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WESTERN CAPE

## DECLARATION

I, Nuraan Human, declare that **“Have Truth Commissions Succeeded in Dealing with Gross Human Rights Violations? A Critical Evaluation”** is my own work, that it has not been submitted before any degree or examination in any other university, and that all the sources I have used or quoted have been indicated or acknowledged as complete references.

Nuraan Human

Signed.....

28 October 2009



University of the Western Cape

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# ABBREVIATIONS

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Basic Principles and Guidelines	<i>Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law 2005</i>
CEH	Guatemalan Commission for Historical Clarification
CHILEAN TRC	National Commission for Truth and Reconciliation
CLSS	Centre of Legal and Social Studies
CONADEP	<i>Comision Nacional para la Desaparicion de Personas (Spanish)</i> English Translation "National Commission on the Diasappeared"
FMLN	Farabundo Marti National Liberation Front
LOME AGREEMENT	<i>Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone Lome 1999</i>
RUF	Revolutionary United Front
SA TRC	South African Truth and Reconciliation Commission
TRC	Truth and Reconciliation Commission
URNG	<i>Unidad Revolucionaria Nacional Guatemalteca</i>

## **CHAPTER ONE**

### ***1. Introduction: Transitional justice and Human Rights***

If it is granted that it is the government's responsibility to promote national unity and reconciliation, what exactly are its obligations according to international law with respect to human rights violations?<sup>1</sup> A question debated by most scholars of Transitional Justice is, what mechanism can be successfully used to heal and reconcile a nation after it has survived a repressive regime. The mechanisms available include prosecutions, reparations, justice reforms, truth commissions<sup>2</sup> or general amnesties.<sup>3</sup>

In order to progress towards a peaceful future to be shared by victims and abusers of a post conflict society, the international human rights community has supported truth commissions as an important part of the healing and peace process.<sup>4</sup> Truth Commissions correspond to state obligations under international human rights law in which states implement their obligation to investigate and identify perpetrators of serious human rights violations and their victims.<sup>5</sup> This obligation corresponds with an individual right, namely, the right to truth.<sup>6</sup>

There are other mechanisms that can be used to transform a society from conflict to peace. In spite of this, truth commissions seem to have gained popularity with each passing year.<sup>7</sup> The reason why truth commissions have become popular includes, that in order to overcome the

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<sup>1</sup> Rwelamira, M in Rwelamira, M and Werle, G (eds) *Confronting Past Injustices* (2006) xix.

<sup>2</sup> Freeman, M *Truth Commissions and Procedural Fairness* (2006) 5.

<sup>3</sup> Boraine, A "Truth and Reconciliation in South Africa: The Third Way" in Rotberg, R and Thompson, D (eds) *Truth v Justice* (2000) 143.

<sup>4</sup> Brahm, E "Truth Commissions" (2004) Available at [http://www.beyondintractability.org/essay/truth\\_commissions/](http://www.beyondintractability.org/essay/truth_commissions/) (Accessed on 29 April 2009).

<sup>5</sup> Freeman *op cit* 6.

<sup>6</sup> *Ibid.*

<sup>7</sup> Mani, R "Does Power Trump Morality?" in Hughes, E, Schabas, W and Thakur, R (eds) *Atrocities and International Accountability: Beyond transitional justice* (2007) 33.

anguish of the past, the truth needs to be told. Families of victims and the surviving victims of gross human rights violations have a right to know the truth and want the truth concerning such violations to be heard. In addition, often in post conflict societies, the number of cases might exceed the capacity of the new regime to investigate and prosecute the perpetrators.

Even though truth commissions are strongly supported as an alternative mechanism to prosecutions, reparations and blanket amnesties, the question lingers as to how successful truth commissions have been when dealing with gross human right violations.

The significance of this study will be to determine whether a truth commission is an effective mechanism to deal with grave breaches of human rights and what role it plays in Transitional Justice. It will also determine and establish whether truth commissions have been successful or not. The criteria success of the truth commissions will be based will be on how best the truth commissions acted out their duties in terms of their mandate, how best they investigated the violations of human rights and how the process of such investigations were conducted in terms of human rights violations. The success will also depend on the outcome of the hearings, if any, arising from the investigations and the findings made by the truth commission including recommendations flowing there from. The recommendations will depend on the nature, extent and the implementation of amnesty, reparations and prosecutions. Success will also be based on the outcome of the truth commission process in terms of its contribution to the reconciliation and transformation of a society. It is important to note that all these factors will depend on the situation within each country. Most importantly, success of the truth commissions will be evaluated by determining whether society as a whole was of the view that the process of the truth commission satisfied the need for transitional justice. This study will also clarify how important mechanisms such as truth commissions are and what relevance they should have in the future.

A problem which arises is, if truth commissions are less successful than anticipated, should countries rather attempt a new strategy or make use of alternative mechanism such as prosecutions or amnesties, in dealing with human rights violations effectively? And even if unsuccessful, do the advantages of a truth commission such as truth outweigh the need to receive justice for gross human rights violation? For this reason, this issue is worthy of investigation. Since a truth commission is the most popular mechanism of transitioning societies, it is of great importance to Transitional Justice that it be determined whether they work in terms of human rights violations. In addition, this research paper will also highlight which were the successful truth commissions that are paving the way for the future.



## **CHAPTER TWO**

### ***2. Amnesties, Prosecutions and Reparations***

Any assessment of truth commissions must involve comparisons between them and the alternate approaches which may be used to deal with gross human rights violations.<sup>8</sup> Alternate approaches may include granting amnesty or prosecuting those responsible for committing gross human rights violations.<sup>9</sup> These approaches are thus worthy of discussion.

#### **2.1 Amnesty**

Amnesty is an exercise of sovereign power by a state.<sup>10</sup> The question of amnesty has often been debated. Marxen defines amnesty by identifying four main characteristics:<sup>11</sup>

1. An amnesty grants a reduction or complete exemption from punishment;
2. Amnesty involves an undefined number of cases as opposed to an individual pardon;
3. Amnesty may be granted to avoid prosecution, to quash a pending case or to prevent the execution of a judgement which has already been passed;
4. The exemption of punishment created by amnesty is of a lesser legal quality. The amnesty does not cancel out the criminal act. It only waives the consequences of the punishable offence.

The effect of amnesty is that national amnesty legislation has an effect only within the jurisdiction of the state that enacted it.<sup>12</sup> This would entail that where jurisdiction is universal,

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<sup>8</sup> Steiner, H in *Truth Commissions: A Comparative Assessment* Human Rights Program Harvard Law School (1997) 10.

<sup>9</sup> See also Steiner *ibid*.

<sup>10</sup> *Kallon v Kamara SCSL* (2004) 15 AR72(E) at para 67.

<sup>11</sup> Marxen, K "Punishment and indemnity for violation of human rights" in Rwelamira, M and Werle, G (eds) *Confronting Past Injustices* (2006) 34.

<sup>12</sup> Fernandez, L *Transitional Justice Class Notes - Transnational Justice and Crime Prevention* (2009).



the amnesty does not prevent the person granted amnesty from being prosecuted by other states.<sup>13</sup> However, if the amnesty results from a broad societal consensus, other states should refrain from prosecuting.<sup>14</sup>

The legal position regarding amnesties under international law often depends on the nature of the crime committed.<sup>15</sup> Amnesties are often frowned upon if they have the power to grant amnesty for crimes deemed to be international crimes, which states are under a duty to prosecute or extradite.<sup>16</sup> General amnesties are therefore unacceptable.<sup>17</sup> Amnesties granted in past countries in transition, were made with reference to “political crimes”, “military crimes” or “crimes against the state.”<sup>18</sup> A prime example would be the amnesty granted by South Africa, which was for crimes “associated with a political objective.”<sup>19</sup>

An amnesty may have a negative effect on the work of a truth commission. Victims and relatives of past abuses have often argued that the granting of amnesty obstructs peaceful and sustained reconciliation.<sup>20</sup> This impacts the objectives and aims of a truth commission. In addition, self-amnesty laws granted in countries like Chile,<sup>21</sup> may also have a negative impact on a truth commission as it prevents the commission from exercising their power in terms of determining the whole truth.

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<sup>13</sup> *ibid.*

<sup>14</sup> *ibid.*

<sup>15</sup> McDonald, A “A right to truth, justice and a remedy for African victims of serious violations of international humanitarian law” in *Law, Democracy and Development* (1999) 3 *Journal of the Faculty of Law of the University of the Western Cape* 139 at 154.

<sup>16</sup> Sarkin, J “The Amnesty Hearings in South Africa Revisited” in Werle, G *Justice in Transition – Prosecution and Amnesty in Germany and South Africa* (2006) 43.

<sup>17</sup> Werle, G *Principles of International Criminal Law* (2005) 65.

<sup>18</sup> McDonald *op cit* 157.

<sup>19</sup> *Promotion of National Unity and Reconciliation Act 34 of 1995* Republic of South Africa Section 18 (1).

<sup>20</sup> Rwelamira *op cit* 8.

<sup>21</sup> McDonald *op cit* 163.

However, a “truth for amnesty” in my view may be extremely advantageous. This is based on the premise that granting amnesty in exchange for truth may result in further facts from the perpetrators perspective, being revealed. It can encourage perpetrators to come forward.

## 2.2 Prosecution

Impunity has been the norm for serious violations of national law and international law.<sup>22</sup> Therefore, prosecutions form one of the key elements of an integrated transitional justice strategy, aimed at moving a society “beyond impunity and beyond a legacy of human rights abuse.”<sup>23</sup>

The purpose for prosecuting gross human rights violations is to communicate to citizens a “disapproval of violations and support for certain democratic values.”<sup>24</sup> Trials can help differentiate between conduct that is condoned and conduct that is condemned by the State, which as the United Nations Office of the High Commissioner for Human Rights states, contributes to the public’s trust in State institutions.<sup>25</sup>

Whether the public places its trust in truth commissions is debatable. Victims of gross human rights violations would expect the perpetrators to be held accountable in some form. If this accountability is lacking by a Truth Commission, there will be a lack of public trust.

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<sup>22</sup> Office of the United Nations High Commissioner for Human Rights: “Rule-of-Law Tools for Post-Conflict States: Prosecution Initiatives” (2006) HR/PUB/06/4 1 Available at <http://www.unhcr.org/refworld/docid/46cebb6c2.html> [accessed 1 September 2009] (Accessed on 21 April 2009).

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid* 4.

<sup>25</sup> *Ibid.*

A duty to prosecute does however exist. Werle states that crimes under international law are directed against the international community as a whole.<sup>26</sup> The international community is therefore empowered to prosecute and punish these crimes.<sup>27</sup> International law allows and even obligates the international community and states to prosecute international crimes through universal jurisdiction.<sup>28</sup> This obligation is also recognized by treaty law and customary international law on the state where the international crime took place.<sup>29</sup>

Prosecutions may not always be an appropriate mechanism. In situations where the number of alleged perpetrators exceeds the capacity of the justice systems, truth commissions may be seen as another way of delivering justice<sup>30</sup>.

Even though many truth commissions list accountability as an aim, others specifically avoid it by offering amnesty.<sup>31</sup> It should be noted that in terms of truth commissions, accountability is not an essential element of the truth-seeking process.<sup>32</sup> However, some may argue that without accountability, truth produces only injustice.<sup>33</sup>

Contrary to this, truth commissions are, in comparison to courts, better than trials at gathering, investigating and publishing information about the previous regime.<sup>34</sup> While they are not usually capable of establishing criminal culpability or imposing punishment, they can

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<sup>26</sup> Werle *op cit* 58.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid* 61.

<sup>29</sup> *Ibid* 62.

<sup>30</sup> Bussman, H “The South African Approach – The Truth and Reconciliation Commission and Amnesty for Gross Human Rights Violations” in Werle, G *Justice in Transition – Prosecution and Amnesty in Germany and South Africa* (2006) 42.

<sup>31</sup> Daly, E “Truth Skepticism: An Inquiry into the Value of Truth in Times of Transition” (2008) 2 *The International Journal of Transitional Justice* 23 at 34 Available at <http://ijtj.oxfordjournals.org> (Accessed on 29 April 2009).

