

Trials and Truth Commissions: Seeking Accountability in the Aftermath of Violence

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The challenge successor regimes face in how to deal with human rights violations and crimes of the past is not a new one. However over the past three decades, the range of responses to this challenge has evolved exponentially. Delivering justice in a post-conflict or post-authoritarian period is complicated by the scale of atrocities, an often compromised judicial system, limited resources and the need to simultaneously effect reconciliation and move the country away from the divisions of the past whilst equally upholding the rights of victims to justice. The need for alternative and complementary mechanisms which together can effect justice, establish a culture of human rights and rule of law as well as contribute to reconciliation has given rise to its own interdisciplinary field; namely 'transitional justice'.

The United Nations Secretary General, in his 2004 report on transitional justice, defined the concept as 'compris[ing] the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.'

Two of the key mechanisms utilized in the pursuit of post-conflict justice and accountability are truth commissions and trials. Both mechanisms share common objectives in that they seek to:

- Secure accountability, truth and some aspect or form of justice;
- Deter future atrocities through punishment or moral sanction;
- Combat impunity

There can however be tensions between these institutions in the way in which each pursues these objectives. In particular, prosecutions are generally perceived as a mode of retributive justice focused on the perpetrator with the end goal being punishment, whereas truth commissions are characterized as institutions of restorative justice with a primary focus on the victim and restoring the dignity of the individual and broader society. Each of these mechanisms are explored in separate sections below with a brief look at both the tensions in operating together but also the gains in pursuing a synergistic or complementary relationship when designing comprehensive responses to the need for post-conflict justice.

Truth Commissions

Knowing the truth of what happened will make it easier to achieve national reconciliation, so that in the future Guatemalans may live in an authentic democracy, without forgetting that the rule of justice as the means for creating a new State has been and remains the general objective of all.

Prologue from "Memory of Silence", Report of the Guatemalan Commission for Historical Clarification

Truth commissions can be defined as "bodies set up to investigate a past history of violations of human rights in a particular country – which can include violations by the

military or other government forces or armed opposition forces.”¹ They are “officially sanctioned, temporary, non-judicial investigative bodies ... granted a relatively short period for statement-taking, investigations, research and public hearings, before completing their work with a final public report.”²

These bodies have their origin in the transitions from authoritarian regimes to democratic states in Latin America in the early 1980s where efforts at prosecution were stymied by the continuing power held by former military regimes and the threat they posed to nascent democracies. Truth commissions, such as Argentina’s National Commission on the Disappearance of Persons (CONADEP) - which was one of the first such commissions and served as a model for others in the region - were used to achieve some measure of accountability for the crimes of the past and issue reports which made their findings publicly known. The focus on ‘truth’ was a response to the clandestine nature of the crimes of those regimes and the particular and pervasive use of ‘forced disappearances’, a crime whose impact is aggravated by denial and secrecy. As such, revelation of the truth, whilst it may not have led to prosecutions, was one element of achievable redress for victims’ families.

These initial commissions were limited and their mandates were only one step beyond that of traditional commissions of inquiry. They took testimony behind closed doors and moved little beyond the facts related to specific incidents: in particular disappearances, torture, and death; saying little about the historic context, causes or consequences. The limited nature of these commissions was a result of both the lack of experience with truth commissions as well as the bargains that had been struck with the outgoing regime.³

Since these initial or ‘first generation’ truth commissions, these institutions have become a staple of post-conflict or post-authoritarian transitions across numerous and varied contexts. The most known, researched and written about truth commission to date remains the South African Truth and Reconciliation Commission, established in 1995 to address the gross violations of human rights that occurred during apartheid. Today, largely as a result of the SATRC, truth commissions generally employ public hearings for victims as well as institutional and thematic hearings which explore the role and impact of the conflict on key groupings and institutions in society. Truth commissions can serve as a platform for recording an inclusive history and denouncing the use of violence in the past. They are also increasingly being adapted to meet the needs of their local context. For example, some recent commissions have moved beyond the traditional focus on political and civil rights and are increasingly addressing the linkages of these rights to socio-economic crimes which are equally (or more) relevant for individual countries and are often inextricably linked to the nature of the conflict itself. Liberia’s truth commission for example included economic crimes in its mandate; Kenya’s recently enacted Truth, Justice and Reconciliation Commission tasked with examining the use of violence since the post-independence period, will also deal with economic crimes and issues of land; and in Bangladesh a Truth and Accountability Commission has been established to look solely at issues of corruption which have undermined the institutions of government and contributed to the military retaking power ahead of a democratic election in December 2008. Equally, truth commissions are adapting and

¹ Priscilla B. Hayner "Fifteen Truth Commissions - 1974 to 1994: A Comparative Study" *Human Rights Quarterly* 16 (4) (1994):597-655.

² Office of the United Nations High Commissioner for Human Rights. *Rule-of-Law Tools for Post-Conflict States: Truth commissions* (New York: United Nations, 2006).

³ Robert Rothberg in *Truth v. Justice: the Morality of Truth Commissions*, Robert Rothberg and Dennis Thompson (eds.) (Princeton: Princeton University Press, 2000).

incorporating local justice and reconciliation processes to deepen their impact and relevance amongst the local populations.

As demonstrated by the range of names and mandates, truth commissions vary in their overall design and focus. The parameters of these institutions are flexible and no two bodies have been the same. Whilst they are generally associated with restorative justice, different contexts have given rise to different emphases. Some have been quite legalistic in orientation, others have focused purely on 'reconciliation' at the expense of both justice and truth (for example, the currently running Indonesian/ East Timor Truth and Friendship Commission, the first bilateral truth commission whose focus is less on truth and more on 'friendship' or reconciliation).

