COMMISSIONING TRUTHS

Essays on the 30th Anniversary of *Nunca Más*

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Contents

Keep your ear to the ground,
to pain's surfacing,
its gulps for air, its low ragged flight
over history's topography.

-- from "The Sound Engineer," by Ingrid de Kok

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Dean Rhoades designed the cover.

We dedicate this e-book to all of those who have fought to gain and protect truth and justice around the world.

Introduction

by Robin Kirk

Pauli Murray's childhood home sits on the eastern border of Maplewood Cemetery in Durham, North Carolina. The city established the cemetery in 1869, only three years after the state legislature incorporated what had once been a lonely tobacco depot and railroad stop. Durham's warehouses and mills drew thousands of formerly enslaved people eager for work, and amid the lush tobacco fields they built homes, businesses and churches. Like all African-Americans at the time, they had to conform to the often violent new regime of segregation or risk violence or death.

Murray is best known as a passionate civil and human rights activist who counted among her friends Eleanor Roosevelt and Bayard Rustin. But in the 1920s, she was a mixed-race child growing up in poverty in a Durham neighborhood known at The Bottoms. In the memoir *Proud Shoes*, Murray describes how the grandparents who cared for her looked liked they'd stepped off one of the Maplewood grave stones, with sharp features and a "pink-and-gray hue" like the marble angels when the sun set.

Durham was fiercely segregated. So was the cemetery - for whites only. For Cornelia, Murray's grandmother, the corner reserved for blacks was a slap in the face (the cemeteries didn't merge until 1996). Cornelia was proud of her white heritage. Her father had been the son of the wealthy, plantation-owning Smith family. Cornelia's mother, Harriet, was the slave her father raped.

For Murray, this violent heritage was not something to be erased or suppressed. Rather, she insisted in *Proud Shoes* that in order to come to terms with the past, people need to tell the whole truth, as uncomfortable as that might be. That means the truth about the rape as well as Cornelia's pride; the truth about segregation as well as how African-Americans built a thriving community; and the truth about divisions within the black community even as the civil rights movement took root. "It had taken me almost a lifetime to discover that true emancipation lies in the acceptance of the whole past," Murray wrote, "in deriving strength from all my roots, in facing up to the degradation as well as the dignity of my ancestors."

Commissioning Truths

Murray's insistence in embracing the degradation as well as the dignity of her ancestors was one of the starting points for our commemoration of the 30th anniversary of Argentina's "*Nunca Más*" (Never Again) report. Although separated in time and place, Murray's call was a reminder that the quest for truth and justice is a powerful element of many societies that have passed through prolonged violence. At the same time, that quest is dangerous, complex and often involves protracted advocacy by victims already marginalized by their societies.

Yet those who demand an accounting for the past are increasingly prevailing. For scholars of contemporary accountability, "Never Again" is the moment when the search for truth became a fundamental part of creating more stable, functioning democracies.

Released on September 20, 1984, "Never Again" documented abuses committed by the security forces during the military dictatorship of 1976-1983. Researched and written by the government-sanctioned National Commission on the Disappearance of Persons (*Comisión Nacional sobre la Desaparición de Personas*, CONADEP), the report drew on over 50,000 pages collected by researchers who traveled across Argentina and the world to interview survivors and collect evidence.

There was abundant degradation to be found. Researchers confirmed the forced disappearance of 8,961 persons from 1976 to 1983, estimating that the actual number could be much higher. The report noted that death squads operating with government support executed almost 500 people. During the dirty war, over 300 secret detention centers operated as torture and death centers.

The report dramatically reasserted the power of truth, in this case fact-collection and eye-witness testimonies of the killings and torture that largely took place in secret. Prior to 1974, the only other influential example of accountability were the Allied trials of Nazi officials at Nuremberg, held by the victors. "Never Again" was the first time a government authorized an independent entity to investigate its former -- and often current -- employees.

As political scientist Kathryn Sikkink has written, "Never Again" was an early part of what she calls a "justice cascade" and is a milestone for the modern human rights movement. "Argentine human rights activists were not just passive recipients of this justice cascade but

instigators of multiple new human rights tactics and transitional justice mechanisms, including the trials of the juntas and the 1984 truth commission."

The emphasis in "Never Again" on fact-collection, accountability and memory have inspired human rights interventions in places as different as South Africa, where the Truth and Reconciliation Commission helped ease a transfer to democracy from apartheid; and Greensboro, North Carolina, site of the first US-based commission.

Commissioning Truths: 30 Years after "Never Again" was a yearlong critical examination of the history and practice of truth commissions pioneered by "Never Again." Hosted at Duke University by the Duke Human Rights Center@the Franklin Humanities Institute and cosponsored by the Human Rights Archive at the Rubenstein Library, the series sought to recognize the importance of "Never Again" while at the same time examining the current and future of truth in a human rights context. We would also like to thank the Josiah Charles Trent Memorial Foundation Endowment Fund for their important support.

This e-book contains the reflections of leading activists and scholars about the impact of "Never Again." Our series began with Juan E. Méndez, an Argentine lawyer and former torture victim, Americas Watch director and director of the International Center for Truth and Justice (ICTJ). At the time of his visit, Méndez was just completing his term as the UN Special Rapporteur on Torture. Dr. Mendez takes us through the legal and activist history that grounds what is now considered a universal right to truth.

In November 2014, we hosted a panel on human rights, truth telling, and justice panel with Eduardo Gonzalez-Cueva, director of the Truth and Memory Program of the ICTJ; Pam Merchant, Executive Director of the Center for Justice and Accountability; and Kimberly Theidon, author of *Intimate Enemies: Violence and Reconciliation in Peru* (University of

Pennsylvania, 2012) and Henry J. Leir Professor of International Humanitarian Studies at Tufts University.

Our series concluded with David Tolbert speaking on the Future of Transitional Justice. As director of the ICTJ, Tolbert has broad experience in this field, having served Special Tribunals in Lebanon, Cambodia and the former Yugoslavia. Through "Commissioning Truths," the Duke community had the opportunity to engage with some of the world's leading experts on transitional justice and truth commissions. Our goal in publishing this e-book is to make their contributions available to a larger public.

A Brief History of Truth Commissions

by Robin Kirk

A creation of the 20th century human rights movement, truth commissions developed as a way to reveal human rights abuses and investigate patterns of violations. Included within the broader category of transitional justice, truth commissions are not permanent but rather time-limited bodies that convene in times of transition from conflict and/or state repression separate from any other justice system. While some commissions also set out a goal of reconciliation between perpetrators and victims, others confine themselves to a pursuit of truth, including the gathering of first-hand testimony, documentary evidence and sometimes human remains. Some commissions are sponsored by states while others operate independently.

All truth commissions collect primarily the experiences of people who suffered violence, whether as victims or their family members. While commissions may invite the participation of perpetrators, in practice this has proved problematic and largely ineffective. A number of truth commissions have arranged for some public or televised hearings while also holding private meetings with some who wish to speak anonymously. Commissions also produce some sort of report that codifies their work and sets out recommendations for how future governments should deal with the legacy of the past, including through reparations, prosecutions, legal reform and the building of memorials.

Scholars and activists note that truth commissions are quite varied, so even this broad definition may not include every body that considers itself a truth commission. As Priscilla Hayner, a co-founder of the International Center for Transitional Justice (ICTJ), has noted in her important work, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, it's less important to count attributes than evaluate a commission's focus. "Truth Commissions focus on victims, usually collecting thousands of testimonies, and honoring these truths in a public and officially sanctioned report represents for many the first acknowledgement by any state body that their claims are credible and that the atrocities were wrong."

In this chapter, I summarize the history of truth commissions and discuss some critiques of their work, originating from both inside the human rights movement and from legal and scholarly thinkers. In order to better understand this subject, I also include three case examples of truth commissions from Chile, South Africa and the United States. By examining how these commissions developed and what they achieved, I hope to shed light on both the strengths and weaknesses of the truth commission tool.

Just as no two conflicts are alike, so too do truth commissions widely vary, responding to the influence of history, culture and religion, among other things. However, there are general similarities, among them the hope that shedding light on past abuses can be a powerful foundation for improvements in human rights protection. While truth commissions are rightly the subject of much scholarly and legal critique, it's essential to understand them as not, primarily, a tool supported and championed by states or the powerful, but rather by a civic society too often silenced and repressed. Since the earliest human societies, we've engaged in an often heated discussion about right and wrong, and how to respond when wrong has been committed, especially against the weak or voiceless. In this discussion, truth commissions have emerged as

an important, though limited tool. Even with limitations, however, truth commissions at their core are a vehicle for often oppressed groups, including women and racial and ethnic minorities, to have a say and contribute to reforms to ensure that abuses aren't repeated.

The need for a truth process can result from many situations, including war's aftermath, the fall of an abusive regime or investigations of a deeply corrupt government, to name a few. Truth commissions are not specific to any type of government. While most commissions examine the legacy of dictatorships, some, including commissions in Peru and the United States, have examined abuses from within a democracy.

Beginning in the 1970s, victims who sought to draw attention to the wrongs done to them found in this model a powerful tool to shine a light on their experiences, seek justice and compensation and find community in shared stories. In her 2001 book on truth commissions, Hayner surveys the role and accomplishments of truth commissions from their beginnings in the 1980s. Hayner identifies Argentina's National Commission on the Disappearance of Persons (Comisión Nacional sobre la Desaparición de Personas, CONADEP) as among the first attempt to reckon with the legacy of past violence. Like its neighbor to the west, Chile, Argentina was riven by violence in the 1970s. A military junta toppled the sitting president in 1976, then detained, tortured and executed thousands of people. Many Argentines were arrested illegally, then "disappeared," a euphemism for an illegal detention and extrajudicial execution.

Often, the detainees were young people, among them pregnant women. Their jailers would wait for the women to give birth, then seize the babies and give them to military families to adopt. Almost always, the mothers were then "disappeared." Many bodies were flown over the Atlantic and dumped, destroying any hope of obtaining physical remains. Between 10,000 and 30,000 people eventually "disappeared" at the hands of the military.

A disastrous war against the United Kingdom in the Malvinas/Falkland Islands led the military to agree to democratic elections in 1983. Among the first items on the agenda of newly elected president Raúl Alfonsín was what to do about the legacy of the dirty war. He created CONADEP, naming 10 civilians to begin an investigation. As Hayner notes, this body was not initially called a "truth commission," but had many of the characteristics we now associate with them.

At the time, human rights groups were skeptical of the commission's work, since the president, still negotiating an uneasy relationship with a powerful military, did not give investigators the power to compel military cooperation. However, for Juan Méndez, an Argentine lawyer, human rights leader and himself a victim of torture who spoke at a Duke University event commemorating CONADEP's 30th anniversary, the commission marked the end of "the old business as usual way of dealing with violations by forgiving and forgetting and sweeping the violations under the rug and by essentially yielding to the blackmail of military establishments."

Known as the Sábato Commission, after its novelist chair, Ernesto Sábato, over its nine-month life, the commission took thousands of victim statements, managing to identify 8,960 "disappearances" and over 360 clandestine detention and torture centers. The final report, titled *Nunca Más* ("Never Again"), was an immediate best-seller. In his forward to the report, Sábato distanced the commission from the existing justice system:

> 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 during those ill-omened years of our nation's life. However, after collecting

> several thousand statements and testimonies, verifying or establishing the existence of hundreds of secret detention centres, and compiling over 50,000 pages of documentation, we are convinced that the recent military dictatorship brought about the greatest and most savage tragedy in the history of Argentina. Although it must be justice which has the final word, we cannot remain silent in the face of all that we have heard, read and recorded. This went far beyond what might be considered criminal offences, and takes us into the shadowy realm of crimes against humanity. Through the technique of disappearance and its consequences, all the ethical principles which the great religions and the noblest philosophies have evolved through centuries of suffering and calamity have been trampled underfoot, barbarously ignored.

Subsequently -- and in large measure because of the CONADEP report -- Argentina's civilian leaders were able to overturn amnesty laws and initiate prosecutions of high-ranking officers. While a subsequent president, Carlos Menem, reinstituted a partial amnesty and pardoned some officers, Argentina's courts continue to chip away at impunity in a process the truth commission began.

As Méndez has pointed out, Argentina was not alone in ending the "business as usual" response to violence, avoiding accountability for the past. One of the key cases establishing a "right to truth" took place in far away Honduras. In 1981, Manfredo Velásquez was a 35-year-old teacher pursuing a graduate degree in Tegucigalpa when he was abducted by armed men, two of whom were later identified as army officers. Velásquez was never seen by his family again. After pursuing justice in the national courts, his family submitted a petition against the country of Honduras to the Inter-American Commission on Human Rights, a body of the Organization of

American States. In 1986, the commission referred the Velásquez case to the Inter-American Court of Human Rights (IACHR).

While world courts like the International Criminal Court receive most attention, regional courts like the IACHR and the European Court of Human Rights have established important human rights norms. In 1988, the IAHCR ruled in its first ever case that Honduras was not only responsible for Velásquez's "disappearance," but also that all governments are required to find the truth of what happened to citizens whose rights are violated. Since this foundational ruling, Méndez has noted in public talks, a body of national, regional and international law has emerged that sustains a universal right to truth. "States are obligated to remove all obstacles to finding the truth, including through the passage of amnesty laws, pardons and statute of limitations," he points out.

Since CONADEP, the ICTJ has recorded over 40 truth commissions internationally. As a tool, commissions have a broad transnational appeal, though each is different. Some are government-supported, including commissions in Morocco and Peru. Others, like Guatemala's Commission for Historical Clarification, are the results of peace negotiations. The iconic South African Truth and Reconciliation Commission (SATRC), discussed in depth later in this chapter, is the only commission so far that has offered judicial amnesty in exchange for truth.

What these commissions share is a central interest in revealing a truth often deliberately hidden or erased by repressive governments and opposition groups. However, how much truth is publicly revealed remains among the most contentious questions facing truth commissions. With the exception of South Africa, most truth commissions tightly manage the amount of truth told, often because the perpetrators of abuses retain significant power and can threaten fragile democracies. The Guatemala Commission, for example, which operated from February 1997 -

February 1999, was expressly prohibited from naming alleged security force perpetrators in the genocide that gripped the country in the 1980s.

As Hayner has written, other commissions place different priorities on categories of truth. In Sri Lanka, the truth commission divided into three sub-groups, each pursuing its own definition. One emphasized the role of perpetrators while another concentrated on the financial losses of victims. The third highlighted the goals of reconciliation and healing.

The type of truth collected is also strongly shaped by the identity of victims and survivors. It's on this question that gender and class play the most critical roles. In most late 20th century political violence, the dead are mostly male. In contrast, most refugees are women and children. When a family breadwinner goes missing, the impact on surviving family members can be devastating. Sexual violence impacts all genders, but females are targeted in greater numbers. Often, women are among those who most enthusiastically support the quest for truth, since they tend to be both hardest hit by violence, most silenced and least able to ensure legal action.

The Sierra Leone Truth and Reconciliation Commission recognized some of these gender issues and took special steps to make sure women's voices were heard in its examination of the conflict between the government and the opposition group known as the Revolutionary United Front (RUF) in the 1990s. Among the steps was the preparation of a history of women's legal, cultural, economic, political, and social status prior to the commission beginning its work, to ensure that commissioners and staff were aware of the issues. During its work between November 2002 - October 2004, the commission provided special training to interviewers and created safe spaces for women to more comfortably share their traumatic experiences.

For political scientist Kathryn Sikkink, who has studied accountability for human rights violations, truth commissions form a piece of what she terms the "justice cascade," a network of

inter-related efforts that hold individuals, including heads of state, accountable for serious human rights crimes. For Sikkink, commissions are part of a "decentralized but interactive system of accountability for violations of core political rights," along with local, national, regional and international courts. What's important to recognize about truth commissions is that they are not necessarily a lesser or fatally flawed avenue of accountability, but rather a unique and uniquely powerful tool, when given support.

A number of truth commissions have set out a new goal of reconciliation, most notably in South Africa. Along with revealing the truth of periods of human rights abuses, the commissions are charged with helping forge a different and peaceful social cohesion, often termed as "healing." As José Zalaquett, a Chilean lawyer and professor, has written, truth commissions "help to create a consensus concerning events about which the community is deeply divided. . . . The purpose of truth is to lay the groundwork for a shared understanding of the recent crisis and how to overcome it."

Critiques of commissions often focus on the fact that they do not result in punishment for perpetrators. Even though victims may know the identity of perpetrators and see them walking freely on the street -- or hear them talk openly about the abuses they committed -- they must accept the fact that testimony before a commission will not lead to an arrest. No commission has the power to jail, compel answers to questions or order individuals to pay reparations.

This critique is valid and remains one of the hardest things for victims to accept. However, it should also be noted that traditional trials have their own failings, especially from the perspective of victims. They can be costly and quite limited in scope, pursuing only a handful of top-level perpetrators. Evidence is limited by strict rules, a real difficulty for victims who often do not possess the high level of factual evidence needed for convictions. While legally sound, such rules

often fail to account for the sweeping powers of states to destroy evidence, threaten witnesses and keep them from knowing facts about their own torturers or detention centers.

For some in the human rights and legal communities, truth commissions represent a "soft" response to cases that demand the harder recourse of prosecutions and punishment, including prison. "Advocates of prosecutions have often clashed with those who prefer 'restorative justice,' truth seeking or no accountability at all," Sikkink contends. However, as Sikkink points out in her book, "justice" all too often fails to give survivors the truth they crave or the ability to tell stories repressed by abusive governments as well as the strictures of legal rules governing testimony and admissible evidence.

Scholars have also pointed out that no commission has examined abuses committed by great powers, including the United States. As Greg Grandin and T.M. Klubock note in an issue of the Radical History Review devoted to truth commissions, in U.S.-occupied Iraq, "the victorious (briefly at least) invaders felt no need to implement a truth commission as an exhortatory body to foster a culture of respect for human rights. Instead, they moved to invoke the more confident time of the Nuremberg and Tokyo trials, putting Saddam Hussein and a number of high-ranking Baathists on the dock to submit to the sword of justice."

Also, critics note that commissions' treatment of past violence may depoliticize complex histories and fail to grapple with the structural violence that persists in the absence of authentic efforts at reform. One example is Peru's Truth and Reconciliation Commission, which succeeded in providing a fuller dimension of political violence in the 1980s, but largely left the country's centuries-long inequalities unaddressed. Scholars have questioned how victims are used in the hearings, either for their testimonies or to serve the need of others for grand goals of reconciliation and healing. Some victims don't find the act of telling their stories "healing."

Others have no wish to participate in national efforts, having already found their own truths at the local level. In Peru, for example, the national truth commission risked creating what anthropologist Kimberly Theidon terms two categories of "untouchables" beyond "the reach of communal mechanisms of assessing guilt and administering justice: the former Shining Path *cabecillas* (commanders) and the soldiers." "What may serve national goals," Theidon notes in *Intimate Enemies*, "may unintentionally complicate local processes of social repair."

Most truth commissions will cede these limitations and obstacles, pointing out that commissions are by their very nature imperfect bodies tasked with a seemingly insurmountable task, finding a way forward when victims and perpetrators must create a way of living together within a national border. Somehow, despite all of this, they manage to provide a place for people who have experienced deep trauma to not only express themselves but be heard, sometimes for the first time.

As historian Steve Stern noted in his three-volume history of Chile's reckoning with the Pinochet dictatorship, the truth commission could be best described as a journey with no end point. While genuine progress was made, "Nonetheless, the walk could also resemble movement in a grand circle leading back to the same frustrating places," Stern wrote. Perhaps the most important ingredient of any commission is knowing that advances are part of a process that only successive generations will be able to appreciate and implement.

While truth commissions are understudied by feminist scholars, some have called into question how commissions approach the testimony of women, particularly after deeply traumatic experiences. As I note in the case examples, early truth commissions failed to accurately take into account the kind of violences women faced, often quite different from men. While all genders experience rape, women are more likely to be subjected to this kind of attack, and carry

the consequences through the rest of their lives, including through children born of rape. Also, the issue of reparations sought through commissions is especially powerful, since women are often left as the sole support of their families and must navigate the tricky economics and social spheres of post-conflict societies.

Case Study: Chile

When the air force jets shelled the presidential palace in Santiago on the morning of September 11, 1973, most Chileans were unaware that a coup had been brewing for months. Prior to the coup, Chile had been relatively stable with a decades-long legacy of democracy. President Salvador Allende, a physician elected in 1970, was the first Marxist to be elected to lead a Latin American country and a popular leader. However, Chile's traditional elites remained bitterly opposed to his policies, including the nationalization of industries like copper mining and banking, government control of education and land reform.

Abetted by the administration of US President Richard Nixon, long opposed to Allende's Popular Unity coalition, the military began rounding up Allende's cabinet members and supporters even as flames raged through the halls of La Moneda. After giving a brief farewell address from his office, Allende apparently committed suicide, although some still believe he was assassinated.

Immediately, the military dictatorship of General Augusto Pinochet detained thousands. Many were disappeared from the city's main sports stadium. Among those who never made it out of the stadium was folk singer and activist Victor Jara, probably executed on September 15 and later dumped on a shantytown street; and Americans Charles Horman and Frank Teruggi, both journalists whose bodies later appeared in the city's morgue.

Until the return of democracy in 1989, the Chilean security forces illegally detained, tortured and killed many suspected of opposing the government -- or people simply in the wrong place at the wrong time. Hundreds were taken to clandestine torture centers like Villa Grimaldi, on Santiago's outskirts. Once a bucolic retreat equipped with a pool, Villa Grimaldi became a fearsome detention center where people were beaten, raped and tortured. As in Argentina, many "disappeared" were drugged by the security forces, then flown over the ocean and dumped. The Chilean security forces also collaborated with Uruguay and Argentina to pursue and disappear dissidents.

In part due to rising internal opposition and external pressure, Gen. Pinochet lost a 1988 referendum that would have allowed him to remain in office for another eight years. After Patricio Aylwin, a Christian Democrat, won the 1989 presidential election, one of his first acts was to create the National Commission for Truth and Reconciliation, also called the Rettig Commission after its chair, Senator Raúl Rettig. Given the fragile nature of democracy as well as a 1979 amnesty law, the Aylwin administration had to adopt a consensus strategy, agreeing to limit the commission's mandate and appoint an equal number of Pinochet supporters and opponents.