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

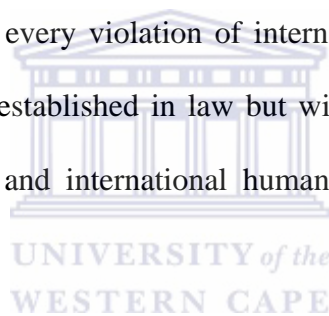
<sup>34</sup> *Ibid.*

illustrate the factual and moral responsibility of the perpetrators.<sup>35</sup> In addition, when a truth commission names the perpetrators responsible in its report, it paves the way for the criminal prosecution of those perpetrators.<sup>36</sup>

### 2.3 Reparations

Reparation is an important tool of transitional justice<sup>37</sup> and comprises restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>38</sup> The aim of reparation is to eliminate, as far as possible, the consequences of the illegal act and to restore the situation that would have existed if the act had not been committed.<sup>39</sup>

Among states, the principle that every violation of international obligations gives rise to a duty to make reparation is well established in law but with regard to individual victims of violations of human rights law and international humanitarian law, the position is more uncertain.<sup>40</sup>



Truth commissions play a role in recognizing the right to reparations and in awarding reparation orders.<sup>41</sup> This is done by recommending reparation programs to be established for victims in their reports. In Chile, the recommendation on reparation was implemented by way of the establishment of the National Corporation for Reparation and Reconciliation to oversee

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<sup>35</sup> *Ibid* 35.

<sup>36</sup> *Ibid* 36.

<sup>37</sup> Freeman *op cit* 62.

<sup>38</sup> *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (hereafter Basic Principles and Guidelines) Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005 Sections 19, 20, 21, 22, 23 respectively.

<sup>39</sup> Gillard, E “Reparations for Violations of International Humanitarian Law” (2003) 85 *International Review of the Red Cross* 529 at 531 Available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5SRLFZ/\\$File/irrc\\_851\\_Gillard.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5SRLFZ/$File/irrc_851_Gillard.pdf) (Accessed 5 May 2009)

<sup>40</sup> *Ibid*.

<sup>41</sup> De Feyter and Parmentier, S “Introduction” in De Feyter *et al* (eds) *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (2005) 1.

reparations to victims.<sup>42</sup> This may not be the case in other countries due to either a lack of resources or lack of political will on part of the governments to implement such reparations. Reparations play an important role in truth commissions by giving the victims or their relatives a form of compensation for their suffering.

These mechanisms illustrate all the elements which a truth commission may encompass. For this reason, truth commissions may be seen as the middle road between the above-mentioned mechanisms. This is in my view ideal for countries in transition where gross human rights violations have occurred.



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<sup>42</sup> Hayner, P "Fifteen Truth Commissions – 1974 to 1994: A Comparative Study" (1994) 16 *Human Rights Quarterly* 597 at 622.

## **CHAPTER THREE**

### ***3. The Importance of Truth and Reconciliation***

In this chapter, the importance of truth and reconciliation will be discussed. It is crucial to understand these principles of truth commissions and how truth and reconciliation correlate.

#### **3.1 Truth**

In her book *Unspeakable Truths*,<sup>43</sup> Priscilla Hayner begins by asking “Do you want to remember, or to forget?”<sup>44</sup> If we choose to remember, the opportunity arises to determine the truth.

In many societies where there has been an abusive rule, there have been secret disappearances, murders and other serious human rights violations. The victims of such abuses and their families want to know and deserve to know the truth as to how and why the violation took place.

The truth in my opinion serves three purposes. Firstly, for the victims, the truth can give closure and heal their pain; secondly, for the perpetrators, the truth can ease their guilt; and thirdly, for the society, the truth will help them understand the reasons why the violations were committed to ensure that they will never be committed again.<sup>45</sup>

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<sup>43</sup> Hayner, P *Unspeakable Truths: Facing the Challenge of Truth Commissions* (2002).

<sup>44</sup> *Ibid* 1.

<sup>45</sup> Amnesty International “Truth Commissions” Available at <http://www.amnesty.org/en/international-justice/issues/truth-commissions> (Accessed on 29 April 2009).

In addition, the truth can bring about unity and reconciliation to a society after surviving abusive rule. Either way, in order for a society to make the “transition” the truth needs to be told. A truth commission is a vehicle for truth telling.<sup>46</sup> Truth-telling is often seen as the first step in the process of achieving justice and reconciliation on an individual level.<sup>47</sup> Thus, truth commissions serve the purpose of being an instrument for victims and perpetrators alike to exercise their right to truth and the opportunity to be heard.



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<sup>46</sup> Mobekk, E “Transitional Justice in Post-Conflict Societies – Approaches to Reconciliation” (2005) 267. Available at [http://www.bmlv.gv.at/pdf\\_pool/publikationen/10\\_wg12\\_psm\\_100.pdf](http://www.bmlv.gv.at/pdf_pool/publikationen/10_wg12_psm_100.pdf) (Accessed on 21 April 2009).

<sup>47</sup> *Ibid* 272.

### 3.2 Reconciliation

Reconciliation implies rebuilding relationships today that are not tainted by the conflicts and hatred of yesterday.<sup>48</sup>

Truth commissions have the objective of reconciliation after the facts have been revealed.<sup>49</sup>

The purpose of any Transitional Justice mechanism is to reunite the people afflicted by past conflict. The purpose is to contribute to reconciling them. Reconciliation represents the bridge between peace and justice, and between past and future.<sup>50</sup>

According to Werle, South Africa's message to societies in transition is that there is no reconciliation without truth.<sup>51</sup> The fact that the truth is seen as a fundamental and central component of reconciliation can nevertheless be disputed.<sup>52</sup> Some writers are of the opinion that truth finding may reveal feelings of resentment, hatred and open old wounds.<sup>53</sup>

I agree that truth is required to reach reconciliation. With the truth comes forgiveness, and only when we forgive can we reunite. Thus, we need to look at society holistically and create processes that would "reconcile" such society as a whole.

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<sup>48</sup> Hayner *Unspeakable Truths op cit* 161.

<sup>49</sup> Baehr, P "How to Come to Terms with the Past" in Hughes, E, Schabas, W and Thakur, R (eds) *Atrocities and International Accountability* (2007) 15.

<sup>50</sup> Mani *op cit* 39.

<sup>51</sup> Werle, G "Without Truth, No Reconciliation: The South African Rechtsstaat and The Apartheid Past" (1996) 29 *Verfassung und Recht in Ubersee* 58 at 72.

<sup>52</sup> Mani *op cit* 34.

<sup>53</sup> Baehr *op cit* 18.

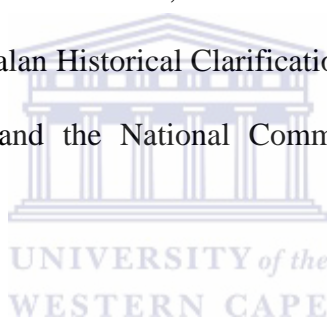


## **CHAPTER FOUR**

### ***4. Truth Commissions***

Truth commissions have become a familiar concept and institution for a state emerging from a period of gross human rights abuses.<sup>54</sup> They are usually set up during or immediately after a political transition in a country,<sup>55</sup> similar to a change of regime.

Up until 2007, 32 truth commissions had been established in over 28 countries<sup>56</sup> with the first truth commission in Uganda in 1974.<sup>57</sup> The five significant commissions are the South African Truth and Reconciliation Commission,<sup>58</sup> the Chilean National Commission on Truth and Reconciliation,<sup>59</sup> the Guatemalan Historical Clarification Commission,<sup>60</sup> the Commission on the Truth for El Salvador and the National Commission on the Disappearance of Persons.<sup>61</sup>



A truth commission is a fact finding body set up specifically to investigate and record serious violations of human rights,<sup>62</sup> uncover the much needed truth and make recommendations for redress and future prevention of abuses.<sup>63</sup> Truth commissions are aimed at bringing about peace and reconciliation in a divided society ravaged by conflict. They are created in various ways. In some cases, truth commissions were reached through negotiated settlements

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<sup>54</sup> Steiner *op cit* 7.

<sup>55</sup> Hayner, P "Fifteen Truth Commissions" *op cit* 608.

<sup>56</sup> Amnesty International *op cit*.

<sup>57</sup> As noted by Hayner "Fifteen Truth Commissions" *op cit* 598.

<sup>58</sup> Hereafter the South African TRC.

<sup>59</sup> Hereafter the Chilean TRC.

<sup>60</sup> Hereafter the Guatemalan CEH. This abbreviation is given by Tomuschat, C "Clarification Commission in Guatemala" (2001) 23 *Human Rights Quarterly* 233.

<sup>61</sup> This is according to Priscilla Hayner. See Hayner *Unspeakable Truths op cit* 32.

<sup>62</sup> Buergenthal, T "Truth Commissions: Due Process and Functions" in Dupuy *et al Festschrift fur Tomuschat* (2006) 104.

<sup>63</sup> Freeman *op cit* 18.

between the former repressive regime and the new government. This was the case with the South African TRC.<sup>64</sup>

Hayner refers to truth commissions as bodies that, share a focus on the past, investigate past patterns of abuses, are temporary bodies, are officially sanctioned, authorised or empowered by the state, and complete their work by submitting a report.<sup>65</sup>

She also writes that truth commissions may have any or all of the following five basic aims: to clarify and formally acknowledge past abuses; to respond to the specific needs of the victims; to contribute to justice and accountability; to outline institutional responsibility and recommend reforms; and/or to promote reconciliation and reduce conflict over the past.<sup>66</sup>

Therefore in order to reach this goal, testimony from victims or perpetrators, depending on the structure of the truth commission, is important.<sup>67</sup>

Once the truth commission has completed its investigations, held hearings and collected evidence, it can give recommendations in its report for broad reforms of state institutions, based on its findings.<sup>68</sup>

It is important to note that no two truth commissions function in the same. They differ in terms of the mandate, which may range from the duration of their operation, the time period they focus upon, and the types of crimes constituting their investigation.<sup>69</sup> It is often stressed

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<sup>64</sup> Hayner *Unspeakable Truths op cit* 41.

<sup>65</sup> *ibid* 14.

<sup>66</sup> *ibid* 24.

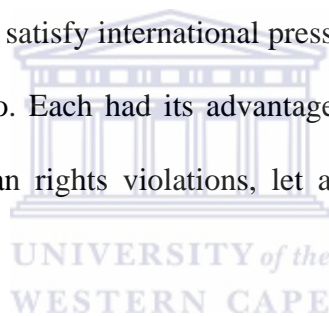
<sup>67</sup> Fernandez *op cit*.

<sup>68</sup> Mobekk *op cit* 266 - 267.

<sup>69</sup> Brahm *op cit*.

that truth commissions do not replace judicial bodies and that they are not courts,<sup>70</sup> however, the truth commissions may possess similar powers to judicial bodies. These powers, which are also covered in the mandates, include the power to subpoena, the power to issue warrants or the power to order seizure of evidence.<sup>71</sup> Truth commissions may also differ in terms of holding public or private hearings, granting amnesty or disclosing the perpetrators responsible. This differentiation depends on the conflict that occurred in a specific society and therefore there are different purposes for each truth commissions.

In spite of the fact that truth commissions are becoming popular, not all truth commissions are genuinely implemented, such as that of Uganda in 1974, which instead of trying to rectify the past, seemed only intended to satisfy international pressure.<sup>72</sup> Not every truth commission achieved what it was intended to. Each had its advantages and disadvantages. And not all succeeded in dealing with human rights violations, let alone succeeded in terms of their mandate.



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<sup>70</sup> Freeman *op cit* 69.

<sup>71</sup> Fernandez *op cit*.

<sup>72</sup> Brahm *op cit*.

## CHAPTER FIVE

### *5. The Successful and Unsuccessful – An Evaluation on Truth Commissions*

The success of truth commissions will be based on the following commissions adopted by the following countries: South Africa (1995), Chile (1990), Guatemala (1997), Sierra Leone (2002), Argentina (1983) and El Salvador (1992).<sup>73</sup>

#### 5.1 ARGENTINA- National Commission on the Disappeared

The military coup that brought General Jorge Videla to power in Argentina in 1976 led to an increase in activities by “right wing death squads and by left wing guerrilla movements.”<sup>74</sup> During their rule, the military government initiated a program of brutal repression against the opposition.<sup>75</sup> At the hands of the military, an estimated 10 000 to 30 000 people were tortured, killed, arrested and disappeared.<sup>76</sup> The military went on to rule Argentina for seven years after it had seized power.<sup>77</sup> Toward the end of their rule, the military lost the war against Great Britain over the Falkland Islands, and this prompted them to agree to an election and a civilian rule in 1983.<sup>78</sup> However, just before relinquishing power, the military granted themselves immunity from prosecution.<sup>79</sup>

With the military was ousted from power, Argentina began to transform itself into a democracy and looked for a way of creating a commission to investigate the gross human

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<sup>73</sup> See Appendix 1 – Table of Truth Commissions in Freeman *op cit* 317 – 325.