Differing characteristics have led to slightly different definitions (and therefore counts) of truth commissions. However it is generally agreed that there have been approximately 35 such commissions to date (See, Appendix A 'List of Truth Commissions To Date' which puts the number at 38). Common institutional characteristics shared by these bodies include a focus on the past, a temporary mandate which includes the production of a final report at its conclusion, a focus on investigating patterns of rights abuse rather than single incidents, a victim-centred nature, and an official status or relationship to the state (although unofficial truth-seeking bodies such as the Recovery of Historical Memory Project (REMHI) in Guatemala have played a meaningful role they are not strictly speaking truth commissions).⁴ Commissions also differ in their powers – i.e., some have the powers of search and seizure, can recommend prosecution or amnesty, or name names of individual perpetrators. They can also differ vastly in their mandates, principle objectives, size and composition amongst other elements.

Their common objectives however include accountability; official acknowledgement for crimes of the past and for victims' experiences of these crimes; establishing an inclusive history and citizenship; identifying victims for reparations; making a moral/ symbolic break with the past; contributing to the development of a culture of respect for the rule of law and human rights; making recommendations for institutional transformation; and serving as a platform for nation-building and reconciliation.

Relationship to amnesty

There continues to be much debate over the use of amnesties after conflict, and whilst international law expressly forbids the granting of amnesty for crimes under international law such as genocide, war crimes and crimes against humanity, amnesties for lesser offences after conflict are often the norm – either in law or in practice. There is also no clear consensus that the pursuit of prosecutions is always in the interest of comprehensive justice (of which peace is a central component), nor is the exclusion of amnesty for even the most heinous of crimes consistently enforced.⁵

⁴ Whilst the standard definition of a truth commission refers to only those bodies that are established by the state, the role of civil society during a transition is critical and unofficial commissions can play a key role in contributing to accountability and strengthening the voice of victims. Such initiatives have occurred in a number of countries in diverse forms – from Zimbabwe to Brazil and Guatemala. A key example of the potential impact of such civil society institutions is Guatemala's Recovery of Historical Memory Project (REMHI) set up by the Catholic Church prior to the establishment of the official Commission for Historical Clarification (CEH) and in response to the official commission's mandate which barred it from naming names of individual perpetrators. REMHI conducted 7000 victim interviews which were included in a 4-volume comprehensive report that detailed both the social contextual as well as individual dimensions of the conflict and served as a foundation for the CEH's own investigations.

⁵ See Louise Mallinder, Can Amnesties and International Justice be Reconciled? *International Journal of Transitional Justice* 1(2) (2007): 208-230 for a comprehensive overview of key arguments within the amnesty debate, quantitative evidence of the number of amnesties granted since WWII, and most

Truth commissions can occupy a space between blanket amnesty and broad-scale criminal prosecutions, and have a relationship to either or both depending on their mandate and objectives.⁶ Some truth commissions have been created as a measure of accountability to offset a blanket amnesty; others did not necessarily preclude domestic trials although they might not have been feasible at that time (i.e., Argentina, Chile etc). Some truth commissions have had judicial powers such as the South African TRC which could grant amnesty and others ran alongside judicial bodies such as in Sierra Leone and East Timor.

When established for the right reasons and with the necessary political will, truth commissions can facilitate acknowledgement for victims, establish accountability for perpetrators, shed light on the role of beneficiaries and bystanders, morally sanction the violation of human rights, write an inclusive history of a nation, counter denial, as well as provide a blueprint for a new democratic state through its findings and recommendations. They can also play an important role in investigations and documentation for trials, which may occur at a later date or simultaneously. They serve as a forum to establish the rights to reparations of individuals and because their evidentiary burdens are less rigorous than trials – an important component given the lack of evidence which often characterizes transitions – they can move proceedings along faster than trials and make findings on the balance of evidence whilst also encouraging constructive dialogue in contrast to the adversarial exchange of a court. They are useful in moving beyond a narrow focus on criminal culpability for past violations to examine the moral dimensions as well – which includes seeking accountability or reflection from bystanders or beneficiaries or groups such as child soldiers – all groups whose role would go unaddressed solely through criminal justice proceedings. The United Nations has either advocated or supported truth commissions in a number of recent peace processes and the UN Secretary General's Report on transitional justice describes truth commissions as 'a potentially valuable complementary tool in the quest for justice and reconciliation, taking as they do a victim-centred approach and helping to establish a historical record and recommend remedial action'.⁷

Limitations of Truth Commissions

Truth commissions can equally be established for politically expeditious reasons which have less to do with accountability and the rights of victims and more to do with avoiding prosecutions, entrenching impunity or discrediting a political grouping. A good example of a commission set up in bad faith to avoid justice and perpetuate impunity would be the truth commission in the Democratic Republic of Congo which did not hear a single case from victims - and whose commissioners included representatives of the warring factions responsible for atrocities. Given their susceptibility to the broader political context there is always the danger that truth commissions are held hostage to the balance of power and political manipulations.

importantly the conditions under which amnesties may be permissible as a TJ tool and in fact contribute to peace. These include where they enjoy democratic legitimacy, are narrow in scope (i.e., not for those most responsible), are conditional, are linked to reparations, and contribute to peace and reconciliation). Note that there is an obligation on successive governments to overturn illegitimate amnesties - Chile, Argentina and Peru all either overturned or disregarded earlier amnesties.

⁶ Mallinder's Amnesty Law Database shows that since the 1980s, 33 amnesty processes have been related to truth commissions - with the bulk of these commissions occurring after the South African TRC. Mallinder (2007).

