

Classifying Truth Commissions

The mechanisms and instruments used in instances of transitional and restorative justice are many; they have been honed and developed over time, and new tools offer significant promise in this regard. This paper attempts to define and distinguish three of the instruments presently in use, and which are often lumped together in the literature: criminal trials, apology and restitution and the truth commission. There follows a discussion of the significant weaknesses present in the literature surrounding these mechanisms of justice. The paper also assesses three of the relative strengths of the truth commission and to discuss their application to different situations.

The state, according to modern thought, exists in the main for the protection of its citizens; sometimes, however, the state assumes the role of perpetrator, carrying out gross human rights violations against its own people over significant periods of time. And once the campaign of terror ceases, whether due to the installation of a new regime or to the reform of a past regime, citizens must begin to resume their lives. Such gross negligence and horror, however, leave in their wake a broken and dysfunctional people, unable to live either in their former lives and roles or in the newly-created circumstances in which they find themselves.

Societies in crisis, therefore, need resolution. Simply ignoring the past will bring no such “closure” for the individuals on both sides of the societal divide which is inescapably created. Rather, the discussion of group and individual experiences, the creation of a

common and official narrative, and the recognition of others' experiences as valid, however different, is required. The assumption is made that it is by acknowledging the past and by talking about one's own experience, as victim or perpetrator or both, that this acceptance can be attained. In the form of truth-telling, acknowledgement appears to provide an effective remedy which kick-starts the healing process and is thought to contribute to the reconciliation of society.

What is needed, then, is a form of restorative justice and/or deliberation over past crimes, with suitable penalties imposed, or not, as the community deems fit.¹ Such restorative justice is to be distinguished from retributive justice, wherein a citizen is tried, sentenced and imprisoned for his or her particular misdeed.² In many cases, societies attempting to recover from an era of mass injustices, those which may be termed "transitional" societies,³ cannot financially afford the expenses which are inevitably incurred in all levels of the process, from policing, to court appearances, to sentencing and

¹ For the purposes of this paper, restorative justice shall be defined as a process of active participation in which the community deliberates over past crimes, giving centre stage to both victim and offender in a process which seeks to bestow dignity and empowerment upon victims, with special emphasis placed upon contextual factors; adapted from Sinclair Dinnen, "Restorative Justice in Papua New Guinea," International Journal of the Sociology of Law 25 (1997): 245-262.

² Punishment in the model of western justice may have a "counterdeterrent effect" and is therefore undesirable in cases of mass human rights violations. See Gordon Bazemore, "Communities, Victims and Offender Reintegration: Restorative Justice and Earned Redemption," Civic Repentance, ed. Amitai Etzioni (New York: Rowman and Littlefield Publishers Inc., 1999) 69-76.

³ A transitional society, as I define it, is one whose regime has, in the past, been corrupt, and whose actions have impacted negatively upon its citizens, but which has stopped, is attempting to stop or is stopping such behaviour (whether due to a regime change or not), and which is attempting to get back to the business of everyday life, with full inclusion extended to every member of society. This draws loosely upon Ruggie's definition wherein "parametric conditions" are reestablished; see J.G. Ruggie, "International Structure and International Transformation: Space, Time and Method," Global Changes and Theoretical Challenges: Approaches to World Politics for the 1990s, eds. Ernst-Otto Cziempel and James N. Rosenau (Toronto: Lexington Books, 1989) 28-30.

incarceration.⁴ Similarly, trade-offs must also be made between the pursuit of justice and democracy.⁵

The literature in this field can be defined as having three identified deficiencies which this paper seeks to fill. First, the scholarly literature contains relatively few, and then only sporadic, writings on the subject of truth commissions. That which does exist has been written for diverse audiences -- lawyers, practitioners, observers -- and by a wide variety of authors, from journalists to victims themselves, but hardly anything has been written for the social science academic. As a result, those books and articles seek more to categorize, describe and discuss the actual mechanics of different truth commissions. There is relatively little in the way of a conceptual and theoretical framework within which to situate the debate as it exists between those audiences identified above.

Since 1983, there have been many investigations carried out which might tend to fit the descriptions given above of trials/tribunals, reparations, and truth commissions. The difficulty with this body of literature, however, is that none has taken the time to consider and carefully define any of these bodies. As a result, investigatory bodies may be classified in one way by one particular researcher and in another way entirely by a different researcher. This forms the basis of the second identified deficiency in the scholarly literature.

