trials in Pilot Gacaca Courts June 2006* accessed at <http://www.inkiko-gacaca.gov.rw/pdf/introduction%20english.pdf>

460 *Ibid*

461 Frank R. Kagabo Gacaca Courts to Close December 2008 *The New Times* (Kigali) 15 July 2007, accessed at <http://allafrica.com/stories/200707160972.html>

462 Edwin Misoni, CLNG to highlight Gacaca achievements *The New Times* (Kigali) 29 June 2009, accessed at <http://www.newtimes.co.rw/index.php?issue=13914&article=16234>

thought sufficient merely that they are under the control of “honest persons” who “have good behaviour and morals” and “always say the truth”.

Judges in gacaca are known as *Inyangamugayo*. This literally translates as “those who detest dishonesty”. In fact, there have been serious concerns expressed about the integrity of the judges. In 2007 there was widespread concern among human rights groups about the case of François-Xavier Byuma, a prominent human rights campaigner, who was sentenced to 19 years in prison by a gacaca court, was presided over by a judge who was himself under investigation by Byuma’s NGO for the rape of an 17 year old girl.<sup>463</sup> In its 2008 Annual Report, Amnesty International notes:

Poorly qualified, ill-trained and corrupt gacaca judges in certain districts fuelled widespread distrust of the gacaca system. In December [2007], the League for Human Rights in the Great Lakes Region (LDGL) reported that seven judges of the gacaca court of the Kibirizi sector, South Province, had been arrested in November for tampering with evidence.<sup>464</sup>

The parallel adjudication process also brings with it the risk of double jeopardy. Human Rights Watch notes:

By September 2007, the Minister of Justice estimated that there had been dozens of cases where persons tried in conventional courts were brought to gacaca jurisdictions for prosecution of the same crimes for which they had already been judged.<sup>465</sup>

The gacaca courts must however be viewed in light of the political circumstances in which they operate. The Rwandan government has taken an increasingly authoritarian approach in the years since 1994. The 2003 Constitution enshrines within it the official account of the genocide. It makes it a criminal offence to question that account, as “revisionism, negationism and trivialisation of genocide are punishable by the law.”<sup>466</sup> Professor Longman of Berkeley University’s War Crimes Institute, who expresses general support for the gacaca process, concedes that:

463 *Amnesty International Report 2008* May 2008, at page 267, accessed at <http://www.amnesty.org/en/library/asset/POL10/001/2008/en/9a3b2fec-2c0d-11dd-b0b9-f7948efb10d4/pol100012008eng.pdf>

464 *Ibid*, at page 267

465 *The Prosecutor v Fulgence Kayishema* Case No. ICTR-2001-67-I Brief Of Human Rights Watch As Amicus Curiae In Opposition To Rule 11 Bis Transfer 3 January 2008, at paragraph 36

466 *The Constitution of the Republic of Rwanda*, 26 May 2003 Article 13

Gacaca in part serves the government interest in highlighting the centrality of the genocide and whitewashing its own crimes.<sup>467</sup>

There has also been strong and successful resistance from the Rwandan government to trials of the RPF military. Few have been tried in Rwandan courts, and the handful who have been convicted have served only derisory sentences. The gacaca courts have no authority to deal with “war crimes” and therefore do not deal with crimes committed by the RPF.<sup>468</sup> This has caused much resentment of the gacaca process in areas where large numbers of RPF crimes were committed.

On 28 May 2008, a trial chamber of the ICTR refused to refer a case to Rwanda. Among the reasons given was the failure of the Rwandan government to observe judicial independence, as well as the failure of its courts to uphold fair trial standards.<sup>469</sup> Two other trial chambers have since followed suit.

Within Rwanda, reactions to the gacaca process are mixed. A survey conducted by Berkeley University in California concluded that about a third of the population viewed the trials negatively, and that a slightly smaller proportion viewed them positively. This may partly depend on which side of the perpetrator/victim divide a person falls. Significantly, for a process whose main claim to legitimacy is its community based approach, many Rwandans feel that they are distanced from the process and feel little better informed about gacaca than they are about trials at the ICTR.<sup>470</sup>

Attendance at gacaca hearings has been low. One participant is reported to have put this in context by saying:

Let me point out that this number here in gacaca is small compared to the number of people who used to go for attacks when an alarm was made.<sup>471</sup>

One reason for the reluctance to participate may be a simple one: in a subsistence economy, people are forced to work in order to eat. They therefore have little time for attending lengthy meetings. A more serious problem may be

467 T Longman *Justice at the Grassroots? Gacaca Trials in Rwanda* in N Roht-Arriaza and J Mariezcurrena (Eds) *Transitional Justice in the Twenty-First Century* Cambridge University Press (2006), at page 223

468 Waldorf (*supra* Note 1), at page 61

469 *The Prosecutor v Yussuf Munyakazi* Case No. ICTR-97-36-R11bis Decision On The Prosecutor's Request For Referral Of Case To The Republic Of Rwanda 28 May 2008, at paragraphs 40-45

470 Longman (*supra* Note 36), at page 209

471 Waldorf (*supra* Note 1), at page 64

widespread reports of retaliatory attacks against genocide survivors who give evidence in gacaca, as well as intimidation and attacks upon those who testify for the defence.

It is perhaps inevitable in a society where victims and perpetrators are forced to live side by side that problems will occur. The gacaca system provides no protection for witnesses, but nor does the ordinary court system. Even the ICTR, with its costly witness protection programme, cannot offer full protection, and there have been a number of cases where witnesses for the defence have been subject to State-authorized reprisals upon their return.<sup>472</sup> Rwanda is a society where many people still live in fear and speaking out can cost lives. This is therefore not a problem that is specific to the gacaca process.

The Rwandan government responded to early reports of a lack of participation by making attendance compulsory. Under the 2004 amendments to the gacaca law:

Every Rwandan citizen has the duty to participate in the Gacaca courts activities.<sup>473</sup>

This has served only to increase the State's hold over the process, and has taken ownership away from the local community, thus moving still further from the original ideal of shared community justice.

The amendment goes on to impose penalties ranging from 3 months to one year on those who refuse to testify to what they know.<sup>474</sup> Despite the incentive of lower sentences for those who confess, the fact that a confession may still result in a lengthy prison sentence acts as a disincentive to perpetrators who have not been named and are not already imprisoned. To many, whether victims or perpetrators, keeping quiet seems to be the safer option.

Gacaca has been further faulted because the process allows personal enmities to be advanced. Waldorf writes:

Not surprisingly, Hutu and Tutsi often have differing perceptions of gacaca. Hutu generally view it as a way to release family members wrongly imprisoned, while Tutsi survivors often see it as a disguised

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472 See comments by Human Rights Watch in *The Prosecutor v Fulgence Kayishema* (supra Note 34), at paragraph 36

473 *Organic Law No. 16/2004* (supra Note 12) Article 29

474 *Ibid* Article 29

amnesty for those who killed their family members. Hutu and Tutsi have difficulty seeing past their own notions of collective victimization to comprehend the suffering of the other group.<sup>475</sup>

Community justice may work where there is a strong community spirit in favour reconciliation. This is however patently not the case in Rwanda. Even if it were, it is entirely contrary to customary standards of human rights to allow a court that does not operate under the rule of law, or allow defendants basic fair trial rights, to impose lengthy prison sentences on those who appear before it. Rwanda serves therefore as an important reminder of the fact that an appeal to traditional methods of conflict resolution, or idealistic notions of community justice, cannot be a substitute for a firm and coordinated commitment to human rights and the rule of law. Without such guarantees, non-judicial processes risk undermining accountability, rather than advancing it as a meaningful compliment to the justice system.

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475 Waldorf (*supra* Note 1), at page 74



## Case Study J

# East Germany

Accounting for the past in the newly liberated communist countries in Eastern Europe after the fall of the Berlin Wall was not an easy task. As the president of Czechoslovakia, Vaclav Havel, pointed out in 1985; after 40 years of Communist rule, the dividing line “runs *de facto* through each person because everyone in his or her own way is both a victim and a supporter of the system.”<sup>476</sup> The crimes committed during the decades prior were not the atrocities of war, but those of systematic repression. To a large extent these crimes were also committed in secret, and a culture of fear meant that victims, their families and colleagues were unlikely to speak only of their suffering.

The East German experience is an interesting one. The opening of the Stasi files in 1992 was a very significant event. It was both symbolic, in that it put an end to decades of secrecy and fear, and informative – everyone now had access to information about what had happened.

A Commission of Inquiry was also set up to investigate the history and consequences of the dictatorship. It was not charged with attributing individual responsibility, but it was required to look at government criminality. There has been little academic discussion of the lengthy final report, which is not readily accessible to the public.<sup>477</sup> Any individual accountability that was achieved was therefore largely achieved through other means.

