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PART I

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1

Truth Commissions

INTRODUCTION

It is common today for countries emerging from periods of conflict or repression to consider the possibility of establishing a truth commission. In such contexts the near impossibility of mounting prosecutions on a large scale makes consideration of such commissions almost inevitable. It is for this and other reasons that truth commissions form an integral part of the broader topic of transitional justice, which is the focus of the first part of this chapter.

Despite the apparent popularity of truth commissions, their nature often remains obscure to lawmakers and laypersons alike. There is, for example, a continuing tendency to assume that all truth commissions look and function like the South African Truth and Reconciliation Commission. The second part of this chapter will address such fallacies, provide a definition of truth commissions, and canvass the actual diversity of truth commission models.

Since truth commissions are but one form of human rights investigation, and not always the most appropriate one, it is important to understand what distinguishes them from other forms of national and international human rights investigation. To that end, the third part of this chapter will posit a taxonomy of human rights investigation and attempt to situate truth commissions within it.

The chapter will conclude by distinguishing truth commissions from courts. Truth commissions, at times seen as substitutes for criminal justice, naturally elicit controversy. This book challenges the notion of truth commissions as

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surrogates for criminal justice, and also seeks to explain the distinct, yet complementary, roles that truth commissions and courts can play in achieving the broader objectives of transitional justice.

SECTION 1: OVERVIEW OF TRANSITIONAL JUSTICE

It would be injudicious to examine the subject of truth commissions in isolation from the broader subject of transitional justice. Indeed, one of their characteristics is that truth commissions are usually established during periods of political or postconflict transition. This fact is best explained by an analysis of the justice-related challenges that attend such transitions.

The term "transitional justice" is of recent origin. In the past two decades, a veritable cottage industry of literature has developed on the subject.[1] In general, transitional justice concerns how states in transition from war to peace or from authoritarian rule to democracy address their particular legacies of mass abuse.[2] Like the broader topic of human rights, of which it forms part, transitional justice is a multidisciplinary field of study and practice that encompasses aspects of law, policy, ethics, and social science.

The field of transitional justice arose as a result of many global developments, including the events and aftermath of the Second World War – which saw major war crimes trials, massive reparation programs, and widespread purges – as well as transitions out of war in places ranging from El Salvador to the former Yugoslavia to Sierra Leone. The development of transitional justice was also prompted by transitions (or returns) to democracy in Southern Europe

1 *See, e.g.,* Aspen Institute, *State Crimes. Punishment or Pardon: Papers and Reports of the Conference, November 4–6, 1988, Wye Centre, Maryland* (Queenstown, MD: Aspen Institute, 1989); B. Ackerman, *The Future of Liberal Revolution* (New Haven: Yale University Press, 1992); N. Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, 3 vols. (Washington, DC: US Institute for Peace Press, 1995); N. Roht-Arriaza, ed., *Impunity and Human Rights in International Law and Practice* (New York: Oxford University Press, 1995); A. McAdams, ed., *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame, IN: University of Notre Dame Press, 1997); R. Rotberg and D. Thompson, eds., *Truth v. Justice* (Princeton, NJ: Princeton University Press, 2000); R. Teitel, *Transitional Justice* (New York: Oxford University Press, 2002); A. Henkin, ed., *The Legacy of Abuse* (New York: Aspen Institute and NYU School of Law, 2002); M. C. Bassiouni, ed., *Post-Conflict Justice* (Ardsley, NY: Transnational, 2002); R. Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Malden, MA: Polity, 2002); J. Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004).

2 These are the standard categories of transition. In fact, there are many other "transitional" contexts that do not fit neatly into either category, but to which the methodology of transitional justice applies. These include, for example, more subtle transitions from a democracy in which human rights are weakly observed to one in which they are more effectively observed.

