

Truth Commissions

CAN COUNTRIES HEAL AFTER ATROCITIES?

After war and unspeakable violence, countries around the world face the challenge of moving forward while dealing with the past. But what should justice look like? From Bosnia to Burundi, from Argentina to Timor-Leste, millions of people around the world have been brutalized by genocide, torture, kidnappings and disappearances of loved ones — often at the hands of their own governments and countrymen. Today countries have a variety of legal options, known as transitional justice, including truth commissions — official panels that investigate atrocities and create authoritative records of past abuses. Truth-telling can foster social healing and reconciliation, supporters say, but early research suggests that results have been mixed. Other countries seek justice through international trials or tribunals. In the end, justice — however it is sought — seeks to expose the truth, protect human rights and pave a path to democracy.

Then-South African President Nelson Mandela (left) accepts the voluminous final report of the South African Truth and Reconciliation Commission from panel chairman Archbishop Desmond Tutu in 1998. The panel has become the gold standard of truth commissions for its ability to avoid violence and reunite South Africans after the fall of the apartheid regime.



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January 2010
Volume 4, Number 1

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CQ Global Researcher is published monthly online in PDF and HTML format by CQ Press, a division of SAGE Publications. Annual full-service electronic subscriptions start at \$500. For pricing, call 1-800-834-9020, ext. 1906. To purchase *CQ Global Researcher* electronic rights, visit www.cqpress.com or call 866-427-7737.

Truth Commissions

BY JINA MOORE

THE ISSUES

In Bomaru, a dusty Sierra Leonean village along the Liberian border, nearly 800 residents gathered in early 2008 for an unusual ceremony — one they hoped would help them come to terms with their past and each other.

Up to 50,000 people were killed during the country's decade-long civil war, 200,000 women were raped and tens of thousands of others were brutally maimed, including children, after rebels hacked off their hands or arms for refusing to join the cause. All told, the fighting displaced roughly 1 million people.¹

The Bomaru residents had come to participate in a ritual of reconciliation that included confessions by the perpetrators and forgiveness from the victims. After music and dancing, the villagers presented a gift to their ancestors to cleanse the village and bring back the harvests.

It wasn't Bomaru's first attempt at reconciliation. The Sierra Leone Truth and Reconciliation Commission had arrived years before to gather some of the 7,000 statements it would use to write a definitive history of the conflict, which started over control of the region's diamonds.² But the commission hadn't healed the village, elders said. Something more was needed.

During the 2008 reconciliation attempt, residents gathered to recall what had happened, but froze when a visiting American film crew moved in with its video cameras. The ceremony came to a halt. "They are afraid

that if they talk," one leader explained, "they will be prosecuted."³

Bomaru's concerns are echoed in countries around the world recovering from massive human rights abuses. The fear of prosecution often prevents "the truth" about past atrocities from emerging. And when there are thousands of perpetrators, some of whom remain powerful, it is difficult for victims to tell their stories and offenders to be brought to justice.

In the last three decades, several dozen countries — from Argentina to Zimbabwe — have chosen an innov-

ative answer: truth commissions. The panels are organized by national governments, usually with the help of the international community, to create official records of human rights abuses committed by past governments. The panels typically spend one to two years recording statements from thousands of victims and perpetrators, sometimes offering perpetrators immunity if they cooperate.

While the commissions uncover crimes, they are not trials: They do not corroborate facts, cross-examine witnesses or judge individual guilt like the 11 international tribunals — such as the famous Nuremberg trials after World War II — established in the past 100 years to investigate war crimes and other human rights abuses. Rather than indictments and verdicts, truth commissions issue final reports that function as official histories of what happened and offer a series of recommendations, often focused on reparations and on nurturing democracy, transparency and human rights.

A handful of commissions, however, have recommended certain individual prosecutions.

In some countries, most famously in South Africa, truth commissions are also asked to foster reconciliation. Such "truth and reconciliation commissions" usually recommend how the government can promote peaceful co-existence among formerly warring factions or even individuals.

"Truth commissions are supposed to reconcile what are seen as two big, conflicting goals for a society coming out of a dark period of war and



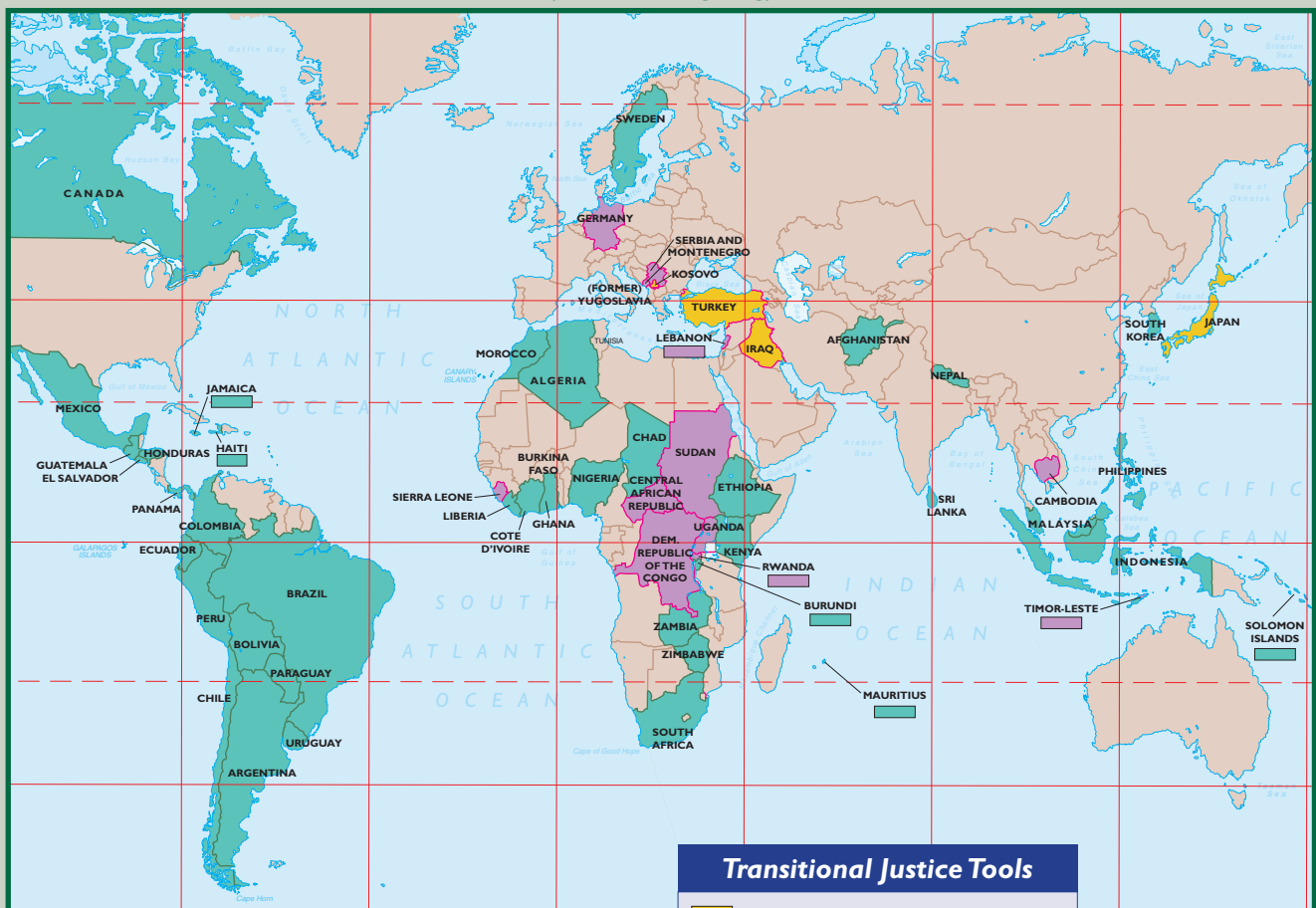
Survivors of Bosnian-Serb war crimes protest on Sept. 16, 2009, at U.N. headquarters in Sarajevo, the capital of Bosnia and Herzegovina. The demonstrators said the International Criminal Tribunal for the Former Yugoslavia in The Hague was not being tough enough on former Serbian leader Radovan Karadzic, who is charged with genocide, war crimes and crimes against humanity for his part in the four-year siege of Sarajevo and the 1995 massacre of 8,000 Muslim men in Srebrenica. Such tribunals can impose jail sentences and are an alternative to nonprosecutorial truth commissions.

AFP/Getty Images/Elvis Barukcic

Many Countries Seek Truth After Past Atrocities

Since 1976, at least 58 countries have set up truth commissions — nonjudicial panels that establish official records of human rights abuses by former regimes. Three commissions are currently operating or just getting organized: in Canada, Kenya and the Solomon Islands. The commissions are one method used by emerging democracies to obtain post-conflict “transitional justice.” Wartime crimes against humanity also have been prosecuted in 11 countries by international tribunals — ad hoc judicial bodies, usually established by the United Nations. The International Criminal Court (ICC), given universal jurisdiction over war crimes and crimes against humanity, is pursuing investigations in four countries: Sudan, Uganda, the Democratic Republic of the Congo and the Central African Republic. In November, the ICC prosecutor asked for permission to open a preliminary investigation into ethnic-based violence following Kenya’s 2007 election.

