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Marten Zwanenburg

*Department of Defense of the Netherlands*

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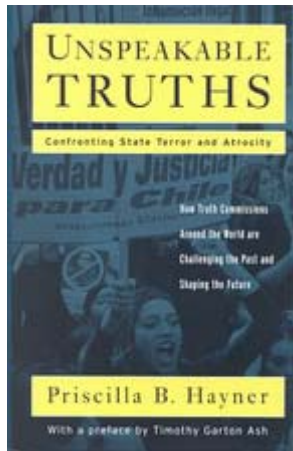
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## Much Truth about Truth Commissions

By Marten Zwanenburg

**Unspeakable Truths: Confronting State Terror and Atrocity by Priscilla B. Hayner. New York: Routledge, 2002. 344pp.**

“Gaining usable knowledge is what this book is all about,” Timothy Garton Ash writes in his foreword to Priscilla Hayner’s Unspeakable Truths: Confronting State Terror and Atrocity. After reading the book this reviewer concludes that it not only communicates a wealth of knowledge on the phenomenon of truth commissions, but also knowledge that can be directly employed by those who are involved in devising strategies of transitional justice. At the same time, the book is a potent reminder that in matters of transitional justice, there are no easy answers.

Unspeakable Truths does not contain a detailed description of its methodology. There is however an important difference between this book and the bulk of the transitional justice academic *discours*: Hayner is able to draw from an impressive amount of interviews that she has conducted with persons involved in transitional justice in general, and with truth commissions in particular. An appendix to the book lists persons that the author has interviewed, including commissioners and staff members of numerous truth commissions, government officials, and representatives of non-governmental organizations, the media and international organizations. This background allows Hayner to describe the different sides to many issues. The book also includes a number of poignant narratives of victims of human rights abuses concerning truth commissions that are taken from these interviews.

Other works on transitional justice often tend to focus very much on legal aspects of truth commissions. In contrast, Unspeakable Truths includes perspectives from sociology, psychology, politics and law, combing these perspectives into one coherent whole. This does not mean that the book does not offer some important speakable truths for lawyers, as Ratner (2001: 996) notes. Some of these are addressed in more detail below.

One of the strong points of Unspeakable Truths is that it contains many concrete recommendations for those involved in setting up and running a truth commission, and those contemplating doing so. Many of these recommendations already appeared in an article written by Hayner published in 1996. It might have been useful if the recommendations that are now scattered throughout the book would have been brought together in an annex. Such an annex would have

been a useful “checklist.” However, it is possible that such a checklist would suggest that there is a “one-size-fits-all” model for truth commissions—an idea Hayner vigorously contests.

### **Truth v. Justice?**

In Chapter 2, Hayner defines truth commissions as bodies that share the following characteristics: (1) truth commissions focus on the past; (2) they investigate a pattern of abuses over a period of time, rather than a specific event; (3) a truth commission is a temporary body, typically in operation for six months to two years, and completing its work with the submission of a report, and; (4) these commissions are officially sanctioned, authorized, or empowered by the state (and sometimes by the armed opposition, as in a peace accord). Hayner also situates the truth commission within the broader context of transitional justice, explaining that the establishment of a truth commission is one of several options available to those considering a strategy of transitional justice. She underscores that truth commissions should not be considered a replacement for trials (16).

This point is elaborated in Chapter 7, dealing with the question of “trade-offs.” Truth commissions are sometimes regarded as a (weaker) alternative for criminal prosecutions. This is due at least in part because the South African Truth and Reconciliation Commission, which was empowered to trade amnesty for a full confession of the truth, is the truth commission that has received most attention from scholars and the media. Hayner argues that truth commissions “should not be seen as a replacement for prosecutions, nor as a second-best, weaker option when “real” justice is not possible” (88). She argues that the powers, structures, and goals of truth commissions and trials are quite different. This is (explicitly as well as implicitly) one of the main themes of the book.

In Chapter 3 Hayner discusses the aims that may be pursued by establishing a truth commission: to discover, clarify, and formally acknowledge past abuses; to respond to specific needs of victims; to contribute to justice and accountability; to outline institutional responsibility and recommend reforms; and to promote reconciliation and reduce conflict over the past (24). These goals are different from the goals that may be pursued by conducting trials. In respect of the first aim of truth commissions mentioned above, Hayner refutes the argument that trials in themselves reveal the truth. She points out that the purpose of criminal trials is not to expose the truth, but to find whether the criminal standard of proof has been satisfied on specific charges. This point is well illustrated in practice by the experience of the International Criminal Tribunal for the former Yugoslavia. Hayner herself describes how in 1997 a truth commission was proposed for Bosnia. The leadership of the International Tribunal initially opposed the establishment of such a commission, *inter alia*, on the ground that the Tribunal was already providing the historical truth (208). While it is true that the Tribunal’s judgments generally contain a detailed description of the facts of the case, these descriptions generally do not place the case in a broader context. As Jacques Klein, the Special Representative of the United Nations Secretary-General stated at a conference on a Truth and Reconciliation Commission for Bosnia and Herzegovina held in Sarajevo in 2001:

*In contrast to the Tribunal’s focus on the specific crimes of individual perpetrators, the TRC would focus on the experiences as well as the perceptions at the level of the society as a whole. In this sense, it would serve as a tool for social self-absolution. The TRC would not only report on the facts of abuses suffered, but also on the*

*broader context in which they occurred, examining in particular elements of government, of the security forces, and of the society, which made those patterns of violations possible in the first place. A TRC can illuminate that [sic] would never become the focus of criminal prosecution - the role of the media, the judiciary, intellectuals, the educational system, religious institutions and so on.<sup>1</sup>*

In Chapter 7, Hayner describes the relationship between truth commissions and prospects for criminal prosecution in six countries, in order to illustrate the complex interaction between truth commissions and criminal prosecutions. These case studies show that in a number of cases truth commissions have actually contributed to criminal prosecutions. In three of the six countries (El Salvador, Argentina and Haiti) analyzed in this section, truth commissions have played a critical role in the trials against members of the former regime. Hayner quotes the deputy prosecutor for the most prominent trial in Argentina, Luis Moreno Ocampo, as stating that the timing and nature of the trial would have been impossible without the information from the commission (94). This particular case took place soon after the Argentine commission completed its work.

The contribution made by a truth commission's work to criminal prosecutions may also become evident only after some time or in an unexpected forum. Spanish judge Baltasar Garzon used the Chilean Truth Commission report as his primary information source in issuing an arrest warrant for former Chilean President Augusto Pinochet in 1998. This extradition request led to the well-known proceedings and decision issued by the United Kingdom's House of Lords.

The Peruvian Truth and Reconciliation Commission provides another example of a truth commission that contributes to holding criminal trials. That Commission's mandate explicitly includes the task of contributing to the clarification by the respective judicial organs. In 2003, one of the commissioners reported that six criminal cases had already been submitted to the public ministry, three of which had been sent to the justice ministry. She stated that one of the first indicators of the Commission's success would be that of legal justice. In Peru the truth commission is clearly not regarded as an alternative to criminal trials.

Chapter 10 of Unspeakable Truths discusses, among other things, the question of whether a truth commission contributes to reconciliation. Earlier in the text, Hayner had already remarked that referring to truth commissions as "truth and reconciliation commissions" is inaccurate and should be avoided, since many of these commissions have not held reconciliation as a primary goal of their work, nor have they assumed that reconciliation would result (23). Hayner is of the opinion that not only is it inaccurate to refer to truth commissions as "reconciliatory" in a generic way, it is also dangerous. Whether a truth commission can contribute to—much less achieve—reconciliation is dependent on any number of outside actors or elements. An example is the South African Truth and Reconciliation Commission, which was initially presented as a vehicle for achieving national reconciliation. Hayner states that there was much disappointment when the press and the public

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<sup>1</sup> Statement by Jaques Klein, Special Representative of the Secretary-General and Coordinator of the United Nations Operations in Bosnia and Herzegovina, to the Conference "An Ideal Whose Time has Come: A Truth and Reconciliation Commission for Bosnia and Herzegovina." Sarajevo, Bosnia and Herzegovina, May 2001, at [www.unmibh.org/news/2001/12maj01.asp](http://www.unmibh.org/news/2001/12maj01.asp).

realized that widespread reconciliation had not in fact been won, which led to the impression that the truth commission was not, in the end, much of a success. Another example is the truth commission in Peru. Upon the release of the Commission's report in August 2003, the *New York Times* reported that the charges in the report (which concludes that major human rights abuses were committed by the Shining Path rebel group but also that the armed forces were responsible for generalized and systematic violations of human rights) have prompted a limited but fierce backlash (Forero 2003).

Hayner also argues for a distinction between individual reconciliation and national or political reconciliation. This is a theme that has also been addressed by other writers in the field of transitional justice, including Martha Minow. She posits that forgiveness is an individual act, a choice that a person can make, and one has the free choice whether to give it or not (Minow 1998: 20). A truth commission cannot force an individual to forgive. This argument finds strong support in the examples that Hayner takes from the experience of the South African truth commission.