This approach has been termed the "politics of agreement" or *convivencia* and can block -- among other things -- trials and imprisonment for perpetrators. Instead, proponents promote "reconciliation" without accountability or meaningful reform aimed at preventing future abuses. While in part meant to placate the security forces, in fact, the commission received little cooperation from them, severely limiting the value of its information. Human rights activists were also critical, since the commission could only examine crimes resulting in provable death,

by far the lesser number. Also, the commission did not hold public hearings and was barred from identifying perpetrators.

Released in 1991, the Rettig Report concluded that 2,279 people had been killed for political reasons. In addition, the report documented 3,428 cases of disappearance, killing, torture and kidnapping. Most "disappearances" took place as a deliberate, coordinated government strategy, with the National Intelligence Directorate (DINA) responsible for a significant part of the repression.

Despite major flaws, the report led to a number of reforms, including a review of constitutional and legal provisions with respect to human rights and some reparations for grieving families. But many were disappointed, since investigations of torture and other abuses that did not result in death were excluded from the Rettig Commission's mandate.

General Pinochet's eventual arrest in 1998 and subsequent legal troubles led to a more stable democracy. Although he was able to elude prosecution prior to his 2006 death, the legal pursuit opened the door for the amnesties of other accused perpetrators to be challenged. Chileans formed a new truth commission in 2003. By that time, the former Head of the DINA, Manuel Contreras, together with hundreds of former military and police officers, had been convicted for human rights violations.

Despite having only six months to prepare a report, the Valech Commission, named for the chair, Bishop Sergio Valech, took testimony from over 35,000 people. Like the Rettig Commission, the scope was quite narrow, and the commission did no investigative work of its own. Rather, the commission invited participation from people able to prove that their detention had been politically motivated. Witnesses had to provide a documentation that was rare given the clandestine nature of many detention centers.

However, valuable information was made public. The commission concluded that the Pinochet regime maintained 1,132 detention centers in Chile, including police and military installations, schools and hospitals. Torture was the rule. Most victims were men. Almost all of the female detainees reported rape. The Valech Report concluded that at least 38,254 people had been imprisoned for political reasons between 1973 and 1989.

For many, the report was welcome but incomplete, since there were no public hearings and the commission met for only six months. Again, the military didn't cooperate even though the commission agreed not to publish the names of alleged perpetrators for 50 years. In other words, none of this data can be used in current human rights trials.

The Valech report also revealed how complex and tangled violence was in Chile. Among those listed in the report were victims who broke under torture and later collaborated with the regime, among them a man who then became a notorious torturer. Victims who did not collaborate with the government demanded that he be removed from the list of those eligible for reparations. The man was later convicted of murder and sentenced to life in prison.

For their part, conservatives objected to the inclusion of a victim of a guerrilla who had been tortured and later went on to mastermind the assassination of a well known conservative political leader. This is not an uncommon reality for truth commissions, where the identities of victim and perpetrator can be the same.

Although both truth commissions established some truth and countered the manipulations of the security forces, Chilean victims and their relatives remain deeply dissatisfied. Some have described the Chilean truth commissions as a continuity – not a break – with what they term "the Chilean way of political reconciliation" extending back to the early 19th century. The real novelty is how the Rettig and Valech Commissions intersected with international law and the

"universal right to truth." The "justice cascade" that Sikkink refers to has interacted with national efforts in powerful ways, meaning that the impunity of the past is no longer the rule of law. As human rights advocates have noted, Chile has made huge strides not only in uncovering the truth but also, through the mechanism of national trials, prosecuting perpetrators and putting them in jail.

Case Study: South Africa

The South African Truth and Reconciliation Commission (SATRC) was a government-supported body with the goal of examining human rights abuses committed under apartheid in the period between 1960-1994. Apartheid was a system of legally enforced racial segregation in South Africa that ended with a negotiated transition to democracy in 1994 and the election of Nelson Mandela to the presidency.

Imposed the same year the country gained its independence, apartheid forced non-whites to live separately from whites, given better living conditions, education, health care and jobs, among other things. The ruling National Party also stripped non-whites of civil and political rights, greatly limited freedom of expression and brutally punished protest, often with torture and extra-judicial executions. The government banned opposition groups, including the African National Congress (ANC), and jailed and killed their members.

By 1961, the ANC had created an armed wing, Umkhonto we Sizwe (Spear of the Nation or MK), in the belief that only armed resistance to apartheid would prove effective in bringing down apartheid. The SATRC also examined violations committed by MK, among them bombings that resulted in civilian casualties. Mandela himself was arrested for his advocacy of

human rights and his links to MK, and spent 27 years in prison before his election to the presidency.

After international sanctions and changing geopolitics isolated the country in the late 1980s, the apartheid government and ANC began negotiations for a peaceful transition. Finding the truth about apartheid's human cost was a central theme even as the National Party continued to systematically destroy records of abuses. Human rights advocates drew on a range of other truth commission experiences from Latin America as they negotiated the scope and mission of the SATRC, demonstrating the transnational character of the truth commission model. The process of drafting the legislation constituting the mission of the SATRC was painfully complex, as Antjie Krog described in her book, *Country of my Skull*. "Every discussion opens up new problem areas. Amnesty takes away the victim's right to a civil claim. Does compensation make amnesty constitutional? What about the state? Should the state ask for amnesty?"

As Krog describes, the South Africans added a dramatic new element to the truth commission model: amnesty in exchange for truth. Perpetrators who told the entire truth of what they had done could apply for protection from prosecution. The interim constitution explicitly linked the search for truth to the concept of ubuntu, defined as an "African philosophy of humanism... there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimization."

This provision responded to a stark reality facing many countries undergoing transitions. Unlike a military victory, when one country surrenders to the army of another, transitions mean that perpetrators, like the South African security forces, retain tremendous, lethal power. The country's courts were in shambles. A fledgling ANC government risked being consumed by costly trials with no guarantee that infamous killers would be convicted.

The trial of former defense minister Magnus Malan is emblematic. Malan, who did testify before the SATRC, was formally charged with authorizing an assassination squad that killed 13 civilians, mainly women and children, in 1987. However, Malan was acquitted on the grounds that there was no direct evidence linking him to the massacre. The trial cost over $1.5 million according to official estimates.

SATRC Executive Secretary Paul van Zyl calls amnesty for truth a "third way in dealing with a legacy of human rights abuse and attempting to institutionalize justice." For him and many others, this was the only way to achieve a largely bloodless transition. Van Zyl has noted, “(The SATRC) steered a middle path between an uncompromising insistence on prosecution on the one hand, and a defeatist acceptance of amnesty and impunity on the other."

Split into three committees, the SATRC began to collect information in 1996. During its existence, the commission took the testimony of approximately 21,000 victims from all sides. 2,000 of those people spoke at public hearings, most of which were either televised or broadcast via the radio.

The commission received 7,112 amnesty applications from perpetrators, most of them either members of the ANC or black security force officers. Amnesty was granted in 849 cases and refused in 5,392 cases (other applications were withdrawn). The public nature of the SATRC along its special powers, including the power to subpoena witnesses, meant that perpetrators ignored the commission at their peril. Some, among them former police colonel Eugene de Kock, willingly testified, in part as a personal mission to demonstrate that he had not acted alone but rather on orders of the state. De Kock ordered and participated in hundreds of murders and sessions of torture as head of C10, a counter-insurgency unit. Unusual among perpetrators, De Kock used his confessions as a way of shedding what SATRC Commissioner Pumla Gobodo-

Madikizela terms an "intolerable shirt of flame" of shame and guilt in her book about the SATRC, *A Human Being Died that Night*. De Kock revealed previously unknown details of hundreds of killings and received amnesties, but was later tried and convicted for acts that the SATRC felt went beyond the call of duty.

In its final report, released in 1998, the SATRC covered the structural and historical background of the violence, individual cases, regional trends, and the broader institutional and social environment of the apartheid system. For Anglican Bishop Desmond Tutu, coming out of a deeply Christian tradition, reconciliation was fundamental to the process. "Forgiving and being reconciled to our enemies or our loved ones are not about pretending that things are other than they are," he said in an interview at the University of California at Berkeley. "It is not about patting one another on the back and turning a blind eye to the wrong. True reconciliation exposes the awfulness, the abuse, the pain, the hurt, the truth. It could even sometimes make things worse. It is a risky undertaking, but in the end it is worthwhile, because in the end only an honest confrontation with reality can bring real healing. Superficial reconciliation can bring only superficial healing."

The SATRC made detailed recommendations for a reparations program including financial, symbolic and community reparations. The commission proposed that each victim or family should receive approximately $3,500 USD each year for six years. The commission further recommended that South Africa's society and political system should be reformed to include faith communities, businesses, the judiciary, prisons, the armed forces, health sector, media and educational institutions in a reconciliation process.

In its conclusions, the SATRC devoted most of its attention to the horrific violence committed under apartheid. However, the commission also noted that while the ANC's armed

struggle was legitimate, some acts carried out during that struggle were abusive. During a ceremony to formally receive the report, President Mandela apologized to all victims on behalf of the state. He also cautioned people not to assume that the commission had solved all of the problems created by apartheid and the transition to democracy. "The commission was not required to muster a definitive and comprehensive history of the past three decades," he said at the release ceremony. "Nor was it expected to conjure up instant reconciliation. And it does not claim to have delivered these either. Its success in any case depended on how far all of us co-operated with it. Yet we are confident that it has contributed to the work in progress of laying the foundation of the edifice of reconciliation."

Mandela's endorsement angered some, especially in the ANC. Albie Sachs, an ANC member and future constitutional court judge dismissed this critique in *The Guardian*. The SATRC, he said, "had to involve a degree of acknowledgment by those who'd done terrible things, not only on the side of the regime but also members of the ANC, to which I belonged. We'd done bad things. We had to come clean on that."

Other critics pointed out that confessed murderers granted amnesty walked free while victims promised compensation either received nothing or a fraction of what they'd been promised. Some believe Mandela and the TRC were too forgiving. 20 years later, the black majority remains impoverished while white remain wealthy and in control of the education, banking and business sectors. Promised reparations and exhumations have been slow and meager. Also, perpetrators who didn't apply for amnesty have, for the most part, been free of any threat of prosecution.

However, that impunity may be weakening. Like Argentina, South Africa has begun to address some of the impunity that remains in force in the wake of the truth commission report. In 2008, the Pretoria High Court ruled that individuals who had not testified before the SATRC

could be prosecuted since not doing so would amount to immunity in violation of international human rights norms. However, the political will to hold perpetrators accountable remains weak. Former President Mbeki instituted a process to grant special pardons in addition to the amnesties granted by the TRC Amnesty Committee, a position that has continued by his successors.

Case study: the United States

The United States has never held a national-level truth commission. However, starting in 2005, a number of commissions modeled on South Africa have been launched at local levels and examine limited abuses. For example, a truth commission launched in Greensboro, North Carolina, in 2005 sought to examine the legacy of racism, poverty and collusion that led to the killing of five anti-Ku Klux Klan marchers on November 4, 1979.

The violence had its immediate roots several months earlier, during a state-wide recruitment drive by the Klan. In the 1970s, elements of the Klan and American Nazi Party merged and began holding events to bring in new members. One of them, a screening of the racist film "Birth of a Nation," was scheduled to take place in the town of China Grove, North Carolina, in July 1979.

However, organizers in the Communist-inspired Workers' Viewpoint Organization, later the Communist Worker's Party (CWP), frustrated in attempts to unionize mill workers, saw this as an opportunity to revive their recruiting drive. CWP members showed up outside the town hall and managed to prevent the screening. Capitalizing on this action, they scheduled a "Death to the Klan" March in Greensboro the following November. The march was slated to start in the poor and largely African-American neighborhood of Morningside Heights. However, before attendees could follow the planned route, Klan members drove through the crowds. Shots were fired. The

Klan members took out the rifles they had brought with them and killed five marchers, including a Duke physician, Michael Nathan, and an African American female organizer, Sandy Smith. Six others were wounded.

Television news cameras recorded how the gunmen fired into the crowd. At least one CWP member also fired a weapon and was killed, William Sampson. But at the subsequent trial, five Klansmen claimed they acted in self-defense and were acquitted by an all-white jury. A second trial also resulted in acquittals. In 1985, Dr. Nathan's family successfully sued in civil court, and the decision against the Greensboro police and Klan resulted in a financial settlement that survivors used to launch the truth and reconciliation exploratory process in 2002.

The Greensboro Truth and Reconciliation Commission (GTRC) never received official backing and instead reached out to a broad range of universities, churches and civic organizations for support. In its statement of purpose, the commission stated that its goal was to "actively engage" the public in the process and build "an accurate and richly collective memory of how the events of Nov. 3, 1979, happened and why. This is not an effort to create a monolithic understanding within the community, but rather to amplify the community's multiple voices, perspectives and experiences of these events and their lasting impact. One end goal is thus a collective memory that incorporates these diverse points of view and a depth of historical understanding within the community that relies upon contextual analysis and self-examination."

With a seven-member commission selected from the community, the GTRC began public hearings in 2005 after welcoming Bishop Tutu to Greensboro to help launch their deliberations. A staff also collected information and solicited testimony from victims, scholars, activists, former CWP and Klan members, city officials and police and others. Unlike commissions in South Africa or Chile, the commission's charge was only to investigate this single incident, not a

multi-year pattern of abuses. However, in the process the commission gathered a wealth of data on slavery, segregation, police corruption and brutality, economic divisions between the races and the role of union organizing in this right-to-work state. The commission also announced that its goal was restorative justice and reconciliation.

All told, over 150 people either gave public statements or met with commissioners in private, including Klan members. In its 2006 report, the commission concluded that police had known the Klan members were planning to attend the march armed, yet did nothing to prevent their presence and were actually some distance away when the shooting started, despite the clear hostility expressed between the two groups since China Grove. Also key in the report was the finding that the CWP was naive in its assessment of the Klan's capacity for violence, especially in an African American community that was largely unaware of their history and methods.

Results were mixed. In their executive summary, the commissioners noted that the findings shed new light on the events of that day even as the hearings brought formerly entrenched enemies together, including CWP members and the Klan. For the first time, the commission gathered in one place a public accounting of what happened and made clear recommendations on what the city and state should do to address not only police negligence, but also the state's long legacy of structural violence.

However, the GTRC failed to garner broad support in Greensboro, in part, the commissioners noted, because of fear. "The fear surrounding these killings has not gone away. In our own process, we have had many citizens who insisted on confidential statements – not because of the content of their statements, but because they feared economic or social retaliation simply for talking to us." As hearings were in process, a resolution expressing support was brought by a black council member before the city. In a 6-3 vote along racial lines, the council opposed the

GTRC, with white members expressing concern that endorsing the process would reopen old wounds and cause further division.

Like the GTRC, other American truth processes have been smaller scale than their international counterparts. For instance, the Boston Busing/Desegregation Project (BBDP) was launched as a way to involve more African American parents in public schools and directly addressed the legacy of anger and hurt still palpable since whites violently opposed integration, often by attacking school busses and screaming racial epithets at children. The BBDP sought to launch a "truth-telling process" to generate a series of reform proposals for planning the schools' future.

Other processes have been launched in the city of Detroit (the Michigan Roundtable for Diversity and Inclusion in 2010), the state of Mississippi (the Mississippi Truth Project) and the Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission, among others.

Conclusion

Truth commissions can be a powerful force of recognition of and acknowledgement for victims of political violence. One of the cruel realities of political violence is that many victims suffer in the shadows, especially women. The effects of trauma -- including physical hardship, grief, and financial hardship -- also occur in a kind of silence, as the larger society ignores the realities of abuse.

But the impact of truth commissions goes far beyond the personal. As SATRC commissioner Pumla Gobodo-Madikizela has pointed out, they can be a powerful way of informing people unaffected by violence -- so-called "by-standers" -- about the true nature of past atrocities and the

needs of victims. By-standers are essential partners in implementing the reparations and reforms that are also often part of the truth commission mandate.

"Abuses are made possible by the voting power of bystanders," Gobodo Madikizela said at a 2006 conference on torture in Berlin. "Many white people came to the [SATRC] to hear these stories and hear how we could have allowed this to happen. If you focus too narrowly on the victim and perpetrator, you don't look at how crimes are supported by societies. We do not reflect on our role. We do not ask the critical questions, on how we support atrocities in ways we do not intend to."

As this chapter has described, truth commissions exist in a network of accountability mechanisms. For long-time human rights advocates, they've become an essential tool along with national, regional and international courts. Increasingly, the "universal right to truth" will prompt more countries exiting periods of conflict to look to the truth commission model not only to understand the past, but also to develop the reforms necessary to prevent future abuses.

However, truth commissions remain relatively infrequent. Although they are often in the news and have been the subject of close scrutiny and study, in fact they remain the exception rather than the rule. In places of long-standing political conflict and human rights violations -- including Turkey, Russia, China, India, most of the United States, North Korea as well as most of Africa -- truth commissions remain an unreachable goal for victims of violence.

In Eastern Europe, for example, Hayner notes that countries transitioning to democracy simply removed former regime officials from their posts with no due process, called "lustration." In the United Kingdom, the 30-year conflict known as "The Troubles" has yet to result in a truth commission. Instead, the government has funded case-specific inquiries largely held in secret and without any promise of prosecution. One looked into the 1972 killing of 14 civil rights

marchers by British paratroopers in the city of Londonderry. After three efforts and millions of pounds, an inquiry found that soldiers had fired on unarmed marchers. However, most of the cases of people killed or "disappeared" during the Troubles remain uninvestigated, leaving their families in a permanent and painful limbo.

While some critics have announced the "end of truth commissions," to the contrary they will likely remain within the human rights toolbox for nations emerging from episodes of human rights abuses. They may be limited or largely ignored; but they are increasingly, as Sikkink has noted, part of a network of justice mechanisms that include trials and others tools that continue to limit the formerly undisputed reign of impunity.

Beyond the facts of atrocities, what gives truth commissions a special power are the stories of victims and survivors. The majority of people who survive conflict are women, with their own stories to tell. These stories complicate -- and enrich -- any dominant or official narrative, especially those used to justify or explain away abuses. A victim may as easily talk about her torture at the hands of a guerrilla fighter as a police officer representing the state sponsoring the hearings; or a survivor may call into question the self-serving account of a government official who justifies the execution of a loved one as a "suspected terrorist" in a way that would be impossible if legal rules of evidence were applied. There is no single truth in any truth commission. Rather, these bodies create linked stories of both degradation and dignity that can create a powerful and inescapable foundation for a more just society.

For victims, story-telling can also be a powerful force to reconstruct their lives. "Only by remembering, telling their story, and learning every last detail about what happened and who was responsible were they able to begin to put the past behind them," as Hayner points out in her book.

Writer Chimamanda Ngozi Adichie has pointed out the "the danger of a single story," when one narrative is allowed to blot out competing or even complementary stories. "Stories can break the dignity of a people, but stories can also repair that broken dignity," she said in a popular TED talk in 2009. Unlike judicial proceedings, truth commissions are venues for these stories, perhaps their most powerful attribute. Albie Sachs, a victim of violence in South Africa as well as a constitutional Court judge, told the Guardian in 2014 that these stories were the most important part of the SATRC. "To me, the most important part of the truth commission was not the report, it was the seeing on television of the tears, the laments, the stories, the acknowledgements. As one political scientist put it, what the truth commission did was convert knowledge into acknowledgment."

The Emergence of a Universal Right to Truth in Argentina: essay based on remarks delivered at Duke University on September 19, 2014

by Juan E. Méndez

The video of Dr. Méndez's remarks is here.

I am happy to be part of a series that will bring to your attention the presentations of colleagues and friends of mine like David Tolbert and others whose presentations I think will really complement what I have to say today. I commend all of them to you. They continue to do excellent work on matters related to transitional justice.

I also want to commend Duke University for remembering that tomorrow is the 30th anniversary of the groundbreaking appearance of the report of the National Commission on the Disappearance of Persons (CONADEP for its acronym in Spanish) exploring that cruel practice in Argentina during the military dictatorship. It is an important milestone. It is remembered in Argentina in the press today, but it should merit more commemoration around the world as well.

The report is one of the pieces of the transitional justice endeavors of the Argentine civil society, an important one that has created precedents that have been imitated and, in some cases, improved upon in many other parts of the world. Those exercises first started in Latin America,

but certainly moved on to other parts of the world as well. Nowadays, truth telling and truth seeking are staples of how societies reckon with legacies of very serious human rights abuses.

CONADEP was not the very first truth commission, but it was the first very effective commission that really broke new ground in terms of dealing with the past. We should put this in the context of transitions to democracy that in Argentina had started less a year before the presentation of the CONADEP report. The transition to democracies in Latin America basically started with the election that brought democracy back to Argentina in October of 1983 with the inauguration of President Raúl Alfonsín in December of that year.

Then it became a positive domino because, in turn, countries that had been governed by military dictatorships, or by very weak democracies with very strong military establishments, gradually became a region of democratic governance. For a variety of reasons, democracy still owes the people of Latin America quite a bit of delivery on its promises; but one thing that is very positive is that we don't now face the threat of military coups d'etat in Latin America.

Thirty years is certainly the longest period of democratic rule that Argentina has experienced in its history, but it is also one of the longest periods of absence of threats to the stability of democracy in most of Latin America as well. One has to consider that at least one possible reason for this prolonged and hopefully continued period of democratic governance has to do with, at that time in 1983, our democratic societies decided that we owe something to the victims of the recent past. They decided to put an end to the old business as usual way of dealing with those violations by forgiving and forgetting, by sweeping violations under the rug. They realized that that old way of not confronting the past was in effect yielding to the blackmail of military establishments that basically said: "if you insist on justice and truth, we can easily take over again and then you'll have to deal with more violations."

In 1983 a lot of well-meaning people in Latin American countries and elsewhere, including Washington, who were never complicit with the military, and really genuinely favored democracy, were very skeptical about truth and justice. They felt that what Argentina was attempting would put off transitions in Uruguay and Chile and Brazil and in other parts of the world. The thinking was that confronting the past could jeopardize democracy even in Argentina itself. But the civil society of Argentina had gone through a very rough period of repression and had withstood that pressure by creating organizations like the Mothers of Plaza de Mayo and the Grandmothers of Plaza de Mayo, organizations that emerged from the dictatorship with very high degrees of credibility and trust that the Argentine people placed on them.