Major Truth Commissions or War Crimes Trials (Past or Ongoing)



Sources: International Criminal Court; United States Institute of Peace, Project on International Courts and Tribunals; Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*, United States Institute of Peace Press, forthcoming, Spring 2010

human rights violations — peace on the one hand and justice on the other,” says Martin Flaherty, a founder and di-

rector of the Leitner Center for International Law and Justice at Fordham Law School in New York City.

Those goals first clashed in Latin America in the 1980s, as countries emerging from abusive authoritarian

rule struggled to democratize. In Argentina, the first country to successfully hold a truth commission, the outgoing leaders of a brutal military dictatorship had granted themselves immunity from prosecution for their crimes before the commission was established. Challenging the amnesty law was impossible: The judiciary was too weak — and the people too cowed — to take on the junta.⁴

Instead, Argentina's new president launched a commission to gather testimony on the prior regime's behavior. In just nine months the panel interviewed more than 7,000 Argentines and documented nearly 9,000 stories of the "disappeared" — civilians who were kidnapped, tortured and murdered by the junta. In a country that had long suffered in fear and silence, the 1984 truth commission report, *Nunca Más* ("Never Again"), became an instant best seller.⁵

Truth commissions since then have emerged as a popular tool of "transitional justice" — a variety of legal options for countries coping with past human rights abuses. "A generation ago, there wasn't even a phrase," says Martha Minow, dean of Harvard University Law School and an expert on transitional justice. "Now, in places all over the world, you hear people saying, 'Maybe we should have a truth commission.'"

Truth commissions aren't the only option for societies recovering from rights abuses. In 2002, the world community set up a permanent global court in The Hague, Netherlands — the International Criminal Court (ICC) — to replace the ad hoc international tribunals, most of which had been mandated by the United Nations. The ICC — which prosecutes genocide, crimes against humanity and war crimes — has opened four investigations so far: in Sudan, Uganda, the Democratic Republic of the Congo and the Central African Republic.

Some countries use a hybrid approach to justice. Cambodia set up a

U.N.-backed national-international court in Phnom Penh, which in November concluded its first trial of a former Khmer Rouge official charged with mass murder during the notorious 1970s regime.⁶ A verdict is expected in March in that case. Meanwhile, genocide charges were filed on Dec. 18 against three other former Khmer Rouge officials, including president Khieu Samphan, the most senior Khmer Rouge leader in

commission, which focused on disappearances and arbitrary detentions over a 43-year period beginning in 1956. (See map, p. 4.)

Truth commissions often cast themselves in transformative terms. "We believe . . . that there is another kind of justice — a restorative justice, which is concerned not so much with punishment as with correcting imbalances, restoring broken relationships — with



Sudanese President Omar al-Bashir defiantly holds a rally on April 7, 2009, shortly after he was indicted for war crimes in Darfur by the International Criminal Court (ICC). The Sudanese president responded to his ICC arrest warrant by evicting 13 Western aid agencies — fueling criticism that internationally imposed justice can backfire, further harming the victims.

dicted in connection with the deaths of 1.7 million people during the 1975-79 "killing fields" reign of terror.⁷

But truth commissions have been far more popular than international trials or tribunals; they're cheaper and don't require as much international assistance. So far, nearly 60 truth commissions have been established around the world, mostly in Latin America and sub-Saharan Africa, though that's beginning to change.⁸ In 2002, Timor-Leste's truth commission reported on 30 years of violent and repressive Indonesian rule, and in 2004 Morocco opened the Arab world's first truth

healing, harmony and reconciliation," wrote Archbishop Desmond Tutu, chair of the South African Truth and Reconciliation Commission, in the panel's final report. "Such justice focuses on the experience of the victims."⁹

Sweeping goals aside, truth exercises are not unlike the commissions of inquiry common in Western democracies, such as the Warren Commission that investigated the Kennedy assassination or the 9/11 Commission. Like them, truth commissions are temporary bodies, official but independent, mandated to create an official record of the past.

Truth commissions, however, focus on patterns of abuse over time, not on single events, and they usually are established during moments of regime change, particularly during a country's transition to a democratic or open society.¹⁰

In fact, it is during such fragile transition periods that truth commissions are most needed — and, some say, most effective. Indeed, creating a public record of secret state crimes represents more than a historical exercise.

"In countries like Chile or Argentina, commissions have successfully made it impossible to deny that the crimes took place," says Eduardo Gonzalez, director of the truth and memory program at the International Center for Transitional Justice (ICTJ) in New York. Consequently, says Gonzalez, a Peruvian who served on the staff of his own country's commission, "truth commissions have been fundamental to cement allegiance to democracy and the rule of law."

But most truth commissions don't exist long enough to see that change blossom. Some succumb to infighting or political pressure before their terms expire. Others are followed by renewed violence, like the 1993 commission in Rwanda — where ethnic violence among Tutsis and Hutus erupted later, killing about 800,000 people.

And truth commissions face incredible financial and logistical hurdles. The panels need qualified commissioners — universally respected by all sides — to conduct the investigations. They also need money to travel across the country and take thousands of statements from victims and perpetrators and sustained political will to weather fatigue and controversy.¹¹

Still, truth commissions can be a pragmatic way for young states to handle large numbers of perpetrators. They also are lauded for giving voice to victims, which some say promotes psychosocial healing.¹²

There are, predictably, spoilers in the truth-telling process. Perpetrators often want to maintain their silence. In 1995, 46 percent of white South Africans called the just-established truth and reconciliation commission a "witch-hunt" designed to discredit the former apartheid government.¹³

In other countries, perpetrators often refuse to apologize for their crimes.

"I sleep good," said Prince Johnson, one of Liberia's most notorious warlords and now a senator, when he was investigated by Liberia's Truth and Reconciliation Commission. "I snore."¹⁴ When the panel recommended prosecuting him for war crimes, Johnson threatened to return to the bush and renew the country's civil war.¹⁵

Even victims themselves don't universally support truth-telling. Some don't believe that sharing their stories will lessen their pain or nudge their countrymen toward reconciliation. More than 90 percent of Rwandan genocide survivors thought the country's truth-telling mechanism would renew trauma; more than half thought truth-telling would make it difficult to live with the perpetrators.¹⁶

Other countries worry that focusing on the past will open old wounds. Yet the other option — doing nothing — may be equally problematic, say scholars and experts.

"People want acknowledgment. Before they can get on with their lives they need that acknowledgment," says Richard Goldstone, a renowned former South African judge and the former chief prosecutor of the international criminal tribunals for both Rwanda and the former Yugoslavia. "If they don't get it, then you get calls for revenge. That's how cycles of violence are born."

As governments, victims and human rights advocates try to heal the wounds of the past, here are some of the questions they are debating:

Do truth commissions produce accurate records of the past?

Truth commissions are designed to provide countries and their people with a single, official version of a controversial past, based on thousands of interviews. But experts say getting an official version of the truth is not always the same as getting an accurate picture of the past.

"They should be called 'fact and fiction commissions,' or 'some-of-the-truth commissions,'" quipped a long-time observer of truth commissions.¹⁷

There are limitations on what truth commissions can discover. They give higher priority to fairness and honesty than to culpability and thereby attempt to arrive at a definitive — but not necessarily complete — picture of the past. "Truth commissions are meant to provide a national narrative of a conflict, but they can be debated, discussed, challenged and contested," says Elizabeth Goodfriend, a program associate at the International Center for Transitional Justice in Liberia. "There's no one truth."

When the South African Truth and Reconciliation Commission was set up in 1995 to examine abuses by the former apartheid governments, it acknowledged four versions of the truth: the forensic truth of numbers and facts; the narrative truth of personal experience; the social truth of publicizing thousands of personal stories and the restorative truth of acknowledging a dark history before moving forward.¹⁸

Those truths can compete in any public process, and the South African commissioners didn't say which truth should trump others.¹⁹ But even when there is no outright conflict among them, each version has its limits, and one version can sometimes require another in order to uncover the complete scope of what happened.

"Interviewing 8,000 people doesn't tell you how many victims there were over a 25-year period; it just tells you

the stories of those particular individuals,” says David Cohen, director of the War Crimes Studies Center at the University of California-Berkeley. Whether a truth commission gets an accurate picture of the past, he says, “depends on which truth you’re looking for.”

Truth commissions also risk recording untruths, especially if they encourage witnesses to come forward by offering them an incentive that looks a lot like immunity. South Africa offered outright amnesty if individuals confessed fully and truthfully. In Liberia, the truth commission promised it wouldn’t recommend prosecution for anyone who offered a full confession and genuine regret for crimes committed during the 14-year civil war.

Such an incentive, critics say, may be a temptation to lie. “If you tie up admissions of guilt and expressions of repentance with provisions of amnesty, you of course have a recipe for pretending,” says Thomas Brudholm, a Danish scholar of transitional justice and co-editor of the book *Religious Responses to Mass Atrocities*.

Whatever version of the truth emerges, it may be just a start. “It’s better to understand any of these transitional devices as contributing to a multi-generational struggle over truth, rather than any one of them producing a definitive truth,” says Harvard’s Minow.

