


# TRUTH COMMISSIONS and PROCEDURAL FAIRNESS

Mark Freeman

 CAMBRIDGE  
UNIVERSITY PRESS

## TRUTH COMMISSIONS and PROCEDURAL FAIRNESS

This is the first law book devoted entirely to the subject of truth commissions. The book sets forth standards of procedural fairness aimed at protecting the rights and interests of those who come into contact with truth commissions – primarily victims and their families, witnesses, and perpetrators. The aim of the book is to provide recommended criteria of procedural fairness for five possible components of a truth commission's mandate: the taking of statements, the use of subpoenas, the exercise of powers of search and seizure, the holding of victim-centered public hearings, and the publication of findings of individual responsibility in a final report (sometimes called the issue of "naming names"). The book draws on the experience of past and present truth commissions, analogous national and multilateral investigative bodies, and international and comparative standards of procedural fairness.

Mark Freeman is an international lawyer, author, and lecturer specializing in human rights and transitional justice. He is co-author of the first comprehensive Canadian textbook on international human rights law, as well as a companion volume of texts, cases, and materials. He has conducted missions to more than a dozen countries to provide advice and training on the establishment and operation of truth commissions and other transitional justice mechanisms. He currently heads the Brussels office of the International Center for Transitional Justice.

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CAMBRIDGE UNIVERSITY PRESS  
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press  
32 Avenue of the Americas, New York, NY 10013-2473, USA

www.cambridge.org  
Information on this title: www.cambridge.org/9780521850674

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First published 2006

Printed in the United States of America

*A catalog record for this publication is available from the British Library.*

*Library of Congress Cataloging in Publication Data*

Freeman, Mark, 1968–

Truth commissions and procedural fairness / Mark Freeman. – 1st ed.

p. cm.

Includes index.

ISBN 0-521-85067-3 (hardback : alk. paper)

1. Truth commissions. I. Title.

JC580.F74 2006

323.4'9 – dc22 2005028817

ISBN-13 978-0-521-85067-4 hardback

ISBN-10 0-521-85067-3 hardback

ISBN-13 978-0-521-61564-8 paperback

ISBN-10 0-521-61564-X paperback

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... for truth is truth  
to the end of reckoning.

– WILLIAM SHAKESPEARE,  
*MEASURE FOR MEASURE*

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## Foreword

Transitional justice has become a feature of the past three decades. It is a consequence of the significant number of nations that have struggled to make the transition from war to peace or from oppression and discrimination to forms of democratic government. The challenge facing such societies is the manner in which they should treat past serious human rights violations. The perpetrators seek blanket amnesties and the victims seek prosecution of the former leaders.

It is tempting in that context to forget the past in favor of building a new and better future. It is the line of least resistance. It is also a recipe for future disaster. Where past human rights violations are ignored and the victims forgotten, there is a cancer in such a society that remains dormant and available for use or abuse by some or other future despotic, nationalistic leader. Examples are there for the choosing – the Balkans, Rwanda, the Middle East.

More enlightened leaders have sought a third way between national amnesia and criminal prosecutions – the establishment of a truth commission. In Chapter 1 of this work there is an excellent and concise history of truth commissions and an explanation of their relationship to courts and other forms of official and nonofficial truth-seeking mechanisms.

One of the challenges facing a truth commission is the fairness of its proceedings. It is all too easy to allow it to be used as a political platform to castigate the former regime. It is a complex and sensitive process to assure victims they will receive protection and respect for their dignity when they testify. It is no



exaggeration to state that the success or failure of a truth commission will crucially depend upon the fairness of its proceedings.

This study could not be timelier. It would have been a great resource for the leaders of earlier truth commissions as they went about their work. I have no doubt that it will be regarded in that way by those still to come.

This book, however, has a wider relevance. It contains a thorough overview of the international law of procedural fairness that applies not only to truth commissions but also to other forms of nonjudicial inquiry. It has become evident that many international organizations fail to observe procedural fairness—whether committees of the United Nations that make decisions affecting the lives of many thousands of persons or committees of investigation set up by other international or regional organizations. There are many domestic committees of investigation that also fail to observe rules of fairness. I have in mind investigations set up by national legislatures and especially in the United States where congressional committees conduct scores of investigations annually. This book should be made compulsory reading for those who conduct such investigations and the members of their staff.

