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# Preventing Future Human Rights Violations – Truth Commissions or Tribunals?

Master thesis  
30 ECTS points

Supervisor  
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Human Rights

Spring 2009

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# Summary

In the past few decades the ways of addressing past atrocities in states on the verge of transition from abusive regimes to human rights abiding democracies have developed into an area of international law commonly known as 'Transitional Justice'. The focus lies on facilitating the transition through different measures with the purpose of addressing the past and seeking reparation for the victims.

Transitional justice includes a wide variation of measures, some judicial in their nature and some more political, social or cultural. In this thesis I will focus on two of them, ad hoc tribunals and truth commissions, and make a comparative study where I try to answer the question of which one of those two measures is best at preventing future human rights violations in transitional states.

These measures are different in both theory and practice and have been used in different contexts and for somewhat different purposes. The thesis consists of two parts, a theoretical part where I compare the different theories, retributive versus restorative justice, and try to find the arguments pro and con each approach, as well as a more practical part where I compare different situations where states have used either tribunals or truth commissions in order to address the past.

Through an examination of the tribunals of former Yugoslavia and Rwanda as well as the Special Court of Sierra Leone I explore the successes and failings of some of the most prominent ad hoc tribunals so far which I use as a base for comparison with the truth commissions I have chosen in order to get a broad picture of the measure; South Africa, El Salvador and the Truth and Reconciliation commission of Sierra Leone.

As recommendations for states contemplating the aforementioned transitional justice measure I will argue, based on my findings, that whether or not they will be successful is dependant on a lot of different factors, the most important being that it should carefully take into account the context and the specific situation in the transitional society.

# Sammanfattning

De senaste decennierna har tillvägagångssätten för stater i övergången mellan regimer som begår övergrepp och demokratier som efterföljer mänskliga rättigheter att hantera de övergrepp som begåtts i staten utvecklats till ett område inom folkrätten som är mest känd som 'Övergångs Rättvisa'. Fokus ligger på att förenkla övergången genom olika åtgärder med syftet att hantera det förflutna och söka upprättelse för offren.

Övergångs rättvisa involverar en mängd olika tillvägagångssätt, en del juridiska till sin natur och andra mer politiska, sociala eller kulturella. I den här uppsatsen kommer jag fokusera på två olika sådana tillvägagångssätt, ad hoc tribunaler och sanningskommissioner, och göra en jämförelse i syftet att besvara frågan om vilken av dessa två som är mest effektiv för att förhindra framtida brott mot mänskliga rättigheter i övergångsstaten.

Dessa båda sätt att hantera en övergång är olika både i teorin och i praktiken och har blivit använda i olika sammanhang och med något varierande syften. Uppsatsen består av två delar; en teoretisk del där jag jämför de olika teorierna, vedergällande- och återställande rättvisa, och försöker finna argumenten för och emot de båda synsätten, samt en mer praktisk del där jag jämför olika situationer där stater har använt sig av antingen tribunaler eller sanningskommissioner för att hantera sitt förflutna.

Genom en undersökning av tribunalerna för forna Jugoslavien och Rwanda samt Sierra Leones Specialdomstol så utforskar jag framgångarna och misslyckandena hos några av de mest framstående ad hoc tribunalerna hittills och använder detta som en bas för jämförelse med de sanningskommissioner som jag valt att studera. De som jag har undersökt är utvalda för att ge en bred bild av sanningskommissioner; Sydafrika, El Salvador och Sierra Leones Sannings och Försoningskommission.

Som rekommendation till stater som överväger att utnyttja något av de aktuella tillvägagångssätten så vill jag hävda, baserat på mina undersökningar, att framgång är beroende av flera olika faktorer varav den viktigaste kanske är sammanhanget och den specifika situationen i övergångssamhället.

# Acknowledgements

First I want to thank my family for their immeasurable love and support; my parents, Catherine and Bengt-olof, who have loved and supported me throughout my life including during the writing of this thesis and my brothers, Johannes and Jonathan. I also want to express my gratefulness and my love to my grand-parents for their support.

My sincere thanks also to my dear friends and classmates, especially Linda, Cigdem, Shannon, Natasa, Mariuxi and Armando, who has made my studies at the masters programme a wonderful experience, without you it would not have been nearly as fun or rewarding. Thank you for your friendship and support. Thanks also to Alessandra, even though you arrived later your friendship and the sandwiches when I spent the night in the library writing the thesis were awesome.

My friends from the Aikido dojo with whom I have spent large parts of the time that I wasn't writing also deserves thanks, especially my dear flat-mate Lisbet who has shown impressive courage in living with me during this process and Oskar who has both supported me and had the doubtful pleasure of editing this thesis.

Also thanks to Tyra, Malin, Mika and the other girls at the stables for their help with care for my beloved Shamrock during long days of writing.

Last, but far from least, sincere thanks to my supervisor Karol Nowak. It has been a pleasure having you as a supervisor. Thank you for your help and support.

# Abbreviations

ADR	Alternative Dispute Resolution
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
FMLN	Farabundo Martí National Liberation Front
ICC	the International Criminal Court
ICTJ	International Centre for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
LRA	Lords Resistance Army
NGO	Non Governmental Organization
RUF	Revolutionary United Front
SC	Security Council
TRC	South African Truth and Reconciliation Commission
UN	United Nations
UNAMSIL	United Nations Mission in Sierra Leone



# 1 Introduction

## 1.1 Background to the Problem

*“For there can be no healing without peace; there can be no peace without justice; and there can be no justice without respect for human rights and rule of law.”*

- Kofi Annan, Concerning the International Criminal Tribunal of Rwanda<sup>1</sup>

*"There is need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation."*

- Interim Constitution of South Africa 1994, Postamble

When South Africa prepared to leave the atrocities of apartheid behind the country's leaders saw the necessity not only to deal with its bloody past but also to seek reconciliation in order for the nation to heal. There was a need not to alienate the white population in the process of democratization and to find ways of moving beyond blame to lasting peace. Thus the South African Truth and Reconciliation Commission (the South African TRC, or simply the TRC) was created. The philosophy behind the South African TRC, and behind other truth commissions, is in its essence different from the philosophy that rules over tribunals set up to deal with the same sort of issues, namely basic issues of transitional justice. The goals, however, are the same; peace, justice and prevention of future violence and human rights violations. These are the intrinsic objectives of a successful transition.

All over the world conflicts have raged through centuries, and are, up to this day, still raging. Due to lack of democracy, poverty, difference in ethnicity or religion, human rights violations or other reasons, conflicts and atrocities continue to tear states and human lives apart. But there are also conflicts ending and nations that find peace and democracy, to the benefit of all people. It is in this transition from war-torn dictatorships to, ideally, peaceful, human rights respecting democracies that there is a call for a way of dealing with the states' painful pasts, and for the area of law that is commonly called 'transitional justice', even though as we will see below, justice is not always the only, or even the highest priority in this process.

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<sup>1</sup> About The Tribunal: Message from Kofi Annan found through R. Byrne, 'Promises of Peace and Reconciliation: Previewing the Legacy of the International Criminal Tribunal for Rwanda', 4 *Cambridge University Press (CUP)*, (2006) pp. 485-498.

One issue that is tremendously important in this equation but that may not always be of highest priority by the states is the issue of human rights. Transitional states are certain to have unresolved issues of human rights violations when entering into the state of transition and there is a danger of new violations in the future, should the state fail to prevent it. Even though it is so this is often in the discussion prioritized below other, more obvious issues, such as the conflict between peace and justice that is a common problem for such states. However, the human rights question is intrinsic in the process and key to a successful transition. Without the aspect of human rights neither peace nor justice will last long or help to establish true democracy.

In the past, countries faced with this situation have made different priorities depending on the specific situation, on the nature of the conflict and violations and on the leaders in the transitional process. Choosing the manner of how to deal with this situation is a choice that is both practical and philosophical in its nature and that has affected the priorities made in the past. The choices made by states in these situations, and the outcomes for those states, can act as a guide and reference for the future.

This is one of the things that has caught my interest and inspired me to choose this topic, the desire to see what the priorities were for some of the states that have dealt with transitions in the past and what outcomes those priorities led to from a human rights perspective. Since it deals with both human rights and conflict resolution it is a field where many interesting and difficult questions arise. There is an inbuilt philosophical conflict between vengeance and forgiveness that gives rise to different forms of measures to deal with the past that have completely different views on, for example, criminal justice. There are also very special circumstances demanding special solutions. All this taken together are aspects of a very interesting area of law, one that I will explore some parts of below.

## **1.2 Purpose and Delimitations**

The purpose of this master thesis is to take into account the background of the problems as described above and, more deeply explored below, make a comparison between ad hoc tribunals and truth commissions with the purpose of answering the question of how to best prevent future human rights violations in transitional states.

Simply trying to answer the question of how to best prevent future human rights violations is of course too broad an objective for a master thesis, one that would require far more extensive research into different preventive measures and different ways of dealing with past violations. Even narrowing it down, as I have done, to the preventive abilities of the different measures taken to deal with the past atrocities in transitional states this is a very wide question. That is why I have limited it down to the two different measures mentioned above. The reasons for choosing these two types of measures are

based on their popularity, the fact that they are judicial or quasi judicial, or at least has a potential of being so, and the fact that they are not preventive measures *per se*, unlike most other aspects of transitional justice, but focus on dealing with the past violations. I think it is very interesting to see how the ways we deal with the past affect the future. There are also other reasons for specifically choosing those two. Since traditional, retributive justice, with tribunals and prosecution of perpetrators is the first that springs to mind when it comes to dealing with crimes committed this aspect has to be dealt with to give any form of clear picture. This is the most common way of dealing with crimes in 'ordinary situations' and in widespread opinion the only 'real justice'.<sup>2</sup>

In the last decades the use of retributive justice has, through international criminal law, taken the step into the area of international law leaving us with international ad hoc tribunals like the Yugoslavia and Rwanda tribunals to study. This, together with the use of mixed 'hybrid courts' where the ad hoc tribunal or court is set up under a mix between international and national law, has meant a huge development for retributive justice in transitional societies, since, as we shall discuss more below, domestic courts have a lot of obstacles that often prevent them from being used as a measure of administering transitional justice. However, retributive justice is not the only way of dealing with the past and it might not, as this thesis shall explore deeper, even always be the most effective way to achieve the goals of the transitional process.

In the last 25 years the use of truth commissions has spread rapidly as an alternative or a compliment for prosecutions and traditional retributive justice. This type of measure has grown in importance and frequency supplying an ample collection of state cases to study. Even though the construction of the commission varies from state to state there are some common denominators and even the differences add a valuable aspect to the evaluation of the effectiveness; the result varies according to the variables put into the measure. This, especially the high number of commissions set up, makes truth commissions an important alternative form of transitional justice to study.

But there is also another reason to choose truth commissions over other possibilities as a basis for this study. Famous commissions established in the past, especially the Truth and Reconciliation Commission of South Africa, has made the use of truth commissions known, not only to lawyers and decision makers, but to the wide majority of ordinary people, increasing the popularity and thus the chance of new commissions being established. This is especially so since in the eyes of the public the use is strongly connected to modern day heroes like Nelson Mandela and Desmond Tutu in South Africa. With the public fame, and almost affection, for truth commissions it is important to study and evaluate them and also to compare them to other possible ways of dealing with the past.

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<sup>2</sup> See the discussion on this below in 3.2.

As mentioned above, there are of course other forms of transitional justice as well but I will limit myself to make a comparison between these two. This work should not be seen as an exhaustive comparative research on transitional justice but as a comparison between those two measures, adding the extra aspect of focusing on the future prevention of human rights violations. Of course in comparing them one must remember that they are also used in combination in order to make the transitional justice process more effective and are not excluding each other.

To show the effect in reality, it is not enough to look at theory; one should also study actual cases. There is a large variety of different states that one could choose to look at but in keeping with the space available I have narrowed it down to a few key cases, giving a good but far from exhaustive view on the material available. Looking at all possible cases may provide additional insight but I maintain the view that the cases chosen show enough range and variation to allow a good overview.

When it comes to looking at tribunals I have chosen to focus on international tribunals and thus examine the Yugoslavia and Rwanda tribunals. The other possibilities here would be to look at the Nürnberg trials or at the International Criminal Court (ICC) but since the Nürnberg is so old and does not reflect the developments in the area of international criminal law thus making it hard to compare with the options available today and also has the problem of, at the time of its creation, lacking an as firm basis in international law since for example the Geneva conventions were created in 1949 and the ICC on the other hand is too new to give us any useful information about what effect its rulings will have on prevention of future violations I have chosen to instead to give a broader view of tribunals through an examination of the Sierra Leone Special Court. This differs from the international tribunals both because it is an 'internationalized' or 'hybrid' court and because it has been co-existing with a truth commission, making it an interesting example of how, under international law, justice is being administered in a transitional society. There are other hybrid courts that one could focus on as well, the perhaps most prominent being the Extraordinary Chambers in the Court of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (the Cambodia Tribunal) but with respect to the purpose of this thesis it suffers from the same problem as the ICC; it is simply too new to provide enough information. Of course the Sierra Leone Special Court also suffers somewhat from this but the above mentioned arguments for choosing it as an object of study still makes it interesting to this examination.

The truth commissions I have picked out to study closer are firstly two that are a little older and more prominent; South Africa and El Salvador. Both are chosen because they are older, having more material, and thus providing a greater possibility to study the effects the commission may have had on the development of the state. But they are also interesting because they are different in both purpose and in how they were created. The South African

is a national measure with the purpose of dealing with the past and reconciling the nation, set up instead of a tribunal and quasi judicial in its method and in the fact that it had the power to give a conditioned amnesty in exchange for truth. The El Salvador Truth Commission on the other hand is an international measure set up by the UN, limited to truth finding and set up in a state that had not yet made it very far through the transitional phase. This is interesting because it was international like the ad hoc tribunals but not really as an alternative to retributive justice even though an amnesty law was passed as well. Rather it had the original purpose of truth commissions; researching the truth. Together with those I have chosen to look at the Sierra Leone Truth and Reconciliation commission with the idea that it may add yet another aspect to look at, one that is at least a little newer although it is still old enough to have given its final report and that it is interesting to see how the coexistence with the court affects the situation. I believe that in choosing a variety of different commissions I will get a clearer picture of the overall effectiveness of truth commissions as a medium of transitional justice.

I will also attempt to precipitate which the important ingredients are in each of the two different forms of dealing with the past that I am looking at; what are the key things to think about, what sets the successful experiences apart from the unsuccessful ones? The point with this is to try to see if there are any recommendations to be made for future countries in transitional states and that is how I will try to conclude this thesis, with the recommendations that I can, from the analysis of my research, make for future, similar situations.

So, to sum things up, transitions are not always smooth and different solutions have been tried with different levels of success. The goal is to find out which model of transitional justice is the most effective in preventing future human rights violations, truth commissions or tribunals? As well as to find out what ingredients seem to be important for the successfulness of the measure; what is important to think about when establishing such a measure? This will lead to a set of recommendations for the future, what a state faced with the decision of establishing this type of measures should keep in mind, which I will conclude the thesis with.

### **1.3 Method**

There are two different aspects of the thesis that require somewhat different methods. Firstly there is the theoretical aspect. This requires mostly research into the doctrinal writings of the field and into the preparatory work and preambles of the different courts and commissions. This is also one of the bases for comparison; how does the philosophy differ between the different ways of dealing with the past? This is a purely theoretical effort, focused on the philosophy behind the different measures taken. In doing this, the underlying question is whether this idea is effective when it comes to preventing future human rights violations? I attempt to evaluate the effectiveness of the different theories.

Secondly, I will explore the practical applications since as the second part I will study different cases and compare them. To do this, the preparatory work and scholarly writing plays a great part here as well but also the actual work of the courts or commissions, as well as studies of what has happened in the states afterward. To delve into this I have to look both at writing, contemporary studies and reports of the states and of different organizations. In short, I will basically look at the different courts and commissions and focus on what the aim and purpose was, whether the goals were achieved and if it seems to be effective in preventing future human rights violations.

## **1.4 Disposition**

I will start by providing a short background to the field of transitional justice. This is not a very widely known or studied area of international law, yet it deals with both delicate and important issues. In order to understand the concepts of tribunals and truth commissions, one will need a clear background on which to project the rest of this thesis. In chapter 2 I will give a brief overview of transitional justice together with the history of, and the theories behind, the concept.