⁷ *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, Report of the Secretary-General to the Security Council, 3 August 2004, UN Doc. S/2004/616

A key concern in relation to the increasing use of these institutions is the paucity of evaluation research that has been conducted to date on their impact on individual healing or on the range of objectives they lay claim to more generally. Whilst commissions function on the assumption that 'revealing is healing' there is little clear evidence of this and impact studies are still needed. Further concerns include:

- Gender weaknesses – truth commissions, although they have evolved considerably in recent years, have historically excluded gender concerns or were 'gender neutral'. The SA TRC began to include an explicit focus on women through women's hearings and these gains have been built on, in particular in Peru, Sierra Leone and East Timor. However there are still huge gaps in how gender crimes as well as gender justice more generally is addressed through these institutions.
- Whose 'truth' and how truth is defined.
- The focus on the past can miss the way in which violence, rooted in the legacy of the past, takes new forms through the transition period which equally undermine the goals of rule of law, human security, peace and non-repetition.
- The final report and its recommendations can create a blueprint for a new democracy but can also become a further injustice or betrayal of victims where there is no political will to implement the recommendations – truth commissions, even where their recommendations have been legally binding such as Sierra Leone, have had little power over how their recommendations are implemented and this continues to be a key weakness.
- Fair trial standards or 'due process' cannot be applied to informal processes. Some therefore critique those commissions who 'name names' of perpetrators or making findings on crimes without the rigour of a court proceeding.

Whether a truth commission succeeds in its objectives and has the desired impact depends on a multiplicity of factors – including timing, political will, follow through, transparency, availability of resources, strength of mandate, composition, the broader context of change/ reform/ democratization, public participation, and perceived political impartiality.

Whilst truth commissions have differing mandates and seek to achieve different goals dependent on their context, Crocker argues that in general the success of a truth commission can best be judged on how well: it uncovers the truth, provides a platform for acknowledgement for victims, sanctions violators, upholds and strengthens the rule of law, draws a hard line between the oppression of past regimes and the democratic future, compensates victims through collective or individual reparations, contributes to institutional reform, and fosters public debate and reconciliation.⁸

Most importantly however for the success of a truth commission is that it be locally owned and informed. There is space to define truth commissions according to local context and needs, to think creatively about an institution that has relevance and ownership and is informed by local actors rather than one which imports an external model which does not 'fit' - as has been the tendency with some commissions in the past.

⁸ Crocker in Rothberg and Thompson (2000).

CASE 1: Guatemala⁹

Name - Commission for Historical Memory (CEH)

Establishing Act - The Agreement on the Commission for Historical Clarification (CEH)

Years of Operation – 1994 – 1998

Local/ International Ownership – Hybrid of local and international. UN-sponsored commission.

Mandate – ‘To clarify with all objectivity, equity and impartiality the human rights violations and acts of violence that have caused the Guatemalan population to suffer, connected with the [36-year] armed conflict.’

Number of Commissioners – 3. Chairperson UN appointed international. 2 Guatemalan Commissioners.

Strengths – Its key finding of genocide by the state against its Mayan population opened the door for future prosecutions as well as firmly established the racist nature of the institutions of the state.

Weaknesses - Characterized by a weak mandate: the CEH had no powers of search, seizure or judicial effect which meant that any findings could not be used to establish a criminal case; its recommendations were to be non-binding; its working time was limited to a brief 6 months with a possible 6-month renewal; there was no witness protection programme despite the high levels of retributive violence by perpetrators; no public hearings for victims; and, most damningly, it was forbidden from naming the names of perpetrators.

Final report - *Guatemala: Memoria del Silencio*, or *Guatemala: Memory of Silence*. Published in 1999. The CEH registered more than 42,000 victims. Its final report was based on investigations into more than 7,500 cases derived from interviewing over 11,000 deponents and from these, the Commission then chose 85 cases judged to be 'illustrative cases'; stories which were representative of various time periods of the violence as well as the various actors, and were described in some detail in the report.

Findings - The CEH's key findings include that of those victims fully identified, 83 percent were Mayan and that the state and its structures had been responsible for over 93 percent of the atrocities committed during the conflict – this included the deaths of more than 200,000 Guatemalans. Most importantly, the Commission found that during the worst years of the conflict the state's policies towards its indigenous population constituted a 'deliberate policy of genocide'. This opened the way for prosecutions once more as the 1996 National Law of Reconciliation which had granted amnesty explicitly excluded amnesty for crimes of genocide.

CASE 2: South Africa¹⁰

⁹ Nahla Valji (2004). *Race, Citizenship and Violence in Transitioning Societies: A Guatemalan case study*. CSVR, www.csvr.org.za. See also, 'Justice in Perspective: A website on truth, justice and reconciliation in transition', www.justiceinperspective.org.za

¹⁰ Ibid.

Name – Truth and Reconciliation Commission (TRC)

Establishing Act - Promotion of National Unity and Reconciliation Act of 1995

Years of Operation – 1994 – 2002

Mandate - Tasked with investigating and recording incidents of gross human rights violations that occurred between 1960 and the first democratic elections in 1994.

Made up of three separate committees:

- The Human Rights Violations Committee – which recorded the story of victims whose voices had until then been silenced, and conducted national public hearings to allow these stories to be heard;
- The Amnesty Committee – which decided on the granting of amnesty to those who had committed political crimes under apartheid;
- The Reparations and Rehabilitation Committee - which made recommendations on reparations, both symbolic and monetary, for those identified as victims.

Commissioners – 17 Commissioners – all local and chosen through a public, inclusive and transparent process. Headed by Archbishop Tutu.

Final Report – Final Report of the South African Truth and Reconciliation Commission. The first 5 volumes of the report were handed to the President of South Africa in 1998. An additional 2 volumes were released following the close of the Amnesty Committee's work in 2003.

Findings - 22,000 victims gave statements to the TRC, of which approximately 10% then gave testimony in public hearings. The TRC's findings and recommendations were widespread, detailed and comprehensive in nature; and included findings that gross violations of human rights and other unlawful acts were perpetrated on a wide scale by members of the South African Police and the former South African Defence Force during the most violence periods of apartheid. It also reiterated the position that apartheid was a crime against humanity. The TRC report made recommendations for individual, collective and symbolic reparations as well as detailed plans for the transformation of institutions from the health sector, to education, media, the security sector and civil society.

