

# Mechanisms complementing prosecution

by  
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“In the final analysis, punishment is one instrument, but not the sole or even the most important one, for forming the collective moral conscience.”

Raoul Alfonsín, Argentina’s first elected president after the collapse of the military regime.<sup>1</sup>

**E**ach State facing a period of transition, whether from a repressive regime or an armed conflict, must decide *whether* to deal with its history of violations. Those States that have chosen to face their past for purposes of reconciliation and preventing future atrocities still must determine *how* to do so. Should emphasis be placed upon holding accountable those responsible for violations of the law *or* upon acknowledging the truth of what happened? The solution usually involves a combination of the two.

During periods of fragile transition, trying suspected criminals, who are often the political and military leaders, does not always appear the adequate or easiest policy choice. However, prosecution — holding perpetrators accountable — demonstrates that the

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principle of the rule of law stands above political decisions. Many of the violations committed during a former repressive regime or conflict are not only violations of national law but also those of international law requiring prosecution.<sup>2</sup> Failure to prosecute promotes a culture of impunity and denies what some consider as “the most effective insurance against future repression”.<sup>3</sup>

If the political will to prosecute exists, common problems still cause few trials to occur: a barely functioning judicial system whether due to lack of human resources (including expertise) or financial resources; police and prosecutors without skills to investigate and present a strong case, or worse, the presence of corrupt or compromised officials; a lack of concrete evidence; the practical or logistical impossibility to prosecute large numbers of accused; absence of the necessary national legislation (implementing international treaty obligations); or the passing of an amnesty law imposing constraints. The “right to justice”<sup>4</sup> advocating prosecution still does not mean prosecute for prosecution’s sake. All judicial guarantees must be in place to ensure fair prosecution.

1 Raoul Alfonsin, “‘Never again’ in Argentina”, *Journal of Democracy*, Vol. 4, January 1993, p. 19.

2 Some examples include: grave breaches of international humanitarian law (Arts 50/51/130/147 respectively of the four Geneva Conventions of 1949 and Arts 11 and 85 of Additional Protocol I of 1977) and violations of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the 1994 Inter-American Convention on the Forced Disappearance of Persons, the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, and for the crimes articulated in the 1998 Rome Statute of the International Criminal Court.

3 Diane F. Orentlicher, “Settling accounts: The duty to prosecute human rights violations of a prior regime”, *The Yale Law Journal*, Vol. 100, 1991, p. 2542; see also Jaime E. Malamud-Goti, “Transitional governments in the breach: Why punish State criminals?”, *Human Rights Quarterly*, Vol. 12, 1990, p. 12.

4 Three rights are articulated — the victims’ right to know, the victims’ right to justice and the victims’ right to reparations — in the Final Report on “The administration of justice and the human rights of detainees: Question of the impunity of perpetrators of human rights violations (civil and political)”, prepared by Mr Joinet pursuant to Sub-Commission decision 1996/119, UN Doc. E/CN.4/Sub.2/1997/20, 26 June 1997 [hereinafter Joinet Report].

Even an ideally functioning judicial system is limited in the role it can play in reconciliation and a successful transition to peace or away from a repressive regime. Prosecution handles individual accountability well, but it does not address institutional accountability, i.e. the recognition that certain institutions played a role in the violations, perhaps even the judiciary, and it does not make proposals for reform of those institutions. A criminal trial seeks to determine the guilt or innocence of an individual for a certain crime by satisfying a standard of proof; this is not necessarily the same objective as exposing the truth. Of course, truth emerges during criminal trials,<sup>5</sup> but a court's necessary compliance with rules of evidence often limits the facts — the truth — exposed. Criminal trials focus on individual guilt and often on a single incident. Paul van Zyl, a lawyer who was senior staff member of the South African Truth and Reconciliation Commission, contends that:

“...trials have a limited explanatory value. They're about individual culpability, not about the system as a whole. Trials set up an 'us versus them' dynamic. A trial is not about *our* complicity. It makes it look like *they're* guilty, not us. So all of white South Africa can look at Eugene de Kock and say 'evil guy' and not realize they made him possible. Middle-class suburban housewives and white businessmen voting for the National Party made Eugene de Kock possible. But a trial will never say that.”<sup>6</sup>

A trial is designed neither to research the history of the political and economic structure of a system that permitted the armed conflict or repressive regime nor to assess the societal impact of violence committed by the regime or parties to the conflict; both those processes, however, are necessary for institutional reform and to create a collective memory of the past contributing to reconciliation. At such

5 In Argentina, for example, trials during the mid-1980s of former *junta* members received extensive media coverage, providing testimony from hundreds of victims and witnesses; Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, Routledge, London, 2001, p. 100.