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476 V Havel *The Anatomy of a Reticence: Eastern European Dissidents and the Peace Movement in the West*, (1985), at page 37

477 M Minow comments that “The report’s length – 15,738 pages – ensures it won’t be read by many, but its sheer existence produces a dramatic public acknowledgement of abused power, complicit actors and the harms to individuals.” M Minow *Between Vengeance and Forgiveness* Beacon Press (1998), at page 127

# 1

## Background

At the conclusion of World War II, the Allied Control Council assumed government authority over Germany and the country was divided into four occupation zones controlled by the United States, the United Kingdom, France, and the USSR.

The occupation zones controlled by the United States, the United Kingdom and France united to establish the Federal Republic of Germany (West Germany). The occupation zone controlled by the USSR became the communist State of the German Democratic Republic (East Germany, or the GDR). Germany remained thus divided until the fall of the Berlin Wall in November 1989 led to the country's eventual reunification in October 1990. Prior to reunification, many East German dissidents had fled to the West and many more lost their lives or freedom attempting to escape.

East Germany was governed by The Socialist Unity Party of Germany (SED) under a regime characterised by its repressive nature and restrictions on the freedom of movement, expression and association of its citizens.<sup>478</sup> The Ministry for State Security ('the Stasi') came to be known as one of the most "effective" secret police forces in the world, and is believed to be responsible for a number of political assassinations, both domestically and abroad. It also conducted constant and sinister monitoring of its citizens combined with targeted character assassination campaigns aimed at causing professional and personal failure for individuals deemed to be opponents of the State.

At the height of its powers, the Stasi employed 85,000 full-time officers; it had records on five million East German citizens – one third of the entire population – and relied on several hundred thousand informers. It established a reputation for ruthlessness, with dissidents being imprisoned and tortured for such "crimes" as trying to leave the country, or telling political jokes.<sup>479</sup>

Following the end of this period of authoritarian rule, the Stasi's files were opened, and in 1992, and the public were able for the first time to discover not only the information that the Stasi had collected against them, but also

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478 Human Rights Watch *World Report* 1989 available at <http://www.hrw.org/reports/1989/WR89/Eastgerm.htm#TopOfPage>

479 'Fearsome Stasi held nation in its grip' BBC News 20 September 1999, accessed at [http://news.bbc.co.uk/1/hi/special\\_report/1999/09/99/britain\\_betrayed/451031.stm](http://news.bbc.co.uk/1/hi/special_report/1999/09/99/britain_betrayed/451031.stm)

the names of the informants. Given the scale of the informer network, many discovered betrayal by members of their own family or by close friends.

## 2 The Commission of Inquiry

In March 1992 the German Parliament established the Study Commission for the Assessment of History and Consequences of the SED Dictatorship in Germany (“the Commission”) to investigate human rights violations that had been committed in East Germany during the fifty years of communist rule.<sup>480</sup>

A 27-member body, headed by parliamentarian and human rights activist Rainer Eppelmann, was established to “work through the history and consequences of the SED”.<sup>481</sup> The legislation noted that:

[...] the legacy of the SED dictatorship continues to be a burden preventing people in Germany from coming together. The experience of injustice and persecution, humiliation and discouragement are still alive. Many people are looking for clarification, struggling for orientation in dealing with their own and others’ responsibility and culpability; they are asking questions about the roots of the dictatorial system set up in the GDR; about the political, mental and intellectual and emotional effects of the dictatorship; about the possibilities of political and moral rehabilitation of the victims.<sup>482</sup>

The purpose of the Commission was “to work through these issues” with a view to making a contribution, in dialogue with the public, to “the solidification of democratic consciousness and the further development of a common political culture in Germany”. This was thought to be “particularly important for the purpose of truly unifying Germany”.<sup>483</sup>

The tasks given to the Commission included the following:

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480 Bundestag Resolution March 1992, Paper 12/2230 of 11 March 1992, cited in Law Creating the Commission of Inquiry on “working through the history and the consequences of the SED dictatorship” Act No. 12/2597 (May 14 1992)

481 Law creating the Commission of Inquiry (*supra* Note 5) Section A I

482 *Ibid* Section A I

483 *Ibid* Section A I

- to analyse the structures, strategies and instruments of the SED dictatorship, in particular the issue of responsibilities for the violation of human and civil rights and the destruction of the environment;
- to illustrate and evaluate the significance of ideology, integrative factors and disciplining practices;
- to examine the violation of international human rights agreements and standards and the forms of oppression in various phases;
- to identify groups of victims and consider possibilities of material and moral restitution;
- to work out the possibilities and forms of deviating and resistant behaviour and oppositional action in the various spheres along with the factors that influenced them;
- to illustrate the role and identity of the churches in the various phases of the SED dictatorship;
- to judge the significance of the international framework conditions, particularly the influence of Soviet politics in the SBZ<sup>484</sup> and the GDR;
- to examine the significance of the relation between the Federal Republic of Germany and the GDR;
- to include the issue of continuities and analogies of thought, behaviour and structures in 20th Century German history, particularly the period of the national socialist dictatorship.<sup>485</sup>

In addition the Commission was directed to “strive primarily to achieve the following practical results from its work”:

- contributing to the political and moral rehabilitation of the victims and to redress damages related to the dictatorship
- showing possibilities of overcoming continuing disadvantages in education and professions;

<sup>484</sup> SBZ is an abbreviation of ‘Sowjetische Besatzungzone’, or ‘Soviet Zone of Germany’, which preceded the creation of the German Democratic Republic

<sup>485</sup> Law creating the Commission of Inquiry Section A II

- contributing to clarifying the matter of government criminality in the GDR;
- obtaining, securing and opening the pertinent archives;
- improving the conditions for scholarly research on the SBZ/GDR past;
- making recommendations for action to the Bundestag with respect to legislative measures and other political initiatives,
- making suggestions for coming to terms with the East German past in pedagogical and psychological terms.<sup>486</sup>

The Commission operated from 1992 to 1994. Testimony was taken from hundreds of witnesses of the course of 44 public hearings, 40 closed sessions, and 150 subcommittee meetings.<sup>487</sup> The final report amounted to a weighty 15,378 pages, and detailed in eighteen volumes the role of the secret police, the churches, the courts and the opposition within pre-1990 East Germany.<sup>488</sup>

### 3 Vetting and lustration

It was common practice at the end of the Cold War for the countries of the former Soviet Bloc to employ procedures to vet or screen members of the public services for serious misconduct. A more drastic measure is the process of “lustration”, the wide-scale dismissal of personnel on the basis of former political or party affiliations, rather than because of their individual acts.

The 1990 Unification Treaty<sup>489</sup> provided that East German administrative bodies and other institutions “serving the purposes of public administration or the administration of justice” would be placed under the administrative jurisdiction of the re-established Eastern States, and reorganised according to West German law. Furthermore, public employees from the former GDR could be summarily dismissed if it was determined that they had violated the principles of humanity incorporated in the Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights. This

486 *Ibid* Section A IV

487 G Eley *The Unease of History: Settling accounts with the East German Past History*, Workshop Journal 57 (2004), at pages 175-201

488 Minow (*supra* Note 2), at page 127

489 The Unification Treaty between the FRG and the GDR Berlin 31 August 1990

provision was to have a significant impact upon the professional landscape of the new country.

For example, in 1990, nearly all of East Berlin's 150 judges were summarily suspended pending a full review of their political loyalty and professional credentials.<sup>490</sup> A similar process was conducted at universities and other public institutions.<sup>491</sup> Around 360 GDR judges and prosecutors subsequently applied for admission to Berlin's judiciary, and were submitted to examination by a judicial screening committee.<sup>492</sup> Only 17% were permitted to resume their work, and only for a probationary period. Outside of Berlin the figures in respect of the same process vary, but have been calculated at somewhere between 41% and 63%.<sup>493</sup>

There was a lack of clarity as to the actual criteria that were applied during the vetting exercise, and some commentators have complained of an arbitrary approach. In Berlin, for example, individuals are said to have been treated more severely than elsewhere in the country.<sup>494</sup>

Generally, an individual was required to fill out a questionnaire about their political activities in the GDR, detailing any contacts they may have had with the Stasi. The questionnaires were then compared with personnel files and Stasi documentation in order to determine consistency and uncover any evidence of misconduct. Those against whom damaging information or allegations were uncovered were granted the opportunity to respond in the context of an individual hearing.<sup>495</sup>

## 4 Prosecutions

A limited number of prosecutions of GDR officials and guards were conducted in the years following the fall of the Berlin Wall. However, for a variety of reasons, no senior members of the regime ever came to trial for events that had occurred during the life of the GDR. Of the trials that did take

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490 D P Kommers *Transitional Justice in Eastern Germany*, Law & Social Inquiry Volume 22, No.3 (Summer 1997), at page 833

491 *Ibid* at pages 832-3

492 *Ibid* at page 836

493 P Quint *The Imperfect Union: Constitutional Structures of German Unification*, Princeton University Press 1997, at page 187; quoted in Kommers (supra Note 15) at page 838

494 Kommers (supra Note 15) at page 838

495 *Vetting Public Employees in Post-conflict Settings: Operational Guidelines* United Nations Development Programme 2006 at page 50; accessed at <http://www.ictj.org/static/Vetting/UNDPVettingGuidelines.pdf>

place, the 1991 prosecution of four border guards for the manslaughter of an individual attempting to breach Berlin Wall security proved one of the most controversial.