Strengths

The key innovation and unique feature of the SATRC was its use of conditional amnesty. The 'truth for amnesty' deal which underpinned the legal compromise demanded that perpetrators come forward and apply for amnesty and meet a clear set of criteria; including disclosing the full truth of the crime and demonstrating that it was an act with a political objective and not for personal gain.

The SA TRC was also the first truth commission to hold public hearings, special hearings which focused on key constituencies such as youth and women, or institutional hearings on the role of various institutions in upholding the apartheid system.

Weaknesses

The TRC has been marred by lack of follow through – reparations payments were paid only years later and were a fraction of what the Commission had recommended, there have been almost no post-TRC prosecutions despite this being the promise of *conditional* amnesty (a new prosecutions policy released by government to guide eventual post-TRC prosecutions has been characterized as a second amnesty

process and is currently being challenged in the courts by victims and civil society), a new Presidential Pardons process has been embarked upon which is designed to release or expunge the record of those convicted of apartheid-era crimes but with no input from victims and little transparency.

Trials –

In the aftermath of violent conflict victims expectations for justice vary, however as one legal expert notes, 'Just as victims of crime in a domestic setting expect to see the due process of law take its place with a criminal investigation, prosecution and possible conviction and sanction, most victims of brutality in armed conflicts have a similar hope'.¹¹

Whilst there are obvious challenges to mounting criminal prosecutions post-conflict – including cost, quality of evidence, and the debates regarding its relationship to fragile peace processes, prosecutions have an important role to play through their contribution to:

- individualizing guilt so that it is not ascribed to an entire group (which can perpetuate divisions and fuel future conflict)
- discouraging individual acts of revenge by institutionalizing a retributive response
- challenging impunity
- deterring such crimes in future
- establishing the rule of law and asserting the rights of victims
- establishing the historical facts related to key events and/ or the nature of the conflict itself
- removing criminal elements from positions of public office and power

Since 1974, there have been trials related to political transitions in approximately 58 countries (See Backer, Appendix B). Criminal prosecutions for mass violations of human rights can take a number of different forms – either domestic, international, or a mix of the two.

Domestic Trials

In many ways, the establishment of domestic trials - where they are feasible - is the 'first prize' for post-conflict prosecutions. They are locally situated which increases opportunities for local ownership and the involvement of intended beneficiaries. Their close proximity also allows the local population to see justice being done. Where the judicial system was compromised by the conflict or previous regime, local trials can rebuild and restore credibility in these institutions and by doing so build up the credibility of the new dispensation more broadly. Equally however domestic trials, by the nature of their proximity to the conflict and political context, can further undermine credibility and exacerbate divisions if carried out in a politicized manner or by an untransformed judicial system.

International Justice: Ad Hoc tribunals, the ICC, Hybrid courts, and Universal Jurisdiction

Since the 1990s there has been an exponential growth in the establishment of new mechanisms for pursuing justice post-conflict, creating what is today a system of international justice. These mechanisms include individual international tribunals, the birth of the International Criminal Court in the Hague in 2002, hybrid courts, and the

¹¹ Howard Varney 'Retribution and Reconciliation: War Crimes Tribunals and Truth Commissions – can they work together?' in [Our Freedoms: A Decade's Reflection on the Advancement of Human Rights](#), Human Rights Institute of the International Bar Association, 2007.

increased use of universal jurisdiction by individual countries prosecuting crimes under international law.

In 1993, with the conflict in the Balkans ongoing, the United Nations established the International Criminal Tribunal for the former Yugoslavia (ICTY), the first trial to be held at an international level since the close of the Tokyo Tribunal in 1948. This was followed almost immediately by the establishment of the International Criminal Tribunal for Rwanda (ICTR) in 1994 which was mandated to try crimes related to the Rwandan genocide. These two tribunals together are referred to as the 'ad hoc tribunals'. They are bodies that were established following specific conflicts and whose mandate is context and time-bounded. The enormous time and resources needed to run these tribunals soon made it apparent that they were impractical models for justice in conflict situations elsewhere however. From here the idea for a permanent international body, tasked with prosecuting the most serious violations of international criminal law, grew in momentum.¹²

In 1998 the Rome Statute to establish the International Criminal Court (ICC) was adopted, and came into effect four years later in 2002. The ICC is the first permanent international tribunal to prosecute 'the most serious crimes of concern to the international community as a whole' and those most responsible for these crimes. Its jurisdiction comes into effect when local authorities lack either the political will or capacity to prosecute these crimes. This 'principle of complementarity' establishes national courts as having priority over the ICC, which is seen to be a 'court of last resort'.

Cases can be referred to the ICC by a state party to the Rome Statute, by the UN Security Council, or alternatively, the Prosecutor can initiate an investigation in respect of a crime falling within the jurisdiction of the Court. Whilst the mandate of the ICC is global, to date all of its cases for prosecution or investigation have been from Africa – northern Uganda, the Central African Republic, and now Sudan/ Darfur. This situation has drawn criticism from some who see the Court as a political vehicle utilized by Western powers against the global south, and more specifically, Africa. The ICC has also come under criticism by some who believe that indictments and prosecutions can threaten the possibility of reaching peace settlements which can end conflicts. This charge is countered by supporters of the Court who argue that prosecutions can in fact remove spoilers, encourage all parties to negotiate, and acts as a deterrence to others in establishing that certain crimes cannot go unpunished regardless of where they occur.

Between the purely international and domestic lie hybrid tribunals and universal jurisdiction – both justice tools which mix elements of national and international in their implementation. Hybrid tribunals, which have thus far been utilized in Sierra Leone, Bosnia and Herzegovina, Cambodia and East Timor, are defined by Sikkink and Walling as "third generation criminal bodies defined by their mixed character of containing a combination of international and national features, typically both in terms of staff as well as compounded international and national substantial and procedural law."¹³ The mix of national and international elements varies with each institution. In Cambodia a separate UN-led tribunal in Cambodia (ECCC) has been established to try former Khmer Rouge leaders. In Kosovo the mix entailed utilizing international

¹² The ICC has built on the lessons of the *ad hocs* - including through establishing a role for victims in the procedures, creating a victims reparations fund and focusing on outreach and awareness in countries affected.

