

state and ally,' said Babacar Sine, one of Senegal's most famous intellectuals. 'France never regarded him as a dictator'.

Mr. Sine, who has known Mr. Habre for 40 years, added: 'This case is much more complex than the role of Habre. There is the role of France that supported him. There is the role of the United States that supported him. If we are to judge Hissene Habre, we have to also judge those who supported him'.

... Human rights organizations behind the case are pushing for the trial to take place in Senegal. If Mr. Habre were extradited to Chad, they say, a fair trial would be unlikely because his testimony would implicate members of the current government, including President Deby.

### QUESTIONS

1. The concern that universal jurisdiction could be abused by states against leaders of their current or former enemies (and military opponents) was expressed in the *Pinochet* opinions. How serious a problem do you take this to be? What steps could be taken to control the problem? What significance do you attach to the fact that acts that are alleged to constitute an international law crime may have taken place in the framework of UN-authorized action under Chapter VII of the Charter, or in the framework of direction by a regional organization like NATO?

2. The article on Rwanda by Alvarez at p. 1190, *supra*, also refers to the responsibility of other states, particularly Western powers, for serious and systemic violations of human rights by leaders of third-world states. Based on the definitions of international law crimes in the Statutes for the ICTY, ICTR and ICC, what charges could be brought—and realistically, in what states?

### ADDITIONAL READING

Andrea Bianchi, 'Immunity *versus* Human Rights: The Pinochet Case', 10 EJIL 1 (1999); Richard Wilson, 'Prosecuting Pinochet: International Crimes in Spanish Domestic Law', 21 Hum. Rts. Q. 927 (1999); Curtis Bradley and Jack Goldsmith, 'Pinochet and International Human Rights Litigation', 97 Mich. L. Rev. 2129 (1999).

## E. TRUTH COMMISSIONS

Sections B–D examined the role of international and national courts in the prosecution of individuals accused of committing international crimes (whether defined by customary international law, by Statutes of tribunals that were adopted by the Security Council or were parts of a treaty to be ratified by states, or by state statutes incorporating the international definitions of the crime). The issues to be

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explored in Section E, like those in earlier sections, arise when systematic and gross human rights violations are committed internally by a controlling state regime and in some cases by opposition groups or forces as well). At a certain stage, whether because of a strengthening internal opposition, international pressures, economic deterioration, or special international circumstances such as a war, negotiations between opposing forces or movements may start to displace the authoritarian regime in power by a popularly elected government that is committed to human rights. Alternatively, the (often military) regime in power may simply collapse.

The question then arises how the new regime should act toward those suspected or accused of serious human rights violations in the prior period. Should there be trial and punishment of individuals, and, if so, of all violators or only of leaders? Should there be a general amnesty?<sup>9</sup> Should other paths be followed? Section E examines one other path, that of truth commissions.

#### HENRY STEINER, INTRODUCTION TO TRUTH COMMISSIONS

Harvard Law School Human Rights Program and World Peace Foundation,  
*Truth Commissions: A Comparative Assessment* (1997), at 7

The cause of the Irish problem, suggested William Gladstone, is that the Irish never forget, while the English never remember. Is there then a golden mean, some proper degree of collective memory appropriate for bearing in mind the cruelties and lessons of a troubled past, while not so consuming as to stifle the possibilities of reconciliation and growth? How might one imprint such a memory on a people's or state's conscience? What kinds of institutions or processes would be appropriate? What purposes might be served by a detailed recording of gross abuses, not only for the collectivity but also for the individuals involved as victims or perpetrators?

In a brief fifteen years, 'truth commission' has become a familiar conception and institution for a state emerging from a period of gross human rights abuses and debating how to deal with its recent past. The term serves as the generic designation of a type of governmental organ that is intended to construct a record of this tragic history, and that has borne different titles in the many countries over several continents that have resorted to it. These commissions offer one among many ways of responding to years of barbarism run rampant, of horrific human rights violations that occurred while countries were caught up in racial, ethnic, class, and ideological conflict over justice and power. They may be alternative or

<sup>9</sup> In general, *amnesties* foreclose prosecutions for past crimes (often by reference to crimes or conduct that took place before a stated date), whereas *pardons* release convicted human rights offenders from serving their sentences (or the remainders thereof if they

are prisoners at the time of pardon). Nonetheless, usage often views these terms as interchangeable, so that persons not yet tried are 'pardoned' and prisoners serving sentences are granted an 'amnesty'.

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complementary to other national responses, including the poles of amnesty and criminal prosecution.

The contemporary surge of truth commissions . . . started in Argentina after the country's defeat in the Falkland Islands war and the military's related retreat from political power. Other prominent examples of commissions that have effectively completed their work include Chile and El Salvador. In some countries such as Uruguay, commissions did not achieve a great deal. In others such as Uganda, hampered by a lack of political will and funds, they have been unable to complete their mission and issue a report. Among the commissions functioning today, the most discussed and—given the degree of reconstruction that will be necessary—potentially the most significant for a country's future operates in South Africa. . . .

The truth commission has been a protean organ, not only in the many institutional forms it has assumed, but also in its varying membership, in the diverse functions that it serves, and in its range of powers, methods, and processes. Each country—as time progressed from the early 1980s to the present, with ever more precedents as guides—has given its commission a distinctive architecture. The mandates imposed on commissions by executive or legislative measures could be spread over many points along a spectrum moving from strong to weak powers and functions.

Although the general purposes 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. The effect of specific historical contexts on the kind of commission created is inconcealable. Consider, for example, one important explanation for the variations among commissions' mandates. When the military continues to hold considerable power as part of a negotiated move toward civilian rule (as in Chile where it retained its commander, the former political leader), severe constraints influence what a truth commission may be empowered to do, or the possibility of prosecution of military personnel. The Argentinian transition following a military disgrace enjoyed greater, though still limited, possibilities.

Commissions are official organs that are generally but not always staffed by citizens. They are organized for a time certain and for the specific purpose of examining through one or another method serious violations of personal integrity. Frequently, victims of gross violations testify before them, and alleged or confessed violators may testify as well. Invariably, the commissions receive or gather evidence of violations committed by state actors, and in some instances also of violations by nonstate actors such as insurgent groups. The investigative capacity given commissions has ranged from extensive staffs armed with legal powers, to reliance principally on voluntary testimony that may or may not be verified. Hearings have been both private and public. The reports of proceedings—including graphic evidence of abuses, sometimes the naming of victims and less frequently of perpetrators, summaries and conclusions, on occasion recommended changes in state institutions or structures—ultimately become public documents. . . .

. . . [T]ruth commissions have addressed state conduct that raises the most politically and morally sensitive issues facing the country as a whole.

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Commission's reports have implicated high reaches of state authority in raw and systematic violations of law that claimed victims into the many tens of thousands. This slaughter, rape, torture, imprisonment, and disappearance of victims occurred in the setting of consuming conflicts, sometimes decades long, over a country's basic nature and structure: ethnic hierarchy or equality, military or democratic rule, dictation or participation, repression or expression, mass murder or the rule of law, concentration of wealth and power within a given elite or broader distribution. . . .

. . . [G]overnments have created these commissions principally at the time of a state's transition toward more participatory government expressing ideals of democracy, power bounded by law, formal legal equality, and social justice. Even when the moment of political change has been non-violent—as in Chile where the structural and substantive features of the change were discussed between an opposition and a government, or in South Africa where those features were submitted to the people for its approval—the term 'transition' may understate how radically the successor regime has departed from its predecessor with respect to moral principle and political ideology.

Realization of (or at least the aspiration toward) fundamental change appears to be an almost constant companion to the use of truth commissions. A repressive regime succeeding as repressive a government that it has ousted from power is unlikely to explore prior misdeeds that may be ideally suited to its own malign purposes. The movement toward democratic rule and associated human rights in the years since the Argentinean experiment has become more common in a world informed by the powerful ideals of the international human rights movement. Hence truth commissions have become more likely.

Second, the rules and principles drawn on by commissions in determining what is relevant testimony, in reaching conclusions about criminal conduct, or in making recommendations may be found directly in the international human rights movement. Or they may be found in a state's own internal law, a law that was violated by those holding power in the prior period. Even when the latter is the case, the impact on the national proceedings of such international norms (on murder, torture, disappearances, repression, ethnic discrimination, and so on) seems evident. South Africa offers a striking illustration of the powerful effect on a state of the international system's norms and pressures. Indeed, the term 'human rights' has figured as part of some commissions' titles.

. . . Any assessment of truth commissions must involve comparisons between them and other approaches toward dealing with a tragic period of national history. At one extreme, a state may grant amnesty to those who committed defined crimes—say, crimes with a political objective—during a prior regime. At another, it may criminally prosecute (as did Argentina) a limited number of leading figures who are viewed as ultimately responsible. Despite recent and massive efforts in Ethiopia and Rwanda, in no instance has a new government succeeded in prosecuting a large number of political figures and military or police personnel involved in serious abuses. Surely the most dramatic and widely known of contemporary efforts to prosecute involves the International Criminal

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Tribunal in the Hague with respect to the conflicts in the former Yugoslavia and Rwanda.

Except where barred by amnesty provisions, victims' civil suits for compensatory damages first become possible as the repression lifts. The new government may develop a public program of systematic compensation or restitution. It may make public apology without fresh investigative proceedings—as, for example, the Czech and German governments have done in a recent joint declaration bearing on stated abuses during and after World War II. The so-called process of lustration (purification) may by law dismiss people from or make them ineligible for government or other positions because of their involvement in the criticized conduct of the prior regime.

Truth commissions can stand apart from all these approaches to dealing with the past, or they may be closely linked to one among them, perhaps to amnesty or to prosecution. In South Africa, for example, confession before a commission may lead to a grant of amnesty. . . .

Some possibilities and purposes of truth commissions are distinctive to them; others characterize several of the alternative or complementary processes that have been noted. . . .

[The author then notes some major issues about truth commissions.]

(1) Why should a state deal in some official way with its past? If it selects the path of truth commissions, what assurance can it have that major goals such as reconciliation among groups or catharsis for victims will be realized? For example, will the findings of a truth commission promote reconciliation without companion policies like compensation? Can the goal of deterrence of massive violations of human rights be realized through selective prosecutions of leaders, or through the narratives of truth commissions? (Consider in this respect the title, *Nunca Mas*, used for several reports of commissions.)

(2) What criteria and conditions should lead a state to resort to a truth commission rather than to alternative ways of dealing with the past like prosecution or lustration?

(3) Should commissions restrict themselves to recording facts developed through voluntary testimony or through investigative procedures? Should they also engage in broader causal analysis, as by advancing historical explanations of the sources of a conflict? Should a report include recommendations of structural and substantive changes in government with the purpose of avoiding mass recidivism?

(4) Can such questions be answered in general, or will answers necessarily depend on the particular close context for decision?

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