Nearly 500 individuals were killed attempting to cross the Berlin Wall during its 28-year existence.<sup>496</sup> It was agreed by all parties that when guards shot the last man to be killed trying to breach the Berlin Wall before it fell, they had simply been following clear orders. A policy had been in place for more than a decade stating that firearms should be used “without consideration” to stop border crossings.<sup>497</sup> The prosecution argued that this did not amount to a defence. Two guards were acquitted, one was convicted of attempted manslaughter and given a suspended sentence, and the fourth was convicted of manslaughter and sentenced to three and a half years imprisonment. This was reduced on appeal to 2 years probation. Professor Minow comments:

The trial itself, and others like it, seemed unfair to the watching public in the former East Germany. Prosecution of the guards but not their superiors in particular seemed unjust. So did the court’s failure to acknowledge or comprehend the context of indoctrination and military control governing the guards’ conduct, and the assumption that West German moral and ethical judgments could fairly be applied to the East German border guards.<sup>498</sup>

In addition, during the early years of unification, more than a million property restitution claims were filed in respect of homes, apartments, businesses and land seized by the GDR without compensation, and for which unified Germany was now obliged to compensate.<sup>499</sup>

## 5 Assessment

One of the factors which sets East Germany apart from other transitional societies examined was the existence of its Western counterpart to provide the necessary infrastructure, legislation, finance and political will to absorb the former GDR into one unified State. Whilst this set-up helped buffer the

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496 T Rosenberg *The Haunted Land: Facing Europe’s Ghosts after Communism* Vintage, (1996), at page 269

497 *Ibid* at page 265

498 Minow (*supra* Note 2), at page 43

499 A J McAdams *Judging the past in Unified Germany* Cambridge University Press (2001), reviewed by E Verdeja in *Law and Politics Book Review*, Vol. 15 No. 12 (December 2005) at page 1049

process, it could not remove the many challenges facing East Germany in its transition from communism to liberal democracy. It also created certain unique problems that would underpin some of the accountability mechanisms designed to ease the transition.

First, there was a sense among many East Germans that, in the eyes of West Germany, virtually the entire population of the East was complicit in the crimes of the communist regime. Many felt that those in West Germany who were judging them had no concept or understanding of what was required to survive in a police State such as East Germany. They occupied a moral high ground without themselves having suffered the reality and brutality of the regime in question. Consequently, the early stages of transition were marked by an inevitable sense of imbalance and division between the population of East and West. This contrasts sharply with the shared experience of history that is usually found in transitional societies, and which often forms an integral part of the foundations upon which a new order can be built.

Some East Germans also viewed the vetting process, conducted largely by West Germans, as a purge akin to “victors’ justice” and lacking in any “nuanced analysis of the past as a legacy of merit and mettle as well as guilt and spinelessness”.<sup>500</sup> For example, one commentator points out that:

[...] those who informed on others at some point in their lives often did so in ways that allowed them to persuade themselves that they were doing no harm. At other times, those same persons may have behaved bravely by resisting pressures to inform.<sup>501</sup>

Another observer comments that:

[...] to ignore the ‘good’ side of the GDR’s past – for example its anti-fascism, enlightened humanism and commitment to equality – marginalised those good people of the GDR who otherwise might have been expected to shape a more vigorous tradition of civic responsibility in Germany as a whole.<sup>502</sup>

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500 J C Torpey *Intellectuals, Socialism and dissent: The East German Opposition and its Legacy* University of Minnesota Press 1993, at page 13; cited in Kommers (supra Note 15), at page 844

501 A Neier ‘Do Trials Work?’ *The New York Review of Books* Vol. 42, No.16 October 1995

502 Kommers (supra Note 15), at page 845



This sense of alienation felt by East Germans was perhaps reinforced by the fact that their State no longer existed and had been encompassed wholesale into the borders of another. One commentator points out:

[...] the moral dilemma that enters the picture is that many people implicated were essentially following the laws or orders from the communist regimes. They were told it was their duty to support the regime by informing on “subversives”. Police arrests made under communism were often consistent with the criminal laws of the communist regimes. Teachers taught approved curriculum. Many professionals were required to be party members in order to practice. In some ways, then, the application of lustration for these acts is akin to ex post facto application of law. Another cost has been in terms of the loss of expertise. Bureaucratic expertise, scientific knowledge, and teaching skills have been lost at a time when they are sorely needed.<sup>503</sup>

Nonetheless, the process in East Germany demonstrated more balance than that which occurred in many of the other Eastern European countries. For example, Czechoslovakia placed all former communists under a blanket five-year ban from government employment. Germany, at least, tried to individualise the process of attributing guilt.<sup>504</sup> In respect of the Commission of Inquiry one commentator writes that:

[...] as the preferred vehicle for examining the overall historical record of the GDR, this parliamentary body proved predictably politicised. [...] It] steadfastly refused to approach the Communist system as anything less than an undifferentiated evil.<sup>505</sup>

Another has described it as:

[...] a dramatic public acknowledgement of abused power, complicit actors, and the harms to individuals.<sup>506</sup>

The former GDR is now an inextricable part of the success story that is a unified Germany, where the distinctions between former citizens of East and West increasingly fade as each year passes. This is well illustrated by the

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503 E Brahm, “Lustration” *Beyond Intractability*, Conflict Research Consortium, University of Colorado, Boulder. June 2004; accessed at <http://www.beyondintractability.org/essay/lustration/>

504 Kommers (*supra* Note 15), at page 845

505 A J McAdams, *Judging the past in unified Germany* Cambridge University Press 2001 113; quoted in Eley (*supra* Note 12)

506 Minow (*supra* Note 2) at page 127

2005 election of a former East German as Chancellor of Germany for the first time.<sup>507</sup> Whether the transitional process was in fact helped or hindered by the accountability mechanisms that were established alongside the unification process may well depend on the standpoint of the observer. Whatever the conclusion reached on that question, the East German experience stands as a unique example of the application of entirely non-judicial accountability mechanisms to a new and unique situation.

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507 [http://en.wikipedia.org/wiki/Angela\\_Merkel](http://en.wikipedia.org/wiki/Angela_Merkel)

# Northern Ireland

Commissions of Inquiry have a long history in the British legal system and in many ways inquiries of this sort can be seen as the forerunners to truth commissions. They are typically set up to look into a specific event or set of events and report to Parliament on their findings. They have often been used to investigate events in countries of the Commonwealth such as Uganda and Zimbabwe.

This chapter examines a very modern example of this type of inquiry, the Bloody Sunday Inquiry, which was set up to investigate a single incident which occurred in Northern Ireland during the Troubles.<sup>508</sup> While the complaint with regard to many accountability mechanisms is that they lack sufficient funding, or that they are not given sufficient time to complete their task, it is instructive to consider an example of a process where both time and money were available in large quantities. If the Bloody Sunday Inquiry turns out to be less than a complete success, it will certainly not be because it was insufficiently resourced.

What happened in Derry on the infamous Bloody Sunday can be described in a sentence: on 30 January 1972, 26 civil rights protesters were shot by members of the 1<sup>st</sup> Battalion of the British Parachute Regiment during a Northern Ireland Civil Rights Association march. While the event lasted less than ten minutes, its ramifications were incalculable.

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<sup>508</sup> This chapter does not consider other non-judicial accountability processes set up to help Northern Ireland move forward, such as Northern Ireland's Consultative Group on the Past or the European Union Peace and Reconciliation Programme or the hundreds of community-based reconciliation programs and processes.

On 29 January 1998 Prime Minister Tony Blair announced to Parliament his decision to set up a new inquiry into the events. He did so with the following words:

Let me make it clear that the aim of the inquiry is not to accuse individuals or institutions, or to invite fresh recriminations, but to establish the truth about what happened on that day, so far as that can be achieved at 26 years' distance.<sup>509</sup>

Over 10 years later, those concerned are still waiting for the Inquiry to report and for the truth, or whatever truth can be established at this stage, to be told.