6 *Ibid.*, p. 101, citing interview with Paul van Zyl in Johannesburg, South Africa (November 1997).

time, prosecution is best complemented by other mechanisms. This article briefly describes the most important of these complementary mechanisms.

### Truth commissions

“Truth commission” is the title commonly used when referring to commissions of inquiry today. This title presumes that a commission will reveal the truth; it also presumes that there exists a clear understanding of what is truth. Nevertheless, as that is the general name used, it is used here as well, and it remains preferable as a general title rather than “truth and reconciliation commission”, which falsely assumes that all commissions have reconciliation as their aim. In fact, it is not even universally accepted that truth commissions help to promote national reconciliation; some argue that they create deeper resentment by reopening old wounds.<sup>7</sup>

There have been more than twenty official commissions since 1974,<sup>8</sup> and they can be identified as bodies of inquiry with the following characteristics:<sup>9</sup>

- a truth commission focuses on the *past*;
- it investigates a pattern of abuses over a period of time, rather than a specific event;
- it is a temporary body, typically operating for six months to two years, and completing its work with the submission of a report; and
- it is officially sanctioned, authorised or empowered by the State (and sometimes also by the armed opposition, as in a peace accord).

<sup>7</sup> Priscilla B. Hayner, “Fifteen truth commissions — 1974 to 1994: A comparative study”, in Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Vol. 1, United States Institute of Peace Press, Washington, 1995, p. 225, p. 229 [hereinafter *Transitional Justice*]; see also Hayner, *op. cit.* (note 5), p. 230.

<sup>8</sup> Truth commissions in chronological order, with the dates they operated: Uganda (1974), Bolivia (1982-1984), Argentina (1983-1984), Uruguay (1985), Zimbabwe (1985),

Uganda (1986-1995), Nepal (1990-1991), Chile (1990-1991), Chad (1991-1992), South Africa (ANC) (1992), Germany (1992-1994), El Salvador (1992-1993), South Africa (ANC) (1993), Sri Lanka (1994-1997), Haiti (1995-1996), Burundi (1995-1996), South Africa (1995-2000), Ecuador (1996-1997), Guatemala (1997-1999), Nigeria (1999-2000), and Sierra Leone (2000-2001). See Hayner, *op. cit.* (note 5), Appendix 1, Chart 1, pp. 291-297. Truth commissions in Peru and East Timor are currently under way.

<sup>9</sup> *Ibid.*, p. 14.

Truth commissions serve a variety of purposes. Their investigations establish an accurate and authoritative record of the past, acknowledged by the government. This *documentation* of abuses and the government's involvement in them is itself a complementary mechanism to prosecution in that it provides a fuller account of the pattern of abuses than could individual criminal trials; when this documentation is handed over to the judiciary, it can be crucial to later prosecutions. In addition to truth commissions, private non-governmental organizations also engage in documentation. However, their findings often receive no official acknowledgement.

A truth commission provides victims the platform to tell their stories, which many consider necessary for the healing process of reconciliation to proceed. However, certain precautions must be taken so as not to retraumatize them. Because truth commissions aim to gather as much information as possible within a relatively short time, they request individuals to tell their stories in significant detail. For some this may provide a release and represent a form of justice after years of silence or denial by the government. However, for others this contact with the truth commission causes retraumatization, which can lead to feelings of revenge and anger, thus quite the opposite of reconciliation. Most truth commissions have provided little, if any, support service, such as appropriate counselling. There are only a few examples of them doing so: the staff of the Chilean and Argentine truth commissions included psychologists and social workers; the truth commissions for Haiti and El Salvador offered their staff a small amount of training on how to take testimony in a sensitive manner; and the South African Truth and Reconciliation Commission provided the most extensive psychological support, and only this Commission attempted to set up a system for follow-up of traumatized witnesses.<sup>10</sup>

Truth commissions also serve as a means to identify victims so they may obtain some form of redress;<sup>11</sup> they furthermore recommend institutional or legislative reforms necessary to avoid

<sup>10</sup> *Ibid.*, pp. 145-146.