That trust and credibility allowed them to convey their agenda of accountability for disappearances to broader circles of democratic thought in Argentina in ways that forced the issue to come forward. It is also significant that a minority party won the election of 1983 precisely because its leader decided that human rights are an important part of the new agenda. Raúl Alfonsín defeated the majority Peronist Party that had fielded a right wing candidate, precisely by bringing the matter of what to do about the violations of the recent past to the forefront of the electoral agenda.

The significance of the 1983 election that brought democracy back to Argentina is that it showed how the mood of the electorate had changed in ways that were not easy to read. After seven years of repression, political observers didn't know how the population felt since until then Argentines had not really been able to express much thought, so even Argentines were surprised at how quickly the agenda of the human rights organizations was adopted by the majority of the republic.

This has to do with several factors, because Argentina has done more about the past than other Latin American countries not because of something about Argentina itself, but owing to the circumstances under which the military dictatorship had to give way to democracy. In fact, the Junta was the first among other military governments in Latin America to call it quits and call for elections, but its retreat from power was also disorganized and marked by an embarrassing loss of credibility and support.

You will remember that in 1982, the military dictatorship, already facing quite a bit of trouble at home with strikes and other popular movements challenging it, decided to do an ambitious and ultimately very irresponsible turn and invaded the Malvinas (Falkland) Islands that were the object a long-standing dispute over sovereignty. This ill-fated rolling of the dice resulted in a winter war with Great Britain with loss of life on all sides, ending with an embarrassing defeat for the Argentine military. From then on it was all downhill for the military. They really needed to get out of power.

They did try, nevertheless, to put conditions on the return of democracy like all other military establishments did in Latin America. For example, Argentina issued a declaration that all persons who were disappeared were considered to be dead for legal purposes. That only made matters worse for the military because it was outrageous. Without explaining what had happened to them, the government wanted to pull a rug over everybody's eyes and say "don't even ask about the fate and whereabouts of the disappeared."

In its waning days, the dictatorship also passed an amnesty law that resulted in the release of some political prisoners, though not all. Significantly, the amnesty would also apply to crimes committed by government agents. This was already October of 1983 and even the courts that had been appointed or had been retained by the military dictatorship challenged the amnesty. They

allowed the release of prisoners certainly, but refused to apply amnesty to the violations that were beginning to be investigated at that time.

President Alfonsín's agenda on how to deal with the past was at first relatively limited. It included not only the creation of a commission on disappearances, but also the prosecution of the leaders of the Juntas and of some names guerrilla leaders as well. Prosecutions therefore would be limited to those bearing the highest responsibility for the violations. Military leaders would be tried in military courts, although the bill submitted to Congress included a provision to allow review by the federal judiciary of sentences passed by military courts. All subordinates would be presumed to have followed orders that were legitimate at the time, and that presumption could not be debated at trial.

The pressure of the human rights community and the public generally expanded that agenda in the legislative debates, so that prosecutions initiated in military courts would be automatically transferred to civilian courts if they did not bear results in a short time. Also, Congress amended the obedience-to-orders clause eliminating the irrefutable presumption. Instead, in the final version, courts could decide whether the defendant could be exempt from punishment if the evidence showed that he had acted in the legitimate belief that his actions were not illegal.

The National Commission on the Disappearance of Persons began its job in this context, with a heavy inclination towards breaking the cycle of impunity and favoring both truth-telling and prosecutions. CONADEP had to conduct this investigation and publish its report job in only eight months, receiving no cooperation whatsoever from the armed forces. There was no access to documents in the possession of agencies of the military establishment. As a corporate decision, the military forbade all its members and institutions from providing any assistance to the discovery of the truth, so most of the work of the commission was done by inviting relatives

and families of the disappeared to come forward and tell their stories. The commission set up offices in downtown Buenos Aires and in some cities in the interior, and for days and weeks long lines of people queued up to tell their stories.

An important part of the credibility of the CONADEP was that Alfonsín decided to appoint to the commission people who had good reputations that were known in the community and had not been either complicit with the military or supportive of the guerrillas. And there were people like that in Argentina, fortunately, like Rabbi Marshall Meyer and surgeon René Favaloro, but also the president himself of the commission, Ernesto Sábato, one of Argentina's foremost writers - well known even beyond Argentina. For wide sectors of the Argentine public, Sábato and the other commissioners embodied a sense of moral courage and responsibility. So, the composition of the commission is one of the good practices that has later been taken as a "lesson learned" by many other truth commissions around the world. Of course, the composition of the commission depends on finding people who fill that kind of profile.

As I said, the methodology applied by CONADEP was based mostly on testimonies of the victims or their families, but there were some attempts to broaden the investigate tools available to it. For example, the commission did not have subpoena powers, but when its officials learned through testimony of a locale that could be identified as a place of clandestine detention, they would go to courts or prosecutors and ask for a warrant to inspect such a place. At the inspection, they would be accompanied by survivors and witnesses who could find identifying features. They conducted these searches in many places around the country, and eventually CONADEP's report identified close to 350 places of detention. Several of them were already known because some survivors had given testimony abroad, but nobody had really reckoned with the fact that there were 350 clandestine centers all over the country.

One very intelligent thing that the commission did, even before publishing its report, was to have a television program one night, in which all they did was show relatives of the disappeared speaking about what had happened to their loved ones - their children, their husbands or wives, and the camera just went to them one by one, everybody else in the dark. About thirty witnesses told their stories in about 2 hours of primetime television without any other material, without adjectives, without adverbs, just basically telling their story. The television show was stunning in its sobriety and created an enormous wave of support for the plight of the relatives of the disappeared; it made it possible for everybody to understand that the state and society owe something to those families who are still seeking to establish the fate and whereabouts of their loved ones.

When the report was published, 30 years ago tomorrow, the report did not include names of perpetrators, although the commission had learned something like 400 or 500 names. The civil society organizations then, because they had had access to the same files and had largely contributed to the material CONADEP analyzed, unofficially published that first list of potential perpetrators. That created pressure towards prosecutions.

In that context, and against the background of a report that spoke very bluntly about the tragedy of forced disappearances, the Trial of the Juntas began. And that's another important milestone in the way Argentina reckoned with the past, because for about six months nine members of Juntas that had governed Argentina in the six years of the dictatorship had to sit through public hearings before a court of law and were put on the dock and prosecuted for their complicity or their participation in crimes, including disappearances but also torture and extra-judicial murders.

It is worth noting that the work of the CONADEP, especially the files it collected, were an important first step in the direction of making it possible to prosecute the generals and admirals that had been all too powerful only a few years before. As you know, that trial ended in the conviction and sentencing to life in prison for at least two of them, General Videla and Admiral Massera, who unfortunately were released five or six years later by pardons issued by President Carlos Menem, who succeeded Alfonsín in 1989.

By decision of the Federal Court of Appeals that sentenced the Junta members, new prosecutions were opened throughout the country against mid-level officers who had been the "lords of life and death" in their jurisdictions during the "dirty war." One other of such cases reached sentencing but there were many more coming, but all of those trials were rendered impossible because of pressures from the military. The government of Alfonsín passed two laws that were called Full Stop (*Punto Final*) and Due Obedience (*Obedencia Debida*) that had the legal effect of being amnesty laws, although the name amnesty was not mentioned. Those laws applied to all but the highest-ranking military, including those who had been convicted plus a handful of high-ranking officers with cases still pending; however, both the Junta members and the remaining prosecutable officers were later covered by President Menem's pardons.

By 1990, therefore, the first experiment with accountability was over and Argentina was back full circle to complete impunity for the human rights violations of the recent past. The human rights community of Argentina never wavered, however, in its insistence that accountability had to happen. In the middle of the decade of the 1990s, an investigative journalist, Horacio Verbitsky, published the testimony of a naval officer who said that he himself had participated in the way the navy disposed of the "disappeared" by throwing them into the ocean or the River Plate from airplanes. That revelation (or actually its confirmation from a

participant, because the “death flights” were already known from testimonies of survivors) created another wave of pressure on the institutions of Argentina to reckon with this testimony.

One of the important things that happened was that the Commander in Chief of the army at the time, General Balza, made a striking public apology to the public of Argentina for what the army had done. He made a very credible public apology because, maybe by chance, he had not been a participant in the dirty war. He had mostly been in foreign posts, and later distinguished himself in the Malvinas Falklands War by fighting a ridiculous war, but fighting it with honor, so he had significant of influence over the rest of his comrades-in-arms. For similar reasons he also enjoyed credibility with the public.

On the basis of the testimony of the naval officer who testified to Verbitsky, the human rights groups came up with a great idea. It was owed mostly to my friend and mentor Emilio Mignone, whose daughter was among the "disappeared" and who had created what I consider the premier human rights organization in Latin America, the Center for Legal and Social Studies (CELS for its acronym in Spanish). He went to court and, invoking international law standards, urged them to investigate the fate and whereabouts of the disappeared on the basis of the testimony about death flights and Balza’s official apology.

Essentially, Mignone and his co-applicants argued that an apology is fine and welcome, but that – together with the new revelations – it should prompt State institutions to investigate and eventually to tell the public what could be established about the disappeared. At first the courts wavered. The Supreme Court first upheld denials of the application citing the pseudo-amnesty laws, but less than a month later changed its mind. First in the case of Lapacó, also the mother of a "disappeared" person, they said no, there’s no such thing as a right to truth, and we can’t use the courts to investigate disappearances because the amnesty laws constitute an obstacle to that.

The second case was called Urteaga. The case was brought by the relatives of a high-ranking leader of the ERP guerrilla, who was taken with others and never found again. In Urteaga, the Supreme Court changed its mind and allowed the regular procedure for a criminal investigation to be used, even if no one will be prosecuted, for the purpose of establishing the facts and telling the victims and society the truth about what happened.

That is the origin of what was then called "Truth Trials," because after that, courts all over Argentina, some more diligently and others less, entertained procedures by which they tried to establish the fate and whereabouts of the disappeared. They did have subpoena powers, so sometimes they obtained documents and searched offices and locales, but mostly they heard the victims and the relatives of the victims in public hearings. These sessions were widely followed by the press and public, which added pressure to break the cycle of impunity. In addition, the truth trials came up with some significant new evidence of the deliberate plan behind forced disappearances.

Because of the information gathered in those truth trials, a federal district court in Buenos Aires, in a sophisticated and well-researched analysis of international law standards, declared the Due Obedience and Full Stop laws unconstitutional. That decision (effectively ordering the prosecution of some well-known perpetrators who had been covered by those laws until then) went to the Federal Court of Appeals for the city of Buenos Aires and was affirmed. Eventually in 2005, the Supreme Court also said that the Due Obedience and Full Stop laws were unconstitutional *ab initio* as contrary to Argentina's international law obligations under human rights treaties as authoritatively interpreted by international tribunals. For that reason, they could not be obstacles for the investigation and prosecution of the crimes committed during the "dirty war."

From 2005 on, Argentina is seeing a second cycle of investigation and prosecution, this time with less threats from right-wing forces against the constitutional order and enjoying wide support in the public conscience. There is no truth commission operating, but a lot of the truth has been and is still being revealed in the literally hundreds of cases that are being litigated around the country today. Some are already finished with convictions and defendants serving time, others are awaiting trial. It's a very extensive exploration of the facts, but rather than strictly revealing the truth, they also establish individual criminal responsibility for the crimes.

I am sorry to have been so detailed in the explanation, and you can tell that it was also at the risk of simplification because it is a process evolving over thirty years explained in a few words. But I want to say something about how this experience has now yielded international standards that are binding on States as a matter of international law.

First of all, I'd like to say that, although now we have treaties dealing specifically with disappearances - both an Inter-American Convention and more recently a United Nations Convention - but of course they cannot be applied retroactively. We also have decisions by established courts of human rights protection of an international nature, like the Inter-American Court on Human Rights, which in its very first adversarial case, called Velásquez Rodríguez v. Honduras, had to deal with disappearances.

In that 1988 decision, the court made findings that are still very often quoted and cited everywhere in the world today. First of all, the Inter-American Court said that, unmistakably, disappearances are a crime against humanity, and that the legal effect of that categorization is that there is an absolutely binding obligation on the part of the state to investigate, prosecute and punish all those who may be responsible.

But the Velásquez court went further and said that the state is also obligated to investigate and reveal the truth about the fate and whereabouts of the disappeared to both the relatives and society at large. The court said further that that obligation remains in force for as long as there is any doubt about the fate and whereabouts of the disappeared. It is an amazingly clear setting up of the standard regarding "disappearances," a phenomenon that had not been specifically contemplated at the time the major human rights instruments were drafted.

This ground-breaking precedent set by the Inter-American Court was then continued by decisions by the Inter-American Commission on Human Rights, mostly dealing with amnesty laws, in particular two reports in 1992 declaring those laws in Argentina and Uruguay to be inconsistent with the American Convention on Human Rights.

There were later further decisions by the Inter-American Court reaffirming its doctrine in cases like Barrios Altos v. Peru, in which not only did the court say the State has to investigate, prosecute and punish, but also that blanket amnesty laws are contrary to the American Convention and therefore the State is obliged to deny them legal effect in the domestic jurisdiction. More recently, in a case called Almonacid Arellano vs. Chile, the court went even further and said the State has to remove all obstacles to investigation, prosecution, punishment and truth-telling, meaning obstacles like amnesty laws, self-amnesty laws, pseudo-amnesty laws, whatever they are called, as long as they are an obstacle to fulfill this obligation.

Beyond that, according to Almonacid Arellano, the State has to remove other obstacles like pardons, statutes of limitation, fraudulent res judicata (as in cases where military courts have actually shielded the perpetrators) and even exercises in prosecutorial discretion. A very sweeping judgment, certainly, but also a very consistent jurisprudence.

If we look outside of the region, in the European Court of Human Rights and in the universal system there are many decisions that go in the same direction. They don't actually say as much as the Inter-American Court has said, but they certainly affirm the existence of an obligation to investigate, prosecute, punish crimes that are widespread or systematic, and that therefore fall under the rubric of crimes against humanity.

In the case of the right to truth, the Inter-American Court interestingly kind of wavered at first in a case called Castillo Páez v. Peru. I'm sure Eduardo González can talk to you about it when he next visits Duke because he worked on that case. The Inter-American Commission and the petitioners had urged the Court to say that there is a right to truth, but the court recognized "an emerging tendency" to recognize it but that it had not yet achieved the status of an international norm as of the Castillo Páez case.

But only a couple of years later, in a case called Trujillo-Oroza vs. Bolivia, the Court actually said that yes, the right to truth is part of the American Convention. There is an obligation on the State to reveal the truth and a right of the relatives and society to insist on the truth. So does that make it an international law standard? I think so. Is it an emerging standard?

I used the words "emerging standard" some years ago. I would say it has already emerged, it's no longer an emerging standard because these decisions, and many that I have not mentioned, are based on an interpretation of long-existing treaties on human rights, like the International Covenant on Civil and Political Rights. The right to truth and the right to justice are grounded on three aspects of international human rights law: one, the categorization of a human rights violation of a certain type as a crime against humanity. I've already mentioned what that means.

The second one is the fact that these violations are of rights that cannot be suspended even during an emergency. If the State cannot suspend the right to life for example or the right to be free from torture, even under the worst of emergencies, then it follows that it cannot suspend them ex post facto by declaring that their violations will remain unrevealed and unpunished.

And the third argument is what is called a right to a remedy. All human rights treaties are based on the State having an obligation to prevent violations, an obligation to mobilize the state apparatus if a violation occurs, and depending on what the violation is, a specific affirmative duty to redress it. In the case of serious human rights violations, like the right to life and the right to personal integrity, that action by the State cannot preclude the obligation to investigate, prosecute, and punish those responsible. So the right to a remedy is based also on another principle of human rights law that is called the duty to ensure rights, rather than to respect them only. The duty to ensure or to guarantee the exercise of rights is an affirmative duty on the part of the State, as opposed to the negative duty to refrain from certain acts, which is the meaning of the duty to respect.

All of that is the argumentation that builds this sense of an affirmative, binding, mandatory — and no longer emerging — obligation to investigate, prosecute and punish certain violations, and to tell the truth about them as well. And that is why nowadays we talk about a “right to truth.” I think it is appropriate that we say it is a right to truth that goes together with a right to justice and a right to reparations and a right to reformed institutions, because it is no longer the case that countries may be able to choose what to do about legacies of mass atrocities by deciding not to prosecute anybody but substitute that with a report and call that the truth. The state has an obligation to conduct, in good faith and to the utmost of its capabilities, the pursuit of truth and the pursuit of justice.

In fact, in most cases where truth commissions have been most successful it has been because they were not been pitted against the possibility of justice. Truth commissions are most successful when in fact they have opened up paths towards justice, like the CONADEP did with respect to the prosecutions in Argentina – and is still doing, because the CONADEP archives and final report are still a very important evidentiary basis for the prosecutions that are going on right now.

Truth Commissions 30 Years After the CONADEP: Between Innovation and Standardization

by Eduardo González Cueva

a video of Dr. Gonzalez Cueva's remarks is here.

Introduction

The members of the Argentine National Commission on Forced Disappearances (CONADEP) would be very surprised by the evolution of truth commissions, three decades after their pioneering work. From very modest beginnings, truth commissions have evolved into complex operations, charged with ambitious investigations, and expected to deliver substantive national transformations.

The activities carried out by the CONADEP look today as simply heroic: a handful of researchers, working mostly on a volunteer basis, without adequate facilities or much state cooperation, managed to put together in little more than 9 months, a comprehensive report, describing in powerful language the criminal methodology behind the disappearances. They received thousands of testimonies from relatives and survivors, issued hundreds of requests of information to the security forces and the judiciary, and visited detention centers in the entire country.

Today, truth commissions are the focus of an ever-growing corpus of international norms and academic debate. Negotiators in peace processes, politicians engaged in a democratic transition and international mediators seem to agree that truth commissions are necessary and feasible in the most varied circumstances and environments. Most observers agree that certain good practices provide the safest route toward a commission's success, and try to support their application.

A certain degree of standardization may have a positive effect: it sets a yardstick to distinguish genuine efforts from cosmetic initiatives. The observance of principles lessens the possibility of governments establishing a commission only to later manipulate it or boycott it. But there is also a risk in too much normative development: truth commissions may end up looking the same in different environments, losing adaptability to specific challenges and creativity to face new situations.

Emergence of a Model

The CONADEP was established as a creative response to an exceptional situation. The military practice to systematically "disappear" supposed opponents defied belief; the complexity of the crime made the existing state of the law seem inadequate; the scale of the repression exposed the limitations of any governmental policy of redress. The Presidential decree[1] establishing the CONADEP recognized these challenges, and presented the commission as a participatory channel, so that civil society would contribute to their solution.

At the establishment of the Chilean Truth and Reconciliation Commission, the first in using that name, a similar recognition took place: the justice system was simply inadequate. The

1 Decree 187/83, December 15, 1983. Available at http://www.usip.org/sites/default/files/file/resources/collections/commissions/Argentina-Charter.pdf

presidential decree[2] affirmed the supremacy of the judiciary to address the legacy of crimes, but the nature of its proceedings was such that it was "unlikely" that society would receive a prompt response to its concerns.

At the very beginning, then, there was the recognition that the justice system was insufficient, but not an intention to substitute it, or make it irrelevant. The idea of an extraordinary instrument was an effort to innovate, introducing new methods and participants in the terrain of accountability.

Less than 10 years after the establishment of the CONADEP, the model was deemed as useful as to propose it in an entirely different situation: not a post-dictatorial transition, but the aftermath of a civil war, in El Salvador. The parties in the negotiation,[3] under the mediation of the United Nations, repeated the reasoning expressed in previous Latin American cases: there was an urgency to address the past that courts of law—as critical as their role was—were unlikely to respond to; a swift, practical instrument was necessary to address the legacy of mass crime, but also to instill confidence in the peace process.

The original Latin American commissions shared, then, an interest in expeditiousness and an original recognition of the role of civil society in the treatment of past human rights violations. These early commissions put a premium on practicality, and their mandates had a scope of investigation that, although wide for a regular prosecutorial effort, was narrow from the point of view of a less exhaustive investigation: the commissions were expected to examine only key violations, committed by clearly identifiable agents over a limited historical period. Since

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2 Decree 355, April 25, 1990. Available at http://www.usip.org/sites/default/files/file/resources/collections/commissions/Chile90-Charter.pdf.

3 Mexico Peace Agreements. Provisions Creating the Commission on the Truth. April 27, 1991. Available at http://www.usip.org/sites/default/files/file/resources/collections/commissions/El%20Salvador-Charter.pdf.

commissions had to be a practical response, they received a very short period of time to discharge their tasks.

The early commissions were established very quickly; just weeks after the assumption of a new regime, or months into the peace process, in the most possibly efficient manner: executive action or the direct implementation of a political agreement. The interest of civil society to participate, although expected, was channeled to the implementation of the commission, rather than to the process of negotiation and establishment.

A significant change occurred when the South African transition took place, and the parties to the process decided to import this Latin American innovation, reportedly after obtaining copies of the English translation[4] of the Final Report of the Chilean Truth and Reconciliation Commission.

For the South Africans, the idea of a non-judicial commission was not too exotic: after all, the concept of a "commission of inquiry" established by parliament, and entrusted to the leadership of a magistrate, is quite usual among countries whose political and legal systems are inspired in Britain; although such commissions typically look into specific cases[5] rather than extended periods of time.[6]

The South African Truth and Reconciliation Commission (TRC) presented ambitious innovations to the model of what had been, previously, an expeditious and relatively simple institution. The establishment of the commission was in itself the object of significant debate,

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4 Report of the Chilean National Commission on Truth and Reconciliation (Notre Dame, Indiana: University of Notre Dame Press, 1993) Available at http://www.usip.org/sites/default/files/resources/collections/truth_commissions/Chile90-Report/Chile90-Report.pdf.