## 1

### **Background**

The “Irish problem” has been a thorn in the side of British governments for most of recent history. Since the Act of Union in 1801, successive governments have struggled to deal with the Catholic majority, who wanted independence from the UK, and the Protestant minority, who wanted union. In 1922, the problem was dealt with by partition – the Catholic south was given independence, while the mainly Protestant Northern Ireland remained part of the UK. The large Catholic minority in Northern Ireland, as well as Catholics in the south, wanted a united Ireland, and so there remained strong and continued resistance to the new status quo.

Between the late 1960s and the signing of the Good Friday Agreement in 1998, Northern Ireland was divided by a violent conflict which became widely known as “the Troubles”. On the Catholic side, this was led by the paramilitary wing of the political party Sinn Fein, the provisional Irish Republican Army (IRA).

In July 1971 British soldiers shot dead two rioters in the city of Londonderry, or Derry, claiming that they were armed. The local population have denied this claim. This incident led to a huge escalation of violence in Derry, and a dramatic increase in IRA involvement. On 9 August the Prime Minister of Northern Ireland introduced internment without trial for those suspected of being members of illegal paramilitary groups, a move principally aimed at the IRA. Meanwhile all marches and parades were banned.

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509 Prime Minister's Statement to the House of Commons, Hansard 29 January 1998, Column 501

Killings of British soldiers increased dramatically all over Ireland, with 30 soldiers killed in the remaining months of 1971, seven of them in Derry. Residents of Derry set up barricades and made the Bogside area, which became known as Free Derry, impassable to the British military.

On 30 January 1972 a march was organised in protest against internment. As violence escalated, Army authorities received reports of an IRA sniper operating in the area. The order was given to go into Bogside. One man was shot in the back while fleeing the troops. As the violence increased further, the British Parachute Regiment was ordered to launch an arrest operation. They chased marchers into a field, during the course of which over 100 rounds of ammunition were fired. 26 protesters were shot; 13 were killed, and another man later died of his wounds; two more protesters were injured when knocked down by armoured personnel carriers. No British soldiers were wounded, and the entire incident lasted about 10 minutes.

The official British government position at the time was that the Paratroopers were reacting to a threat from IRA members armed with guns and nail bombs. Certainly many IRA members were present at the march, and the Saville Inquiry heard several reports of men carrying guns. However, all eyewitnesses maintained that those shot were unarmed. Londonderry city coroner, Major Hubert O’Neil, who presided over the inquest into the deaths, accused the British army of “sheer unadulterated murder”.<sup>510</sup>

The event has achieved an almost mythical status among British atrocities in Northern Ireland. In the years since the shootings, violence in the province has killed more than 3,000 people. Bloody Sunday was different: it was carried out in the full view of the public and the media, and was, for many Irish Catholics, conclusive proof of the ill-will and criminality of the British Army in Ireland. Previously, many non-extremist Irish Catholics had welcomed the presence of the British army as their protectors from the Protestant violence and the Royal Ulster Constabulary (RUC); after Bloody Sunday, the British Army was the enemy.

In the wake of Bloody Sunday, the Northern Ireland government was suspended, and Northern Ireland came under direct rule from London, a situation that lasted until the Good Friday Agreement in 1998. It was in no small part due

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<sup>510</sup> BBC news *Bloody Sunday inquest accuses British Army*, 21 August 1973 accessed at [http://news.bbc.co.uk/onthisday/hi/dates/stories/august/21/newsid\\_2500000/2500321.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/august/21/newsid_2500000/2500321.stm)

to events of that day, and to the British government's mishandling of the aftermath, that the trust necessary to bring about peace took another 26 years to rebuild.

## 2

### **The Widgery Inquiry**

On 31 January 1971, the day after the incident, the Prime Minister Edward Heath asked a senior Law Lord, Lord Widgery, to chair an inquiry into the event. This short inquiry produced a report on 19 April 1972.<sup>511</sup> This report relayed evidence (which was later conclusively disproved) that the deceased had had contact with guns and explosives, and placed blame for the events firmly on the marchers:

There would have been no deaths in Londonderry on 30 January if those who organised the illegal march had not thereby created a highly dangerous situation in which a clash between demonstrators and the security forces was almost inevitable.<sup>512</sup>

It supported the Army's official account of the incident:

There is no reason to suppose that the soldiers would have opened fire if they had not been fired upon first.

[...]

None of the deceased or wounded is proved to have been shot whilst handling a firearm or bomb. Some are wholly acquitted of complicity in such action; but there is a strong suspicion that some others had been firing weapons or handling bombs in the course of the afternoon and that yet others had been closely supporting them.

[...]

For the most part the soldiers acted as they did because they thought their orders required it. No order and no training can ensure that a soldier will always act wisely, as well as bravely and with initiative. The individual soldier ought not to have to bear the burden of deciding

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511 The Rt. Hon. Lord Widgery, O.B.E., T.D. *Report of the Tribunal appointed to inquire into the events on Sunday, 30 January 1972* H.L. 101, H.C. 220, April 1972

512 *Ibid* Summary of Conclusions at paragraph 1

whether to open fire in confusion such as prevailed on 30 January. In the conditions prevailing in Northern Ireland, however, this is often inescapable.<sup>513</sup>

The report of the Widgery Inquiry may charitably be called unsatisfactory. In the Irish community it was widely believed to be a whitewash. No prosecutions resulted from the incident. In the years that followed there were consequently constant calls for a proper investigation into the events.

### **3**

## **The Bloody Sunday Inquiry**

The Saville Inquiry, commonly known as the Bloody Sunday Inquiry (“the Inquiry”), was set up by Tony Blair in January 2008. In his speech to the House of Commons he acknowledged that the Widgery Report was unsatisfactory:

The time scale within which Lord Widgery produced his report meant that he was not able to consider all the evidence that might have been available. For example, he did not receive any evidence from the wounded who were still in hospital, and he did not consider individually substantial numbers of eye-witness accounts provided to his inquiry in the early part of March 1972.<sup>514</sup>

He reaffirmed his predecessor’s assertion that those shot should be regarded as entirely innocent of handling firearms or explosives. He said:

Bloody Sunday was a tragic day for all concerned. We must all wish that it had never happened. Our concern now is simply to establish the truth, and to close this painful chapter once and for all. [...]

I believe that it is in everyone’s interests that the truth be established and told. That is also the way forward to the necessary reconciliation that will be such an important part of building a secure future for the people of Northern Ireland.<sup>515</sup>

Blair was a Prime Minister who came to office with the stated aim of bringing peace to Northern Ireland. Many British Prime Ministers have come to office with the same ambition; all have failed to a greater or lesser extent. Blair’s

513 *Ibid* Summary of Conclusions at paragraph 11

514 Prime Minister’s Statement (*supra* Note 2) Column 501

515 *Ibid* Column 503

negotiations, however, provided the start of a solution to the Northern Ireland problem. The Good Friday Agreement, which paved the way for a peaceful end to the Troubles, followed in 1998. It is undoubtedly one of the greatest successes of Blair's premiership.

To many Irish republicans, Bloody Sunday was the high point of army criminality, and followed by executive cover-up. It was therefore thought to be essential that the British government prove its good faith by launching a proper enquiry into the tragedy. Although it was only one of thousands of fatal incidents, in Blair's words:

Bloody Sunday was different because, where the state's own authorities are concerned, we must be as sure as we can of the truth, precisely because we pride ourselves on our democracy and respect for the law, and on the professionalism and dedication of our security forces.

[...]

We believe that the only course that will lead to public confidence in the results of any further investigation is to set up a full-scale judicial inquiry into Bloody Sunday.<sup>516</sup>

The aim of the Inquiry, therefore, was to show good faith on the part of the British government by uncovering the truth about a British atrocity.

The new Inquiry was presided over by a Tribunal consisting of one domestic and two international judges, namely Lord Saville, a senior British Law Lord, together with the Canadian Judge William Hoyt and the Australian Judge John Toohey.<sup>517</sup> These three senior judges were assisted by Counsel to the Inquiry, Christopher Clarke QC, who led the evidence.

Its terms of reference were to enquire into:

[...] the events of Sunday, 30th January 1972 which led to loss of life in connection with the procession in Londonderry on that day, taking account of any new information relevant to events on that day.<sup>518</sup>

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516 *Ibid* Column 502

517 Judge Toohey replaced New Zealander Sir Edward Somers QC in 2000

518 Opening Statement of Lord Saville 3 April 1998



It was set up under the Tribunals of Inquiry (Evidence) Act of 1921, which allows Parliament to set up a Tribunal of Inquiry into “a definite matter... of urgent public importance”.<sup>519</sup> The Tribunal:

[...] shall have all such powers, rights, and privileges as are vested in the High Court, [...] on the occasion of an action in respect of the following matters:

- (a) The enforcing the attendance of witnesses and examining them on oath, affirmation, or otherwise;
- (b) The compelling the production of documents; [...].