<sup>11</sup> In Chile and in Argentina reparation programmes relied on their truth commissions' records. *Ibid.*, p. 172.

repetition of past abuses.<sup>12</sup> Sometimes truth commissions have been used to establish who was responsible and provide a measure of accountability for the perpetrators. They are not, however, the same as judicial bodies: they clearly hold fewer powers than a court, e.g. they can neither impose punishment, such as a jail sentence, nor compel testimony.<sup>13</sup> When truth commissions take on even quasi-judicial functions difficulties arise. For example, they often face the dilemma of whether to name suspected perpetrators. Naming names is part of the truth-telling process, even more so when the judicial system clearly does not function well enough to expect that they will be prosecuted.<sup>14</sup> This need to tell the truth, however, collides with the principle of due process;<sup>15</sup> due process requires that individuals receive fair treatment and be allowed to defend themselves before being pronounced guilty. Establishing an outline of fair standards of proof by which a truth commission should abide would alleviate some due process concerns.<sup>16</sup> Nevertheless, the threat of revenge killings remains. The Rwandan Commission, for example, named dozens of officials, two of whom were killed in the months after the report's publication.<sup>17</sup>

The Commission on the Truth for El Salvador chose to name names despite fierce governmental resistance. The Commission reasoned that:

“In the peace agreements, the Parties made it quite clear that it was necessary that the ‘complete truth be made known’, and that was why the Commission was established. Now the whole truth cannot be told without naming names. After all, the Commission was not asked to write an academic report on

<sup>12</sup> Margaret Popkin and Naomi Roht-Arriaza, “Truth as justice: Investigatory commissions in Latin America”, in *Transitional Justice*, *op. cit.* (note 7), p. 262.

<sup>13</sup> Hayner, *op. cit.* (note 5), p. 16.

<sup>14</sup> *Ibid.*, p. 107; Hayner, *op. cit.* (note 7), pp. 254-255; Juan E. Méndez, “Accountability for past abuses”, *Human Rights Quarterly*, Vol. 19, 1997, p. 265.

<sup>15</sup> Méndez, *op. cit.* (note 14), p. 265; José Zalaquett, in Alex Boraine *et al.* (eds), *Dealing with the Past: Truth and Reconciliation in South Africa*, 1994, p. 51.

<sup>16</sup> Hayner, *op. cit.* (note 7), p. 257; see also Méndez, *op. cit.* (note 14), p. 265.

<sup>17</sup> Rebels killed one, and the other was apparently killed by government death squads to cover up evidence. Hayner, *op. cit.* (note 7), p. 257.

El Salvador, it was asked to describe exceptionally important acts of violence and to recommend measures to prevent the repetition of such acts.<sup>18</sup>

The Argentine National Commission on the Disappearance of Persons did not list names in its report, but it did not delete from the report quotations of witnesses' testimony containing names of some accused; however, the confidential list of names given to the Argentine president was later leaked to the press.<sup>19</sup> Unlike other truth commissions, the South African Truth and Reconciliation Commission<sup>20</sup> held mainly public hearings with the names of accused broadcast regularly, and it provided more safeguards for the accused. The act creating the Commission stipulates that anyone negatively implicated must be afforded the "opportunity to submit representations to the Commission within a specified period of time (...) or to give evidence at a hearing of the Commission".<sup>21</sup> In addition, after the South African Appeals Court<sup>22</sup> held against the Commission, it established procedures giving a twenty-one-day written notice to those expected to be named in a public session; these procedures were also used for those individuals the Commission intended to name in its final report.<sup>23</sup>

To better ensure the successful work of a truth commission, it should meet certain minimal requirements.<sup>24</sup> The truth

<sup>18</sup> *From Madness to Hope: Report of the Commission on the Truth for El Salvador*, p. 25, quoted in Hayner, *op. cit.* (note 5), p. 117.