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in the 1970s, Latin America in the 1980s, and Africa, Asia, and Central and Eastern Europe in the 1990s and beyond.[3]

On one level, there is little that unites any single transitional context to another; the differences are greater than the similarities. Sometimes the transition is quick and relatively unconstrained (*e.g.,* Greece's return to democratic rule in the 1970s), other times it is slower and more constrained (*e.g.,* the return to democratic rule in Chile in the 1990s). Sometimes the United Nations is deeply involved (*e.g.,* in negotiating the end of civil war in Guatemala), other times not (*e.g.,* the return to multiparty democracy in Ghana in the 1990s). Sometimes the transition is catalyzed by foreign intervention (*e.g.,* Afghanistan), other times by internal armed rebellion (*e.g.,* South Africa), by scandal (*e.g.,* Peru), or by general elections (*e.g.,* Serbia and Montenegro). Sometimes the scale of violations is massive (*e.g.,* Cambodia), other times less so (*e.g.,* Panama). In some instances, the worst violations occurred long before the transition (*e.g.,* Spain); in other cases, they have continued right up until the moment of transition (*e.g.,* Timor-Leste). Sometimes state actors have committed the bulk of violations (*e.g.,* El Salvador); other times it has been nonstate actors (*e.g.,* Sierra Leone); and at times responsibility has also been shared more or less equally by state and nonstate actors (*e.g.,* Mozambique).

Despite these and other differences, there is one feature that unites all these contexts: the legacy of widespread violence and repression. It is this feature that led to the development of the field of transitional justice. In many of these countries the ordinary tools of justice – primarily, the courts – were simply not up to the task of meting out a form of justice commensurate with the scale of violations committed. The contexts demanded other tools, other responses, other mechanisms.

Truth commissions constitute one such response or mechanism. Transitional justice is not, however, synonomous with truth commissions; truth commissions are but one component of the field of transitional justice.

In theory and in practice, transitional justice focuses on four main mechanisms:

1. *Trials* – whether civil or criminal, national or international, domestic or foreign
2. *Fact-finding bodies* – whether truth commissions or other similar national or international investigative bodies

3 *See, e.g.,* G. O'Donnell and P. Schmitter, eds., *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Baltimore: Johns Hopkins University Press, 1986); S. P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991); J. Linz and A. Stepan, *Problems of Democratic Transition and Consolidation* (Baltimore: Johns Hopkins University Press, 1996).

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3. *Reparations* – whether compensatory, symbolic, restitutionary, or rehabilitative in nature
4. *Justice reforms* – including legal and constitutional reforms, and the removal of abusers from public positions through vetting or lustration procedures

Transitional justice also intersects with other subjects such as amnesty, reconciliation, and the preservation of memory, as well as democratization and peacebuilding.[4]

The four main mechanisms of transitional justice closely correspond to state obligations under international human rights law. Trials are a means by which states implement their obligation to investigate and punish perpetrators of serious human rights violations. Fact-finding bodies such as truth commissions are a means by which states implement their obligation to investigate and identify perpetrators of serious human rights violations and their victims. Reparations are a means by which states implement their obligation to provide restitution and compensation for serious human rights violations. And justice reforms are a means by which states implement their obligation to take effective measures to prevent future serious human rights violations.

Each of these obligations corresponds, in turn, to an individual right. The obligation to investigate, prosecute, and punish serious human rights violations corresponds to the right to justice (or the right to an effective remedy); the obligation to investigate and identify victims and perpetrators of serious human rights violations corresponds to the right to truth (or the right to know); the obligation to provide restitution and compensation for serious human rights violations corresponds to the right to reparation; and the obligation to prevent serious human rights violations corresponds to the right to guarantees of nonrepetition.[5]

The right to truth, which is of primary interest in this book, has been interpreted very broadly, if erratically, by domestic and regional courts and multilateral human rights supervisory organs. The right – affirmed in 2005 in

4 For example, the themes and mechanisms of transitional justice form part of the mandate of the proposed UN Peacebuilding Commission. *See* World Summit Outcome: Final Document, GA res. 60/1 (2005), paras. 97 and 98.

5 For a review of most of these obligations and their corresponding rights, *see* L. Joinet, "Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity," UN doc. E/CN.4/Sub.2/1997/20/Rev. 1 (1997) [Joinet Principles], which was updated in 2005 by UN expert D. Orentlicher, "Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity," UN doc. E/CN.4/2005/102/Add.1; and "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law," annexed to GA res. A/C.3/60/L.24 [Bassiouni Principles].

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an unprecedented resolution of the UN Commission on Human Rights[6] and in the draft International Convention for the Protection of All Persons from Enforced Disappearance[7] – has been found to encompass an individual's right to have serious human rights violations effectively investigated by the state,[8] to be informed of the fate of missing or forcibly disappeared relatives,[9] to be kept informed of the state of official investigations into disappearances and other serious violations,[10] to be provided with the "mortal remains" of loved ones once they have been located,[11] and to know the identity of those responsible for the violations.[12] It has also been found to include a societal right to know

6 Resolution 2005/66, "Right to the Truth." The resolution was adopted without a vote. The resolution calls upon the Office of the UN High Commissioner for Human Rights "to prepare a study on the right to the truth, including information on the basis, scope and content of the right under international law, as well as best practices and recommendations for effective implementation of this right . . ."