As a Tribunal of Inquiry, not a court of law, it was able to decide on its own rules and procedure. It was not bound by strict rules of evidence “though of course the weight that we are likely to give to any particular piece of evidence may well depend on how direct and first hand it is.”<sup>520</sup>

The Tribunal also considered the power to grant immunity from prosecution; Lord Saville stated:

We have considered whether to recommend to the Attorney-General at the outset that there should be an immunity from prosecution for all who give evidence to this Inquiry. The reason for doing this would be to encourage people to come forward and to speak frankly with no inhibitions. We have decided, however, not to make such a blanket recommendation at this time, but instead to look again at the question in the course of carrying out our investigations, when it may be possible to see more clearly whether the grant of immunity in any given case, or group of cases, is necessary for the purpose of carrying out the object of the Inquiry.<sup>521</sup>

In any event, no witnesses were granted such immunity, although the Attorney-General gave an undertaking that no evidence provided to the Inquiry by any person would be used against that person in any criminal investigations or proceedings.<sup>522</sup>

519 Tribunals of Inquiry (Evidence) Act 1921

520 Opening Statement of Lord Saville

521 *Ibid*

522 Attorney-General Press Notice 25 February 1999, available from <http://www.bloody-sunday-inquiry.org.uk/>

The issue of anonymity caused significant difficulties. British soldiers sought anonymity on the grounds that their lives would be in danger if their names became known. The tribunal, which was compelled to consider the issue on two separate occasions, refused to grant anonymity, with limited exceptions. It considered that:

[...] the danger to the soldiers who fired live rounds on Bloody Sunday does not outweigh or qualify our duty to conduct a public open inquiry.<sup>523</sup>

Some of the soldiers who had fired shots challenged this decision and the matter again went to the Court of Appeal, which finally held that the only lawful decision that the Tribunal could make was to grant anonymity to the soldiers who fired shots.<sup>524</sup> That still did not address the position of the other soldiers, but the Tribunal decided that the reasoning of the Court of Appeal applied equally to them, and hence that it was obliged to grant anonymity to all the soldiers, except those whose names were, for one reason or another, already in the public domain.

During the course of the Inquiry various other witnesses were also granted anonymity, including a number of intelligence officers or agents, as well as former paramilitaries, and one witness who was alleged to have been a member of the IRA.

The identities of witnesses granted anonymity were sometimes known to groups outside the Inquiry. For example, some of the former paramilitaries would have been well known in Derry, and might have been recognised by members of the public or journalists when they gave their evidence. However, anonymity meant that their names were never mentioned during any of the proceedings, nor in any subsequent press coverage. The press and the public therefore did not know the identities of the majority of the soldiers appearing before the Tribunal.

Quite apart from the implications for the public nature of the Inquiry, the granting of anonymity to thousands of military witnesses gave rise to many problems. Huge numbers of documents had to be redacted and names replaced

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523 The Bloody Sunday Inquiry: Further Rulings by Lord Saville Mr William L. Hoyt Sir Edward Somers 5 May 1999  
*Applications for Anonymity* at paragraph 28, available from <http://www.bloody-sunday-inquiry.org.uk/>

524 *R v Lord Saville of Newdigate and Others* Court of Appeal [1999] EWCA Civ 3012

with ciphers. Soldiers giving evidence about other soldiers had to be told their ciphers and warned not to blurt out the names in the witness box.

Legal representation could be requested, and was granted in many cases, including for the families of victims and for the military witnesses. Proceedings were mostly public, and most hearings took place in Londonderry over a period of 13 months. From September 2002 until October 2003 evidence was heard in London because it was judged unsafe for military witnesses to travel to Northern Ireland.

It was clear from the outset that there would be no quick answers. The opening speech of Counsel to the Inquiry lasted 42 days. The Tribunal sat for a total of 431 days, and heard orally from 932 witnesses and received written statements from a further 1,555 witnesses. Counsel to the Inquiry's closing submissions alone amounted to 10 volumes, and a further 32 volumes were submitted by interested parties. There were also about 160 volumes of evidence.

The enormous scale of the proceeding was felt necessary:

[...] in order [for the Tribunal] to fulfil the duty which Parliament entrusted to it, of trying to discover the truth of what happened on that day. What happened on that day was, and has remained, controversial in almost every respect. What led up to the day, almost equally so. The critical events were witnessed by a very large body of people, both civil and military. Many gave contemporaneous accounts, others did not. Over the years thereafter a sizeable quantity of accounts has been given by civilians and soldiers alike, sometimes casting new light on what happened, sometimes casting doubt as to the accuracy of previous accounts.<sup>525</sup>

## **4 Assessment**

Whether the mass of evidence available can justify the extraordinary scale of the Inquiry is open to question. In his closing submissions to the Tribunal, Counsel to the Inquiry said:

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525 Closing statement of Christopher Clarke QC, Counsel to the Enquiry, 22 November 2004, at page 2

The process has been arduous, the journey long and unfinished. I hope and believe that the process itself has already played a part in enabling people to come to terms with the events of that day in holding to account those whose decisions, actions or inactions contributed to what happened and, whatever the difficulty of determining the roles of individual soldiers, of advancing our understanding of what happened on that day, as I doubt not will become apparent in the Tribunal's report.<sup>526</sup>

More than four years since that closing submission, the Tribunal has not yet reported. When he announced the announcing the Inquiry, Tony Blair said:

It is not possible to say now exactly how long the inquiry will take, but it should be allowed the time necessary to cover thoroughly and completely all the evidence now available.<sup>527</sup>

There is no report to analyse at this stage, but it is clear from the evidence that the final report will not give definitive answers. The essential matters into which the Tribunal was looking were simple: who shot who and why. At the end of the evidence, Christopher Clarke QC confessed:

[...] even after many days of evidence the answer to even the first question, who shot them, is not, on the soldiers' evidence, in any way clear.<sup>528</sup>

He details the extraordinary number of unexplained facts and continues that the Tribunal might conclude:

[...] that so much is unexplained because no justifiable explanation could be given. On the other hand it might take the view that uncomfortable facts have been airbrushed out of history and that the situation the soldiers faced was radically different to that of which the civilian evidence speaks.<sup>529</sup>

The cost of the Inquiry is also staggering. The Tribunal's website, which has not been updated since 2005, states that the cost "is currently expected to be

.....  
526 *Ibid* at pages 125-6

527 Prime Minister's Statement (*supra* Note 2) Column 502

528 Closing statement of Christopher Clarke QC (*supra* Note 18), at page 5

529 *Ibid* at pages 7-8

£172 million<sup>530</sup>; a government minister has since put the cost at £400 million.<sup>530</sup> On any basis, this is the largest and costliest legal inquiry ever to take place in the UK.

Some interested parties defend the length of the Inquiry, if not the expense. Eamonn McCann, who helped organise the march and is now Chair of the Bloody Sunday Trust, said:

Every shooting was witnessed by scores of people, many of whom knew the victims personally. That's why the inquiry has taken this long: there were so many witnesses who wanted to be heard but had been ignored by Widgery.<sup>531</sup>

Despite these explanations, many doubt that the long-awaited report of the Inquiry will heal wounds. Northern Ireland Senator Maurice Hayes said last year:

I do not believe that the Saville Inquiry will unearth the essential truth, the definitive account of the events on Bloody Sunday, which are so deeply incised on the psyche of this city. I can think of many better things to do for the families of victims and survivors [...].<sup>532</sup>

Tony Blair's former Chief of Staff, Jonathan Powell, was blunt about the matter:

[In 1997] Labour had been out of government for so long, there was nobody around with much experience of public inquiries. We'd forgotten how rarely they actually resolved deep-rooted problems, and how often they came back to bite you.<sup>533</sup>

According to Powell, they pressed ahead with the Inquiry because they believed that Sinn Fein, the political wing of the IRA, would not accept an apology from the British government and only discovered later, and to their mortification, that as far as Sinn Fein was concerned, an apology would have sufficed.<sup>534</sup> This was subsequently denied by Martin McGuinness, to whom

530 G Jones and J Petre Bloody Sunday: Full inquiry, cost £400m *The Telegraph* 5 July 2006, accessed at <http://www.telegraph.co.uk/news/uknews/1523111/Bloody-Sunday-Full-inquiry,-cost-andpound400m.-July-7-bombs-No-inquiry,-'too-expensive'.html>

531 P Jacobson A special report on the Bloody Sunday inquiry *The Sunday Times* 1 June 2008, accessed at <http://www.timesonline.co.uk/tol/news/politics/article4022221.ece>

532 Senator Maurice Hayes 'Moving Out of Conflict' Tip O'Neill Peace Lecture, University of Ulster, 5 June 2007; accessed at <http://news.ulster.ac.uk/releases/2007/3221.html>

533 Quoted in Jacobson (*supra* Note 24)

534 Quoted in *ibid*

these remarks had been attributed, and who has admitted he was the second in command of the IRA at the time of the Bloody Sunday incident.<sup>535</sup>

Meanwhile the families of the victims are unlikely to be satisfied with anything less than criminal trials and convictions following the report. However, there is no indication that criminal trials are likely at this stage or at any point in the future.