In the following two chapters (chapter 3 and 4) I will look at ad hoc tribunals and truth commissions respectively. I will first look at the background and theory behind them and then at the practice, focusing on the chosen cases mentioned above. I will then try to look at the outcomes in a section about each country on the situation today and the results achieved, focusing on prevention of human rights violations. Lastly I will try to conclude each ‘case section’ with a conclusion that tries to answer whether or not this specific tribunal or commission has been effective from a human rights point of view.

Then, to answer the question whether truth commissions or tribunals seems to be the most efficient way of preventing human rights violations overall, I will use chapter 5 to do a comparison between the two, focusing on the prevention of future human rights abuse.

To conclude this thesis, I will in chapter 6 give my thoughts on what, from what I have found out in my research, is important to think about when establishing a system for transitional justice and what future states faced with such issues should consider. This results in a set of recommendations for the future based on my research.

# 2 Transitional Justice - a Background

## 2.1 What is Transitional Justice?

Transitional Justice is not a specific form of justice but rather a concept enclosing the different forms of activities, judicial and non judicial, undertaken by, and adapted to, societies that are in the process of transition after a period of conflict and human rights abuses. It is a response to widespread or systematic violations of human rights attempting to deal with past atrocities. The purpose is to seek recognition for victims and to promote possibilities for peace, reconciliation and democracy.<sup>3</sup>

There are certain defining characteristics of transitional justice.<sup>4</sup> Firstly, it includes the concept of justice. This however is not restricted to traditional justice based on prosecution of criminals and judicial remedies but entails a broader spectra of different forms of justice, for example reparations programs and truth-seeking mechanisms. Even though the field is dependant on international law that require the prosecution of perpetrators<sup>5</sup> other priorities are also taken into account and the focus are often on the victims rather than on the perpetrators.

Secondly it is transitional, happening during and after a major political transition, such as a regime change from authoritarian, human rights abusing rule to a democratic society or a transition from conflict to peace and stability. Shortly, “When a society “turns over a new leaf” or “gests a fresh start,” mechanisms of transitional justice can help strengthen this process.”<sup>6</sup>

The different forms of transitional justice that are considered to form the contemporary basis for the concept are criminal prosecutions, truth commissions or similar ways of documenting and acknowledging violations, reparative programs with the goal of providing reparations to the victims, reformation of abusive institutions and laws that has been used as instruments of oppression and abuse, memorization efforts in order to prevent reoccurrence and facilitation of reconciliation processes.<sup>7</sup>

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<sup>3</sup> International Centre of Transitional Justice, ‘What is transitional justice?’, <[www.ictj.org/static/TJApproaches/WhatisTJ/ICTJ\\_WhatisTJ\\_pa2008\\_.pdf](http://www.ictj.org/static/TJApproaches/WhatisTJ/ICTJ_WhatisTJ_pa2008_.pdf)>, visited on 25 May 2009.

<sup>4</sup> L. Bickford, ‘Transitional Justice’, 3 *The Encyclopedia of Genocide and Crimes Against Humanity* (Macmillan Reference USA) (2004), pp. 1045-1047 <[www.ictj.org/static/TJApproaches/WhatisTJ/macmillan.TJ.eng.pdf](http://www.ictj.org/static/TJApproaches/WhatisTJ/macmillan.TJ.eng.pdf)> visited 25 May 2009.

<sup>5</sup> See for example Geneva conventions I art. 49-50, II art. 50-51, III 129-130, IV146-147.

<sup>6</sup> Bickford, *supra* note 4.

<sup>7</sup> Bickford, *supra* note 4, International Centre of Transitional Justice, *supra* note 3.

These measures are however not exhaustive, and different countries have utilized different instruments, sometimes unique to the country in question. They are not exclusive of each other either, most of the time diverse methods are used together in order to be more effective in both appeasing the victims and reconciling the nation.

As has happened with for example the mixed, or internationalized tribunals, like the one set up in Sierra Leone, transitional justice practitioners sometimes engage with local, maybe more "traditional," justice measures. A society may wish to use for example traditional rituals in the process of transitional justice and reconciliation. In those cases the mixing with an international approach can ensure fairness and that other important factors are taken into account, as will be discussed further in section 3.1.<sup>8</sup>

In order to understand the workings of transitional justice it is important to understand that transitions of different societies are as diverse as the societies themselves. Depending on a wide range of different things, no transition will be exactly like another. They may be peaceful or conflictive, they may happen suddenly and swiftly or they may span over decades, they can be effective or they can leave a society with deep scars and unhealed wounds that may at any time cause new conflict. It is therefore important to understand what factors affect the process and the outcomes of the transition.

Depending on the nature of the transition, the actors and their respective strengths, weaknesses and other factors that affect the transition there are different types of transitions available. What types of transitions are possible, and which one that is chosen, will shape the transitional process and what forms of justice that are available in the specific situations. Below I will try to give an account of the different transitions that are possible, and the factors that scholars have found to affect transitions.

## 2.1.1 Different Types of Transition

Sriram refers to Huntington when describing the different types of transitions that are possible.<sup>9</sup> According to Huntington there are four types of transitions; transformation, transplacement, replacement and intervention.

Transformation is a transition initiated by the old regime.

Transplacement is a transition where "democratization is produced by the combined actions of the government and the opposition"<sup>10</sup> where the government, although unwilling to initiate change, eventually realize the

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<sup>8</sup> International Centre of Transitional Justice, *supra* note 3.

<sup>9</sup> Huntington, *The Third wave* cited by C. L. Sriram, *Confronting past human rights violations- justice vs. peace in transitional societies* (Frank Cass, London 2004) p. 21f

<sup>10</sup> C. L. Sriram, *Confronting past human rights violations- justice vs. peace in transitional societies* (Frank Cass, London 2004) p. 21f



need to negotiate it. Replacement on the other hand is when the old regime is replaced by the opposition through a coup d'état, civil war or other type of internal struggle. Finally a change in regime can be brought about by an intervention by external forces, as we have seen in recent years in for example Iraq and Afghanistan.<sup>11</sup>

## 2.1.2 The Actors and Their Relationship

There are two different sets of actors that may affect the process of transition, internal and external actors.<sup>12</sup> Almost all of the actors, be it internal or external, even the old government that was the problem in the first place and the new one that is hopefully the solution to the problem can act both as obstructions of the transition or as aid in the transition depending on the character and belief of the actor in question. If it is opposed to change, corrupted or in other ways inclined to violate human rights, the actor can complicate the situation more while it if it is seeking to transform the society into a human rights respecting democracy can be the decisive factor in bringing about change.

Internal actors can be the regime in the state, the opposition, be it civilian or armed, the military, media etc. and even individuals can play a great part in this process. Any internal actor that has the possibility of influencing the transition, and uses that possibility, is an actor that has to be taken into account.

The power-balance between the old regime and the post transition regime affects how the transition will come to pass and what type of transition is possible. If you have a very uneven power-balance in favour of the old regime it seems unlikely that they will change on their own initiative, although, given time, even weak oppositions can with the help of media and the support of external actors bring about some change in the state, depending on how corrupted or set in their ways the regime is. If the regime is very strong and unmatched by any internal actors though, it is very unlikely that any change will occur without strong pressure from the outside.

If you have a very strong opposition the situation is very different. Then chances are higher for both transformation, transplacement and replacement to occur. But there may also, depending on the situation, be higher risks for violence to spread. However, this is not always the case; sometimes weak oppositions that take to weapons pose a greater threat of escalating the violence than stronger groups that can influence the situation with their power in other ways than with armed struggle.

The military, the police, the justice system and other actors with the governmental powers of violence monopoly have a big part to play. If those

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<sup>11</sup> Ibid.

<sup>12</sup> Ibid., p.24

instruments of state are corrupted and on the side of the oppressive government they are a strong force that is both obstructing the possibilities of change and making the abuses worse. They can also help bring about change and does not always have to act as a bad guy but as a rule they are usually the ones committing the atrocities on behalf of the government.

The media is another actor that can influence the situation. They can sway the opinions of both the people in a society and of the international community. By telling, or hiding, the truth they can make the attitudes and powers of different actors change, playing a large role in how and when a transition unfolds.

Even individuals can play a great part, both as leaders, thinkers and symbols. Sometimes the image of a hero can act in moralizing an oppressed community and giving them the courage and hope to fight. Depending on the specific situation in a society there are probably other actors that can affect the situation as well, but those mentioned above are the most common and in one form or another present in all transitions.

When it comes to the external actors they vary, but they consist largely of other states, the UN, other international or regional organizations etc. Depending on the interest from the rest of the world and the measures that can be put in place the different forms of transition may be helped or hindered. If a regime for example has strong support from one of the permanent members of the Security Council, there is a smaller chance that the international community can act in order to ease the transition.

An international community that sees the need for change and supports it can play a very large role in the transition. This usually only happens after the transition is already on its way, since the international community is reluctant to step in and get involved in internal conflicts due to state sovereignty. Humanitarian intervention is as of yet not a part of international customary law<sup>13</sup> and the UN, held back by for example the veto power in the security council mentioned above, have a small possibility of acting in these cases. It is more often individual states that in those cases act to bring about change, sometimes urged on by a widely held public opinion. Once change is a fact however the international community can, and often does, help a lot in the process.<sup>14</sup> The amount of help is not the same in all cases though, some situations are still affected by a relationship with one of the permanent members of the security council, aiding or hindering the process, or a specific case may have a lot of international publicity and a strong public opinion may arise, putting it on top of the agenda of the international community.

International organizations and Non Governmental Organizations (NGO:s) may also play a part in what happens. By aiding with the transition and

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<sup>13</sup> M.D. Evans (ed.), *International Law*, (Oxford University Press, Oxford, 2006) p. 594 *et seq.*

<sup>14</sup> *See for example* Charter of the United Nations, art.1 and 52(2).

bringing knowledge and aid in the transitional justice process they can help the situation.

So, in summary, the actors and their respective powers play a large part in how the transition comes about and what it will look like. Since no two situations are exactly the same it is important to have an overview of the whole situation when deciding how to deal with it and how to deal with the different actors.

### **2.1.3 Other Factors Affecting the Transition**

Different factors, including but not limited to those mentioned above, affect the transition from an authoritarian state to democracy. According to Sriram there are three important things to consider.<sup>15</sup>

Firstly the situation is affected by the nature and intensity of the conflict or the human rights abuses. This is decisive in what the feelings among the public will be and in how much anger and resentment there is standing in the way of peace and reconciliation. If the conflict has been long and bloody, that can affect the outcome in either way. The victims hunger for justice may be stronger but the people may also be tired of war and eager to find any solution that will stop the conflict.<sup>16</sup> Thus, according to Sriram, the endurance and the numbers of casualties matters, but so does the nature of the violations. “Disappearances and torture have different psychological, social and political effects from killings where the location of the dead is acknowledged or where detentions do not result in deaths”<sup>17</sup>, since killings, though terrible, does not have the trauma of not knowing what has happened to your loved ones.

Secondly the prior relations and the subsequent reforms on the relations between the military and the civil society also strongly influence the transition. This has mostly been discussed above, under 2.1.2, so I will not embellish on this further here, I will merely point at the “subsequent reforms” part. This is sometimes an important factor that is easily forgotten. Sometimes the regime in a state is also actively seeking, if not a transition, then at least to make the situation more stable. It may therefore make changes in its laws and practices in order to calm the situation which can help making the transition go more smoothly. There can however also be situations where a state in order to stabilize conditions will make changes in its policies for the worse with the idea that stricter laws and stricter use of governmental powers may keep the population in check. This will then be a problem when the transition comes to pass.

Thirdly and lastly the effect of the measures taken by the international community on the peace versus justice process is also an important

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<sup>15</sup> Sriram, *supra* note 10, p.22.

<sup>16</sup> *Ibid.*, p.22 footnote, nr. 7.

<sup>17</sup> *Ibid.*, p. 22f.

consideration. This has also mostly been discussed above in the same section, 2.1.2.

As we can see, most of the factors Sriram mentions are based on the relationship between the different actors. It is of course true that the actors, their relationships and their acts are in many cases the strongest ingredients affecting the shape of the transition. However, there are other ingredients as well and Sriram chooses not to focus strongly on them as might be need in order to get a completely clear picture of the situation.

## 2.2 The History of Modern Transitional Justice

In countries faced with a situation of transforming from a society of violence and human rights abuses to peace, democracy and protection of human rights special concerns emerge. Not only issues of justice and reparations are at hand but also issues of reconciliation and national unity since stabilization is an important factor in preventing future outbursts of violence.

In the past this has mainly been an area of victor's justice or diplomacy between strong factions but during the later parts of the 20<sup>th</sup> century the concern has evolved it into one where the rights and welfare of individuals has come to be an issue of international law. With the formation of the United Nations and the drafting of the Universal Declaration of Human Rights after the Second World War the focus of the international community was changed and broadened and human rights became an ever growing and evolving part of international law. This brought about a change in the mindset of international actors that has eventually led to the development of transitional justice to the area of law that it, although as of yet somewhat undefined, is today.<sup>18</sup>

The modern transitional justice approach is a quite new addition to the sphere of international law. According to the International Centre of Transitional Justice (ICTJ) it;

“...emerged in the late 1980s and early 1990s, mainly in response to political changes in Latin America and Eastern Europe and to demands in these regions for justice. At the time, human rights activists and others wanted to address the systematic abuses by former regimes but without endangering the political transformations that were underway. Since these changes were popularly called "transitions to democracy," people began calling this new multidisciplinary field ‘transitional justice’.”<sup>19</sup>

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<sup>18</sup> Bickford, *supra* note 4.

<sup>19</sup> International Centre of Transitional Justice, *supra* note 3.

The field has since developed and grown, gaining an important foundation in international law through development in case law as well as in customary law and conventions.<sup>20</sup>

An important early role was played by the 1988 decision of the Inter-American Court of Human Rights in the case of *Velásquez Rodríguez v. Honduras*<sup>21</sup> in which the Inter-American Court found that all states have four fundamental obligations in the area of human rights;

- To take reasonable steps to prevent human rights violations;
- To conduct a serious investigation of violations when they occur;
- To impose suitable sanctions on those responsible for the violations; and
- To ensure reparation for the victims of the violations.”<sup>22</sup>

Later decisions by the Inter American court have affirmed those principles and both the European Court of Human Rights and UN treaty bodies such as the Human Rights Committee has used them.<sup>23</sup>

Another significant milestone in the development of transitional justice that has to be mentioned is the creation of the International Criminal Court (ICC). This is a new addition to international criminal law and thus to transitional justice and it has great possibilities of evolving the area further, even though it has yet to be used enough to give a clear praxis and although it might lead to certain problems concerning amnesty laws and the peace-justice divide, demanding prosecution in situations where it might obstruct peace.

There are also evolvments happening due to the changes in the nature of the conflicts and abuses happening around the world. The International Centre for Transitional Justice (ICTJ) state that

“New practical challenges have forced the field to innovate, as settings have shifted from Argentina and Chile, where authoritarianism ended, to include societies such as Bosnia and Herzegovina, Liberia and the Democratic Republic of Congo, where the key issue is shoring up peace. Ethnic cleansing and displacement, the reintegration of ex-combatants, reconciliation among communities and the role of justice in peacebuilding have become important new issues.”<sup>24</sup>

There is no doubt that this is an area where we will see more development in the future, as the dictatorships and conflict zones of today will hopefully also undergo this transition in due time. The more we learn of this area, the

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<sup>20</sup> See for example the Geneva Conventions, *supra* note 5.

<sup>21</sup> *Velásquez Rodríguez v. Honduras* 29 July 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 paras.165 *et seq.*

<[www1.umn.edu/humanrts/iachr/b\\_11\\_12d.htm](http://www1.umn.edu/humanrts/iachr/b_11_12d.htm)>, visited on the 26 may 2009.

<sup>22</sup> International Centre of Transitional Justice, *supra* note 3.

<sup>23</sup> See for example *Cases of Kurt v. Turkey*, 25 May 1998, ECtHR, 15/1997/799/1002, *Šilih v. Slovenia*, 9 April 2009, ECtHR, Application no. 71463/01, and *Sankara et al. v. Burkina Faso*, 28 March 2006, HRC, Communication No. 1159/2003.

<sup>24</sup> International Centre of Transitional Justice, *supra* note 3.

more it evolves, we see the need for effective forms of transitional justice helping states through turbulent times.

## 2.3 Theoretical Issues in Transition

In the process of transition many philosophical and ethical questions arise concerning how we should handle concepts like the rule of law and justice in times when those notions that we take for granted may clash with other values that needs to be achieved in society, like peace and human rights protection. Below I will discuss some of these issues that I find are important to consider when later assessing the values of the different models of transitional justice. These are questions where there might not be a clear answer; rather we have to balance the different notions against each other.