7 UN doc. E/CN.4/2005/WG.22/WP.1/REV.4 (23 September 2005), article 24(2): "Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate steps in this regard." In addition, the preamble affirms "the right to know the truth about circumstances of an enforced disappearance and the fate of the disappeared person, and the respect of the right to freedom to seek, receive and impart information to this end."

8 *See, e.g., McCann and others v. United Kingdom*, 18984/91 [1995] European Court of Human Rights (27 September 1995), at para. 161; *Laureano v. Peru*, UN Human Rights Committee, UN doc. CCPR/C/56/D/540/1993 (1996), at para. 8.3; *Rodriguez v. Uruguay*, UN Human Rights Committee, UN doc. CCPR/C/51/D/322/1988 (1994), at para. 12.3.

9 *See, e.g., Quinteros Almeida v. Uruguay*, UN Human Rights Committee, Communication no. 107/1981 (2003); *Bámaca Velásquez v. Guatemala*, Inter-American Court of Human Rights, vol. 70, Series C, paras. 159–66 (25 November 2000); the *Srebrenica* cases, Human Rights Chamber (BiH), Cases Nos. CH/01/8365 *et al.*, Decision on Admissibility and Merits (7 March 2003), at paras. 191 and 220 (4). Article 3 of the Inter-American Convention on Forced Disappearance of Persons 1994, (1994) 33 ILM 1429, provides that the offense of forced disappearance "shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined." Article 32 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1977, 1125 UNTS 3, provides for "the right of families to know the fate of their relatives." *See also* art. 33, which requires parties to international conflicts to search for missing persons. *See also* Principle 16(1) of the Guiding Principles on Internal Displacement, UN doc. E/CN.4/1998/53/Add.2.

10 *See, e.g.,* the *Del Caracazo* case, Inter-American Court of Human Rights, vol. 95, Series C (Reparations) (2002), at para. 118; *Kurt v. Turkey*, 24276/94 [1998] European Court of Human Rights 44 (25 May 1998), at para. 140.

11 *See, e.g., Bámaca Velásquez* case, Inter-American Court of Human Rights, vol. 91, Series C (Reparations), para. 79 (22 February 2002). *See also Law on Missing Persons*, Bosnia and Herzegovina, Official Gazette 50/04, art. 3.

12 *See, e.g., Ellacuría and others v. El Salvador*, Inter-American Commission of Human Rights, Case 10.488, OEA/ser.L/V/II.106 (1999), at para. 221.

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the full truth concerning serious violations, both for its own sake and to avoid the future recurrence of such violations.[13] Violations of the right to know have been deemed, among other things, violations of the prohibition on torture,[14] the right to respect for private and family life,[15] the right to life,[16] the right to an effective remedy,[17] and the right to reparation.[18] Like most human rights, however, the right to truth is probably not absolute. It may be subject to limitations in the broader public interest.[19]

The Inter-American Court of Human Rights articulated the first truly comprehensive statement of a state's human rights obligations in the landmark case of *Velásquez Rodríguez v. Honduras*.[20] The case dealt with a Honduran student who was apparently detained without warrant, tortured by police, and ultimately forcibly disappeared. In a unanimous judgment, the court found Honduras in violation of several articles of the American Convention on Human Rights 1969 (ACHR),[21] and directed it to pay fair compensation to Velásquez's next-of-kin.

The Court grounded its judgment in an analysis of ACHR article 1(1), by which states parties to the convention "undertake to respect the [ACHR's]

13 *See, e.g., Ellacuría*, above note 12, at paras. 223 and 226; *Romero v. El Salvador*, Inter-American Court of Human Rights, Case 11.481, OEA/ser.L/V/II.106 (2000), at para. 144 ("The right to the truth is a collective right that enables society to have access to information essential to the development of democracies."); the *Srebrenica* cases nos. CH/01/8365 *et al.*, above note 9, para. 212. The societal right to truth is also linked to the right of access to information. *See* T. M. Antkowiak, "Truth as Right and Remedy in International Human Rights Experience" (2002) 23 *Mich. J. Int'l. L.* 977, at 994. *See also* Orentlicher, "Updated Set of Principles," above note 5, Principles 2 ("The Inalienable Right to the Truth") and 3 ("The Duty to Preserve Memory").