Finally, those studies which have been undertaken have tended to focus, almost without exception, on specific truth commissions. For example, the recent truth commission in South Africa has generated an almost unprecedented amount of interest. Other truth

⁴ Paul van Zyl, "Plenary Session: Truth Commissions," The Academic Council on the United Nations System Twelfth Annual Meeting, 17 Jun. 1999, recording.

⁵ Mark Gibney, "Decommunization: Human Rights Lessons from the Past and Present, and Prospects for the Future," Denver Journal of International Law and Policy 23.1 (1994): 89.

commissions, those which have tended to be relatively inaccessible not only to the nations in which they have taken place but also to the international community, have been neglected; these include Uganda and Haiti, among others. That information which does exist is sometimes known only to select individuals, and is simply not available to the average person interested in the topic, although it does exist.⁶ Indeed, this forms the basis of a third particular void in the literature.

It is on this basis, that of discussing the identified weaknesses in the literature, that this paper proceeds. States have attempted to deal with such mass violations of human rights using a variety of restorative methods and instruments. And by attempting to classify the different means by which states have addressed their unique past, the potential for greater understanding of the issues and their respective complexities can be identified.

One of the instruments which has been implemented is trials and/or international tribunals. The Nuremberg and Tokyo trials in the post-war period marked the international community's first real attempt to prosecute those who had perpetrated abuses on a wide scale; their relative success has since been discounted, and many are hesitant to point to these proceedings as having been successful on any number of levels, and for good reason: the tribunals themselves and the prosecutory officials presiding over them were appointed by outsiders; only the top officials in each case were ever tried; and the impact on the respective communities appears to have been negligible. Only recently has the world community, under the auspices of the United Nations, begun again to prosecute criminals for

⁶ The Commission of Inquiry into Human Rights Violations (CIVHR) of Uganda provides a clear example of this; no copies of the Commission's report were ever circulated outside of the country and even Human Rights Watch and the U.S. Institute of Peace never obtained a copy. This document does exist, however, and a copy of it has been traced. It is available to be viewed -- only within Uganda.

mass violations of human rights, in order to compensate for states' inability to apply justice;⁷ the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda were begun in the early 1990s. Hayner, elaborating on Human Rights Watch's distinction, situates such trials within the "justice" phase of transition.⁸

The second instrument is what is often referred to as reparation. Minow divides this area into two: apology and restitution.⁹ In effect, reparation of any stripe involves either one or both of these steps. After a government has wronged its people, it ought to (and in several isolated cases, has) extend to those people its expression of sorrow over its actions. This expression may include some monetary compensation for the losses incurred by the people, or not. Australia's Council on Aboriginal Reconciliation, appointed in 1991, for example, intends to release a "document of reconciliation" in the early summer of 2000;¹⁰ to date, Prime Minister Howard has adamantly resisted any issuance of apology.¹¹ The Australian example sits at one end of the scale.

The example most often cited, and which sits at the other end of that scale, is of the Japanese Canadians and Americans who were interned during the Second World War; both

⁷ Ivo Banac, "History, War-Crimes Tribunals, and the Prospect of Truth Commissions in Balkan Conflicts," The Academic Council on the United Nations System, *Rebuilding Societies in Transition*, 24 Mar. 2000, presentation.

⁸ Priscilla B. Hayner, "Fifteen Truth Commissions - 1974 to 1994," *Human Rights Quarterly* 16 (1994): 605.

⁹ Martha Minow, *Between Vengeance and Justice: Facing History after Genocide and Mass Violence* (Boston, Mass.: Beacon Press, 1998) 107-117.

¹⁰ U.S. Department of State, "Australia Report on Human Rights Practices for 1999," 25 Feb. 2000, http://www.state.gov/www/global/human_rights/1999_hrp_report/australi.html, 24 Apr. 2000.

¹¹ U.S. Department of State, "Australia Report on Human Rights Practices for 1998," 26 Feb. 1999, http://www.state.gov/www/global/human_rights/1998_hrp_report/australi.html, 24 Apr. 2000.

the Canadian and American governments gave those Japanese who had been interned \$20,000 per survivor as a form of compensation.¹² Again, the distinct disadvantage of such a strategy is that societies emerging from an extended period of repression and torture, in which a segment of the population has been marginalized, and military and/or civilian police presence strengthened, are often in poor moral and financial shape. In most cases, such reparation is simply not possible, at least on a large scale.