### 2.3.1 The Rule of Law

The process of transition has a conflict inbuilt in regard to the concept of the rule of law. The rule of law is an important ideal because in a democracy we are following known rules instead of arbitrary governmental decision. This gives us the possibility of planning our actions and to trust society to not prosecute us for invalid reasons, in contrast to the *rule of men* where we are left to follow the whim of whoever may be holding government.

But what happens when the laws are immoral and a part of the abusive system? Teitel writes: “There is a tension between the rule of law in transitions as backward-looking and forward looking, as settled versus dynamic.”<sup>25</sup> In a transitional society the whole concept of law and justice is often changed, so how then do you keep the foreseeability and legal security that the rule of law offers? If in a normal situation the rule of law means regularity and observance of a stable set of rules, how does this apply in transitional societies?

There is historically a debate about the nature of law as a whole, positivism versus natural law. The positivists would argue that one has to recognize the former regime as, though immoral, lawful, making prosecutions impossible as long as the regime adhered to domestic law. The advocates of natural law would answer that higher norms than the domestic rules has been broken, making the former law not only immoral but also illegitimate and those performing the abuses are violating codes of law as well as codes of morality.

Today it is rather a question of international norms versus state sovereignty. International law, both in conventions and in international customary law, set up rules of human rights protecting the citizens from governmental abuse. These rules are above domestic law and thus solve a great part of the problems of justice in transitional times.

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<sup>25</sup> R. G. Teitel, *Transitional Justice*, (Oxford University Press, New York, 2000) p.11.

There is still a problem however in the areas that international law does not clearly cover. If there are oppressive pieces of law that are not clearly overruled by international law, what happens then? The easiest and most consistent way of dealing with the law would probably be to interpret it in the light of the international law, trying to keep a consistent view of the law in the adjudication, similar to the process used in Europe under European community law.<sup>26</sup> But this will lessen the foreseeability remarkably, leaving us with the same problem we started out with even though on a lesser scale.

The conclusion has to be that whatever we do and however justified the acts are, some of the concept closely connected with the idea of the rule of law will have to take a step back in some aspects in order to further the concept in other aspects. This is, however, a price we have to pay for change and the practice of the law will eventually be more consistent and thus in the end easier to understand and foresee as well.

On the other hand, in time this issue will probably be more resolved due to the constant development of international law. Important questions like human rights protection will be covered, leaving only less important issues unresolved and providing a greater universal protection of individuals.

## 2.3.2 Peace versus Justice

There is, in the question of how to handle past wrongdoings and past conflict, a possible clash between peace and justice. In a peaceful democracy we are taught that peace and justice are interdependent. That in order to have peace we need to have justice and in reciprocity we need justice in order to have any lasting peace. The justice system does not survive long in a country torn by conflict, neither does any peace last for long in a society that has abandoned, or never achieved, justice.

In contrast, when it comes to states in the process of transition it may not be as easy as that. In the face of transition, peace and justice may not always go hand in hand; in some situations one may prevent the other. To put the perpetrators to justice may help the victims move on or it may cause further

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<sup>26</sup> *Von Colson* (Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen) 10 April 1984, ECJ, 14/83 ,  
<[eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61983J0014:EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61983J0014:EN:HTML)>  
visited last 13 June 2009, *Pfeiffer* (Bernhard Pfeiffer (C-397/01), Wilhelm Roith (C-398/01), Albert Süß (C-399/01), Michael Winter (C-400/01), Klaus Nestvogel (C-401/01), Roswitha Zeller (C-402/01) and Matthias Döbele (C-403/01) v Deutsches Rotes Kreuz, Kreisverband Waldshut eV) 5 October 2004, ECJ, C-397-403/01,  
<[eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001J0397:EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001J0397:EN:HTML)>  
visited last 13 June 2009 and *Marleasing* (Marleasing SA v La Comercial Internacional de Alimentacion SA) 13 November 1990, ECJ, C-106/89,  
<[eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61989J0106:EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61989J0106:EN:HTML)>  
visited last 13 June 2009.

strife as the members of the losing faction rebel against the punishments of their leaders or comrades.

This is something that can affect the comparison between truth commissions and tribunals as well. If the call for justice hinders the evolvment of peace there may in some situations be a need to deal with the past in other ways than with prosecutions, for example with truth commissions. Sometimes it may be that peace in the short run has to stand back in order for justice to prevail, giving priority to the prosecution of criminals.

However, it is a key to consider what truly constitutes justice. If we by justice refer to the traditional western retributive justice, where criminals should be put to trial and punished for their deeds, it may be difficult to consistently combine with an effort to strengthen stability and peace. But justice can also be seen in the broader sense of the word, as we already do in a way when we talk about transitional justice. Measures taken specifically to promote peace, while not ‘just’ in the retributive, traditional, sense of the word may be appropriate if we view justice as a broader concept, taking into account other forms of justice as well.

One way of doing this that merges well with the concept of transitional justice is to put the needs of the victims and the civilian population in centre instead of the crimes and the perpetrators. Then we can try to see the needs of the individuals instead of the requirements of a system to put criminals to trial. The victims may very well be better off if stability is prioritized over retributive justice if that justice might ignite a new outburst of violence. When we look at justice this way there may not always be a conflict between peace and justice.

Nevertheless, we must remember that the peace and justice conflict has to be taken into account when deciding on what methods to use when handling the intricate situation of a transitional society.

### **2.3.3 Prosecution versus Amnesty**

In a more practical sense, the justice versus peace divide often concerns the question of whether to prosecute or grant amnesty and then it is important to know the arguments for and against both, which will be more closely explored below.

In the eyes of human rights advocates and victims of human rights abuses, amnesty in transitional societies is often seen as “dealing with the devil”.<sup>27</sup> In the peace versus justice dilemma discussed above it is seen as the complete sacrifice of justice on behalf of political stability. The fact that it is the perpetrator getting what they want instead of fair punishment while the

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<sup>27</sup> L. Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide*, (Hart Publishing, Oxford and Portland, Oregon, 2008) p. 1f.



victims are in a way asked to forgive and forget makes this a mockery of justice in the eyes of victims and those who fight for the rights of victims.

This is also the persisting view in international criminal law since it is based on retributive justice. The question has already arisen in regard to how the ICC should handle amnesty laws since it is not concerned with how the national law looks in this respect.<sup>28</sup>

However, Mallinder argues that this view is neither the most objective nor the most practical one.<sup>29</sup> Rather than letting peace completely overthrow justice in the peace versus justice dilemma amnesty laws can act as conciliation between the two.

In the question of the impact amnesty laws has on reconciliation processes, she argues that amnesty may actually have a positive impact, rather than impairing it.<sup>30</sup> Instead of believing that “there can be no just and lasting reconciliation unless the need for justice is effectively satisfied”<sup>31</sup> with the view that justice always has to mean traditional, retributive justice, one should look at the values that the granting of amnesty, if used right, can bring into the reconciliation process.

If the arguments against amnesty with the regard to seeking reconciliation are that a transitional government that grants amnesty may be seen as disregarding the needs of the victims, leading to the public losing confidence in the government and in the rule of law, and to a society where human rights are held in lower regard, and where, since the signal has been sent that you can violate human rights and get away with it, the risk of future violations, both from the same perpetrators and from others, are more likely.

The answer is that firstly, you can not build lasting peace on conditions that crush the losing party completely. The prosecutions, even if they are just, may sometimes serve to maintain a structure of ‘us versus them’ where violence may have fertile soil to grow again, especially in societies where the strength is very evenly divided between groups. There is also an idea, that has been dominant for example in the South African TRC that rather than focusing on blame the society should try to seek forgiveness, show mercy and try to address root causes instead.

Secondly, when it comes to the argument about what signals of deterrence prosecution or amnesty may send to society, it can be argued that the threat of prosecution can, instead of limiting violence, once the violence has already started serve to perpetrate it instead, or as Mendez puts it; “the threat of prosecution can be a clear disincentive for actors in an armed conflict to

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<sup>28</sup> Ibid., p. 279 *et seq.*

<sup>29</sup> Ibid., p. 1 *et seq.*

<sup>30</sup> Ibid., pp. 16 *et seq.*

<sup>31</sup> Ibid., p. 17, footnote 75, UNCHR (n 6) preamble.

give up their resort to violence.”<sup>32</sup> It may make it harder to find a peaceful resolution to the conflict and make international criminals put down their weapons since they know that they will then be prosecuted. This is a problem for example in Uganda where the leaders of the Lords Resistance Army (LRA) are facing the threat of prosecution by the ICC if they should lose their guerrilla war or surrender.<sup>33</sup>

Another argument to grant amnesty is that the perpetrator themselves may sometimes be victims too. The ordinary soldiers in LRA mentioned above are for example often child soldiers, abused and kept in a form of slavery. Thus, there is a moral problem in prosecuting them even though they have committed hideous crimes.<sup>34</sup>

Most transitional societies tend to prosecute the perpetrators when it is possible but sometimes the situation speaks against prosecutions. It may be because there is such a high amount of perpetrators that it will be impossible for the justice system to deal with or the power-balance in society may act as an obstruction to prosecutions, posing as a threat of violence if members or followers of a former regime are punished. In most cases the state would then try to find a middle ground between the polarities of prosecution or amnesty. For example in the case where the sheer amount of criminals hinders the justice from being done this is the most plausible answer to the problem. Then you can chose to put to justice those who have committed the worst crimes and those that have been responsible for leading or ordering the violations, and provide amnesty for the “foot soldiers”.

There is of course another scenario as well that may occur in situations of transformation or transplacement, where the old regime as a condition for the transition demands amnesty. Then you have the classic peace versus justice question put to the front; is amnesty a prize you are willing to pay for peace? Sometimes you don't have a choice, for example in many transformation situations but in other situation you have to balance the different interests in order to answer this question. One way of doing so can be to consider conditioned amnesties.

There is a difference between amnesty that is conditioned and amnesty that is given unconditionally. That type of blanket amnesty is described as applying without requiring any form of application or even any inquiry into the facts to see if a certain crime fits into the scope of the law.<sup>35</sup> This is different from the more limited institution of conditional amnesty that can be given for example in the exchange for truth or some other value that the nation needs, maybe to act as a reparative measure for the victims or to act

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<sup>32</sup> J. E. Méndez, ‘Accountability for past abuses’, 19 *Human Rights Quarterly* (1997) pp. 255- 282.

<sup>33</sup> See for example S. Manisuli, ‘The International Criminal Court and the Lord's Resistance Army Leaders: Prosecution or Amnesty?’ 7 *International criminal law review* (2007) pp. 361-389.

<sup>34</sup> Mallinder, *supra* note 27, p. 18.

<sup>35</sup> *Ibid.*, p. 6.

in order to further assure peace and stability.<sup>36</sup> It can be that this form of conditional amnesty may offer an answer to the problem of finding a path to reconciling the wants and needs of all involved and perhaps an answer to the peace versus justice dilemma in transitional societies where the situation makes it hard to reach full accountability through courts or tribunals and still maintain stability.

Mallinder identifies seven different types of conditions in amnesty laws: “Surrendering and disarming; applying within prescribed time limits; repenting and providing information on comrades; telling the truth; repairing the harm; participating in community-based justice mechanisms; and submitting to lustration or vetting processes.”<sup>37</sup> Some of them are mainly a part of the amnesty process while some add an extra element to it. It is those conditions that are interesting in a theoretical discussion, since they may actually add an element of accountability and reparations for the victims.

When it comes to the context of tribunals versus truth commissions, amnesty laws can be introduced together with either one of them. Together with criminal trials, amnesty laws act as delimitation on whom or for what you can prosecute. This has the problem of leaving a blank spot in the justice system, justice will not be administered for certain crimes and if it is not paired with any other form of transitional justice some victims will have neither recognition nor reparation.

Together with truth commissions this works better and amnesty has actually been used as a part of the “truth commission deal” in some cases, for example in the aforementioned South African TRC, in order to enhance the possibilities of the truth commission of actually unearthing the truth, amnesty has been given to those who chose to aid in that effort. This way of dealing with it of course has its problems in not putting to trial all the criminals and the problems that entails but it has no obvious blank spots when it comes to the victims being recognized. Unless paired with some form of reparations there will however still remain a deficit in that area.

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<sup>36</sup> Ibid., p.153.

<sup>37</sup> Ibid., p. 154.

# 3 Tribunals

The traditional way of dealing with perpetrators is of course by prosecution before a court and this is seen as the core of transitional justice. International law demands that those responsible for human rights violations and other crimes under international law are dealt with.<sup>38</sup> This can be done in national courts, international tribunals, mixed or internationalized tribunals or due to more recent developments in the permanent International Criminal Court (ICC).

Below, in 3.1, I will take a closer look at international and internationalized tribunals, giving the background to why and when you chose to set up this form of courts instead of letting domestic courts deal with the crimes committed.

In 3.2 I will examine the ideals that underlie those courts. Prosecuting criminals seems like a natural response and the right thing to do in order to see justice done and to make a clear statement that it is not acceptable to commit crimes but it is clearly not the only one. Since there are other ways of dealing with past atrocities than putting the criminals to trial and punishing those found guilty we have to look closer at what the arguments are for choosing this measure of dealing with crime, be it international or national. Why is it right to prosecute criminals? And is it always right to do so? What goals are you furthering when you prosecute those who have committed international crimes, and what goals are you sacrificing? Below, I will try to answer those questions by looking at the philosophical ideals that form the basis of modern retributive justice.

After that I will consider a couple of examples of courts that have dealt with issues of transitional justice, attempting to link the theory to specific cases. This way we will be able to at least try to undertake an exploration of what the values are that have guided the most famous instances where, on an international level, prosecutions of perpetrators have been used in the form of a transitional justice measures.

Since the concept behind a law or a court in execution might not accurately mirror theory, it is important to look at the practical work of the courts as well. Thus, there will be a short section under each case laying out the findings I have made on how the workings of the court have actually translated into reality. This will mostly try to answer whether the courts have functioned and are functioning in accordance to their intended purposes or not.

After that I will try to give an overview of the results achieved. Did the tribunal reach it is goal? Since most are still in effect it is of course hard to know the exact outcome but how has it progressed so far and what is the

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<sup>38</sup> For example *supra* notes 5 and 21.

situation like in the state today? Are there still serious breaches of human rights law? What is, according to experts, the outlooks for the future?

Lastly in each state section I will try to give a clear conclusion of my findings about that specific situation and whether it has been effective in respect to preventing future human rights violations.

### 3.1 Dealing with Transitional Justice Through Courts

International criminal law is a fairly new branch of international law. It developed from international human rights law and national criminal law as the need for it became more and more obvious. In the beginning international law just prohibited certain international crimes while leaving it up to the states to carry out the jurisdiction but over time an international criminal law actually dealing with adjudications and punishments as well has developed. However, the basis is still that the crimes forbidden in international law are punished on a national level. This has led to the national courts fleshing out the prohibitions, creating their own praxis and using their own procedural law and their own approach to the substantive criminal law.<sup>39</sup>

There are practical explanations for this development other than just some form of 'legal evolution'. We should remember that as a rule, national courts are best suited for dealing with the international crimes for several reasons, mostly practical. For example this is probably where most of the evidence is, where the witnesses are and where the judges may have a better understanding of the civil population and the situation of the victims.<sup>40</sup>

The special development and how it is used in practice is why international criminal law shows certain characteristics that makes this an area of law that has a somewhat underdeveloped feeling associated to it. For example the international crimes lack scales of penalties and the crimes themselves lack a clear definition.<sup>41</sup> One example of this is found in part 2, article 5(1) of the Rome Statute for the ICC, where the crime of aggression is prohibited, yet it is, unlike the other crimes under the jurisdiction of the court, not clearly defined in any of the other articles.<sup>42</sup> It may also be why there is a lack in the doctrinal works of discussion about the principles behind international criminal justice being based on prosecutions, as we shall see below in section 3.2.

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<sup>39</sup> Evans, *supra* note 13 p. 721.

<sup>40</sup> C. P. R. Romano *et al.* (ed.), *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo and Cambodia*, (Oxford University Press, Oxford, 2004) p. 4.

<sup>41</sup> Evans, *supra* note 13 p. 720.

<sup>42</sup> Rome Statute of the International Criminal Court [as corrected by the procès-verbaux of 10 November 1998 and 12 July 1999], Part 2, Article 5 *et seq.*  
<[untreaty.un.org/cod/icc/statute/romefra.htm](http://untreaty.un.org/cod/icc/statute/romefra.htm)> visited last 9 June 2009.

