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TRUTH COMMISSIONS: BETWEEN IMPUNITY AND PROSECUTION

TRANSCRIPT OF THE FREDERICK K. COX INTERNATIONAL LAW CENTER
LECTURE IN GLOBAL LEGAL REFORM *

Judge Thomas Buergenthal †

TRANSCRIPT:

Before speaking about truth commissions in general, I thought you might be interested in hearing about my participation in one such entity—the United Nations Truth Commission for El Salvador. This is how it all began. In November 1991, while attending a human rights conference in Norway, I received a call from the office of the UN Secretary-General in New York. The caller explained that the Secretary-General wished to name me to the United Nations Truth Commission for El Salvador that would be established shortly. Would I accept the appointment? As I listened to the caller, I looked out of the window of the Oslo conference center where we were meeting; the icy rain continued to fall and the cold I had been nursing in Oslo for the past few days was getting worse. All I could think of at that moment was the tropical climate of El Salvador. I immediately accepted the appointment without so much as asking all the right questions one is supposed to ask on such occasions.

That is how I became a member of the UN Truth Commission for El Salvador. It turned out to be one of the most important, albeit heart-wrenching, assignments I have ever had. The Peace Agreement between the Government of El Salvador and the FMLN (Farabundo Martí National Liberation Front), the insurgents in that conflict, was signed in 1991. It put an end to the twelve-year long civil war that had brutalized this small Central American country and caused the deaths of thousands of innocent people, among them Archbishop Oscar Romero of San Salvador. There had been some large-scale massacres, including the massacre at El Mozote, where more than five hundred people, mostly women and children, were killed by government forces. But the government did not have a monopoly on human

* Judge Thomas Buergenthal delivered this lecture on October 17, 2006 at Case Western Reserve University School of Law. A webcast of the event is available at <http://www.law.case.edu/centers/cox/webcast.asp?dt=20061017&type=wmv>.

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rights violations; the insurgents, too, were guilty of many serious violations. All in all, it is probably also true that many more innocent human beings than combatants became the victims of the conflict. That is frequently the case in such conflicts.

The UN Truth Commission for El Salvador consisted of three Commissioners. Our chairman was Belisario Betancur, a former President of Colombia. Reinaldo Figueredo, a former Foreign Minister of Venezuela, and I were the two remaining members. Some people who knew of my prior service as judge and president of the Inter-American Court of Human Rights, joked that the Commission was composed of two politicians and a judge to keep them honest; others warned me that the politicians would play the games politicians are wont to play and that I would find myself in an impossible position. I need not have worried. My two colleagues turned out to be unreservedly committed to establishing the truth; we worked together extremely well, came to trust each other fully, and became good friends.

Our mandate required us to investigate all major human rights violations that had been committed in El Salvador during its civil war and to make recommendations to help the country achieve reconciliation. Immediately on taking office, we hired an executive director and a staff of some twenty-five young lawyers, sociologists and forensic anthropologists from various countries in Latin America, the U.S. and Europe, and moved into rented offices in San Salvador. We spent the first few weeks in El Salvador meeting with the political and civic leaders of the country, with the leadership of the guerilla movement, editors of the country's leading newspapers and media outlets, church and labor union representatives, military commanders, NGO representatives, and members of different political parties. These meetings were designed to allow us to hear what Salvadorans had to say about their sad past and how they saw the future of the country. This was our way of feeling the post-conflict pulse of El Salvador.

To begin our fact-finding efforts, we flooded the country with announcements, inviting the population to provide the Truth Commission with information about what happened to them, their families or friends during the armed conflict. Besides sending our staff into the countryside to interview witnesses, we traveled to the major massacre sites, met with survivors and inspected the work being carried out by of our forensic anthropologists. We also visited those regions of the country where much of the heavy fighting had taken place. We subpoenaed military officers and guerilla commanders and examined them about their activities during the conflict. And we sought information from the U.S. Government, which had supported the Salvadoran government during the civil war. We also interviewed various NGOs who had investigated human rights violations in El Salvador at different times of the conflict.