Another response to mass human rights abuses by the state has been the truth commission. In the spirit of restorative justice, the truth commission lacks both the capacity for retribution and sentencing and also the intent to provide apology or reparation to the citizens of a country who have been wronged by human rights abuses. This is due in part to the relative cost associated with other forms of reparation, resources which are often thought to be better allocated to other social programs in a transitional society.¹³ The truth commission fits squarely within the “truth” phase, as opposed to the “justice” phase identified above.¹⁴ A truth commission, as I define it, is made up of four components: it is (a) an investigatory body established by the state (or by a dominant faction within the state) to (b) determine the truth about widespread human rights violations that occurred (c) in the past to discover which parties may be blamed for their participation in perpetrating such violations (d) over a specified period of time. The first of these was begun in 1983 in Argentina; since that time, more than sixteen truth commissions have been appointed by national governments.

¹² Minow 94-102.

¹³ Paul van Zyl, recording.

¹⁴ Hayner 605.

From time to time, other investigatory bodies have been set up and carried out by international organizations including the United Nations, sometimes in cooperation with national governments; Namibia, for example, appointed a truth commission jointly with the International Committee of the Red Cross.¹⁵ Other investigations have been undertaken by national non-governmental organizations and agencies like the Roman Catholic Church. The best example of these is the clandestine project undertaken in concert by the Roman Catholic Church and the Presbyterian church in Brazil, wherein secret government documents were copied and compiled in a startling report entitled *Nunca Más* -- Never Again.¹⁶

Clearly, there are great disparities between trials, tribunals, reparation, and several forms of truth commissions. A distinction must be drawn between the many different types of instruments used in the attainment of restorative justice. To be sure, there appears to be a place for each; this does not, however, imply that each of these instruments of restorative justice can or ought to be used in the resolution of every situation. Rather, each situation requires a unique and innovative solution, one specifically tailored to its specific needs.

Yet due to the intense financial burdens already shouldered by many of these countries, and also as a result of the distrust of the western model of retributive justice, the truth commission appears to provide an effective means of dealing with the legacy left by months or even years of abuse. Indeed, many countries, having witnessed the success of other commissions in places like South Africa and Chile, are keen to adopt the same model. Sierra Leone, for example, has gone about establishing a truth commission, and one is

¹⁵ Alexandra Barahona de Brito, Human Rights and Democratization in Latin America: Uruguay and Chile (New York: Oxford University Press, 1997) 2-3.

¹⁶ Lawrence Weschler, A Miracle, A Universe: Settling Accounts with Torturers (New York: Pantheon Books, 1990) 4-82.

scheduled to begin there in the fall of 2000.¹⁷ Even Cambodia has made inquiries in this direction, modelling its potential response after South Africa's focus on reconciliation.¹⁸

What, then, are the successful aspects of the truth commission upon which these other states presently setting up their own systems of inquiry might wish to base their own models? First, the cultural specificities of each state must be taken into account. The traditional stature and moral standing of the Roman Catholic church in Brazil,¹⁹ for example, granted the investigation there a moral legitimacy. The South African Truth and Reconciliation Commission focused a great deal upon the aspect of reconciliation, operating in the spirit of Christianity that is found across both black and white communities; the biblical tradition of confession and forgiveness was promoted by Commission chairperson Archbishop Desmond Tutu, among others. In Argentina, the country's long practice of democracy was the tradition upon which the truth commission was appointed; pardons there, for example, were handed out only selectively.²⁰ In all of these cases, consideration of cultural (including, as above, religious and or political) predilections made for both acceptance and cooperation.

Another of the aspects of success might well be termed an experience with "other" than either the western model or the truth commission itself. Mozambique, for example, chose not to adopt a typical truth commission and instead has used a traditionally strong

¹⁷ Priscilla Hayner, "The Role of Truth Commissions in Reform," The Academic Council on the United Nations System Rebuilding Societies in Transition, 24 Mar. 2000, presentation.

¹⁸ Kay Johnson, "Will Justice Ever be Served?" *Time* 10 Apr. 2000: 15-17. See also "Truth or Consequences," *Far Eastern Economic Review* 162.8 (1999): 8.

