

# Are truth and reconciliation commissions an effective means of dealing with state-organised criminality?

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When a nation passes out of a period of tyranny or oppression there is often a sense that those responsible for past persecution and injustices should be punished. While many former dictators or high government officials seek to protect themselves through self-granted amnesties or immunities these are now at risk due to developments in the international community, which cast doubt on the legality of such protections. Between amnesty and punishment, however, lies a third option – the truth and reconciliation commission. Designed to give a voice to victims and perpetrators alike, these commissions have become an increasingly popular tool in post-conflict reconstruction. There is growing concern, however, that commissions have become a new vehicle through which wrongdoers can escape prosecution. This work examines the history of the truth and reconciliation commission, in its various forms, from post-apartheid South Africa to the new South American democracies and through to the latest commission, set up in the new state of East Timor.

## Introduction

Societies emerging from conflict, in which a democratic government replaces a repressive one, face the difficult question of how to deal with human rights abuses perpetrated under the previous regime. The processes that hope to effectively account for such abuses, and to achieve a lasting peace, are debated within the field of transitional justice. One of the foremost options for states seeking transitional justice is the truth and reconciliation commission.

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Although the first truth commissions, broadly conceived, appeared in the early 20<sup>th</sup> century,<sup>1</sup> there have been two notable surges in their popularity during the last 20 years. The first increase in popularity coincided with the democratic transitions in many Latin American nations in the 1980s, whereas the second period arose in response to the work of the South African Truth and Reconciliation Commission (TRC), the most comprehensive exercise in truth-telling ever seen.<sup>2</sup> Along the way, various claims have been made regarding the benefits of truth and reconciliation commissions in promoting effective and lasting nation-building after periods of societal conflict, with nearly all positive claims met by sceptical responses.<sup>3</sup>

This article sets out the perceived advantages of truth commissions in dealing with state crime, as put forward by scholars, government officials, victims, and other parties. Criticism of those perceived advantages will also be considered in an attempt to address the shortcomings of some truth commission models and to further ensure their effectiveness in the future.

### **The Multiplicity of Truth Commissions**

It is important to keep in mind when discussing the relative value of truth commissions as instruments of peace-building that the powers, aims and composition of such bodies have varied greatly between different nations, and according to different historical trends. As Stanley observes, the principal function of all truth commissions is to 'record the extent and scale of serious violence through the use of testimony',<sup>4</sup> however, this is where the similarity ends.

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<sup>1</sup> The first investigative commissions into atrocities were the those arising from the Balkan Wars of 1912-13, and Turkish and German actions during the First World War: M.A. Weiner, 'Defeating Hatred with Truth: an Argument in Support of a Truth Commission as Part of the Solution to the Israeli-Palestinian Conflict' (2005) 38 *Connecticut Law Review* 129.

<sup>2</sup> J. Sarkin & E. Daly, 'Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies' (2004) 35 *Columbia Human Rights Law Review* 661, 723; J. Laakso, 'In Pursuit of Truth, Justice and Reconciliation: The Truth Commissions of East Timor and South Africa' (2003) 22(2) *Social Alternatives* 44.

<sup>3</sup> T.G. Phelps, *Shattered Voices: Language, Violence and the Work of Truth Commissions* (2004) 124.

<sup>4</sup> E. Stanley, 'Truth Commissions and the Recognition of State Crime' (2005) 45 *British Journal of Criminology* 582. Hence, models such as Germany's research-based commission

Looking at the different types of truth commissions that have been employed in post-conflict societies over the last few decades, most were statutory government bodies (eg. South Africa's TRC), although some have been inaugurated by executive decree (Chile),<sup>5</sup> under a United Nations mandate (El Salvador and Timor-Leste), and others by international (Rwanda) or domestic NGOs (Brazil).<sup>6</sup> Most commissions work to a limited timeframe, although those of Chad and Uganda are to run for an indefinite period.<sup>7</sup> The commission's terms of reference may allow it to look at a pattern of abuses over a number of decades (Chile and South Africa), or instead focus on specific crimes or specific groups of perpetrators.<sup>8</sup> Some may reveal the identities of perpetrators (Timor-Leste) and some may not (Chile, Guatemala). Some attempt a massive exercise in public participation and mobilisation (South Africa, Sierra Leone), whereas other commissions are smaller and more secretive (Guatemala, Sri Lanka, Haiti).<sup>9</sup> Finally, some commissions have broad powers of subpoena, search and seizure, or to make recommendations, whilst others do not.<sup>10</sup> As is evident, the truth commission is a flexible institution, capable of being adapted to different national circumstances.

Whether or not a truth commission report is accompanied by a recommendation for amnesty for some or all perpetrators is especially controversial, as this is the basis for much of the debate over restorative versus retributive justice processes in peace-building. The truth commissions of Guatemala, El Salvador, Argentina, Chile and South Africa included various conditional and unconditional amnesties as part

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into the practices of the German Democratic Republic between 1949 and 1989 will not be discussed here: see R. Daye, *Political Forgiveness: Lessons from South Africa* (2004) 44.

<sup>5</sup> R.I. Rotberg, 'Truth Commissions and the Provision of Truth, Justice and Reconciliation' in R.I. Rotberg & D. Thompson (eds.), *Truth v. Justice: the Morality of Truth Commissions* (2000) 13.