During the first three months of our investigation, we had very little success in getting much information. People were afraid to testify, particu-

larly against the military and security forces because the government which had conducted the war was still in power, with its military and police infrastructure intact. The insurgents also were still in control in their strongholds in the countryside and did not look kindly on being accused of having killed or tortured people. Both sides, of course, had good reasons for keeping the truth from us. People were not only scared to testify, they also did not believe that our findings would be any more honest than those produced by the investigations the government had carried out from time to time, mainly under U.S. pressure. That meant that we had to convince the population that we were serious and would present an honest report. We also had to find ways to protect those who were willing to talk and realized that to get witnesses to come forward, we had to guarantee them full confidentiality. As a result, clandestine meetings with witnesses had to be arranged outside our offices, particularly when military officers or insurgents agreed to testify against their superiors. Some of these meetings were scary cloak and dagger operations. Specialists from the UN periodically swept our offices for hidden microphones, and our radio was always on when we received sensitive testimony that we did not want to be overheard.

These and similar efforts began to pay off at the end of our first three-month stay in the country. People began to talk, and more and more witnesses came forward to tell their stories. Over time, we were able to convince people that we could be trusted and would make every effort to protect our witnesses. Gradually they could also see that we were committed to reporting the truth about the large-scale violations of human rights that had been committed in El Salvador and to do so regardless of whether the perpetrators were members of the insurgency or government forces.

At the end of the eight-month period assigned to us, we presented our findings to the UN Secretary-General, describing the horrendous events that had taken place in the country. We dealt with the causes of the conflict and indicated which side—the Government or the insurgents—was responsible for each of the serious violations we described in the report. Whenever we had the necessary evidence, we identified the individuals responsible for these violations, that is, we named names. We also recommended a series of measures we believed were necessary to facilitate reconciliation.

* * *

The UN Truth Commission for El Salvador was just one of a number of such institutions that have been established during the past three decades. I knew little about these commissions until I served on one and began to study their history, composition, *modus operandi*, and where they fit into the institutional framework of international mechanisms for the protection of human rights. To understand the functions they perform, it is necessary to

relate their role to that of other contemporary institutions perform that deal with human rights issues. Let me do that now.

As you know, since the Second World War the international community has created a large number of institutions that seek to protect and promote human rights in different ways. At one end of the spectrum are international human rights tribunals. They try states for violations of international human rights law committed or tolerated by their governments. At the other end of the spectrum are international criminal tribunals. Their task is to try individuals charged with those violations of human rights and international humanitarian law that constitute international crimes and give rise to individual responsibility. These crimes include, but are not limited to, genocide, crimes against humanity and war crimes.

Today there exist only three human rights courts in the world—the European Court of Human Rights, the Inter-American Court of Human Rights, and the relatively new African Court of Human and Peoples' Rights. In addition to these three regional courts—as yet there does not exist a worldwide human rights court—there are numerous international and regional institutions of a quasi-judicial, investigatory and reporting character, among them the UN Human Rights Committee and the new UN Human Rights Council.

The existing international mechanisms for trying individuals charged with massive violations of human rights and humanitarian law consist of one permanent universal tribunal—the recently established International Criminal Court—and a handful of *ad hoc* tribunals. These *ad hoc* judicial bodies were created to deal with international crimes that were committed in certain parts of the world prior to the establishment of the permanent International Criminal Court. The two best known *ad hoc* tribunals are the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. We tend to forget, in this connection, that the Nuremberg War Crimes Tribunal was also an *ad hoc* tribunal.

Where do truth commissions fit into this picture? In terms of their functions, they stand half-way between international human rights bodies and international criminal tribunals, for they deal both with human rights violations committed by governments and by individuals. But they are neither judicial nor quasi-judicial bodies. Truth commissions are fact-finding bodies set up for the specific purpose of investigating serious violations of human rights and humanitarian law committed in a country during an internal armed conflict or a particularly repressive regime. Their mandates differ greatly, depending upon the nature of the conflict they are charged with investigating. Some truth commissions are empowered to assign individual responsibility for serious violations of human rights and humanitarian law, that is, naming names; others are denied that power. As a rule, truth commissions are also mandated to propose methods for the compensation of the

victims of these violations and/or to recommend measures designed to bring about national reconciliation. Some truth commissions have been authorized to recommend the prosecution of major offenders, others have been empowered to offer immunity from prosecution if the offenders confess their guilt and ask for forgiveness. That was true of the South African Truth and Reconciliation Commission, for example.