<sup>19</sup> Hayner, *op. cit.* (note 5), pp. 110-111. Five days after the Commission's report was released, a broad amnesty law was passed shielding all named. *Ibid.*, p. 40.

<sup>20</sup> The South African Truth and Reconciliation Commission is the only commission authorized to offer individualized amnesty.

<sup>21</sup> Promotion of National Unity and Reconciliation Act, No. 34 (1995) (South Africa), Section 30, quoted in *Truth and Reconciliation Commission of South Africa Report*, Vol. 1, 1999, chap. 7, para. 21, p. 179.

<sup>22</sup> Case No. 3334/96, *Truth and Reconciliation Commission v. Du Preez and Another*, 1996 (3) SA 997; Case No. 4443/96 (Appellate Division) — cited in *Truth and Reconciliation Commission of South Africa Report*, Vol. 1, 1999, chap. 7, sec. 21-76, pp. 179-190.

<sup>23</sup> Hayner, *op. cit.* (note 5), p. 125.

<sup>24</sup> Hayner, *op. cit.* (note 7), p. 259. For a description of an ideal truth commission, see comments by Jamal Benomar, Director of the Human Rights Program at the Carter Center of Emory University quoted in Mary Albon, Conference Rapporteur, "Truth and justice: The delicate balance — documentation of prior regimes and individual rights", in *Transitional Justice*, *op. cit.* (note 7), pp. 290-291.

commission's mandate or terms of reference, which set its aim, scope of inquiry and powers and is usually determined by presidential decree, the legislature or a peace agreement, must be clear. A mandate of limited scope greatly restricts the extent of truth exposed. By broadly interpreting the mandate, commissioners may gain some latitude regarding the scope of the truth commission, yet others have interpreted their mandate restrictively due to constraints such as time, limited resources and lack of sufficient or reliable information. The truth commission must operate impartially and in good faith, independent from political forces, with the necessary resources<sup>25</sup> and with free access to information for full investigation. Often the greatest hurdle facing truth commissions is political pressure which may, directly or indirectly, restrict its work, e.g. by hindering access to information. The mandate should grant the truth commission the power to make recommendations that can be expected to be given serious consideration, and when possible it should be agreed in advance that the truth commission's recommendations are obligatory. The truth commission's report should be published immediately and be readily available to the public.<sup>26</sup>

A truth commission should be set up as soon as possible after resolution of the conflict or government transition, during this momentum for change, and should operate for a limited, specified period of time.<sup>27</sup> Meeting the time limit may be difficult, but a truth commission must focus on the most important aspects, as it cannot investigate all cases. If no deadline is set, the truth commission's work could continue for years, as in the case of the Ugandan Commission of Inquiry (1986-1995), eliminating any effective contribution by it to the immediate transition. Finally, agreement to establish a truth commission must coincide with a real commitment to making significant improvements.

<sup>25</sup> Hayner, *op. cit.* (note 7), p. 251.

<sup>26</sup> *Ibid.*, p. 254. The Haiti Truth Commission was a failure in this regard because it published a report six months *after* the

mandate of the Truth Commission ended and did not widely distribute it. Méndez, *op. cit.* (note 14), p. 269.

<sup>27</sup> Hayner, *op. cit.* (note 7), p. 249.



## Lustration

Lustration means purification or illumination.<sup>28</sup> It is an administrative mechanism, defined as “the disqualification and, where in office, the removal of certain categories of officeholders under the prior regime from certain public or private offices under the new regime”.<sup>29</sup> This consists mainly of exclusion from candidacy for political office but also sometimes denial of a licence to exercise certain professions, e.g. teaching.

Primarily the former Soviet bloc countries<sup>30</sup> chose to deal with the past through lustration, disqualifying former Communist officials and collaborators and sidestepping criminal prosecution; hence these lustration laws were also sometimes referred to as “de-Communization laws”.<sup>31</sup> Lustration statutes were passed in the Czech Republic and Slovakia (1991), Albania (1992), Bulgaria (1992, 1997, 1998), Poland (1992, 1997, 1998), Hungary (1994, 1996) and Romania (1998).<sup>32</sup> However, only Albania, the former Czechoslovakia<sup>33</sup> and Germany<sup>34</sup> conducted purges affecting large numbers of individuals. The others refrained from doing so, primarily because of widespread indifference among the population: during the final decades of the communist regimes political repression had become much less extreme, and there were fewer victims in the 1980s.<sup>35</sup> At the time of transition the Communist elite, in general, handed over power peacefully