<sup>74</sup> Sikink, K and Walling, C “Argentina’s contribution to global trends in transitional justice” in Roht-Arriaza, N and Mariezcurrena, J (eds) *Transitional Justice in the Twenty-First Century* (2006) 304.

<sup>75</sup> *Ibid.*

<sup>76</sup> Hayner *Unspeakable Truths op cit* 33.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

rights atrocities perpetrated by the Argentine military regime between 1976 and 1983.<sup>80</sup> Raul Alfonsin, the newly elected president, created the “National Commission on the Disappeared”<sup>81</sup> (CONADEP) through a presidential decree within a week of taking office.<sup>82</sup>

The Commission consisted of ten commission members and was headed by the well-known and respected author Ernesto Sabato.<sup>83</sup> The non-governmental organisations had initially lobbied for a parliamentary commission and not a presidentially appointed commission because the latter lacked the power to compel the production of information from the military institutions.<sup>84</sup> The Commission also had no powers of subpoena.<sup>85</sup>

The Commission was mandated to ‘clarify the acts related to the disappearance of persons’ and also to determine, where possible, the location of their remains.<sup>86</sup> During the investigations, many human rights organisations handed over an extensive number of files relating to the disappeared.<sup>87</sup> The Commission inspected detention centres, police facilities and secret cemeteries.<sup>88</sup> Testimony was taken only from families of the disappeared, those who survived temporary disappearance and those who were witness to others being imprisoned.<sup>89</sup> Statements were taken in embassies and consulates of Argentina around the world and people in exile returned to give testimony to assist in the investigations.<sup>90</sup> The Commission also worked closely with the families of the disappeared to try and find persons

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<sup>80</sup> Hayner “Fifteen Truth Commissions” *op cit* 615.

<sup>81</sup> *Comision Nacional para la Desaparicon de Personas.*

<sup>82</sup> Hayner *Unspeakable Truths op cit* 33.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid* 33 – 34.

<sup>85</sup> *Ibid* 109.

<sup>86</sup> *Ibid* 316.

<sup>87</sup> Hayner “Fifteen Truth Commissions” *op cit* 615.

<sup>88</sup> Hayner *Unspeakable Truths op cit* 34.

<sup>89</sup> *Ibid* 175.

<sup>90</sup> *Ibid* 34.

who might have been alive at the time.<sup>91</sup> It must be noted, however, that the Commission had no capacity to undertake in-depth investigation into individual cases.<sup>92</sup>

The Commission did not hold public hearings.<sup>93</sup> It received over 7 000 statements during nine months.<sup>94</sup> 1 500 people who survived the military's detention camps gave detailed descriptions of the camps and what kinds of torture were used.<sup>95</sup> The investigations also focused on detention and torture camps and often visited these camps with survivors to confirm the location of these camps.<sup>96</sup>

As confirmed by non-governmental organisations, the Commission received hardly any information it had requested from the military forces.<sup>97</sup>

After nine months of investigations, the Commission presented its final report called *Nunca Mas* (English – *Never Again*).<sup>98</sup> The report documented that 8 960 people had disappeared<sup>99</sup> and that most of the disappeared were eventually killed and their bodies were either incinerated, buried or thrown into the sea.<sup>100</sup> It is also estimated that over 9 000 people were killed and that the bulk of these murders occurred during 1976 and 1977.<sup>101</sup> The report also included a list of 365 “former torture centres” accompanied by photographs.<sup>102</sup> The report

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<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid* 109.

<sup>93</sup> *Ibid* 34.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid* 34.

<sup>98</sup> See Hayner *Unspeakable Truths* *ibid.*

<sup>99</sup> *Ibid.*

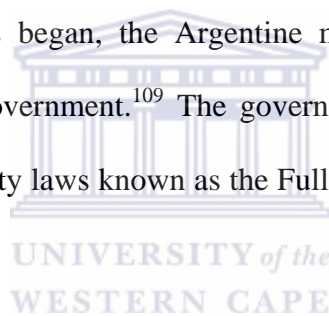
<sup>100</sup> Sikkink and Walling *op cit* 304. See also *Nunca Mas: The Report of the Argentine National Commission on the Disappeared* 209 – 234.

<sup>101</sup> *Ibid.*

<sup>102</sup> Hayner *Unspeakable Truths* *op cit* 34.

was well received and was published into a book, which went on to become a national best-seller.<sup>103</sup>

The “self-amnesty” that was granted by the military government was soon repealed by the new government.<sup>104</sup> Following this, the Commission handed over its files directly to the state prosecutor’s office.<sup>105</sup> The files gave the prosecutors access to a large number of primary witnesses and allowed the prosecutors to build up cases quickly.<sup>106</sup> All the information collected by the Commission was essential in the trial of senior members of the military juntas, which resulted in the conviction of five generals.<sup>107</sup> The most important general convicted was General Videla, who was sentenced to life imprisonment.<sup>108</sup> However, when the trials against junior officers began, the Argentine military carried out various coup attempts against the Alfonsín government.<sup>109</sup> The government was then led to decree two laws which were basically amnesty laws known as the Full Stop Law and the Due Obedience Law.<sup>110</sup>



These amnesty laws did not reverse or overturn previous trials, but blocked the possibility of more trials.<sup>111</sup> The government of Carlos Menem, which followed the government of Alfonsín, also offered a pardon to those military in prison.<sup>112</sup> However, the pardons did not reverse their trials or sentences.<sup>113</sup>

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<sup>103</sup> Hayner “Fifteen Truth Commissions” *op cit* 615.

<sup>104</sup> Hayner *Unspeakable Truths op cit* 34.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid* 93.

<sup>107</sup> *Ibid.*

<sup>108</sup> Sikkink and Walling *op cit* 306.

<sup>109</sup> *Ibid* 306 – 307.

<sup>110</sup> *Ibid* 306.

<sup>111</sup> *Ibid* 307.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

A reparations law was put in place 10 years after the *Nunca Mas* was published.<sup>114</sup> The 8 960 files of the disappeared served as the heart of the reparations program which was set up to reach families of the disappeared.<sup>115</sup> This reparations program was very inclusive.<sup>116</sup> Monetary reparations<sup>117</sup> were given to majority of families of the disappeared,<sup>118</sup> political prisoners<sup>119</sup> and those who were forced into exile after arrest.<sup>120</sup>

A key innovation in Argentina was the creation of “truth trials.”<sup>121</sup> This came about after the amnesty laws blocked trials for many past gross human rights violations.<sup>122</sup> Judges were encouraged to develop trials that would assist in determining the truth about the fate and whereabouts of the disappeared.<sup>123</sup> The Centre of Legal and Social Studies (CLSS) argued that the families of the disappeared had a “right to truth” and to pursue that right through judicial investigations.<sup>124</sup> Truth trials were eventually established as a judicial process in 1998.<sup>125</sup> It incorporated elements from both truth commissions and criminal justice.<sup>126</sup>

The CLSS’s greatest challenge was having the amnesty laws declared null and void in court.<sup>127</sup> Other human rights activists also worked for many years at getting the “amnesty laws repealed, annulled or declared unconstitutional.”<sup>128</sup>

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<sup>114</sup> In 1994. See Hayner *Unspeakable Truths op cit* 172.

<sup>115</sup> *Ibid* 175.

<sup>116</sup> *Ibid* 174.

<sup>117</sup> *Ibid* 330.

<sup>118</sup> *Ibid* 175.

<sup>119</sup> *Ibid* 178.

<sup>120</sup> *Ibid* 176.

<sup>121</sup> Sikkink and Walling *op cit* 316.

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

<sup>123</sup> *Ibid*.

<sup>124</sup> *Ibid*.

<sup>125</sup> *Ibid*.

<sup>126</sup> *Ibid*.

<sup>127</sup> *Ibid*.

<sup>128</sup> *Ibid* 317.



Eventually, the Supreme Court, in a majority judgement, declared the amnesty laws unlawful in 2005.<sup>129</sup> In addition, in 2003, the Argentine Congress, with support from new government of Nestor Kirchner, passed a law that declared the Full Stop and Due Obedience Laws null and void.<sup>130</sup>

Today, it is suggested that Argentina is in the process of permitting the blocked human rights trials to proceed.<sup>131</sup>

The truth commission in Argentina was the first important truth commission in the world because it provided a model for all subsequent truth commissions.<sup>132</sup> It made use of many transitional justice mechanisms that included trials and reparations.<sup>133</sup> It was set apart from other truth commissions because it held “near-immediate trials” of top leaders for their human rights abuses.<sup>134</sup> The Argentine model suggested that truth commissions and trials can be beneficially combined.<sup>135</sup> It also, amidst two controversial amnesty laws, enacted laws that permitted the reopening of blocked human rights cases.

However, a flaw of this Commission was that it was only limited to nine months for investigations. Had the investigators had more time, they would have been able to receive more testimonies<sup>136</sup> which would have been effective. More time awarded to the mandate

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<sup>129</sup> *Ibid.* See note 30 *Corte Suprema de Justicia de la Nacion, S. 1767, XXXVIII, Recurso de Hecho s./caso Julio Hector Simon, June 15, 2005.*

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid* 321.

<sup>132</sup> *Ibid* 305.

<sup>133</sup> *Ibid* 307.

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid* 321.

<sup>136</sup> Logan, S and Garret, S “Truth Commissions in Latin America: An Analysis of Truth Commissions in Argentina, Brazil and Chile” 12 Available at [http://sand.miiis.edu/research/documents/logan\\_truth.pdf](http://sand.miiis.edu/research/documents/logan_truth.pdf) (Accessed on 22 September 2009).

would have led to more healing for the society.<sup>137</sup> But with the assistance of the human rights organisations and the society, the Commission accomplished in getting the government's acknowledgement in its involvement in past atrocities.<sup>138</sup>

The Argentine model may not have been perfect regarding reconciliation and the investigations may have been limited, but it encompassed all elements necessary to deal with gross human rights violations. Argentina was therefore successful in dealing with gross human rights abuses. It should be looked at as an example that truth and justice can be successfully achieved.



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<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid* 3.

## 5.2 CHILE - National Commission for Truth and Reconciliation

In September 1973, General Augusto Pinochet overthrew the democratically elected government of Salvador Allende, the then president of the civilian government of Chile.<sup>139</sup> He brutally repressed every opponent and continued to rule in Chile for 17 years.<sup>140</sup> Under Pinochet's rule political differences were "resolved through a systematic policy which involved police brutality, censorship, exile, torture, disappearances and executions."<sup>141</sup> During his rule, Pinochet instituted an amnesty law in 1978.<sup>142</sup> This law covered all crimes against persons committed between 11 September 1973 and 10 March 1978, and included serious crimes such as murder and kidnapping.<sup>143</sup> It was widely criticised as a self-amnesty law.<sup>144</sup>



As specified by the Constitution which was designed by the military<sup>145</sup>, presidential elections were held in 1990.<sup>146</sup> Chile returned to democratic government when President Patricio Aylwin was elected to power.<sup>147</sup> President Aylwin, however, assumed presidency with certain restrictions on democratic rule.<sup>148</sup> One restriction was that Pinochet remained head of the army and that the military structure remains intact.<sup>149</sup> In relation to the transition which was ahead of Chile, the Aylwin government "apparently assumed" that an aggressive attitude regarding human rights violations would provoke clashes with the armed forces "that might

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<sup>139</sup> Hayner *Unspeakable Truths op cit* 35.

<sup>140</sup> *Ibid.*

<sup>141</sup> Sutil, J "No Victorious Army Has Ever Been Prosecuted..." The Unsettled Story of Transitional Justice in Chile" in McAdams, *A Transitional Justice and the Rule of Law in New Democracies* (1997) 126.

<sup>142</sup> Hayner *Unspeakable Truths op cit* 35.