The author does not pontificate, yet makes no concessions on matters of principle. He is well aware of and takes into account the practical and pragmatic problems faced by truth commissions. I have in mind questions such as the appropriate burden of proof, the admissibility of evidence, and notice to those who might be adversely affected by evidence or the findings. There are a host of other practical issues that are treated with thoroughness and thoughtfulness.

I recommend this book to anyone who has an interest in transitional justice and, in particular, truth commissions. I also believe *Truth Commissions and Procedural Fairness* will be a useful and insightful work for lawyers, legislators, and members of the public who have an interest in the fairness of institutions that continue to multiply and affect the daily lives of millions of people around the world.

Richard J. Goldstone

## Preface

Since the Nuremburg trials and even more so since the end of the Cold War, formal mechanisms to address human rights abuses have increased dramatically, both in number and variety. Today there are, for example, a permanent International Criminal Court, two *ad hoc* international criminal tribunals (the International Criminal Tribunals for the former Yugoslavia and for Rwanda), and several mixed national-international criminal tribunals. There are three regional human rights courts: the European and Inter-American Courts of Human Rights, and the African Court on Human and Peoples' Rights. There is also a multitude of quasi-judicial and nonjudicial human rights mechanisms, including seven UN treaty bodies and two regional human rights commissions.

Most contemporary mechanisms for the vindication of human rights follow well-established rules of procedure. International criminal tribunals, for example, abide by internationally recognized standards of a "fair trial." Regional human rights courts and commissions have followed essentially the same rules of procedure for, in some cases, more than three decades. Yet there are a number of human rights mechanisms for which rules of procedure remain *ad hoc* and vague. This book constitutes a systematic attempt at outlining fair procedures for one such mechanism: the truth commission.

A truth commission is an *ad hoc*, autonomous, and victim-centered commission of inquiry set up in and authorized by a state for the primary purposes of (1) investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that



occurred in the state during determinate periods of abusive rule or conflict, and (2) making recommendations for their redress and future prevention.

Particularly since the Truth and Reconciliation Commission in South Africa, the subject of truth commissions has attracted worldwide interest. Today it is widely believed that truth commissions can contribute not only to the clarification of contested historical events but also to criminal justice efforts, victim reparation, reform of dysfunctional public institutions, and national reconciliation. Remarkably, several truth commissions have done so. If it were otherwise, their general popularity among human rights activists would be difficult to explain. Yet truth commissions are only one tool among many available to help a society confront its past. Truth commissions, in fact, are part of the broader field of transitional justice, which focuses on the complex question of how states come to grips with a legacy of mass abuse.

Observers and sponsors of truth commissions have rarely taken a hard look at issues of procedural fairness for truth commissions. There are some exceptions. Priscilla Hayner, the leading authority on truth commissions, has examined fairness issues that arise for commissions that publish findings of individual responsibility in their final reports. The South African Truth and Reconciliation Commission's terms of reference were the result of extensive parliamentary and public debate on issues of fairness, and local courts rendered important judgments on questions of fair procedure that arose in the commission's course of operation. There have also been sporadic attempts at the UN Commission on Human Rights to codify a limited number of relevant procedural standards. But overall, there remains no sustained account of procedural fairness for truth commissions.

This book recognizes the fact that no two truth commissions – nor, for that matter, two political contexts – are identical. Some truth commissions are established by the executive branch of government, others by the legislature; some truth commissions run for less than a year, others for several years; some comprise three commissioners, others more than twenty; some hold public hearings, others only operate in private; some “name names,” others do not; some have subpoena and search and seizure powers, others lack them; some operate in contexts marked by serious and ongoing security threats, others operate in more settled environments. The world of truth commissions is, in short, marked by diversity. Yet the fact is that the similarities between truth commissions are far greater than the differences. As this book demonstrates, truth commissions resemble nothing so much as each other. For this reason, and despite the apparent diversity of models, it is possible to develop a set of guiding principles on procedural fairness for truth commissions.