<sup>6</sup> Sarkin & Daly, above n 2, 723.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid; Rotberg, above n 5, 4.

<sup>10</sup> Sarkin & Daly, above n 2, 723; C. Stahn, 'Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor' (2001) 95 *American Journal of International Law* 952, 955; see also United Nations Transitional Administration for East Timor, *Regulation No. 2001/10: On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor*, 13 July 2001, s21(2).

of their work, whereas those of Rwanda, Yugoslavia and Timor-Leste (for serious crimes) did not.<sup>11</sup>

Despite the fact that international human rights and humanitarian law places limits on the provision of amnesties for genocide, war crimes and crimes against humanity,<sup>12</sup> this article will not preclude the use of such amnesties merely on the basis of their legality or otherwise within international law. In looking at the methods by which a post-conflict society can heal itself and prevent further bloodshed, a full range of institutional models must be considered.<sup>13</sup> As Sarkin and Daly note:

‘Crimes of state are both legal and political. Reconstruction of community likewise has both legal *and* political dimensions.’<sup>14</sup>

### **Claims about the Effects of Truth Commissions: Advocates and Detractors**

There is increasing agreement amongst theorists and practitioners of transitional justice that some form of accounting for the past is a necessary prerequisite to achieve lasting peace in societies previously afflicted by conflict.<sup>15</sup> A failure to deal sufficiently with the past may create mistrust between groups in society and towards the institutions of state.<sup>16</sup> Importantly, proponents of such a view are found on both sides of the restorative versus retributive justice debate. However, is the formal mechanism of a national truth and reconciliation commission the appropriate mechanism to account for state crime? As noted above,

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<sup>11</sup> D. Mendeloff, ‘Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?’ (2004) 6 *International Studies Review* 355, 367; Laakso, above n 2, 49; Stahn, above n 10, 958.

<sup>12</sup> I. Simunovic, ‘Dealing with the Legacy of Past War Crimes and Human Rights Abuses: Experiences and Trends.’ (2004) 2 *Journal of International Criminal Justice* 701, 702-703.

<sup>13</sup> The Uruguayan case is one example where a comprehensive amnesty program initially went ahead with popular support: Sarkin and Daly, above n 2, 702.

<sup>14</sup> *Ibid*, 688, emphasis added.

<sup>15</sup> *Ibid*, 669-670; G. Gentilucci, ‘Truth-Telling and Accountability in Democratizing Nations: The Cases Against Chile’s Augusto Pinochet and South Korea’s Chun Doo-Hwan and Roh Tae-Woo’ (2005) 5 *Connecticut Public Interest Law Journal* 79; peace here may be defined as the absence of war, in addition to social equality and democracy: Mendeloff, above n 11, 363.

<sup>16</sup> A. Fleschenberg, et al., ‘Statement of the “Reflection Group”’ (paper produced as a result of the Dealing with a Burdened Past – Transitional Justice and Democratization Conference, Berlin, Germany, 20-21 April 2006).

the many types of truth commissions all share one common feature, that of a *truth-seeking* mandate, and hence it is this common feature that will be the main focus of this article in attempting to answer this question.

The paragraphs below look at the various (sometimes overlapping) justifications advanced for the use of truth and reconciliation commissions, as opposed to predominantly retributive justice procedures, particularly formal criminal prosecutions. Significantly, it is through a perception that restorative justice processes, such as truth and reconciliation commissions, can serve a number of purposes beyond the reach of the domestic and international court system that their popularity has developed.<sup>17</sup> As will be noted, some of the claims in support of truth commissions are meritorious, whereas some are misguided. Heeding lessons from the past will enable the truth commissions of the future to follow a model that increases their effectiveness.

### ***Social Healing and Reconciliation***

The first claim that is made about the value of truth-telling is that the exposure of the truth regarding human rights abuses perpetrated by the previous regime may help to psychologically heal the victims of such abuses and their families, and to assist with reconciliation.<sup>18</sup> Proponents claim that it is only after psychological healing takes place that two previously warring parties can come together in a spirit of reconciliation.<sup>19</sup> Reconciliation, meaning the bringing together of previously opposing parties, is a recognised means of reckoning with state-sponsored atrocity,<sup>20</sup> the success of which might be measured by an overall feeling of peace amongst a nation's citizens.<sup>21</sup>

Truth and reconciliation commissions, unlike trials and historical commissions, are the institutional models best equipped to promote reconciliation in a fractured society, if for no other reason than the fact that they are usually set up for this express purpose.<sup>22</sup> Although

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<sup>17</sup> Stahn, above n 10, 954.

<sup>18</sup> Laakso, above n 2, 50.

<sup>19</sup> Mendeloff, above n 11, 359.

<sup>20</sup> Sarkin & Daly, above n 2, 670.

<sup>21</sup> Gentilucci, above n 15, 86.