14 *See, e.g., Cyprus v. Turkey*, 25781/94 [2001] European Court of Human Rights 327 (10 May 2001), at paras. 157–8; the *Srebrenica* cases, above note 9, at paras. 191 and 220 (4).

15 *See, e.g., Srebrenica* cases, above note 9, at paras. 181 and 220 (3). *See also* UN docs. E/CN.4/1435 and E/CN.4/1983/14, para. 134.

16 *See, e.g., Cyprus v. Turkey*, above note 14, at para. 136.

17 *See, e.g., Parada Cea et al. v. El Salvador* (case 10.480), Inter-American Commission on Human Rights, report no. 1/99, at para. 152; *Aksoy v. Turkey*, 26 European Court of Human Rights 2260 (1996), at 2287; and *Mentes et al. v. Turkey*, 59 European Court of Human Rights 2689 (1997), at 2716. *See also* the African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS (XXX) 247, Principle C.

18 *See, e.g., Monsignor Oscar Arnulfo Romero y Galdámez v. El Salvador* (case 11.481), Inter-American Commission on Human Rights, report no. 37/00, paras. 147–8; *Myrna Mack Chang* case, Inter-American Court of Human Rights, vol. 101, Series C, paras. 274–5 (23 November 2003).

19 On such limitations generally, *see* M. Freeman and G. van Ert, *International Human Rights Law* (Toronto: Irwin Law, 2004), at 33–5. The right to truth could also conflict with other human rights, including privacy and reputation rights. *See* Chapter 2, Section 1.

20 (1988) I/A Court HR Series C no. 4 [*Velásquez Rodríguez*].

21 OAS TS no. 36.

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rights and freedoms" and "ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms" without discrimination. Its most important holding for present purposes was the following:

> The state has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.

The essence of *Velásquez Rodríguez*, implicit in the main UN and regional human rights treaties, has been affirmed, *inter alia*, in the Joinet Principles[22] and the Bassiouni Principles.[23] Though nonbinding, these Principles probably constitute the most comprehensive and widely accepted description of a state's human rights obligations and an individual's human rights.[24]

The field of transitional justice is conceptually wedded to the broad approach to human rights articulated in *Velásquez Rodríguez* and affirmed in the Joinet and Bassiouni Principles. Transitional justice, in other words, includes – but extends well beyond – the realm of criminal justice. This is unsurprising, because in nearly all transitional contexts there is a virtual guarantee of "incomplete justice." There are many reasons for this. In transitional contexts there are often thousands of victims, as well as hundreds if not thousands of perpetrators. The abusive forces of the past often continue to wield some measure of political authority and military or police power. The administration of justice – from police to prosecutors to judges – is typically weak and frequently plagued by corruption. Transitional contexts are usually marked by widespread unemployment and scarce public resources too, making it difficult to meet or justify the costs associated with a program of retroactive justice.

22 *See* note 5 above. The Joinet Principles specify four rights: the "right to know," the "right to justice," the "right to reparations," and the right to "guarantees of non-recurrence" of violations.

23 *See* note 5 above. Principle 3 of the Bassiouni Principles provides: "The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, *inter alia*, the duty to: (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations; (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law; (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and (d) Provide effective remedies to victims, including reparation . . ."

24 *See* D. Orentlicher, "Promotion and Protection of Human Rights: Impunity," UN doc. E/CN.4/2004/88 (2004), at "Summary."

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Rising criminality is also a common feature of countries in transition, placing governments in the invidious position of having to confront massive numbers of past as well as present crimes. Key documents are often destroyed and crime scenes altered to conceal evidence. Witnesses may still fear the potential repercussions of testifying, even in the absence of persistent intimidation, and judges and prosecutors may face death threats. There are often legal obstacles to achieving justice as well, whether in the form of amnesty laws, lapsed prescription periods for prosecuting certain crimes, or lacunae in the reception of international norms into domestic law.