¹⁹ 70% of the population presently claims to adhere to Roman Catholicism. See Robert Famighetti, "Brazil," *The World Almanac and Book of Facts 2000* (Mahwah, NJ: Primedia Reference, 1999) 779.

²⁰ Alexandra Barahona de Brito, *Human Rights and Democratization in Latin America: Uruguay and Chile* (New York: Oxford University Press, 1997) 2.

indigenous mechanism: the cleansing ceremony.²¹ To enforce the use of a truth commission where some other model might suffice simply does not make sense. And yet Rwanda, which has a rich history of the use of *gacaca*, or community hearings, also apparently has a burning desire for truth;²² Rwanda has begun to incorporate its indigenous participatory justice into the truth commission model. South Africa, on the other hand, had a limited history of truth commissions; twice earlier, the African National Congress, the party which presently holds power in that country, had held commissions to investigate the activity of both the ANC and its white majority opposition, the National Party.²³ For hundreds of years, countries have been utilizing many different means to settle disputes and to make their societies once again habitable. It seems a somewhat obvious point: these alternative means and “other” experience should be considered and, indeed, valued in the establishment of truth commissions.

Additionally, many of the states which must come to terms with their past have had (or continue to have) significant difficulties with the western model of retributive justice. The Cambodian case provides a nice illustration: its weak court system is comprised of judges, 80% whom do not hold law degrees, and many of whom have never received formal education at all, let alone training in legal matters.²⁴ The truth commission model could conceivably compensate for this simply by being spared the task of meting out sentences; the population of Cambodia might feel more comfortable in circumventing the legal system

²¹ Hayner, “The Role of Truth Commissions in Reform.”

²² Susan Cook, “The Role of Truth Commissions in Reform,” The Academic Council on the United Nations System Rebuilding Societies in Transition, 24 Mar. 2000, presentation.

²³ Hayner, “Fifteen Truth Commissions” 625, 632.

²⁴ Johnson 17.

altogether. In other cases, the sheer magnitude of the period of mass atrocity would make it nearly impossible to deal effectively with the cases at hand. In Ethiopia, charges had been brought only against 5,198 people by 1998;²⁵ prosecutions of military and police personnel and political figures were also largely unsuccessful.²⁶ A similar situation today exists in Rwanda. Approximately 120,000 Rwandans remain in prison following the genocide of 1994, and it is estimated that dealing with each individual case in the regular court system would take upwards of 180 years.²⁷ Certainly, a time-frame such as this is unacceptable. Yet those constructing the model of restorative justice must recognize and deal with these constraints and the perceptions of the system and its limitations.

And so the truth commission does appear to offer a set of significant strengths from which other states beginning to grapple with their histories of mass abuse and torture might draw. Certainly, the truth commission appears to be more adaptable than the criminal tribunal, and certainly more cost-effective; the truth commission also functions differently than either apology or restitution, both of which many states are either unable or unwilling to initiate. The literature, to date, simply does not bear out any specific hypothesis. Rather, much work is needed in this area. In fact, the field of research surrounding truth commissions and the quest for restorative or transitional justice is ripe for study.

²⁵ U.S. Department of State, "Ethiopia Report on Human Rights Practices for 1998," 26 Feb. 1999, http://www.state.gov/www/global/human_rights/1998_hrp_report/ethiopia.html, Jan. 27 2000.

²⁶ Truth Commission: A Comparative Assessment: An Interdisciplinary Discussion Held at Harvard Law School in May, 1996 (Cambridge, MA: Harvard Law School Human Rights Program, 1996) 11.

²⁷ Rafeedin Ahmed, "Economic Development and Justice for Countries in Transition," The Academic Council on the United Nations System Rebuilding Societies in Transition, 24 Mar. 2000, presentation.

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Abstract

The truth commission is one mechanism available to states interested in engaging in transitional and/or restorative justice. The literature, however, rarely makes the distinction between the truth commission and other instruments often used in dealing with a legacy of mass human rights violations. This paper distinguishes between three similar and yet very different mechanisms: truth commissions, criminal tribunals and apology/restitution. The paper then considers those successful aspects of the truth commission which might be adopted by those states interested in pursuing the truth commission as a mechanism of alternative justice.