It is difficult to resist the conclusion that the Bloody Sunday Inquiry was an expensive political mistake. Well before it has reported, peace has been conclusively established and political tensions have diminished. The families of the victims of Bloody Sunday, who are still desperate to know the truth and to have it acknowledged by the British Government, are unlikely to be fully satisfied with a report that can give only partial answers. The families of many others who were killed in the Troubles may also understandably feel resentful at the huge sums spent on investigating a single incident.

Northern Ireland has moved on in the years since the Good Friday Agreement. The IRA formally laid down its weapons in 2005 and, following democratic elections in 2007, the Troubles are widely regarded as over, before the Bloody Sunday Inquiry has spoken. It is unclear therefore what relevance its final conclusions will have to Northern Irish politics, or, when it finally reports, whether it will be able to provide accountability for what happened one day almost 40 years earlier.

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<sup>535</sup> H McDonald, 'Fresh delay to Bloody Sunday report 'causing anxiety'' *The Guardian* 6 November 2008, available from <http://www.guardian.co.uk/uk/2008/nov/06/blood-sunday-report-anguish>

## Case Study L

# Spain

Spain earns its place in a book about accountability mechanisms for a different reason than most other countries. After the end of the Franco regime in Spain there were no truth commissions or excavations of the past. No-one was held accountable for crimes committed, and there was virtually no suggestion that anyone should be until fairly recently. Tired of being an outcast among the democracies of Western Europe, the Spanish kept quiet about atrocities committed by the previous regime. There was a “deliberate and consensual decision”<sup>536</sup> not to bring offenders to account:

Underpinning the transition to democracy was the ‘pact of silence’ which meant that the mainstream parties would effectively not talk about the war.<sup>537</sup>

While in Spain, the failure to account was apparently attended by few ill effects, the fact that it continues to be the subject of sometimes heated discussion does underscore the suggestion that the crimes of the past will come back to haunt the future if they are not dealt with adequately.

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536 J Elster *Closing the Books: Transitional Justice in Historical Perspective*, Cambridge University Press (2004), at page 61

537 A Durgan ‘Seventy years after the Spanish Civil War’, *International Socialism*, Issue 111, 3 July 2006 (unpaginated); accessed at <http://www.isj.org.uk/index.php4?id=220&issue=111>

# 1

## Background

The Spanish Civil War was a precursor to the Second World War that immediately followed. It was fought from July 1936 until April 1939, ending with the victory of the fascist Nationalists over the left-wing Republicans, and the establishment of a military dictatorship under General Franco.

Tens of thousands died on both sides during the conflict.<sup>538</sup> Both Republicans and Nationalists, who came to be known respectively as “The Red Terror” and “The White Terror”, committed atrocities. Republican atrocities included attacks on churches and monasteries, as well as the killing of Catholic clergy, landowners, industrialists and politicians. Nationalist violence extended into the years of the Franco dictatorship and ranged from mass executions and bombings of civilian areas during the war – such as those famously depicted in Picasso’s “Guernica” – to extensive post-war executions, imprisonment, and the torture of those suspected of supporting the Popular Front.

The Nationalist regime was ruthless in crushing its opposition: some estimates calculate that during the post-war years around 50,000 people were executed through military tribunals and summary indictments.<sup>539</sup> More general estimates suggest that between 200,000 and 800,000 people died as a result of Nationalist repression during and after the war.<sup>540</sup>

Political opponents were the subject of repression and discrimination. Pensions and compensation for killings and injuries sustained during the war were refused to those who had opposed Nationalism; and property was taken from Republican sympathisers. By contrast, those who had supported Franco were handsomely rewarded by means that included privileged employment, pensions, compensation for wartime injuries and healthcare.<sup>541</sup>

Franco died in 1975 and Spain became a liberal democracy that operated with a constitutional monarchy under the restored rule of Juan Carlos I, who was the descendant of the Spanish Bourbon monarchy that had been exiled during

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538 P Aguilar *Transitional Justice in the Spanish, Argentine and Chilean Case Study* “Workshop 10 – Alternative Approaches to Dealing with the Past”, International conference: Building a Future on Peace and Justice, Nuremberg 25-27 July 2007, at page 4

539 *Ibid* at page 4

540 A Beevor *The Battle for Spain; The Spanish Civil War 1936-1939* Weidenfeld and Nicholson (2006), at page 94

541 Aguilar (*supra* Note 3), at page 4



the Republic. Prime Minister Adolfo Suárez was appointed in July 1976,<sup>542</sup> a line of succession that had been put in place by Franco before his death. The transition was relatively smooth, perhaps due in part to a general consensus among Spain's political elite that democracy was vital for Spain's economic and political future.<sup>543</sup> Measures had even been put in place within the military to guard against "any possible moves [...] against democratization in aftermath of Franco's [...] death."<sup>544</sup>

## 2

### The policy of forgetting

Remarkably, at the time of transition, there was little or no call from politicians, civil society or even victims and their relatives for acknowledgement of the atrocities committed during the war and under the Franco regime.<sup>545</sup> Several commentators refer to a tacit consensus that excluded the past from public debate.<sup>546</sup> In contrast to the opening of the Stasi files in East Germany, in Spain, the archives of the secret police were, and remain, sealed.

Spanish economic and political affairs had been severely mismanaged under Franco and, in the aftermath of his rule, the country faced both the threats of an economic crisis and the rise of Basque terrorism. In those circumstances it may be that the present challenges faced by the country overrode a desire to look back into the past.

The policy of forgetting was in fact more than tacit. A series of provisions for amnesty and pardon were put in place in the years immediately following Franco's death. In November 1975 King Juan Carlos granted a pardon that led to the release of approximately 6,000 prisoners, more than 500 of whom had been imprisoned for political reasons.<sup>547</sup> In 1976 a Royal Decree Amnesty Law was approved which specifically covered crimes related to political intentions. On 15 October 1977 a new parliament approved a second amnesty law that clarified the first:

542 R Gunther, J R Montero and J I Wert *The Media and Politics in Spain: From Dictatorship to Democracy* Working paper, Barcelona 1999, accessed at [www.recerca.net/bitstream/2072/1288/1/ICPS176.pdf](http://www.recerca.net/bitstream/2072/1288/1/ICPS176.pdf)

543 See S A Garrett *Models of Transitional Justice – A Comparative Analysis* International Studies Association March 2000, (unpaginated); accessed at <http://www.ciaonet.org/isa/gas02/>

544 F Aguero, *Soldiers, Civilians and Democracy: Post-Franco Spain in Comparative Perspective* Baltimore: Johns Hopkins University Press (1995), at page 104, cited in Garrett (*supra* Note 8)

545 Aguilar (*supra* Note 3), at page 5

546 See e.g. *ibid* at page 5

547 *Ibid* at page 5

[...] in its second article, the [1977] law also contained two paragraphs that practically passed unnoticed, both in the parliamentary debate on the law and in most of the media commentaries prompted by its approval. They spoke of amnesty being extended to “crimes and faults that may have been committed by the authorities, officials and guardians of public order on the occasion and as a result of the investigation and persecution of acts covered by this law”, as well as “crimes committed by officials and guardians of public order against the people exercising their rights”. These are the aspects that converted the Law of Amnesty into a “Full Stop Law”: in exchange for the liberation of political prisoners who had committed violent crimes [...] the impunity of the Francoist regime was established as its perpetrators could no longer be taken to court.<sup>548</sup>

Complementary legislation followed which could in some respects be seen as granting reparations: the Royal Decree Law of March 1978 granted retirement pensions to members of the military and the Republican Public Order Forces or their dependants. In September 1979 legislation was enacted that provided pensions, medical care and social assistance to the widows and relatives of those who had died or had been wounded during the war, or as a result of political or trade-unionist activities.<sup>549</sup> These provisions became collectively known as “the reconciliation policy.”<sup>550</sup>

Professor Stephen Garrett has described the Spanish approach to transitional justice as ‘the Amnesia Model’, not only because of the absence of prosecutions or any form of accountability mechanism, but also because of the lack of public discussion about the past and the failure to acknowledge the violations that took place.<sup>551</sup>