My interest in developing fairness standards for truth commissions was borne of an appreciation for international fair trial standards, and a recognition that the world of trials was at least as diverse as the world of truth commissions.

There are criminal trials and civil trials; group trials and individual trials; full-length trials and summary trials; trials in common law jurisdictions and trials in civil law jurisdictions; trials in person and trials *in absentia*; trials by specialized tribunals and trials by ordinary tribunals; trials in public and trials *in camera*; trials by judge and trials by jury; and so forth. None of this diversity has led any serious scholar to suggest the futility or irrelevance of having international fair trial standards. The same goes for truth commissions. Those who create or run truth commissions require guidelines on fairness no less than those engaged in trial proceedings.

This book does not cover all aspects of a truth commission's mandate or operation. Instead, it offers recommended criteria of procedural fairness for five possible components of its work that bear directly on issues of procedural fairness: the taking of statements, the use of subpoena powers, the use of powers of search and seizure, the holding of public hearings, and the publication of findings of individual responsibility in a final report. In examining these functions, the book explores the notion of procedural fairness for persons who might be adversely impacted by them, but it gives equal attention to the procedural fairness interests of witnesses and of victims and their next-of-kin.

Certain of these five components arise more frequently than others. For example, every truth commission conducts some form of statement taking, but not all have wielded subpoena or search and seizure powers; some commissions have the power to make findings of individual responsibility, others do not; some hold public hearings, others do not. At the same time, it is rare for truth commission sponsors to bypass consideration of any of the five attributes. Moreover, truth commission mandates increasingly encompass most, and in some cases all, of these attributes, thus increasing the need for attention to issues of procedural fairness. Admittedly, the quality of the justice system in most transitional contexts tends to be low, making resort to the courts on procedural fairness violations unlikely when the commission is still in operation. But this is beside the point. Truth commissions, no less than courts, should apply high standards of procedural fairness for their own sake. No one would suggest that fair trial standards are irrelevant because they are difficult to discharge. The same logic should apply to truth commissions.

Some readers may note this book's omission of more controversial and atypical aspects of some recent truth commission mandates. For example, there is no in-depth analysis of the truth-for-amnesty procedure used by the South African Truth and Reconciliation Commission. Nor does the book examine the Timor-Leste Commission on Reception, Truth, and Reconciliation's power to formalize contracts of community service for perpetrators. Nor, finally, does it cover the compensation-granting power wielded by the Moroccan Commission on Fairness and Reconciliation. The primary reason for not examining these unique attributes here is their adjudicative character (*i.e.*, the fact that they

involve the settling of legal rights). The focus of this book is limited to the nonadjudicative aspects of truth commission work.

In light of the wide range of possible truth commission objectives, attributes, and budgets, and given the importance of local participation in any commission's conception, this book does not provide a blueprint for the design of an "ideal" truth commission. Rather, it aims to provide a practical reference tool for local sponsors, advocates, and members of truth commissions, as well as for international human rights scholars and practitioners. Some of the material in the book will be of most use at the "design stage" (*i.e.*, for sponsors and advocates of a truth commission prior to its establishment). Some will be of most use at the "implementation stage" (*i.e.*, for appointed commissioners and staff and for a commission's many external stakeholders). And some of it will be most relevant to the "postcommission" stage (*i.e.*, for governments and others dealing with implementation of the final report and any attendant legal challenges). All of it, however, will be relevant to persons who accept the importance of procedural fairness and who wish to depoliticize what is an inherently controversial public exercise.

A very diverse, if nonexhaustive, range of relevant mechanisms and sources was consulted in the research for this book. Particular attention was paid to the experiences of (1) past truth commissions; (2) analogous domestic, multilateral, and nongovernmental human rights investigations; and (3) relevant international human rights and criminal law standards. An effort was also made to consult legal sources from different legal traditions. Admittedly, however, the book has a common law bias corresponding to the legal education of its author. I hope that bias is overcome in part by the selection of sources: the truth commissions and the analogous bodies examined in the book operate in civil and common law countries alike, and the referenced international standards represent the closest approximation to "universal" standards.