Three different types of truth commissions, depending on their composition, have come into being over the years: national truth commissions, mixed commissions and international commissions. The best known national truth commission was the South African Truth and Reconciliation Commission. Similar national commissions had previously been established in Argentina and Chile to investigate the massive violations of human rights that had been committed in these countries while their military regimes were in power. The best known mixed truth commission was the Guatemalan Historical Clarification Commission, which consisted of a foreign chairman and two Guatemalan nationals. It was established pursuant to the terms of an agreement negotiated under UN auspices between the Government of Guatemala and the insurgent forces. Truth Commissions, composed entirely of foreign nationals, are rare. The best known one was the United Nations Truth Commission for El Salvador on which I served.

What are the advantages or disadvantages of having national, mixed, or international truth commissions? The question cannot be answered in the abstract since it will depend on the individual country and its political climate. A national commission established by consensus among all major political groups will, as a rule, enjoy national legitimacy and be able to count on broad support for its findings and recommendations. But when such a consensus is lacking and the composition of the commission is controversial, it will lack the credibility it needs to make a difference. This will be true in countries where the prior regime or its leadership still exercises power or controls the security services. The establishment of an international commission will frequently make sense for a small country, where the population continues to be politically polarized. Here it may be difficult to find even a small group of nationals of the country the population would trust to be impartial. This was the situation in El Salvador and explains why the parties to the Salvadoran peace agreement preferred to have only foreigners comprise their truth commission. Mixed commissions have the advantage that their foreign members will be able to draw on their national colleagues for an understanding of the historical, political, and social context of the conflict. But mixed commissions also have disadvantages similar to those of national commissions. Unless their national members are seen by the population at large as truly non-partisan, the commission will have difficulties gathering the information it needs to prepare a credible report because it will not be trusted.

Truth commissions exercise what I would call macro fact-finding functions. They investigate conflicts that produced large-scale violations of human rights and/or humanitarian law. International criminal courts, by contrast, engage in micro fact-finding functions and adjudication of specific criminal charges. Depending upon the context, a truth commission can provide reliable information about widespread violations of human rights, including genocide, disappearances, extrajudicial executions, torture and rapes, conditions in detention camps, and massacres. It can identify the military or insurgent units responsible for these acts. Truth commissions can also explore the causes, political or otherwise, that produced the conflict and provide a comprehensive historical overview of these events. Such histories can promote national reconciliation by settling long-festering disagreements about disputed charges and countercharges. They can recommend the payment of compensation to various categories of victims, public trials of the alleged perpetrators, and amnesties.

International criminal courts play a much more limited, but no less important role. Their function is to establish individual criminal responsibility and impose appropriate punishment. Their judgments have practical and symbolic value: they exact retribution, stigmatize the conduct that resulted in the punishment, and serve as deterrents by warning potential offenders of the likely consequences of the criminal actions they might be contemplating. Judicial decisions also send a message that the international community considers the acts committed to be criminal, politically unacceptable, and morally reprehensible.

Only in the rarest of cases, though, are international courts, whether criminal or human rights tribunals, able to provide a comprehensive historical overview of the events that transpired in a country and of the causes that precipitated the crimes or violations they produced. International criminal courts are also not in a position to try more than a limited number of offenders. In Rwanda, for example, some one hundred thousand individuals allegedly took part in the genocides. No international court could try that many defendants in any reasonable period of time. Because the focus of courts is person-specific, their approach to the facts before them must of necessity be narrower than that of truth commissions whose mandates are broader. Courts, of course, are also not well equipped to make policy recommendations; truth commission are.

But truth commissions are not judicial bodies. They lack the power to try, convict and sentence persons accused of criminal offenses. A truth commission is able to make factual findings based on its investigations and, if given that power, it can also identify those individuals it considers responsible for criminal acts, but only a court can try them and impose the requisite criminal sanctions. Frequently, though, the findings of truth commissions can settle long unresolved political controversies about individual and group responsibility for the crimes that were committed. Without such

findings, national reconciliation, particularly after a bloody civil war, is seldom possible. The conviction of a few individuals by a court is unlikely to achieve that objective.

These considerations lead me to believe that it would be useful in many post-conflict situations to supplement the work of international courts with the findings and recommendations of truth commissions. I realize that there are practical problems involving due process and various evidentiary issues that may make it difficult to have both a court and a truth commission deal with one and the same conflict situation. But these problems are not insurmountable. In many instances a truth commission and a court, working either side-by-side or in tandem, can come up with findings that will enable a country to put the past behind it without sweeping the truth under the rug. Reconciliation is possible only when a society has reason to believe that it has purged itself of the impunity that ruled its past.