¹³ Kathryn Sikkink and Carrie Booth Walling, "The Impact of Human Rights Trials in Latin America" *Journal of Peace Research*, 44(4) (2007): 427-445.

judges and prosecutors in the national courts. A key objective of these courts is to build local justice sector capacity, localize the judicial process so that it is closer to its intended beneficiaries and reduce overall costs inherent in purely international justice mechanisms.

The last 'tool' of international justice is universal jurisdiction - a mix of domestic and international, the principle of universal jurisdiction holds that crimes such as genocide and related crimes are prosecutable by a domestic court in any country no matter where the crime took place or the nationality of the victims or alleged perpetrators. The recently adopted Princeton principles on universal jurisdiction define it as: 'Criminal jurisdiction based solely on the nature of the crime without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim or any other connection to the state exercising such jurisdiction.'¹⁴

To date, approximately 32 states have some legislation providing for universal jurisdiction over war crimes committed in internal conflicts. According to Bronkhorst, since WW2 a dozen countries have prosecuted based on the principle of universal jurisdiction or have arrested accused in order to extradite to a country that will prosecute.¹⁵ Whether a customary norm exists however which establishes the right of states to extend universal jurisdiction over crimes committed elsewhere remains a contested issue.

Proponents of universal jurisdiction note that to try crimes regardless of where they were committed establishes that these crimes are crimes against humanity and will be treated as such – i.e., that it is incumbent on humanity in general to prosecute these crimes. Critics however note that international prosecutions should be left to the institutions of international justice and not to individual states, and that the principle of universal jurisdiction breaches international norms which accept the equality and sovereignty of all states in the international system. They further argue that such prosecutions risk being utilized to pursue foreign policy agendas, and that such matters should be left to treaty-based bodies such as the ICC.

The most well-known use of universal jurisdiction was the effort by Spain to prosecute former Chilean military dictator Pinochet. Current cases of the use of universal jurisdiction include the prosecution of cases related to the Rwandan genocide which are currently being tried in a number of countries including the Netherlands.

Just as with truth commissions, trials for conflict-related violations, and in particular international trials, present their own challenges in securing justice for victims. In addition to the limitations or weaknesses inherent in trials generally, additional challenges posited by international trials include:

- Distance from victims – international prosecutions take place away from their intended beneficiaries (though this is less so with hybrids).
- Disjuncture between the mass resources spent on these processes and the limited resources contributed by the international community to the

¹⁴ Cited in Eve La Haye, *War Crimes in Internal Armed Conflicts* (New York: Cambridge University Press, 2008), p. 242.

¹⁵ Daan Bronkhorst, *Truth and Justice – A Guide to Truth Commissions and Transitional Justice* - 2nd edition, June 2006, Amsterdam, the Netherlands
http://www.amnesty.nl/bibliotheek_vervolg/thema_berechting_introduction

- fundamental reconstruction and development needs of a country post-conflict. This can exacerbate rather than address feelings of injustice.¹⁶
- Differing penal regimes between domestic and international trials – the often comparatively lenient sentences handed down by international institutions can again exacerbate feelings of injustice.
 - Prosecution of only a few can lend itself to a huge ‘impunity gap’, particularly in contexts of mass violence where the judicial systems is not equipped to deal with the sheer numbers.
 - Trials cannot deal with those who can’t be held judicially accountable but still need to be held accountable through some means – ie, collaborators, beneficiaries or child soldiers.
 - Trials cannot deal with the wider context or enabling context of system crimes.
 - Adversarial nature of court procedures makes it difficult for new information or truth to be disclosed as there is an incentive to limit truth rather than disclose.
 - Court procedures are inherently perpetrator-focused, placing the needs of victims second.

Relationship between TCs and Trials

Even where a recovering state pursues prosecutions in the most widespread manner possible (which is rarely an option given the limitations of evidence, capacity of the judicial system, competing priorities, the potential threat to peace processes etc), in the context of transitioning states, there will likely remain a large ‘impunity gap’. This is particularly the case in countries where mass violence took place or large-scale horizontal conflict; an increasingly common characteristic of present day conflicts. As a result, comprehensive redress requires the establishment of numerous and complementary initiatives.

Increasingly, states faced with a legacy of past human rights violations are employing a variety of responses over the long term. Sikkink and Walling note the example of several Latin American states which have employed amnesties in the short term but also truth commissions and trials at some point. In the past however, these varying options were generally pursued in isolation from each other, separated by time or with trials being incompletely pursued. It was generally assumed that the pursuit of retribution (characterized by prosecutions) or reconciliation (characterized by truth commissions, non-judicial accountability mechanisms) were mutually exclusive or even at odds. There are however growing examples today of both objectives being pursued simultaneously through distinct mechanisms. Recent examples include Sierra Leone and East Timor which have both had hybrid tribunals as well as truth commissions – in Sierra Leone the two operated side by side, the first time that two such mechanisms have operated simultaneously. There are currently plans in place for both mechanisms to also be established in Burundi.