The messy debates over recent Balkan history suggest a truth commission can be a healthy start to that process. Although an international tribunal in The Hague is prosecuting Balkan war criminals, the region has never had a truth commission. Every generation of schoolchildren learns a different version of history, depending on their ethnicity. “There should be a recorded history,” said a Bosnian civil society leader, when asked if a truth and reconciliation commission could establish a historical record of what happened. “It is not good that different people are hearing different histories. It is bad for future generations.”²⁰

Criminal justice, meanwhile, is limited. It requires hard, physical evidence and a perpetrator who is present in the courtroom. “There were thousands upon thousands of incidents the prosecutor would never get to,” says Goldstone, the tribunal’s former chief prosecutor. Were there a truth commission, “the prospects for permanent peace would be a lot better.”

Whether a truth commission can get an accurate record of the past, or even the best record, may soon be-

cide, has argued. “Whether we call it a right or not, the obligation of the state very honestly to explore every detail of human rights abuses is now so well established that almost nobody denies it anymore.”²¹

Can truth commissions reconcile individuals and societies?

Few people considered reconciliation a component of truth-telling until 1995, when South Africa mandated creation of a truth and reconciliation



Former Liberian warlord Prince Johnson has refused to apologize for his role in Liberia’s long civil war. When the country’s truth and reconciliation commission recommended prosecuting Johnson for war crimes, he threatened to return to the bush and resume fighting.

AFP/Getty Images/Zoom Dosso

come a secondary argument. A growing movement seeks to establish the “right to truth” as a universal human right that — like other rights — governments must protect and fulfill.

“The state has an obligation to explore the truth to the best of its abilities and to disclose it publicly,” Juan Méndez, an Argentinean who was the first United Nations special advisor on the prevention of geno-

commission. It has become the gold standard of truth commissions for its ability to avoid violence and reunite South Africans after the fall of apartheid. Today, many people — both inside and outside of conflict countries — expect truth commissions to produce reconciliation.

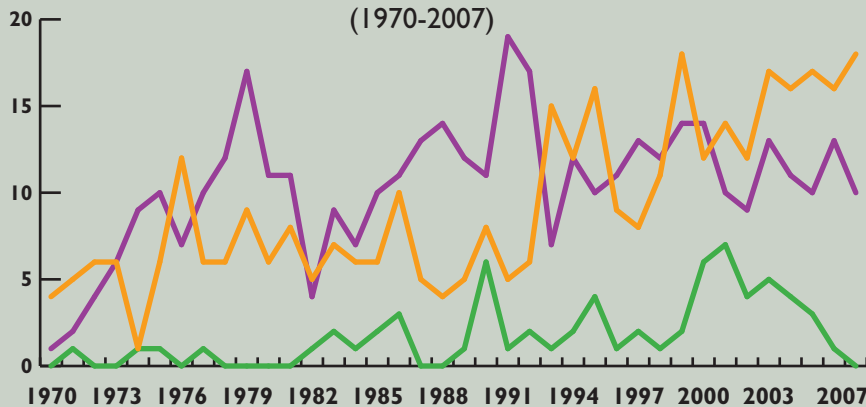
However, there is no universally accepted definition of reconciliation. Priscilla Hayner, a co-founder of the

Trials and Amnesties Are Used Most Often

Since the early 1990s, criminal trials have been used most often in seeking justice following human rights abuses, usually perpetrated by authoritarian governments. Amnesty laws, which absolve perpetrators, have been the second most popular option, followed by truth commissions. The use of all three approaches jumped dramatically in the early 1990s, with the end of the Cold War and the dissolution of the Soviet Union. Since 1993, more than 90 countries have transitioned from authoritarian rule.

Popularity of Transitional Justice Tools

(1970-2007)



Source: Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*, United States Institute of Peace Press, forthcoming, Spring 2010

— Criminal Trial Verdicts
— Adoption of Amnesty Laws
— Truth Commissions Launched

ICTJ and an expert on truth commissions, calls reconciliation a “hazy concept” that can describe everything from the cessation of hostilities to the co-existence of social groups to forgiveness between victims and their perpetrators.

Others agree the conversation can be confusing. Charles Griswold, author of *Forgiveness: A Philosophical Exploration* and a philosophy professor at Boston University, says, “You’ve really got three moving parts: forgiveness, truth and reconciliation, and the relation of the three of them is debated.”

Reconciliation is generally defined as a process that acknowledges the past and repairs the relations it has destroyed. But there’s a debate about culture and context.²²

In Rwanda, where local courts function as a kind of hybrid truth commission and trial chamber, forgiveness plays a major role in the social and political process of reconciliation, which is a national priority. “The committed sins have to be repressed and punished, but also forgiven,” Rwandan President Paul Kagame has said. “I invite the perpetrators to show courage and to confess, to repent and to ask forgiveness.”²³

In Latin America, on the other hand, reconciliation was an unpalatable goal, according to Gonzalez of the International Center for Transitional Justice. After a decades-long official silence that covered up state crimes, reconciliation was seen as a cover that allowed political elites to get away with abuses.

Hayner and others doubt that truth commissions can produce individual reconciliation, so they recommend that commissions and the societies they serve distinguish between individual and national (political) reconciliation.²⁴

Forgiveness and reconciliation can be especially difficult if the perpetrator’s identity is unknown. In Liberia, more than 80 percent of 85,000 victims didn’t know who committed a crime against them.²⁵

“Forgiveness is really a relation between two individuals — a way of repairing that relation,” says Griswold. If the perpetrator’s identity is unknown, there is no relationship to restore.

And in the few instances where victims and perpetrators did cross paths at Liberia’s Truth and Reconciliation Commission (TRC) hearings, it didn’t go well. “The perpetrators were condescending,” says Aaron Weah, a Liberian civil society advocate and co-author of the book *Impunity Under Attack — Evolutions and Imperatives for the Liberian TRC*. “They were very rude.”

Moreover, “To expect survivors to forgive is to heap yet another burden on them,” wrote Harvard’s Minow in *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*. “The ability to dispense, but also to withhold, forgiveness is an ennobling capacity and part of the dignity to be reclaimed by those who survive the wrongdoing.”²⁶

Others find the notion of forgiveness downright impossible. “If it is difficult for some individuals to forgive during a family dispute, why would it be easy for a victim of torture to reconcile with a perpetrator?” asks Gonzalez. “No institution can be expected to reconcile in a matter of a few years a society that has been divided by violent conflict.”

Gonzalez faced that expectation himself as a core staff member of the Peruvian Truth and Reconciliation Commission, established in

2001 to investigate assassinations, disappearances and torture under previous presidents. "We were given the mandate to reconcile," says Gonzalez, "but the question was, at what level? We decided it would be impossible — it would be too much to ask of the victims — to push for individual reconciliation between them and their perpetrators."

Instead, the commission tried to "reconcile the individual with the state," the only relationship it felt a government body could repair, he says. To do that, the commission analyzed the causes of the violence and the breakdown in citizen-state relations underlying the violence. Proposals for governmental reform thus shared center stage with collecting individual stories.

Moreover, truth commissions appear to be better at supporting peaceful coexistence between individuals than at full-fledged reconciliation. "You might cease hostilities," says Griswold, "but continue to hate each other. That's perfectly possible."

Peaceful coexistence can still succeed, however, if the victims and their aggressors mutually forswear vengeance or violence. "If reconciliation means what I heard in South Africa — simply that 'When I'm walking down the street, and I see someone I know is part of the secret police and they see me, we just keep walking' — if that's reconciliation, then I think a truth commission can be very helpful," says Minow.

Forgiveness, on the other hand, seems far more unlikely. As one Rwandan genocide survivor told a French journalist, "A man may ask forgiveness if he had one Primus [beer] too many and then beats his wife. But if he has worked at killing for a whole month, even on Sundays, whatever can he hope to be forgiven for?"²⁷

Are truth commissions more effective than trials?

Human rights advocates often warn that failing to hold perpetrators ac-

countable for their deeds perpetuates a "culture of impunity." Unless we try war criminals like Sudanese President Omar al-Bashir, the argument goes, future heads of state won't think twice about committing crimes against humanity.

As former U.S. Secretary of State Madeleine Albright remarked, "Adolf Hitler once defended his plan to kill Jews by asking the rhetorical question: 'Who, after all, remembers the Armenians?' " ²⁸ He was referring to the allegation by Armenians that the Ottoman Turks slaughtered hundreds of thousands of Armenians during World War I. ²⁹

Truth commissions and trials both counter impunity, but in different ways. In the Latin America of the 1980s, where military dictators wrote their own immunity into the laws, "prosecution was pretty much off the table," says former South African Judge Goldstone. "In that context, truth commissions were the best one could hope for. Since then, the world has changed dramatically."

Today, international law prohibits amnesty for crimes against humanity, and the ICC is required to prosecute large-scale abuses in the 110 countries that have given it jurisdiction if their own governments fail to pursue trials or prosecution. That means truth commissions have fewer options for offering amnesties to encourage cooperation.

"I think South Africa just scraped by with the amnesties," says Goldstone. "By today's standards, I would find it difficult to amnesty crimes against humanity. In 1995, it was a little different."