5 A recent commission of inquiry looking into one specific incident is the Bloody Sunday Inquiry, whose report was published in 2010. The final report of the commission, signed by Lord Saville of Newdigate is available at http://webarchive.nationalarchives.gov.uk/20101103103930/http://report.bloody-sunday-inquiry.org/.

6 A commission of inquiry looking into human rights violations that took place over a long period of time is "Bringing Them Home", the Report of Australia's National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, published in 1997. The report is available at https://www.humanrights.gov.au/publications/bringing-them-home-report-1997

and it was taken to the newly established Parliament to be passed in the form of a law. Civil society interest, recognized notionally in the early commissions, had become part of the process itself. Victims' groups and democratic activists were essential to modulate the original agreements achieved by the negotiators of the democratic transition.

The South African legislation[7] established a complex mechanism to nominate and appoint the members of the commission, calling for open applications and public examination of the candidates. Even though the President of the Republic had the final authority to choose commissioners from a short list, this process was far different from previous commissions, where the commissioners were named directly by the establishing authority.

To this procedural innovation, the mandate of the commission added a new level of complexity: the commission's functions were not limited to finding the facts and making policy recommendations. The commission, differently from its Latin American predecessors, was entrusted with the administration of a difficult quasi-judicial function, administering a conditional amnesty process. In order to assess the applications for amnesty, the commission had to establish a specialized subcommittee with the help of magistrates capable to lead a unique legal process, impenetrable for the layperson and probably as complex as a regular trial.[8]

One immediate result of the commission's complexity was a size expansion in relation to previous experiences. The TRC was large, hiring over 300 staff members, and requiring significantly more resources. While the fact-finding function of the commission was finalized in 1998, two years after the establishment of the body, the specialized Amnesty Committee required five more years to present its report to the President of the Republic.

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7 Promotion of National Unity and Reconciliation Act, No. 34 of 1995. July 26, 1995. Available at http://fas.org/irp/world/rsa/act95_034.htm.

8 See Posel, D. & Simpson, G. (eds) (2002). *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission*. Johannesburg: Witwatersrand University Press, July.

The additional time needed brought in a new complexity: the commission delivered its findings and recommendations in a political situation vastly different from that of its foundation. The South African TRC delivered the main body of its report[9] to President Mandela, a historic, charismatic leader with a global following, at a moment of still active societal mobilization and fluidity. The amnesty report was presented to President Mbeki, when political disenchantment started to set, and at a moment when political willingness to follow through difficult tasks, such as prosecuting those not receiving amnesties, was scarce.

The material mandate of the commission had also expanded in relation to previous cases, as additional crimes and situations fell under its investigative scope. This is a process that is not entirely attributable to the South African commission. As truth commissions grew in popularity and a plethora of new stakeholders intervened in their creation, their terms of reference included more offenses, committed by several agents, over longer periods of time.

While the CONADEP had focused on one specific violation, committed by state agents during a 7-year period, the Guatemalan Historical Clarification Commission (Comisión de Esclarecimiento Histórico - CEH) received the mandate to look into "human rights violations and acts of violence that have caused the Guatemalan population to suffer",[10] if they were connected with the thirty-six year long conflict, committed by the security forces and the guerrillas, but also by a variety of illegal agents, acting under the acquiescence of the state.

In addition, while the initial commissions limited themselves to a factual description of the events under investigation, starting with the Guatemalan CEH the commissions were expected to produce a comprehensive interdisciplinary report, combining the factual details with a social and

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9 Truth and Reconciliation Commission. Final Report. Vols. 1-5 were delivered on 29 October 1998. Vols 6-7 were delivered on 21st March 2003. Full report available at http://www.justice.gov.za/trc/report/.

10 Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer. June 23, 1994. Available at http://www.usip.org/sites/default/files/file/resources/collections/commissions/Guatemala-Charter.pdf.

historical interpretation. It was no longer acceptable, as with the Argentine or Chilean cases, to bypass the political history of the period under examination: truth commissions were expected to look into the root causes of the conflict.

One of the most persuasive critiques of the South African TRC, in fact, was that, in spite of a comprehensive effort to reconstruct the patterns of Apartheid criminality and examine individual violations of physical integrity, it did not examine the socio-economic characteristics of the system itself,[11] therefore resulting in a flat exercise, focused on the consequences, not the deep processes that had to be dismounted in order to effectively prevent repetition.

The Emergence of Orthodoxy

After the South African experience, academic literature and political attention around commissions grew exponentially. The narrative of a nation coming together through acknowledgment of fault and forgiveness was potent and politically attractive. Where the initial Latin American initiatives presented truth-seeking as a practical effort that would not substitute for prosecutions, the South African experiences seemed to suggest that truth-seeking had value in itself, and that it was an alternative that could make criminal justice unnecessary.[12]

For new governments dealing with the dilemmas of transitional justice, and conscious of the political cost of prosecuting former leaders, the idea of a potential alternative mechanism, endowed by the aura of South Africa's transition, became irresistible. Over the years, several post-conflict negotiations resulted in truth commissions at least nominally endowed with the

11 Mahmood Mamdani "Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)," *Diacritics* Vol. 32, No. 3/4, Ethics (Autumn - Winter, 2002).

12 See for example Desmond Tutu's *No Future Without Forgiveness.* Doubleday, 1999.

capacity to manage amnesties, even though, for several reasons, that capacity has never been fully applied.[13]

The risk of reducing truth commissions to procedures to administer a conditional amnesty was identified soon enough. In South Africa itself, the controversial mechanism had been probed in the Constitutional Court,[14] and had created sustained discontent among victims' groups. In constitutional litigation in South Africa, the mechanism survived scrutiny because it had been included in the provisional constitution during the transitional period, and it was seen as a wise political compromise that enabled democracy. Still, the amnesty-for-truth mechanism has continued to be seen as controversial in the country where it was born.

The transplantation of the conditional amnesty outside of South Africa proved to be extremely problematic. In Sierra Leone, during the peace negotiations leading to the end of the conflict between the government and the Revolutionary United Front (RUF), the parties agreed on the passage of a comprehensive amnesty for all sides and all crimes related to the conflict, even those that amounted to crimes against humanity or war crimes. A truth commission, established in the same peace process would cement the deal by giving all combatants the opportunity to present their perspectives, without risk of prosecution. The peace accord,[15] signed in Lome, Togo, in 1999 contains a written objection to the amnesty clause, deposited by the Representative of the United Nations Secretary General.

Later on, when the Lome process faltered and the conflict reignited, resulting in the defeat of the RUF and the capture of its leadership, the Government of Sierra Leone and the UN agreed on

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13 Legislation for truth commissions with the capacity to offer or recommend some form of amnesty in exchange for cooperation include Sierra Leone (2000), East Timor (2001), the Democratic Republic of Congo (2004), Indonesia (2004), Liberia (2005), Kenya (2008), Tunisia (2013), and Nepal (2014).

14 Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others (CCT17/96) [1996] ZACC 16; 1996 (8) BCLR 1015; 1996 (4) SA 672 (25 July 1996).

15 Peace Agreement between the Government of Sierra Leone and the RUF (Lomé Peace Agreement). As contained in UN Document S/1999/777 of 12 July 1999.

the establishment of an ad hoc Special Court[16] that would try perpetrators independently of the truth commission process.

The unprecedented discrepancy between parties to a peace process and international observers led to a period of intense debate and normative development, which has been critical for the evolution of transitional justice as a field. Developed around soft law instruments,[17] the experience of truth commissions, trials and reparations processes, and through the establishment of specific governmental and non-governmental institutions, transitional justice tackles the question of the relations between truth and justice, and identified those principles and good practices that would give legitimacy to a truth commission initiative.

The central debates in the field of transitional justice were often motivated by the questions raised during the operations of a truth commission and, in turn, their conclusions had a direct impact in new truth-seeking initiatives. They produced an ample agreement that certain rules, if correctly applied in each case, gave nascent truth commissions a good chance to achieve their objectives and contribute effectively to the consolidation of peace and democracy.

Some normative development concerned the application of universal human rights norms to truth commissions. Three principles seem to be particularly important in this regard:

- The state obligation to effectively prosecute international crimes.
- The affirmation of truth-seeking as an actual right of victims, with identity and value in itself, independently from the right to seek judicial redress.

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16 Security Council resolution 1315 (2000) of 14 August 2000.

17 See for example, Louis Joinet, revised Final Report, Question on the Impunity of Perpetrators of Human Rights Violations, June 26, 1997 (E/CN.4/Sub.2/1997/20); Diane Orentlicher, Independent Study on best Practices, Including Recommendations to Assist States in Strengthening their Domestic Capacity to Combat all Aspects of Impunity, February 27, 2004 (E/CN.4/2004/88); UN Secretary General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, August 23, 2004 (S/2004/616).

- The protection of procedural fairness.

The South African amnesty model was not replicated exactly in any truth commission, partly because of a legal objection to the use of amnesties, conditional or not, to the treatment of the worse crimes of international character. Normative developments, such as the Rome Statute of the International Criminal Court, leading international jurisprudence such as Barrios Altos v. Peru, and the collapse of self-amnesty laws in several countries, gave civil society groups and the international community instruments to oppose the use of truth commissions as administrators of amnesty instruments. Because of this, even commissions legally authorized to apply some variation of the amnesty-for-truth mechanism had to deal with strong limitations for its use.

In East Timor, for example, the amnesty-for-truth mechanism was limited to crimes not included in the category of "serious crimes", i.e. crimes against humanity, war crimes and genocide, and could only be applied under the supervision of the prosecutorial service.[18] In Indonesia, an unrestricted amnesty-for-truth mechanism was voided by the Constitutional Court;[19] and in Kenya, it was the members themselves of the truth commission who decided that the instrument was inapplicable.[20] In practice, even though the South African model continues to exert a strong appeal, truth commissions interested in eliciting cooperation from perpetrators have limited their powers to recommending amnesties, not effectively granting them.

Another fundamental norm that has gained some strength over time is the affirmation of the right to the truth.[21] It may be paradoxical, but only a few truth commissions make an explicit

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18 United Nations Transitional Administration in East Timor. Regulation 2001/10, July 13, 2001.

19 See ICTJ and Kontras *Derailed: Transitional Justice in Indonesia since the Fall of Suharto.* March, 2001.

20 Truth Justice and Reconciliation Commission of Kenya. Final Report. 2013.

21 Most truth commission norms explicitly appeal to the concept of reconciliation, in different forms. Only a few norms explicitly refer to a right to the truth: the Historical Clarification Commission of Guatemala; the Truth and Reconciliation Commission of Peru; the National Truth Commission of Brazil, and the Truth and Dignity

affirmation of such a right in the instruments that establish them. Indicating that a truth commission is based on the right to the truth is significant because it limits the appeal of competing objectives, such as political expediency, or seeking to resolve the legal difficulties faced by former perpetrators.

Truth commissions also, over time, have devoted more attention to the rights of persons who may be adversely mentioned in their reports. Early commissions had an inconsistent approach to the question of whether to "name names", and when personal findings were included in reports, there was no indication of whether the investigation had afforded those implicated a chance to respond to allegations. It has become more accepted over time that making appropriate findings on a person's responsibilities, which may bring adverse legal consequences, requires careful attention to fairness, requiring guarantees even if they may not be as stringent as those used in a judicial process.[22]

At the same time that an affirmation of international human rights principles became important for truth commissions, another related normative development took place: the affirmation of good practices in the implementation of transitional justice mechanisms, including truth commissions. Differently from human rights principles, good practices are operational directives, derived from the observation of successful experiences in a comparative perspective.[23] Some of the practices that have become a trend over time, and that are growingly identified as correct include:

Commission of Tunisia.

22 See Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge: Cambridge University Press, 2006).

23 See ICTJ – Kofi Annan Foundation *Challenging the Conventional. Can Truth Commissions Strengthen Peace Processes?* 2014.

- The inclusion of a large and comprehensive scope of research, in the mandate of truth commissions.
- The creation of commissions through inclusive and democratic consultative processes.
- The establishment of truth commissions through solid norms, such as laws and constitutional amendments.

Early truth commissions, including South Africa, have been criticized variously as being too focused on the consequences of conflict, such as violations of basic human rights, but less able to cast light on the root causes of violence. Also, the early focus on a restricted number of human rights violations has been criticized as insufficient to deal with the complexity of violence and the way in which it is experienced by different groups.

As a result, the mandate of truth commissions has expanded over time, in an exponential manner. Recent truth commissions' mandates include generic allusion to gross violations of human rights, in order to be as overly inclusive as possible, and explicitly add conducts deemed important to understand conflict, such as socio-economic injustice and corruption. Also, independently from how the scope of the violations is defined, recent truth commission mandates include clauses to ensure that the specific experiences of marginalized or vulnerable groups are included.[24]

The expansion of mandates has resulted not only on a wider catalog of conducts under investigation, but also in larger historical periods under analysis. Legislators in countries like

24 See Vasuki Nesiah et al., *Truth Commissions and Gender: Principles, Policies and Procedures* (New York: ICTJ, July 2006); UNICEF Innocenti Research Centre and ICTJ, *Children and Truth Commissions* (August 2010); Eduardo González and Joanna Rice, eds., *Strengthening Indigenous Rights through Truth Commissions: A Practitioner's Resource* (New York: ICTJ, 2012).

Kenya and Tunisia have deemed necessary to include the entire independent existence of their nations under the mandate of a truth commission, presumably as a safer course towards the clarification of social and political conflicts and, also, as a manner to link up recent conflicts with the legacy of colonialism.

Another significant innovation and trend is the establishment of truth commissions through extensive processes of social consultation.[25] Consulting with the population to gather demands, obtain information about expectations, and suggestions about the mandate of the future institution, can be a useful tool: it educates the public, it modulates expectations, and it may generate ownership of the process. The formats of consultation recommended are no longer limited to direct interaction between policymakers and the leadership of civil society organizations: good practice today includes public sensitization, opinion surveys, town hall-style meetings and outreach to marginalized or vulnerable populations, among other mechanisms.

There is a direct relationship between consultative methods and the expansion of commission's mandates. If more constituencies are given a stake during the process of drafting of a truth commission, the scope of the future commission's investigations becomes larger, as each group demands specific and separate attention to their concerns.

A third important trend is the passage of commissions' mandates through legislative action. A cursory examination of early truth commissions reveals that they were established by the Executive branch, in an expeditious manner, during the early moments of a transition. Recent truth commissions, in contrast, have been established after a more or less comprehensive parliamentary debate.

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25 OHCHR, Rule of Law Tools for Post-Conflict States: *National consultations on transitional justice,* 2009.

The preference for legislation as the basis for the work of a truth commission seems to respond to a desire for democratic legitimacy, more legal security for the institution and independence from a powerful Executive branch. A truth commission whose basic mandate is contained in a law may be safer from political interference, and may have better institutional conditions to work independently.

The convergence of these three tendencies, often seen as the best possible route, has resulted in stronger mandates for truth commissions, at least in paper. However, it has also resulted in severe practical complications.

Expansive research mandates, of compulsory legal application, responding to the demands of constituencies across the country, do not necessarily lead to the best possible quality of the commissions' products. A truth commission may be overwhelmed by its expansive mandate, and fall prey to tensions between different methodological approaches; a commission, also, may have difficulty ensuring the quantity and the quality of personnel needed for such a complex research project. If truth commissions are established at some point during the reconstruction of a country after conflict, it is possible that the pool of professional resources of the country are still depleted or under pressure from different priorities. One solution, the cooperation of international experts, can work as a stopgap measure, but it often carries problems of its own, including financial and political considerations.

Extensive consultation mechanisms, while politically wise, may consume lengthy periods of time, particularly if they will link up with legislative debates. Comprehensive outreach, which may include preparatory processes and should result in serious consideration of the proposals received, consumes time, a precious scarce resource in political transitions. Indeed, over time, as citizen mobilizations recede and political elites reassert their role, those political groups related

to past abuses become stronger. The difficulties of building new institutions, or overcoming the economic weaknesses of a transition may result in a misleading nostalgia of the strong "order" of the past. If a commission is established through a slow procedure it may miss the elusive window of opportunity provided by a period of active citizen mobilization.

Two cautionary tales illustrate this difficulty. One is the case of Indonesia at the time of Suharto's fall. It is indisputable that the gravity and breadth of crimes committed during the Suharto era require official truth-seeking, but the process suffered from a number of tactical blunders that made it slow and ultimately determined its failure. Indeed, Indonesian preference for a legislative process resulted in a protracted negotiation in the branch of government where old regime loyalists enjoyed significant power and had extensive experience.

Legislation establishing the commission was only passed in 2004, six full years after the fall of Suharto, after experiencing all sorts of procedural delays and after being profoundly affected in its integrity. The flaws in the legislation were so profound that they resulted in constitutional litigation and, eventually, the voiding of the law by the Constitutional Court.

Another, more recent example of the difficulties of long processes of establishment is Tunisia. The government of that country followed punctiliously the current understanding of best practices and it worked diligently to consult the idea of a commission in all regions of the country, and then it produced a fairly expansive piece of legislation, which put a powerful truth commission at the center of a system of justice, reparation and fight against corruption. The bill was subject to a long and complex debate and negotiation in the Assembly of People's Representatives and was passed at the end of 2014, almost three years after the fall of Ben Ali's government.

At that point, however, a number of serious political changes had taken place. Tensions between Islamist parties and the secular Left, which had made the revolution together, flared, and provided an opening to new political groupings of a more technocratic identity, which made no qualms about their intention to normalize the country and finish the revolutionary agitation and instability. The commission, whose membership had to be selected by the legislators, was installed in late June of 2014, and after a few months devoted to its preparatory tasks, it found itself, in December, working in an entirely different political environment, as presidential elections gave victory to Mr. Beji Caid Essebsi, an experienced politician, whose experience went back to service under authoritarian leaders, and whose political discourse expressed deep skepticism about the truth commission or, indeed, any effort to pursue justice instead of reconciliation.[26]

Thirty years after the CONADEP and 15 years after the South African TRC, truth commissions, then, have evolved toward strong, comprehensive institutions, but also—regrettably—toward unwieldy structures, with overly ambitious mandates, established in a manner that sets them up against impossible expectations and adverse political scenarios. On paper, commissions have become more difficult to manipulate by self-interested elites, but they have also become more difficult to manage and lead in favor of the fight against impunity.

New trends

In spite of what this essay calls the existing orthodoxy, truth commissions continue to be extremely plastic institutions, open to innovation, which is usually the result of their interaction with civil society initiatives. Three key processes of innovation are:

26 See Rim el Gantri "Tunisia in Transition: One Year after the Establishment of the Truth and Dignity Commission" ICTJ Briefing Series, 2015.

- The use of new formats and media circuits to communicate their findings
- The use of decentralized forms of truth-seeking
- The interaction with civil society truth initiatives

One clear change from the times of the pioneering CONADEP to the contemporary truth commissions is the revolution in the use of communications technologies. Early commissions operated in private, confidential form, and disseminated their findings only at the end of their work through official reports that followed the conventions of what Latin Americans call "the lettered city".[27] Commission's reports, starting with "Nunca Más" relied on the power of argumentation, facts and the existence of an active public sphere populated by politically engaged readers.

The South African commission produced a revolutionary innovation in this scheme by conducting public investigative hearings, which had an enormous impact due to the confessions by perpetrators and the emotional intensity of victims' accounts. The South African experience transported truth commissions from the code of written accounts to that of imagery: public hearings and performance became probably as important and consequential as the actual text of the findings of the commission.

Such a tendency has only become stronger as media technologies evolved. Recent truth commissions like Canada created specific protocols to reach out to victims in remote areas through internet connection, and the Brazilian National Truth Commission (NTC) consistently transmitted each of its public activities to a television, radio and a growing internet audience. Commissions in Sierra Leone, Liberia and Kenya have dedicated specific work to develop

27 Angel Rama *La ciudad letrada*. Arca, Montevideo 1998.

versions of their findings aimed at younger readers and schoolchildren. The truth commission of Peru was the first one to produce a photographic account of the armed conflict as an integral part of its reporting.[28] In view of the evolution of even more innovative informational platforms through social networks, it is difficult to envision what will be the new initiatives that commissions such as Tunisia's will develop.

Another key innovation is the recognition that violent or authoritarian processes can hardly be recounted from a single "national" perspective. The Peruvian Truth and Reconciliation Commission devoted significant resources and two full volumes of its report to account for territorial experiences of the armed conflict, dislocating the notion of a single historical timeline.

Recent truth commissions have been even more radical in their departure of the model of a single narrative. In fact, truth commissions have either emerged directly from specific regions, as it has occurred in Mexico with the Truth Commission of the State of Guerrero,[29] or have interacted with autonomous local truth commissions, as happened in Brazil, where the NTC cooperated with truth commissions formally established by state legislatures, municipalities, universities and unions. In the state of Maine, United States, a truth commission was established by agreement.[30]

Not only territorial dimensions challenge the notion of a single, unified, national narrative, but also the experiences of specific sectors of society. The Canadian commission has been the first one to focus exclusively in the experiences of indigenous peoples, subjected to forced assimilation practices; and in Colombia, civil society groups have launched truth commission-like efforts to reflect the experiences of women and LGBT groups.

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28 Comision de la Verdad y Reconciliación del Perú. *Yuyanapaq. Para recordar.* Lima, 2003.

29 Comisión de la Verdad del Estado de Guerrero. Informe final de actividades. 15 de Octubre de 2014.

30 Maine-Wabanaki Child Welfare Truth and Reconciliation Commission. *Beyond the Mandate. Continuing the Conversation.Report of the Commission.* 2015.

Civil society truth initiatives, which have emerged as a response to government inaction, or to prod insufficient governmental efforts, have become also more sophisticated over time. Another essay would be necessary to trace their evolution from the seminal Brazilian report "Nunca Mais"[31] to the recent "Truth of Women" report in Colombia.[32] What is of interest here is that civil society has been critical for the evolution of truth commissions, not just through advocacy efforts, demanding allegiance to human rights principles or good practices, but also by running its own initiatives.