Having more than one mechanism to deal with the past allows for complementarity: creating a system of multiple strategies as part of a comprehensive response where accountability and retributive justice is sought for those that bear the most responsibility, alongside alternative mechanisms for accountability and reintegration for those at lower levels or who cannot be held judicially accountable as well as to

¹⁶ The ICTR and ICTY combined have an annual budget of a quarter of a billion US dollars – that is approximately 10% of the UN’s total annual budget (La Haye (2008)). It is estimated that by the time the tribunals are closed down between 2010 and 2012 they will have cost \$2.5b for the prosecution of approximately 200 individuals.

effect reconciliation and reintegration more broadly in society. The Secretary General's 2004 report states that 'It is now generally recognized, for example, that truth commissions can positively complement criminal tribunals, as the examples of Argentina, Peru, Timor-Leste and Sierra Leone suggest.' Truth commissions can cover context, responsibility of groups, hear a broad cross-section of victims and make findings which do not need to meet the evidentiary burden of a court but which are nevertheless of significance to the country's historical narrative. They can also hold accountable individuals that cannot be held to account through the judicial system such as child soldiers, beneficiaries and bystanders, and serve as sites for the reintegration of lower level offenders and an opportunity for reconciliation between victims and perpetrators.

Equally however, having two mechanisms to deal with past crimes simultaneously, both with different mandates and objectives, can create tensions and complications. In Sierra Leone, the first example of a court and truth commission operating alongside each other, the relationship faced some challenges in particular with regards to effectively communicating their mandates to the local population (see case study below). Successful co-existence of different mechanisms requires what Varney defines as 'harmonization of objectives', defined as meaning 'that a post-conflict body pursuing justice and another body pursuing truth and reconciliation cannot operate in a manner that is oblivious of the other,' and that the two bodies must find a way to pursue their differing objectives in a symbiotic way. He notes that 'where there is no harmonisation of objectives a criminal justice body will have largely punitive and retributive aims, whereas a truth and reconciliation body will have largely restorative and healing objectives. Where the two bodies operate simultaneously in an *ad hoc* fashion, conflict between such objectives is likely. Confusion in the minds of the public is inevitable.'¹⁷

This 'harmonization' between different mechanisms will become all the more important as mechanisms of international justice grow and the number of trials and truth commissions operating together increases. Whilst there is as yet no indication of how the ICC will relate to national truth-seeking processes, some scholars anticipate that the greatest difficulty between the two institutions will concern 'the reuse of materials developed within a truth and reconciliation commission process for the purposes of subsequent criminal prosecution.'¹⁸

It is important to note however that international courts are also evolving to better incorporate the positive attributes of non-judicial mechanisms, lessening the tensions and perceived polarized objectives between these institutions. With the ICC for example, the inclusion of victim-centred principles include: 'informing victims of decisions that concern them; victims' participation in proceedings as well as legal aid for their representation; measures for victims' protection, support and assistance; and the ability to claim reparation. The inclusion of provisions that oblige the Prosecutor and the Registrar to inform victims of specific decisions underscores the importance of outreach in the Rome Statute.'¹⁹ How these measures will actually work in practice is yet to be seen though, and key challenges include the insecurity of conflict situations and protection of witnesses in situations of insecurity – as well as the limitations of a reparations scheme with limited resources intended to cover large numbers of victims in situations of mass conflict and violence.

¹⁷ Varney (2007).

¹⁸ William A. Schabas and Shane Darcy (eds.) *Truth Commissions and Courts: The Tension Between Criminal Justice and the Search for Truth*, Kluwer Academic Publishers (2004), p.2.

¹⁹ Mariana Goetz in *Courting Conflict: Justice, Peace and the ICC in Africa*, Nicholas Waddell and Phil Clark (eds.) (Royal African Society, 2008), p.66.

Case study – Sierra Leone: TRC and Special Court

The Lomé Peace Agreement which ended the Sierra Leone conflict in 1999 included provision for a truth and reconciliation commission. There was at that point no plans for any criminal prosecutions – the Agreement included a full amnesty for all parties to the conflict. This was reversed when a resurgence in the conflict led the government to request UN assistance to effect prosecutions, and the Special Court for Sierra Leone, a hybrid tribunal with both national and international features, was established.

There was no anticipated formal relationship between the two institutions although they were seen to be complementary. In a 2001 report, the UN Secretary General noted that '[t]hese two institutions are mutually reinforcing instruments through which impunity will be brought to an end and long-term reconciliation may be achieved.'²⁰ There was never any formal agreement established on the relationship between the two bodies in part as they were not intended to run concurrently. But institutional delays meant that for the 18 months that the TRC operated, it in fact ran in parallel to the Special Court. Even during this period, neither institution sought a memorandum of understanding with the other. This resulted in practical problems during their operations, which the Commission described as resulting from a 'dual accountability' model which created two institutions separated from each other.²¹

One Commissioner writes that much of the 18 month overlap period passed without major incident and a cordial relationship was retained until the final months of the TRC's activities when three prisoners indicted by the Court asked to testify before the TRC and the Court refused permission for either confidential interviews or public hearings with the three to take place.²²

Beyond this one incident however, there were challenges in conveying the different mandates to the local population, many of whom believed that the two were one body and that testimony given to the TRC would be used by the Court. These external challenges are likely to be present where ever two bodies of this type operate simultaneously, and lie in part in the inherently different approaches each has to addressing impunity. In the words of one Commission member, operational difficulties between a court and commission are likely 'given that they ... share many objectives: both seek truth about a conflict, although in different forms; both attempt to assign responsibilities for atrocities; both work with similar bodies of law; both are aimed at establishing peace and preventing future conflict.'²³ These overlaps and tensions are also compounded by the fact that there is likely to also be competition for resources, funding and staffing given the proximity of the work.

Conclusion –

Since the mid-1990s there have been significant shifts in the 'system' of international justice, beyond simply the evolution of new mechanisms for pursuing justice. Former ICTY/ ICTR prosecutor Justice Goldstone notes that these shifts include, in particular, a return to the 'Nuremberg model' of specifically established temporary

²⁰ Schabas and Darcy (2004), p.4.

²¹ Quoted in Varney (2007).

²² The case was ultimately decided by the President of the Special Court's Appeals Chamber – who ruled that the accused could testify but not publicly. The ruling is the only legal judgement on the relationship between truth commissions and criminal prosecutions and 'will doubtless influence future efforts at transitional justice where truth commissions and courts operate simultaneously'. Schabas and Darcy (2004), p.5.