Not even with the development of the international tribunals the world has seen in the last decades are the crimes as they are prohibited in international law made much clearer. The tribunals set up for Rwanda and Yugoslavia, and later the internationalized courts set up in for example Sierra Leone, are only focused on a very narrow jurisdiction, only proscribed for their specific circumstances rather than creating a criminal code.<sup>43</sup>

The ICC on the other hand is too new yet to have produced any substantial praxis that we can rely on for guidance in the field. In a few years, with more states ratifying its statute, the ICC may however be able to provide us with a clearer picture of what international criminal law is. Until then we need to work with what we have, national courts and the occasional international tribunals, giving us some help in finding out how international criminal law works in transitional societies.

In transitional societies there are some special issues to consider. There are often certain problems preventing the national courts from effectively adjudicating international crimes. Sometimes the justice system does not work at all due to turmoil. Often it has been state agents carrying out the atrocities, leaving the people with deep distrust for the state and the justice system and the justice system itself in the position of trying to reform itself. And when it comes to courts of other states than the one who has the territorial jurisdiction they are often reluctant to use their universal jurisdiction over perpetrators who happen to be on their territory for political reasons.<sup>44</sup>

In this case it is the responsibility of the international community to step in and try to solve the situation, since it might otherwise lead to more violence if the abuses in a society are left unaccounted for. This can, as mentioned above, be done through international and internationalized courts or tribunals.

### **3.1.1 International and Internationalized Tribunals**

International or internationalized courts or tribunals are needed the most in situations of “civil strife, international armed conflict, dictatorship in a particular country, or where there is a rift at the ethnic or religious level between groups in the country.”<sup>45</sup> These leads to the problems with national courts mentioned earlier and are common in transitional societies especially.

There are however some conditions that have to be fulfilled for an international tribunal to come into existence.<sup>46</sup> Firstly there has to be a problem with the national courts administration of justice. They do not have

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<sup>43</sup> Evans (ed.), *supra* note 13 p. 721.

<sup>44</sup> Romano *et al.* (ed.), *supra* note 40.

<sup>45</sup> *Ibid.*, p. 5.

<sup>46</sup> *Ibid.*

to have suffered a complete collapse, just an inability to administer justice in a fair and safe way, for example they can be biased and therefore not trusted by the public. Secondly there has to be a will in the international community to set up such a tribunal, implying that there has to be a certain amount of involvement or at least concern on an international level. Thirdly there also has to be a political will to find funding for the tribunal, since it is a costly solution.

If all of these conditions are fulfilled an international ad hoc tribunal may be established. This was the situation in former Yugoslavia and in Rwanda, making the tribunals possible in those cases.

In order for internationalized tribunals to be an option there are also some conditions that has to be fulfilled. These can be identified by the following conditions:<sup>47</sup> Firstly it is necessary that the national judiciary system is at least partly available, so that there is a possibility to rely on national courts to some extent, if not fully. Secondly you have to have a situation where there is a need to “assuage the nationalistic demands of the local population”<sup>48</sup>. This is something that happens in situations where the national state views the administration of justice as an intrinsic part of state sovereignty, leading to problems with accepting for example the adjudications of an international tribunal. Thirdly you need a lack of political will in the international community to set up a true international tribunal, or at least a lack in will to provide proper funding for it.

There are some values to international tribunals that internationalized tribunals lack and vice versa. International tribunals have the value of hopefully being more impartial than national courts that have been involved in the conflict. Since they are only set up in extraordinary situations they tend to be necessary, providing justice where it otherwise would be impossible to obtain. They are also more closely connected with international law norms, perhaps being more objective in applying them. Another positive aspect is that an international tribunal will be more closely watched by both media and experts, helping to spread knowledge about the situation throughout the world.

The problem is that they are very far from the situation and the people affected by it. The public of the society concerned may have difficulty following the proceedings and sometimes with trusting the tribunal since it is something foreign that they know little about and can not connect to. The distance may also be a problem for the judges, making it harder to get a clear picture of what has happened and what the situation truly is.

Internationalized tribunals, however, display some other values that are specific to this kind of tribunals that Romano, Nollkaemper and Kleffner account for, arguing for the values of some of them.<sup>49</sup>

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<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid., p. 6.

The judges are familiar with the territory, the language and the habits of the accused and I would add that this is often true when it comes to victims and witnesses as well, adding even more background and understanding. Moreover, the internationalized tribunals have the advantage of being held on the territory of the state where the crimes have happened. This makes them closer to the civil population of that state with the benefit of the people being aware of what is happening and able to take part in the findings about the past that unfold during the trials. This has the added values of both making those who sided with the perpetrator aware of the truth and to add an aspect of public stigmatization and thus being an addition to the just retribution of the crime. One could argue that this can have a value in the reconciliation process. Also, they may have the added benefit of through the processes giving a democratic legal training to the local members of the court and to other lawyers involved in the process.

Lastly, through the in international involvement, they should still have the value that we found in international tribunals of being able to administer justice with full respect for human rights and international criminal law.

There are however some problems with such courts as well. These involve practical problems with making the national and international parts of the tribunal operating smoothly together despite differences in experiences, views and legal culture, for example the difference in legal culture may make it hard for the court to find its working order and differences in cultural background can complicate communications between the judges, and with funding of this type of tribunals.

There are also some legal problems.<sup>50</sup> Firstly there can be a problem in identifying a coherent body of both criminal and procedural law to use. This is hopefully addressed when the court is set up so the proceedings can function fairly smooth after that. Secondly there might be a problem with the cooperation with local authorities in the national state and in other states that may be involved. The legal issue that arises then is that the court seldom has any means of inducing them to cooperate, should they fail to do so. This is something that is rarely addressed in the agreements and that should be considered before the problems arise.<sup>51</sup> Thirdly there is a problem in most existing internationalized tribunals in that they do not provide for financial aid, which is important to ensure everyone's right to a fair trial.

However, many of the problems that have been discussed above with these two forms of international tribunals can be at least partially solved if addressed properly. Few are intrinsic and beyond repair. What has to be studied as well though is the theoretical philosophies behind them. On what moral basis do we set up tribunals to punish perpetrators? What is it that we seek to achieve? This will be addressed in the following section.

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<sup>50</sup> Ibid., p. 8.

<sup>51</sup> Ibid.



## **3.2 Theoretical Underpinnings of Tribunals**

The idea that prevails in international criminal law and that is the basis for the international tribunals that have been set up so far is the idea of retributive justice. The reason that this is the prevailing idea of justice in international society is probably that it is the most widespread idea of justice in national law throughout the world.

When it comes to the internationalized ‘hybrid tribunals’ the philosophies that guide them are mostly founded on the same ideas as the international ones, even though international law and tradition is mixed with domestic, so they will not be discussed separately from a philosophical point of view here.

Retributive justice is basically the idea that crimes should be punished. There are different theories on why it is so, how it should happen and who should be punished, but the idea is in essence that no matter why there are rules that we should follow, there has to be consequences if we do not. What those consequences should achieve varies however. Below I have chosen to look at two of the most common theories behind retributive justice.

The theories have different arguments for using punishments as an answer to crime and, due to a lack of literature discussing the issues, it is a bit hard to find out which theory international criminal law adheres to even if there seems to be a clear favour for deterrence ideals.<sup>52</sup> They are however important to discuss. Since the prevailing idea in international criminal law is that criminal justice equals retributive justice, this is often taken for granted, it is essential that we ask ourselves why it is so. Retributive justice is not the only theory that exists on how to deal with crime and thus we have to look at the arguments for and against it in order to be able to compare it with other views.

### **3.2.1 Common Theories: Retributivism and Utilitarianism**

There are different theories that argue for retributive justice. Below I will explain a few theories that dominate the area, focusing on retributivism and consequentialism in the form of utilitarianism.

The theory behind retributive justice that is probably the oldest and the most original is the philosophical idea of retributivism. The embryo for this view existed already in early societies where vengeance was the same as justice. In Exodus 21:23-27 in the bible we can read “an eye for an eye, a tooth for a

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<sup>52</sup> See for example Security council resolution 827, 25 may 1993, UN doc S/RES/827 (1993) and Security Council, resolution 955, 8 November 1994, UN doc S/RES/955 (1994).

tooth". In its crudest form this is basically simple vengeance, allowing everything as long as it is reciprocal to the crime first committed. Even when justice had, due to development of criminal laws, become a matter of state rather than just an issue between individuals the basic idea was still in many states reciprocity.

The norm here is then simply that a crime should have a consequence that is proportional to the crime. This is based on the idea that if it is equal then it is just. So if someone causes suffering they have deserved to suffer in equal amount to the suffering they have caused.

The greatest problems with this idea, both from a moral and a practical point of view, are firstly that it does not consider the consequences; there is no purpose with the punishment other than evening out the score, no goal to be achieved other than that; and secondly; that it does not care about the values of human rights and inherent dignity in the punishment; once you've committed a crime you have in the same extent relinquished your human rights. This is of course a view that is not reconcilable with the inalienability of the human rights.<sup>53</sup>

The other more common approach is consequentialism, of which the most common theory is based on a utilitarian approach, but you can of course take other approaches as well. This approach does not view reciprocity as the goal of criminal justice. Instead it is, at least when taking the utilitarian approach, based on the idea that things or actions should be valued according to its utility, because the moral thing to do is to try to maximize the total amount of happiness.

A utilitarian view on criminal law tells us that if the happiness in society is greater when we put some people behind bars, that is what we should do. From a utilitarian point of view punishment has no intrinsic value; equal suffering does not make things 'just'. Especially since punishment in itself is suffering, not happiness, it should be avoided unless it leads to a greater amount of happiness for more people. This is however the case if there are other positive effects of the punishment.

The positive effects that you can, from a utilitarian point of view, see with retribution in the justice system are the following: Firstly, the threat of punishment will lead to deterrence from crime, leading to greater safety and thus more happiness in society. Secondly, punishment may lead to the wrongdoer seeing the error of his or her ways and changing for the better. Thirdly, if you put someone away you disable them from repeating the crime, leading to crimes being prevented and society more secure, to the utility of everyone except the perpetrator.

Here, however, you also have one of the greatest problems with utilitarianism, especially from a human rights point of view. Because

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<sup>53</sup> Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993 < [www2.ohchr.org/english/law/pdf/vienna.pdf](http://www2.ohchr.org/english/law/pdf/vienna.pdf)> visited last 27 may 2009.

utilitarians can, although some argue that they would not because it would create fear outweighing the utility, sacrifice some individuals for the greater good in ways that are not compatible with human rights standards. Utilitarians can for example accept torture if it will lead to saving innocents, in the ‘ticking bomb scenario’.

Another problem is that, drawn to its extreme, utilitarianism would even accept using innocents as scapegoats if it would increase the total amount of happiness, lessening the actual justice in two ways since there is both a problem then with innocents being convicted and with perpetrators avoiding all forms of justice. However this is an extreme and most utilitarians would argue that the fear of that happening in a society with that praxis would be greater than the gain leaving us with the problem that this argumentation would make scapegoating moral as long as no one knows.

Since utilitarianism is not the only view that argues for consequentialism, some other theories may solve some of these problems, for example liberal theories that put the rights of the individual in centre. The view that is dominant in international law is probably a more modified consequentialist view than the completely utilitarian; one that seeks to achieve the same goals but that is limited by international human rights standards, thus solving some of the worst problems. There is also an element of retributivism, since the vengeance aspect is still present as a part of re-establishing the dignity of the victims. It is for and against this view that I will try to find the arguments below.

### **3.2.2 Arguments For Retributive Justice**

You can argue for retributive justice either from the point of view that it is the right thing to do because it is just and moral in itself, using a retributive mindset, or you can argue that it is the right thing to do because it has the best effect on society.

In my opinion the strongest arguments are found when we argue from the point of view lastly presented above; that it is the right thing to do because it has the best effect on society, as long as it is within certain limits, human rights being the most important.

The most prominent arguments for this view are the ones presented above; that it prevents crime, both on a communal and on an individual level, which leads to a safer society and to individuals not committing crimes and thus hopefully leading better lives; and that it shelters the rest of society from criminals.

Even when having these practical, purposeful goals in mind there is an element of believing that it is also right that your actions should have consequences, because this sends important moral signals out as well, not only deterring crime by scaring potential criminals with the possibility of

punishment but also signalling and fostering a moral value in society and a belief that punishing criminals help the victims to deal with the crime and gives them comfort. Classical retributive values that do have some worth even in a modern, human rights focused society.

### **3.2.3 Arguments Against Retributive Justice**

There are several arguments against the retributive justice as well and as always some are more valid than others. One problem is that the justice systems fail to effectively achieve the set goals. For example, criminal laws all over the world are, on the national as well as the international level, unable to deter from crime and on the level of personal prevention, due to flaws in the penal systems, the rehabilitation fails, or sometimes is even replaced with a situation where criminals are worsened by their punishment, for example due to the climate in prisons.

Another problem is the human rights concerns in some of the approaches mentioned above. Punishment is an area where states have to step carefully in order to not violate human rights and often fail to do so satisfyingly. On a theoretical level this is solved as long as the system is limited by human rights and this is the natural situation when it comes to international criminal justice but on a practical level there are still a lot of problems in this respect, especially in the multitude of domestic legal systems.

Yet another important problem, closely connected to the special situation present in transitional societies, is that retributive justice theories are often too focused on the perpetrators and the crime, forgetting the victim and the society as a whole. In some situations carrying out retributive justice may lead to problems that are not outweighed by the gains, for example in the situations in transitional societies that I have mentioned earlier. It is possible that instead of achieving the set goals it may cause new or increased unrest, or it may be possible to punish the criminals but leave the victims without any recognition, perhaps due to too many victims to make reparations for or to even account for all.

Another problem is the, also already mentioned, situation where there are too many perpetrators for it to be possible to put all to justice. Then we really have no answer from the retributive justice point of view.

So, in conclusion, retributive justice have some problems in answering the special needs of transitional societies that have to be addressed in order for it to be an effective way of dealing with the past.

## **3.3 Former Yugoslavia**

The values of studying the case of the Tribunal of former Yugoslavia lie above all in the fact that it is one of very few international or

internationalized tribunals that have been set up by the international community that has put enough years and cases behind it to give a picture of its successes and shortcomings. Since it is still in session it is of course hard to make a final evaluation but we can get a quite a good idea of the effects it has had so far and of the problems it has. It is also the first international tribunal to be established with a clear basis in international law and it has been an important part of the development of international criminal law leading to the establishment of the ICC.

The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (the International Criminal Tribunal for the former Yugoslavia, henceforth ICTY) was set up by the Security Council<sup>54</sup> under chapter 7 of the UN charter as an enforcement measure in may 1993 and has its seat in The Hague.

It has jurisdiction over the prosecution of serious violations of international humanitarian law committed in the territory of former Yugoslavia since 1991. It has supremacy over national courts based on the provision in art 25 of the UN Charter but its jurisdiction is limited to concern the crimes mentioned in art 2-5 in the statute of the tribunal.<sup>55</sup> Those consist of the grave breaches of humanitarian law that entail individual criminal responsibility, war crimes, genocide and crimes against humanity.<sup>56</sup> Responsible for the prosecution of cases before the court is the Prosecutor, an independent and separate organ of the tribunal.<sup>57</sup>

### 3.3.1 Background

The background is the conflicts that erupted when the Socialist Federal Republic of Yugoslavia collapsed and several states tried to secede from the former republic, creating the states that exist on Balkan today. The conflicts were based on ethnical and religious tensions as well as political, economic and cultural issues.

The conflicts, that have been called the bloodiest wars on European soil since the Second World War, led to the killings of hundreds of thousands in the first genocidal conflict since then and monstrous crimes against humanity including war rapes and other atrocities as well as war crimes. The territory of Bosnia Herzegovina was worst in this regard with more than a hundred thousand deaths between 1993 and 1995. The conflicts were still raging when the tribunal was created and did not end until 2001.<sup>58</sup>

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<sup>54</sup> Security Council, Resolution 827, 25 may 1993, UN doc S/RES/827 (1993).

<sup>55</sup> *Statute of The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (ICTY statute)*, adopted by SC Res 827.

<sup>56</sup> The Geneva conventions of 1949 and the additional protocols of 1977.

<sup>57</sup> ICTY statute, *supra* note 55, art 16.

<sup>58</sup> Webpage of ICTY, *The former Yugoslavia – Conflicts*, <[www.icty.org/sid/322](http://www.icty.org/sid/322)>, visited on 27 may 2009.