<sup>143</sup> Sutil *op cit* 127.

<sup>144</sup> *Ibid.*

<sup>145</sup> Mera, J "Chile: Truth and Justice under the Democratic Government" in Roht-Arriaza, *N Impunity and Human Rights in International Law and Practice* (1995) 171.

<sup>146</sup> Sutil *op cit* 125.

<sup>147</sup> Mera *op cit* 171.

<sup>148</sup> Hayner *Unspeakable Truths op cit* 35.

<sup>149</sup> Mera *op cit* 171.

jeopardise the success of the transition itself.”<sup>150</sup> However, there was a sincere desire by the new government to seek out the truth, apply justice and also provide reparations to the victims who suffered violations.<sup>151</sup>

Another restriction which faced President Aylwin was the amnesty law.<sup>152</sup> The amnesty constrained options for dealing with the abuses owing to the Pinochet regime.<sup>153</sup> However, amnesty does not prevent the investigation of facts.<sup>154</sup> Realising that the amnesty law could not be nullified, President Aylwin “turned to a policy of investigating and establishing the truth about the past.”<sup>155</sup>

In the most important initiative of the new government,<sup>156</sup> President Aylwin established a National Commission for Truth and Reconciliation.<sup>157</sup> Article One of the Decree Establishing the National Commission on Truth and Reconciliation<sup>158</sup> stated that the Commission was created for the purpose of clarifying “in a comprehensive manner the truth about the most serious human rights violations committed” during the time of the military rule “in order to bring about the reconciliation of all Chileans.”

The mandate of the Commission included establishing a complete picture of the grave acts;<sup>159</sup> gathering evidence making it possible to identify victims individually and determining their

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<sup>150</sup> *Ibid.*

<sup>151</sup> *Ibid.*

<sup>152</sup> Hayner *Unspeakable Truths op cit* 35.

<sup>153</sup> *Ibid.*

<sup>154</sup> Mera *op cit* 181.

<sup>155</sup> Hayner *Unspeakable Truths op cit* 35.

<sup>156</sup> Mera *op cit* 172.

<sup>157</sup> Hayner “Fifteen Truth Commissions” *op cit* 621.

<sup>158</sup> Supreme Decree No. 355 of April 1990.

<sup>159</sup> *Ibid* Article One (a).

whereabouts and fate;<sup>160</sup> to recommend measures of reparations;<sup>161</sup> and to recommend legal and administrative measures that should be adopted in order to prevent violations from been committed again.<sup>162</sup> The mandate excluded abuses that did not result in deaths or disappearances, such as torture not resulting in death.<sup>163</sup> The reason for this restriction was because deaths and disappearances were considered serious crimes.<sup>164</sup> This decision was criticised by human rights organisations.<sup>165</sup> In my view, this decision deserves criticism because under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>166</sup> torture is considered a “serious crime”.

A “well-balanced” commission was appointed and was headed by Senator Raul Rettig.<sup>167</sup> The Commission worked for nine months.<sup>168</sup> It investigated 3 400 cases, of which it determined that 2 920 fitted within its mandate.<sup>169</sup> The Commission thoroughly investigated each case.<sup>170</sup> It was assisted in its investigations by being given detailed records of a majority of cases of disappearances that were taken to court during the military rule<sup>171</sup> and by making use of documents and files of domestic and international human rights groups.<sup>172</sup> The Commission also took testimony from the family of the disappeared or killed.<sup>173</sup> In addition, the Commission even went as far as placing advertisements in newspapers across the world

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<sup>160</sup> *Ibid* Article One (b).

<sup>161</sup> *Ibid* Article One (c).

<sup>162</sup> *Ibid* Article One (d).

<sup>163</sup> Hayner “Fifteen Truth Commissions” *op cit* 621.

<sup>164</sup> Mera *op cit* 172.

<sup>165</sup> Hayner “Fifteen Truth Commissions” *op cit* 621.

<sup>166</sup> GA res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984); 1465 UNTS.

<sup>167</sup> Hayner “Fifteen Truth Commissions” *op cit* 621.

<sup>168</sup> *Ibid*.

<sup>169</sup> *Ibid*.

<sup>170</sup> *Ibid*.

<sup>171</sup> *Ibid*.

<sup>172</sup> Mera *op cit* 172.

<sup>173</sup> Hayner *Unspeakable Truths op cit* 36.

requesting information from exiles.<sup>174</sup> The Commission however received a little co-operation from the armed forces.<sup>175</sup>

In addition, the Commission had no powers to issue subpoenas or search warrants and it also did not hold any public hearings.<sup>176</sup>

The Commission produced the so called *Rettig Report* in February 1991.<sup>177</sup> According to the report, 95 percent of the human rights abuses, according to the Commission's definition, were caused by State agents<sup>178</sup> and four percent of human rights abuses were caused by the opposition groups.<sup>179</sup> However, it must be noted that the Commission could not determine the fate or whereabouts of most victims but it was to be assumed that those who had disappeared had been killed.<sup>180</sup> According to Sutil, this is related to the controversy surrounding the amnesty law<sup>181</sup>. Sutil states that amnesty affects the public disclosure of truth, which is a battle that is centred on the fate and whereabouts of the victims of the military regime.<sup>182</sup>

The report also failed to name publically the persons appeared to be responsible for human rights abuses.<sup>183</sup> This decision was made because the Commission felt it would be equivalent to bringing criminal charges, which was beyond its competence.<sup>184</sup> This would have constituted a violation of due process.<sup>185</sup> This was a flaw of the Commission because it chose

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<sup>174</sup> *Ibid.*

<sup>175</sup> *Ibid.*

<sup>176</sup> Fernandez *op cit.*

<sup>177</sup> Sutil *op cit* 134.

<sup>178</sup> Hayner *Unspeakable Truths op cit* 36.

<sup>179</sup> Mera *op cit* 172.

<sup>180</sup> *ibid.*

<sup>181</sup> Sutil *op cit* 136.

<sup>182</sup> *Ibid* 137.

<sup>183</sup> Mera *op cit* 177.

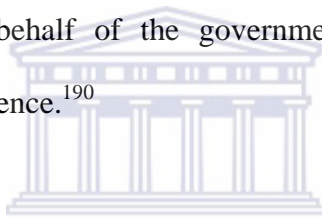
<sup>184</sup> *Ibid* 177.

<sup>185</sup> *Ibid.*

not to comply fully with its mandate “to place all information regarding crimes, including the names of the perpetrators before competent courts.”<sup>186</sup> Instead, as Mera puts it, it selected information it sent to the courts and which it considered relevant for judicial proceedings.<sup>187</sup> Despite the amnesty, the Commission was required to send to the courts any information it uncovered involving a crime.<sup>188</sup>

The report also contained recommendations for reparations for past violations which included moral and material compensation.<sup>189</sup>

On presenting the report to the public, President Aylwin made a formal apology to the victims and their families on behalf of the government and also asked the army to acknowledge their role in the violence.<sup>190</sup>



The report was received with praise from the public and human rights groups.<sup>191</sup> However, in the three weeks after the release of the report there were three assassinations in Chile that caused alarm in political circles.<sup>192</sup> This resulted in attention being shifted away from the report and “plans for social reconciliation exercises” dropped.<sup>193</sup>

Despite the limited attention given to the report,<sup>194</sup> many of its recommendations were implemented.<sup>195</sup> The most important recommendation that the government followed was

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<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid* 178.

<sup>188</sup> Hayner *Unspeakable Truths op cit* 98.

<sup>189</sup> Mera *op cit* 173.

<sup>190</sup> Hayner “Fifteen Truth Commissions” *op cit* 622.

<sup>191</sup> *Ibid.*

<sup>192</sup> *Ibid.*

<sup>193</sup> Hayner *Unspeakable Truths op cit* 37.

<sup>194</sup> *Ibid.*

<sup>195</sup> Hayner “Fifteen Truth Commissions” *op cit* 622.

establishing a “National Corporation for Reparation and Reconciliation.”<sup>196</sup> The Corporation was established to search for the remains of the disappeared, resolve cases still left open, organise the files of the Commission so that they are made available to the public, and implement a reparations program.<sup>197</sup> The reparations included cash payments to families of the disappeared,<sup>198</sup> educational and medical benefits and a pension for the survivors of the disappeared or killed.<sup>199</sup> Families of the disappeared have accepted these benefits.<sup>200</sup> However, other families were of the opinion that the benefits represent recognition from the state of its own guilt for crimes they committed.<sup>201</sup>

Although limited in its mandate, this truth commission has been considered to be one of the most successful in dealing with gross human rights abuses.<sup>202</sup> Regardless of the fact that the Commission only investigated a limited number of cases and dealt with limited types of crimes, its commitment to investigate each case thoroughly has to be applauded. Given its mandate, the Commission struck a good balance between its investigations, findings and recommendations.

The Commission may have failed in not being able to fully reconcile the country due to the sudden assassinations after the release of the report, but this was through no fault of the Commission. The Commission did what it was required in terms of its mandate. Regarding

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<sup>196</sup> *Ibid.*

<sup>197</sup> Hayner *Unspeakable Truths op cit* 37.

<sup>198</sup> *Ibid* 328.

<sup>199</sup> Hayner “Fifteen Truth Commissions” *op cit* 623.

<sup>200</sup> Mera *op cit* 173 note 189.

<sup>201</sup> Hayner *Unspeakable Truths op cit* 173.

<sup>202</sup> Heine, J “All the truth but only some justice? Dilemmas of dealing with the past in new democracies” in Hughes, E, Schabas, W and Thakur, R (eds) *Atrocities and international accountability: Beyond transitional justice* (2007) 72.



the amnesty, the situation dramatically changed in 1999 when the Chilean Supreme Court held that the amnesty could no longer be applied to cases involving the disappeared.<sup>203</sup>

Mera states that the government was over cautious and could have done more without jeopardising the transition to democracy.<sup>204</sup> This may be the case, but I disagree on the basis that it would have been a huge risk, considering that the army was still intact. President Aylwin also possibly did not want to violate the amnesty laws enacted by the Pinochet regime in 1980 – enactments designed to ensure his continued role of the army.<sup>205</sup>

The fact that nobody has since challenged the findings of the report would presumably be interpreted to mean that the report may be considered an “authoritative and commonly accepted version of the facts.”<sup>206</sup> The report also helped diminish the sense of impunity that was associated with the crimes committed under the Chilean dictatorship.<sup>207</sup> In addition, today, much progress has been made in Chile, not only in uncovering the truth about what had happened during the dictatorship, but also in the dispensing of justice.<sup>208</sup> This attributes to the success of the Commission.

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<sup>203</sup> Hayner *Unspeakable Truths op cit* 98.

<sup>204</sup> Mera *op cit* 172.

<sup>205</sup> Hayner *Unspeakable Truths op cit* 35.

<sup>206</sup> Sutil *op cit* 134.

<sup>207</sup> *Ibid.*

<sup>208</sup> Heine *op cit* 66.

### 5.3 EL SALVADOR - Commission of Truth for El Salvador

During the 1980's, El Salvador was ravaged by a civil war between the Salvadoran military and "the most effective guerrilla movement on the continent," the Farabundo Marti National Liberation Front (FMLN).<sup>209</sup> The Salvadoran military and its allies waged an attack on the rebels and anyone else thought to be associated with.<sup>210</sup> At the beginning of the war, the military massacred thousands of peasants as part of a strategy to terrorise the peasant population in the guerrilla areas and to eliminate the sources of supply and information to the guerrillas.<sup>211</sup> The rebels retaliated through tactics such as executing civilians considered opponents.<sup>212</sup> The war which began in 1980 and ended in 1991, resulted in thousands of political killings and disappearances.<sup>213</sup> One of the prominent cases was the killings of six Jesuit priests in 1989 which triggered international pressure to end the war.<sup>214</sup> With the aid of the United States, the war ended in 1991 with a "United Nations-brokered peace accord"<sup>215</sup> which was reached by way of a negotiated agreement between "an undefeated military and undefeated insurgency."<sup>216</sup>

One issue the peace accord addressed and the parties agreed to, was that steps be taken to improve respect and guarantees for human rights in the future.<sup>217</sup> In order to address the past violations, the peace accords established two mechanisms.<sup>218</sup> These mechanisms included the *Ad Hoc* Commission, designed to purge the military; and the Truth Commission, which

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<sup>209</sup> Popkin, M "El Salvador: A Negotiated End to Impunity?" in Roht-Arriaza, N *Impunity and Human Rights in International Law and Practice* (1995) 198.