The best known case is that of Guatemala, where a civil society project, supported by the Catholic Church, the Project on the Recovery of Historical Memory (REMHI) resulted in a comprehensive report of the civil war, and prodded the official Historical Clarification Commission, to carry out an investigation that could surpass the yardstick set by the very professional REMHI report.[33]

This dynamic of emulation can also be reflected in the experience of Morocco. The Moroccan Instance Equité et Reconciliation (IER) conducted public hearings in full knowledge that human rights NGOs, critical of the commission's mandate, would conduct their own parallel hearings, a dynamic that created tension, but also zeal. Eventually, the commission's hearings were hailed as a historic occasion, as they were the first occasion for victims of state abuse to broadcast nationally their experiences.

Conclusion

31 Paulo Evaristo Arns, Jaime Wright. *Brasil: Nunca Mais.* Editora Vozes 1985.

32 Comisión de la Verdad y Memoria. Ruta Pacífica de las Mujeres *La verdad de las mujeres.Víctimas del conflicto armado en Colombia.* 2014.

33 Proyecto Interdiocesano de Recuperación de la Memoria Histórica (REMHI) *Guatemala: Nunca más.*

Truth commissions are at the center of a complex dynamic pulling them in at least three different directions. On the one side, elites worried about the risks of transitional justice have the expectation that truth commissions may be established as some form of soft justice, less demanding than formal prosecutions and more consistent with the delicate balances negotiated during a transition. Commissions established with a view focused on political expediency are born with extreme weaknesses and have to struggle to gain public confidence and international respect.

The response to such a manipulation has been the emergence of an orthodoxy centered on principles and good practices. A strong international movement toward the development of norms has limited the discretionary capacity of governments to create whitewash institutions, and it has provided the international community and civil society groups with a common language and valuable comparative experience. However, the risk of this route is that commissions may be established with a "check the box" mentality, as a just another procedure to follow in a peace process, in a technocratic manner, without adequately reflecting local realities.

Finally, in processes that some have called "transitional justice from below", civil society has conducted numerous experiments with different formats and methodologies to provide platforms to victims' accounts of human rights abuse. Some of the effort of civil society has resulted in the strengthening of a global template, but also, some initiatives have resulted in innovation, and have challenged the existing models. Creativity is always possible in the still short story of truth commissions, three decades after the CONADEP.

Hidden in Plain Sight: Children Born of Wartime Sexual Violence

by Kimberly Theidon

a video of Dr. Theidon's remarks is available here.

NOTE: This text is an excerpt from a longer article published in the special issue, "The Death of the Secret: The Public and Private in Anthropology," Current Anthropology, Volume 56 Supplement 12, December 2015.

On August 28, 2003 the Commissioners of the Peruvian Truth and Reconciliation Commission submitted their Final Report to President Alejandro Toledo and the nation. After two years and some 17,000 testimonies, the Commissioners had completed their task of examining the causes and consequences of the internal armed conflict that convulsed the country during the 1980s and 1990s. The PTRC determined that almost 70,000 people had been killed or disappeared, and that three out of four casualties were rural peasants who spoke some language other than Spanish as their native tongue. The distribution of deaths and disappearances reflected long-standing class and ethnic divides in Peru.

The Peruvian TRC: Commissioning Gender

Although the PTRC was given a gender-neutral mandate, feminists were successful in insisting the commission think about the importance of gender in their work. They argued for proactive efforts to include women's voices in the truth-seeking process. This reflected the desire to write a more "inclusive truth," as well as developments in international jurisprudence with regard to sexual violence. Given that "(p)erhaps the most commonly underreported abuses are those suffered by women, especially sexual abuse and rape", "gender sensitive" strategies were employed with the goal of soliciting women's testimonies about rape and other forms of sexual violence. The results? Of the 16,885 people who gave testimonies to the PTRC, 54% were women and 46% men (TRC 2003, vol. VIII: 64). Thus women spoke a great deal, but not necessarily about sexual violence — at least not in the first person. The total number of reported cases of rape was 538, of which 527 were committed against women and 11 were crimes against men (TRC 2003, VIII: 89). The Commission's effort to provide a "fuller truth" about the use of sexual violence by various armed groups was met with a resounding silence.

But recall that women provided over half of the testimonies compiled by the TRC. What did they talk about? Women offered insights into the gendered dimensions of war, and the ways in which the violence permeated all spheres of life. They spoke about the challenges of keeping children fed, homes intact, livestock safe, the search for missing loved ones, the lacerating sting of ethnic insults in the cities in which they sought refuge: women spoke about familial and communal suffering, and about the quotidian aspects of armed conflict. When people go to war, caregiving can become a dangerous occupation. The international focus on conflict related rape and sexual violence has been a hard-won achievement, but it comes at a cost. Even a broad

definition of sexual violence results in a narrow understanding of the gendered dimensions of war, and the full range of harms that women (and men) experience and prioritize.

Although women overwhelmingly refused to narrate first person accounts of rape, they spoke a great deal about the collective legacies of sexual violence. While working on this article, I turned to volume six of the Final Report and to the chapter entitled "Sexual Violence against Women." I found 37 references to girls and women impregnated as a result of wartime rape or exploitative sexual relationships. Mostly these are third party reports, and the women speaking refer to the phenomenon of unwanted pregnancies in the plural. "They ended up pregnant," "they came out pregnant" — the army, the police, and guerrillas of the Shining Path and the Tupac Amaru Revolutionary Movement are all named in the women's testimonies about rape-related pregnancies. The TRC acknowledges that these children may suffer as a result.

There are numerous cases of women who, being pregnant, were subjected to sexual violence and saw their pregnancies interrupted as a result of that violence. On the other hand, there are abundant cases of women who became pregnant as a result of the sexual violence they suffered at the hands of agents of the conflict; they found themselves obligated to assume a forced pregnancy and their children still continue to suffer the consequences of the violence (TRC 2003, Vol. 6:372, my translation).

The reader is left with no further information about those consequences. The women indicate that the guerrillas frequently forced the girls and women to have abortions, and when pregnancies were somehow carried to term, the babies were "forcefully taken away" (TRC 2003, Vol 6: 310). There are fleeting references to babies who died shortly after birth. The singular focus on compiling first person accounts of rape and sexual violence in order to "break the

silence" about these crimes somehow reduced children to a mere coda. What happened to all of those babies? Who else was talking about them?

What's in a Name

Abortions and infanticide are phenomena widely reported in post-conflict settings in which the use of rape was widespread. In Peru, some women tried to abort with herbs, attempting to rid their bodies of fetuses they could not bear. Others sought out *curanderos* (healers) who used various abortifacients to perform *limpiezas* (cleansings). In this instance, the word *limpieza* is a form of veiled speech that allowed women to maintain a useful ambiguity. *Limpiezas* of various sorts are common for a range of illnesses; indeed it was only with time that my colleagues and I realized the women had visited *curanderos* to cleanse themselves literally — they complained of feeling "filthy" as a result of being raped — as well as to cleanse their uteri of unwanted pregnancies. Across a variety of post-conflict settings, the recurrent theme of children born with disabilities is striking. For example, Carpenter noted a number of children born to rape survivors in Bosnia who were disabled. I believe some of these disabilities are due to botched abortion attempts. The lack of safe, accessible and affordable abortions does a grave disservice to these women, their fetuses, and babies.

Still other Peruvian women resorted to infanticide. There is a long-standing practice of "letting die" those babies who are unwanted, perhaps because they are born with congenital defects or are the product of rape. The idea is that *criaturas* (little babies) do not suffer when they die; one can leave them sleeping "mouth down," gently drifting off to death. Additionally, given women's concerns about the transmission of *llakis* (toxic memories) and *susto* (soul loss due to fright) from mother to baby, either in utero or via their mother's "milk of pain and

sorrow," concerns about damage to their infants were omnipresent. How could a baby born of such suffering and fear be normal? Many women were certain they could not. Letting these babies die reflected a desire to spare them the violence of memory —□ and to spare their mothers these memories of violence.

Amidst the trope of "unspeakable atrocities" endured in the war a great deal was being said. In addition to women's testimonies about rape-related pregnancies, audible speech acts of another sort were playing out all around those of us working in the highlands. I am referring to the names given to children born of conflict-related sexual violence. In any community — this is in no way limited to Peru — there is the audible impact of names, both individual and collective, that are frequently of an injurious nature. Some examples of these are:

Rwanda: collectively labeled "unwanted children," "children of bad memories," "children of hate," "genocidal children", and the individual names include "little killer," "child of hate," "I'm at a loss," and "the intruder."

Kosovo: "children of shame."

East Timor: "children of the enemy."

Viet Nam: "dust of life" and "American infected babies."

Nicaragua: "monster babies."

Guatemala: "soldadito."

Uganda: "Only God knows why this happened to me," "I am unfortunate," and "things have gone bad."

Colombia: "paraquitos."

In Peru, among other names, children are referred to as "*los regalos de los soldados*," (the soldier's gifts), "*hijo de nadie*" (nobody's child), "*fulano*" (what's his name), and "*chatarra*"

(stray cat). Linguistic or cultural variation alone does not explain this widespread phenomenon in post-conflict settings. Time and again, across regions, names reveal the conjuncture of painful kinship and "poisonous knowledge". These naming practices seem strikingly at odds with the secrecy and silence assumed to surround rape and other forms of sexual violence. Concealment is a leitmotif in the findings of researches conducted on the topic, and is generally understood as a way to avoid stigma for both the mother and her child.

And yet, names mark certain children and reveal their violent origins. Naming is verbal, audible, and interpersonal; naming practices are one way of expressing, perhaps projecting, the private into public space and laying claims upon others. These "entanglements" are worth contemplating. Every woman who spoke with me or with my research assistants about rape insisted, "I've never told anyone before." However, those of us who work amidst secrets and silences know that "I never told anyone" is not synonymous with "Nobody knows." Indeed, in his study of public secrecy, Taussig asks, "[What] if the truth is not so much a secret as a public secret, as is the case with the most important social knowledge, knowing what not to know?" (1999:2). Public secrets may be privately known but collectively denied, such that the drama of revelation amounts to "the transgressive uncovering of a secretly familiar" (1992:51). But for the moment, let us assume that some women did successfully conceal their pregnancies — did conceal this violence and its legacies. Even so, at some point women give birth to the secret. In that process of emergence, who and what is being made public? Who and what is being named?

Over the years, I have known several children who were the result of rape. Here I mention just one boy whose mother had been passed around by the soldiers in the base that had overlooked their community for almost 15 years. I first noticed him because he was standoffish, never joining the growing group of children who made my room a lively place. I tried to speak

with him a few times, but he had no interest in conversation. After months of living in the community, I finally asked someone about him. It was late afternoon and I saw him heading down the steep hill toward home, his three goats and one llama kept together with an occasional slap of a slender stick. The woman sitting at my side knew him by name: Chiki. My face must have expressed my surprise because she whispered that his mother was "one of those women."

Chiki is a painful name for a young boy, who in turn was a painful child for his mother. Chiki means "danger" in Quechua and in daily usage refers to a warning that something bad is about to happen and should be averted. People recall the ways they learned to look for a sign that the enemy might attack. One such chiki was a strong wind that blew through the village, rattling the roofs and letting people know something evil was about to occur. This boy could not be a warning; it was too late to avert this particular danger. Rather, he was the product of an evil event his mother had been unable to escape. His mere being extends his mother's memory both to the past and into the future. Her son is a living memory of the danger she survived, and a reminder that nothing good could possibly come from this Chiki she had failed to avoid.

In a fascinating piece on children born to young women who had been abducted and made "wives" by the Lord's Resistance Army in Uganda, Apio briefly discusses naming practices. In a sample of 69 children, she found that 49 of them had injurious names. These children were named by their mothers, while the other 20 had been named either by the father, or by medical staff who delivered the babies following their mother's reintegration. "These names compile all the bad experiences of a mother into a name and give it a life in the nature of her baby," Apio wrote. "In this way the baby is turned into a living reminder of her suffering" (2007: 101).

Social workers made efforts to give these children new names such as "I am fortunate" or "Things have turned good," but as Apio found in her interviews with World Vision staff, the

women were reluctant: “They prefer the old names” (2007:101, emphasis added). We are not told why. This example, however, is at odds with the idea that women inevitably seek to conceal the violent conception of these children. When it is the mother who does the naming, and in doing so names the violence she survived, poisonous knowledge is moved outward into the public domain. This appears to be less about shame than it is about pressing some sort of claim upon others — from poisonous knowledge to a demand for acknowledgment? Why are the mothers breaking this particular silence?

The concept of stigma is frequently applied to these children, yet is that really all we can say about these names? Stigma seems a thin explanation for a thick phenomenon, and forecloses a broader repertoire of potential meanings and motivations. While the evidence does not allow one to make totalizing claims, these names surely have something to do with memory and memorialization, and with theories regarding what is passed from parent to child. Hence my insistence on who and what is being named and made public, and why.

In the literature on rape, women frequently appear as metonyms for the nation, the community — for some collective that is allegedly attacked via the rape of its female members. The “rape as a weapon of war” approach turns on this idea, and on the deployment of rape as a strategic means of achieving an end (Baaz and Stern 2013). Baaz and Stern rightly challenge this framework, noting that the uses and meanings of rape are far more variable than the “weapon of war” approach allows. If rape is, however, at times used to undermine the morale of the enemy and to destroy communities, then marking these children may be a way of bearing witness to the harm done to the collective. Naming is both a “saying” and a “doing,” and speaking these names implicates others in an act of memorialization. Might this be, at times, a woman’s refusal to accept shame and stigma, albeit at a cost to the wellbeing of her child? As we saw above, in their

testimonies to the Peruvian TRC, women narrated the familial and communal consequences of the internal armed conflict: women were bearers of collective history. Women were also disruptive of communal histories that had frequently been elaborated by community leaders, virtually all men (Theidon 2012). Women were "counter-memory specialists" whose versions of events often diverged from the seamless accounts of the war offered up to those who came around asking about the past. These children's names can be a form of narrating the past, of attesting to the legacies of violence in the present, and of denouncing the harm done, for which no redress has yet been found.

I return to public secrets and their revelation in language. Ní Aoláin has noted that many acts of sexual violence during war are not private acts: "Unlike the experience of gendered violence during peacetime, which is predominantly located in the domain of the private, the home, sexual violence during war is strikingly public" (2000: 78). In Peru, women were raped in front of their families and communities; at times they were hauled off to nearby military bases and returned with their hair shorn as a mark of the gang rapes that they had endured. These violations frequently occurred with the complicity of local authorities —all male — and the neighbors who turned a deaf ear to the screaming next door. I have found that officials in the military bases demanded a "communal counterpart" in exchange for the "security" they provided to rural communities during the internal armed conflict. That counterpart consisted of food, wood and warmis (women). At times this demand was veiled by the term *aynicha*, a diminutive of *ayni*. *Ayni* refers to reciprocal labor exchanges by which people work on one another's agricultural plots. It implies reciprocity, but with an element of hierarchy and obligation. Communal authorities would indicate to the military officials which houses were occupied by single mothers and widows; these homes would be the first targeted when the soldiers descended from the bases

at night for "*la carnada*" — literally "bait," but in this context it refers to gorging on meat (carne), that is, the women they would rape. Again, who and what is being named and made public?

If names can implicate others in acts of memorialization, they may also implicate others in acts of betrayal and treachery. Communal contracts involved sexual contracts, and the burden of providing the communal counterpart fell heavily upon certain women and girls who were obliged to "service" the troops. These names disrupt the rules of the game — in this instance, that of knowing what not to know and what not to say. Rather than the "labor of the negative" that is vital to public secrets, with their reproductive labor women gave birth to, and insisted upon naming, a body of evidence. Taussig has argued that, "truth is not a matter of exposure which destroys the secret, but a revelation that does justice to it" (1999:2). The names — this revelation —may not do justice but constitute a demand for it.

Concluding Thoughts

This article grew out of reflections on my own research, and on the "absent presence" of children born of wartime rape and sexual exploitation in the literature produced about every post-conflict region in the world. These issues are global in scope, the questions seemingly endless, and yet what we know remains woefully limited. There are always policies — implicit or explicit — put in place to address the issue of children born of wartime sexual violence, the women who may abort or give birth to them, and the biological fathers. From state militaries to irregular forces, from combat troops to international peacekeeping missions, the question of what will be done with the children who (inevitably?) result from these encounters is a topic of discussion and policy-making (Grieg 2001). I began writing in the hope of making these

questions part of the anthropological research agenda, convinced that ethnographic methods are the most appropriate and ethical way to approach these issues. Beyond Institutional Review Boards and compliance with their "technical ethics," research on children and sexual violence raises deep moral concerns and ambiguities. Long-term anthropological research — which relies less on asking questions than it does on listening to both speech and silences — is the only way I can imagine of finding answers to the questions raised in this article, and of doing so in a way that respects how much is at stake in peoples' lives when public secrets are involved.

We might begin by considering rape-related pregnancies as a form of "reproductive disruption." Inhorn has asked, "What do reproductive falterings and failures, miscommunications, and outright battles — or the politically and emotionally charged contestations taking place in the everyday reproductive experiences of women and men around the globe — tell us about the subtleties of culture and power in everyday life?" (2008:iv). Framed this way, one could study children born of wartime rape, as well as the related issues of abortion, unwanted births, kinship, gender regimes, adoption policies, and infanticide, as central to exploring post-conflict reconstruction and social repair. The topics have not received the sort of anthropological focus they warrant. For example, Aengst has noted that infanticide has rarely been the direct focus of anthropological works, prompting her to ask what an ethnography of infanticide would look like, and what "this kind of desperation would reveal about mothering, motherhood, and reproduction" (2014: 423).

We might also use "jurisdiction" as an analytical tool. All women live within multiple reproductive jurisdictions, in the sense of multiple and perhaps contradictory regimes of law, language and practice (Richland 2013). For example, in her research on the legacies of the Partition, Das analyzes the Indian state's policies to "recuperate" and "recover" women who had

been abducted and sexually violated during the violence, tracing the national response to women impregnated by "other" men and giving birth to the "wrong" children (1995). She found that in the sphere of the nation, identity categories were rigidified in the service of national honor, while at the familiar and communal levels kinship norms were bent in a myriad of ways to absorb these women and their children into the structures of family and marriage. The multiplicity of customary norms that existed with regard to the children of victimized women were standardized into one single law by which illegitimacy was defined, frequently to the detriment of both the mothers and their children. This is a useful reminder that law can be a blunt instrument, working at odds with "practical kinship" and its useful ambiguities (1995:65). Thus we might ask when and why a state is compelled to take action on these issues, and with what consequences. Why do "protectionist" legal regimes frequently do women a disservice, further instantiating paternalism and patriarchy rather than advancing gender equality?

Finally, we might attend to various lifespans. Longitudinal research could tell us a great deal about these children, their experiences, and their life chances. Do the injurious names follow them throughout their lives, or are there ways of escaping the labels and changing one's fate? How do inheritance practices work in their families? Are they considered full members of the family, or treated as second-class children and siblings? In those cases in which stigma is a factor, do children born of rape pass the mark across generations? There is so much we do not know.

I envision this article as a conversation with colleagues, and an invitation to think further about these questions. Exploring the ways in which children born of wartime sexual violence are named, represented, marked and, perhaps, loved could generate new insights into the intersection

of gender, ethnicity, sexuality, violence, and identity. Perhaps these insights could help to achieve a greater measure of justice for these women and their children.

Truth Telling, Human Rights Litigation and Resilience

by Pamela Merchant

a video of Merchant's remarks is available here.

International accountability and transitional justice efforts have enjoyed significant and unprecedented advances in the past 30 years since *Nunca Más*. Well-positioned "universal jurisdiction" cases against individual human rights abusers are important tools to promote truth telling, strengthen broader transitional justice strategies, and provide survivors with a voice. Early universal jurisdiction cases, such as *Pinochet* (Chilean abuses prosecuted in Spain), *Scilingo* (Argentinean abuses prosecuted in Spain), and *Filartiga* (Paraguayan abuses litigated in the U.S.), established that national courts could be used to address human rights abuses that occurred outside the nation's borders. The next generation, such as the *Guatemala Genocide Case* and *Jesuits Massacre Case* pending in Spain, were conceived as part of a broader strategy that contemplated wider transitional justice principles.

This paper will provide a brief survey of the use of universal jurisdiction in human rights cases. And, since none of these cases would be possible without the courage and resilience of the survivors and their communities, this paper will also highlight a few of their stories.

Thank you to Robin Kirk, co-Director of the Duke Human Rights Center @ the Franklin Humanities Institute, and Patrick Stawski, Human Rights Archivist with the David M. Rubenstein Rare Book and Manuscript Library, for organizing "Commissioning Truths." Thank you also to the Center for Latin American Studies, Duke History Department, and Duke Cultural Anthropology for co-sponsoring the series.

On behalf of the Center for Justice & Accountability (CJA), I also want to express gratitude to Duke's Human Rights Archive for housing CJA's archives. The archives are particularly meaningful to CJA's work to help create a record of truth.

Nuremberg and the Origins of Universal Jurisdiction

The story of Nuremberg is well known. The Allied nations had in their power the leaders of a monstrous regime, which had nearly conquered the world; which had tried to exterminate the Jewish people; and which had taken the lives of tens of millions of children, women and men. British Prime Minister Winston Churchill argued for a summary execution. Soviet Premier Joseph Stalin advocated for the equivalent of a kangaroo court that would lead directly to the death penalty. Italian dictator Benito Mussolini and his mistress, Claretta Petacci, were killed by an angry anti-fascist mob; their bodies were brought to Milan and then hung from metal scaffolding in a public square for the public to abuse.

In the end the Allied nations chose to reject the certainty of an execution for the uncertainty of a trial. It was a test of principle over power. The war that began with torch lit parades would end with a cross-examination. The arrogance of power would be silenced by the still, small voice of law.

In embracing the rule of law—the leaders at Nuremberg announced themselves as quiet revolutionaries. They stood against the instinct that cries out to be ruled by force and by spectacle and declared that there was a better way.

As Justice Jackson said so eloquently in his opening address at Nuremberg:

> The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. *That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason*.[34]

The lesser-known International Military Tribunal for the Far East, also known as the Tokyo Tribunal, was also established at the end of World War II and presided over trials of senior Japanese political and military leaders including the prosecution against the commander of the Japanese Army, General Tomoyuki Yamashita.[35] The leading U.S. decision on command responsibility is based on General Yamashita's conviction.[36]

The Nuremberg and Tokyo Tribunals established the principle of individual criminal accountability as a pillar of international criminal law: "crimes against international law are

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34 Justice Robert H. Jackson, Chief Counsel for the United States, Opening Address to the International Military Tribunal, in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg,* November 10, 1945.