Truth commissions can seem, deceptively, like a simpler alternative to courtroom justice. "There is often this sort of sentiment, 'Let's have a truth commission, and let's not really deal with everything else.' It does feel like the easier route toward accountability, without really putting anyone in jail," says International Center for Transitional Justice co-founder Hayner. "But

it doesn't play out that way." The Chilean truth commission's files helped indict former Chilean leader Gen. Augusto Pinochet, nearly 10 years later, despite an amnesty law. ³⁰

In Sierra Leone, an international criminal tribunal and a truth and reconciliation commission operated simultaneously, with occasional cooperation and complications, according to William Schabas, a professor of human rights law at the National University of Ireland and a member of Sierra Leone's commission. A majority of Burundians want both mechanisms for the country's 30-year ethnic conflict: Nearly 8 out of 10 support a truth and reconciliation commission and nearly 7 in 10 want to see perpetrators tried and punished. ³¹

Méndez, the former U.N. special advisor on genocide, thinks countries like Burundi need, and can have, commissions and courts. "Both aspects, truth-telling and prosecutions of perpetrators, are obligations of the state in transitional justice, and both have to be conducted in good faith," he has said. "What I reject is the notion that the state can say it will not prosecute anyone but it will give the victims a report on what happened. That is a travesty, because it tries to exchange the demands for justice for a truth-telling exercise." ³²

But good faith doesn't help post-conflict countries solve a pressing public-policy dilemma: If justice, truth and reconciliation are all national priorities, which takes precedence? "If reconciliation is the goal, truth commissions probably do a better job than criminal prosecutions," says Schabas. "In Sierra Leone, most of the people didn't know who the perpetrators were," he explains, making prosecution impossible for all but the leaders of the warring factions.

Even when individual perpetrators' identities are known, truth-telling has advantages over trials. "Truth commissions

Continued on p. 11

Finding Out What Really Happened

Statistician separates fact from fiction for truth commissions.

Patrick Ball is used to being the odd guy out. When he walks into the headquarters of most truth commissions, he finds himself surrounded by lawyers. As a statistician and a self-professed data geek, Ball is there to crunch numbers and “hack code,” as he puts it.

Ball heads the Human Rights Data Analysis Group (HRDAG) at Benetech, a Palo Alto, Calif.-based non-profit technology consulting firm with a social justice focus. His team brings quantitative analysis to truth commissions, which otherwise rely on anecdotes from victims, survivors and alleged perpetrators of war crimes and genocide. It's an unusual application of technology — few college students solving problem sets in statistics labs imagine they're learning skills useful in defending human rights. But when the challenge is to find patterns of violence amid conflicting claims and denials, a statistician like Ball is an invaluable ally.

“Human rights violations don't occur one at a time,” says Ball. His job is to help clarify whether violent incidents number in the thousands or the tens of thousands.

The essence of Ball's job is the ability to see ordinary material as statistical data. “Everything is data to us,” he says. “A pile of scrungy paper from border guards — 690 pages — that's data.” His team finds it, codes it, analyzes it, interprets it. But statistics is a world of careful hypotheses, not bold proclamations. Data, he says, “is what we're able to observe. That's not the same as what is true.”

Still, data that Ball and his team observe — and quantify — has changed our ideas about what's true in places around the globe. In Peru, for example, Ball's team estimated that the number of dead or “disappeared” in that country's 1980s war against terrorists was twice as high as the estimate by a human rights commission in Lima. In Guatemala, the group helped prove that genocide had been committed against the indigenous Mayans. And in Kosovo, the data they collected and analyzed unraveled Slobodan Milosevic's defense during his trial at an international tribunal.

In that case, Ball used hundreds of pages of border-crossing reports, analyzing who moved across the Kosovo-Albanian border and when. The pattern that emerged from that data, combined with 11 other sources on civilian deaths in Kosovo, cast doubt on Milosevic's claim that Kosovars were fleeing NATO bombings, not Serb violence. Ball's work helped prosecutors make a case that the deaths amounted to “ethnic cleansing.”

HRDAG grew out of Ball's independent consultations with truth commissions in South Africa, Haiti, Guatemala, Timor-Leste and Peru. The group also has worked with commissions in Ghana and Sierra Leone, as well as nongovernmental human rights groups in Cambodia, Sri Lanka and Burma (also called Myanmar) and with the International Criminal Tribunal for the Former Yugoslavia.

Much of the work can be tedious, and some of the victories minor. At times, though, Ball's work surpasses even his most ambitious expectations. For a truth commission in El Sal-

vador, for instance, he wrote software to aggregate and analyze the human rights records of army officers; the results forced a quarter of the military leadership to retire. The issue was so politically sensitive, Ball remembers, “We figured they were going to blow our office up.” Instead, the officers sued the commission — an unexpected recourse to the very rule-of-law principles that truth commissions try to enshrine.

Today, Ball's team is working on its most sensitive project yet: analyzing the 80-million-page archive of the Guatemalan National Police. Human rights advocates have long blamed them for much of the rampant kidnapping, torture and murder during the country's 36-year civil war, but there was no proof until four years ago. Then tons of police records — stacks upon stacks of musty, molding paper — were found in an abandoned ammunitions depot.



Ann Harrison

Statistician Patrick Ball examines some of the 80 million pages of the Guatemalan National Police archives — discovered by accident — that show the police participated in kidnapping, torture and murder during the country's 36-year civil war.

Although the team has gone through only about 10 percent of the archive, a new picture already is emerging. There is “no doubt that the police participated in the disappearances and assassinations,” says Carla Villagran, former adviser to the Project to Recover the Historic Archives of the National Police.¹

Changing the picture of a nation's horrific experiences can help give atrocity victims' suffering “meaning in some bigger story,” Ball says. The science of numbers can help victims separate painful histories from destructive mythologies of violence.

Still, for all the good that analyzing patterns can do, Ball knows that numbers and graphs don't say everything about the bigger story. “Statistics define the limits of what's plausible and what's not plausible,” he says. “Statistics do not tell us how it felt to be there.”²

¹ Julian Smith, “A Human Rights Breakthrough in Guatemala; A chance discovery of police archives may reveal the fate of tens of thousands of people who disappeared in Guatemala's civil war,” *Smithsonian*, October 2009, www.smithsonianmag.com/history-archaeology/Digs-Paper-Trail.html?c=y&page=1.

² See Jina Moore, “A human rights statistician finds truth in numbers,” *The Christian Science Monitor*, Feb. 7, 2008.

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often come up with a grand narrative that is more plausible, or at least more visible, than an individual trial, which telescopes all the issues through an individual defendant," says Harvard Law School dean Minow. "There, the grand narrative is often in the background."

But some trials can create records that rival, or even surpass, those of truth commissions. The War Crimes Studies Center's Cohen, an adviser to the Timor-Leste commission, points to the International Criminal Tribunal for the Former Yugoslavia. "No truth commission could have possibly compiled all the documents they did, or examined individual cases in the exhaustive manner the court did."

Ultimately, trials and truth commissions are not mutually exclusive, and each achieves advantages the other can't. "I see all of these things as tools of transitional justice," says Judge Goldstone, "and you've got to use the best tools for the situation." ■

BACKGROUND

From Constantinople to The Hague

Truth commissions and their emphasis on accountability have roots in an earlier era of human rights innovation.

Behind the bloody battlefields of the 20th century's two world wars, genocide raged. The Armenians, a religious and ethnic minority, allege that the Ottoman Empire committed genocide by killing hundreds of thousands of Armenians during World War I. (The Turks don't deny the deaths occurred, but they vehemently deny it was genocide.) And more than 6 million Jews

and others considered "undesirable" by the Nazi regime were put to death during World War II.³³

Immediately after World War I two commissions began investigating the Armenian deaths, though both panels were largely thought marred by corruption and politics. In British-ruled Constantinople in 1919, the British insisted that the Turkish political elite be tried for crimes against the Armenians. The British were eager to punish the Turks for the suffering of both the Armenians and British prisoners of war. The effort faltered after British politicians demanded the Turks release the British prisoners, claiming due-process violations. A year after it was established, the Constantinople court crumbled.³⁴

That legacy helped to shape the future of international human rights law, while the Constantinople proceedings set the stage for the post-World War II war crimes trials in Nuremberg. In the capital of German history and culture, 22 senior Nazi officials were tried in 1945 for "crimes against humanity" — language borne out of the Armenian experience 25 years before. Nuremberg marked the first time such crimes ever reached a courtroom.³⁵

Yet the Nuremberg trials were far from perfect. Run by the wartime Allied powers, the trials were criticized as retaliatory victors' justice. Twelve of the 19 men convicted at Nuremberg were executed; two of those indicted committed suicide in their cells.³⁶

Crimes of war weren't new, but trials for crimes against humanity — against civilians — were, and retroactively applying these new charges raised concerns. Halfway around the world, the Tokyo tribunals, where the United States tried 28 Japanese military leaders for war crimes and human rights atrocities, raised similar critiques, according to Minow.³⁷

Today, the Nuremberg trials are remembered as a watershed event for human rights and international justice.

And yet, the judicial precedents they established lay untouched for decades, while the Pol Pot regime in Cambodia murdered nearly 2 million people in the mid-1970s, the Guatemalan government killed nearly 200,000 Mayans during a 36-year internal conflict that began in 1960 and Saddam Hussein slaughtered 50,000 Kurds in 1988.³⁸

"There was Nuremberg and Tokyo, and then there's nothing for 60 years," says the Leitner Center's Flaherty.