<sup>210</sup> *Ibid* 199.

<sup>211</sup> *Ibid*.

<sup>212</sup> *Ibid*.

<sup>213</sup> Hayner *Unspeakable Truths op cit* 38.

<sup>214</sup> *Ibid*.

<sup>215</sup> *Ibid*.

<sup>216</sup> Popkin *op cit* 198.

<sup>217</sup> *Ibid* 202.

<sup>218</sup> *Ibid*.

examined the most serious ‘acts of violence’ committed during the war.<sup>219</sup> The truth commission was known as the Commission on the Truth for El Salvador.<sup>220</sup> Unable to agree to a list of cases that should be investigated, the parties to the accord indicated that it would only investigate ‘serious acts of violence’ that had occurred during the war.<sup>221</sup> The parties also recognised that there was a need to make the complete truth known.<sup>222</sup>

The Commission was given broad powers to carry out its mandate.<sup>223</sup> According to the Mexican Agreements, the Commission, apart from investigating “serious acts of violence that occurred since 1982 and whose impact on society urgently demanded that the public should know the truth,”<sup>224</sup> was also charged with making recommendations regarding legal, political, or administrative measures based on the results of the investigations.<sup>225</sup>

In its investigations, the Commission received information from more than 2 000 people regarding violations involving more than 7 000 victims.<sup>226</sup> The Commission interviewed hundreds of witnesses and individuals who had information about certain cases.<sup>227</sup> These included victims, military members, FMLN members, lawyers, court personnel, and even government officials.<sup>228</sup> The Commission also collected information from international and national human rights groups, Salvadoran institutions and foreign governments.<sup>229</sup> The Commission even went as far as bringing in the Argentine Forensic Anthropology Team to

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<sup>219</sup> *Ibid.*

<sup>220</sup> Hayner *Unspeakable Truths op cit* 38.

<sup>221</sup> *Ibid.*

<sup>222</sup> Popkin *op cit* 205.

<sup>223</sup> *Ibid.*

<sup>224</sup> See also *From Madness to Hop: The 12-Year War in El Salvador: Report of the Commission on the Truth for El Salvador* UN Security Council, U.N. Doc. 2/25500 at 18 (1993).

<sup>225</sup> Popkin *op cit* 205 – 206.

<sup>226</sup> *Ibid* 207.

<sup>227</sup> *Ibid.*

<sup>228</sup> *Ibid.*

<sup>229</sup> *Ibid.*

exhume the remains of a massacre in a town that was the centre of international controversy.<sup>230</sup>

The publication of the Commission's report was considered a "major political event in El Salvador".<sup>231</sup> The report was well received by human rights groups in El Salvador.<sup>232</sup> However, the government and military were not that impressed.<sup>233</sup> The Commission claimed that five percent of the cases were attributed to the FMLN whereas over 85 percent were attributed to government forces.<sup>234</sup> The Commission also assigned individual responsibility for the violations.<sup>235</sup> Hence, it named over forty senior members of the military, judiciary and armed opposition for their role in the violence.<sup>236</sup> The Commission stressed that "the responsibility should not fall on the institutions but on those who committed the violent acts and who took steps to cover up the criminal deeds."<sup>237</sup>

The Commission was criticised for failing to report on the operation of death squads and the role of the United States in supporting government forces.<sup>238</sup> In addition, the Commission failed to recommend prosecutions. This was blamed on the fact that the existing judiciary was too unreliable, weak and compromised to be able to adjudicate cases involving past, gross human rights violations.<sup>239</sup> The Commission did make it clear however that persons responsible for human rights violations should be prosecuted and punished.<sup>240</sup>

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<sup>230</sup> Hayner *Unspeakable Truths op cit* 39. The town referred to was El Mozote.

<sup>231</sup> *Ibid.*

<sup>232</sup> *Ibid.*

<sup>233</sup> Popkin *op cit* 210.

<sup>234</sup> *Ibid.*

<sup>235</sup> *Ibid.*

<sup>236</sup> Hayner *Unspeakable Truths op cit* 39.

<sup>237</sup> Popkin *op cit* 207.

<sup>238</sup> Hayner *Unspeakable Truths op cit* 39 – 40.

<sup>239</sup> Popkin *op cit* 209.

<sup>240</sup> *Ibid* 210.

Five days after the release of the report, a general amnesty law was passed.<sup>241</sup> The amnesty law provided for the “extinction” of civil and criminal responsibility.<sup>242</sup>

Certain recommendations were implemented over time, particularly in the area of judicial reform.<sup>243</sup> The Commission’s condemnation of the judicial system, including the new mechanisms for electing justices which was established in the Peace Accords, led to efforts to appoint respected lawyers, the majority of whom were not connected with or affiliated to any political party.<sup>244</sup>

No steps have been taken to implement the Commission’s recommendations to create a compensation fund for victims.<sup>245</sup> Nor has the government made any effort to rehabilitate victims or provide moral compensation.<sup>246</sup>

It is very hard to determine to what extent this truth commission succeeded in dealing with gross human rights abuses. The fact that the Commission was only granted eight months to undertake all its investigations and submit a report<sup>247</sup> makes it impossible to believe that it did its work thoroughly. Regardless of the fact that the report was well received, there is no balance between the investigations conducted, the general amnesty, the lack of prosecutions and the lack of any form of compensation. When determining if a truth commission succeeded in dealing with gross human rights abuses, one has to look at the commission and circumstances surrounding it objectively, but also subjectively as a victim. And as a victim,

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<sup>241</sup> *Ibid* 211.

<sup>242</sup> *Ibid*.

<sup>243</sup> Hayner *Unspeakable Truths op cit* 40.

<sup>244</sup> Popkin *op cit* 214.

<sup>245</sup> *Ibid* 215.

<sup>246</sup> *Ibid*.

<sup>247</sup> Hayner *Unspeakable Truths op cit* 39.

the human rights abuses were only investigated and not really “dealt with”. There was no real form of justice for victims.



#### 5.4 SOUTH AFRICA - Truth and Reconciliation Commission

Apartheid was a system of minority domination of “statutorily defined colour groups on a territorial, residential, political, social and economic basis” which was entrenched for nearly 50 years<sup>248</sup> in South Africa. During this time, the country “suffered massacres, torture, killings, lengthy imprisonment of activists and severe economic and social discrimination against its majority non-white population.”<sup>249</sup>

The transition from “oppression, exclusivity and resistance to a new negotiated, democratic order” was realised in 1994<sup>250</sup> when Nelson Mandela was elected president of the new government.<sup>251</sup> With the transition, there was a need to restore moral order.<sup>252</sup>

South Africa was left to determine how it would deal with past violations of human rights.<sup>253</sup>

The decision was to introduce a truth commission that would offer some form of truth for victims, “the restoration of dignity for victims and survivors, a limited amnesty and a search for healing and reconciliation.”<sup>254</sup> Consequently, after many negotiations, the Truth and Reconciliation Commission (TRC) was created.<sup>255</sup>

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<sup>248</sup> Boraine, A “Truth and Reconciliation in South Africa: The Third Way” in Rotberg, R and Thompson, D (eds) *Truth v Justice* (2000) 141.

<sup>249</sup> Hayner *Unspeakable Truths op cit* 41.

<sup>250</sup> Boraine *op cit* 142.

<sup>251</sup> Hayner *Unspeakable Truths op cit* 41.

<sup>252</sup> Boraine *op cit* 142.

<sup>253</sup> *Ibid.*

<sup>254</sup> *Ibid* 143.

<sup>255</sup> Stanley, E “Evaluating the Truth and Reconciliation Commission” (2001) 39 *Journal of Modern African Studies* 525 at 525 Available at <http://journals.cambridge.org/action/displayFulltext?type=1&fid=87366&jid=MOA&volumeId=39&issueId=03&aid=87365> (Accessed 26 October 2009).

The TRC was established by way of the Promotion of National Unity and Reconciliation Act 34 of 1995 (the Act).<sup>256</sup> The Act presented the TRC with the most “complex and sophisticated mandate” for any truth commission.<sup>257</sup> The Act also provided “carefully balanced powers and an extensive investigatory reach.”<sup>258</sup> The TRC had powers to subpoena, search and seizure.<sup>259</sup> It also had the ability hold public hearings,<sup>260</sup> to run a sophisticated witness protection program, but most importantly, had the power to grant individual amnesty.<sup>261</sup> The commission also had a staff of 300 and according to Hayner, it “dwarfed previous truth commissions in its size and reach.”<sup>262</sup>

The objective of the TRC was to establish the causes, nature and extent of violations of gross human rights violations committed from 1 March 1960 to May 1994.<sup>263</sup> It aimed to establish the circumstances, factors and the context of the violations as well as the perspectives of the victims and perpetrators, by conducting investigations and holding hearings.<sup>264</sup> It also had to establish and make known the whereabouts of victims, restore the civil rights and dignity of those who survived by granting them an opportunity to express the violations they suffered and recommend reparation measures.<sup>265</sup>

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<sup>256</sup> Boraine *op cit* 145.

<sup>257</sup> Hayner *Unspeakable Truths op cit* 41.

<sup>258</sup> *Ibid.*

<sup>259</sup> Boraine *op cit* 146.

<sup>260</sup> Freeman *op cit* 222.

<sup>261</sup> Hayner *Unspeakable Truths op cit* 41. The amnesty was only granted to those who fully confessed their crimes and who could show that their crimes had a political motive. See Hayner *ibid* 99.

<sup>262</sup> *Ibid.*

<sup>263</sup> *Promotion of National Unity and Reconciliation Act* 34 of 1995 Section 3 (1)(a).

<sup>264</sup> *Ibid.*

<sup>265</sup> *Ibid* Section 3(1)(c).



The Act provided for three specialised committees operating under the TRC.<sup>266</sup> These were the Human Rights Committee, the Reparation and Rehabilitation Committee and the Amnesty Committee.<sup>267</sup>

The Human Rights Committee was responsible for collecting statements from victims and witnesses and to record the extent of gross human rights violations.<sup>268</sup> The Reparation and Rehabilitation Committee was charged with designing and making recommendations for a reparations policy.<sup>269</sup> The Amnesty Committee was responsible for processing and deciding on applications made for amnesty.<sup>270</sup>

The TRC received testimony from over 21 000 victims and witnesses, and 2 000 of them appeared in public hearings.<sup>271</sup> Special hearings focusing on the religious community, the legal community, the health sector, the media, prisons and the armed forces were also held.<sup>272</sup>

The most controversial power granted to the TRC was the granting of individual amnesty for politically motivated crimes committed between 1960 and 1994.<sup>273</sup> A total of 7 116 individuals applied for amnesty, but only 1 167 were granted amnesty.<sup>274</sup> Amnesty was granted only to those perpetrators who fully disclosed their “involvement in past crimes and showed them to be politically motivated.”<sup>275</sup> Thus, crimes committed for personal gain or out

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<sup>266</sup> Justice in Transition “The Truth and Reconciliation Commission” (1994) 7.

<sup>267</sup> *Promotion of National Unity and Reconciliation Act* 34 of 1995 Section 3(a), (b) and (c).

<sup>268</sup> Hayner *op cit* 42.

<sup>269</sup> *Ibid.*

<sup>270</sup> *Ibid.*

<sup>271</sup> *Ibid.*

<sup>272</sup> *Ibid.*

<sup>273</sup> *Ibid* 43.

<sup>274</sup> Sarkin, J “The Amnesty Hearings in South Africa Revisited” in Werle, G *Justice in Transition – Prosecution and Amnesty in Germany and South Africa* (2006) 46.

<sup>275</sup> Hayner *op cit* 43.

of malice were not eligible for amnesty.<sup>276</sup> In the hearings involving amnesty applicants, testimony was given about “how the operations were planned, why certain targets were chosen, what forms of brutality and torture victims suffered before they were killed” and who in the line of command, gave orders.<sup>277</sup> This, in my opinion, is the absolute advantage offering amnesty for truth.