35 For a thought provoking review of the trial against General Yamashita and the appeal to the U.S. Supreme Court, *see* Allan A. Ryan, *Yamashita's Ghost: War Crimes, MacArthur's Justice, and Command Accountability* (2012).

36 *In* re *Yamashita*, 327 U.S. 1 (1946).

committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[37]

The Nuremberg Tribunal also extended the use of universal jurisdiction to cover human rights crimes. Universal jurisdiction is the doctrine of international law which holds that certain crimes are so egregious that the perpetrators may be held accountable wherever they are found. These crimes include genocide, crimes against humanity, war crimes, and torture. Centuries ago, under this principle, pirates could be brought to justice in whatever port they were found. Like the pirates of old, torturers and war criminals today can and should be held criminally or civilly liable wherever they are found.

Universal Jurisdiction post-*Nunca Más*

It took almost forty years for the United Nations to adopt the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (also known as the United Nations Convention against Torture (CAT).[38] The CAT requires states to take effective measures to prevent torture in any territory under their jurisdiction, and forbids states to transport people to any country where there is reason to believe they will be tortured. The Convention also mandates that states establish universal jurisdiction to try cases of torture where an alleged torturer cannot be extradited to the country where the torture occurred. Through the process of ratifying and adopting CAT, many countries began to enact universal jurisdiction laws including Belgium, France, Germany, Italy, Spain and Sweden. By way of example, Spain's law was enacted in 1985 and conferred on Spanish courts universal jurisdiction over genocide and "any offense that

37 Judgment of the International Military Tribunal, in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22, London (1950) at 447.

38 U.N. General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, December 10, 1984.

Spain is obliged to prosecute under international treaties" including the Convention Against Torture and the Geneva Conventions.

The term "universal jurisdiction" refers to the principle that a national court may prosecute individuals for any serious crime against international law — such as crimes against humanity, war crimes, genocide, and torture — based on the principle that such crimes harm the international community or international order itself, which individual States may act to protect.

The 1990's saw the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Extraordinary Chambers in the Courts of Cambodia (ECCC or the Khmer Rouge Tribunal).[39] The 1990's also saw the creation of the International Criminal Court through the Rome Statute which was adopted in 1998 and came into force in 2002.

As countries began to ratify the Rome Statute they also began to enact domestic human rights laws with universal jurisdiction components. According to Amnesty International, the vast majority of U.N. Member States "can exercise universal jurisdiction over one or more crimes under international law, either as such crimes or as ordinary crimes under national law."[40] Today, over 150 countries have defined at least one of the four crimes upon which universal jurisdiction can be exercised – war crimes, crimes against humanity, genocide, and torture – as crimes in their national law.[41]

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39 Dozens of war crime tribunals and truth commissions have been established in the past 30 years from the Special Courts in Sierra Leone to Canada's Truth and Reconciliation Commission. *See,* Eduardo González, International Center for Transitional Justice, "Truth Orthodoxies: The Truth Commission Model, 30 Years after Argentina," (2015).

40 *See* Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World – 2012 Update* (2012) (Amnesty UJ Report). While Amnesty's survey has been criticized as being over inclusive, "there is a distinct upward trend in the degree to which states are incorporating atrocity crimes into their domestic codes and empowering their courts to exercise various forms of extraterritorial jurisdiction." *See also*, Beth Van Schaack, "The Unexceptional Nature of South Africa's Universal Jurisdiction Law," *Just Security,* December 12, 2013.

41 Ibid.

Universal jurisdiction in its purest sense means that courts may exercise jurisdiction over certain human rights crimes regardless of the location where the crime was committed or the nationality of the perpetrator or the victim. In practice, most countries have enacted universal jurisdiction laws that are not "pure" and require that there be some type of nexus between the country where the case will be tried and the victim or the perpetrator. Today, most criminal universal jurisdiction prosecutions are against perpetrators who have fled the violence in their own country and sought safe haven in a third country. This is also known as "extraterritorial jurisdiction," which is the legal ability of a government to exercise authority beyond its boundaries.

As this audience knows well knows, there is a special relationship between post-Nuremberg universal jurisdiction litigation and *Nunca Más*. *Nunca Más* is the report that was issued in 1983 by the first contemporary truth commission which was established to investigate human rights abuses committed during Argentina's "Dirty War." The *Comisión Nacional sobre la Desaparición de Personas* (CONADEP or National Commission on the Disappearance of the Disappeared) called for the prosecution of nine senior military officers for human rights violations. Those trials began in 1985 in Argentina and made legal and human rights history.

Unfortunately, that victory was short-lived. Under pressure from the military, laws were soon passed that effectively granted amnesty to most human rights abusers from the Dirty War period. In a further blow to the cause of justice, Argentina's next president, Carlos Menem, pardoned military officers who were indicted or convicted despite these laws. Faced with these obstacles, survivors joined international human rights advocates and looked to countries in Europe to bring universal jurisdiction cases against Argentine human rights violators. Investigations into human rights abuses in Argentina were opened in Italy, France, Sweden and Spain.

In March 1996, Spanish judge Baltasar Garzón began investigating crimes committed during Argentina's dirty war which culminated in the prosecution of former naval officer Adolfo Scilingo for his role in the "death flights." Just a few months later, Judge Garzón opened an investigation into former Chilean dictator General Augusto Pinochet. The 1998 arrest of Pinochet in London pursuant to a Spanish arrest warrant was a watershed moment in the international human rights movement. This legal precedent for seeking to bring a former head of state to trial outside his home country signaled that neither the immunity of a former head of state nor legal amnesties at home could shield participants in the crimes of military governments.[42]

Inspired by the Pinochet case, in 1999 the Nobel Laureate Rigoberta Menchú Tum filed a criminal complaint in Spain against former military dictator General Efraín Ríos Montt and other senior Guatemalan officials charging them with terrorism, genocide and systematic torture. The next year, human rights groups initiated prosecutions against former Chadian dictator Hisséne Habré in Senegal and Belgium.[43] Many other universal jurisdiction investigations were initiated to address abuses committed around the world including politically fraught investigations into abuses committed by Israel in Gaza, the United States at Guantánamo Bay and by China in Tibet.[44] The Belgium and Spanish courts were at the forefront of the post-Nuremberg human rights investigations based on universal jurisdiction.

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42 See Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (2011); Elin Skaar, *Judicial Independence and Human Rights in Latin America: Violations, Politics, and Prosecution* (2011); and Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights,* (2005).

43 *See,* Reed Brody, "Bringing a Dictator to Justice: The Case of Hisséne Habré," *Oxford Journals, Journal of International Criminal Justice* (2015).

44 *See e.g*, Human Rights Watch, "Universal Jurisdiction in Europe: The State of the Art" (2006); Beth Van Schaack, "South Africa Constitutional Court on Universal Jurisdiction: Validating the Obvious," *Just Security* (2014).

At the same time that we are seeing great advances in human rights litigation, our field is constantly challenged by those in power who seek to limit access to the courts for human rights crimes. In response to political pressures a number of countries have significantly revised their universal jurisdiction laws. As a result of pressure from Israel and the United States, the Belgium government restricted the reach of its universal jurisdiction in 1993; its high court dismissed war crimes cases against former President Bush, Secretary of State Colin Powell and Israeli Prime Minister Ariel Sharon in 2003 in order to restore diplomatic relations with both countries. In 2009 Spain restricted the reach of its universal jurisdiction laws due to similar pressure from China, Israel and the U.S.[45]

Despite these setbacks, there has been a steady rise in the use of universal jurisdiction to prosecute human rights abusers and a proliferation of war crimes units created to pursue human rights prosecutions. Since the end of WWII, there have been investigations or prosecutions based on universal jurisdiction in the courts of at least 17 countries, including Argentina, Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Israel, Netherlands, Norway, Spain, Sweden, Switzerland, United Kingdom and the United States.[46]

The United States

The post- World War II era of universal jurisdiction human rights litigation in the U.S. began with the 1980 case, *Filártiga v. Pena Irala*.[47] Joelito Filártiga, the 17-year-old son of a

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45 The 2009 reforms restricted the jurisdiction of Spanish courts to cases where (i) the alleged perpetrators are present in Spain, (ii) the victims are of Spanish nationality, or (iii) there is some relevant link to Spanish interests. *See*, CJA's analysis of the reform of Spain's universal jurisdiction laws at http://www.cja.org/article.php?id=740. The majority of existing investigations have survived because they satisfied one of these prongs or because the cases included terrorism charges which are still subject to universal jurisdiction.

46 Amnesty International. http://www.amnestyusa.org/our-work/issues/international-justice/universal-jurisdiction.

47 *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). *See also*, William J. Aceves, *The Anatomy of Torture: A Documentary History of Filartiga v. Pena-Irala* (2007).

Paraguayan opposition figure, was tortured and killed by Paraguayan police. The Filártiga family sought justice in Paraguay, but the courts were closed. When the Filártiga family learned that Joelito's torturer had fled to New York, they brought a civil suit in the United States under the Alien Tort Statute (ATS).[48] In a landmark ruling, the U.S. Court of Appeals for the Second Circuit held that torturers, like pirates, had become —enemies of all mankind—and could be sued in federal court for violating international law under the ATS, wherever the torture occurred.

The U.S. Congress reinforced the use of the ATS in human rights cases by passing the Torture Victim Protection Act (TVPA) which President George H. Bush signed into law in 1992.[49] Under both laws, in order for a U.S. court to exercise jurisdiction the defendant must be present in the United States. Both of these laws are civil -- as opposed to criminal.

The Center for Justice and Accountability was founded in 1998 to bring civil law suits against human rights abusers who sought safe haven in the U.S. using the ATS and the TVPA. It is estimated that thousands of human rights abusers have found safe haven in the United States, including more than one thousand with substantial responsibility for heinous atrocities.[50] One of CJA's first projects was to work with members of the Chilean diaspora in the United States on the Pinochet case in Spain. CJA has brought cases in the U.S. against human rights abusers from Bosnia, Chile, China, Colombia, East Timor, El Salvador, Haiti, Honduras, Peru and Somalia.[51]

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48 Alien Tort Statute, 28 U.S.C. § 1350.

49 Torture Victim Protection Act, 28 U.S.C. § 1350 note.

50 Amnesty International, USA, "A Safe Haven for Torturers" (2001).

51 *See, e.g.*, *Mehinovic, et al v. Vuckovic*, 198 F. Supp. 2d 1322 (Ga. 2002) (finding Serbian soldier liable for torture, cruel, inhuman and degrading treatment, arbitrary detention, war crimes, crimes against humanity; and genocide for abuses committed against Muslims during Bosnian War); *Doe, et al v. Liu Qui*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004)(finding that defendant exercised command and control over security forces responsible for torture and arbitrary detention of Falun Gong members in China); *Doe v. Saravia*, 348 F. Supp. 112 (E.D. Cal. 2004) (finding Salvadoran captain liable for extrajudicial killing and crimes against humanity for his role in the assassination of Archbishop Oscar Romero); *Jean, et al v. Dorelien*, 431 F.3d 776 (11th Cir. 2005) (affirming jury verdict holding Haitian colonel liable for torture, extrajudicial killing, arbitrary detention and crimes against humanity); *Cabello, et al v. Fernandez-Larios,* 402 F.3d 1148 (11th Cir. 2005) (upheld jury verdict finding Pinochet

In 2006 CJA expanded its legal work to Spain and became lead counsel in the *Guatemala Genocide Case* in Spain and two years later filed the *Jesuits Massacre Case* in Spain. In 2011 CJA began representing 45 Civil Parties in the Second Khmer Rouge Trial in Cambodia.

For decades now, victims of human rights abuses have used the ATS and the TVPA to seek redress against those responsible—natural persons, organizations, and corporations alike—for perpetrating the abuses against them. For these victims, the results have been profound. The cases have afforded them the opportunity to hold the perpetrators to account, thereby obtaining a measure of justice for themselves and their families; to establish a truthful historical record; and to contribute to broader efforts to deter human rights abuses.

Unfortunately, the last few years have also seen a great restriction on the reach of the ATS and the TVPA due, once again, to political pressure.[52] In 2012 the U.S. Supreme Court ruled that the TVPA limits liability to natural persons and no longer imposes liability on corporations or organizations for torture of killing committed by their agents.[53] The following year the Supreme Court held that that the ATS only applies to human rights violations in other countries where there is a strong connection to the United States.[54]

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operative found liable for torture, crimes against humanity, extrajudicial killing and cruel, inhumane and degrading treatment in Chile); *Doe, et al v. Constant*, Civ. No. 04-10108 (S.D.N.Y. Oct. 24, 2006) (finding Haitian death squad leader liable for torture, crimes against humanity and the systematic use of violence against women); *Chavez, et al v. Carranza*, 559 F.3d 486 (6th Cir. 2009) (affirming jury verdict holding former Vice Minister of Defense of El Salvador liable for crimes against humanity, torture and extrajudicial killing); *Romagoza Arce, et al v. Garcia*, *et al.,* 434 F.3d 1254 (11th Cir. 2006) (affirming jury verdict holding two Salvadoran Generals liable for torture under a command responsibility theory); *Reyes et al., v. Lopez Grijalba*, Civ. No. 02-22046 (S.D. FL March 31, 2006) (finding former Honduran Minister of Intelligence liable for torture and extrajudicial killing); *Ochoa, et al v. Hurtado*, Civ. No. 07-21783 (S.D. FL March 4, 2008); *Yousuf, et al v. Samantar*, 699 F.3d 763 (4th Cir. 2012) (denying immunity appeal and upholding lower court finding that former Somali Minister of Defense was responsible for torture, extrajudicial killing, arbitrary detention and war crimes); *Ahmed v. Magan*, Civ. No. 2:10-cv-00342 (S.D. Ohio August 20, 2013) (finding former Somali Colonel liable for torture, cruel treatment and arbitrary detention).

52 *See,* Beth Stephens, "The Curious History of the Alien Tort Statute," *Notre Dame Law Review*, May 2014.

53 *Mohamed v. Palestinian Authority*, 132 S.Ct. 1701 (2012).

54 *Kiobel v. Royal Dutch Shell Petroleum*, 133 S.Ct. 1659 (2013). The Justices unanimously agreed that the mere presence of a multinational corporation was not a clear enough connection. The Court left open the issue of whether an individual perpetrator who seeks safe haven in the U.S. may still be liable under the ATS.

The United States was a late signatory to the Convention Against Torture and is not a signatory to the Rome State. The U.S. became a party to the CAT in 1994 and enacted a federal criminal torture statute which provides for jurisdiction over torture committed outside the U.S.[55] In the next decade, the U.S. amended the Genocide Accountability Act to allow for the prosecution of genocides committed abroad; enacted the Child Soldiers Accountability Act with extraterritorial reach; and established a war crimes unit.[56] All three criminal laws require that the defendant be present in the United States. While the U.S. has only brought a single criminal universal jurisdiction human rights case to date, there is a commitment to future prosecutions and, for the most part, the U.S. is no longer a safe haven for human rights abusers.[57]

Trends

International accountability and transitional justice efforts have enjoyed significant and unprecedented advances since *Nunca Más*. It has become increasingly clear that well-positioned universal jurisdiction cases are among the best tools to bring the voices of victims back into the center of the public discourse and catalyze demands that in-country judicial systems take responsibility for crimes committed within their jurisdictions. The hope is that these cases and the networks built around the cases will shepherd in a new era of transnational accountability.

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55 The Torture Act, 18 U.S.C. § 2340A.

56 The Genocide Accountability Act was amended in 2007 (18 U.S.C. § 1091); the Child Soldiers Act was enacted in 2008 (8 U.S.C. § 1227(a)(4)(F); and, the Human Rights Enforcement Act, which established the Human Rights and Special Prosecutions Unit within the U.S. Department of Justice, was enacted in 2009 (28 U.S.C. § 509B).

57 The U.S. successfully prosecuted Roy Belfast, a.k.a., Chuckie Taylor, under the Torture Act for abuses he committed in Liberia when he was head of the Anti-Terrorism Unit. Belfast is the U.S. born son of former Liberian dictator Charles Taylor. *U.S. v. Belfast*, 611 F.3d 783 (11th Cir. 2010) *cert. denied*, 131 S. Ct. 1511 (2011). Under the Obama administration, the U.S. has initiated removal and deportation proceedings against numerous high ranking human rights abusers and no longer offers sanctuary to known human rights abusers. http://www.ice.gov/human-rights-violators-war-crimes-unit. In a particularly significant victory for CJA's clients and human rights activists in El Salvador, in March 2015, the U.S. finally removed Salvadoran General Vides Casanova at http://www.nytimes.com/2015/03/13/us/general-in-el-salvador-torture-and-killings-can-be-deported-immigration-court-rules.html. Regrettably, other prominent human rights abusers, including Michael Townley, Armando Fernández-Larios and General Mohamed Ali Samantar, remain in the U.S.

Today, successful human rights cases are based on a collaborative and transnational model to maximize impact. By working closely with in-country and diaspora accountability groups, we can better position universal jurisdiction cases that support broader accountability efforts with an ultimate goal of supporting prosecutions in the home country. This model is especially useful where in-country justice movements have been stalled or thwarted. The earlier generation of UJ cases, such as *Pinochet* (Chilean abuses prosecuted in Spain), *Scilingo* (Argentinean abuses prosecuted in Spain), and *Filartiga* (Paraguayan abuses litigated in the U.S.), established that national courts could be used to address human rights abuses that occurred outside the nation's borders. The next generation of these cases, such as the *Guatemalan Genocide Case* in Spain, has been litigated as part of a broader strategy that contemplates wider transitional justice principles. This evolved model is moving the human rights field to its next stage of impact and development.

As practitioners, we have learned the importance of building a network of partners that includes in-country human rights defenders, medical professionals, therapists, military and forensic experts, survivors, refugee groups, law school clinics, and other non-governmental human rights organizations. These partnerships are foundational to success in investigating and gathering evidence for new cases, communicating with key constituencies, locating plaintiffs and witnesses, and ensuring that survivors receive critical medical, psycho-social, and legal services. These partnerships also create a synergy between transnational and local anti-impunity efforts that is crucial to effecting long-term change in the home country.

The *Guatemalan Genocide Case* is a prime example of the value of collaboration and international cooperation. As mentioned above, this case was initiated by Rigoberta Menchú Tum in 1999 and was initially viewed with trepidation by survivor and justice organizations in

Guatemala, who harbored a historical distrust of Spain's role in Guatemalan affairs. The case had been dormant for years waiting for a ruling on jurisdictional issues. When the case became active again CJA and our partners made a strategic decision to develop the case in Spain as a long-term strategy to support Guatemalan civil society's efforts to achieve justice in Guatemala. We introduced wide-ranging evidence on the genocide in the hope that it would ultimately be used in the national courts in Guatemala. This vision became a reality when Claudia Paz y Paz became the Attorney General of Guatemala with a commitment to prosecuting human rights abuses. These efforts culminated in the 2013 national court prosecution against General Ríos Montt, the first prosecution in the world against a former head of state for genocide.[58]

The 25-year struggle to bring the former Chadian dictator Hissène Habré to justice is another important example of how universal jurisdiction can be used to support in-country justice efforts. In May 2015 Habré will face human rights charges before a special chamber in the Senegalese courts. Habré's trial will mark the first time in history that the courts of one country try the former leader of another country for human rights crimes. As with the *Guatemalan Genocide Case* and the subsequent prosecution of Ríos Montt in Guatemala, the Habré prosecution has also spurred justice efforts back in Chad, where former agents of Habré's political police now stand trial for torture and murder and the president has finally promised compensation to Habré's victims. The Habré case has only become a reality due to the collaboration and vision of a wide coalition of survivors, NGOs, lawyers and human rights activists.[59]

Civil universal jurisdiction cases have also been used to support justice efforts in the home country. Two civil ATS/TVPA cases in the U.S. were used to help set the stage for a criminal

58 On May 10, 2013, General Ríos Montt was found guilty of genocide by a national court. Unfortunately, the victory was short-lived. Due to political pressure, just ten days later the verdict was overturned on a technicality and a new trial was ordered. As of this writing, the retrial still has not occurred. Despite this disappointment, the genocide conviction changed the face of accountability in Guatemala forever.

59 *See,* Reed Brody, "Bringing a Dictator to Justice: The Case of Hisséne Habré," *Oxford Journals, Journal of International Criminal Justice* (2015).

prosecution in Peru for those responsible for the Accomarca Massacre. CJA and *La Asociación Pro Derechos Humanos* (APRODEH) joined together to pursue a combined litigation strategy, which involved ATS/TVPA litigation in the U.S. and a criminal prosecution in Peru. By filing ATS suits in the U.S. against Telmo Hurtado and Juan Rivera Róndon, two former military officers who were living in the U.S., CJA kept the accountability efforts of the survivors alive and supported their transitional justice efforts in Peru. The suits also became the basis for extradition proceedings by the U.S. government. The defendants were arrested, extradited, and, upon their return to Peru, charged with crimes against humanity.

At the same time that we are seeing great advances in human rights litigation, our field is constantly challenged by those in power who seek to limit access to the courts for human rights crimes. As a result, it is extremely important that we learn from our experiences and remain nimble. Given the backlash that we have seen after the prosecutions of Fujimori in Peru and Ríos Montt in Guatemala, one clear lesson is that we have to focus on long- and mid-term transitional justice processes. We need to develop a strategy to continue the momentum at the end of the trials – even where there has been a reversal due to political forces -- as with the Ríos Montt genocide conviction.

Truth Telling and Resilience

The role of the client and survivor communities is critical to building and creating successful human rights cases. For survivors of torture and other human rights abuses or their family members, their involvement in human rights cases can be profound. The cases have afforded them the opportunity to hold the perpetrators to account, thereby obtaining a measure of justice

for themselves and their families; to establish a truthful historical record; and to contribute to broader efforts to deter human rights abuses.