But when the U.N.-run international criminal tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) were established in the early 1990s they followed the Nuremberg precedents. Launched in 1993, the ICTY was directed to investigate war crimes committed after 1990 in the Balkans during the dissolution of the republic, where a genocidal campaign, mostly against Muslims, gave the world the term "ethnic cleansing."

Two years later, the ICTR was established to try the masterminds of the 100-day-long Rwandan genocide, in which more than 800,000 people, mostly Tutsis, were killed.³⁹ Although slow and fraught with political and bureaucratic difficulties, the tribunals for Rwanda and Yugoslavia have completed the trials of 170 people (and indicted nearly 70 others) and established important human rights law precedents that paved the way for similar tribunals in Sierra Leone and Cambodia.⁴⁰

But at the beginning of the 21st century, policy makers decided international justice needed a more permanent solution. The International Criminal Court (ICC) was created in 2002 by adoption of the so-called Rome Statute. The ICC prosecutes those responsible for massive human rights violations committed in countries that are unable or unwilling to prosecute such crimes themselves. So far, the ICC has filed cases against Congolese and Ugandan rebels and Sudanese government

officials — including the president — and rebels.

Normally, the ICC can only try individuals for crimes committed in the 110 countries that have ratified the 2002 Rome Statute. When abuses happen in non-ratifying countries — such as Sudan — an investigation can begin only if the U.N. Security Council refers the case to the ICC. That's when international justice gets complicated by world politics: The United States and China — veto-wielding members of the Security Council — have refused to ratify the Rome Statute. When it came to a vote, the ICC worried the two powers would oppose a referral, blocking the court from investigating crimes in Darfur. They didn't, and the court's investigations led to indictments against Sudanese President al-Bashir.

Truth vs. Justice

For all the progress made by modern war crimes tribunals, some remain vulnerable to a poignant, long-standing criticism.

"There is a critique of Nuremberg and Tokyo for not giving enough air time to the victims and survivors," says Harvard Law School's Minow. "It says, 'Why is all this attention being paid to the banality of evil? What about the people who died, or who survived?'"

Beginning in 1980s Latin America, citizens began experimenting with truth commissions as they threw off the chains of military dictatorships and groped towards democracy. "Justice was just impossible because the army was so powerful," says Cohen, of the War Crimes Studies Center in Berkeley. "They were saying, 'We're not going to be able to get justice, so let's get as much truth as possible.'"

The Argentinian commission's hands were tied when it came to recommending punishment of particular individuals, primarily because of the

junta's self-awarded immunity. The protection was later repealed, mostly because of the commission's report.⁴¹

The 1990 Chilean commission also inherited amnesty laws passed by and for the previous government. Nonetheless, Gen. Pinochet was arrested in Europe almost 10 years later, when a Spanish judge, Baltasar Garzón, insisted he had universal jurisdiction to try anyone from anywhere who committed crimes against humanity, thereby overriding Chile's amnesty law.⁴²

South Africa's TRC is perhaps the most well-known example of trading amnesty for truth. The commission agreed to take applications for amnesty from perpetrators, provided they fully confessed their crimes and the crimes were politically motivated. Those who confessed to "gross violations of human rights" had to answer questions in public. More than 7,000 witnesses asked for amnesty, but fewer than 10 percent received it.⁴³

Truth commission expert Hayner says the idea that justice must take a back seat to truth may be an outdated concept. "Ten years ago that tension was very present," she says. "Now, that's changed." Most human rights lawyers today say it's legally impossible to offer amnesty for testimony, thanks to changes in international law.

Yet the carrot of amnesty may be critical to truth commissions. In one of the most sweeping empirical comparisons of truth commissions, political scientists Jack Snyder and Leslie Vinjamuri say that on the rare occasions when truth commissions have been successful, they have been accompanied by amnesties.⁴⁴

El Salvador, on the other hand, is a cautionary example of how the process can unravel. In 1993, a truth commission report on the country's decade-long civil war named high-level military and government officials as human rights abusers. Five days later, after threats of a coup, the legislature

granted general amnesty for all crimes committed during the conflict.⁴⁵

"Justice on the Grass"

Virtually every day for the last four years, a community somewhere in Rwanda has gathered to confront the nation's 1994 genocide. Survivors offer testimony, and the accused — often wearing pink prison uniforms — respond. Often, they deny having participated; sometimes they confess. Nine *inyangamugayo*, or "persons of integrity," preside over the process. They interrogate defendants and witnesses alike, ultimately determining guilt or innocence. There is copious truth-telling here, but this is also a court, and the guilty go to jail.⁴⁶

The process — called *gacaca*, or "justice on the grass" — is a modern adaptation of a conflict resolution ritual the government says stretches back to Rwanda's precolonial days. While celebrated as a "traditional" approach to Rwanda's atrocities, *gacaca* is also expedient: By turning trials over to local communities, it has brought justice to nearly a million genocide suspects, according to Denis Bikesha, director of training, sensitization and mobilization services at the National Service of Gacaca Courts in Kigali, Rwanda.

But Human Rights Watch argues that *gacaca* trials violate defendants' due process rights and exclude crimes committed during and after the genocide by the military — which at the time was led by current Rwandan President Paul Kagame. A Spanish court, invoking universal jurisdiction for crimes against humanity, in 2008 indicted 40 former Rwandan army officers in 1994 and said it would have indicted Kagame, except that as a head of state he has immunity.⁴⁷

But those shortcomings may reflect the same violence *gacaca* investigates.

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Chronology

1910s-1940s

After atrocities in two world wars, “crimes against humanity” becomes a legal precedent.

1915

The term “crimes against humanity” is coined by a Russian minister in a declaration by World War I allies vowing to hold Turkey accountable for the Ottoman Empire’s massacre of hundreds of thousands of Armenians.

1918

Two Ottoman fact-finding commissions look into malfeasance during the war, including the Armenian massacres.

1919-1920

Setting precedents for the later Nuremberg trials, the Ottoman Empire holds a court-martial and an international tribunal to investigate Turkish officials’ behavior during World War I, including the ordering of the Armenian massacres.

1945

World War II allies, led by the United States, launch war crimes trials in Nuremberg, Germany, against 22 former Nazi officials. Twelve were executed; some committed suicide in their cells.

1946

International tribunal begins in Tokyo for Japanese military and government officials charged with atrocities during World War II. Together with Nuremberg, the trials set precedent for future international justice.

tice, while ad hoc war crimes tribunals carry on the legacy of Nuremberg.

1982

Bolivia opens Latin America’s first truth commission; it disbands before completing its work, but the country later tries former officials and paramilitary officials for civilian murders and “disappearances.”

1984

Argentina publishes *Nunca Más* (“Never Again”) — a landmark truth commission report that documented nearly 9,000 reports of the “disappeared,” ordinary citizens kidnapped, tortured and murdered by the military junta. Report becomes instant best seller.

1993

U.N. creates International Criminal Tribunal for the Former Yugoslavia to try Balkan officials for war crimes.

1995

South Africa opens its Truth and Reconciliation Commission, the first to include reconciliation in its mandate. . . . U.N. empowers International Criminal Tribunal for Rwanda to try leaders of the 1994 Rwandan genocide. . . . Sri Lanka opens Asia’s first truth commission.

1997

Guatemala opens a truth commission to investigate 36 years of state repression and violence, including the genocide of more than 150,000 indigenous Mayans.

2002

Rome Statute establishes the International Criminal Court (ICC).

2003

U.N.-sponsored Special Court for Sierra Leone begins trials of those responsible for atrocities during that country’s long civil war.

2005

ICC indicts Joseph Kony and other leaders of the Lord’s Resistance Army, a Ugandan rebel group. Kony demands immunity from prosecution in exchange for surrender. Local leaders suggest using traditional reconciliation rituals instead, but the issue remains stalemated.

2008

The Extraordinary Chambers in the Courts of Cambodia is given a U.N. mandate to try five Khmer Rouge leaders for genocide from 1974 to 1979.

2009

ICC indicts its first sitting head of state, Sudanese President Omar al-Bashir, for war crimes; he retaliates by evicting aid groups from the country. . . . ICC opens its first trial, of Congolese warlord Thomas Lubanga, accused of using child soldiers. . . . Liberia’s Truth and Reconciliation Commission recommends banning President Ellen Johnson Sirleaf from public office for 30 years for her past support of former warlord and indicted President Charles Taylor. . . . Kenya sets up a truth commission to examine violence after its 2007 elections; ICC asks for permission to conduct preliminary investigation of the ethnically tinged Kenyan election violence. . . . First Khmer Rouge trial ends in Cambodia in November with verdict expected in 2010.

1980s-1990s

Truth commissions emerge as a new method of transitional jus-

2000s *International Criminal Court (ICC) is established, creating a new legal option for post-conflict justice.*

Do Truth Commissions Work?

The jury is still out, experts say.

Is transitional justice working? So far, experts say they can't tell for sure. Too few researchers have studied the impact of truth commissions and related human rights tools, and almost no one can say for certain where and when reconciliation actually has occurred in post-conflict countries.