<sup>22</sup> Sarkin and Daly, above n 2, 724.

criminal trials may offer a significant sense of healing and satisfaction to victims,<sup>23</sup> their utility for reconciliation is doubtful. In fact, reconciliation may in fact be the antithesis of prosecution.<sup>24</sup> Daly and Sarkin claim that:

[T]he relevance to reconciliation of trials, generally, is questionable, but the impact on reconciliation of *international* trials is surely minimal. The primary reason for this is that trials that take place outside the country are likely to have little effect on relations among people within the country. Even when international trials take place within the country, as in Sierra Leone, they are, by definition, conducted by *foreigners* – people who were not involved in the actual events.<sup>25</sup>

Moreover, truth commissions are far superior to private environs for the exchange of confession and forgiveness, as such an exchange takes place in a non-confrontational and non-dangerous environment.<sup>26</sup>

On the other hand, opponents argue that truth-telling, rather than having a healing effect, may reopen old wounds and divisions in society.<sup>27</sup> Certainly, in circumstances where a state is not yet fully stable, where peace has been miraculously achieved by means of a settlement or otherwise,<sup>28</sup> then truth-telling would appear to present more dangers than benefits (e.g. with the promotion of collective ‘amnesia’ in post-Franco Spain and Mozambique).<sup>29</sup> Yet, the examples of the South African TRC, Chilean Commission and Timor-Leste’s Commission on Reception, Truth and Reconciliation (CAVR<sup>30</sup>) point to the opposite

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<sup>23</sup> R.J. Goldstone, ‘Justice as a Tool for Peacemaking: Truth Commissions and International Criminal Tribunals’ (1996) 28 *New York University Journal of International Law and Politics* 485, 491 in Mendeloff, above n 11, 359.

<sup>24</sup> Sarkin & Daly, above n 2, 691.

<sup>25</sup> *Ibid.*, 690-691, emphasis added.

<sup>26</sup> D. Schalkwyk, ‘Truth, Reconciliation, and Evil in South Africa’ in M.S. Breen (ed), *Truth, Reconciliation, and Evil* (2004) 32.

<sup>27</sup> Mendeloff, above n 11, 365.

<sup>28</sup> *Ibid.*, 376.

<sup>29</sup> *Ibid.*, 367.

<sup>30</sup> CAVR is the Portuguese acronym that is commonly used for the Timor-Leste Commission: T. Järvinen, ‘Human Rights and Post-Conflict Transitional Justice in East Timor’ (Working Paper No. 47, UPI, 2004) 56, fn. 183.

conclusion.<sup>31</sup> In divided societies where former adversaries are forced to live side by side, it is precisely in those circumstances that political leaders are likely to engage in stereotyping and scapegoating along ethnic, cultural, religious or other lines.<sup>32</sup> The findings of a truth commission can preclude this type of behaviour, exposing it as fallacy before it becomes widely accepted.<sup>33</sup> In deeply divided nations, as Phelps notes, 'the sharing of personal narratives may be the only means by which such diverse people can begin to recognize the humanity of each other.'<sup>34</sup>

One other criticism that has been levelled at the perceived 'societal healing' benefit of truth commissions is that although storytelling and acknowledgement of the facts may have significant therapeutic benefit for individuals, this personal psychological response cannot be extrapolated in its application to the psyche of an entire nation or oppressed social group.<sup>35</sup> Addressing this concern, it would appear that the larger the truth-seeking operation, the more a cathartic effect on an entire society would ensue, individual by individual.<sup>36</sup> Thus, South Africa's TRC should serve as a model to future commissions with its ambitious mandate (documenting human rights violations between 1960 and 1994<sup>37</sup>) and mobilisation of mass participation (over 22,000 statements from all sides of the conflict were taken).<sup>38</sup> Although it is of course impossible to include every single surviving victim's story of suffering and every single perpetrator's confession within the one process, a truth commission report should be comprehensive enough to establish notable trends and patterns of violence that many more of the non-testifying public can relate to.

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<sup>31</sup> Laakso, above n 2, 52.

<sup>32</sup> Mendeloff, above n 11, 375.

<sup>33</sup> *Ibid*, 375-6.

<sup>34</sup> Phelps, above n 3, 69.

<sup>35</sup> Mendeloff, above n 11, 364.

<sup>36</sup> Sarkin & Daly, above n 2, 692; Fleschenberg, et al., above n 16.

<sup>37</sup> Laakso, above n 2, 49.

<sup>38</sup> Rotberg, above n 5, 20, fn. 1.

### *Justice for Victims and Perpetrators: Retribution*

Retribution, or the punishment of criminals for their actions, is usually a vital ingredient in transitional justice processes, in order to give perpetrators 'what they deserve' and to preclude vigilante-style revenge.<sup>39</sup> Advocates claim that truth-seeking in and of itself provides justice for victims of state crime, and acts as an effective form of retribution against the perpetrators of such actions. Their argument is that the public exposure of truth and the assignment of blame for the crimes committed are a form of punishment through shame,<sup>40</sup> quite apart from the more traditional forms of retribution (which include fines, trials, imprisonment, and sometimes execution).<sup>41</sup> Rotberg argues, in relation to the South African Truth and Reconciliation Commission:

The public shaming that came through the open nature of the TRC procedures substituted reasonably well for penal justice. Exposure is punishment. It is a powerful component of accountability.<sup>42</sup>

Of course, a pre-requisite for the effectiveness of such a retributive measure is the power and willingness of the commission to publicly identify the perpetrators and their superiors by name, a requirement that has not been heeded by some commissions.<sup>43</sup>

If this retributive aspect of the truth-seeking process is sought, another dilemma will arise. The release of information implicating the alleged perpetrator in state crime is likely to violate the right to due process that would ordinarily be available to them during a criminal trial.<sup>44</sup> Although the alleged perpetrator will of course have the right to remain silent (or even not participate in commission proceedings at all), the fact that no burden of proof exists increases the chance of false accusations being made.<sup>45</sup> This problem has no easy solution, other than to

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<sup>39</sup> Phelps, above n 3, 39, 52.