²³ Varney (2007).

bodies to try conflict-specific crimes as in the *ad hoc* and hybrid tribunals. Second has been the simultaneous internationalization and localization of international justice – internationalization in the form of the establishment of a permanent court, the ICC, and localization in the increased domesticization of international justice through the use of hybrid tribunals and universal jurisdiction or of successor regimes embarking on prosecutions for past crimes.²⁴ The third shift has been the rise in non-judicial bodies to deal with mass crimes – this includes mechanisms such as truth commissions.²⁵

This evolution in the system of justice towards multiple mechanisms, in particular of utilizing both truth commissions and trials, is a positive trend. Mass atrocities and conflict have a profound impact on societies and call for a comprehensive response which can achieve the multiple goals of justice, broad accountability, reconciliation, healing, transformation, and deterrence. Truth commissions, through their focus on addressing victims' needs for acknowledgement and redress can contribute to reconciliation - in particular at the national level. Trials, whether domestic or international, are important in holding to account those most responsible and serve as condemnation by the international community as well as deterrence. Both are necessary to redress the legacy of past violence and should be jointly pursued with a view to managing the relationship as it unfolds in each context to maximize synergies and minimize tensions.

Literature and links to key resources –

Websites –

African Transitional Justice Research Network – www.transitionaljustice.org

Centre for the Study of Violence and Reconciliation – www.csvr.org.za

International Center for Transitional Justice – www.ictj.org

Justice in Perspective – www.justiceinperspective.org.za

Transitional Justice Data Base Project (University of Wisconsin-Madison) - <http://www.polisci.wisc.edu/tjdb/home.htm>

United States Institute of Peace – Truth Commissions Digital Collection - <http://www.usip.org/library/truth.html>

Key literature resources –

Daan Bronkhorst, *Truth and Justice – A Guide to Truth Commissions and Transitional Justice* - 2nd edition, June 2006, Amsterdam, the Netherlands
http://www.amnesty.nl/bibliotheek_vervolg/thema_berechting_introduction

Howard Varney 'Retribution and Reconciliation: War Crimes Tribunals and Truth Commissions – can they work together?' in [*Our Freedoms: A Decade's Reflection on the Advancement of Human Rights*](#), Human Rights Institute of the International Bar Association, 2007

²⁴ Goldstone notes that this last shift means that today there are more international crimes tried domestically than internationally. Richard J. Goldstone and Adam M. Smith, *International Judicial Institutions: The architecture of international justice at home and abroad* (Routledge, 2008).

²⁵ Goldstone and Smith (2008).

Kathryn Sikkink and Carrie Booth Walling, 'The Impact of Human Rights Trials in Latin America,' *Journal of Peace Research*, 44(4) (2007): 427-445.

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<http://www.ohchr.org/Documents/Publications/RuleoflawTruthCommissionsen.pdf>

Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2001).

Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War*. Cambridge and Malden, Mass: Polity Press and Blackwell, 2002

Robert Rothberg and Dennis Thompson (eds.), 2000: *Truth v. Justice: the Morality of Truth Commissions*, Princeton, Princeton University Press.

The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, Report of the Secretary-General to the Security Council, 3 August 2004, UN Doc. S/2004/616

Tristan Anne Borer (2006). *Telling the Truths : Truth Telling and Peace Building in Post-Conflict Societies*. South Bend (Ind.): University of Notre Dame Press.

William A. Schabas and Shane Darcy (eds.) *Truth Commissions and Courts: The Tension Between Criminal Justice and the Search for Truth*, Kluwer Academic Publishers (2004).

Appendix A –

The following lists countries in which truth commissions have taken place up to date (to the end of 2008). Because the definition of a truth commission remains contested the universe of cases is equally contested. This list serves as a sample however of the range of countries, contexts and types of commissions that have take place over the past 40 years. (source: USIP database of truth commissions; Hayner; Justice in Perspective website (www.justiceinperspective.org.za); media articles and related sources)

1. Argentina
2. Bangladesh (corruption focus, established 2008)
3. Bolivia
4. Burundi (peace agreement provides for a commission and court – to be established)
5. Canada (currently running)
6. Chad
7. Chile
8. Democratic Republic of Congo
9. East Timor
10. Ecuador
11. El Salvador
12. Ethiopia
13. Germany
14. Ghana
15. Grenada
16. Guatemala
17. Haiti
18. Indonesia and East Timor (bilateral ‘Commission on Truth and Friendship)
19. Kenya (law signed in 2008)
20. Liberia (currently running)
21. Mauritius (currently running)
22. Morocco
23. Nepal (Commission of Inquiry to Find the Disappeared Persons ran from 1991 to 1994. Recent peace agreement provides for new and wider-mandated truth commission)
24. Nigeria (Human Rights Violations Investigation Commission was a national truth commission. Currently the Rivers Commission is running, a localized commission looking at the conflict on the Niger Delta)
25. Panama
26. Paraguay
27. Peru
28. Philippines
29. Serbia and Montenegro (formerly Federal Republic of Yugoslavia)
30. Sierra Leone
31. Solomon Islands (about to be established)
32. South Africa
33. South Korea
34. Sri Lanka
35. Togo (about to be established)
36. Uganda
37. Uruguay
38. Zimbabwe

Appendix B – Criminal Prosecutions Related to Political Transitions

Reproduced with the author's permission from David Backer, "Cross-National Comparative Analysis" in Hugo van der Merwe, Audrey Chapman and Victoria Baxter *Assessing the Impact of Transitional Justice: Challenges for Empirical Research*, (Washington DC: USIP Press, 2009)