"There have been a lot of claims about whether truth commissions can provide — fill in the blank — human rights, democracy, reconciliation, the list goes on," says Eric Wiebelhaus-Brahm, a senior researcher at the International Human Rights Law Institute at DePaul University and author of the new book *Truth Commissions and Transitional Justice: The Impact on Human Rights and Democracy*. "The broader research community is really only beginning to scratch the surface in terms of coming up with compelling, empirically based evidence to support any of those contentions."

The complexity of the social science underpinning such studies makes them especially difficult, and often too little time has passed since the end of the war or conflict. But a picture is beginning to emerge about how trials and truth commissions help secure human rights and encourage democracy.

The picture is surprisingly bleak. Most studies produce no evidence that truth commissions make much difference, according to James Ron, an associate professor at the Norman Paterson School of International Affairs at Carleton University in Ottawa, Canada, who co-authored a paper on transitional justice.¹ And one study found that truth commissions can exacerbate the very tensions they seek to quell.²

Leigh Ann Payne, a professor of political science at the University of Wisconsin at Madison, has just completed a forthcoming comprehensive study on the effectiveness of truth commissions. She and her two co-researchers found that the

commissions by themselves are actually bad for human rights and democracy. However, when combined with trials and amnesties, truth commissions are likely to improve democracy and human rights.³

Payne says it's too early to say, with empirical confidence, why the combination of approaches works. "It's probably not that amnesties work because of the threat of trials," she says. In fact, most of the amnesties they examined were followed by trials. "Our hunch is that amnesties provide a way for fragile democracies to get through that very vulnerable moment."

Payne says many of the potential benefits of truth commissions can't be captured by even the most rigorous research. "The measures that are standard in social sciences tend to look at institutional changes. They may not pick up on some of the societal changes taking place," says Payne.

But it's the desire for precisely those societal changes — namely, democracy — that spurs truth commissions. "Truth commissions do a whole lot of other things, particularly giving voice to the victims and acknowledging the violent past, that may not show up" in the variables analysts look at, says Payne.

¹ Oskar N. T. Thomas, James Ron and Roland Paris, "The Effects of Transitional Justice Mechanisms," working paper, University of Ottawa Centre for International Policy Studies, April 2008, www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ord588=grp1&ots591=0C54E3B3-1E9C-BE1E-2C24-A6A8C7060233&lng=en&id=103597.

² Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," *International Security*, winter 2003/04, p. 20.

³ Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*, United States Institute of Peace Press, forthcoming, spring 2010.

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After genocide, the Rwandan government thought, Western justice wasn't necessarily the best answer, says Stephen Kinzer, author of *Thousand Hills: Rwanda's Rebirth and the Man Who Dreamed It*. "Gacaca tries to combine the two necessities [Rwandans] see in the reconciliation process. One is justice, that is, the punishment of the guilty, and the other is reconciliation."

As thousands of prisoners trade truth for jail time, survivors are finally learning where their families were killed and have been able to

retrieve their remains. Every April 7, on the anniversary of the beginning of the genocide, families rebury the bones at the national memorial, "with dignity and honor," in the words of one survivor.

If Rwanda is an example of a society choosing to remember, Mozambique has chosen to forget. Nearly a million people died in Mozambique's 16-year war that ended in 1992. Ten days after a peace agreement was signed, the parliament passed a general amnesty. But unlike Latin America, where survivors rallied for justice, Mozambique has never had a truth

commission, and it's difficult to find anyone there who wants one.

"Today, if we opened up the idea of the past, it would be to restart the hate," said Brazao Mazula, who once headed the country's electoral commission.⁴⁸

Others share his preference for official silence, but for a different reason. "I don't believe in truth commissions," a Mozambiquan journalist has said. "People need the right to their own interpretations of the past. I don't want to reconcile myself with the horrendous crimes against the people."⁴⁹

There may be a bias among human

rights activists for more truth telling, but some say the option to forget must be given due consideration. "You have to put on the table, as well, doing nothing," says Harvard's Minow, who notes that Cambodia managed its transition successfully without formal transitional justice mechanisms. Today, the country is stable and moving steadily toward economic prosperity.

Others are not so sure. Survivors of the Khmer Rouge's killing fields have rarely talked about the past; when they do, Cambodian youths — who make up more than half of the country — don't believe them.⁵⁰ A U.N.-sponsored national/international trial of five Khmer Rouge leaders began in 2008 — 35 years after the Cambodian genocide took nearly 2 million lives and a decade after Pol Pot died.

So far, it's unclear whether the power of truth is opening more wounds in Cambodia than it's healing — and whether it's worth passing the trauma on to a generation that doesn't know it. "It reminds me of my experiences then, how my parents were killed," survivor Yim Somlok told a U.N. agency. "It's good to show everyone, but it's also difficult for me to see the children watching such terrible things."⁵¹

A high-level Cambodian diplomat said Cambodia just needs a little more time to process its painful past. Perhaps the country's best hope, he said, is that the generation traumatized by the Khmer Rouge — both its perpetrators and its victims — "die off and with them gone, the country might start over again, afresh."⁵²

Compensation

Together with justice and reconciliation comes an urge for restitution. Rwanda forces perpetrators of genocide to build roads or terrace hillsides, and in dozens of villages they have volunteered to build homes for

genocide survivors.⁵³ Other governments, on the basis of truth commission recommendations, have compensated victims.

Chile offered a free college education to the children of the "disappeared," and family members receive a monthly pension check; Argentina gave each survivor \$220,000 in state bonds.⁵⁴

Most truth commissions recommend monetary reparation as both a literal and symbolic restitution. But getting the money isn't easy. Once a commission's final report is published, the panel is disbanded, and the government may have no interest in or budget for even symbolic payments.

Sierra Leonean human rights activist John Caulker, for instance, spent nearly 10 years lobbying the government to make good on the truth commission's recommendation, and the government's subsequent promise, to provide financial redress for victims of the country's decade-long war.⁵⁵

Not making reparations can be more than a matter of simple political inaction. South Africa's truth commission recommended a "wealth tax" on those who benefited from apartheid as a way to address the poverty of those who suffered in the segregated system. But the government did not institute a formal reparations program, leading to cynicism about the supposed success of a commission that offered some perpetrators amnesty, while victims got only rhetoric.⁵⁶ "Reparations," suggests an expert on South Africa's truth commission, "can perhaps correct for amnesty" by making the scales of truth and justice feel more balanced.⁵⁷

But exchanging cash for suffering is equally complicated. International law demands that governments provide restitution for wrongs committed by states, but from whose pocket should the money come?

"The irony is you'd be having the Nelson Mandela regime literally paying for the misdeeds of Bothe," the

last president of the apartheid regime, says Flaherty of the Leitner Center for International Law and Justice.

And the compensation should not be too small, says Gonzalez at the International Center for Transitional Justice, who worked on the Peruvian commission. "Reparations need to have an element of magnanimity," he says. "It's nice to have recognition, but if the government says, 'The life of your husband is worth \$50,' that's a slap in the face." ■

CURRENT SITUATION

Publicizing Results

Even in the midst of a global communications revolution, truth commissions have trouble publicizing their work. While they may generate attention in capital cities, the details — including the conclusions — don't always reach the rural areas, especially in undeveloped countries.

Indeed, it's a safe bet that few people read truth commissions' voluminous final reports.

"The report we wrote was nine volumes long," says Gonzalez. "Who reads a report of 4,000 pages?"

Schabas, of the Sierra Leone TRC, admits, "There is a tradition with the published reports of truth commissions of 'mine is longer than yours,' " which can make their findings all but inaccessible.

But even the shorter reports don't always reach rural areas, where many people can't read, in part due to the years of education lost during the very conflicts the reports cover.

Some groups have used multimedia techniques to spread the word. Peru's commission hosted a photography

exhibition. In Sierra Leone, the United Nations Children's Fund commissioned a children's version of the report, and WITNESS, a video-oriented human rights organization, produced a companion video version of the commission's final document. But even with these innovations, says Schabas, "there are limits to how far you can go in a country like that because of the level of literacy and education. You're not going to get very much profound thinking and concern about deep issues of governance."

Still, spreading the word can produce concrete results. The Peruvian commission's "very expensive recommendations on reparations" unexpectedly created "an interesting alliance between victims and one local government," who realized they could use reparations funds to force national leaders to help their impoverished province, Gonzalez says.

Traditional vs. International Justice

The hillsides of northern Uganda are slowly emerging from 30 years of violence, but today there's a new battle raging. This time, the fight is over peace.

The International Criminal Court in 2005 indicted the three top leaders of the Lord's Resistance Army (LRA) — a rebel group that has fought a generation-long insurgency in Uganda — for some of its brutal crimes. Among other things, the group kidnapped hundreds of children, often after forcing them to murder their own parents, and then impressed them into service as child soldiers.⁵⁸

But LRA founder Joseph Kony and his two deputies are hiding in the Democratic Republic of the Congo (DRC), where they are terrorizing civilians already traumatized by a long-running civil war. Some local leaders in Uganda are willing to give Kony the amnesty he wants,

if he submits to *mato oput* — "drinking the bitter herb" — a conflict resolution ritual of the Acholi people, the ethnic group primarily targeted by the LRA. The ritual requires offenders to provide details about their crimes, victims to forgive and both parties to share a drink of the herb.⁵⁹ Both Uganda's president and the Ugandan Amnesty Act, which recognizes traditional mechanisms as legitimate forms of justice, support the use of such rituals.⁶⁰

The two processes aren't necessarily mutually exclusive, but local leaders say a choice must be made about which should come first.