<sup>40</sup> Weiner, above n 1, 130.

<sup>41</sup> Phelps, above n 3, 53.

<sup>42</sup> Rotberg, above n 5, 16.

<sup>43</sup> For example, see Rotberg on the Guatemalan Commission on Historical Clarification (1997-1999): Rotberg, above n 5, 4.

<sup>44</sup> Weiner, above n 1, 132.

<sup>45</sup> *Ibid.*



acknowledge that the alleged perpetrator (usually) also has the right to testify before the commission, and to respond to any allegations.<sup>46</sup>

### *Deterrence and Defeating Impunity*

Deterrence is a kind of pre-emption, a strong statement directed at potential future perpetrators so that the crimes described in the report are never committed again. No fewer than four Latin American truth commission reports have employed the title 'Nunca Mas' ('no more' in Spanish),<sup>47</sup> whilst the CAVR, Timor-Leste's Commission for Reception, Truth and Reconciliation, has adopted the title 'Chega' ('enough' in Portuguese).<sup>48</sup> Moreover, former Argentinean President Raul Alfonsin stated that his national commission's aim 'was to prevent rather than to punish'.<sup>49</sup> Clearly then, deterrence is one of the primary goals of truth commissions. How then does the public exposure of human rights abuses prevent more of the same in the future?

The main way that deterrence is achieved by truth commissions, it is claimed, is through the removal of perpetrators of state crime from public life. The culprits cannot then engage in criminal behaviour again, but more significantly, other would-be perpetrators are discouraged from doing so.<sup>50</sup> Although generally truth commission reports are not accompanied by high-level prosecutions, the mere 'naming and shaming' of perpetrators may force them to retreat from public view, given the extent to which they are likely to be ostracised by the greater public.<sup>51</sup> Truth commission advocates often point to the fact that ritual shaming carries more serious consequences for the subject than criminal prosecution in a number of different cultures.<sup>52</sup>

Although truth-seeking may function as a dispensation of retributive justice and as a message of deterrence in individual cases, the challenge for the architects of truth commissions is how to ensure such bodies act

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<sup>46</sup> Stahn, above n 10, 955. A prominent example is the Ugandan Commission of Enquiry Act, which allowed alleged perpetrators to cross-examine witnesses and respond to the allegations made against them.

<sup>47</sup> Sarkin & Daly, above n 2, 695.

<sup>48</sup> S. Powell, 'UN Verdict on East Timor', *The Australian* (Sydney), 19 January 2006 no page.

<sup>49</sup> Sarkin and Daly, above n 2, 695.

<sup>50</sup> Mendeloff, above n 11, 361.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

against the *impunity* previously enjoyed by perpetrators (be they police, military, or civilians). Impunity is not merely the absence of criminal punishment, but that failure to punish reflecting an official endorsement of the perpetrators' actions.<sup>53</sup> It is not disputable that criminal prosecution abolishes impunity, by breaking the cycle of violent reprisal and sending a clear deterrent message to other would-be perpetrators.<sup>54</sup> However, is there a way this can be achieved through 'restorative' processes alone? This is this area where the controversy over truth commissions with attached amnesty provisions reaches its crescendo. Although, as will be noted below, the provision of an amnesty to perpetrators may help to significantly improve the truthfulness of testimony and create a more accurate historical record, on the other hand, opponents of amnesties vigorously assert that such a measure perpetuates impunity through a lack of accountability and responsibility, leading to prolonged hatred and the threat of violent revenge by victims and their families.<sup>55</sup>

It is at this point where *conditional* amnesties, equivalent to a special type of plea-bargain,<sup>56</sup> become an important tool in the process. Although conditional amnesties that exonerate the perpetrators of serious human rights breaches will probably be unlawful according to international law,<sup>57</sup> they can still function to defeat impunity, depending on how they are framed and managed.<sup>58</sup> In order to convey a strong statement to the public (and the international community) that the amnesty does not legitimate the crimes committed, the amnesty should be:

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<sup>53</sup> Sarkin & Daly, above n 2, 719. For a detailed account of the dangers of impunity for serious crimes, see Daye, above n 4, 107.

<sup>54</sup> Mendeloff, above n 11, 360.

<sup>55</sup> Laakso, above n 2, 51.

<sup>56</sup> Rotberg, above n 5, 17.

<sup>57</sup> Simunovic, above n 12, 702-703; nation-states have a non-derogable duty under international law to prosecute and punish individuals who commit violations of human rights: Daye, above n 4, 113. Moreover, in October 2000, UN Secretary-General Kofi Annan reported to the Security Council that the UN position on the matter was that 'amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law': Stahn, above n 10, 955.

<sup>58</sup> Sarkin & Daly, above n 2, 721.