### 3.3.2 Theory and Purpose

The legal philosophy behind the court has already been discussed above in 3.2; a form of retributive justice limited by human rights considerations. This is also evident in the fact that these theories, in the form they take in the domestic legal traditions in the states concerned, have a focus on retribution and deterrence rather than rehabilitation.<sup>59</sup>

The purpose was ending the worst human rights violations in the area through achievement of the goals of putting those who had committed grave breaches under the Geneva conventions of 1949 to justice, bringing an end to the conflict and sending out the message that the international community was dealing with the situation.

In the resolution the Security Council states that it is:

*“Determining* that this situation continues to constitute a threat to international peace and security,

*Determined* to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

*Convinced* that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace,

*Believing* that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed”<sup>60</sup>

From this we can distinguish that the goal was to end the breaches and the conflict and promote peace as well as administrating justice for those responsible for the breaches. The idea is both to halt and to redress. So what the Security Council seeks here is both peace and justice.

In the book “Post-war protection of human rights in Bosnia and Herzegovina”, O’Flaherty and Gisvold refer to professor Pellet, who identifies three possible roles for the tribunal; preventive, repressive and

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<sup>59</sup> H. Barbora, S. Alette and B. Catrien, ‘Is ICTY Sentencing Predictable? An Empirical Analysis of ICTY Sentencing Practice’, 22 *Leiden Journal of International Law*, (2009) pp. 79-97, see also *Prosecutor v. Aleksovski*, 24 March 2000, ICTY, Case No. IT-95-14/1-A, App. Ch., para. 185 and *Prosecutor v. Kordic and Cerkez*, 17 December 2004, ICTY, Case No. IT-95-14/2-A, App. Ch., para. 1079. <[www.icty.org/action/cases/4](http://www.icty.org/action/cases/4)> visited last 0n 27 may 2009.

<sup>60</sup> Security council resolution 827, 25 may 1993, UN doc S/RES/827 (1993).

symbolic<sup>61</sup>, but adds that there are other possible role that it may be meant to fulfil as well.

One is the above mentioned contribution to the peace efforts. One aspect of this is the fact that it helps furthering peace and reconciliation by holding individual perpetrators responsible instead of a whole people. Should an ethnic group for example take the blame, new disagreements and violence would not be far of.<sup>62</sup>

Another suggestion is that the tribunal's role is to act as an example, sending out the message that war crimes will not be accepted and hopefully acting as deterrence for future crimes.<sup>63</sup>

A third suggestion is that the tribunal has a preventive role, the one intended when the Security Council states that it should "put an end to such crimes". O'Flaherty and Gisvold however suggests realistically that this is an impossible feat for the tribunal alone, putting the blame for its failure to do so on the fact that the other measures that were adopted as well by the security council never were implemented.<sup>64</sup>

Yet another, very obvious, suggestion is that the purpose is simply to render justice. The problem with this is that defenders, not being used to the system or the language of the court, may be at a disadvantage compared to the international prosecutors.<sup>65</sup>

The last suggestion is that the purpose may be that it is a step towards the creation of a permanent international tribunal, the ICC. As we can see today, no matter whether or not it was a purpose of the ICTY, it was definitely an effect.

I would suggest that all of these were goals that the international community, through the Security Council, hoped to achieve in creating this tribunal to deal with the situation. But I will also add, as I have mentioned above, that an additional purpose may have been to show that the international community did something to prevent the atrocities from continuing. Or as David A. Martin states; "The Yugoslavia War Crimes Tribunal exists largely because of the rest of the world's sense of guilt."<sup>66</sup>

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<sup>61</sup> M. O'Flaherty and G. Gisvold (ed.), *Post-war Protection of Human Rights in Bosnia and Herzegovina*, (Martinus Nijhoff Publishers, the Hague, 1998) p. 210.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid., p. 211.

<sup>64</sup> Ibid., p. 212 f.

<sup>65</sup> Ibid., p. 213.

<sup>66</sup> David A. Martin, "Reluctance to Prosecute War Crimes: Of Causes and Cures, 34 Va. J. Intl. L. 265 (1994), cited by O'Flaherty and Gisvold *supra* note 61 p.198 footnote 11.

### 3.3.3 Practice

Since its creation the Tribunal has indicted 161 accused for crimes committed against many thousands of victims during the conflicts in former Yugoslavia according to the ICTY's webpage.<sup>67</sup> Some of them have been high profile cases, like Slobodan Milošević although he died before he was tried but most are of less interest to the public on an international level.

There was some critique against the tribunal in the mid- to late nineties when there were some accusation of the trials being unfair mostly due to problems in the courts Statute and Rules of Procedure and Evidence<sup>68</sup> but also some due to the involvement of the courts officials in making it possible to bring people to justice in the Hague. This critique however seems to have dissolved somewhat during the years since the last discussion in this area that I managed to find was an answer to the critique from 1997.<sup>69</sup>

Nevertheless there has been some discussion as well on whether the ICTY judgements are predictable or not since there is no clear and objective scale to use when sentencing criminals before the tribunal.<sup>70</sup> In the statute the only guide is that it "should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person."<sup>71</sup> However the court itself has stated that it in its judgement believes that the most important denominator is the gravity of the offence<sup>72</sup> and that "[t]he determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime".<sup>73</sup> This gives us, if not any clear scale, at least the grounds on which the court bases its sentencing on. An empirical study that was presented in 2009 in which it is concluded that it does have predictability and a clear pattern in its sentencing, punishing those of highest ranks more severely and crimes against humanity harder than war crimes.<sup>74</sup>

One remarkable finding in this study however is the fact that those of superior but not the highest, rather middle, ranks giving the orders tend to

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<sup>67</sup> Webpage of ICTY, *Achievements*, < [www.icty.org/sid/324](http://www.icty.org/sid/324)>, visited on 27 may 2009.

<sup>68</sup> Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. IT/32/Rev. 37 (1994).

<sup>69</sup> O. Swaak-Goldman, 'The ICTY and the right to a fair trial; a critique of the critics', 10 *Leiden Journal of International Law* (1997) pp. 215-221.

<sup>70</sup> See for example M. Bagaric and J. Morss, 'International Sentencing Law: In Search of a Justification and Coherent Framework', 6 *International Criminal Law Review* (2006) pp. 191-255.

<sup>71</sup> ICTY statute, *supra* note 55, art. 24(2).

<sup>72</sup> *Prosecutor v. Mucic et al.*, 16 November 1998, ICTY, Case No. IT-96-21-T, T.Ch. II, para. 1225, < [www.icty.org/action/cases/4](http://www.icty.org/action/cases/4)> visited last on 27 may 2009.

<sup>73</sup> *Prosecutor v. Kupreskic et al.* Case No. IT-95-16-T, T.Ch. II, 14 January 2000, para. 852. < [www.icty.org/action/cases/4](http://www.icty.org/action/cases/4)> visited last on 27 may 2009.

<sup>74</sup> Barbora, Alette and Catrien, *supra* note 59.



get lower sentences than the de facto perpetrators.<sup>75</sup> One could argue that it should be the other way around, giving the subordinates less severe sentences than those responsible for making the decisions.

### 3.3.4 Results Achieved

The court itself claims that it has reached successes in a number of areas; when it comes to holding leaders accountable, bringing justice to victims, giving victims a voice, establishing the facts, developing international law and strengthening the rule of law.<sup>76</sup> In some of these areas it is evident that the courts assessment of its own success is correct, especially when it comes to developing international law in this regard, which we can see today with the existence of the ICC and of the other international criminal tribunals.

The Tribunal has in many ways been a pioneer in that it has been the first international tribunal successfully holding individuals accountable for international crimes. When it comes to the question of bringing justice to victims, as the ICTY claims that it has done, this may be true from a retributive justice point of view, even if it is a work still uncompleted. However, if the victims desire something more than only retribution in the form of punishment for the perpetrators, how well has the tribunals done then?

To answer this we can establish that it has, as it states itself, given victims a voice and recognition, which is an important part in the work towards reconciling the society. Even if there are still those whose voices are unheard, it still has time to let them have their opportunity to speak as well. It has also, as the ICTY suggests, helped establishing an account of what actually happened, thus adding an element of what a truth commission does as well since it is creating a record of the past. Lastly it claims to have had successes in strengthening the rule of law, something that it is very likely to do as a by-product of a well conducted work but that it probably tries to work towards as well.

While most of the states are getting close to joining the European Union, a sure sign of stability and are doing their best to respect human rights, others still have issues to deal with that are connected to the old conflict. The most obvious are Serbia and Kosovo, where the situation never really normalized, which led to Kosovo declaring independence from Serbia in 2008.

It is hard to say, however, what part the ICTY has played in the fact that the situation is calmer today and what is due to other reasons, for example the desire to become a part of the European Union etc. We do know however, that even with the establishment of the courts, it took several years before the wars ended, so when it comes to the ICTY stopping the conflict this was clearly not an immediate success.

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<sup>75</sup> Ibid.

<sup>76</sup> Webpage of ICTY, *supra* note 67.

From a human rights point of view, with the goal of preventing further human rights violations, the most important questions we have to ask ourselves are; has it helped? What is the situation like in the states today? Is there still a risk of a new outbreak of human rights violations?

The situation in former Yugoslavia today is considerably different than it was when ICTY was established. Today, the human rights situation has improved remarkably since the nineties but it varies between the different states and it is still not perfect, for example in Serbia the situation has been unstable for a long time due to what has happened in Kosovo, leading to its final secession in 2008. The human rights situation in that conflict was bad enough to be the concern of a form of humanitarian intervention.<sup>77</sup>

The European Court of Human Rights (ECtHR) has some cases from the different states but for most of the states it is not an exceptionally large amount compared to most European states. Croatia however has a large amount of cases, some concerning the serious, 'absolute' human rights like art. 3 torture<sup>78</sup> and a high amount concerning art. 6 the right to a fair trial, for example due to excessive court delays and the denial of effective remedy.<sup>79</sup> This is the situation as well with Slovenia.<sup>80</sup> These are however not the same type of grave- and mass violations that falls under the jurisdiction of the ICTY.

### **3.3.5 Prevention of Future Human Rights Violations**

So how well has the ICTY been able to prevent future human rights violations then? Firstly it is essential to note that it is hard to assess what human rights developments it is possible to give the ICTY credit for. What we can do is look at the general situation in the states as described above in 3.3.4 and attempt to evaluate what developments that the tribunal has had a part in.

What is clear is that the Tribunal was no 'quick fix' for the human rights situation; it is simply not focused on reforming the abusive systems but on putting the perpetrators to trial, the rest is a secondary effect even if stated as a purpose; and we can see this in the fact that changes in this area, even though they have been effective, have taken their time.

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<sup>77</sup> Evans, *supra* note 13.

<sup>78</sup> See for example Case of *Secic v. Croatia*, 31 May 2007, ECtHR, Application no. 40116/02 and Case of *Pilic v. Croatia*, 17 January 2008, ECtHR, Application no. 33138/06.

<sup>79</sup> See for example Case of *Kultic v. Croatia*, 1 March 2002, ECtHR, Application no. 48778/99 and Case of *Acimovic v. Croatia*, 9 October 2003, ECtHR, Application no. 61237/00.

<sup>80</sup> See for example Case of *Matko v. Slovenia*, 2 November 2006, ECtHR, Application no. 43393/98 and Case of *Lukenda v. Slovenia*, 6 October 2005, ECtHR, Application no. 23032/02.

It is clear that in many of these states, even those often taken before the ECtHR, is that they are not brought before the court due to the type of massive human rights violations that is under the jurisdiction of the ICTY. These forms of violations have stopped, even though the situation with regard to human rights is far from perfect.

Something that could possibly affect the outcomes from a human rights point of view is the fact, mentioned above in 3.3.3, that those of middle rank handing out the orders tend to get lower sentences than their subordinates, since this could leave us with a society where we have not given a clear message that this is not an accepted behaviour from governmental officers, which might be a good way to prevent abusive cultures in the government structure. Whether or not this will have a long term effect or not is however not clear. Since the court is focusing on the worst crimes and the worst perpetrators anyway this should be of little consequence.

### 3.4 Rwanda

The reasons for examining the Rwanda Tribunal are somewhat similar to the reasons for looking at the Tribunal for former Yugoslavia that I have stated above in 3.3; it is old enough to provide us with useful information and it is a part of the recent development in the area. There are however differences between the two tribunals as well, especially when it comes to the results achieved, which gives us added knowledge on what problems this approach can entail.

The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, (the International Criminal Tribunal for Rwanda, henceforth ICTR) was set up by the Security Council<sup>81</sup> under chapter 7 of the UN charter in Arusha, Tanzania. The Prosecutor however is shared with the ICTY and has its office in The Hague with a deputy prosecutor located in Rwanda.

It has jurisdiction over the prosecution of those who have committed genocide or other serious violations of international humanitarian law committed in the course of or in relation to the 1994 Rwandan genocide.<sup>82</sup>

The tribunal has concurrent jurisdiction with the competent national courts<sup>83</sup>, but the national courts are subject to the primacy of the ICTR.

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<sup>81</sup> Security Council, resolution 955, 8 November 1994, UN doc S/RES/955 (1994).

<sup>82</sup> Art 1-8 of the *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994* (Statute of the ICTR).

The ICTR is in many ways modelled after the ICTY and they maintain many administrative ties as well as share a common foundation in theory and international law.

### 3.4.1 Background

The background to the Rwanda tribunal is the genocide that took place in Rwanda in 1994, where over a million people were killed in a short time, in a sudden outburst of violence between the ethnical groups of the Hutu and Tutsi while the international community failed to act.<sup>84</sup> However, once the violence had faded the international community stepped in and set up a tribunal similar to the one that had been set up the year before in former Yugoslavia.

The things that are characteristic for the Rwandan genocide, prompting the creation of the tribunal seems to be the nature of the violence and the reactions of the international community.<sup>85</sup> To its nature the violence in Rwanda was particularly horrifying, both because of its sheer brutality and because of the fact that it happened in such a small, closely tied together society.<sup>86</sup>

The reactions from the rest of the world however were mild at its best. Of course there were groups that saw what was happening but the international community paid little interest to the small, African country, with the result of a full scale genocide going unstopped despite the unison 'never again' vowed by the world at the end of the second world war. To try to deal with what had happened the ICTR was set up.

### 3.4.2 Theory and Purpose

The theories behind the ICTR and the purposes set up for it are mostly the same as those for the ICTY already accounted for in 3.3.2 and I will not make a repetition here. Instead I will just mention the differences I have discovered.

One basic difference in the resolution, if compared to the resolution establishing the ICTY,<sup>87</sup> is that the ICTR resolution speaks about national

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<sup>83</sup> Ibid., art 8.

<sup>84</sup> R. Byrne, 'Promises of Peace and Reconciliation: Previewing the Legacy of the International Criminal Tribunal for Rwanda', 4 *Cambridge University Press (CUP)*, (2006) pp. 485-498.

<sup>85</sup> G. Prunier, *Africa's world war- Congo, the Rwandan genocide, and the making of a continental catastrophe*, (Oxford University Press, New York, 2009) pp. 1 *et seq.*

<sup>86</sup> Ibid., *For further reading see for example*; G. Prunier, *The Rwanda crisis- history of a genocide*; (Columbia University Press, New York, 1995) or; M. Mamdani, *When victims become killers- colonialism, nativism, and the genocide in Rwanda*(Princeton University Press, Princeton, 2001).

<sup>87</sup> SC Res. 827, *supra* note 54.

reconciliation, which the ICTY resolution for obvious reasons does not. This should provide a difference in the focus of the process, tuning it somewhat more towards a goal of national unity.

There is also another part in the ICTR resolution that is unmatched in the ICTY resolution;

“*Stressing* also the need for international cooperation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with large numbers of suspects,”<sup>88</sup>

Even more that the ICTY does the ICTR seems like the international community’s way of dealing with its guilty conscious, a way of trying to make up for the fact that the world stood idly by while a genocide was committed.

### 3.4.3 Practice

The early years of the ICTR faced the problem of the tribunal being severely mismanaged by the UN to the point where this has become a critique that has been hard to shed for the ICTR.<sup>89</sup> This, and the slow workings that is a problem inherent to the system of international tribunals, has led to it being criticized for this as well; it has been seen by human rights observers as “a threat to the legitimacy of the system itself”<sup>90</sup> especially since most of the trials depend on the testimonies of eyewitnesses which will weaken as the memories fail or important witnesses pass away.