### **Learning From the Past without Prejudging the Future**

Hayner stresses that it is important that those deciding on a transitional justice strategy in a particular country need to be aware of the possibilities and the challenges of the different mechanisms, and in particular of truth commissions, in order to be able to make informed choices. She states that the aim of *Unspeakable Truths* is to better understand how states and individuals might reckon with horrible abuses of the past, and specifically to understand the role played by truth commissions (5). This explains why the book contains two chapters that describe the principal characteristics of a large number of truth commissions. Chapter 4 describes the five commissions that are most likely to be looked to as examples to follow—or to learn from—including of course the South African Truth and Reconciliation Commission. Chapter 5 describes sixteen less-prominent commissions that “are well worth studying in an attempt to improve on these bodies in the future” (51).

Hayner sees signs that as understanding of truth commissions has grown, particular issues are given attention or are addressed in a particular way. For example, she notes that mandates of new commissions have been more likely to spell out the powers of these commissions to identify individual perpetrators (108). She also notes that the interplay between non-judicial truth-seeking and prosecutions in the courts has in some cases become much more explicit (255). One interesting development in this respect is the exchange of information between different truth commissions. In July 2002, representatives from the truth commissions of Sierra Leone, Ghana, East Timor, and Peru met in Mexico City to exchange experiences.

No matter how much information is available to those deciding on a transitional justice strategy, however, the choice whether a truth commission should be set up in a particular country—and if so, what it should look like—requires looking at the specific needs and the context of each country. This is one of the main points of *Unspeakable Truths*, even though it is rarely stated explicitly. Hayner does state that the strength as well as the challenge of these truth-seeking efforts remains in their flexibility and great potential, as well as in the need to carefully shape their plan of work to respond to the needs and realities of each country (258).

In accordance with Hayner's central thesis that local factors should play an important role in determining whether a truth commission should be established in a particular country, she states that there can be factors that lead to the conclusion that a truth commission should not be established. She posits that there may be cases in which a "truth always" recommendation is not appropriate, or at least in which a recommendation for a formal and official truth-telling project such as a truth commission might be inappropriate (184). Hayner rejects blanket recommendations for official truth-seeking, such as the one made in the "international principles to combat impunity" proposed in 1997 by United Nations Special Rapporteur Louis Joinet.

As to the kind of local circumstances concerned, it is interesting that Hayner includes cultural and religious factors among these. She describes Cambodia as a country where there were legitimate reasons not to establish a truth commission. In this context she refers to the Director of the Cambodian Institute of Human Rights who described his vision of confronting the past in a way that would be compatible with the cultural foundations of Cambodian society. This would encompass replacing the existing monuments to the genocide by a center with a Buddhist shrine that would be a place of remembrance but not of denunciation, a place where families could come and reflect on the lives of loved ones. Anything that might jeopardize peace should not be allowed (197). In this respect it may be noted that cultural and religious factors have also been given as a reason for not establishing a truth commission in Iraq. A high British official in the civil administration created and led by the United States stated that a truth commission like the South African truth commission was unlikely to work in Iraq. According to him "there is a spirit of forgiveness among Africans and Afrikaners as well. This part of the world is more into retributive justice" (Hinsliff 2003).

### **The Role of the International Community**

Unspeakable Truths addresses several elements of the relationship between foreign governments and truth commissions. One of these involves a truth commission's mandate, addressed in Chapter 6. The mandate is obviously one of the most important elements of the terms of reference of a truth commission. The wording of the mandate to a large extent determines the process of truth-seeking and its results. Hayner notes that a particularly interesting issue is the extent to which truth commission reports have included an analysis of or commentary on the role of international actors in the political violence within the country (75). She reports that most truth commissions have not investigated this international role at any depth and that few have addressed the issue at all in their final report. This reviewer finds this understandable, because national society is usually most interested in the role that local actors played during a repressive period or conflict. In this the reviewer does not necessarily agree with Hayner who states that where domestic government forces have committed ongoing, massive human rights violations, the role of foreign governments should be investigated or at least formally recognized in a truth report (75).

It is interesting to note that the reports that have recognized the role of foreign governments all seem to point to involvement by the United States. For example, the chair of the Guatemalan Historical Clarification Commission in presenting the report of the commission noted that the United States government, through its constituent structures, including the Central Intelligence Agency, lent direct and indirect support to some illegal state operations.

Another element of the relationship between foreign governments and truth commissions is the attitude that the international community should take toward a country in transition. Should it push for a truth commission? If a truth commission is established, how can it assist such a commission? It seems that the international community increasingly exerts influence on transitional justice strategies, including the question whether a truth commission should be established. In a general sense this reflects the notion that today, human rights violations are a legitimate concern of the international community. This notion was articulated in the Vienna Declaration and Program of Action adopted by the 1993 United Nations conference on Human Rights in Vienna. It also lies at the basis of renewed interest in the doctrine of humanitarian intervention.