<sup>28</sup> Herman Schwartz, “Lustration in Eastern Europe”, in *Transitional Justice*, *op. cit.* (note 7), p. 461, No. 1. Lustration is also referred to as purges. The term comes from the Latin *lustratio*, which means purifying by sacrifice; see Alexandra Barahona De Brito, Carmen González-Enríquez and Paloma Aguilar (eds), *The Politics of Memory: Transitional Justice in Democratizing Societies*, Oxford University Press, Oxford, 2001, p. 6 [hereinafter *The Politics of Memory*].

<sup>29</sup> Schwartz, *op. cit.* (note 28), p. 461.

<sup>30</sup> Luc Huyse, “Justice after transition: On the choices successor elites make in dealing with the past”, *Law & Social Inquiry*, Vol. 20, 1995, cited in *Transitional Justice*,

*op. cit.* (note 7), p. 337. In Belgium, France and the Netherlands after World War II, lustration was accompanied by criminal conviction. *Ibid.*

<sup>31</sup> *The Politics of Memory*, *op. cit.* (note 28), p. 6; Schwartz, *op. cit.* (note 28), p. 463.

<sup>32</sup> *The Politics of Memory*, *op. cit.* (note 28), p. 6.

<sup>33</sup> *Ibid.*, p. 219. In Slovakia, the lustration law ceased to be in force when the Federation broke up on 1 January 1993. It was never formally repealed, but the necessary administrative mechanisms to enforce it were never activated; *Ibid.*, p. 228.

<sup>34</sup> *Ibid.*, p. 6.

<sup>35</sup> *Ibid.*, p. 219.

unlike Latin America where the former elite feared revenge. Most of the populace's lack of intense interest was also because thirty to forty per cent of them were either party members or closely related to party members. Simultaneously, most Eastern Europeans were struggling economically, with little time to take an interest in a mechanism that was an unpleasant reminder of the purges undertaken by the Communists after 1945.<sup>36</sup> Yet despite seemingly popular indifference, lustration dominated parliamentary agendas. The new political elites found it a means of clearly indicating a break with the past, especially as many of them, even if they had not been part of the old elite, were not associated with an anti-regime stance or known for their suffering under political repression.<sup>37</sup>

Lustration as a policy of settling accounts with the past raises serious concerns of procedural fairness and due process: the right to defence becomes extremely fragile, and often the burden of proof is reversed onto the accused.<sup>38</sup> Many individuals purged were identified through examination of secret police files. For example, in Germany political police records were opened and a commission re-viewed them, resulting in dismissal for collaboration of thousands of civil servants, including judges and police officers.<sup>39</sup> This *documentation* (exposure of information) as a form of acknowledgement serves a similar purpose to that of documentation undertaken by a truth commission; however, in these cases many police records were faulty — either incomplete or falsified to make the agent look better<sup>40</sup> — augmenting the due process concerns associated with lustration. The lustration process also tends to become highly politicized. Avoiding some of these difficulties necessitates insisting that each case of lustration be treated individually, based solely on the actions of that particular individual.<sup>41</sup>

<sup>36</sup> *Ibid.*, p. 220.

<sup>37</sup> *Ibid.*, p. 221.

<sup>38</sup> Huyse, *op. cit.* (note 30), p. 346.

<sup>39</sup> *The Politics of Memory, op. cit.* (note 28), p. 6.

<sup>40</sup> Schwartz, *op. cit.* (note 28), p. 464. The former Czechoslovakia provides one example.

See *The Politics of Memory, op. cit.* (note 28), p. 225.

<sup>41</sup> Schwartz, *op. cit.* (note 28), p. 466; see generally, Andrzej Rzeplinski, "A lesser evil?", *East European Constitutional Review*, Vol. 1, 1992, pp. 33-35, reprinted in *Transitional Justice, op. cit.* (note 7), pp. 484-487.