When it comes to quantity the ICTR has been modest compared to the ICTY as well. The ICTR have handled down judgments in different questions concerning the genocide, mostly focused on its leaders since there are so many perpetrators that there is no chance that the ICTR will ever be able to deal with them all, but even when it comes to those cases it should focus on it has so far only adjudicated a very limited number.<sup>91</sup> That is also why, as is mentioned below in 3.4.4, the government has chosen to launch the Gacaca Project.

There is also a problem in the connection between the tribunal and the public of Rwanda, something that Byrne points out as affecting the effects of the ICTR:

“In spite of a mandate focused on peace and reconciliation, the Tribunal was late to develop effective outreach programmes in Rwanda that explained the process of international justice and the progress and substance of the trials to the society most

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<sup>88</sup> SC Res. 955 *supra* note 81.

<sup>89</sup> Byrne, *supra* note 84.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

directly affected by the Tribunal's work. Perhaps the greatest obstacle to the Tribunal's function as a reconciliation mechanism has been the exclusive prosecution of Hutu perpetrators of the genocide, and the non-prosecution of the RPF crimes of serious violations of international humanitarian law."<sup>92</sup>

This will be discussed below as well, in 3.4.5.

### 3.4.4 Results Achieved

Compared to the ICTY there has been very little and fragmented coverage in international media of the ICTR, which, together with an obvious lack of rigorous research on the effects of the tribunal makes it very hard to evaluate what results the ICTR has achieved, or, as Byrne puts it; "...there is a weak empirical basis for projections of the broader legacy of the ICTR and its relationship to peace and reconciliation. Previewing legacy in this case relies heavily upon underlying assumptions regarding the role of international justice in delivering peace."<sup>93</sup>

However, we could try to look at the results so far. If the situation in former Yugoslavia is considerably better, the changes have gone slower in Rwanda. It is still a poor country with human rights problems. Just like in Yugoslavia however, the tribunal did not stop the violence. In Rwanda it spilled over to neighbouring countries, starting what by some has been called 'Africa's world war'<sup>94</sup>.

The last report of the situation in Rwanda available on the UN webpage before the Special representative for Rwanda was taken home is from 2001. At that point the situation had eased a bit but the situation was still in unrest, as we can see in the special representative's end note:

"The Special Representative wishes, once more, to conclude his report by urging all concerned authorities and organizations, in Africa as well as in the United Nations, to use all possible means to ensure that peace and security finally prevail and are respected throughout the Great Lakes region; that all civilian populations in the region are fully protected; and that their basic economic needs are fulfilled. These are the fundamental requirements for allowing a culture of human rights to develop and to take deep root in the region."<sup>95</sup>

Since then some developments have taken place, bettering the conditions of the people.<sup>96</sup>

The Human rights situation in Rwanda is however still not even close to a solution, and the nation has not healed yet from its many scars. In an attempt to address this issue the government has introduced the Gacaca

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<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> G. Prunier, *supra* note 85.

<sup>95</sup> Commission on Human Rights, *Situation of human rights in Rwanda*, (E/CN.4/2001/45/Add.1), para. 58.

<sup>96</sup> Webpage of SIDA <[www.sida.se/sida/jsp/sida.jsp?d=299](http://www.sida.se/sida/jsp/sida.jsp?d=299)>.

courts, a traditional means of dispute resolution.<sup>97</sup> They are supposed to deal with the vast majority of perpetrators while the leaders will still be put before national or international courts. Should they be successful it would lead to Rwanda at last finding some form of national reconciliation, something that it is in dire need of. No matter whether the Gacaca are successful or not, the ICTR quite obviously not succeeded in its purpose to deal with Rwanda's past.

With hindsight we can see that the ICTR was probably not the most effective way of dealing with the past in the context of Rwanda. We can compare the goals we think are within reach; for example; "A modest vision of the future legacy of these trials could claim the creation of an international system of criminal justice, the progressive development of international procedural, humanitarian and human rights law, and above all, convictions."<sup>98</sup>

But we have to look at the problems and failures as well. Some scholars suggest that instead of achieving reconciliation the high expectations might lead to disappointments, even to the point where they claim that the ICTR may have some blame in the subsequent development in the area and the war that followed.<sup>99</sup> However these are theories that I have found very little support and few arguments for.

The fact, already mentioned in 3.4.3, that only Hutu perpetrators have been prosecuted may however be a problem in the future, which I will discuss more below in 3.4.5. According to Byrne this is leading to "the same 'victor's justice' refrain that attached to the Nuremberg and Tokyo trials is now transposed to its modern-day successor trials in the guise of 'selective justice.'"<sup>100</sup> This is a bad way of trying to achieve the goals of justice and reconciliation.

### **3.4.5 Prevention of Future Human Rights Violations**

Even though the human rights situation today is a little better in Rwanda than when the ICTR was established, the road there has been long and there is still far to go before we can say that there is a secure human rights environment, with many issues to be resolved.

The aforementioned (3.4.3) lack of connection between the ICTR and the public has led to problems in the incorporation of the court into the national consciousness, which is a big flaw, especially due to the special

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<sup>97</sup> M. Retting, 'Gacaca: Truth, Justice, and Reconciliation in Postconflict Rwanda?' 51 *African Studies Review* (2008) pp. 25-50.

<sup>98</sup> Byrne, *supra* note 84.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

circumstances; most of the Rwandan genocide was carried out by ordinary citizens.<sup>101</sup>

This is a potential danger to the fragile peace and greatest a risk for future outbursts of violence. If we look at the surveys that have been made with the Rwandan people, we can see that very few are aware of how the court works.<sup>102</sup> This is a great threat to its abilities to prevent future violations since it thus lacks the abilities for deterrence, which can, if those in favour for retributive justice are right, lead to new crimes.

There is a problem with selectively only prosecuting Hutu perpetrators, even though there is an amount of Tutsi perpetrators in the state as well that also may constitute a threat to the stability, and thus to human rights, since it creates a situation where the prosecutions are dependant on ethnicity rather than simply based on the crime committed. It may be a mistake to maintain this unbalance as perpetrators exist in both groups, even if Hutu of course are clearly over represented due to the circumstances of the conflict, since it is harmful to the belief in the justice system as impartial and can cause unrest due to certain criminals not being prosecuted because they belong to the “right” ethnic group. Especially the Hutu population may have a problem accepting this, and it may further cement the gap between the two groups.<sup>103</sup>

All in all, compared to the situation in the states of former Yugoslavia and with the ICTY, the ICTR is so far less of a success. It is clear that it has failed to reach the goals set out and as the situation looks today it is impossible to claim that it effectively is preventing future human rights violations, not even those connected to the conflict.

### 3.5 Sierra Leone

The Special Court of Sierra Leone is newer than the Tribunals of former Yugoslavia and Rwanda, thus adding an insight on the more recent development in the field. This has the negative aspect of there being less material both from and about it, making it harder to see any long term effects on the human rights situation in the state but besides the two international tribunals discussed above it is the most prominent of the contemporary efforts in the area of international criminal justice. The other, even more important, reason for choosing this court is the fact that there has been established a truth commission as well, the Truth and Reconciliation Commission of Sierra Leone, that worked beside the Special Court to achieve lasting peace and justice and made its final report in 2007, which we will look closer at in 4.5. This gives us the opportunity to explore the

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<sup>101</sup> G. Prunier, *supra* note 85.

<sup>102</sup> E. Stover and H. Weinstein (2004) *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity Cited by Byrne, supra* note 84.

<sup>103</sup> Byrne, *supra* note 84.



reasons and the results of establishing both measures to deal with the same transition.

The special court for Sierra Leone (the Special Court) was established through an agreement between the United Nations and the government of Sierra Leone 16 January 2002.<sup>104</sup>

The court has jurisdiction over “the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996”<sup>105</sup> including crimes against humanity and other forms of serious violation of international humanitarian law.<sup>106</sup> It is an internationalized ‘hybrid court’, a mix between an international court and a national court. This creates some special advantages and problems that have been discussed above under 3.1.1.

### 3.5.1 Background

The background to the establishment of the Special Court is the over 10 year civil war between 1991 and 2002 that led to tens of thousands of deaths and more than 2 million refugees fleeing the country.

The war started between the military government and the opposition, the Revolutionary United Front (RUF), and led to blatant violations of human rights and humanitarian law throughout the state. By May 2000 the situation in the country had deteriorated to such an extent that British troops had to enter to evacuate foreign nationals and establish order. They stabilized the situation, and were the catalyst for a ceasefire and ending of the civil war in 2002.<sup>107</sup>

In order to deal with the situation both the Special Court and the Sierra Leone TRC were established in an agreement between the Sierra Leone government and the UN.

### 3.5.2 Theory and Purpose

Just like the international tribunals, the Special Court is also based on the principles of retributive justice. The purpose set forth in the agreement and

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<sup>104</sup> *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, annex to Secretary-General’s Report, Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915 (4 October 2000).

<sup>105</sup> *Statute of the Special Court for Sierra Leone*, enclosure to Secretary-General’s Report, 4 October 2000, Art 1.

<sup>106</sup> *Ibid.*, Art 1-8.

<sup>107</sup> United Nations Mission in Sierra Leone (UNAMSIL) Sierra Leone- UNAMSIL- Background, <[www.un.org/Depts/dpko/missions/unamsil/background.html](http://www.un.org/Depts/dpko/missions/unamsil/background.html)> Visited last 5 June 2009.

statute for the court is to deal with the crimes committed during the civil war, but other goals can be identified as well, aims like “ending impunity, deterring would be perpetrators, providing a measure of justice to the victims, helping to strengthen the rule of law in Sierra Leone, and contributing to the capacity-building within the country, particularly for the legal profession.”<sup>108</sup> The idea is not only to deal with the past but also to build for the future.

The arguments for and the ideas behind internationalized courts have been discussed above in 3.1.1. In establishing the Special Court as a mixed court the hope is to achieve greater legitimacy through a closer connection to the public in Sierra Leone and more effectiveness due to the increase closeness to victims, witnesses and evidence as well as the other gains from this type of measure that has already been discussed as well, for example an effect on the local judiciary as their education and knowledge will improve through the process.

### 3.5.3 Practice

So far the court has completed two cases and even though it has more under way, that gives us too little material to look at when it comes to the courts behaviour.

What can be noted however is the fact that it took quite some time between the agreement and the time when the court became operational. This is a problem in the justice system since the effect of the trial will lessen the more time passes.<sup>109</sup>

In addition to this, it also creates a problem with lessened credibility for the court as there was a discussion on the funding of the court and an unwillingness of the UN members to throw their committed weight behind the project.<sup>110</sup>

### 3.5.4 Results Achieved

The Special Court, although welcomed by many, has so far failed to produce the desired result. Due to politics and practical considerations the role of the court has become lesser than it was planned to be and so far it has failed to produce any noticeable result, partly due to the limitation of the temporal restriction.<sup>111</sup>

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<sup>108</sup> Romano *et al.* (ed.), *supra* note 40, p. 125.

<sup>109</sup> S. Beresford and A.S. Muller, ‘The Special Court for Sierra Leone: An Initial Comment’, 14 *Leiden Journal of International Law*, (2001) pp. 635-651.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Statute of the Special Court*, *Supra* note 105, Art. 1.

It is not a complete failure however, because it seems to be, by its mere existence, having positive effects on the laws of Sierra Leone. Effects that could however multiply if it were to be used more.<sup>112</sup>

The situation today in Sierra Leone is better from both a peace and a human rights perspective and there has been a continuous progress.<sup>113</sup> But there is much left to do in many areas, including the rights of the victims of the war, of children and of women.<sup>114</sup>

With only two cases adjudicated there is still a great need for the court to deal more with some important issues, especially those that concern women's rights to protection from for example rape is still a problem,<sup>115</sup> which may be helped somewhat if the court concerned itself with dealing more with the cases where rapes were used as a part of the mass violations during the civil war.<sup>116</sup>

### **3.5.5 Prevention of Future Human Rights Violations**

It is too early yet to see whether or not the Special Court has any real effect when it comes to preventing future human rights violations. It is, as always, hard to say what parts of the bettered situation are due to the general improvement in the state and what is due to results achieved by the court and, in this specific case, it may be even harder since there is also a truth commission working towards the same goals.

However the fact that there is a court operating to punish grave breaches of human rights should at least send out a message that this is not accepted behaviour. None the less, the lasting effects in the area of preventing human rights abuse are too early to evaluate. It is too early yet to say whether a successful policy of prosecutions before the court will lead to a stabilized situation and effective deterrence from crime or whether the conflict will break out anew but so far no obvious failures in this area seems to be apparent.

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<sup>112</sup> Romano *et al.* (ed.), *supra* note 40 p. 137 *et seq.*

<sup>113</sup> Advisory Services and Technical Cooperation in the Field of Human Rights, Situation of human rights in Sierra Leone, Report of the High Commissioner for Human Rights, E/CN.4/2005/113, 2 February 2005.

<sup>114</sup> *Ibid.*

<sup>115</sup> Amnesty International USA, *Sierra Leone Human Rights: Human Rights Concerns*, <[www.amnestyusa.org/all-countries/sierra-leone/page.do?id=1011232](http://www.amnestyusa.org/all-countries/sierra-leone/page.do?id=1011232)> visited 27 May 2009

<sup>116</sup> Beresford and Muller, *supra* note 109

## 4 Truth Commissions

*“An eye for an eye makes the whole world blind”*

- Mahatma Gandhi

Sometimes, as has been mentioned earlier, retributive justice is not a satisfactory means of dealing with a transition. For different reasons a state may have to resort to other options, be it because of an unmanageable amount of criminals, because of internal power structures that make retributive justice risky at best and fatal for the stability at worst or for some other reason. An option open for states in the process of transition is to set up a truth commission. The last quarter of a century this has become a more and more popular way of dealing with past violations.

What defines a truth commission is the intention to construct a record of the past atrocities. The concept of “truth commission” is more of a generic term used for a governmental organ with this specific purpose at its core and it can be referred to by different names depending on the country using it.

A truth commission is not a form of court and is not an alternative to a court that a state can use and hope to achieve the same goals. It is, however, a way of dealing with past abuses and it has its clear application in transitional societies, as we shall explore more closely below in 4.1 and in 4.3-4.5 where I will account for a few cases where this measure has been used in such situations.

I will also look more closely at the theories that form the philosophical foundation of this form of transitional justice and that are in its essence different from those forming the foundation for retributive justice. Nevertheless I will confront them in the same way, looking into the theories and then trying to gather the main arguments for and against this approach to the concept of justice, something I will do in section 4.2.

Following the same structure as chapter 3, as I just mentioned as well, I will look into a few specific cases where this approach has been used.

Here I am trying to answer the same questions as I answered in the correlating sections in chapter 3; looking at the background, the purpose and ideals behind it, the practical work and what results they have achieved, finishing each case study with a conclusion.

### 4.1 Dealing with Transitional Justice through Truth Commissions

As mentioned above, transitional states sometimes, for various reasons, set up truth commissions to deal with the past. How they are constructed vary from situation to situation. They can vary in importance, power and

purpose, depending on the situation. In the somewhat old interdisciplinary discussion on truth commissions held at Harvard Law School in May 1996 the writer of the introduction, Henry Steiner, states that:

"The truth commission has been a protean organ, not only in the many institutional forms it has assumed, but also in its varying membership, in the diverse functions that it serves, and in its range of powers, methods, and processes. Each country- as the time progressed from the early 1980's to the present, with ever more precedents as guides- has given it its commission a distinctive architecture. The mandates imposed on commissions by executive or legislative measures could be spread over many points along a spectrum moving from strong to weak powers and functions."<sup>117</sup>

They may be an alternative to either complete amnesty or criminal prosecution, or they may complement either. How the truth commission works is largely affected by its stance in respect to these regards. Some, like the South African TRC are functioning as the sole actor (as we shall see below the South African TRC was paired with the threat of prosecutions for those who did not witness for amnesty) while others have a tribunal or court that is active at the same time, leaving the truth commission as strictly a fact finding body, while yet others lack the possibility of prosecution but still leaves the truth commissions as fact finding bodies and instead grant unconditional amnesty.

They can, just like the courts that deal with the same issues, be national, mixed or international. The values of either approach are comparable to those discussed above under 3.1.1.