The prevailing silence was not only applicable to the political elite: one survey in 2006 showed that 50% of Spaniards have never talked about the Civil War at home, and 35% say they were never taught about it at school.<sup>552</sup> In addition, some of the basic features that usually mark a society’s transition to a new era are lacking in Spain: no monuments were erected either to the deposed leader

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548 *Ibid* at page 5

549 *Ibid* at page 8

550 *Ibid* at page 5

551 See Garrett (*supra* Note 8)

552 D Wood Civil War legacy divides Spain *BBC News* <http://news.bbc.co.uk/1/hi/world/europe/5192228.stm>

of the pre-war regime, or to the victims of the war and dictatorship.<sup>553</sup> On the contrary, the emblems of the previous regime continued to be displayed throughout the country. It is startling to discover that statues of Franco stood in Madrid until 2005 and in Zaragoza until 2006.<sup>554</sup> It is equally surprising that it took more than 30 years for the head of a Spanish government to pay a visit to the Mauthausen concentration camp, and thereby accord official acknowledgement of the atrocities committed at the site where Franco had imprisoned opponents.<sup>555</sup>

An observation made by Prime Minister Adolfo Suárez is often relied upon to explain the national response:

[...] the question is not to ask people where they are coming from, but where they are going to.<sup>556</sup>

It is worth remembering that at the time of transition the majority of crimes had taken place over three decades earlier. Garrett points out that in the year of Franco's death, around two-thirds of the population (the new king included) was made up of persons who were not born at the time of the Civil War.<sup>557</sup> In addition, a survey conducted by the Centre of Sociological Research in 2005 found particular resistance to reopening the past among the generation most affected (that is, those born between 1941-1950). Aguilar notes that:

[...] one has the impression that this cohort attributes a large part of the success of the transitional period precisely to the fact that the past was left out of the political debate.<sup>558</sup>

More than two decades were to pass before the national restraint began to relax. Durgan explains that

The 'pact of silence' about the civil war began to change after the 1996 elections [...]. The socialist party rediscovered the civil war. [...] here has been an outpouring of books and documentaries on the Francoist repression.<sup>559</sup>

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553 Aguilar (*supra* Note 3), at page 12

554 *Ibid* at page 11

555 *Ibid* at page 11

556 Editor's Introduction 'Spain' in N Kritz (Ed) *Transitional Justice Volume II* United States Institute of Peace Press 1995, at page 299

557 V Alba *Transition in Spain: From Franco to Democracy* at page 245; cited in Garrett (*supra* Note 8)

558 Aguilar (*supra* Note 3), at page 21

559 Durgan (*supra* Note 2)

The Spanish legislature followed this trend by approving legislation in 2002 that acknowledged the victims of the Civil War and of the Franco regime.<sup>560</sup> Also in 2002, the United Nations Working Group on Enforced or Involuntary Disappearances included Spain for the first time in its list of countries that have yet to resolve the problem of forcible detention and subsequent disappearance of people.<sup>561</sup> In 2004 an Inter-Ministerial Commission was established “to examine the moral and legal rehabilitation of the victims of Franco’s dictatorship”.<sup>562</sup> In 2006 the first grants were awarded for the exhumation of mass graves and identification of those who had disappeared under the dictatorship.<sup>563</sup>

In 2007, more than 70 years after the start of the civil war, the Law for the Recovery of Historical Memory formalised condemnation of Franco’s dictatorship and the military trials which led to the execution of thousands of Franco’s opponents.<sup>564</sup> In addition, the law required the removal of all statues, plaques and symbols of the dictatorship from public buildings,<sup>565</sup> and the establishment of a monument to the war dead of both sides.<sup>566</sup>

### 3

## Assessment

The legislative developments and increasing societal openness towards Spain’s past in recent years may appear to be too little too late. By contrast with most other societies in transition, it is particularly interesting that the amnesty laws in Spain were conceived, drafted and approved after the fall of the dictatorship at the behest of a new regime. It is an unusual feature of the Spanish experience that blanket amnesty laws were enacted by the fresh democratic administration, rather than designed and pushed through by the perpetrators who wished to shield themselves from accountability.

It is also notable that there have been no private attempts to launch prosecutions for any crimes committed during the Civil War or during the years of dictatorship. No attempts have been made to invalidate or circumvent the

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560 Aguilar (*supra* Note 3), at page 14

561 M Davis ‘Is Spain recovering its memory? Breaking the Pacto del Olvido,’ *Human Rights Quarterly* Volume 27, No. 3, August 2005

562 P Stuart Spain: “Law of historical memory” continues cover-up of Franco’s crimes, *World Socialist Website*, 11 September 2006; accessed at <http://www.wsws.org/articles/2006/sep2006/spai-s11.shtml>

563 Aguilar (*supra* Note 3), at page 14

564 Spanish MPs condemn Franco’s rule *BBC News* 31 October 2007; accessed at <http://news.bbc.co.uk/1/hi/world/europe/7071405.stm>

565 *Ibid*

566 V Burnett ‘Bill in Spanish Parliament aims to end “Amnesia” about civil war victims’ *New York Times*, 27 October 2007 <http://www.nytimes.com/2007/10/28/world/europe/28spain.html?pagewanted=all>

amnesty laws by using the available international law challenges,<sup>567</sup> and the Supreme Tribunal has rejected all applications for a review of the trials that took place during Francoism.<sup>568</sup>

This lack of legal challenge is all the more striking in a country that has been at the vanguard of international criminal justice in recent years. It is ironic that it was Spain that issued an extradition request to the UK and took the subsequent legal proceedings against General Pinochet for crimes committed in Chile during the 1970s and 1980s. Spain has also issued more than 40 international arrest warrants against members of the ruling party in Rwanda for crimes committed before, during and after the genocide.<sup>569</sup> In such a legal culture it seems extraordinary that no Spanish lawyer would harness this legal creativity and tenacity to work on similar domestic cases. Amnesia about past crimes appears to be of a purely domestic variety.

It is now pointed out as a warning that “Spanish victims have been paid far less attention and given less acknowledgement than those in other countries”,<sup>570</sup> and it is notable that the recent provisions which have been introduced only apply to a limited number of those who may be entitled to acknowledgement. For instance, pension provisions have only been made for those victims directly connected to the Civil War. No measures have been put in place for those who were tortured or imprisoned under the Franco regime, nor for the families of those executed following judicial rulings after the War.<sup>571</sup>

The recently passed Law for the Recovery of Historical Memory is controversial at both ends of the political spectrum. Those on the left condemn the legislation as a betrayal and complain that the bill not only fails to annul the decisions of Franco’s military tribunals, but also “protects the anonymity of fascist killers”.<sup>572</sup> Many others, by contrast, feel the law goes too far. Gustavo de Aristegui, the Popular Party spokesman, expressed a view commonly held in Spain that:

[...] our transition from dictatorship to democracy is an example in Europe and I think that we’ve got to cherish this and not re-open

567 Aguilar (*supra* Note 3), at page 19

568 *Ibid* at page 21

569 *Rwanda: Spanish Arrest Warrant 'Is not a European cause against Ethnic Tutsis'* Hironelle News Agency 11 February 2008; accessed at <http://africannewsanalysis.blogspot.com/2008/02/rwanda-spanish-arrest-warrant-is-not.html>

570 Aguilar (*supra* Note 3), at page 23

571 *Ibid* at page 21

572 Article 7.3 of the Act provides that investigators “will omit any reference to the identities of those who took part in the events or legal proceedings that led to sanctions or condemnations”; see Stuart (*supra* Note 27)

old wounds that have already been able to be cured, wounds that are healed.<sup>573</sup>

Some Spaniards feel that:

National reconciliation really took place during the 1960s and 1970s, when Franco was still in power, through a natural process, not by government edict, but because of a collective feeling that the war had been horrible and that Spain had to move on.<sup>574</sup>

Others take a different view:

It is important that the present generations honour and recover all those that suffered injustice and offence in those painful moments of our past: those who were killed, those who were imprisoned for years, those who were condemned to hard labour or had to live in concentration camps, and those who had to leave Spain in a long and painful exile.<sup>575</sup>

While some may feel that the Spanish amnesia contributed to the success of modern-day Spain, it is evident that the lack of an accountability mechanism of any kind contributes to the reality that 30 years later, the wounds of the past continue to cast a shadow over Spain.

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573 Wood (*supra* Note 17)

574 M Kimmelman In Spain, a monumental silence, *New York Times*, 13 January 2008

575 J M González, *Spanish Literature and the Recovery of Historical Memory*, *European Review*, Vol. 17, No. 1, 17 at page 181

# Conclusion

It is clear from this report that no non-judicial accountability process to date can be described as an unqualified success. None of the case studies explored have revealed a package of measures that successfully meet each and every goal its architects have set. Some have failed because they were asked to do too much in too little time, or with inadequate human and financial resources; others because powerful opponents purposely frustrated their efforts; and some because the political will necessary to achieve genuine accountability dissipated too quickly.