In the face of these myriad challenges, it is little wonder that societies in transition are breeding grounds for new models and broader conceptions of justice. At the same time, criminal justice retains an appropriately unique place in the range of responses to mass atrocity. In the last fifteen years alone, the world has witnessed the establishment of *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda, a permanent international criminal court in The Hague, and hybrid criminal tribunals in Kosovo, Sierra Leone, Timor-Leste, Bosnia-Herzegovina, and Cambodia. Alongside these developments, domestic prosecutors and judges have become increasingly important actors in the transitional justice arena in relation to international crimes committed both within and outside national borders.[25] In short, the importance of criminal trials remains unrivaled. No other mechanism is perceived to have a greater impact on specific and general deterrence, public confidence in the state's ability and willingness to enforce the law, and a victim's sense of justice.

Yet if criminal trials were alone sufficient, the field of transitional justice would never have emerged. The fact is that other responses, beyond criminal justice, are required. Justice systems simply are not designed to remedy violations committed on the massive scale typical of transitional contexts. Rather, justice systems are designed to handle crime as an exceptional occurrence.[26] The relatively slow pace, minimal victim participation, and weak rehabilitative or reconciliatory capacity that tend to be endemic to criminal prosecutions also limit the depth and reach of their impact, no matter the context. Accordingly, the recourse of transitional governments to complementary nonjudicial mechanisms such as truth commissions is natural.

25 *See* Section 4 below.

26 M. Freeman and P. van Zyl, "Conference Report," in Henkin, *The Legacy of Abuse*, at 5. *See also* A. Boraine, *A Country Unmasked* (Oxford: Oxford University Press, 2000), at 434: "In trying to come to terms with genocide, crimes against humanity, and other massive atrocities, not only does our moral discourse appear to reach its limit, but ordinary measures that usually apply in the field of criminal justice become inadequate. Abnormal atrocities demand abnormal measures."

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SECTION 2: OVERVIEW OF TRUTH COMMISSIONS

Despite its Orwellian name, the truth commission has become a preferred fixture of international law and politics alongside international and hybrid criminal tribunals. Particularly since the advent of South Africa's Truth and Reconciliation Commission (TRC) in the 1990s, it is difficult to conjure an example of a political or postconflict transition in which the idea of establishing a truth commission has been overlooked.[27] For the most part this is a good thing. The majority of truth commissions have done important work in their respective contexts. They have often rebutted the misrepresentations of the old order through investigation, public hearings, and detailed reports. Some have spurred significant national debates and helped push governments to take corrective and preventive actions in the areas of justice, reparation, and institutional reform. Many truth commissions have also contributed to a sense of "historical justice" on the part of victims and society when criminal justice was not a viable option.[28]

At the same time, some people's expectations of what a truth commission can achieve exceed the bounds of reason. There is often a sense that truth commissions can do magic: heal nations, reconcile victims and torturers, ensure the rule of law, and establish a culture of human rights.[29] It is also often imagined that truth commissions can help "refound" a broken polity,[30] or construct a kind of psychological bridge between a country's past and its future, without which the future remains volatile.[31] With expectations so high, it is little

27 This is not to suggest that truth commissions command universal appeal. Countries in the former Eastern Bloc of communist states did not (with the exception of Germany) establish truth commissions. This is often explained by factors such as the public distrust of official "truths" (after years under Soviet rule) and the fact that responsibility and victimization were spread across almost the entire population. *See, e.g.*, H. Steiner, ed., *Truth Commissions: A Comparative Assessment* (Cambridge, MA: Harvard Law School Human Rights Program, 1997), at 39–41. Also, "In cases where a clear victor emerges, no truth commission is established. The winners simply prosecute the losers. Truth commissions have been established in situations where there is no clear victor" (Jose Zalaquett, cited in *ibid.*, at 70).

28 *See* Teitel, *Transitional Justice*, at 81–92. Teitel distinguishes between criminal justice, historical justice, reparatory justice, administrative justice, and constitutional justice. Historical justice, in brief, refers to a perception on the part of victims and society that the worst crimes of the past have been adequately identified and acknowledged.

29 Such outcomes tend to be presumed, rather than tested in a serious manner. For a proposed research agenda to test some of the claimed benefits of truth telling, *see* P. de Greiff, "Truth-Telling and the Rule of Law," in T. A. Borer, ed., *Telling the Truths: Truth Telling and Peacebuilding in Post-Conflict Societies* (Notre Dame, IN: University of Notre Dame Press, 2005).

30 Jose Zalaquett, cited in Steiner, *Truth Commissions*, above note 27, at 30.

31 *See, e.g.*, the preamble to the *Promotion of National Unity and Reconciliation Act*, 1995 (South Africa), which created the South African TRC. It declares in part: "Since the Constitution of

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