There are four characteristics that are specific in defining a truth commission. Firstly, it is focused on the past. Secondly, it does not deal with specific events or cases, but try to document as many cases of human rights violations as possible and try to get a view of the whole picture. Thirdly, it is limited in time, it is set up to investigate certain crimes and it is supposed to at some point finish its work and hand in a report. And fourthly, it has a certain authority that has been granted by the political body that established it.<sup>118</sup>

The wave of truth commissions that made them a part of international law on conflict resolutions started with the Argentinean National Commission on the Disappearance of Persons in 1983 and was made world famous by the already mentioned South African TRC. As the amount of truth commissions keeps growing, so does the need to study them and to understand what they actually have to offer to international transitional justice. One way of broadening the understanding is discussing the theories behind them; on what concept and justifications do they rest?

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<sup>117</sup> H. Steiner for the Human Rights Program at the Harvard Law School and the World Peace Foundation, *Truth Commissions: a Comparative Assessment- An Interdisciplinary Discussion Held at Harvard Law School in May 1996*, (Harvard Law School Human Rights Program, Cambridge, 1997) p. 8

<sup>118</sup> Priscilla Hayner cited by N. Dimitrijevic, 'Justice beyond Blame: Moral Justification of (the idea of) a Truth Commission' 50 *Journal of Conflict Resolution* (2006) pp. 368-382

## 4.2 Theoretical Underpinnings of Truth Commissions

If the basis for Tribunals is retributive justice, the basis for truth commissions is to be found in notions of restorative justice. The goals to be achieved are to some extent the same, but the focus is completely different. Rather than focusing on punishing the criminals, truth commissions are focused on finding out the truth about the past in order to make a society, including both the victims and the perpetrators, able to move on. In the same way, restorative justice is based on completely different philosophical ideals than retributive justice. It is focused mainly on the healing process rather than on punishing, as we shall see below.

It is important, before I go on, to discuss the basic ideas and the moral justifications of restorative justice, to understand that truth commissions are not the same as restorative justice, it is simply a way of dealing with the past that falls under the restorative justice approach.

The basic idea of restorative justice can be said to be that “[t]he various models, heterogeneous as they are, typically regard transgressions as conflicts that need to be given back to their rightful owners for them to resolve: offenders, victims, and their respective communities.”<sup>119</sup> This means that the parties are directly involved in the justice process through the possibility to voice their feelings and present their different sides of the story with the goal of coming to an agreement about the hurt that has been caused by the violation, what responsibility the perpetrator has and what there is that can be done in order to restore a sense of justice between the two.<sup>120</sup> For example this can concern compensation to the victim or services that are to the benefit of society or “meaningful punishments to the offender that benefit the victim, the community and, through facilitation of moral transformation, potentially the offender.”<sup>121</sup>

The focus however is on reconciliation and healing rather than punishment, and simply the fact that that the victim has been able to tell his version and be recognized and that he has been able to get a clear picture of what has happened can help in the restorative process.

Thus, the justifications of the truth commissions, from a restorative justice point of view, are that through truth telling and recognition of the victims, sometimes paired with reparations, the parties to a conflict can seek understanding and reconciliation rather than keeping and deepening the polarized situation in a society through a process of prosecutions.

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<sup>119</sup> M. Wenzel, T. G. Okimoto, N. T. Feather, M. J. Platow, ‘Retributive and Restorative Justice’, *32 Law Hum Behav* (2008) pp. 375–389.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid.

In addition to this, there is, in some of the truth commissions, especially the South African TRC an aspect of forgiveness that goes well with the restorative justice approach and that can add an extra justification but feels foreign to classical western concepts of law. It is supposed that the meeting between the victim and the offender that some of the commissions create, or simply the deepened knowledge of the truth, will lead to a more profound understanding between the parties and thus to a more effective reconciliation process, facilitating forgiveness.

A somewhat different justification for truth commissions however is suggested by Dimitrijevic:

“... a feasible justification of the idea of a truth commission requires that we abandon the familiar arguments of condemnation, ascription of guilt, distribution of blame, healing, reconciliation, or even the restoration of equality between victims’ and perpetrators’ groups. Those goals are undoubtedly all very important, but I argue that none of them can pass the test of serving as a generally acceptable legitimation basis of the idea of a truth commission. As an alternative, I propose to look for justification in the province of practical morality: the specific task that justifies truth commissions consists of rebuilding the lost sense of justice in the community of perpetrators. A commission will live up to this task if it proves capable of reconstructing the reasons that led vast numbers of people to forsake the basic standards of right, good, and just. It will be assumed that those standards were valid in the community of perpetrators at the time when crimes were committed.”<sup>122</sup>

The arguments for this view are based on the fact that if a society lets those crimes happen, then there is a deeply rooted problem with the moral in the society, preventing people from distinguishing between right and wrong. This problem can not be dealt with to a satisfactory degree through prosecutions, you prosecute the perpetrators, leaving all those who were watching and letting the atrocities happen without showing them the error of their ways. This is what truth commissions can help with, creating a sense of right and wrong in the society. In arguing for this justification he describes the other justifications, accounted for above, as statements of intention rather than actual justifications, since they have rarely been proven to actually work and they are very dependant on the context of a specific commission.

#### **4.2.1 Restorative Justice in Different Legal Contexts**

One way of understanding the measures of restorative justice better can be to compare them to similar approaches in other areas of law, for example offender-victim mediation in criminal law or Alternative Dispute Resolution (ADR). Other areas of law also have approaches that are similar to the ones

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<sup>122</sup> N. Dimitrijevic, 'Justice beyond Blame: Moral Justification of (the idea of) a Truth Commission' 50 *Journal of Conflict Resolution* (2006) pp. 368-382.

that we experience in truth commissions and other restorative justice measures.

If we look at the offender victim mediation, which is sometimes used in national criminal law, we can see that there is some research in this area that can be helpful when studying restorative justice measures. The basic idea, not very different from the idea behind many truth commissions, is that the victim and the perpetrator get to meet each other, face to face, and tell of their different experiences. The hope is that this will lead to a better recognition of the victims, full knowledge of the truth and a possibility to better understanding. From a psychological point of view this can be a good way of strengthening the victim, although some suggests that it has problems as well.<sup>123</sup>

An interesting comparison to make is to look at ADR (Alternative Dispute Resolution) in for example international property law as well. I will not do it here however. But the principles, and the lessons, found in these neighbouring fields of law can be useful when using a restorative approach to international criminal law.

## **4.2.2 Arguments For Restorative Justice and Truth Commissions**

Firstly there are arguments advocating for restorative justice as a whole. One important aspect that restorative justice adds is the fact that it does not perpetrate the roles as enemies, or contestants for justice. It has a more communal view, where victims, perpetrators and society, by communication and trying to face the painful offences together, try to find a just solution where both parts to a conflict have been active in the process.

It may also lead to a better situation for the victims, since instead of focusing on the crime and the perpetrator it focuses on the victim and the solution. There can be psychological, empowering value both for the victim that gets seen and affirmed and for the perpetrator that, ideally, gets to be a part of a reconciliation process and hopefully be changed by learning the full effect of their deeds.

It also has the value of focusing on promoting peace rather than ending up in old squabbles over who is most wrong. Not that the offences committed should not be recognized, but again, the solution and the future is more in focus than the problem. Reconciliation is the goal, not vengeance.

However, even though it has the view of focusing on the solution, restoring the wronged part to justice rather than punishing the wrongdoers, it is still also aware of the past and what has happened because it is through the

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<sup>123</sup> P. M. Gerking, 'Participation in Victim- Offender Mediation: Lessons Learned From Observations', 34 *Criminal Justice Review* (2009) pp. 226-247.



mutual recognition of the crime that both parties can move on and solve the consequences. You can not ‘restore’ something without knowing what has been taken.

Secondly there are arguments that are more specific to the truth commissions’ approach of dealing with the past through truth findings. A frequently used argument for facing the past this way is that the past will be there and it will make itself known whether we want it to or not. The past exists and trying to not deal with it will not make it go away. The past has not ceased to be relevant just because the regime leading a nation has changed and as long as the past is not dealt with true democracy will remain out of reach;

“... ‘mastering the past’ is a process that contributes to (1) moral, political, and legal disassociation from the crimes of the previous regime; (2) establishment and stabilization of a new democratic legitimacy; and (3) creation of the basis for civil normality and justice after the period of barbarianism.”<sup>124</sup>

Another value that is specific to truth commissions is that it takes on a broader view, not person specific, but investigates a whole society.<sup>125</sup> This has the value of focusing on oppressive systems and cultures that lie behind the abuse and solves the problem mentioned above in 2.3.3 where the offender is also a victim.

This also has the value that Dimitrijevic argues; that the true justification of the truth commissions is that they teach the society about right and wrong by holding up a mirror to show the true horror of the deeds committed, not only to the perpetrators but to the public that stood beside watching as well, creating a moral awareness that has clearly been lacking in the transitional society.

### **4.2.3 Arguments Against Restorative Justice and Truth Commissions**

Firstly we can ask ourselves, as a critique for restorative justice, whether or not restorative justice even is justice from a legal point of view? It does not fall under the classical criminal justice norms and it is not based on any actual rules, it is more a way of case to case dealing with offences that has happened than setting up a set of rules on how to behave. There is a problem in this because the deterrence idea that is important in retributive justice is lacking here. What is there, if we have no set behavioural rules on how to deal with offences, to deter possible perpetrators?

We can also ask ourselves what it does to the victim when a criminal is not punished “properly”. Does that hurt the victim’s belief in the justice system?

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<sup>124</sup> Dimitrijevic, *supra* note 122.

<sup>125</sup> T. Buergenthal, ‘Truth Commissions: Between Impunity and Prosecution’, 38 *Case Western Reserve Journal of International Law*, (2006/2007), pp. 217-223.

Does it hurt the public's belief in the justice system? Many would argue that this is the case, while the answer from someone talking in favour of restorative justice might be; 'not if the restorative justice process is successful' although most might have a more realistic approach than this.

In those cases where the perpetrators "walk free" there may, should the reformative values of the restorative justice approach fail, be a higher risk for new violence as well. There is nothing in the restorative justice process that can ensure us that the perpetrator has been reformed and no longer poses as a threat to society and since it lacks the protective abilities that retributive justice has in putting criminals behind bars, there is a very high risk for both a higher actual and psychological insecurity in a society that only uses restorative justice measures.

There are specific problems with truth commissions as well. One issue is whether we, in trying to reckon with the past, are 'opening up a Pandora's box' full of hurt and resentment, further fuelling conflict and disrupting what little consensus that has been found when entering into the transition.<sup>126</sup>

Amnesty laws that are frequently used together with this type of ways of dealing with the past can be a problem, something that has been discussed under 2.3.3. This is in a way the core of the problem we have when comparing truth commissions to ad hoc tribunals; a truth commission can either be complemented by an amnesty law or by prosecutions. If it is followed by an amnesty law, the problems discussed above will occur, otherwise it will only be a complimentary measure to the tribunal, but then the state will have to deal with the problems this entail.

There is also a problem in the fact that truth commissions are often state bodies that have as a mission to give us 'The Truth'. As Dimitrijevic suggests this "points to an important problem in the treatment of the truth: a commission is a state body that is expected to offer an *official authoritative truth*."<sup>127</sup> This can be a problem in a fledgling democratic society trying to establish democratic pluralism, since a situation will arise where "[g]uided by the general intention to promote the case of an aspiring democracy, a commission is supposed to provide a specific political and moral diagnosis of the past."<sup>128</sup> This can hinder different views from being uttered, perhaps preventing the whole truth from being publicised.

## 4.3 South Africa

When choosing a few important truth commissions to look at the South African Truth and Reconciliation Commission needs to be discussed. It is special in many ways, both in practice and philosophy, which will be

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<sup>126</sup> Dimitrijevic, *supra* note 122.

<sup>127</sup> Ibid.

<sup>128</sup> Ibid.

discussed more closely below. The very uniqueness of the commission makes it interesting to study, but it is also important to do so since it has in the years that have passed since its establishment been a role model for other commissions and has led to the boost of truth commissions in the past few decades. This, together with the fame and almost reverence it is viewed with on the international level, makes it an important object of research.

The South African Truth and Reconciliation Commission (TRC) was established in 1995 through the Promotion of National Unity and Reconciliation Act<sup>129</sup> and had its seat in Cape Town.

The mandate, as set forth in chapter 2 para. 3(1) was the following:

- “3. (1) The objectives of the Commission shall be to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past by-
- (a) establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period from 1 March 1960 to the cut-off date, including the antecedents, circumstances, factors and context of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations, by conducting investigations and holding hearings;
  - (b) facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this Act;
  - (c) establishing and making known the fate or whereabouts of victims and by restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims, and by recommending reparation measures in respect of them;
  - (d) compiling a report providing as comprehensive an account as possible of the activities and findings of the Commission contemplated in paragraphs (a), (b) and (c), and which contains recommendations of measures to prevent the future violations of human rights.”<sup>130</sup>

### 4.3.1 Background

The background of the establishment of the South African TRC was the negotiated end of the apartheid regime in South Africa. For decades the racist apartheid laws had held the black population in oppression, without any access to human rights or basic justice and with constant human rights abuses.

After the African National Congress (ANC), with now legendary leaders like for example Nelson Mandela and Desmond Tutu, had managed to negotiate a transition and the country had held its first truly free elections, the South African TRC was set up in order for the nation to deal with its past.

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<sup>129</sup> Promotion of National Unity and Reconciliation Act, No. 34 of 1995.

<sup>130</sup> Ibid., chapter 2 para 3(1).

### 4.3.2 Theory and Purpose

The south African TRC is a somewhat atypical truth commission for a couple of different reasons. Firstly its goals are set wider than just truth finding. In the preamble of the Promotion of National Unity and Reconciliation Act it is stated that:

“To provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the period from 1 March 1960 to the cut-off date contemplated in the Constitution, within or outside the Republic, emanating from the conflicts of the past, and the fate or whereabouts of the victims of such violations; the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past during the said period; affording victims an opportunity to relate the violations they suffered; the taking of measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights; reporting to the Nation about such violations and victims; the making of recommendations aimed at the prevention of the commission of gross violations of human rights; and for the said purposes to provide for the establishment of a Truth and Reconciliation Commission, a Committee on Human Rights Violations, a Committee on Amnesty and a Committee on Reparation and Rehabilitation; and to confer certain powers on, assign certain functions to and impose certain duties upon that Commission and those Committees; and to provide for matters connected therewith.”<sup>131</sup>

As we can see in this statement of purpose there is both the element of conditional amnesty that is specific for the TRC and an element of reparations for the victims. Compared to most truth commissions the South African TRC is closer to being an actual alternative to a court, rather than just a fact finding mission, albeit a court that does not prosecute or punish.

The conditional amnesty laws are based on the idea of trading amnesty for truth. The reason for this has been discussed in 2.3.3, but it is basically that you can give amnesty when needed without sacrificing the right of the victims to be recognized and to hear the truth. Here the idea is that in order to forgive the truth must be made public and the amnesties were used as an incentive to get that truth. But at the same time the amnesties were also a trade-off in order to make the transition go easier and be more peaceful.<sup>132</sup>

The TRC provides, as just stated, for reparation for the victims as well. In this system the victims lack the possibility of demanding that the offenders pay for reparations, so someone has to do it. The reparations have the purpose of appeasing the victims and providing exactly that; some form of reparation for the damage done.

Another thing that we can see in the text cited above is the strong element of restorative justice that is present, giving us the basic foundation for the

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<sup>131</sup> Ibid., Preamble.

<sup>132</sup> See for example C. Jenkins, ‘‘They have built a legal system without punishment’’: reflections on the use of amnesty in the South African transition’, 64 *Transformation: Critical Perspectives on Southern Africa*, (2007) pp. 27-65.

theories behind the TRC. If we listen to the words of its makers and leaders we can learn more about the theories behind the TRC. For example, Desmond Tutu;

“A person with Ubuntu is open and available to others, affirming of others, does not feel threatened that others are able and good, for he or she has a proper self-assurance that comes from knowing that he or she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed.”

Some of the theories behind the TRC are somewhat foreign to the “western” concept of law, and the concept in the citation above is one of them, the idea of ubuntu, referred to in for example the interim South African Constitution of 1994, in the postamble cited in the introduction.

There is also a focus on reconciliation and forgiveness that can seem different as well. But that goes well with these traditional concepts and with the restorative justice ideal discussed above in 4.2.

When it comes to human rights violations, the goal set up is clearly human rights oriented. This is probably more so in the South African case than in others, since other are more based on international humanitarian law due to recent wars being the decisive factor in the transition instead of blatant, ongoing human rights violations without open war. The goal is to deal with those violations in a way that will heal and reconcile the nation, preventing them from happening again.