1. Individual, so as to preclude blanket amnesties: each applicant must submit themselves for consideration;<sup>59</sup> and,
2. as mentioned, conditional, such that the amnesty is only granted in exchange for something of value to society, rather than for the performance of a pre-existing duty (i.e. to obey the law or to disarm).<sup>60</sup>

These requirements epitomise recent international legal practice, as demonstrated in South Africa and Timor-Leste.<sup>61</sup> The individual amnesty requirement ensures that each perpetrator takes responsibility and acknowledges their own actions, whilst the requirement of conditionality guarantees that the new administration cannot be 'held hostage' by the old regime until amnesty is awarded.<sup>62</sup> Thus, involvement in this kind of amnesty regime indicates that the former power-holders are prepared to work within the parameters and laws of the new government.<sup>63</sup>

### *Rehabilitation of Perpetrators*

The opportunity to rehabilitate perpetrators emerged in the early 20<sup>th</sup> century as the third general justification for criminal punishment, along with retribution and deterrence.<sup>64</sup> So can a perpetrator's cooperation with a truth commission contribute towards the reform of their behaviour, and reintegration within a peaceful society?

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<sup>59</sup> Ibid.

<sup>60</sup> Ibid; this element could of course be met by a requirement to tell the truth during testimony (in the TRC), or alternatively to pay restitution or engage in community service (as in Timor- Leste's 'Community Reconciliation Procedure' for less serious crimes): La'o Hamutuk, 'Reviewing the East Timor Commission for Reception, Truth and Reconciliation (CAVR)' (2003) 4(5) *La'o Hamutuk Bulletin*.  
<<http://www.laohamutuk.org/Bulletin/2003/Nov/bulletinv4n5.html#cavr>> at 25 March 2006.

<sup>61</sup> Stahn, above n 10, 954; The conditional amnesties employed in South Africa and Timor-Leste contrast with the older 'blanket' model used in Chile, Argentina and El Salvador: Daye, above n 4, 95.

<sup>62</sup> Sarkin & Daly, above n 2, 721.

<sup>63</sup> Ibid, 722.

<sup>64</sup> Phelps, above n 3, 30.

The key to the rehabilitation of perpetrators is their acceptance of responsibility for their actions.<sup>65</sup> When the perpetrator steps forward at a truth commission hearing and acknowledges their own culpability, this crucial first step towards reintegration within society takes place. Such a process contrasts greatly with criminal trials, where a defendant will seek to maintain their innocence,<sup>66</sup> often even after a guilty verdict, and the punishment then meted out has its aim in isolating that individual from the remainder of society, rather than including them.<sup>67</sup> Truth-seeking processes, on the other hand, aim to reconcile the two parties so they may live together peacefully.<sup>68</sup> Whilst honest participation in a truth-seeking process is far from an automatic guarantee to forgiveness and a normal life within the new nation, there are a number of precedents to that effect.<sup>69</sup>

### ***Building a Historical Record***

The findings presented in a truth commission report constitute an important addition to the public historical record.<sup>70</sup> Importantly, an accurate historical record can function to resolve disputes about the occurrence and extent of human rights abuses. As such, any historical lies created by the propaganda machine of the former regime will be publicly rebuked.<sup>71</sup> A common understanding of the troubling parts of a nation's history may allow the two or more former warring factions to unite in government, rather than argue over the past.<sup>72</sup> Although it is sometimes true that the otherwise laudable goal of promoting national

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<sup>65</sup> Daye, above n 4, 96.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid, 110.

<sup>68</sup> Ibid.

<sup>69</sup> For example, the comparative success of the Community Reconciliation Procedure as part of the CAVR process in East Timor, which allowed the repatriation of former militia members back to their communities, largely without incident: S. Zifcak, 'Restorative justice in Timor-Leste: The Truth and Reconciliation Commission' (2005) 68 *Development Bulletin* 51, 53; reconciliation between supporters of Ian Smith and those of Robert Mugabe following civil war in Zimbabwe: Daye, above n 4, 81; and in South Africa, the notorious former 'wet bag' police interrogator, Jeff Benzien, who continued serving in the police force after his testimony before the TRC, with a number of his former victims as his senior officers: Daye, above n 4, 93-94.

<sup>70</sup> Laakso, above n 2, 44; Weiner, above n 1, 130.

<sup>71</sup> Mendeloff, above n 11, 360.

<sup>72</sup> Ibid.

identity in infant nations is achieved through a great deal of mythmaking,<sup>73</sup> for a feeling of trust between former adversaries and a lasting peace to ensue, a spirit of transparency and objectivity with regards to national history is an important starting point.<sup>74</sup>

As compared with civil or criminal trials, which can undoubtedly also make a positive contribution to the historical record,<sup>75</sup> truth commission hearings and reports have been criticised as providing inaccurate accounts of the past. First, the testimony obtained in truth hearings is nearly never subject to the cross-examination and burden of proof procedural requirements that characterise criminal or civil trials; as such it is more unlikely that an accurate and common understanding of the truth will arise.<sup>76</sup> Further, it has been argued that even if all testimony is tendered in good faith, the finite terms of reference and resources of a truth commission will mean an accurate and complete historical record of past human rights violations can never be produced, without the benefit of years of comprehensive research by qualified historians.<sup>77</sup>

This second criticism is more easily dealt with, first by the host nation ensuring that professional historians and researchers are amongst the staff of the commission, and second by ensuring that the commission's lifespan and powers (e.g. powers of subpoena, search, and seizure<sup>78</sup>) are sufficient in order for substantial historical research and compilation to be achieved. It is true that no history, no matter how exhaustively researched, can ever constitute the complete, objective truth, and this same principle applies to the reports of truth commissions: they are 'partially-constructed histories' like any other.<sup>79</sup> Ideally, a commission's

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<sup>73</sup> Ibid, 371.