It was hoped that early trials would increase the threat of prosecution.<sup>278</sup> But when the important trial involving Magnus Malan (the former Minister of Defence) and others ended in acquittal, it became clear that other “senior-level perpetrators” would not be persuaded by the threat of prosecution and apply for amnesty.<sup>279</sup> The commission also attempted all sorts of methods to lure perpetrators to apply for amnesty. One method aimed at increasing pressure on perpetrators to apply for amnesty, was for the Commission to hold certain investigative hearings behind closed doors, keeping secret the names mentioned and the crimes committed, this was intended to make perpetrators fear that they would be implicated in these hearings.<sup>280</sup> However, many perpetrators did not apply for amnesty.<sup>281</sup>

The issue concerning the granting of amnesty was severely criticised, and there were those who felt so strongly about this matter, that a case challenging the constitutionality of it was brought against the TRC in the Constitutional Court of South Africa.<sup>282</sup> This was the case of *Azanian Peoples Organisation et al v President of the Republic of South Africa et al*,<sup>283</sup> in which the court held that “the amnesty provisions were not inconsistent with international

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<sup>276</sup> *Ibid.*

<sup>277</sup> *Ibid* 99.

<sup>278</sup> *Ibid* 42.

<sup>279</sup> *Ibid.*

<sup>280</sup> *Ibid.*

<sup>281</sup> *Ibid.*

<sup>282</sup> Boraine *op cit* 149.

<sup>283</sup> 1996 (8) BCLR 1015 (CC).

norms and that it did not breach South Africa's obligations in terms of public international law instruments."<sup>284</sup>

The TRC was mandated by the enabling law, to compile a report which recommended detailed measures that needed to be implemented to prevent future human rights abuses.<sup>285</sup> In October 1998, the TRC issued a five volume report.<sup>286</sup> It sparked controversy concerning the persons named in it and the role attributed to the African National Congress.<sup>287</sup> The TRC named the former President of South Africa, P.W Botha and Winnie Madikizela Mandela, former spouse of Nelson Mandela, as persons who condoned, encouraged or committed gross human rights violations.<sup>288</sup>

The TRC made comprehensive recommendations for a reparations program, which included financial compensation and community recommendations,<sup>289</sup> such as the renaming of streets or community facilities<sup>290</sup>. It also envisaged symbolic acts such as the building of monuments.<sup>291</sup> However, from an international human rights perspective, these reparations do not constitute an effective remedy or a sufficient remedy for Apartheid victims.<sup>292</sup> From an international human rights perspective, the aim of reparation is to eliminate, as far as possible, the consequences of the illegal act and to restore the situation that would have existed if the act had not been committed.<sup>293</sup> In my view, the reparations recommended by

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<sup>284</sup> Boraine *op cit* 149. See also *Azanian Peoples Organisation et al v President of the Republic of South Africa et al* at para 32.

<sup>285</sup> Sarkin *J Carrots and Sticks: The TRC and the South African Amnesty Process* (2004) 59.

<sup>286</sup> Hayner *op cit* 44.

<sup>287</sup> Fernandez *op cit*.

<sup>288</sup> Hayner *op cit* 127.

<sup>289</sup> *ibid* 178.

<sup>290</sup> *ibid* 327.

<sup>291</sup> Motala, Z. "The Use of the Truth Commission in South Africa as an alternative dispute resolution mechanism versus the International Law Obligations" (2005) 45 *Santa Clara Law Review* 913 at 922.

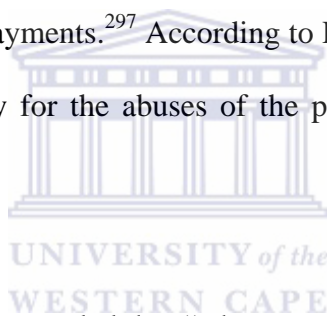
<sup>292</sup> *Ibid* 923.

<sup>293</sup> Gillard *op cit* 531.

any truth commission cannot possibly eliminate “as far as possible” the consequences of illegal acts.

In terms of its reparations policy, the Commission announced that \$600 million would be designated for “direct financial reparations.”<sup>294</sup> It also proposed that each victim, or family of persons killed, would receive \$3 500 each year for six years.<sup>295</sup>

The work of the TRC was followed by the implementation of a reparations programme although, it must be pointed out, minimal funds were available.<sup>296</sup> The reparations program fell short due to administrative difficulties and because government was unable to allocate the required funds for the financial payments.<sup>297</sup> According to Hayner, it is a sad irony that a new democratic government must pay for the abuses of the prior government.<sup>298</sup> I completely agree with her.



In its Final Report, the TRC recommended that “where amnesty has been denied, prosecution should be considered wherever evidence exists that an individual has committed a gross human rights violation.”<sup>299</sup> The prosecution of those perpetrators who had been denied amnesty or had not applied for it only occurred in very few cases.<sup>300</sup> According to Fernandez, the principal obstacles to the prosecutions were the tensions that existed between the

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<sup>294</sup> Hayner *op cit* 178.

<sup>295</sup> *Ibid.*

<sup>296</sup> *Ibid* 45.

<sup>297</sup> *Ibid* 178 – 179.

<sup>298</sup> *Ibid* 171.

<sup>299</sup> Volume 5 Chapter 8 311. See also Fernandez , L “Post-TRC Prosecutions in South Africa” in Werle, G *Justice in Transition – Prosecution and Amnesty in Germany and South Africa* (2006) 79.

<sup>300</sup> Fernandez Transitional Justice Class Notes *op cit*.

prosecuting authority and the police investigating team and the lack of resources in the prosecution service.<sup>301</sup>

However, after receiving the TRC's report, the President mandated the National Director of Public Prosecutions to institute proceedings from the findings of the TRC.<sup>302</sup> In March 2003, the Priority Crimes Litigation Unit was created with the function of prosecuting persons refused amnesty by the TRC.<sup>303</sup> Although, the accepted prosecution guidelines entailed that only serious human rights violations be prosecuted where the evidence is reliable, and that "humanitarian considerations" and the "interests of reconciliation" should be considered in decision making.<sup>304</sup>

The South African truth and reconciliation process is based on the idea that by revealing the truth about what happened to the victims of gross human rights abuses, such as the persons who were tortured or killed or disappeared, the nation would become more amenable to reconciliation.<sup>305</sup> It would be naive to believe that "actual" reconciliation was achieved considering the lack of prosecutions and reparations programs. However, it is submitted that the TRC succeeded in "promoting" the reconciliation it set out to achieve regardless of the lack of proper reparations programs or prosecutions. It contributed to "promote" reconciliation by bringing forth truths that were unknown, and to some victims, this may have been enough. In my view, truth goes hand in hand with reconciliation. Even if the whole truth was not known, it brought certain victims closure. And this is a step to reconciliation.

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<sup>301</sup> Fernandez, L "Post-TRC Prosecutions in South Africa" in Werle, G *Justice in Transition – Prosecution and Amnesty in Germany and South Africa* (2006) 74.

<sup>302</sup> *Ibid* 66.

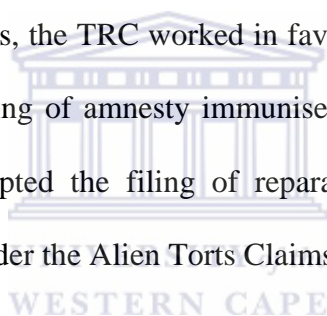
<sup>303</sup> *Ibid*.

<sup>304</sup> *Ibid*.

<sup>305</sup> Gibson, L "Does Truth lead to Reconciliation? Testing the Causal Assumptions of the South African Truth and Reconciliation Process" (2005) 48 *American Journal of Political Science* 201 at 201.

According to Boraine, there was an “accumulation” of knowledge, and also an acknowledgment of Apartheid.<sup>306</sup> It should also be kept in mind that the lack of prosecutions and reparations was the fault of the government and not the TRC.

However, the granting of amnesty is controversial because it takes away the fundamental right of a victim to seek redress from a court.<sup>307</sup> And by granting amnesty for crimes considered crimes under international law, the rule under international humanitarian law, that no amnesty may be granted for these crimes, is violated.<sup>308</sup> In addition, few perpetrators came forward and there was no sincere apology for their crimes committed.<sup>309</sup> Many were of the view that due to these deficiencies, the TRC worked in favour of the perpetrators and not the victims.<sup>310</sup> In addition, the granting of amnesty immunised perpetrators from both criminal and civil liability.<sup>311</sup> This prompted the filing of reparations proceedings by victims of apartheid, in the United States under the Alien Torts Claims Act.<sup>312</sup>



However, the idea of “truth-for-amnesty” was plausible. This idea was a compromise for a country that dealt with mass human rights violations and especially for a country that is unable to afford costly trials. I agree with Boraine that the truth revealed offered not only peace of mind, but also a limited form of justice.<sup>313</sup> According to Werle, with whom I also agree, the reason why the TRC was successful was because it was all about “truth” and truth

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<sup>306</sup> Boraine *op cit* 155.

<sup>307</sup> Motala *op cit* 924.

<sup>308</sup> *Ibid* 927.

<sup>309</sup> *Ibid* 921.

<sup>310</sup> *Ibid* 922.

<sup>311</sup> Osborne, M “Apartheid and The Alien Torts Act: Global Justice Meets Sovereign Equality” in Du Plessis *et al Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses* (2007) 235.

<sup>312</sup> *Ibid. Alien Tort Claims Act* 1789: 28 U.S.C S.1350.

<sup>313</sup> Boraine *op cit* 150.

has precedence over punishment and also over amnesty.<sup>314</sup> The amnesty was the price that South Africa had to pay for a “relatively peaceful transition.”<sup>315</sup>

The TRC dealt with the perpetrators without vengeance. It carried out its mandate and performed its duties as was required by the Promotion of National Unity and Reconciliation Act. In my opinion, the TRC was not entirely successful in dealing with gross human rights violations. It could have made more substantial recommendations such as having perpetrators apologise or recommending perpetrators carry out community service.

But it must be noted that reconciliation is not automatic. The TRC may not have succeeded in dealing with gross human rights violations, but it succeeded in its “commitment.”<sup>316</sup> Boraine states that despite the restraints of a negotiated settlement and major compromises between blanket amnesties and Nuremberg style prosecutions, the TRC achieved the best possible outcome by taking the route it did.<sup>317</sup> The TRC contributed to the growing popularity of truth commissions across the world.<sup>318</sup> It is in my view the ultimate model to “learn” from, not only from its originality, but also from its mistakes.

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<sup>314</sup> Werle, G “Without Truth, No Reconciliation” *op cit* 72.

<sup>315</sup> Boraine *op cit* 150.

<sup>316</sup> *Ibid* 157.

<sup>317</sup> *Ibid* 155.

<sup>318</sup> Heine *op cit* 77.

## 5.5 GUATEMALA - Commission for the Historical Clarification

The civil war between the “anticommunist government forces and the leftist *Unidad Revolucionaria Nacional Guatemalteca* (URNG)” in Guatemala lasted over thirty years and led to the death and disappearances of about 200 000 people.<sup>319</sup> This war continued into the 1990’s until it was put to an end by “United Nations moderations.”<sup>320</sup> During negotiations of a peace agreement, it had to be determined how past abuses would be addressed.<sup>321</sup> There was an agreement to establish the Guatemalan Commission for Historical Clarification (CEH<sup>322</sup>).<sup>323</sup> The CEH was a peace settlement between the Government and the URNG by virtue of the “Oslo Agreement” of June 1994.<sup>324</sup> This settlement provided that the CEH was required to “clarify the human rights violations and acts of violence committed during the armed confrontation that affected Guatemala for thirty five years.”<sup>325</sup>

The CEH was made up two Guatemalans and was headed by a German law professor, Christian Tomuschat, a German law professor.<sup>326</sup> The reason for this type of mixed commission was because the negotiating parties believed that an element of impartiality and independence was needed “to shield the CEH from any suspicion of bias.”<sup>327</sup>

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<sup>319</sup> Hayner *Unspeakable Truths op cit* 45.

<sup>320</sup> *Ibid.*

<sup>321</sup> *Ibid.*

<sup>322</sup> Tomuschat, C “Clarification Commission in Guatemala” (2001) 23 *Human Rights Quarterly* 233 at 233. This abbreviation is provided by Tomuschat.

<sup>323</sup> Hayner *Unspeakable Truths op cit* 45.

<sup>324</sup> Tomuschat *op cit* 233.

<sup>325</sup> *Ibid.*

<sup>326</sup> *Ibid* 237.

<sup>327</sup> *Ibid* 238.