"At the international level they say, 'There is no justice without peace, there is no peace without justice,' an argument that is a bit ridiculous to me as an international lawyer," says Fabius Okumu-Alya, director of the Institute for Peace and Strategy Studies at Gulu University in northern Uganda. "At least one of the two comes first. The Acholi are not saying we don't want Kony to be prosecuted. They are not supporting impunity. But what they want is prioritization."⁶¹

The LRA indictments have thus produced a stand-off in Uganda. ICC indictments in the DRC and Sudan have created similar tensions. When Chief Prosecutor Luis Moreno-Ocampo indicted al-Bashir for genocide in Darfur, the Sudanese president responded by evicting 13 international aid agencies, including those offering food aid and assistance for rape survivors.⁶²

In the DRC, on the other hand, the indictments of three rebels on charges including recruitment of child soldiers, have been viewed as an unfair gesture of accountability. One ex-child soldier, after watching a video of the trial of Congolese warlord Thomas Lubanga, wondered how he ended up in the dock in The Hague when "others who did the same thing are working within the government?"⁶³

Moreno-Ocampo, the Argentinian lawyer who was named ICC prosecutor in 2003, insists his hands are tied. "I can't make allowances for politics," he has said. "I have to apply and implement the law."⁶⁴

But American lawyer Adam Smith, author of the 2009 book *After Genocide: Bringing the Devil to Justice*, says the court should incorporate the expertise of more than just lawyers. "The decision to indict people in the LRA is a decision made in The Hague by international lawyers, but other people should be involved, such as anthropologists or sociologists or psychologists, people who are better able than I am or Ocampo is" to determine the wisdom of prosecution, Smith says.

"Everything is embedded," he continues. "If you don't see where it's coming from, where it's going and what's around it," he continues, you're not going to have resonance on the ground [and prosecution] won't have a sustainable benefit."

Future TRCs?

The International Institute for the Rule of Law, backed by the Washington-based U.S. Institute of Peace, is court-ing public support for a truth commission on the atrocities committed by the former Saddam Hussein regime in Iraq.⁶⁵

Some ground for a truth commission has been laid by the Iraq History Project, a three-year collaboration between the Iraqi Ministry of Human Rights and DePaul University's International Human Rights Law Institute. Though not a formal truth commission, the program — which has recorded more than 7,000 stories from both victims and perpetrators — was designed to pave the way for an official truth-telling process.⁶⁶

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Can the International Criminal Court bring justice to Darfur?



PAMELA YATES
DOCUMENTARY FILMMAKER
"THE RECKONING: THE BATTLE FOR THE
INTERNATIONAL CRIMINAL COURT"

WRITTEN FOR *CQ GLOBAL RESEARCHER*, JANUARY 2010

Nothing has caught the attention of Sudan's President Omar al-Bashir more than the arrest warrant issued for him by the International Criminal Court (ICC) on charges of war crimes and crimes against humanity in Darfur. The ICC warrant — the first ever issued against a sitting head of state — caused al-Bashir to curtail his travel to regional and global summits and raised questions about the legitimacy of a national leader with a war crimes indictment hanging over his head.

Since the crisis in Darfur began, Darfuris have pleaded with the world to stop the murders, rapes and forced displacements and to bring the perpetrators to account. Despite harrowing photos, filmed evidence, survivor testimonies, copious hand-wringing and speech-making on the part of the international community and claims of a peace process by the Sudanese government, the Darfuris continue to be victimized by these massive crimes. Only after the U.N. Security Council referred the case to the ICC in 2005 did a serious criminal investigation into the alleged crimes begin.

The meticulous ICC investigation involved 17 countries, and the evidence led back to President al-Bashir. The ICC's decision to issue an arrest warrant was not made without a look at Sudan's own institutions; the ICC found that there were no credible prospects for justice in Sudan, despite the government setting up courts that purportedly investigated crimes in Darfur.

Halima Bashir, a young Sudanese woman who has been a victim of and witness to numerous barbaric acts in Darfur, has spoken out against the government in Khartoum with a hard-hitting book about the tragedy: "I can't explain how happy I am for the ICC case," she said. "It is now more than five years this has been going on, and very little has been done. It's as if we've been talking to deaf people. For me this is a step for justice."

Darfuri refugees and the international diaspora overwhelmingly supported the International Criminal Court. In fact, more than 100 babies born this year to Darfuris in Sudan have been named Ocampo — in honor of ICC prosecutor Luis Moreno-Ocampo.

Now it is time for the international community, in particular the Security Council, to support bringing al-Bashir to face justice in The Hague. Otherwise, our work to create the International Criminal Court — and raise awareness about Darfur — will be for naught.



ADAM M. SMITH
INTERNATIONAL LAWYER AND AUTHOR
AFTER GENOCIDE: BRINGING THE DEVIL
TO JUSTICE

WRITTEN FOR *CQ GLOBAL RESEARCHER*, JANUARY 2010

ICC prosecutions are unlikely to provide real, enduring justice, consistent with the peace Darfuris deserve.

The roots of the present crisis stretch far beyond the recent violence. The ICC's mandate, however, is restricted — temporally, to the last seven years; geographically, to the "situation in Darfur"; personally, to those whom it deems "most responsible" and, punitively, to the courtroom.

Nonetheless, the court dominates and limits justice discourse throughout Sudan, reducing prospects for more comprehensive solutions and disempowering the real stakeholders: the Sudanese. Bosnian and Rwandan experiences demonstrate that narrow top-down justice cannot quell longstanding inter-ethnic conflict, nor build institutions needed for sustainable peace.

Given Khartoum's lack of political will, it may appear fanciful to argue that justice for Darfur must come from Sudan itself. Yet this is no more unlikely than Khartoum extraditing its ICC-indicted president to The Hague. Both international and domestic justice require Sudan to investigate Darfur crimes, and absent such a choice, neither can be pursued.

The African Union's Panel on Darfur recommends a hybrid court. Operating alongside nonprosecutorial tools like truth commissions, homegrown approaches have greater chances of coming into being, imparting justice and establishing the conditions required for security and meaningful reconciliation.

The ICC may yet compel Sudan to address Darfur, but at what cost? The court has already distorted political debate (with unknown risks), and pursuit of ICC justice imperiled millions when President al-Bashir criminally (but predictably) responded to his indictment by evicting aid agencies from Darfur.

More concerted international action — from the U.N. Security Council or otherwise — could have similarly cajoled Khartoum, without the negative consequences of an indictment. As we have seen in Uganda, where the possibility of ICC prosecution keeps indicted Joseph Kony in the bush, threats of Hague justice may limit leaders' willingness and ability to guarantee peace.

Many Darfuris dream of an al-Bashir trial. Many also rightly worry that such proceedings will radicalize his supporters, unleash more crimes and catalyze violence surrounding the 2010 elections and 2011 referendum, which will likely approve the contentious secession of the oil-rich South.

There need not be debate about "peace versus justice." Sudan needs both. If ICC action leads to more violence, or impedes genuine security, neither will emerge.

Continued from p. 16

"People here . . . have been through so much: the Iraq-Iran war, 35 years under Saddam, civil war in Kurdistan," said Kurda, a 26-year-old Iraqi who ran the project's local office in Iraq. "So people sometimes forget they are human."⁶⁷

But observers warn the time may not yet be right for a truth commission in Iraq. "One of the requirements [of a commission] is that it looks at past abuses with a new regime," says Kevin Avruch, a professor of conflict resolution and anthropology at George Mason University in Fairfax, Va. "The Sunni and Shia and the Kurds are still working things out, so to speak."

Many say the same is true in Afghanistan, where the war between coalition forces and the Taliban is still raging. "At the moment, there's not the political will" for a truth commission, "neither by the Afghan government nor by the international community," says Huma Saeed, an Afghan human rights activist. "The model in South Africa came from within parliament; in El Salvador, it came with a U.N. mandate. We have neither of these."

Even if there were local or international support for a commission, it's unclear how much truth it would uncover. In 2007, Afghan President Hamid Karzai signed a bill, passed by both houses of parliament, granting blanket amnesty to anyone who fought in the 25 years of violence that preceded U.S. operations in 2002.⁶⁸ Human rights lawyers challenge the law's validity, arguing that under international law there can be no amnesty for war crimes. But local human rights activists say the damage is done.

"Even if the amnesty bill legally has not taken this right from us, socially and politically it has created problems in the mind of people," an activist says.⁶⁹ ■

OUTLOOK

Jurisdictional Battles

International courts, truth commissions and local processes will continue to compete for attention among the options available in the transitional justice system, say experts in international justice.

Last fall, Kenya approved a truth, justice and reconciliation commission to examine the violence that erupted after the 2007 elections. But the government also has promised to prosecute those responsible, and the ICC prosecutor is pushing for indictments, which could land current senior officials in The Hague.⁷⁰

But it's simplistic to view the friction between the judicial tools as a turf war. After all, the 110-signatory Rome Statute of 2002 gives the ICC the jurisdiction — indeed, the obligation — to investigate crimes against humanity in states that are unwilling or unable to prosecute.