<sup>74</sup> As witnessed in the example of modern-day Germany: Mendeloff, above n 11, 371. Of course, the above point regarding nations, such as Mozambique, must be heeded: in a small number of post-conflict societies, exposure of the truth can do more harm than good.

<sup>75</sup> M.A. Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (2005) 99 *Northwestern University Law Review* 539, 593.

<sup>76</sup> Mendeloff, above n 11, 374; Schalkwyk notes that this criticism has been levelled at the TRC: Schalkwyk, above n 26, 11.

<sup>77</sup> Mendeloff, above n 11, 374.

<sup>78</sup> For example, see Stahn, above n 10, 955 on the TRC.

<sup>79</sup> Laakso, above n 2, 50.

report might better be seen as producing a set of *truths* rather than *the* truth.<sup>80</sup>

The first criticism described above, a lack of checks and balances on the accuracy of testimony, might be rectified by the use of a conditional amnesty provision, as employed by the TRC, such that perpetrators may only be granted amnesty if, amongst other factors, they satisfy the commissioners that they have told the complete truth.<sup>81</sup> Additionally, it is precisely this relaxation of procedural rules regarding testimony that forms part of the attraction of the truth commission mechanism. As compared with formal criminal trials that provide only 'microscopic' or 'logical' truth in relation to a single case,<sup>82</sup> truth commissions are able to build a much more comprehensive account of past events, due to their ability to hear many more witnesses and involve various segments of civil society over the same time period that the trials of only a few leading perpetrators might be processed.<sup>83</sup>

### *Human Rights Education*

A truth and reconciliation commission's final report, together with the publicity that will usually accompany its hearing procedure, can constitute an important source of public education. The didactic element that might be taken from such narratives can ensure that the same kind of violence never occurs again. The message ideally conveyed is that in a democratic society, the use of abusive means to achieve nation-building will never again be tolerated.<sup>84</sup> Moreover, apart from a focus on specific historical events, a truth commission can help to create a human rights culture and elevate its associated vocabulary into the public discourse, where, under the repressive regime, such ideas may

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<sup>80</sup> Phelps, above n 3, 124.

<sup>81</sup> Schalkwyk, above n 26, 4; in contrast, when the Sri Lankan Commissions on Disappearances were formed, the government and the families of victims refused to accept similar amnesties, and hence, significantly less information was obtained from alleged perpetrators: Rotberg, above n 5, 15.

<sup>82</sup> Drumbl, above n 75, 593.

<sup>83</sup> Simunovic, above n 12, 703. Relevantly, a study by Ronald Slye on the TRC found that 'despite the absence of the highly developed rules of evidence, procedure, and proof that govern trials in a Western setting, the quality and quantity of information collected by the TRC was comparable or superior to that which might have been produced in a courtroom': Rotberg, above n 5, 15.

<sup>84</sup> Sarkin & Daly, above n 2, 697; Mendeloff, above n 11, 360.

never have previously existed.<sup>85</sup> Of course, the publication of a truth commission's report by itself is not enough to rapidly spread human rights awareness. At the very least, the release of the report should be accompanied, wherever possible, by a sustained and institutionalised effort in educating the broader public of the commission's findings, and the human rights doctrine which has underpinned them.<sup>86</sup>

Although admittedly the human rights records of a number of nations that have previously instituted truth commissions remains questionable (e.g. South Africa, Guatemala, El Salvador, Nicaragua and Rwanda<sup>87</sup>), the educative aspects of the commission's report must be given time to mature into common practice. Education remains a key step in ensuring respect for human rights in a nation's long-term future.

### *Institutional Reform*

Although most truth commissions primarily operate by assigning blame for the commission of human rights abuses to individual perpetrators,<sup>88</sup> it is not just individual responsibility for state crime that can be emphasised through the commission process. The aggregation of many different individual accounts will often reveal the scope of an entire institutional culture of abuse and disregard for human rights,<sup>89</sup> be that in the government, military, police force, legal system, education system, or elsewhere.

Looking at institutional responsibility for crimes will enable a post-conflict society to take political steps to remedy those shortcomings,<sup>90</sup> whether the individual perpetrators of those crimes remain within that institution or not. This contrasts with the nature of criminal trials, with their focus on the facts of the individual case at hand, rather than a 'big picture' view which reveals the root causes of the violence, and informs recommendations as to the future.<sup>91</sup> Relevant examples include the judicial reforms that took place in El Salvador, as recommended by the

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<sup>85</sup> Daye, above n 4, 99.

<sup>86</sup> Laakso, above n 2, 51.

<sup>87</sup> Mendeloff, above n 11, 374.

<sup>88</sup> *Ibid.*, 359.

<sup>89</sup> Simunovic, above n 12, 703.