This approach presents other disquieting dilemmas. Many governments have had recourse to lustration statutes during a period of transition to democracy, purging people for being part of a now condemned group; this is contrary to basic democratic principles to which the States employing this method aspired. How far should disqualification extend? Who was truly “innocent”?<sup>42</sup> Harmful effects of lustration extend to families and friends of those purged, resulting in the alienation of a huge proportion of the population. In practical terms, the new State also deprives itself of many of its specialists. Pavel Dostal, a member of the Czechoslovak Federal Assembly, commented on the Czechoslovak Screening Act of 1991: “Providing we are not blind with hatred, we must incorporate these people, since among them are specialists and experts whom we will need if we really want to join Europe.”<sup>43</sup>

### Reparations

In contrast to the mechanisms previously discussed, reparations focus more on the victim than on the offender. International law establishes the “right to reparation”,<sup>44</sup> thus imposing an obligation on States to provide reparations for violations of their international obligations.<sup>45</sup> In order to successfully fulfil this obligation, States must dedicate the significant time and resources required for any reparations programme.

<sup>42</sup> “All of us are responsible, each to a different degree, for keeping the totalitarian machine running. None of us is merely a victim of it, because all of us helped to create it together”: Vaclav Havel, “New Year’s Address” (1 January 1990), quoted in Andrew Nagorski, *The Birth of Freedom*, Simon and Schuster, New York, 1993, p. 89; Schwartz, *op. cit.* (note 28), p. 461.

<sup>43</sup> Huyse, *op. cit.* (note 30), p. 348.

<sup>44</sup> Joinet Report, *op. cit.* (note 4).

<sup>45</sup> Regional and international human rights treaties, confirmed in decisions by international courts. See “United Nations Commission on Human Rights: Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: Final Report”, Theo van Boven, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1993, 8 July 1993; see also Joinet Report, *op. cit.* (note 4).

The four main forms of reparation are restitution, indemnity, satisfaction, and declaratory judgment;<sup>46</sup> they may be material or non-material. Material reparation may be in cash or other monetary terms, e.g. education, housing or restitution of wrongfully seized property. For example, Germany has paid over US \$600 billion to Nazi victims and their families in the last fifty years. More than fifteen years after the end of military rule in Brazil, the government instituted a reparations programme providing approximately US \$100,000 to each of some 135 families of disappeared persons.<sup>47</sup> In Chile, 4,886 persons receive monthly cheques beginning at US \$345 as part of a “pension plan” set up in 1997 for family members of those killed or disappeared under the military dictatorship; family members of those killed and disappeared also receive educational and health benefits, and a waiver of mandatory military service.<sup>48</sup> The South African Truth and Reconciliation Commission also made recommendations for material and non-material reparations for victims, which have resulted in limited programmes.<sup>49</sup>

Yet how can suffering and loss be quantified in monetary terms? Are all victims entitled to the same amount? For some victims or their families even a small sum can be a symbolic demonstration of the State’s responsibility. For others, such as the members of Mothers of the Plaza de Mayo in Argentina, where a reparations law for families of disappeared was put in place in 1994, any sum is rejected as “blood money” for life has no price.<sup>50</sup>

Even if a monetary amount can be agreed upon, many governments do not have the means to provide for direct financial compensation to all victims. Non-material reparation includes a range of measures. One of the most important forms of non-material reparation is disclosure of the truth accompanied by the government’s

<sup>46</sup> “Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities”, Theo van Boven, Special Rapporteur, Preliminary

Report, UN Doc. E/CN.4/Sub.2/1990/10, 26 July 1990, paras 25-29.

<sup>47</sup> Hayner, *op. cit.* (note 5), p. 180.

<sup>48</sup> *Ibid.*, pp. 172-173.

<sup>49</sup> *Ibid.*, p. 178.

<sup>50</sup> *Ibid.*, p. 177.

formal acknowledgement of this truth and its responsibility for the wrongs done. Erecting memorials in order to show respect for the victims and establishing preventative measures, such as constitutional and institutional reforms or human rights training, are other examples of this form of reparation. Argentina again provides an example by its creation of a new legal status of “forcibly disappeared”; this status is legally equivalent to death for civil matters, thereby allowing families to process wills or close estates, for example, but it does not declare the person dead. Prior to this law, families could not settle the affairs of someone who had disappeared until they had declared that person “presumed dead”; this status was unsatisfactory for them because it did not recognize government responsibility.<sup>51</sup> The prosecution of perpetrators, hence the rejection of amnesty laws, is furthermore extremely important not only because victims feel that justice is done, but also, if perpetrators are not prosecuted, it becomes extremely difficult for victims to gain access to the necessary evidence, even if they have the means, to bring their case to court for awards from the State. In some countries general amnesties block both criminal prosecution and civil claims.