The mandate of the CEH was defined in very broad terms.<sup>328</sup> The CEH had the task of clarifying human rights violations and acts of violations that occurred during the armed conflict.<sup>329</sup> The CEH would have to explain the results of its investigations in a report addressing internal and external factors.<sup>330</sup> In addition, the CEH had to formulate recommendations designed to promote peace and harmony in Guatemala.<sup>331</sup>

During its investigations the CEH gave priority to attacks on life and personal integrity such as extrajudicial executions, forced disappearances and sexual violence.<sup>332</sup> This did not however entail that other violations were totally excluded.<sup>333</sup> One of the objectives of the CEH was to ensure that the past would never repeat itself.<sup>334</sup>

According to the agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer,<sup>335</sup> the Commission also had to receive particulars and information from individuals or institutions that considered themselves to be affected.<sup>336</sup> In addition, “a formal pledge” had been made in Guatemala that everyone would enjoy an opportunity to go to the CEH and inform it about his or her personal experiences.<sup>337</sup> In turn, and after hesitation, the Mayan population made use of the chance to bring to public knowledge the suffering they endured and were subjected to.<sup>338</sup>

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<sup>328</sup> *Ibid* 239.

<sup>329</sup> *Ibid.*

<sup>330</sup> *Ibid.*

<sup>331</sup> *Ibid.*

<sup>332</sup> *Ibid* 240.

<sup>333</sup> *Ibid.*

<sup>334</sup> *Ibid.*

<sup>335</sup> Annex II (1994) UN Doc. A/48/954 S/1994/751 English 13.

<sup>336</sup> *Ibid* Operation I 14.

<sup>337</sup> Tomuschat *op cit* 242.

<sup>338</sup> *Ibid.*

A controversial issue of the CEH was its prohibition against assigning individual responsibility.<sup>339</sup> Human rights organisations believed that a report was only useful if it named the perpetrators of the crimes.<sup>340</sup> This was one of the major reasons why the Catholic Church in Guatemala decided to create its own truth commission.<sup>341</sup>

The CEH had no search, subpoena or seizure powers.<sup>342</sup> It also provided no amnesty incentive.<sup>343</sup> The perpetrators could thus only rely on not being named in the report.<sup>344</sup> In addition, the hearings of witnesses were held in private, which in this case, provided assurance to the witnesses that their identity would be protected, thus shielding them from potential retaliatory attacks on the part of the Armed Forces, for example.<sup>345</sup>

In terms of its investigations, the CEH failed to receive any substantial response to its requests for information from the Guatemalan armed forces and government.<sup>346</sup> According to Tomuschat, the contribution made by the Government of Guatemala for clarification could be characterised as next to nothing.<sup>347</sup> The co-operation by the URNG was more productive with the CEH.<sup>348</sup> The URNG acknowledged responsibility in certain incidents and therefore took significant steps to comply with their duties under the agreement decided in Oslo.<sup>349</sup> The CEH also incorporated the data from two non-governmental organisations.<sup>350</sup> These were the Recovery of Historical Memory Project of the Catholic Church's Human Rights Office and

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<sup>339</sup> *Ibid* 243.

<sup>340</sup> *Ibid.*

<sup>341</sup> *Ibid.*

<sup>342</sup> *Ibid* 246.

<sup>343</sup> *Ibid.*

<sup>344</sup> *Ibid.*

<sup>345</sup> *Ibid* 247.

<sup>346</sup> *Ibid* 249.

<sup>347</sup> *Ibid* 250.

<sup>348</sup> *Ibid* 252.

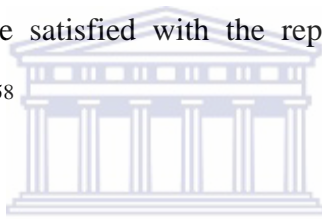
<sup>349</sup> *Ibid.*

<sup>350</sup> Hayner *Unspeakable Truths op cit* 47.

the *Centro Internacional para Investigaciones en Derechos Humanos*, which collected thousands of statements from victims and their families.<sup>351</sup> The CEH used the data of these organisations to help estimate the total number of people killed or disappeared.<sup>352</sup>

The CEH eventually submitted its report to the Government of Guatemala and the former URNG in February 1999.<sup>353</sup> The report described acts of extreme cruelty<sup>354</sup> and stated that genocide had been perpetrated “at certain times in certain places during the civil war.”<sup>355</sup> The report documented 23 000 killings, 6 000 disappearances and 626 massacres.<sup>356</sup> Although the commission was unable to name the perpetrators, it did state that most of the human rights violations that occurred were known to the regime or carried out pursuant to its orders.<sup>357</sup>

Human rights organisations were satisfied with the report and everyone agreed that all expectations had been exceeded.<sup>358</sup>



It must be noted that the CEH was very much involved with the nation at large. Whilst preparing its recommendations, the CEH convened a forum giving interested parties an opportunity to “give their view as to the desirable contents of the recommendations.”<sup>359</sup>

The CEH recommended that a National Reparations Program be created to provide moral and material reparations.<sup>360</sup> The recommendations in the report included that the former president apologise in public, as a moral gesture, and take responsibility for the human rights abuses

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<sup>351</sup> *Ibid.*

<sup>352</sup> *Ibid.*

<sup>353</sup> Tomuschat *op cit* 233.

<sup>354</sup> Hayner *Unspeakable Truths op cit* 48.

<sup>355</sup> Tomuschat *op cit* 234.

<sup>356</sup> Hayner *Unspeakable Truths op cit* 48.

<sup>357</sup> *Ibid.*

<sup>358</sup> Tomuschat *op cit* 234.

<sup>359</sup> *Ibid* 253.

<sup>360</sup> Hayner *Unspeakable Truths op cit* 327.

connected with the armed confrontation.<sup>361</sup> This was rejected.<sup>362</sup> In addition, no consequences resulted from the finding that genocide had been committed.<sup>363</sup> In terms of the recommendations made in the report, the newly elected president stated in his inaugural speech that he was committed to implementing the Commission's recommendations.<sup>364</sup> However, human rights organizations observed that no element of the recommendations had been put into practice.<sup>365</sup> Nor did the public prosecutor's office take active steps to institute proceedings.<sup>366</sup> The government also showed no interest in implementing the recommendations.<sup>367</sup> Whether the CEH laid a foundation for national reconciliation is also unclear.<sup>368</sup>

It is submitted that the CEH carried out its mandate successfully. However, this does not mean that it dealt with gross human rights abuses successfully. The CEH's mandate was limited, and by not acknowledging in the report at least the perpetrators of the abuses, it could hardly deserve the appellation "truth" commission. Even though it would have been impossible to name all the perpetrators,<sup>369</sup> some names could have been reported so as to actually "clarify" the human rights violations. According to Tomuschat, arrangements were agreed upon that certain perpetrators would be indicted, but this never happened.<sup>370</sup> The Commission also offered no amnesty, which meant that only victims would come forward to give testimony and not perpetrators. Thus, the victims did not receive any form of "real" truth

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<sup>361</sup> Tomuschat *op cit* 253.

<sup>362</sup> *Ibid.*

<sup>363</sup> *Ibid* 254.

<sup>364</sup> Hayner *Unspeakable Truths op cit* 49.

<sup>365</sup> Tomuschat *op cit* 256.

<sup>366</sup> *Ibid* 254.

<sup>367</sup> Tomuschat, C "Putting End to Civil War – The experience of the Guatemalan Truth Commission" Lecture and discussion held at Humboldt University Berlin – "Transitional Criminal Justice and Crime Prevention – an International and African Perspective" (2009).

<sup>368</sup> Tomuschat *op cit* 256.

<sup>369</sup> *Ibid.*

<sup>370</sup> *Ibid.*

or any form of justice or reparations. Regardless of the fact that it may have clarified past abuses and acts of violence and that it did deliver a detailed report, it does not according to the international notion of a truth commission, depict the entire truth.

The Guatemalan model is another classic case of their being a “lack of political will” on behalf of the government<sup>371</sup>.



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<sup>371</sup> *ibid.*

## 5.6 SIERRA LEONE - Truth and Reconciliation Commission

The civil war in Sierra Leone was begun in March 1991 by armed forces known as the Revolutionary United Front (RUF), led by Foday Kankoh, when they entered Sierra Leone from Liberia.<sup>372</sup> The RUF declared that their objective was to overthrow the government of Joseph Saidu and the All People's Congress.<sup>373</sup> The events that day were regarded as "the beginning of a decade of violence that devastated the country."<sup>374</sup> During the war that followed, the RUF, its allies and opponents, resorted to methods of the "utmost brutality."<sup>375</sup> The war was notorious for the mutilation of civilians by mainly RUF forces.<sup>376</sup>

The nine-year civil war ended with the signing of the *Lome Peace Agreement* (hereafter the *Lome Agreement*) in 1999<sup>377</sup> by the Government of Sierra Leone and the RUF.<sup>378</sup> The *Lome Agreement* granted a sweeping amnesty to all combatants for all crimes committed during the war.<sup>379</sup> This was criticised by national and international human rights groups.<sup>380</sup> The Special Representative to the Secretary-General of the United Nations made a reservation to the amnesty provision on the grounds that it could not apply to international crimes.<sup>381</sup> Due to national and international pressures exerted for some form of accountability for the crimes

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<sup>372</sup> Horovitz, S "Transitional criminal justice in Sierra Leone" in Roht-Arriaza, N and Mariezcurrena, J (eds) *Transitional Justice in the Twenty-First Century* (2006) 44.

<sup>373</sup> Schabas, W "The Sierra Leone Truth and Reconciliation Commission" in Roht-Arriaza, N and Mariezcurrena, J (eds) *Transitional Justice in the Twenty-First Century* (2006) 22.

<sup>374</sup> *Ibid.*

<sup>375</sup> *Ibid.*

<sup>376</sup> Hayner *Unspeakable Truths op cit* 70.

<sup>377</sup> *Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Lome, 7 July 1999.*

<sup>378</sup> Schabas *op cit* 22.

<sup>379</sup> Horovitz *op cit* 45. See also the *Lome Agreement* Article IX.

<sup>380</sup> Hayner *Unspeakable Truths op cit* 70.

<sup>381</sup> Schabas *op cit* 22. See also UN Doc. S/1999/836.

committed during the conflict,<sup>382</sup> the *Lome Agreement* called for the establishment of a Truth and Reconciliation Commission.<sup>383</sup>

According to Section 6(1) of the Truth and Reconciliation Commission Act 2000 (TRC Act), the Commission was established “to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the Conflict in 1991 to the signing of signing of the Lome Peace Agreement; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered”. The Commission also had powers to search,<sup>384</sup> seize<sup>385</sup> and subpoena<sup>386</sup> and also to request and receive police assistance as needed for its investigations.<sup>387</sup>

In terms of its investigatory functions, the Commission was charged with investigating and reporting on the nature and extent of the violations and also to investigate and report on the antecedents of the conflict.<sup>388</sup> This indicated that there was no “precise” temporal framework in the mandate because “antecedent” implied that the Commission could “look well back from 1991.”<sup>389</sup> The Commission also had to provide the victims with an opportunity to talk about their violations suffered and perpetrators an opportunity to relate their experiences so as to help restore the human dignity of the victims and to promote reconciliation.<sup>390</sup> In addition, the Commission had to give special attention to children and victims of sexual

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<sup>382</sup> Hayner *Unspeakable Truths op cit* 70.

<sup>383</sup> Tejan-Cole, A “Painful peace: Amnesty under the Lome Peace Agreement in Sierra Leone” in *Law, Democracy and Development* (1999) 3 *Journal of the Faculty of Law of the University of the Western Cape* 239 at 241.

<sup>384</sup> TRC Act Section 8(b).

<sup>385</sup> TRC Act Section 8(a).

<sup>386</sup> TRC Act Section 8(d).

<sup>387</sup> TRC Act Section 8(g).

<sup>388</sup> TRC Act Section 6(2)(a).

<sup>389</sup> Schabas *op cit* 23.