Participating in accountability can help overcome a sense of powerlessness. These cases help survivors experience a sense of justice and meaning in their survival and satisfaction in knowing that they have brought dignity to themselves and the memories of those who were killed or tortured.[60]

Participation in these cases is extremely difficult. Survivors are called upon to tell the stories of their trauma – horrific stories of rape, beatings, solitary confinement, torture, etc. – over and over again. The experience of telling these stories, while empowering and often cathartic, is also re-traumatizing; nightmares will return and they may not sleep for weeks.

In addition to trauma of having to relive torture or the death of a loved one, there is also the innate challenge of participating in any type of litigation as the wheels of justice turn very slowly, particularly in human rights cases. Human rights cases are conducted in an historic framework after the conflict has ended and enough time has passed for the survivor communities to organize, locate the defendants, gather evidence and find an appropriate court in which to file the case.

Safety is another paramount concern. Survivors and witnesses often participate in human rights cases at great personal risk to themselves and their family members.

International human rights cases are fraught with lengthy battles over technical legal issues. When the U.S. Supreme Court heard argument in *Samantar v. Yousuf*, not a single question was

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60 *See*, Martha Minnow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, (1998) at 26; Michelle Parlevliet, "Considering Truth: Dealing With a Legacy of Human Rights Violations," 16 Netherlands Q. of Hum. Rts. 143 (1998) at 145; Jamie O'Connell, "Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?" 46 *Harv. Int'l L.J.* (2005) at 295, 320-23; Laurel E. Fletcher & Harvey Weinstein, "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation, 25 *Hum. Rts. Q*. 573 (2002) at 590.

asked about the brutal Siad Barré regime or the abuses suffered by the plaintiffs.[61] Instead, all of the questions turned on technical legal issues on the reach of the Foreign Sovereign Immunity Act. As important as it was for our clients to have their case heard by the Supreme Court, they were also understandably disappointed that the facts underlying the complaint – torture, the extrajudicial killing of loved ones, and other war crimes – were not discussed.

Despite these seemingly insurmountable hurdles, survivors continue to step forward to participate in these cases.

Who are these extraordinarily brave, patient and resilient people who participate in these cases? The short answer is that they are everywoman and everyman. They come from every walk of life. CJA's clients are doctors, lawyers, teachers, social workers, artists, journalists, religious workers, students, farmers, domestic workers, soldiers, and health care workers, businessmen and businesswomen. They are religious and non-religious: political and non-political. They represent every class and age group. They are also the daughters, sons, brothers, sisters, mothers, fathers, wives and husbands of those who have been murdered and disappeared.

They all share a commitment to the rule of law and the creation of a record of truth.

They also share a commitment to using these cases as leverage to support broader transitional justice efforts. This obviously can be difficult where the conflict is ongoing, where there are amnesty laws, or where the courts in the home country cannot guarantee a free or fair trial.

And they are resilient. There are many definitions of resilience, but in this context it is the capacity of a person to function with a sense of core purpose, meaning and forward momentum in the face of trauma.[62] Much research has been conducted in recent years on how and why survivors of trauma cope, with the unexpected conclusion that resilience is much more

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61 *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010).

62 *See*, Andrew Zolli, *The Resilient Mind: Why Things Bounce Back* (2012) at 118-143, citing to research by experts in the field including George Bonanno.

commonplace than expected. Experts are learning that resilience is more common than they originally thought and results, in most cases, from the operation of basic human adaptational systems.[63]

Social psychologists who study resilience have found that those of us who have the following personality traits are better able to adapt and succeed after suffering and trauma: "1) a belief that one can find meaningful purpose in life, 2) the belief that one can influence one's surroundings and the outcome of events, and 3) the belief that positive and negative experiences will lead to learning and growth."[64] It is no surprise that survivors who gravitate towards litigation are the more resilient among us. By participating in litigation, survivors are playing an active role in taking charge of their lives and changing the face of history.

It has been my great privilege to work with these remarkable individuals. I am constantly struck by their capacity to survive unspeakable harms with grace, dignity and even humor. It has given me great hope and reinforced my faith in what good can do in the face of evil.

CJA has represented over 200 survivors of torture and other human rights abuses since its founding in 1998 and has worked with hundreds more who have supported the cases, each of whom is remarkable in his or her own right. Because of space limitations I will only share a few of their stories, I encourage you to visit CJA's website and to learn more about these inspiring individuals. The common thread in the following stories from six very different people -- a businessperson and a lawyer from Somalia, a domestic worker from Peru, a doctor and a teacher from El Salvador, and a mental health counselor from Cambodia – is their resilience, their commitment to justice and their commitment to create a record of truth and to speak for those who cannot.

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63 Id. at 122, citing to Ann S. Masten, "Ordinary Magic: Resilience Processes in Development," *American Psychologist* 56 (2001) at 227-28.

64 Zolli at 128.

Bashe Abdi Yousuf

Bashe Abdi Yousuf was a young businessman in Somalia who was deemed a threat by the military dictatorship because of his involvement in a local civic organization. He was arrested, brutally tortured and held in solitary confinement for seven years. Yousuf considers those years of isolation to be the worst of all the tortures he endured. Still, he demonstrated remarkable resilience. The following is from a piece written by Aaron Loeb about Mr. Yousuf's strategies for staying alive and sane while in solitary confinement:

> It's night, and Bashe Abdi Yousuf is alone. He's locked in solitary confinement in a remote prison, placed there by his own government because he's part of the wrong clan. Placed there because he, and the other men in this prison, defied the Somali dictator.
>
> But right now, Bashe has a more immediate problem. His leg is turning blue. So, he reaches out and knocks on the wall.
>
> Bashe and the other men taught themselves a code, an alphabet based on short and long knocks, not unlike Morse code. If they shout to each other, the guards will come, but with the code, they can pass messages. Over time, all twenty of them learned it.
>
> Bashe knows the man in the cell beside him is a doctor. The doctor knocks back: you have an infection, and without medicine, you will likely die. He keeps knocking … but you are in luck. I managed to get some antibiotics from the guards.
>
> The doctor will throw them out the window of his cell into the prison yard below, and later, when Bashe is taken by the guard for his weekly walk outside, he will fish them from the bushes.

Bashe lived to tell this story as part of his testimony against the man who imprisoned him, General Ali Samantar.

On the stand, Bashe explained that before he was imprisoned he was tortured. He was electrocuted and water boarded. His torturers tied his feet and hands behind him and placed stones on his back. But Bashe [explained] that of all the tortures he had been subjected to … isolation that was the worst. He was locked in a cell alone … for seven years. When .. [asked] how he and the other men kept themselves sane. He said it was the code that saved them.

Bashe explained. One night, when time had lost all meaning, he picked up a book. Each man had been allowed one or two personal items – in Bashe's case, two novels and a copy of *Newsweek* with Ronald Reagan on the cover. One of the novels was *Anna Karenina*. And he began knocking. (knock, knock, knock.) Passing the story letter by letter to the man in the cell beside him. To the doctor. It was something to do. But then … after some time … he heard an echo ... … the doctor "retelling" the story (*knock, knock) to* the man in the cell beside him. And soon that man passed it on, as well. Letter by letter, word by word, cell to cell, the men passed the novel to one another -- all 349,686 words of it.[65]

Mr. Yousuf was released from prison in 1989 and two years later came to the U.S. where he made a new life for himself. Fourteen years later when a federal district court judge found General Ali Samantar liable for Mr. Yousuf's unlawful detention and torture he had this to say:

65 Aaron Loeb, "Knock, Knock… Knock, Knock, Knock" performed May 15, 2014*, Pop Up Magazine: The Measure of All Things*, San Francisco, CA.

> For many, many years, I have been looking for justice -- for my day in court and not just for me personally, but for the thousands of people in Somalia who were tortured, and murdered. It has been many years and required a lot of patience, but today Samantar is finally being held accountable for ordering these horrific crimes. It is hard to put into words what this means for me and so many others who were impacted by the Síad Barre regime. It gives me great comfort that I can put this chapter of my life behind me.[66]

Dr. Juan Romagoza Arce

Dr. Juan Romagoza Arce was among the many innocent civilians who were tortured during the repressive campaign of violence unleashed by the Salvadoran government in the 1970s and 1980s. Born in Usultán, El Salvador, Dr. Romagoza entered medical school at the University of El Salvador in 1973 and went onto to set up medical clinics and provided health education to the underserved in the poor areas of San Salvador and neighboring communities.

In December 1980, as he was working at a church clinic, two vehicles carrying soldiers from the army and National Guard arrived and opened fire on the clinic. Dr. Romagoza was shot in the foot, then blindfolded and taken by helicopter to a local army garrison. For 22 straight days he was interrogated, beaten and tortured. He was administered electric shocks, subjected to water torture and a mock execution, and shot in his left hand so he would not be able to perform surgery again. When he was finally released he could not walk and weighed only 70 pounds.

Dr. Romagoza fled El Salvador and was eventually granted asylum in the U.S. His ability to transcend his time in prison and build a new life is another example of the strength of resilience.

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66 Bashe Yousuf, CJA Statement, February 23, 2012. http://cja.org/article.php?id=1077.

Dr. Romagoza settled in Washington, DC where he served as the director of La Clinica del Pueblo, a public health clinic.[67]

Dr. Romagoza was initially uncertain about becoming involved a law suit against the Generals. He was concerned about the safety of his family members who remained in El Salvador. "But out of respect for the many who died in El Salvador – particularly the churchwomen – I found the courage."[68] At the time, he joined the case to help create a record of truth and to take a stand against injustice. What he did not expect was that participating in the case would became part of his healing process.

> When I testified strength came over me. I felt like I was in the prow of a boat and that there were many, many people rowing behind that were moving me into this moment. I felt that if I looked back at them, I'd weep because I'd see them again: wounded, tortured, raped, naked, torn and bleeding. So, I didn't look back, but I felt their support, their strength and their energy. Being a part of the case and having the opportunity to confront these Generals with these terrible facts provided me with the best possible therapy a torture survivor could have.[69]

Sophany Bay

Sophany Bay is a survivor of the Khmer Rouge regime in Cambodia. She lost over a hundred family members including her three young children. A university graduate in Cambodia, when

67 Dr. Romagoza was named one of *Washingtonian* magazine's Washingtonians of the year, 2005, for his work at the clinic to serve low-income Latino families. Today, Dr. Romagoza lives in El Salvador, in 2009 he was appointed to be the Coordinator of the Basic Integral Health System of the Department of Usulután. Prior to hold that position, he founded a community clinic and a home for impoverished persons living with HIV.

68 Dr. Juan Romagoza, Testimony, Subcommittee on Human Rights and the Law Committee of the Judiciary U.S. Senate, "*No Safe Haven: Accountability for Human Rights Violators in the United States*," November 14, 2007.

69 *Id*.

she came to the U.S. she studied psychology at Evergreen Community College to learn how to help refugees like herself. Today, she works as a mental health counselor for low-income Cambodians in San Jose, California. Because of her training, Ms. Bay is able to manage her own symptoms of PTSD. Yet at night, Bay's dreams always take her back to those years of torture by the Khmer Rouge.

> I'm seeing a man who wants to use a knife to kill me, a Khmer Rouge soldier trying to hit me or beat me or catch me. When I wake up, I talk to myself. 'Go back to sleep, go back to sleep,' I tell myself. 'It will all be there to deal with tomorrow.'[70]

Ms. Bay has sought justice through the courts since she first escaped from Cambodia in the late 1970s. She has been able to realize that goal through her participation as a Civil Party in the Khmer Rouge Tribunal in Cambodia. According to Ms. Bay, the tribunal is not only a chance for the world to hear and acknowledge her suffering and the suffering of her community, but it's a chance to help end her nightmares as well. Her participation in the case is a way to take control of her life and hold those responsible for the death of her children to account.[71]

Ms. Bay testified at trial about her continued suffering and loss of all three of her children during Pol Pot's regime. The Court found that one of her children died as a direct result of atrocities committed by the Khmer Rouge regime. Upon hearing the verdict, Mrs. Bay said:

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70 Tracie White, "Khmer Rouge on Trial: Can Serving Justice Cure PTSD?" *Stanford Medicine*, Summer 2011, http://sm.stanford.edu/archive/stanmed/2011summer/article6.html.

71 *Id*.

> The Court cannot give me my children back but it can give me justice. I participated in the trial for the memory of my children and for all victims. Today, the world will know who is responsible for our suffering.[72]

Teófila Ochoa

Teófila Ochoa and Cirila Pulido were just 12 years old when they witnessed the Accomarca Massacre in Peru where 69 members of their community were killed including both of their mothers and six siblings. They are co-founders of the *Asociación de Familiares Afectados por la Violencia Política del Distrito de Accomarca* (Association of Relatives of the Victims of Political Violence in Accomarca). The Association's primary goal is to seek truth and justice for the victims. Ms. Ochoa and Ms. Pulido became plaintiffs in cases in the U.S. against two of the soldiers responsible for the massacre.

Ms. Ochoa's own words on her decision to become a plaintiff,

> My husband says that I am a fighter...that I am always fighting, and I say, of course, we need to fight, what else we can do? I want to make sure that nobody, no other child suffers what I had to suffer. I want a better life for my children, something that I believe is possible as long as the truth is told about what happened to our family and that justice is finally achieved.[73]

Professor Abukar Hassan Ahmed

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72 Sophany Bay, CJA Statement, August 7, 2014. http://www.cja.org/downloads/CJA%20Press%20Release%20ECCC%20Verdict.pdf.

73 Teófila Ochoa, CJA Statement, July 18, 2007. http://www.cja.org/downloads/Rondon_PR_7.18.07.pdf.

After discovering that his torturer resided in Ohio, Professor Abukar Hassan Ahmed, a former constitutional law professor and human rights advocate in Somalia, contacted CJA and filed a case against Colonel Abdi Aden Magan for torture, cruel treatment, and arbitrary detention. In 2013, nearly 25 years after his release from prison, he finally had his day in court where he gave the following testimony:

> I knew that justice was not only national, justice is universal. If you are black, you need justice. If you are white, you need justice. If you are yellow, you need justice. So everybody needs justice. … [F]or me it is very simple… I am a man who always seeks justice. But this time, I don't seek only my justice, but I seek justice for other people also. I call them the silent victims of torture - in Somalia or in other countries. And those people also must have justice … That's why I want to come to the United States to have the justice that I couldn't have in my country.[74]

Professor Ahmed received asylum in the United Kingdom and despite ongoing physical pain due to his torture, continues to work to help promote a democratic government in Somalia. Professor Ahmed received the International Bar Association's Annual Human Rights Award in 2013. This award is given each year to an individual who, through personal endeavor in the course of legal practice, has made an outstanding contribution to the promotion, protection and advancement of the human rights, particularly with respect to the right to live in a fair and just society under the rule of law.

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74 Abukar Ahmed, CJA Statement, August 20, 2013. http://www.cja.org/downloads/Ahmed%20v%20%20Magan.8%2020%2013.pdf.

Carlos Mauricio

Carlos Mauricio was a mathematics teacher in El Salvador when he was arrested and tortured. Today he is a human rights activist who speaks around the world on behalf of his NGO, Stop Impunity, on the importance of ending human rights abuses and seeking accountability. Mr. Mauricio has inspired many to become involved in the human rights movement including CJA's Legal Director, Kathy Roberts.[75] This is how Mr. Mauricio describes his decision to become a plaintiff,

> First, I am participating in order to seek justice, and to help put an end to the culture of impunity that exists in El Salvador. Second, I want to be the voice for people who were never able to speak out, for those who do not want, or are unable, to take their cases to court. Not only those who have been tortured and never want to talk about it, but also those who were killed during torture. Third, I am looking for a psychological healing of the wounds that torture left on me. I need an explanation and that is why I need a day in court. I believe that General Vides Casanova had the power to stop his police from committing the atrocities that they committed, and that he is, therefore, responsible. I want to know why he did nothing to stop his police from torturing me and thousands of others. Fourth, I am participating in this case in order to help send a message to military leaders around the world that, if they commit atrocities, they will not be able to visit or live in the U.S. with impunity. … Resolutions passed by the U.N. General Assembly and reports by human rights organizations are effective in publicizing what happened, but

75 Sarah Winfield, "Women in Human Rights Law: Kathy Roberts," April 16, 2015. http://ms-jd.org/blog/article/women-in-human-rights-law-kathy-roberts.

> they do not send a strong message to military leaders, who think they are above the law….[76]

Bashe Yousuf, Juan Romagoza, Sophany Bay, Teófila Ochoa, Abukar Ahmed and Carlos Mauricio have each played a critical role in helping to build successful human rights cases. Through some form or resilience, they each had the courage, strength and patience to participate in the long game that is human rights litigation. Their stories remind us of how powerful the justice movement is when we join together with a common purpose.

Well positioned transnational and universal jurisdiction cases are among the best tools to bring the voices of victims back into the center of the public discourse and catalyze demands that in-country judicial systems take responsibility for crimes committed within their jurisdictions. Despite judicial and political setbacks, when viewed in its totality, international accountability and transitional justice efforts have enjoyed significant and unprecedented advances in the past 30 years and we have much work to do in the next 30 years.

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76 Carlos Mauricio Statement. http://www.cja.org/article.php?id=484.

Thirty Years After Nunca Más: Is the International Community Abandoning the Fight Against Impunity?

by David Tolbert

Essay based on remarks delivered at Duke University on March 25, 2016. The video is available here.

I am very pleased to be here at Duke, particularly on the occasion of the 30th Anniversary of the historic Nunca Más ('Never Again') report. Being at Duke also brings back memories of my favorite aunt, Lucy Tolbert Davis, who was a professor at Duke for many years. Aunt Lucy was quite formidable – as I expect is the case for many Duke professors, particularly if she happens to be your aunt – but a bit more conservative and risk averse than I am, and when I was deciding to leave behind my partnership in a law firm and move to the UK to study human rights law, she used various stratagems to get me to reconsider. After all, why would anyone leave a partnership in a law firm to pursue a career in human rights!

One of her stratagems was to have Professor Lawrence Baxter, who was teaching at Duke Law and from the UK himself, to speak to me. Lawrence, who is here with us tonight barely recalls our phone call of 26 years ago, but he said some things that reinforced my decision to pursue a career in human rights, and I am eternally grateful for his advice (and for indirectly

convincing Aunt Lucy and my family that I hadn't gone – completely – mad). We finally meet in person tonight, but I think the story does show how important a wise word can be.

I am also very pleased to have Professor Ted Shaw here as well. Ted is on the ICTJ Board of Directors and teaches at UNC Law. Ted – who comes under a flag of truce - previously headed the NAACP Legal Defense Fund and is a leading figure in the field. I am deliberately not talking about basketball tonight.

I want to thank my hosts tonight for inviting me to its series on "Commissioning Truths: Thirty Years after Nunca Más." It is indeed an honor to be here and to be able not only to commemorate this important anniversary in the fight for justice but also to reflect about justice and the fight against impunity that is going on during our own time today.

I was originally invited to talk about "the future of transitional justice." I think (rather obviously given that I am the President of ICTJ) that transitional justice is going to be important in the future as long as we have human rights abuses, as long as governments fail to protect their citizens and as long as such legacies get in the way of the respect for human rights in future. So, indeed and unfortunately, transitional justice approaches, like those we work on at ICTJ, will be an important part of "dealing with the past in the future" (if that makes sense – perhaps you see why I changed topics). Of course, it would be a good thing if there was no true need for our advice and assistance. More seriously, I would be clear though that I do think that transitional justice approaches will be relevant in the future, but in somewhat different variations than they have been in the past.

The landscape has changed rather dramatically over the last 30 years since the Nunca Más report was issued. In the 1980's, we saw a significant number of countries "transition" from authoritarianism and repressive regimes to much greater respect for human rights, the rule of law

and democracy. You rightly honor the Nunca Más report, as President Alfonsín's brave step to set up the Truth Commission ensured accountability for massive crimes through a seminally important truth-telling process. As I talk today about some of the challenges that the fields of transitional justice and human rights face, it is worth remembering the hunger for justice when Nunca Más was released, with 40,000 copies of the first edition sold in only two days. More importantly, spurred by this report, the Junta trial began on April 22, 1985.

Nunca Más also led to a number of other steps to ensure accountability and address massive human rights abuses of the past in Argentina, but I would argue that its impact went far beyond the borders of Argentina or of Latin America for that matter and impacted a significant number of other countries across the world. While we saw the early efforts to address an abusive past in Latin American in the 1980's, other parts of world began to take some of that experience and apply it in their own contexts. Thus, in post-1989 central and Eastern Europe transitions from authoritarian regimes to democratic states took place in a way that took human rights seriously. Their approach was somewhat different as they addressed the abuses of the past in a variety of ways, primarily focusing on opening state archives, coming clean on abuses by the state, adopting lustration laws which exposed those who committed human rights abuses and shedding light on past abuses through commissions and other steps. In South Africa, we saw a transition from the authoritarian apartheid state in South Africa to a democratic one headed by Nelson Mandela. The South African transition was marked by the very well-known Truth and Reconciliation Commission as well as a number of other processes in terms of reparations and memorialization.

Obviously, the transition to democracy and the rule of law took different paths in these countries as well as a plethora of others. Some societies were more effective than others in

addressing the abuses of the past, but we saw the emergence of a variety of approaches that have emerged out of these experiences. These approaches primarily included some variation of truth seeking processes, i.e., Truth Commissions or Commissions of Inquiry (there have now been more than 40 truth commissions), criminal prosecutions, reparations programs and reforms, including of the security sector but also of the judiciary and other parts of the government. These measures or mechanisms – truth, prosecutions/criminal justice, reparations and institutional reforms - have often referred to as the "four pillars" of transitional justice, but I fear that in many ways this otherwise useful analytical formulation has engendered a much less admirable formulaic approach in some instances. Thus, in the hands of some the four pillars approach has become a kind of "check the box" approach that is formulaic or "paint by numbers" in nature, whereas transitional justice is anything but formulaic – it needs to be responsive to the local conditions and situation. In particular, these processes are driven by active social forces (by this I mean not just civil society as is normally formulated, e.g., victims groups, human rights activists, but also unions [in Tunisia, for example], religious groups [the church in Latin America and Eastern Europe] and other social groupings in that society).