### **Customary methods — two examples**

All the complementary mechanisms described in this article can contribute to successful transition and reconciliation, but the extent may be determined by the local, customary methods available. For example, in Mozambique traditional rituals opened the path to reconciliation after an extremely violent fifteen-year conflict between the government and the Mozambican National Resistance (Renamo), which ended in 1992 with the Mozambican peace settlement.<sup>52</sup> At the end of the conflict national and international organizations found that while they “were all thinking about how to increase peace and reconciliation, (...) when [they] came to the grassroots, [the people] were reconciling already. (...) [Their] ideas were only confusing and stirring

<sup>51</sup> *Ibid.*

<sup>52</sup> Alcinda Honwana, “Sealing the Past, Facing the Future: Trauma Healing in Rural Mozambique”, *Accord — An Inter-*

*national Review of Peace Initiatives*, 1998, <[http://www.-c-r.org/accord/acc\\_moz/honwana.htm](http://www.-c-r.org/accord/acc_moz/honwana.htm)>.

up trouble.”<sup>53</sup> The remarkable phenomenon of Mozambicans living together again without ongoing conflict so quickly is largely due to the local importance of traditional healing mechanisms. “[R]ecent studies of war-affected populations in Mozambique (...) show that talking about traumatic experience does not necessarily help patients ‘come to terms’ with their distress.”<sup>54</sup> The tradition of performing cleansing rituals to purify people from experiences of wartime atrocities makes it possible, after the purification, for links to the past to be cut and the individual to be reintegrated into the community. Also, rituals venerating ancestral spirits “in postwar context (...) restore severed ancestral links and (...) obtain spiritual guidance and protection to face the challenges of social reconstruction.”<sup>55</sup>

At the political level and through customary methods at the individual level the decision was made not to dwell on the past. Raul Domingos, a former senior Renamo leader who also headed the Renamo party in parliament, explains the meaning of reconciliation in Mozambique: “The word *reconciliation* is a word used to mean forget the past and be tolerant. We killed each other, but we forget this because we are sons, brothers, and we have lived together. Without this the war would never have ended.”<sup>56</sup> Mozambique remains an interesting case to study on the choice between remembering or forgetting the past and between accountability and reconciliation.

The *gacaca*<sup>57</sup> in Rwanda is an example of a customary mode of justice. In Rwanda, approximately 120,000 individuals are detained in connection with the 1994 genocide, and it has been estimated that Rwandan national courts and the International Criminal Tribunal for Rwanda (ICTR) would need at least 100 years to try

<sup>53</sup> José Luís Cabaço, the former Frelimo government official, quoted in Hayner, *op. cit.* (note 5), p. 191.

<sup>54</sup> Honwana, *op. cit.* (note 52), p. 2; Hayner, *op. cit.* (note 5), pp. 193-195.

<sup>55</sup> Honwana, *op. cit.* (note 52), p. 5.

<sup>56</sup> Hayner, *op. cit.* (note 5), p. 192, interview with Raul Domingos, former senior Renamo leader, in Mozambique.

<sup>57</sup> On 12 October 2000, the National Assembly of Transition voted the law instituting the *Gacaca*. *Gacaca* is a Kinyarwanda term for the grass on which traditional village assemblies used to be held. Herve Bar, “Rwanda-Rwandans elect judges for grass-roots courts for genocide hearings”, AFP via NewsEDGE, 4 October 2001.

them all.<sup>58</sup> In order to alleviate the situation, the Rwandan government has decided to set up the *gacaca*, an alternative system of transitional justice using participatory and proximity justice whereby individuals from the communities act as “people’s judges”. The Rwandan President Paul Kagame contends that “[i]f the *gacacas* succeed, it will show our ability to find a typically Rwandan therapy for the ills of our society. Classical justice, even endowed with all the necessary means, cannot resolve all the problems inherited from the genocide. The *gacacas* will bring out the truth on what happened, accelerate the process, eradicate impunity, reconcile Rwandans and consolidate the unity of the country.”<sup>59</sup>