Hayner states that the international community should not push for a truth commission in all circumstances. As discussed above, she asserts that there can be cases where the particular local situation in a country in transition can be a legitimate ground for not establishing a truth commission. Where the resistance in a country to dig into the past reflects a broad consensus, a policy of reconciliation through silence should be acceptable and accepted by the international community (200). The 1999 report by a group of experts appointed by the United Nations Secretary-General to explore legal options for bringing Khmer Rouge leaders to justice is an example where representatives of the international community have taken the approach advocated by Hayner in respect of truth commissions. The report discusses the possibility of creating a truth commission under the heading of “other forms of individual accountability.”<sup>2</sup> It notes that during the experts group’s mission to Cambodia, few of the people to whom the group spoke endorsed the idea of a truth commission, and none suggested it of their own accord. The group also noted several concerns relating to the effectiveness of a truth commission in Cambodia, including the fact that it was not apparent to the group whether Cambodians themselves were prepared to participate in the processes undertaken by commissions, i.e., recounting by many witnesses of the events of the period. The group concluded that it was premature to make a concrete recommendation in favor or against the establishment of a truth commission. Instead, it left the initiative with the Cambodians, by stating that it would be useful for the Cambodian people, through its government and non-governmental sectors, to engage in a process of reflection to consider appropriate steps on the truth-seeking front. This would help them determine whether a commission is desirable and what form it should take.

On the other hand, says Hayner, where sectors within the country demand an accounting, it is important for the international community—the United Nations, bilateral partners, international non-governmental organizations—to back them up and to put pressure on the government where national actors may not have the power or political space to do so (200). It is not always easy to determine whether such a situation obtains, as Hayner admits.

Unfortunately, the book devotes very little attention to the question what the international community can do to assist once a truth commission has been established. Many possibilities come to mind, including financial support, diplomatic support and the provision of technical assistance, for example by the Office of the United Nations High Commissioner for Human Rights. The latter

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<sup>2</sup> Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135, UN Doc. A/53/850 of 16 March 1999.

has provided important assistance to the Sierra Leone truth commission. Technical assistance could also be provided by the International Center for Transitional Justice. This non-governmental organization based in New York has been involved in advising transitional justice processes in a number of countries. The center employs Priscilla Hayner as a program director. Another way in which the international community can assist a truth commission that is mentioned by Hayner is by preserving documents. Documents can be easily destroyed as a political transition is under way, or can be lost or damaged over time for lack of attention. Outside actors may have the opportunity to assist in preserving documents that can be used by a truth commission (203).

It is pointed out that the foreign governments can also be an obstacle to making documentation available to a truth commission. Hayner describes how the United States hauled away documentary evidence of atrocities by the armed forces and paramilitaries in Haiti when it invaded that country in 1994. Until now none of this evidence has been returned to the country. It remains in the United States under the responsibility of the Department of Defense. Hayner states that the assumed reason the United States is holding onto the documents is that they would almost certainly reveal that the United States provided direct support for some of those directly implicated in abuses. In its final report the Haitian National Commission of Truth and Justice regrets the fact that the United States Department of Defense has not responded to a request for archives concerning the paramilitaries. It notes that these documents would have been of great interest for the study of the structures of repression that it has not been possible to address in the report other than on the basis of testimony and certain information obtained by the commission's investigators. The commission's report is very brief on the relationship between the United States and the repressive regime. It states that the role of the North American intelligence services has been studied by credible journalists, United States Congress committees and other experts, and that maintaining relationships with high military officials while neglecting the Aristide civilian government certainly did not contribute to the restoration of democracy.

## Conclusion

Apart from the issues discussed above, Unspeakable Truths addresses numerous other aspects of truth commissions. These include the question of reparation for state crimes and the relationship between truth commissions and the International Criminal Court, as well as many other questions. Given the wide variety of issues discussed in the book and their nuanced treatment, it is tempting to conclude that this book is the definitive word on truth commissions. Hayner however strongly argues that this is not the case. She suggests that we are only beginning to know more about the real impact and limitations of these bodies. Certainly, much work remains to be done in this field by lawyers, as well as and together with moral philosophers, psychologists, historians, and others (Ratner 2001: 997). In the meantime, we have to hope that those in a position to make decisions on future truth commissions have a copy of Unspeakable Truths.



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*Marten Zwanenburg is a lawyer for the Department of Defense of the Netherlands. The views in this essay are the views of the author and do not necessarily represent those of the Department of Defense of the Netherlands.*

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