This should not come as a surprise. Whereas a culture of impunity and rewards for violence date back centuries, efforts to achieve lasting peace through comprehensive accountability are by contrast relatively young. Although most post-conflict societies can by now identify at least a handful of relevantly similar cases as a source of potential guidance, they will inevitably also be among the first to confront a number of challenges unique to their own situation. Much more practice will therefore be necessary before the international community can begin approaching the hope that an accountability process will get everything right.

The appropriate test for non-judicial accountability mechanisms is therefore not whether they have been successful in their entirety, but whether they have made some significant and tangible contribution to the difficult process of closing the impunity gap and achieving accountability. This question has been carefully distinguished from that of whether non-judicial accountability

mechanisms could ever take the place of judicial ones – a possibility that has been ruled out from the start. What we have asked is whether transitional societies that have employed non-judicial mechanisms alongside judicial ones have achieved more in the way of accountability than those that have opted only to go as far as their courts will take them.

In the context of this question, what is remarkable is that almost every case considered has achieved at least some of its objectives. This report has shown how some truth commissions have been able to provide the victims of conflict with a comprehensive, if not entirely complete, picture of the crimes they suffered. Such reports have provided a basis on which some victims have found it possible to begin the difficult process of moving on with their lives, provided prosecutors with a valuable historical narrative, and perhaps most importantly, provided a final rebuttal to the lies and deceit of past periods of oppression. Some processes have also found means of turning such reports into official acknowledgements of past abuses, and as a basis for reparations to the victims identified. Even where financial resources have proved inadequate for financial reparations, some innovative processes have found other means of extending acknowledgement and reparations to victims, including apologies, memorials, and the restitution of property or a family name.

This report has also stressed that although non-judicial mechanisms deal primarily with what the criminal courts do not, much can be achieved through the careful integration of the judicial and non-judicial components of transitional justice. Not only are non-judicial processes enhanced when supported by effective criminal courts, the courts themselves are often better able to pursue their objective of prosecuting the most serious perpetrators for the most serious crimes when there are effective non-judicial processes available to deal with other victims and perpetrators. Although no process has yet achieved the optimal balance between these two forms of accountability, there is some evidence to suggest that a clear and transparent policy of prosecutorial discretion can do much both to engage low-level perpetrators in the important work of truth-telling and reconciliation, while at the same time offering criminal courts the opportunity to dedicate their full resources to trying the most senior perpetrators.

These are all real and tangible achievements that undoubtedly do go some way towards closing the impunity gap. Despite their limitations, the non-judicial



accountability processes of Argentina and Chile, South Africa and Morocco, all appear to have moved their societies closer to complete accountability than would have been possible through the use of courts alone.

Of course some processes have achieved more than others. Some may even have done more harm than good. This is the starting point of this report. It has therefore not sought to identify a single process for replication across all contingencies, but has tried instead to consider the post-conflict accountability process as a set of inter-related components, each of which must be carefully tailored to specific circumstances. It has looked at these components in turn, and attempted to extract, where possible, lessons that might help adapt these components to future situations. Where for example the success of a reparations programme or truth commission can be traced to the considered policy-decisions of those structuring the process, there is scope to learn from the decision making process that led to this success. Equally, where failure has clearly followed from certain assumptions or policies, important lessons can be learnt and communicated to those contemplating similar mechanisms in the future. It is in these pockets of success and failure this report finds reason to be optimistic about the future of non-judicial accountability processes. Although there is a great deal of study yet to be done, we can begin already to build on successes, prevent mistakes from being repeated, and thereby ensure that each successive non-judicial accountability process is better than the last.

Each chapter of the Analysis section has drawn a number of specific conclusions about the various components of a non-judicial accountability process. What has emerged most clearly, however, is that much of what is significant to the success and failure of any given component is determined well before its work is started. Planning and integrating an accountability process has in many cases proved just as important as financial and human resources or the absence of unwanted interference.

Numerous case studies make it clear that successes are more frequent where real thought has been given to articulating and prioritising objectives, and where time has been taken to communicate and engage affected communities and victims in this process from the very beginning. As these communities and victims are the ultimate judges of a non-judicial accountability process, success is not possible without a clear appreciation of their needs, expectations, and goals. Extensive and inclusive consultation with an eye to identifying and

prioritising specific objectives has therefore been identified as an important first step towards avoiding mistaken expectations and planning an accountability process with a real prospect of success.

Similarly, experience has shown that no component of the accountability process can be viewed in isolation. Prosecution strategies affect the work of truth commissions; reparations policies can affect the willingness of victims to participate in a process; and, as was the case in Fiji, unconditional amnesties can undo the achievements of a whole accountability process. Along with extensive consultation, the architects of a process must therefore give careful thought to coordinating the work of the various components they choose to include in their accountability package. This does not only require ensuring there is sufficient cooperation and communication across all bodies and institutions, but also affording sufficient independence and autonomy where this is necessary for a body to meet its particular objectives.

These conclusions have not supported the view that any one model is superior to others, but have emphasised that with careful planning and some innovation, non-judicial accountability processes can be adapted to most situations so as to provide a comprehensive and integrated approach to justice.

One of the questions that opened this report was whether non-judicial accountability mechanisms make sufficient contribution to justice to be considered relevant to the principle of complementarity as enshrined in the Rome Statute of the ICC. That is, should a State's efforts to pursue non-judicial forms of accountability be weighed when asking whether it is "willing and able" to seek justice from crimes punishable under international law?

This report cannot pretend to have provided a decisive answer to this question. A number of relevant conclusions have however presented themselves. First, as this report has argued that non-judicial mechanisms cannot provide an *alternative* to criminal prosecutions, it follows that non-judicial mechanisms cannot alone demonstrate that a state is "willing and able" to seek justice. As non-judicial accountability mechanisms can never the place of criminal prosecutions, they can also never excuse a State that fails to seek judicial accountability for the crimes that have affected its citizens.

Although non-judicial mechanisms do not provide complete accountability by themselves, this report has however also argued that non-judicial mechanisms

can, when planned and integrated, provide a form of accountability that goes beyond that available to criminal courts. Particularly where the scope of conflict has been large, non-judicial mechanisms can provide the means to reach a greater number of victims and perpetrators than available to the criminal courts alone, and so go some way towards closing the impunity gap and serving long-term peace and stability. This report has therefore found no reason to dismiss non-judicial mechanisms when considering a State's ability and willingness to pursue justice. If anything, a focused and careful commitment to non-judicial accountability as a complement to judicial accountability should be interpreted as definite commitment to extending justice as widely as possible. Before they can be interpreted as such however, these processes must be subject to the same demands of transparency and fairness as any criminal proceeding.

It is difficult to imagine how a society gripped by conflict or oppression could ever hope to come to terms with all the crimes that have affected its citizens without turning to some form of non-judicial accountability. These processes are at least as difficult to implement as their judicial complements, but their potential to extend the reach of justice cannot be ignored by the architects of transitional justice. Although a real commitment to closing the impunity gap must therefore begin with criminal courts, it must in most cases also find expression outside the courtroom and in the communities directly affected by conflict. This is the task for which non-judicial accountability mechanisms may prove particularly apt.



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## Closing the gap

No one visiting Sierra Leone in 1998 could fail to be struck by the scale of the tragedy that saw this beautiful country transformed in to a living monument to our acceptance of and capacity for evil. The same can be said of so many other places in the world; from the killing fields of Cambodia to the shameful tragedy at Srebrenica, and of the thousands of Darfurians who today are still the target of death and destruction.

One thing is certain: If we are to confront escalating violence and tear down once and for all these monuments to human barbarity, it must be through a comprehensive solution that includes a commitment to accountability and an end to impunity.

There is a new determination to finding this solution, matched by a growing recognition that criminal prosecutions are not the only item in the accountability toolbox. We are still at the early stages of this process, and there is much innovation still to be done. Each situation is different, and so each solution must also be different. But what we can ask – what the victims of violence can demand – is that those searching for solutions articulate clearly what they are trying to achieve and consider carefully how they intend to do so.

This Report is intended to help in this endeavour by examining and analysing the goals of accountability mechanisms, and by considering how different approaches have both succeeded and failed in achieving each of their stated objectives. In recognising that no single mechanism can meet a country's accountability needs, we also hope that this Report will provide impetus for a more rigorous consideration of the interplay between different mechanisms and their potential contribution to accountability for war crimes, crimes against humanity and genocide.

**Emma Bonino**

Vice-President of the Italian Senate



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