Many remain sceptical of the *gacaca*, not only because of existing logistical constraints and concerns about the competence of the “people’s judges”, but also due to the fact that traditional forms of justice are no longer fully accepted by the entire population.<sup>60</sup> In addition, the traditional *gacaca* was never conceived to try serious crimes such as genocide; this new variant of *gacaca*, imposing penal law, comes nearer to repression than a search for reconciliation found in the traditional *gacaca* and is criticized for lacking the minimum judicial guarantees. The *gacacas* are scheduled to start in May 2002.

## Conclusion

The mechanisms discussed above are often referred to as alternatives to prosecution, when they should more accurately be seen as complements not only to prosecution but to each other as well. Rarely can one mechanism satisfy all the needs for a successful transition after serious violations have taken place. Satisfying the “right to know”<sup>61</sup>

<sup>58</sup> “Rwanda: Genocide survivors worried about people’s courts”, Agence France-Presse via NewsEDGE, 10 March 2001. Other estimates include 150 years: Abigail Zoppetti, “Crime de guerre. Au Rwanda, retour à la justice coutumière de les ‘gacaca’”, *Le Temps*, 19 July 2001; and 200 years: Gabriel Gabiro and Julia Crawford, “Les Rwandais expriment des sentiments partagés sur les ‘gacaca’”, *Arusha International Criminal Tribunal for*

*Rwanda News*, Agence de Presse Hironnelle, 4 May 2001.

<sup>59</sup> Bar, *op. cit.* (note 57).

<sup>60</sup> Charles Ntampaka, “Le *gacaca* rwandais, une justice répressive participative”, *Actualité du droit International Humanitaire*, Les Dossiers de la Revue de Droit Pénal et de Criminologie, Vol. 6, la Charte, Brussels, 2001, p. 211, p. 213.

<sup>61</sup> Joinet Report, *op. cit.* (note 4).

requires that the truth be told; this can occur through criminal trials, documentation and, more extensively, through truth commissions. By engaging any of these mechanisms and acknowledging the truth, the State also provides non-material reparation to the victims, one response to the “right to reparation”. Truth commissions suggest reforms, e.g. of the judiciary; the government’s implementation of these reforms represents a guarantee of non-repetition, also a form of reparation. When documentation, whether gathered by a truth commission investigation or a private non-governmental organization, is handed over to the judiciary, this aids in the prosecution of offenders as required by the “right to justice”; prosecution of the perpetrator or the use of an administrative form of accountability, such as lustration, can simultaneously be considered as a form of reparation. The context determines the appropriate combination of complementary mechanisms and specific composition of each necessary to promote reconciliation and prevent future atrocities.

## **Résumé**

### **Mécanismes pour compléter les poursuites judiciaires**

par LAURA M. OLSON

*Tout État qui vit une période de transition, au sortir d'un régime répressif ou à l'issue d'un conflit, doit décider d'affronter ou pas son passé de violations. Les États qui ont choisi de faire face à leur passé doivent déterminer comment procéder. Faut-il s'attacher à demander des comptes à ceux qui sont responsables des violations du droit ou reconnaître la vérité de ce qui est arrivé ? La solution fait généralement combiner ces deux éléments.*

*Engager des poursuites – c'est-à-dire, demander des comptes aux auteurs des violations –, c'est montrer que le principe du respect du droit prime sur les décisions politiques. Ne pas en engager, c'est promouvoir une culture de l'impunité et faire fi de ce que certains considèrent comme le moyen de dissuasion le plus efficace contre une*



*répression future. Pourtant, même quand la volonté politique existe d'engager des poursuites, des problèmes courants font que peu de procès ont lieu et qu'un système judiciaire fonctionnant au mieux est limité dans le rôle qu'il peut jouer en faveur de la réconciliation et d'une transition réussie à la paix, ou à un régime non répressif.*

*Dans ce cas, il est des plus opportun de compléter les poursuites par d'autres mécanismes. Cet article décrit brièvement les mécanismes les plus importants : commissions de la vérité, lustration, réparations et méthodes coutumières.*