Country	Type of Court	Defendant(s)	Charges
Afghanistan	Foreign (Netherlands)	Various	War crimes; crimes against humanity
	Foreign (U.S.)	Various	War crimes; terrorism; conspiracy
Albania	Domestic	Top leaders	Various
Algeria	Domestic	Militia member	Massacre; assassination
	Foreign (France)	Militia members	Disappearances; extrajudicial killings
Argentina	Domestic	Junta leaders	"Dirty war"
	Foreign (France, Spain)	Military officers	Murder; disappearances
Benin	Domestic	Political officials	Corruption
Bolivia	Domestic	Top political officials	Various
Bulgaria	Domestic	Top leaders	Embezzlement
Cambodia	Domestic	Khmer Rouge leaders	Genocide
	Hybrid (ECCC)	Political officials	Genocide
Central African Rep.	Domestic	Ex-president Bokassa	Political massacres
	Domestic	Military officers	Extrajudicial killings
	International (ICC)	Rebel leader Bemba	War crimes; crimes against humanity
Chad	Foreign (Senegal)	Ex-president Habré	Torture
Chile	Domestic	Political officials	Murder; disappearances
	Foreign (Spain)	Political officials	Murder; disappearances
Congo-Brazzaville	Domestic	Members of police and military	Disappearances (acquitted)
Czechoslovakia	Domestic	Communist officials	Various
DRC	Domestic	Various	Various (some acquittals)
	Foreign (Netherlands)	Death squad leader	Torture
	International (ICC)	Rebel leaders	War crimes; crimes against humanity
Ecuador	Domestic	Political officials	Murder; disappearances
El Salvador	Domestic	Military officers	Murder; disappearances
Estonia	Domestic	Former Soviet officials	Crimes against humanity
Ethiopia	Domestic	Various	Various
Fiji	Domestic	People involved in 2000 coup	Treason
(East) Germany	Domestic	Various	Various
Greece	Domestic	Military police	Torture; treason
Grenada	Foreign (U.S.)	Top leaders	Murder
Guatemala	Domestic	Military officers	Murder; disappearances
Guinea-Bissau	Domestic	Ex-president Vieira	Arms trafficking (canceled)
	Domestic	Military leaders	Treason (acquittals)
Haiti	Domestic	Military officers	Murder
Honduras	Domestic	Army and police officers	Disappearances
	Foreign (Spain)	Military officers	Disappearances
India	Domestic	Leader, officials, and policemen	Torture; murder
Indonesia	Domestic	Military officers	Murder
Iraq	Domestic	Various	War crimes
	Foreign (Netherlands)	Dutch businessman	War crimes; genocide
Kenya	Domestic	Judges	Corruption
Latvia	Domestic	Former Soviet officials	Genocide
Liberia	Hybrid (SCSL)	Ex-president Taylor	Various
	Foreign (Netherlands)	Dutch businessman	War crimes; arms trafficking (conviction overturned on appeal)

Country	Type of Court	Defendant(s)	Charges
	Foreign (U.S.)	Taylor's son	Torture
Lithuania	Domestic	Political officials	Genocide; murder; detainee abuse
Madagascar	Domestic	Ex-president Ratsiraka	Embezzlement
	Domestic	Various	Murder; torture; corruption
Mali	Domestic	Various	Murder; embezzlement
Malawi	Domestic	Ex-president Banda and other top party officials	Extrajudicial killings (acquitted)
	Domestic	Ex-president Banda, minister of state, and police officers	Extrajudicial killings (acquitted)
Mexico	Domestic	Members of security forces	Murder; disappearances
Niger	Domestic	Police and military officers	Murder (canceled)
Panama	Foreign (U.S.)	Ex-president Noriega	Drug trafficking
Paraguay	Domestic	Political officials	Murder; disappearances
Peru	Domestic	Various	Murder; disappearances
Philippines	Foreign (U.S.)	Ex-president Marcos and wife	Racketeering (acquittals)
	Domestic	Imelda Marcos	Corruption
Poland	Domestic	Police generals	Murder of priest
Portugal	Domestic	Political officials	Murder
Romania	Domestic	Ex-leader Ceausescu; Politburo	Abuses during 1989 uprising
Rwanda	International (ICTR)	Various	Genocide; crimes against humanity; war crimes (some acquittals)
	Domestic	Various	Genocide
	Foreign (Belgium, Canada, Denmark, France, Switzerland)	Various	Genocide; crimes against humanity; war crimes
Sierra Leone	Hybrid (SCSL)	Various	War crimes; crimes against humanity
South Africa	Domestic	Former defense minister Malan and 15 codefendants	Political massacre (acquitted)
	Domestic	Police commander de Kock	Murder
	Domestic	Policeman Nieuwoudt	Murder
	Domestic	Biowarfare head Basson	Various (charges dismissed)
South Korea	Domestic	Ex-presidents	Treason; mass murder
Spain	Domestic	Political officials	Various
Sri Lanka	Domestic	Members of security forces	Disappearances
Suriname	Foreign (Netherlands)	Ex-president Bouterse	Drug trafficking
	Domestic	Ex-president Bouterse and others	Murder; torture
Timor-Leste	Hybrid (Special Panels)	Militias	Murder
	Foreign (Indonesia)	Militia commander	Crimes against humanity
Uganda	Domestic	Various	Various
Uruguay	Domestic	Top political officials	Various (canceled)
	Domestic	Political officials	Murder; disappearances
(Former) Yugoslavia	International (ICTY)	Top leaders and soldiers	War crimes; genocide
	Domestic (Bosnia)	Various	Genocide; war crimes
	Domestic (Croatia)	Various	Genocide; war crimes
	Domestic (Serbia)	Various	Genocide; war crimes
	Foreign (Denmark, Germany, Switzerland)	Various	Genocide; war crimes

Note: This list excludes the recent indictments by the International Criminal Court of the president of Sudan and four top leaders of the Lord's Resistance Army in Uganda, as well as the opinions rendered by the Permanent People's Tribunal. Additional information on foreign prosecutions is drawn from Trial Watch (<http://www.trial-ch.org>).