"The question is, does a domestic procedure that is a truth commission, or for that matter a traditional process, count as an adequate domestic response that deprives the ICC of jurisdiction?" says Harvard's Minow.

The answer can be complicated. Rwanda's gacaca system highlights the problem: Hailed by some as an effective and efficient adaptation of tradition to deal with crimes on a massive scale, critics say it violates the due process rights of the accused.

At the same time, political realities complicate the post-conflict picture in ways no one yet understands. Aside from social reconciliation, difficult matters of statecraft must be considered. For instance: Are truth commissions good for state building, or are tribunals better? Do either prevent the recurrence of violence?

"We don't know," says Minow.

Today's justice scales are weighted in favor of the ICC. The court has near-universal jurisdiction and more resources than most truth commissions. But its real strength is in its founding statute: States that ratified the statute, and thereby gave the court its power, must now adopt its terms into their national laws. They cannot offer even limited amnesties, which have been the underlying incentive truth commissions have held out to would-be witnesses.

"I fear that the ICC's international justice is perverting the situation on the ground," says international lawyer Smith. "If the ICC continues this way, it will further infuse the importance of prosecutions, which will in turn make it difficult to use other tools."

While nothing technically makes an ICC trial and a local truth commission incompatible, trials and commissions have not exhibited a stellar track record when it comes to collaboration. Smith prefers that the ICC duplicate a different model — bolstering local judicial systems' capacities to investigate and make domestic prosecutorial decisions. Two years ago, for example, ICC staff members helped Senegal prepare to try exiled Chadian president Hissine Habre, accused of torture and crimes against humanity.⁷¹ In a historic action, the African Union had referred the case from Chad to Senegal.

The possibility of collaboration addresses a common critique among Africans of international justice: that tribunals and truth commissions are "white man's justice" imposed on the developing world. "The white man will come and take over our leaders and do whatever they want with them," says Sarrfo Amoakohene, a small business operator in Ghana.

"To the extent that we say these issues apply just to [those in developing countries], that's the end,"

warns James A. Goldston, executive director of the Open Society Institute's Justice Initiative, a global law reform program with offices in five world capitals and New York City. "These ideas are very much applicable to the developed world."

Among developed countries, Canada is learning just how complicated transitional justice can be. It established a truth commission in 2008 after Prime Minister Stephen Harper apologized to Canada's First Nations for more than 100 years of "residential education" — a program that forcibly removed more than 100,000 aboriginal children from their homes and put them in often abusive boarding schools.⁷² After some controversy and political battles, the commission began its work in December.

And in the United States, Sen. Patrick Leahy, D-Vt., chairman of the Judiciary Committee, has called for a truth commission to investigate alleged abuses during the George W. Bush administration, including the use of coercive interrogation techniques generally considered to be torture. The proposal is seen as a compromise between critics demanding criminal prosecutions of those involved in authorizing so-called enhanced interrogation techniques and others, who want to move on.⁷³ Because the United States has not signed the Rome Statute, the ICC has no jurisdiction over the case. But an Italian court in November convicted in absentia 22 Central Intelligence Agency operatives for a kidnapping that led to the "extraordinary rendition" of an Italian citizen.⁷⁴ And the same Spanish judge who indicted former Chilean leader Pinochet opened a criminal investigation into alleged Bush administration involvement in the torture of five Spanish citizens or residents.⁷⁵

President Barack Obama has said he is "more interested in looking forward than in looking back." But Leahy insists, "It's a lot easier to look for-

ward if you know what happened in the past."⁷⁶

The debate echoes those in dozens of other countries, where the push for peace collides with the need for acknowledgement and accountability for past abuses. ■

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AFP/Getty Images/Roberto Schmidt

Post-election violence ravages Kibera, a slum in Nairobi, Kenya, in December 2007, leaving more than 1,000 people dead and hundreds of thousands of people homeless. Although the Kenyan government's Truth and Reconciliation Commission — set up in 2008 to investigate human rights violations during the rampage — has yet to release its final report, the International Criminal Court has expressed interest in conducting its own independent investigation of the violence.

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About the Author

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Institute for Historical Justice and Reconciliation, Laan van Meerdervoort 70, The Hague, 2517AN Netherlands; +31 (0) 70 361 5530; www.historyandreconciliation.org. Organization that brings together local historians and other stakeholders to work through disputes about historical truth.

Leitner Center for International Law and Justice, Fordham University, 33 West 60th St., New York, NY 10023; (212) 636-6862; LeitnerCenter@law.fordham.edu. An early pioneer of law and human rights studies; sponsors hundreds of programs a year open to the public.

Open Society Institute, worldwide offices and headquarters at 400 West 59th St., New York, NY 10019; (212) 548-0600; www.soros.org. Oversees programs on transitional justice, rule of law and open societies in the Americas, Asia, Eastern Europe and Africa.

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Voices From Abroad:

AHN BYUNG-OOK

**President, Truth and
Reconciliation Commission
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Apologies necessary

"To move on, our society needs to offer a sincere apology to those victims so that they can accept it and forgive what the past regimes did to them."

*Korea Times (South Korea),
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MUTULA KILONZO

Justice Minister, Kenya

Tribunals unnecessary

"The future of Kenya lies in truth, justice and reconciliation. Judicial process, whether at The Hague or in the High Court or in a special tribunal, will never reconcile Kenya."

Capital FM (Kenya), July 2009

PRINCE Y. JOHNSON

**Former Leader, Independent National Patriotic
Front of Liberia**

Moving forward

"We remain unfailingly committed to the pursuit of peace, reconciliation, security and stability of our country. We who fought for and died on the battlefields have agreed to lay down our weapons in exchange for peace, healing, forgiveness and reconciliation. We who witnessed and experienced the deaths by bullets and rockets, by hunger and starvation of our loved ones have overwhelmingly agreed

to bury the past in favor of a better future."

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HUGH ROBERTS

**Former Director,
North Africa Program,
International Crisis Group**

They want to know why

"It is a positive discourse, but there is a negative element as well that says, in effect, 'We should turn the page and not seek explanations of what happened and why.' But the [Algerian] families of those who lost someone . . . want to know the truth."

*The Christian Science Monitor,
April 2009*

MARCO CACERES

**Co-Founder,
ProjectHonduras.com**

People must now listen

"[Hondurans] who have traditionally done most of the talking will now be asked to listen without interruption so that they can fully understand why the majority of Hondurans are angry, fearful or lacking in hope. This is a good way to begin to heal Honduras. . . ."

*ProjectHonduras.com,
August 2009*

PAUL MUTTE

**Human Rights Activist,
Kenya**

Kenya not ready

"You can not have a generally effective TJRC when there is no transition.

It is premature. And really, it is just going to be used to sanitize the perpetrators of land grabbing, corruption, political assassinations, rather than establishing the truth and getting reparations for the victims. That is my view: Kenya is not ready for the TJRC."

Voice of America, August 2009

GILBERT TANDIA

**Human Rights Activist,
Democratic Republic of
the Congo**

People need reconciliation

"[I]n the absence of a Truth Commission, one must set up a mechanism [that] will help people to express themselves, giving truth its proper place. It would help people to freely discuss, as though in a family, those events in which they were the perpetrators or the victims, thus creating an atmosphere for reconciliation."

*Inter Press Service (South Africa),
May 2009*

KNUT OSTBY

**Resident Coordinator,
U.N. Development Program
Solomon Islands**

Reconciliation a top priority

"Reconciliation is the number one priority of the government, as it affects the ability of thousands of Solomon Islanders to participate fully in social, cultural and economic life."

States News Service, April 2009

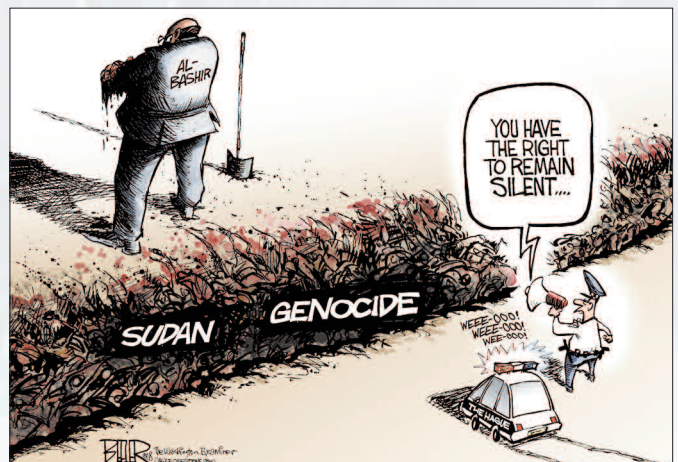
MULBAH K. MORLU JR.

**Founder, Forum for the
Establishment of a War
Crimes Court, Liberia**

Delaying justice encourages war

"Every time you postpone the mechanism of justice, there is a successive crisis. We said we are fed up with war now, but . . . we have a consistent record of going back to war."

*The Washington Times,
January 2009*



The Washington Examiner/Nate Beeler