One final remark by way of introduction. While its immediate topic is truth commissions, much of the book is also directly relevant to human rights investigations by analogous bodies such as nongovernmental organizations, Commonwealth commissions of inquiry, national human rights commissions, coroners, international commissions of inquiry, vetting bodies, and compensation commissions – many of which operate according to *ad hoc*, and not especially victim-sensitive, standards of procedural fairness. My discovery in writing this book was that truth commissions have as much to teach as to learn in relation to these and other investigative bodies.

The book comprises two principal parts. Part I provides an overview of the book's two main themes: truth commissions and procedural fairness. Part II examines the five previously noted possible components of a truth commission mandate. Each chapter in Part II consists of a detailed analysis of specific issues, followed by concrete recommendations. Although consistent themes emerge

throughout Part II, the chapters and sections are intentionally self-contained and can, for the most part, be read independently of one another. At the end of the book are three appendices. Appendix 1 is a table of past and present truth commissions and their key attributes. Appendix 2 consists of a small selection of primary materials on truth commissions. Appendix 3 contains a sampling of primary materials on analogous commissions of inquiry.

This work is current as of 1 January 2006 except where otherwise noted.

## Acknowledgments

As with any book, this one benefited immensely from the contributions of many individuals.

I am compelled to start with a special tribute to Patricia E. Ronan, as well as to Cynthia M. Reed. Both made major contributions to the preparation of initial versions of Part II of this book. I am indebted to both of them, and I hope they will find the final results worthy.

Heartfelt thanks are also owed to Orla Bannan and Jedediah Purdy, as well as to Mike Halberstam, Paul Lall, Renate Lunn, Stuart Naifeh, and Sandra Sheldon. Early in the process, they too made noteworthy contributions to selected chapters in Part II of the book.

Along the way, many other friends and colleagues have provided invaluable assistance or advice. I am deeply grateful to all of them. These include Patrick Burgess, Irina Ceric, Gibran van Ert, Kirsten Fisher, Jordan Glick, Eduardo González, Pablo de Greiff, Daina Groskaufmanis, Priscilla B. Hayner, Oscar Bañez Herráez, Luc Huyse, Diana Juricevic, Hugo Leal-Neri, Renu Mandhane, Andrew Matheson, Anita McBride, Tamara Morgenthau, Michael Nesbitt, Joanna R. Quinn, Ronald C. Slye, Henry F. Smith, Emilie Taman, Darren Thorne, Paul van Zyl, and Marieke Wierda. Others who have kindly assisted include Yousuf Aftab, Claire Freeman, Alejandro Garro, Ena Paul, and Andrew Pinto.

I would additionally like to acknowledge the International Center for Transitional Justice for the initial encouragement and support that helped get this

research underway. I am also indebted to Paul, Weiss, Rifkind, Wharton & Garrison LLP for its valuable *pro bono* support.

John Berger at Cambridge University Press has been a fervent supporter of this work from the moment it arrived on his desk. My gratitude to him, and to my editors Susan Greenberg and Holly Johnson, is immense.

Last, but certainly not least, I would like to thank my wife, Annamie Paul. Without her, this moment would never have arrived. The book is lovingly dedicated to her, and to our two children, Malachai and Jonas.

## Abbreviations

ACHR	American Convention on Human Rights 1969
AfrCHPR	African Charter on Human and Peoples' Rights 1981
AJIL	<i>American Journal of International Law</i>
AmDR	American Declaration on the Rights and Duties of Man 1948
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women 1979
CERD	International Convention on the Elimination of All Forms of Racial Discrimination 1966
Charter	See "Mandate"
Commonwealth commission of inquiry	A commission of inquiry established in an English or Commonwealth jurisdiction pursuant to a statute generally entitled <i>Commissions of Inquiry Act</i> or <i>Tribunals of Inquiry Act</i>
CRC	Convention on the Rights of the Child 1989
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms 1950
ECOSOC	UN Economic and Social Council