<sup>390</sup> TRC Act Section 6(2)(b).

abuses.<sup>391</sup> The Commission was also charged with determining which parties were responsible for violations.<sup>392</sup> The core of the Commission's mandate was the concept of "human rights violations and abuses" and the TRC Act suggested that this could be committed by both individuals and governments.<sup>393</sup> The Commission not only considered civil and political rights, but also economic, social and cultural rights.<sup>394</sup>

The work of the Commission consisted of two phases.<sup>395</sup> The first phase was called the "statement taking phase."<sup>396</sup> This phase lasted three months and approximately 7 000 statements from victims and a few perpetrators were collected.<sup>397</sup> Particular attention had to be given to the taking of statements by women.<sup>398</sup> The second phase, known as the "hearings phase", began a month after the statement taking phase and lasted approximately five months.<sup>399</sup> These hearings, which brought together victims and perpetrators, were held throughout the country.<sup>400</sup> Hearings were also held on thematic issues such as the media, corruption, governance and the legal profession.<sup>401</sup> The actual operations of the Commission took about eight months.<sup>402</sup>

The final report was presented in 2004<sup>403</sup> after being drafted for more than a year.<sup>404</sup> It elaborated on the causes of the conflict<sup>405</sup> which, according to Schabas, had conflicting

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<sup>391</sup> *Ibid.*

<sup>392</sup> TRC Act Section 7(1)(a).

<sup>393</sup> Schabas *op cit* 24.

<sup>394</sup> *Ibid* 25.

<sup>395</sup> *Ibid.*

<sup>396</sup> *Ibid.*

<sup>397</sup> *Ibid.*

<sup>398</sup> *Ibid.*

<sup>399</sup> *Ibid* 26.

<sup>400</sup> *Ibid.*

<sup>401</sup> *Ibid.*

<sup>402</sup> *Ibid* 21.

<sup>403</sup> Fernandez Transitional Justice Class Notes *op cit.*

<sup>404</sup> Schabas *op cit* 27.

<sup>405</sup> Fernandez Transitional Justice Class Notes *op cit.*



versions,<sup>406</sup> and it also discussed the history of Sierra Leone in detail.<sup>407</sup> The report also made extensive recommendations on how the root causes of the conflict be tackled.<sup>408</sup> The report called for the abolition of the death penalty and the release of illegally detained persons.<sup>409</sup>

The Commission recommended services such as healthcare, education and access to microcredit and also called for a “robust program of compensation to victims,” but it was unclear as to how these reparatory measures would be funded.<sup>410</sup>

In the report, the Commission discussed the amnesty provision and stated that it is unable to condemn the amnesty and to declare that the amnesty was “too high a price to pay for the delivery of peace to Sierra Leone.”<sup>411</sup>

In June 2000, President Kabbah withdrew the amnesty partially<sup>412</sup> and called upon the United Nations to assist in prosecuting those who committed atrocities.<sup>413</sup> In 2002, the Special Court for Sierra Leone, which was a treaty-based international institution, began its work.<sup>414</sup>

The parallel existence of the Commission and the Special Court was one of the most distinctive aspects of the Sierra Leone model.<sup>415</sup> After resistance to the idea of working together, the Special Court’s prosecutor and the Chairman of the Commission said publicly

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<sup>406</sup> Schabas *op cit* 27.

<sup>407</sup> *Ibid* 23.

<sup>408</sup> Fernandez Transitional Justice Class Notes *op cit*..

<sup>409</sup> Schabas *op cit* 30.

<sup>410</sup> *Ibid* 31.

<sup>411</sup> *Ibid* 29. See also *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission* 3B Chapter VI paras 10 – 12.

<sup>412</sup> *Ibid* 30.

<sup>413</sup> Horovitz *op cit* 46.

<sup>414</sup> *Ibid*.

<sup>415</sup> Schabas *op cit* 33.

that they would work in mutual support of each other.<sup>416</sup> Thus, the two institutions operated “contemporaneously.”<sup>417</sup>

The circumstances eventually brought about the trials of certain well-known perpetrators.<sup>418</sup> And in March 2004, the Special Court of Sierra Leone declared the amnesty was in breach of international law.<sup>419</sup>

The approach taken by Sierra Leone may have had its difficulties and complexities but it also showed the possibility that an international court and a truth commission can operate simultaneously.<sup>420</sup> However, even though the Commission successfully fulfilled its mandate and the Special Court prosecuted certain individuals, this truth commission did not successfully deal with gross human rights violations. This submission is based on the amnesty agreed to in the *Lome Agreement* which still barred the prosecution of certain perpetrators. It is also based on the complexity surrounding the creation of the Special Court. The fact that the Special Court was not part of the *Lome Agreement* initially, means that the *Lome Agreement* was to benefit only the perpetrators. Despite a detailed report, the victims’ rights to truth and reparations were not sufficiently addressed<sup>421</sup> by the Commission itself which means that in this case, the victims were rewarded with nothing.

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<sup>416</sup> Horovitz *op cit* 55.

<sup>417</sup> Schabas *op cit* 21.

<sup>418</sup> *Ibid* 34.

<sup>419</sup> *Prosecutor v Kallon* SCSL-2004-15-AR72(E) 13 March 2004. *Prosecutor v Kamara* SCSL-2004-16-AR72(E) 13 March 2004.

<sup>420</sup> Schabas *op cit* 21.

<sup>421</sup> Tejan-Cole *op cit* 252.

## CHAPTER SIX

### *6 Findings and Recommendations*

#### 6.1 Findings

Five of the above truth commissions are the most significant truth commissions to date.<sup>422</sup> These commissions are significant in their size, impact and the attention it received in their respective countries and across the world.<sup>423</sup> Sierra Leone, a more recent truth commission, is important as well because it illustrates a truth commission working almost parallel to an international court. Therefore, truth commissions may complement and not replace other forms of mechanisms to deal with the past.

Despite the limitations experienced, “the process and the product”<sup>424</sup> of the above truth commissions illustrated the significant contribution that was provided in fundamentally changing how the country understood and accepted some of the controversial aspects of its past.<sup>425</sup> Where the commissions have completed remarkable work despite “political or financial restraints”<sup>426</sup>, there has been a lack of commitment on part of the governments to implement the recommendations. This is erroneously regarded the greatest failing of truth commissions. It must be noted that this is not the failure of the truth commission but of their respective government.

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<sup>422</sup> Hayner *Unspeakable Truths op cit* 32. These truth commissions are Argentina, Chile, South Africa, Guatemala and El Salvador.

<sup>423</sup> *Ibid.*

<sup>424</sup> *Ibid* 23.

<sup>425</sup> *Ibid.*

<sup>426</sup> Mani *op cit* 34.

In my view, the Chilean and South African TRC's are the most significant truth commissions to date. The approach adopted by these TRC's was the middle road of two extremes of Nuremberg style prosecutions and blanket amnesties. According to Heine, both countries today "are among the most politically stable and economically prosperous".<sup>427</sup> They are the truth commissions that have paved the way of the future and that future truth commissions may learn from.

Thus, truth commissions are effective and on a whole, may be successful in dealing with gross human rights violations, if correctly implemented and executed. Even when unsuccessful, truth commissions have the ability to succeed and therefore, remain in my opinion, the most important mechanism to deal with grave breaches of human rights.



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<sup>427</sup> Heine *op cit* 78.

## 6.2 Recommendations

In my view, it cannot be accurately determined as to how successful truth commissions are. Each truth commission has its problems. However, truth commissions may be more effective if the following recommendations were to be considered:

- The mandates of the truth commissions should be broad enough to include powers of subpoena, search and seizure. It should also be sufficiently broad to allow investigation into all forms of human rights abuses.<sup>428</sup>
- Victims should be the focus.
- Public hearings must be held. Private hearings may only be held in situations where the victim fears for his or her safety. An advantage of this may be that the testimonies cannot be edited by the commission.
- Testimony must be given under oath.
- The final report must be presented to the public.
- Prosecuting senior-level perpetrators. This is important and useful even if it is impossible to prosecute all persons responsible.
- Amnesty is possible and could be made available in peace agreements. This is provided that full disclosure is made and that the amnesty does not extend to those who committed serious international crimes.
- All persons responsible for committing gross human rights violations must be named. This includes those persons granted amnesty.
- The names of those persons responsible, which were not granted an amnesty, must be forwarded to the prosecuting authorities if sufficient evidence is available.

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<sup>428</sup> Hayner "Fifteen Truth Commissions" *op cit* 636.

- If an agreement exists between the old regime and new government that no persons from the prior regime will be prosecuted, the new government must introduce measures of lustration. Lustration should also take place where there has been limited or no prosecutions. This may satisfy some victims as a form of punishment. It may also assist in preventing past abuses from recurring.
- Formal apologies must be given by senior officials of the old regime.
- If no prosecutions are recommended, or in the absence of prosecutions, the Commission must recommend that perpetrators must be given community service.
- The commission must also contribute by addressing issues of gender and woman empowerment.<sup>429</sup> This must be done where there have been cases of sexual violence.
- Apart from recommending reparation programs, the government should also establish a reparations fund to which perpetrators and beneficiaries of the old regime may contribute.<sup>430</sup>
- If there is a lack of resources available to establish a reparations program, other forms of compensation must be made available. This may be done by building monuments or memorial plaques and providing national holidays in memory of the past and its victims.
- The peace agreement or negotiations concerning the establishment of a truth commission must include that the implementation of the truth commission's recommendations is mandatory.

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<sup>429</sup> Sooka, Y "Dealing with the past and transitional justice: building peace through accountability" (2006) 88 *International Review of the Red Cross* 311 at 322.

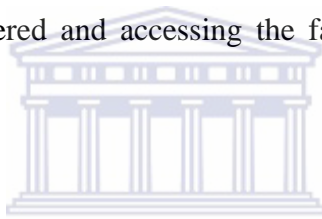
<sup>430</sup> O'Malley, G "Respecting Revenge: The road to reconciliation" in *Law, Democracy and Development* (1999) 3 *Journal of the Faculty of Law of the University of the Western Cape* 181 at 191.

## CHAPTER SEVEN

### *7. Conclusion*

Truth commissions are in favour with the international human rights community for ending civil conflict.<sup>431</sup> In addition, international human rights instruments also assist in guiding successor regimes to deal with prior regimes who committed gross human rights violations.

According to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law,<sup>432</sup> remedies for the violations of international human rights law includes the victims right to access justice, reparation for harm suffered and accessing the factual information concerning the violation.<sup>433</sup>



In addition, establishing the truth about the past is necessary to begin the healing process of victims and society as a whole.<sup>434</sup> Only when the truth is found, can it be determined if a society can reconcile. This depends on the execution of the truth commission. And even though truth commissions do not have judicial powers to dispense punishment, “it has the moral power to pass judgment.”<sup>435</sup> Truth commissions encompass a combination of elements of the various other mechanisms available to countries in transition and therefore, if correctly executed, truth commissions are and can be successful in dealing with gross human rights

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<sup>431</sup> Brahm *op cit.*

<sup>432</sup> *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law* (revised) UN Document E/CN.4/2005/59 UN Commission on Human Rights. See also Mani *op cit* 38.

<sup>433</sup> *Ibid.*

<sup>434</sup> Fernandez, L “Possibilities and limitations of reparations for the victims of human rights violations in South Africa” in *Confronting Past Injustices* in Rwelamira, M and Werle, G (eds) (2006) 78.

<sup>435</sup> Zalaquett, J “Institutional Design and Processes of Truth Commissions” in *An Interdisciplinary Discussion held at Harvard Law School in May 1996 Harvard Law School Human Rights Program* (1996) 60.

violations. However, in order to succeed it needs the support from both the political society and the civil society.<sup>436</sup>

Everyone has the right to know what happened in the past. The past must therefore be dealt with in a way that contributes to peace. As Dullah Omar stated, “We are not dealing only with the past, we are dealing with the future...the way you deal with the past must impact upon the shape of the future.”<sup>437</sup>

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<sup>436</sup> Freeman, M “Truth Commissions – facts and myths” Speech on the Second Regional Forum *Establishing the Truth about War Crimes and Conflicts* Zagreb, Croatia February 2007 Available at [http://www.hlc-rcd.org/uploads/editor/Truth%20Commission-facts%20and%20myths-Mark%20Freeman-ff\(1\).pdf](http://www.hlc-rcd.org/uploads/editor/Truth%20Commission-facts%20and%20myths-Mark%20Freeman-ff(1).pdf) (Accessed on 22 September 2009).

<sup>437</sup> Omar, A in Rwelamira, M and Werle, G (eds) *Confronting Past Injustices* (2006) ix.



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