<sup>90</sup> Laakso, above n 2, 51.

<sup>91</sup> Simunovic, above n 12, 703.

truth commission there,<sup>92</sup> the Argentinean Commission's uncovering of its military's culture of torture, leading to reforms,<sup>93</sup> and the TRC's major role in exposing the cruelty of the apartheid system in South Africa.<sup>94</sup>

Significantly, institutional reform does not have to be limited to the formal institutions of the state. The patterns revealed by victim and perpetrator testimony may reveal substantial social injustice.<sup>95</sup> If for example, gender, employment, or economic-based discrimination is extremely widespread it may represent an institutionalised practice. The role of a truth commission in identifying social injustice and making recommendations to overcome it, rather than merely combating state-sanctioned violence, can be the first step in an agenda of further social change.

One area where this crucial function of truth commissions in promoting institutional reform has fallen down in the past is through governments' failures to follow the recommendations of their commission's report. Given it takes political will in order to effect institutional change (for example in the armed forces, labour market, or economy), the ultimate success of the commission's work in this area depends upon its constituent government following its recommendations. A truth commission cannot fix every ailment of a post-conflict society by itself.<sup>96</sup> The Chair of Timor-Leste's CAVR, Aniceto Guterres, agreed:

Sometimes when I respond to questions [about dealing with inequalities], I kind of laugh and say, 'Look, if you're really putting so much onto the CAVR then you don't need a Parliament, you don't need a Prime Minister, you don't need a Government. You don't need a President of Timor, you just ask the CAVR to do everything!'<sup>97</sup>

A simple, yet controversial, method of overcoming this problem would be to agree in advance to make the recommendations of the commission

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<sup>92</sup> Mendeloff, above n 11, 368.

<sup>93</sup> Phelps, above n 3, 120.

<sup>94</sup> Mendeloff, above n 11, 368.

<sup>95</sup> Stanley, above n 4, 586.

<sup>96</sup> *Ibid.*, 588; see also Phelps, above n 3, 125-126.

<sup>97</sup> Stanley, above n 4, 593.



obligatory.<sup>98</sup> However, this will only be possible in certain circumstances, such as where the commission is a legislatively-created body, and as such, has a popular democratic mandate.

### *Promotion of Democracy*

Why is the promotion of democratic government a laudable goal of truth commissions? It is indisputable that strong democracies are far less likely to lapse into civil war than undemocratic nations.<sup>99</sup> Although it is true that democracy is not the only political route to a peaceful society,<sup>100</sup> its broad acceptance as a form of government by the international community and its guarantees for individual freedoms means it is an attractive model of governance.<sup>101</sup> Of course, for most nations that have engaged in a major truth-seeking exercise, democratic values were far from the norm up until their recent past.

While there are of course post-conflict societies that have made a successful transition to democratic government without the aid of a truth and reconciliation commission,<sup>102</sup> the work of such a body undoubtedly contributes towards the propagation of democratic ideals. This occurs through a threefold process: first, through the reconciliation of warring groups, as it is only where conflicting segments of society agree to be governed in common that democracy may result.<sup>103</sup> Second, the public exposure of a truth commission's work can indirectly inspire other democratic transformations, such as a more active judiciary, a more reformist parliament and a more politically aware populace.<sup>104</sup> Third and most directly, the process of truth-seeking promotes several democratic values in and of itself. These include popular participation,

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<sup>98</sup> Laakso, above n 2, 51.

<sup>99</sup> Mendeloff, above n 11, 372.

<sup>100</sup> *Ibid.*

<sup>101</sup> R. Pannikar, 'Is the Notion of Human Rights a Western Concept?' (1982) 120 *Diogenes* 75, [III]; H.J. Steiner & P. Alston, *International Human Rights in Context*, (2<sup>nd</sup> ed, 2000) 903-904.

<sup>102</sup> Mendeloff, above n 11, 367; for example: Spain, Mozambique, Lebanon, Namibia and Cambodia.

<sup>103</sup> *Ibid.*, 700.

<sup>104</sup> Phelps, above n 3, 123-124.

an accurate and transparent historical record, and the rule of law.<sup>105</sup> These democratic values will now be discussed in turn.

First, popular participation is promoted through the truth-seeking process by the empowerment of victims as they step forward to give their testimony.<sup>106</sup> Under the previous regime, their opinions may have been seriously repressed, and testifying before a truth commission will serve as an encouragement (for the witness and others) to further contribute to the public discourse. As such, truth commissions mobilise the participation of the previously-powerless, and encourage them to speak critically of those in power. Once the commission's final report has been completed, if its findings are widely disseminated, this will further encourage popular participation, together with the transparency of public processes.<sup>107</sup>

Second, the democratic benefits of an accurate and common historical record are manifest in the sense that the leaders of previously conflicting societal factions can focus their energies on forming an effective government for their new nation, rather than debating the past.<sup>108</sup> As previously discussed, all efforts may be focussed towards the democratic needs of the present society, rather than trying to affix blame for past misdeeds.