If I look at the situations where we are called to work in and societies that seek ICTJ's help, very few of them today fit the classic transitional paradigm of moving from authoritarianism to democracy. Tunisia in a number of ways fits into that category. It is undergoing a tumultuous transition from dictatorship to democracy that is employing a number of transitional justice measures, including a landmark Truth and Dignity Commission, a specialized Human Rights Chambers in its court system and examining reparations and various reforms. In Colombia where there are historic peace negotiations occurring in Havana between the Colombian government and the FARC guerrillas, a number of transitional justice measures are on the table, including a

truth commission, prosecutions (who is going to be prosecuted is a critical question), reparations and reforms. I was in Colombia a few weeks ago with Kofi Annan to launch our organizations' joint study on truth commissions coming out of peace processes, and the question of transitional justice – and what it means - is on everyone's lips. Indeed, we had 800 attend our conference and Colombian President Santos gave a long speech on the important role that transitional justice will play in the process.

However, if I look at the other countries we are engaged in and indeed look across the world, I see very different situations where there is a partial transition or an on-going conflict, as in the DRC, or a simmering stalemate, as in Lebanon. In a number of cases, our supporters are asking us to provide assistance – that is our comparative experience in transitional justice situations – in failed states, in the midst of conflict (e.g., Syria) or where there is no transition (e.g., Uganda) or where there is little political will (e.g., Sudan, Kenya). I would underline that I do think that transitional justice has a role in these contexts, but it is indeed a different one than it has had historically. Moreover, we have to be very careful to not allow transitional justice to be instrumentalized for nefarious purposes, such as impunity or the use of amnesties for serious crimes.

I would also point out that one element of these new demands or requests is that we are being asked to help in situations where there are very weak or nonexistent institutions. If we think about Latin American states or Eastern European countries, they had strong institutions, too strong in many cases, so the effort was to reform or reconstruct those institutions so that they would be accountable in the future, respect human rights and follow the rule of law. This is radically different from countries where they have very weak or non-existent institutions. I think that transitional justice approaches are relevant to these societies, but in a different and much

longer term way, and those carrying the banner of justice must work much more closely with other actors, in, e.g., the development, rule of law communities.

So, those are some words on the subject I was originally asked to speak on, but I thought there is a more fundamental question that deserves attention. In my view, at the heart of transitional justice is the fight against impunity, for fundamentally transitional justice is very much about accountability and is in line with Nunca Más; that is to ensure that in the society where human rights abuses occurred, these violations will be addressed with a view to ensuring that human rights will be respected and protected in the future. It does seem to me for that for that to happen or at least to make recurrence less likely and to build a society that respects human rights, impunity cannot reign.

I would stress at the outset that by framing this struggle in terms of accountability and the fight against impunity, this does not imply that I am primarily focusing on criminal justice. Obviously, criminal justice is an important element in the fight against impunity, but so is truth – one could argue that it is even more crucial – and the same could be said for reparations, which address the victims' suffering losses most directly. Moreover, reforms, not just of the security sector but also of the institutions of the state, including the courts and the constitution, are important. In particular, I would note that ensuring justice for marginalized groups, particularly women who often suffer sexual violence as well as discrimination, indigenous groups and sexual minorities, is a key element in ensuring that impunity is fought. Also, the special needs and situations of children, and here I think of the child solider phenomenon in particular, must be given special attention.

All of these measures or approaches are important, they make accountability real and get at different underlying issues.

If we look at the fight against impunity, there is much to be concerned about and thus much to worry about in our field, that after quite imperfect but tangible progress in the fight against impunity from the time of Nunca Más up until September 11th or thereabouts, we are now going backwards in important respects. Call it what you will – when I published my article on this subject in Project Syndicate, they entitled the piece "Wrong Turn for Human Rights." As I speak, atrocities are mounting in South Sudan and the Central African Republic, which are also being swept by an epidemic of sexual violence. We have witnessed horrific atrocities by Boko Haram, with only a token response by the national authorities or international community. The bloody handiwork of ISIL/S is grabbing headlines, and there seems to be no coherent strategy to address its barbarity.

The Syria conflict rages month after merciless month, with untold civilian casualties as a divided UN Security Council sits on the sidelines, in a chilling reminiscence of Rwanda's recent history. Gaza is struggling to recover after its umpteenth destruction. Eastern Ukraine is rocked by daily attacks on civilian targets, and very few seem to remember the outrageous downing of a civilian airplane there, in which 295 people died.

If we look here at the United States, we see that three months after the publication of the US Senate Intelligence Committee's partial but damning report on the CIA's Detention and Interrogation Program, not a word has been said about bringing the perpetrators of torture to justice, much less bringing redress to their victims.

This somber list could go on and on.

What I find most disturbing – perhaps the better word is disgusting - is the fact that thirty years after Argentina's Never Again and more than a decade after the establishment of the International Criminal Court, shockingly little is being done to stop these abuses. Perhaps

even more importantly, in the face of these atrocities, impunity reigns. Moreover, the prospects of the victims ever getting justice, let alone bringing the perpetrators to account, seem ever more remote.

The response by the international community to these horrors has been one primarily of lip service and well-worn shibboleths. Indeed, powerful states often seem to be casting support to whichever group of killers best suits their interests, with only faint rhetorical nods to human rights.

I express these concerns not only professional but personally. I joined the United Nations in 1993 to work on issues in Palestine and started my new job on the very day the Oslo Accords were signed, marvelling both at the apparent breakthrough and my seeming good fortune to be part of an era of peace-building.

Several years later I joined the International Criminal Tribunal for the former Yugoslavia and later sat across a jail cell desk from one of the principal architects of the Balkan tragedy, Slobodan Milosevic, whose prevarications were then being made from behind bars, far from the halls of power.

In 1998, I was in Rome for negotiations on the International Criminal Court; I was both awe-inspired by the apparent flowering of international justice and a bit nervous that the world perhaps did not understand fully the implications of such a groundbreaking step.

Thus, like other human rights activists and supporters of this generation, I was a witness to some key moments – sometimes from afar and sometimes up close, beginning with Nunca Más and followed by the 1990s, a decade in which there was an upswing across the planet in responding to massive human rights abuses. It was hardly enough. One need only recall the agony in the Balkans, the genocide in Rwanda, and many other abuses. Nonetheless, while the

international community may have responded in agonizingly slow manner (just ask General Delaire or the dead of Srebrenica), but at least there were some responses in some situations.

We saw the establishment of UN-backed courts and tribunals in the former Yugoslavia, Rwanda, Sierra Leone, and Cambodia. A decade before, the establishment of these tribunals would have been unthinkable. The ICC, with jurisdiction over atrocities committed in 123 member states, was established to try cases referred to it by state parties or the Security Council, and opened its doors in 2002. For the first time, an international court was established with wide jurisdiction to prosecute those responsible for war crimes, crimes against humanity, genocide, and perhaps in the future, for the crime of aggression.

Even a darling of great powers, former Chilean dictator, Augusto Pinochet, was arrested in 1998 in London for violating the Torture Convention and other abuses, thus tearing at the edifice of head of state immunity.

On the national level, some 10 truth commissions were established in that decade across every geographical region as well as other important initiatives, including reparations programs, national prosecutions and other reforms, providing a measure of justice to victims and accountability for some of the worst perpetrators.

I would be the first to say that these responses were fitful and erratic and that they were far from perfect. In fact, the Nunca Más report and the Junta trials were later followed by the Full Stop Act, the Due Obedience Act, and Menem's pardons in 1989, all of which blocked Argentina's struggle for accountability for years; three permanent members of the UN Security Council – the United States, Russia, and China – have not ratified or acceded to the Rome Statute; Pinochet returned to Chile and died before being convicted of any crimes. Even the International Criminal Tribunal for the former Yugoslavia, where I spent a considerable part of

my career, which had an impressive record at least until recently, prosecuted 121 individuals while national courts also prosecuted hundreds more, but these numbers pale in comparison to the estimated 10,000 estimated perpetrators in Bosnia-Herzegovina alone.

Nonetheless, these and other efforts did begin to close the impunity gap, and they also gave victims a voice and recognized their suffering, while signaling to culprits that their crimes will not be forgotten. These efforts have also deeply affected, and in some cases transformed, public discourse for the better.

I think it's fair to say that not so long ago, the moral arc of our universe, in the words of the Rev. Martin Luther King, Jr., seemed, perhaps ever so slowly, to be "bending towards justice."

I am afraid that we cannot say that today. Instead, we seem to be going, in too many instances, in the other direction: towards silence, amnesia, and impunity.

Not to put too fine a point on my argument, but it does seem that the international community appears to be backsliding on its human-rights commitments. The world's emerging powers lack any sense of urgency in addressing the ongoing abuses, preferring the pursuit of narrower, short-term interests to investing in long-term peace and justice.

Now, to be fair, I would admit that my argument is a work of advocacy and that there are other different and perhaps more nuanced views on this critically important subject.

Some may argue that if we adopt a long-term perspective, our time is one which is gradually but consistently moving towards justice. Yes, there may be setbacks but the big picture of the 20th century, when compared to the 19th or 18th century, is that we are moving towards accountability for massive human rights violations.

Some voices may posit that the fight against impunity is not the right lens to examine the question posed and that, instead, economic, social, and cultural rights should come to the fore and progress on human rights should be measured in these terms.

Others may say that the focus of the argument is too narrowly construed or that it does not take into account the advances made in recent years. Indeed, as I mentioned earlier the rollback has not been across the board and there are some bright spots out there. I have already mentioned Colombia and perhaps Tunisia (the recent killings are very worrying) and there are other indicators that are more positive, such as the successes indicated on the economic and development side as a result of the Millennium Development Goals that ultimately may rebound in favor of accountability efforts. Moreover, there are other bright spots in the fight against impunity, such as the recent resumption of Operation Condor in Italy, and Argentina and Chile have been relentlessly working on bringing the perpetrators of crimes against humanity to justice.

I am afraid that I, however, find these as small victories against a background that looks distinctly negative compared to a decade ago. To take this argument further, a few weeks ago we held an online debate on ICTJ's website, precisely on this topic: 'Is the fight against impunity being abandoned?' We had a wide audience of some 100,000 readers and outstanding participants, including UN High Commissioner Zeid and Michael Ignatieff, who is one of the 'big thinkers' on human rights (and who, I might add, is more pessimistic than I am). Also participating were the Prosecutor of the ICC, Fatou Bensouda, former President of Open Society Foundation, Aryeh Neier, Kenyan activist Betty Murungi, and academic James Stewart (a leading expert on crimes relating to natural resources and the crime of pillage). While some pointed to the "glass being half full" as some advances have been made in the UN Human Rights

Council and other fronts, there was much concern expressed all around. What was more interesting to me is what might done to address what many feel to be a "wrong turn" for human rights.

Put simply, even if we all agree that advances were made during the 90's, the last decade has seen some disheartening setbacks that cry out to be addressed.

We cannot hardly be satisfied with many innocents being disappeared in Mexico, Nigerians being murdered with impunity by Boko Haram – I will just say the word "Syria" again - and prisoners have been tortured by our own intelligence agencies with no accountability in sight.

In an important sense in the field of transitional justice we are addressing the past for the future. By that I meant that when the Argentinean Truth Commission some thirty years ago cried out *Nunca Más*, it was looking to the future. The states gathered in Rome in 1998 echoed the same sentiment when they adopted the International Criminal Court treaty: they were also looking to the future. So in the 90's, when the ICTY and the ICTR issued their first judgments, and the ICC was established, we were once again looking at past atrocities while looking at the future and saying: never again. Never again will the international community stand by while mass murder is being committed. Never again will atrocities go by unaccounted for.

And here we are in 2015, in this august hall at Duke University, also looking towards the future and asking how the fight against impunity be reinvigorated.

Before we look to the future, it is perhaps useful to understand some of the forces that caused the "wrong turn" and then look at what might be done to begin to reverse the course. I will say that these are tentative ideas, some of which I draw from our on-line debate, so I look forward to your feedback, your comments and your (not too harsh) criticism.

Analytically, one can certainly argue that understanding the underlying causes of the apparent waning commitment to human rights is key to finding remedies as well as setting our sights on a better course. Some voices will probably point to the impact of the attacks on September 11th and its ensuing fallout, particularly in the approach of the United States and some of its allies, including the use of "extraordinary renditions," "black sites," torture, and other dark arts employed at detention facilities in Guantánamo Bay and Abu Ghraib. The alleged 'war on terror' has certainly switched the priorities of the international community, driving them away from accountability and towards an ill-conceived quest for 'security'. Obviously, the US-led invasion in Iraq has had many negative consequences as well. It broke the Western alliance, undermined the international rule of law and deeply damaged the US's reputation regarding respect for human rights and rule of law (much less competence, which is another issue). Moreover, it gave potency to the argument of Western hypocrisy.

A somewhat related phenomena is the rise of a more aggressive group of non-democratic states and their active disregard for human rights and this factor is increasingly prominent and should be taken into account. Thus, we see Putin's pawns committing acts of aggression and emboldened tyrants around the world.

I think we also must recognize that the disappointment and rather poor performance of the ICC is also a factor. The hopes were too high on a single court in The Hague with a complicated mandate to hang the entire responsibility for the fight against impunity. I think this reliance on the ICC as the principal factor in the fight against impunity to be misconceived on several counts. The Court was always intended as a court of last resort and to complement national courts and judicial systems. I think we have to be honest with ourselves that for the purposes of criminal accountability, this has to be primarily at the national level and that there is a very long

way to go in this regard. So, I say support the Court – indeed, I do strongly, if I look tired I was in The Hague yesterday chairing an extended discussion on how to sort out some of its issues.

To take the point a bit further, in light of the mass atrocities that are currently going on, many point to the very limited deterrent effect the ICC has had; a concern I certainly share.

Whatever our specific views, the critical question is: what is to be done so that 'Never Again' starts becoming more the norm and less of the exception?

I think that we must first be honest with ourselves and acknowledge that the primary energy and innovation for taking the fight against impunity forward must be at the national level, led by active social forces. The Inter-American Court of Human Rights has been advancing precisely in the direction of accountability at the domestic level, ordering national courts to prosecute the perpetrators of state-sponsored atrocities. This stance has had profound effects in Latin America. Judgments handed down in cases like *Velasquez Rodríguez*; *Gelman*; *Almonacid Arellano*, and *Barrios Altos* have been major benchmarks in the fight against amnesties and impunity.

Therefore, the first step in the process of winning the battle against impunity is to make clear that the fight against impunity is not seen as only about the ICC and, more generally, not only about criminal justice.

We must be aware that the focus on the ICC is too narrow a lens to view the fight against impunity. The Rome Statute itself makes clear that the ICC is intended to be a court of last and very limited resort. Even an efficient ICC will be able to deal only with a handful of cases from a given situation.

So, I put this on the table: let's be clear that the fight against impunity is not limited to the ICC and that if the ICC stumbles, the fight against impunity is somehow imperiled as well. As important as the ICC is, the fight against impunity remains primarily about national processes.

Thus, if we are serious about criminal accountability, the complementarity principle must develop real teeth. At this stage we see a great deal of lip service paid to this idea but virtually no action aside of from some South American examples, like Chile, Peru and Argentina. National governments, at best, wave complementarity as a proverbial flag to cover their own intended inaction: one can point to a number of countries, ranging from Kenya to Uganda and beyond; and also, by analogy, recall what happened or did not happen in Indonesia and its promise to prosecute those responsible for the crimes committed in East Timor during the scorched earth campaign in 1999.

Moreover, donor countries are neither willing to expend either the political capital nor provide the necessary investments to make national prosecutions a reality. I fear that the principle of complementarity is in danger of becoming a charade.

More fundamentally, in my view we need to reframe the fight against impunity to take into account the centrality of victims, and the best ways to create stable democratic institutions and enduring peace. Otherwise, we leave many victims out of the justice equation, and the fight against impunity becomes a very narrow struggle with the forces of human rights leaving important tools on the sidelines, including the rights to truth, the right to a remedy and reparations.

There is a case to be made, of course, that the criminal justice system should be broadened in its scope so that corporations are held liable for their part in the perpetration of atrocities, particularly as they relate to exploitation of natural resources and pillage. There is no doubt that we urgently need to address this impunity gap. However, even if and when we broaden the scope of criminal justice, we must remember that in cases of mass atrocities, only a limited

number of perpetrators will be brought to the bar of justice. Criminal law is not capable of dealing with radical evil by itself: the fight against impunity cannot be fought only in courts.

Thus, other approaches and measures have evolved to address, in particular, the needs of victims, including reparations programs, which seek to recognize and acknowledge materially and/or symbolically the injuries that victims have suffered. I do not think I can stress enough the importance of acknowledging victims, their suffering, their heroic struggle, and the fact that they have been wronged.

Therefore, as much as criminal prosecution is an essential step in the fight against impunity, it should never be the only one. Rule of law building, reparation measures, serious guarantees of non-recurrence and, of course, truth commissions are tools that have worked on the national level. How they are used and/or sequenced will depend on the conditions on the ground and to national actors.

Needless to say, truth commissions have played an important role in many contexts to uncover facts, identify root causes of human rights abuses, propose critical reforms, and in some contexts, award reparations and/or uncover important evidence for criminal investigation and trials. Moreover, they can transform our understanding of past violence by putting the emphasis on the victims.

Reforms can also play a key role in fighting impunity, by ensuring that institutions, including the courts, the police, the military and other authorities, do not commit abuses again and become part of a democratic government based on the rule of law.

Finally, there are particular measures that can be taken that do not call for major expenditures of funds, such as the annulment of sentences handed down against victims of human right violations on trumped up charges; the removal of symbols and monuments that glorify

perpetrators of atrocities or their regimes (think here of Spain and its willed amnesia); and public apologies by the relevant institutions, among others.

While every situation is context-driven, I would argue that ensuring accountability, acknowledgement, and reform on the national level are generally at least as important as often-symbolic prosecutions at the international level.

Another key element in re-thinking the fight against impunity is that we need to bring together the intertwining elements of transitional theory and practice into better alignment. By this I mean that we seek two broad aims in transitional justice. On one hand, we are seeking a consolidation of peace and/or democracy and on the other focusing on addressing human rights violations through accountability to help re-establish the social contract between the citizen and the state and restore civic trust. I would argue that these two propositions are complementary: they combine the essential elements of human rights and justice in the context of political and social change.

In this regard, it is clear that impunity cannot somehow be the "price to pay" for political stability. It is difficult to sustain peace on the basis of a willed amnesia about the past or a renunciation of accountability. Challenging these assumptions might mean initiating a bitter public discussion among political actors, but long-term stability is more likely to be ensured on the basis of respect for human rights and addressing the past. If we approach the argument – this ongoing debate about peace and justice - to advance the demands of justice depends on the possibility to extricate the discussion from the political merry-go-round and frame it in terms of the legal rights and obligations arising from universal principles of human rights, we are, in my view, more likely to have peace and justice on the long-term.

I want to take a moment to approach this subject on a more personal note, on a subject much closer to home. We often think of human rights abuses or of dealing with historical injustices as something far from home, that happen elsewhere, across the Atlantic or in developing countries. We often think about dealing with the past as only in nations that are moving away from authoritarian regimes and into the path of democratization. Although our primary focus at ICTJ is on counties who have experienced massive human rights in the context of repression or armed conflict, many societies which are now more peaceful states and operate at one level or another with the rule of law have human rights abuses both past and present.

If we think about the United States for a moment: there is also a lot to answer for, and I'm not only referring to the recent report on torture.

As a North Carolinian whose primary school was racially segregated, I am often struck by the failure to address the history of slavery and segregation, the deepest and gravest human rights abuses committed in the United States. For example, in Washington, DC, there are museums or memorials to virtually every war, cause, and prominent statesperson – including many slaveholders – but very little about slavery or its millions and millions of victims. There is a Holocaust Museum (and a good one, nothing against that) for horrors which happened in Europe but not much dedicated to the horrors of slavery (this is now finally being rectified a bit by an addition to the Smithsonian). In addition, many other historical injustices still await an encompassing and profound official recognition, critical reflection, and response for the victims: the violation of the rights of people of Japanese descent who were interred in camps in the United States during World War II, which has only been partially addressed, is particularly relevant in this regard.

I cannot help but think that our willed amnesia about the past is partly to blame for what has recently happened in Ferguson.

The United States is hardly alone. I was in Spain this summer and the crimes and abuses of the Spanish Civil War and Franco's dictatorship cry out to be addressed. The same can be said of Australia (or the US for that matter) regarding past treatment of indigenous peoples, to give just a few examples.

In closing, I want to say a few words on how we take this fight against impunity forward and find the energy to reinvigorate the fight. This is my first speech about the topic since the end of our on-line debate, so my thoughts are no doubt somewhat tentative, so I am sure your questions and comments will sharpen them up.

The question is then what to do next? I think that we must first acknowledge that the primary energy for taking the fight against impunity forward must be at the national level, led by active social forces at that national level. To this end, Aryeh Neier made an interesting proposal in our debate. He suggested that civil society actors and key governments work towards a new Rome conference for the 20th anniversary of the adoption of the Rome Statute. Moreover, he suggested that this be preceded by national and regional gatherings of civil society. He has suggested that these meetings should look seriously at innovations. In the 1980's and 1990's justice proponents exhibited a great deal of innovation in terms of accountability, including the ad hoc tribunals, the concept and use of truth commissions on a widespread scale, the Rome Statute itself, regional courts grew much stronger and a civil society groups at both the national and international levels grew much more sophisticated. Neier suggested that there are a number of ideas to look at: more ad hoc tribunals, the use of in absentia trials, etc.

This kind of energy and innovation are critically needed. I do think that energy and innovation is likely to come from active social forces on the national level. One thinks of groups like Argentina's Mothers of Plaza de Mayo and the Bosnia's Mothers of Srebrenica who have always bravely led the way; they will, no doubt, continue to do so. While international civil society has a role to play, I think the ownership and ideas need to come principally from the societies grappling with the issues. They have the credibility and the on-the-ground knowledge. So, we are thinking about how we might support that process. Obviously, ICTJ is a small NGO, so we can probably be no more than a catalyst and that has been our intention in the debate. Nonetheless, it is important for the debate to move towards generating ideas to deal with this very real issue and put more ideas on the table – to truly innovate.

Contributors

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Footnotes for González Cueva and Merchant papers follow: