

TRUTH VERSUS JUSTICE. THE CHALLENGE OF TRUTH AND RECONCILIATION COMMISSIONS.

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“The Lord set me in a valley; it was full of bones. He led me back and forth among them, and I saw a great many bones in the floor of the valley, bones that were very dry. He asked me, “Son of man, can these bones live?” Then he said to me, prophesy, son of man, and breathe into these slain, that they may live. So I prophesied as he commanded me, and breath entered them; they came to life and stood up on their feet – a vast army.” Ezekiel 37

In March 2006, Humam Hamoudi, a leader of the most powerful Shiite party in Iraq, and Seleh Mutlaq, a leading Sunni politician, were part of a delegation of Iraqis who traveled to South Africa to meet with Archbishop Desmond Tutu. The purpose of the UN sponsored meeting was to explore whether a Truth and Reconciliation Commission, similar to that in South Africa, could help to quell the budding violence in Iraq. Hamoudi came away with the sense, as he put it, “that beautiful things can come from very fragile situations.” Unfortunately such was not to be, at least not yet, in Iraq. If Iraq, like South Africa in 1994, is to be reinvented as a constitutional democracy, it must in some way be able to embrace reconciliation, and forge some degree of collective understanding of a terrible past.

An intense debate rages internationally about the best ways to provide for a transition from dictatorship or harsh authoritarian rule, to democracy. A democratic government must re-establish its legitimacy in the public’s eyes as a government. It must establish its institutions as ones strong enough to address the legitimate interests of a free people, as opposed to ones which serve the totalitarian regime that

preceded it. The people who have been victims in the prior conflict need to have a way to have their voices heard, and some measure of accountability is required for those who have done evil.

There are three main paths that nations take to address these complex and interrelated issues: the first is criminal prosecutions; the second, Truth Commissions; and the third, to do nothing. Sometimes countries go down more than one of these paths at the same time. Tonight I want to share a bit about each of these options. I do that in part because of the relevance of the issue to current events. For example In March of this year, the lower house of the Afghan Parliament passed a bill providing for amnesty for groups involved in war crimes, and recognizing the rights of victims to seek justice. President Hamid Karzai praised what he called an “important initiative” to promote national reconciliation, while human rights groups, both inside and outside Afghanistan opposed the bill and are pushing for war crimes trials.

Second, I think the issue of which path to choose is key to the long-term health of the countries involved. Political thought and ethics tend to look to defining morality in warfare and prescribing responses to discrete offenses: just war, pacifism and punishment. But what should ethicists make of Rwanda, Bosnia, East Timor and Iraq, places where peace falls short of justice. These are places that are utterly devastated and where the social and physical landscapes resemble Ezekiel’s valley of dry bones. Here, memories of death and injustice are recent and fresh, ready to ignite into revenge. What is needed is a new morality of repair. And the issue is which model or combination of models gives the best chance for that repair.

The first path, and still the most common, is criminal trials. Trials tend to focus on individual perpetrators. At their best, they are selective in scope. The most famous of these was at Nuremberg after World War II, where the Allies tried Nazi war criminals. The International War Crimes Tribunal in The Hague is trying cases from Balkans for example. The choice was made to try those persons who had committed serious offenses, and in so doing provide a measure of justice. People who do bad things should be punished, both because they deserve it, and because it restores the moral compass of a country. As one commentator has put it in speaking about Rwanda, “When individuals corral victims into churches and systematically slaughter them with machetes, the killers are not the latest hapless victims. They are deliberate, immoral actors. Failing to prosecute them is both wrong and dangerous. Wrong because it does a deep disservice to the victims, as if their deaths were a natural accident, not a deliberate choice. Dangerous because it signals to others who would be mass murderers that they risk not punishment but a therapy session at most.”

The International War Crimes Tribunal is a permanent sitting court. In addition to this forum, some international courts have been set up in individual countries to try, under international supervision, crimes against humanity perpetrated in those countries. One such example is Rwanda, where the massacres of the Tutsis are being tried in an internationally supervised forum with both Rwandan and foreign judges.

In addition to international courts, many nations have now passed laws which allow them to reach worldwide to prosecute crimes against humanity. Perhaps the best known example of this is the indictment in Spain of Augusto Pinochet of Chile.

Chile is really a fascinating study, because it highlights major issues with respect to truth commissions. In Chile, the Pinochet government submitted to a plebiscite, which it only narrowly lost to Patricio Aylwin. The fascist right had substantial support, and was a political force to be reckoned with. Prior to turning over power it voted amnesty for itself for all crimes committed under its regime.

Aylwin did not have the political force to overturn the amnesty, but he did create a Truth Commission to investigate the truth about the past. He appointed a commission of 8 people, 4 supporters of each side. All 8 people endorsed the ultimate report, and it had therefore a moral force to it. The Truth Commission was limited to cases involving death or disappearance only. Once the report was released, President Aylwin apologized on national television, and there matters would have stood. The issue of past abuses was not discussed in public, and little happened until Spain indicted Pinochet.

As Human Rights Watch put it, "If Gen. Augusto Pinochet had not been arrested in England on the night of October 16, 1998, the truth about his crimes would never have been fully revealed and democracy in Chile might have remained in a state of arrested development.

Eight years after Pinochet relinquished power, he still cast a long shadow over Chilean society. The Senate was stacked with his supporters. The Chilean courts lacked true independence. Painfully little progress had been made in restoring democratic rights to the importance they had enjoyed before the military takeover. ... In the face of Pinochet's lingering power, the elected government quickly abandoned its pledge to seek derogation or annulment of the

self-amnesty law. Indeed, despite a highly regarded report by a government-sponsored truth commission, proof of Pinochet's own role in the worst atrocities remained largely circumstantial.” End quote

Pinochet was arrested in England, on a warrant from Spain. The Spanish judge relied on information gathered during the Truth Commission to issue the indictments. The controversy surrounding that incident fundamentally changed the political landscape in Chile, leading to criminal prosecutions of those responsible for the disappearances. It was not the Truth Commission that changed Chile – it was the judicial process in Spain that broke the power of the prior government.

The most recent example of a trial is that of Saddam Hussein in Iraq. To say the trial was not a model of due process is an understatement, and clearly it did not result in a more reconciled nation.

A second path, used with greater frequency over the past twenty years, has been the formation of truth commissions. I will discuss them in more detail in a moment, but in brief, these commissions are officially sanctioned investigations into some aspect of the prior regime. They hear from witnesses, usually primarily victims, and create some type of permanent record of what occurred. Conceptually, finding out the truth about what occurred is the primary objective. It is only in finding out the truth that the victims and their families can begin to heal from the past. In order to get at the truth, in many cases these commissions give amnesty to perpetrators, so that they will be free to come forward and tell what happened without fear of prosecution.

When I first began to contemplate this issue, I was offended by the thought that someone who had committed a terrible crime would receive amnesty. I am after all, deeply steeped in the American justice system, where conviction and punishment of the guilty is a central tenet.

I had a conversation that opened me to the possibility that my first impression might not tell the whole story.

I was speaking with some friends about the South African experience. One of the friends had immigrated to the US from Lebanon during the civil war. Her parents were Armenian survivors of the genocide. She was emphatic that any cost, even freeing of the people who killed her family members, was worth it if only to find out what had happened. Because for her and for her family, the central agony was not knowing. And to know made the rest of the cost, the lack of justice, more than acceptable.

Almost all Truth Commissions share four characteristics:

- **First**, they focus on the past. The events may have occurred in the recent past, but a truth commission is not an ongoing body akin to a human rights commission.
- **Second**, truth commissions investigate a pattern of abuse over a set period of time rather than a specific event. In its mandate, the truth commission is given the parameters of its investigation both in terms of the time period covered as well as the type of human rights violations to be explored.
- **Third**, a truth commission is a temporary body, usually operating over a period of six months to two years and completing its work by submitting a report. These parameters are established at the time of the

commission's formation, but often an extension can be obtained to wrap things up.

- **Fourth**, truth commissions are officially sanctioned, authorized, or empowered by the state. This, in principle, allows the commission to have greater access to information, greater security, and increased assurance that its findings will be taken under serious consideration. Official sanction from the government is crucial because it represents an acknowledgment of past wrongs and a commitment to address the issues and move on. Furthermore, governments may be more likely to enact recommended reforms if they have established the commission.

The Truth and Reconciliation Commission of South Africa is acknowledged to be one of the most comprehensive, sophisticated and innovative of the more than 150 commissions that have been formed to date.

The South African Truth and Reconciliation Commission was established pursuant to a “post-amble” to the revised South African Constitution negotiated in late 1993 and early 1994. That post-amble provided that “amnesty shall be granted in respect of acts, omissions and offenses associated with political objectives and committed in the course of the conflicts of the past.” Only later was this connected to a truth-seeking process. Nelson Mandela was elected president of South Africa in April 1994.

In 1995 Parliament passed implementing legislation. The Commission had three interconnected committees: the Human Rights Violations Committee was responsible for collecting statements from victims and witnesses and recording the gross human rights violations. The Amnesty Committee processed and decided individual applications for

amnesty and the Reparations and Rehabilitation committee set up the reparations program. The National Party, the primary Afrikaner party, feared bias on the part of the Commission, and thus insisted that a judge would head the Amnesty Committee, and that its decisions could be reviewed only by a court, and not by the Commission as a whole.

The Commission had a significant budget and a staff of more than 300. The Commission addressed only those events between 1964 and 1994, when Mandela was elected.

The TRC was an explicit political compromise between the broad amnesty that apartheid leaders sought and the prosecutions proposed by the African National Congress, which would have antagonized any hope of a peaceful transition. The solution was to keep the prosecution option open but grant individual amnesties for those who came forward and told the truth about their crimes, in public and often on television. This quasi-penal process encouraged confession and transparency.

The constitutionality of the Commission was challenged both by the Nationalist Afrikaners, but also by victims of the government, most notably the family of Stephen Biko, a well-known activist killed by police.

In upholding the constitutionality of the Commission the Chief Justice of the South African Supreme Court wrote the following:

The call to punish human rights criminals can present complex and agonizing problems that have no single or simple solution. While the debate over the Nuremberg trials still goes on, that episode – trials of war criminals of a defeated nation—was simplicity itself as compared

to the subtle and dangerous issues that can divide a country when it undertakes to punish its own violators. A nation divided during a repressive regime does not emerge suddenly united when the time of repression has passed. The human rights criminals are fellow citizens living alongside everyone else, and they may be very powerful and dangerous. If the army and police have been the agencies of terror, the soldiers and police aren't going to turn overnight into paragons of respect for human rights. ... For a successful negotiated transition, the terms of the transition required not only the agreement of those victimized by abuse but also those threatened by the transition.

The Commission took testimony from 21,000 victims and witnesses over a two and one-half year period, including 2000 of which were public hearings. There was intense media coverage, and the Truth Commission Special Report, which aired Sunday evenings was the most watch news show in the country.

More than 7,000 individuals applied for amnesty. Amnesty was granted only on an individual basis, to those who fully confessed their involvement in past crimes. Further, those crimes had to have a political motivation. Gross violations of human rights required a public hearing where the Commission, the victims or their families, and their attorneys were permitted to ask questions. No apology or sign of remorse was required for amnesty to be granted. Amnesty not only barred criminal prosecution, it barred any civil redress by victims or their families.

Early on it became clear that only those who feared prosecution would come forward. Some early trials resulted in convictions and others in acquittals. Most senior-level

perpetrators did not come forward, and very few members of the army asked for amnesty. Desmond Tutu has said that one of the greatest weaknesses of the Commission was that fact that it failed to attract the bulk of the white community to participate enthusiastically in the process.

The primary objection to Truth Commissions is that they are deals with the devil – flawed compromises with those seeking to obstruct justice. Many Human Rights groups object to any agreement providing for amnesty, whether individually as in South Africa, or corporately. This is particularly true where the amnesty is given for significant human rights violations, such as torture or murder. They contend that even if the national structure is not sufficiently robust for trials, the International Criminal Courts provide a vehicle for trials to occur.

Truth Commissions have tended to form in countries where the opposition to change still retains significant power, particularly armed power. In South Africa for example, the primary mechanisms of oppression, the police and army, remained intact after Mandela's election. One commentator has argued that abusive governments most often see Truth Commissions as a soft option for avoiding justice. If the former government leaders used repression to empower themselves then a real transition requires that they be disempowered. And opponents of truth commissions argue that the only real disempowerment is trial, conviction and punishment.

Truth Commission proponents counter that it is unrealistic to remove all power, but that what is needed is a new sharing of power in the country. In the long run, no country can survive with a significant percentage of its people completely disempowered. Desmond Tutu, in discussing the

compromises that were made wrote that South Africa could not have “victor’s justice” because neither side won the decisive victory that would allow for such trials.

In addition, Truth Commission proponents object to the burden of proof requirements of trials. As Chief Justice Mahomed put it: All that remains is the truth of wounded memories of loved ones deep and traumatizing to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigors of law.” Truth Commissions, especially those that require individual applications for amnesty, reverse the usual burdens, and require the perpetrators rather than the prosecutor to tell what they did.

A second objection raised to Truth Commissions is to the very conceptual basis for Commissions – the idea that a public airing of the painful past can establish “truth” and provide catharsis for victims and healing and reconciliation for a country.

Opponents contend that in fact there is no support for the proposition that the re-telling of horrific events does anything to promote healing. A significant problem encountered by the South African Truth Commission has been the psychological trauma of telling their stories. South Africa provided a support person for each victim who testified, and also provided some follow-up mental health assistance. Other countries with fewer resources have been unable to provide this assistance. As an aside, this problem is particularly acute where a primary means of torture or intimidation was rape, because the public retelling in many cases causes significant stigma to attach to the female victims. Further, most studies that support talking as leading to healing evaluate the talking in terms of psychological

support over a long period of time rather than a one-shot statement before a group of strangers.

Truth commissions do seem to begin to satisfy a clear need of some victims to tell their stories, and more importantly, to be listened to. Long lines form of people anxious to give testimony.

There are anecdotes on each side of this debate. Lucas Sikwepere, an ANC activist was blinded when the police shot him in the face and tortured him. After telling his story to the Commission, he said “I feel what has been making me sick all the time is the fact that I couldn’t tell my story. But now, it feels like I got my sight back by coming here and telling you the story.” During the amnesty proceedings for one policeman he testified to killing a black man driving by in order to get his car. The family of the man recognized the description of what had happened to their father, the milkman, and called to thank the commission for what they had found out, saying that they had always wondered what had happened to their father, who simply didn’t come home one day. Many anti-apartheid activists were tortured into giving confessions by having a wet bag placed over their heads until they reached the point of asphyxiation. For years the police denied using this tactic, until it was admitted at the Truth Commission. The impact of this admission on the victims was intense; many spoke afterward of feeling profoundly exonerated and vindicated by the revelation.

It is perhaps too early to tell whether the Truth Commissions in South Africa or elsewhere increased the level of reconciliation. For Desmond Tutu reconciliation was paramount, and it required forgiveness. He consistently told participants in the Commission process “if you live with

hatred and revenge in your heart, you dehumanize not only yourself, but your community.”

Some of the people who committed grievous deeds did confess, and ask for forgiveness from those they had wronged. But many of the people who ultimately asked for forgiveness were also ones who were tried and convicted, and sentenced to long prison terms.

In fact, a respected poll taken at the conclusion of the Commission showed that two-thirds of South Africans believed that the Commission investigations led to a deterioration of race relations. Only 17% of those surveyed felt that the people of South Africa would become more forgiving as a result of the Commission.

Richard Goldstone, a leading South African judge who went on to become the first prosecutor of both the Rwanda and Yugoslavia war crimes tribunals has written that the most significant accomplishment of the Truth and Reconciliation Commission is that no one now can deny the worst manifestations of apartheid.

While falling short of reconciliation, the general understanding of the worst abuses is a significant accomplishment.

For either trials or Truth Commissions, or some combination of the two to be effective, they must have the following characteristics:

1. They must have government endorsement. Those efforts at either trials or Truth Commissions that have been attempted solely by NGOs or by foreign governments alone have met with such resistance that they have been ineffective.

2. They must be adequately funded and staffed.
3. They must have a level of independence and be perceived to be fair by all sides in the conflict.
4. Truth Commissions are rarely effective when they opt for blanket amnesty, rather than individualized amnesty as was done in South Africa. South Africa was the first nation, and so far one of the few, to utilize this effective method of getting information.
5. Generally a significant percentage of their proceedings must be public, and must be well publicized by the media.

I want to very briefly address the third option to trials or Truth Commissions, and that is to do nothing.

When I was 20, in 1973, I lived in Spain for a year, attending the University of Madrid. Spain at that time was a real live fascist country. Francisco Franco was in power, and his authority was absolute. Franco had come to power during the Spanish Civil War, which extended from 1936 to 1939, in which it is estimated more than one million people died. It was not a geographic but an ideological war. Imagine in the United States a war in which Democrats and Republicans killed each other.

None of this was studied in school. My class at the University in modern Europe covered the rest of Europe until the present, but Spanish history stopped at 1936. Simply talking about these issues was dangerous.

The country was deeply divided. The two sides hated and distrusted each other, and with good reason. In November 1975, Franco died, and Spain began a process of moving toward democracy. The issue that arose for Spain was what to do with that history.

Spain adopted a deliberate policy it called “pacto de olvido” [the pact or agreement of forgetting] in which the violent acts committed during Spain’s years of civil war and subsequent dictatorship would not be mentioned or brought up. And for 30 years, that policy has survived, and the Spanish democracy has held. There are beginning to be chinks in that armor however. Proposals are circulating in Spain to dig up certain mass graves in order to find out who is buried and how they were killed. This is being met with great resistance. We do not yet know how this will play out.

Mozambique ‘s transition out of the civil war after 1992 also involved a similar pact to forget, and let bygones be bygones. Similarly in Sierra Leone, most survivors wanted reintegration and peace, and a truth commission or trials, especially ones with public hearings, was felt to be a destructive process.

How nations decide which path to choose, and how to address the consequences of their pasts is one of the central issues confronted by each nation as it transitions from a terrible past to its future. The path chosen can, for good or for ill, affect the success of the efforts to create a new nation out of an old one, and to give life to Ezekiel’s dry bones.