Third, the rule of law is the contention that no-one is 'above the law'.<sup>109</sup> One of its consequences is the principle that crimes are punished by the state, through legal means, rather than through personal reprisal.<sup>110</sup> The fact that state crime can be dealt with by negotiation and truth-seeking by means of a commission, rather than reprisal killings, is seen by truth commission advocates as strengthening that principle.<sup>111</sup> However, this is one of the most controversial conceptual areas of the truth commission model. If an amnesty regime accompanies the tabling of the commission's final report, critics of truth commissions will claim that a

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<sup>105</sup> Mendeloff, above n 11, 361; Weiner, above n 1, 131; Gentilucci, above n 15, 87.

<sup>106</sup> Weiner, above n 1, 131.

<sup>107</sup> Rotberg, above n 5, 9.

<sup>108</sup> Mendeloff, above n 11, 361.

<sup>109</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10<sup>th</sup> ed, 1959) 202-203.

<sup>110</sup> Mendeloff, above n 11, 361; W.I. Jennings, *The Law and the Constitution* (5<sup>th</sup> ed, 1959) 51.

<sup>111</sup> Rotberg, above n 5, 11.

failure to prosecute those responsible for prior state-sponsored crime is a direct affront to the rule of law in a democratic system. This contention might be answered by natural law theory, where, unlike with positivist theories espousing legal continuity, a break with the old legal regime may be justified because the prior law 'lacked morality and hence did not constitute a valid legal regime'.<sup>112</sup> Nonetheless this remains an important point of contention.

### *International Image*

The establishment of a successful truth commission may have a positive role to play in the way that the outside world views the newly democratised nation.<sup>113</sup> Although this argument obviously overlaps with a number of the others mentioned above, it is still worth considering separately. Whilst transitional justice processes generally focus on the grievances of victims and the incapacitation of perpetrators, it is still a fact that civil conflict and state-sanctioned human rights abuses can often (but not always) damage the economy of the newly democratised nation.<sup>114</sup> The reconciliation of previously warring factions, the promotion of democratic principles, and the institutional reforms that truth commissions contribute substantially towards are likely to make the new nation more attractive to foreign economic investment.<sup>115</sup> Therefore, in an indirect manner, the work of a truth commission can promote business, trade, reconstruction and tourism.<sup>116</sup>

On the other hand, the use of restorative, rather than purely retributive transitional justice mechanisms, may attract foreign criticism, particularly from nations with strong human rights traditions. This is most often the case where the truth commission report recommends blanket amnesties for perpetrators, which, as articulated above, breaches the international legal obligation on states to prosecute those who have committed war crimes and crimes against humanity on their

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<sup>112</sup> Gentilucci, above n 15, 87.

<sup>113</sup> Sarkin & Daly, above n 2, 698.

<sup>114</sup> *Ibid*, 727.

<sup>115</sup> *Ibid*, 689-690.

<sup>116</sup> *Ibid*.

territory.<sup>117</sup> Yet, for all the negative international attention that might arise, it would constitute a serious step in international relations to threaten an economic relationship with a newly democratised nation if they have violated this obligation. International law also calls for states to respect each other's sovereignty, and refrain from intervening in each other's internal affairs.<sup>118</sup> In any case, depending on the newly democratised state's level of development, much post-conflict investment is likely to arrive from private, rather than government sources.

## Conclusion

This article does not set out to claim that truth and reconciliation commissions are a cure for all of the problems created by a history of state-sponsored criminality in every single case. In certain circumstances, such as where a miraculous but fragile peace exists following civil war, exposure of the true extent of human rights violations could do more harm than good.<sup>119</sup> Moreover, democratisation without the aid of a truth and reconciliation commission has not led to a relapse of war in a number of post-conflict states, including post-Franco Spain, Namibia, Mozambique and Cambodia.<sup>120</sup> The popularity of truth and reconciliation commissions is a comparatively new phenomenon: previously, numerous armed conflicts arrived at a final closure without the benefit of truth-telling, or even without prosecution.<sup>121</sup>

However, this is not to deny the many benefits that truth commissions can have on societies with a troubled past, in order to account for prior state-organised criminality, and aid the transition to lasting peace. Truth commissions offer many of the benefits of criminal prosecutions (for example: retribution, deterrence, rehabilitation of offenders,

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<sup>117</sup> Simunovic, above n 12, 702.

<sup>118</sup> *Charter of the United Nations*, Article 2(1); *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, GA Res 2131, UN GAOR, 20<sup>th</sup> sess, 1408<sup>th</sup> plen mtg, UN Doc A/Res/2131 (1966); *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res 2625, UN GAOR, 26<sup>th</sup> sess, 1883<sup>rd</sup> plen mtg, UN Doc A/Res/2625 (1970).

<sup>119</sup> Daye, above n 4, 43.

<sup>120</sup> Mendeloff, above n 11, 367, 369.

<sup>121</sup> *Ibid.*, 367.

building a common historical record), in addition to several unique features: societal healing and reconciliation, the promotion of democratic values and human rights, improvement of a state's international image, and the possibility of initiating broad institutional reform. Finally, when the work of a truth commission is combined with political steps by the new government, such as a comprehensive program of public education, and provision of reparations to victims,<sup>122</sup> together with the mere passing of time,<sup>123</sup> a lasting and comprehensive sense of justice and peace can result, and the legacy of state-organised criminality will no longer haunt the new nation.

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<sup>122</sup> *Ibid*, 376.

<sup>123</sup> Daye, above n 4, 43.

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