ETS	European Treaty Series
EU Charter of Rights	Part II (Charter of Fundamental Rights of the Union) of the draft Treaty establishing a Constitution for Europe 2004
EurSC	European Social Charter 1996
GA res.	UN General Assembly resolution
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights 1966
ICJ Rep	International Court of Justice Law Reports
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILM	International Legal Materials
ILO	International Labour Organization
Mandate	The legal instrument(s) by which a truth commission is established and in which can be found its objectives, functions, and powers
<i>Mutatis mutandis</i>	"Making the necessary alterations"
NGO	Nongovernmental organization
OAS	Organization of American States
OAS TS	OAS Treaty Series
Rome Statute	Rome Statute of the International Criminal Court 1998
SC res.	UN Security Council resolution
Terms of reference	See "Mandate"
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights 1948
UN Charter	Charter of the United Nations 1945
UNTS	United Nations Treaty Series

## PART I

# Truth Commissions

## INTRODUCTION

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

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

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

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

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

## SECTION 1: OVERVIEW OF TRANSITIONAL JUSTICE

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

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

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

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

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

in the 1970s, Latin America in the 1980s, and Africa, Asia, and Central and Eastern Europe in the 1990s and beyond.<sup>3</sup>

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

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

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

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

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

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



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

Transitional justice also intersects with other subjects such as amnesty, reconciliation, and the preservation of memory, as well as democratization and peacebuilding.<sup>4</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- 13 See, e.g., *Ellacuría*, above note 12, at paras. 223 and 226; *Romero v. El Salvador*, Inter-American Court of Human Rights, Case 11.481, OEA/ser.L/V/II.106 (2000), at para. 144 ("The right to the truth is a collective right that enables society to have access to information essential to the development of democracies."); the *Srebrenica* cases nos. CH/01/8365 *et al.*, above note 9, para. 212. The societal right to truth is also linked to the right of access to information. See T. M. Antkowiak, "Truth as Right and Remedy in International Human Rights Experience" (2002) 23 *Mich. J. Int'l. L.* 977, at 994. See also Orentlicher, "Updated Set of Principles," above note 5, Principles 2 ("The Inalienable Right to the Truth") and 3 ("The Duty to Preserve Memory").
- 14 See, e.g., *Cyprus v. Turkey*, 25781/94 [2001] European Court of Human Rights 327 (10 May 2001), at paras. 157–8; the *Srebrenica* cases, above note 9, at paras. 191 and 220 (4).
- 15 See, e.g., *Srebrenica* cases, above note 9, at paras. 181 and 220 (3). See also UN docs. E/CN.4/1435 and E/CN.4/1983/14, para. 134.
- 16 See, e.g., *Cyprus v. Turkey*, above note 14, at para. 136.
- 17 See, e.g., *Parada Cea et al. v. El Salvador* (case 10.480), Inter-American Commission on Human Rights, report no. 1/99, at para. 152; *Aksoy v. Turkey*, 26 European Court of Human Rights 2260 (1996), at 2287; and *Mentes et al. v. Turkey*, 59 European Court of Human Rights 2689 (1997), at 2716. See also the African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS (XXX) 247, Principle C.
- 18 See, e.g., *Monsignor Oscar Arnulfo Romero y Galdámez v. El Salvador* (case 11.481), Inter-American Commission on Human Rights, report no. 37/00, paras. 147–8; *Myrna Mack Chang* case, Inter-American Court of Human Rights, vol. 101, Series C, paras. 274–5 (23 November 2003).
- 19 On such limitations generally, see M. Freeman and G. van Ert, *International Human Rights Law* (Toronto: Irwin Law, 2004), at 33–5. The right to truth could also conflict with other human rights, including privacy and reputation rights. See Chapter 2, Section 1.
- 20 (1988) I/A Court HR Series C no. 4 [*Velásquez Rodríguez*].
- 21 OAS TS no. 36.

- 22 See note 5 above. The Joinet Principles specify four rights: the "right to know," the "right to justice," the "right to reparations," and the right to "guarantees of non-recurrence" of violations.
- 23 See note 5 above. Principle 3 of the Bassiouni Principles provides: "The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, *inter alia*, the duty to: (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations; (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law; (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and (d) Provide effective remedies to victims, including reparation . . ."
- 24 See D. Orentlicher, "Promotion and Protection of Human Rights: Impunity," UN doc. E/CN.4/2004/88 (2004), at "Summary."