### 4.3.3 Practice

Compared to other truth commissions the TRC worked in a new way, having public hearings in different communities where the victims could tell their stories for the commissioners, the local population and the world through media.

The hearings were however somewhat arranged, the commission had before picked out the victims that were going to testify, choosing those that represented the local atrocities best. In fact less than 10 per cent of the testimonies were given this way. Most of the victims had little contact with the TRC except for giving their statements and receiving note of whether they were entitled to reparations or not.<sup>133</sup>

At the same time the amnesty committee gathered the testimonies given by the perpetrators in exchange for amnesty, sorting out those who were eligible for amnesty and refusing those who were not. Those who were eligible were taken before a public hearing as well. The victims had the chance of challenging the process where the full truth was not told, but in practice there were a small possibility for this by the disadvantaged victims.

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<sup>133</sup> A. R. Chapman and H. vd. Merwe, *Truth and Reconciliation in South Africa: Did the TRC Deliver?*, (University of Pennsylvania Press, Philadelphia, 2008) p. 10.

In addition to the hearings mentioned above, the TRC had hearings with different institutions and sections in society that had taken part in the oppression.<sup>134</sup>

The TRC also had a section working with reparations; the rehabilitation committee. However, most reparations were supposed to be paid by the state, something that proved to be a problem when the state first took too long time to deliver any reparations and then delivered far less than the committee had recommended.<sup>135</sup>

All in all the workings of the TRC in some instances held its promises and in some it did not. In some ways ‘the show’ was the point, letting the citizens and the world know about the atrocities that had been committed.

#### **4.3.4 Results Achieved**

The TRC has been celebrated and emulated<sup>136</sup> but the question is rarely asked; what were the results? Did the TRC deliver what it promised?

Chapman and Van der Merwe have researched this and found that how well the TRC delivered varies between the different areas where it has been active.<sup>137</sup> I will give a short account for those findings here.

The clear answer is maybe, or for some. In some areas, like in the truth finding and truth delivering areas, too many interests to be reconciled resulted in that the TRC did not do as well as it should.<sup>138</sup>

When it comes to promoting reconciliation there is no visible data showing that it did.<sup>139</sup> This is not so strange however. Forgiveness and reconciliation takes time, it is not a quick fix you achieve that easily. We can not know yet whether some of those ideas maybe took root somewhere, still working to achieve its goal. However, it was not completely unsuccessful either, even though there are things that it could have done better.

What it did do is to take the edge of the enmity and the destructive power, giving the nation a possibility to heal.<sup>140</sup> It did take South Africa through a transition that could have erupted into violence instead. It has also been somewhat successful in removing the widespread human rights abuses, even though there is still a long way to go when it comes to the human rights protection in South Africa.

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<sup>134</sup> Ibid., p. 11.

<sup>135</sup> Ibid., p. 11f.

<sup>136</sup> For example in Sierra Leone, *see* 4.5.

<sup>137</sup> Chapman and Merwe, *supra* note 133, p. 241 *et seq.*

<sup>138</sup> Ibid.

<sup>139</sup> Ibid., p. 277.

<sup>140</sup> Ibid., p. 278.

The situation today in south Africa is remarkably better than during the apartheid era and apartheid is clearly ‘dealt with’, at least on a legal level. However in some areas there are still remaining rests of the abusive system and there is still a serious segregation in the society and a lack of human rights for the black minority, even if it is not as blatant as before and more focused on areas of economic, social and cultural rights than on civil and political rights.<sup>141</sup>

### **4.3.5 Prevention of Future Human Rights Violations**

Even an organ that is as focused on the future situation in the state as the TRC is still not completely turned towards the prevention of future human rights abuses. The goal of reconciliation is of course a goal of prevention as well but it is neither fully focused on human rights prevention nor fully successful as a preventive measure. There are still human rights violations going on in South Africa<sup>142</sup> and there is still a need o deal with those that the TRC did not provide.

Of course this can partly be due to too little time having passed, although in some ways the TRC also made some promises in this area that it could not deliver; it put it self out to, in contrast to courts and tribunals, be a quick fix for the nation, a way to heal all wounds. In the end no governmental organ or other measure of transitional justice can ever deliver that, because it takes time for the human heart to heal.

So the real questions are the same as with the tribunals; did it succeed in preventing future human rights violations? Not completely, but there is a measure of peacefulness and prevention of violations to the transition that can probably, since there are fewer other factors in this case that can take the credit, be traced back to the TRC. Thus it may actually have had some real effect in the area. However, we must remember that the culture and the parties to the conflict as well as the individuals involved play a great part in the transitional processes, and this holds true here as well of course, so even successful concepts can not be copied directly.

And secondly; will it continue to prevent human rights violations? I think that this is dependant on the people to say: ‘we will remember’ and not forget the ideals of and the, if imperfect, truths discovered by, the TRC. If they do and actually take the time to heal it might help even more, eventually achieving the goal that was set up for it.

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<sup>141</sup> South African Human Rights Commission, <[www.sahrc.org.za/sahrc\\_cms/publish/cat\\_index\\_26.shtml](http://www.sahrc.org.za/sahrc_cms/publish/cat_index_26.shtml)> visited last 24 may 2009.

<sup>142</sup> Ibid.

## 4.4 El Salvador

The El Salvador Truth Commission is interesting in the comparison since it is very different from the South African TRC and a more classic example of a truth commission, solely focused on truth finding and lacking all the extra functions of the TRC. It was however followed by a blanket amnesty, the presence of which adds another interesting aspect. In addition to this the fact that it was established by the UN and the context in which this happened makes it interesting to study as well.

The UN Truth Commission in El Salvador was set up by the UN in 1992 after it had been established by the Mexico Peace Agreement in 1991.<sup>143</sup> It was a 'pure' truth commission with the mandate of uncovering and making public the truth about the human rights violations committed during the civil war.

### 4.4.1 Background

Between 1980 and 1991 El Salvador was engaged in a bloody civil war between the government and the Farabundo Martí National Liberation Front (FMLN). Thousands were killed and massive human rights violations were perpetrated during this time.

The ones responsible for the violations were mostly members of the military and security forces. Even though the regime was not technically a military regime, the military forces had strong power over the political process and the transition in El Salvador faced a lot of the same problems that transitions from military regimes face.

When at last a peace accord was negotiated this created two bodies to deal with the past abuses, a UN- sponsored truth commission and an internal ad hoc commission to review the human rights records of military officers and recommend necessary removals of the worst perpetrators.<sup>144</sup>

Another important background fact is that an amnesty law<sup>145</sup> was passed, ensuring amnesty for most political crimes, with the exception of cases decided by jury or where the truth commission would recommend prosecution.

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<sup>143</sup> *El Salvador: Mexico Peace Agreement- Provisions Creating the Commission on Truth*, 27 April 1991, reprinted in *3 Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Laws, Rulings, and Reports, p. 174-179, <[www.usip.org/files/file/resources/collections/commissions/El%20Salvador-Charter.pdf](http://www.usip.org/files/file/resources/collections/commissions/El%20Salvador-Charter.pdf)> visited last 12 June 2009.

<sup>144</sup> Sriram, *supra* note 10, pp. 78 *et seq.*

<sup>145</sup> *Ibid.*, p. 89f.



## 4.4.2 Theory and Purpose

The theory forming the basis for the UN truth commission in El Salvador is basically one of restorative justice but solely focused on the truth finding mission that forms the idea of the truth commission.

It differs from the other commissions discussed here for two reasons. First, because it is an international truth commission set up by the UN, not a measure of transitional justice set up by the state. Second, because its “jurisdiction” is smaller and more consistent with the original idea of a truth commission, being a fact finding and truth seeking body.

When it comes to human rights violations, the goal set was very focused on that in its inquiry into the past.<sup>146</sup> The purpose was to find and publicise knowledge about the human right violations, in order to create a greater awareness, put shame to the perpetrators and help recommending them for removal from office.

## 4.4.3 Practice

The truth commission issued its report 15 may 1993. In the report the commissions actually named names of perpetrators in the course of publicising the truth.

The report contained, in addition to the witnesses’ stories, a number of recommendations. Among other things the commission recommended that those named in the report should be removed from office and forbidden to hold public positions for ten years. It also recommended that all members of the Supreme Court should resign from their positions, that private military groups should be investigated, that the accord provisions demands of a reform of the judiciary and of the military should be done, that judges should be named by an independent council and that a special fund should be created to compensate victims. This created wild protest from the government’s officials, sadly leading to a blanket amnesty a short time after that.

## 4.4.4 Results Achieved

Sriram describes the El Salvadoran truth commission as a ‘UN success story’.<sup>147</sup> Despite the amnesties that hindered the recommendations of the commission from being carried out the situation in El Salvador and the sacrifices of justice made in favour of peace, many of the worst perpetrators been removed from power, the supreme court judges have be replaced and there are FMLN members in the legislature. In 1995 El Salvador was removed from the UN Human Rights Commissions list of states that need

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<sup>146</sup> Ibid., p. 88 *et seq.*

<sup>147</sup> Ibid., p.90f.

permanent monitoring. However there have been setbacks on the way where the state fell back into the human rights violations of the war, for example in 1993.<sup>148</sup>

Also, there are still human rights problems connected to the former situation in El Salvador that are not dealt with. For example the issue of children that were abducted by government forces during the war is still not dealt with.

El Salvador today is no longer torn apart by war, but there are still human rights problems, if not so many directly connected to the conflict, and of them the greatest concern remains the children that disappeared during the conflict.<sup>149</sup>

#### **4.4.5 Prevention of Future Human Rights Violations**

I would agree with Sriram when she calls the El Salvadoran Truth Commission a UN success story, but I would add that it is a somewhat limited success.

The El Salvadoran Truth Commission did not have the high goals of forgiveness and reconciliation brought forward by for example the South African TRC, even though it had the same purposes in a somewhat less grandiose design.

Nevertheless, with the goal of simply furthering peace and human rights protection by truth it has been able to achieve these goals even if there is a long way left to go and some grave issues concerning the conflict remain, mainly the missing children that should have been made an issue for the commission to focus on as well.

But there have however not been any new large outbursts of gross human rights abuse, something that might at least in part be due to a successful work by the commission in gathering information that can help the nation to handle its bloody past.

### **4.5 Sierra Leone**

The reasons for choosing the Sierra Leone Truth and Reconciliation Commission are partly accounted for above in 3.5; the fact that both a truth commission and a tribunal were established for the same conflict and the interesting question of what the effects can be of this. The other reason for choosing the Sierra Leone TRC is the fact that it is an attempt to imitate the

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<sup>148</sup> Ibid.

<sup>149</sup> Amnesty International USA, *El Salvador Human Rights: Human Rights Concerns*, <<http://www.amnestyusa.org/all-countries/el-salvador/page.do?id=1011148>> visited last May 25 2009.

South African TRC but in a very different context, which also makes it a very interesting object for further studies.

The Sierra Leone Truth and Reconciliation Commission was adopted 22 November 2000 when the Parliament of Sierra Leone unanimously passed the Truth and Reconciliation Commission Act.<sup>150</sup>

It was set up as an alternative to judicial prosecution for atrocities, especially in cases where they are not an option. In the case of Sierra Leone, this was explicit. The creation of the Commission was provided for in the Lomé Peace Agreement of 7 July 1999 since the agreement provided for amnesty for participants in the conflict. The Commission was therefore viewed as a means of providing a degree of accountability for human rights abuses committed during the conflict.

### **4.5.1 Background**

The background for the Sierra Leone Truth and Reconciliation Commission is the same conflict that has already been summarized above under 3.5.1 so it will not be repeated here.

### **4.5.2 Theory and Purpose**

The theories and purposes are almost copied from the South African TRC, with the lack of course of needing to deal with apartheid, and an additional focus on women, youths and children. But in addition to finding the truth it is supposed to deal with national reconciliation, peace building and reparations for victims.<sup>151</sup>

When it comes to human rights violations, the goal set up is to provide some form of accountability for the crimes covered by the amnesty agreement. This means giving at least some recognition to the victims and creating an awareness of those crimes that are never going to be tried before the Special Court.

### **4.5.3 Practice**

The Commission worked alongside the Special Court for Sierra Leone, drawing help and experiences from each other. It came with its final report 2007.

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<sup>150</sup> *Truth and Reconciliation Commission Act*, establishing the Sierra Leone Truth and Reconciliation Commission, 22 November 2000.

<sup>151</sup> The Final Report of the Truth & Reconciliation Commission of Sierra Leone, Volume 1: Chapter 1: Mandate of the Commission, <[trcsierraleone.org/drwebsite/publish/v1c1.shtml](http://trcsierraleone.org/drwebsite/publish/v1c1.shtml)> visited last 26 may 2009.

Compared to the Sierra Leone Special Court the Sierra Leone TRC has passed largely unnoticed by the international community. But that does not mean that it has passed completely unnoticed. The issue of what kind of truth a truth commission produces has for example been raised by Basu, criticising it for painting an unrealistic, nationalist picture.<sup>152</sup>

Mostly, however, the Sierra Leone TRC has been working for the same goals as the Special Court, providing the nation with the benefit of having both approaches.

#### **4.5.4 Results Achieved**

The goals set forth for the commission were, depending on where you look, either quite simple or very difficult. The commissions' ability to fulfil them is reciprocal to this.

The very complex goals, inspired by the South African TRC, that were set out have not been reached, even though the commission has published its final report.

If you look at the more basic goal however, providing some accountability for crimes that would otherwise unaccounted for, this has been fulfilled through the report. So in this aspect and in the positive side effects from working together with the Special Court, it has been successful to some extent.

#### **4.5.5 Prevention of Future Human Rights Violations**

The highest value that the Sierra Leone TRC has had in preventing future human rights violation it has had because it has worked side by side with the existence of the Special Court. This gives it the value of providing both approaches, which, even though the nation still has far to go due to problems in both the organs and due to other national problems like poverty, gives it a stronger ability to deal with those issues, in some respects having the benefits of both approaches. Even though it may still be too early to see the full effect of the conjunctive works of the Special Court and the Sierra Leone TRC, we can see that this way of working still gives a broad approach that the 'either or' views lack. It is a promising, if not yet fulfilled, way to deal with transitions. However, as all of the cases I have looked at, it is flawed; it is an idea that helps the situation, probably more than either of the two measures would do if used alone, but way less than they would if they were working as they are supposed to and even less than if they would have been working ideally. Nevertheless, even in the specific situation, it

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<sup>152</sup> P. Basu, 'Confronting the Past?: Negotiating a Heritage of Conflict in Sierra Leone', 13 *Journal of Material Culture* (2008) pp. 233-248.

has provided added value to the process, which could be seen as a form of success, if far from complete.

In other respects it also a long way to go. The Sierra Leone TRC has left its final report but that nation is still far from a reconciled and human rights stable state and the Sierra Leone TRC failed to reach up to the levels of success reached by its big brother, the South African TRC.

In the end it may have helped furthering the cause, but it has not, as of yet, showed that it has prevented new outbursts of violations even though the situation is more stable today.

# 5 Analysis - Comparing the Two

## 5.1 Difference in Approach - a Comparison

In essence the question of tribunals versus truth commissions is a question of retributive justice versus restorative justice. They have different goals and different mindsets. What those are has been well accounted for above, so I will not list what they entail here. I will however do some direct comparisons, first from a philosophical point of view.

As has been suggested in many places above the two ways of dealing with the past have completely different ways of facing the problem. If the problem is: How do we prevent future human rights violations in a transitional society? Then, as we have seen above, the two views would give completely different answers, based on different premises. Because this is what it boils down to, that restorative- and retributive justice are based on different premises.

Restorative justice has the premise that we can prevent future crime by becoming aware of and trying to solve problems at its heart, thus preventing future outbursts of crime. It is focused on solving the problem, be it through changes in society or on a personal level, making punishment for the crime less important.

Retributive justice on the other hand have the premise that the most effective way of preventing crimes is to punish the perpetrators, preferably by locking them away, thus both keeping society safe from them, and having the threat of being locked away pose as a strong enough motivation for others to not commit crimes. It also has the premise that justice equals some form of proportionate punishment; something should happen to the perpetrator that on some level puts the perpetrator in the same situation as the victim and this would then bring comfort to the victim or to those who are close to the victim.

There is research arguing both for and against both approaches in practice, making it hard to know what premises will prove to be more solid even though the retributive approach has the advantage of being more used and trusted in the legal sphere, although on an individual level we will use the restorative justice approach every day in our interpersonal relationships. This will be discussed a little further below when I compare the achievement of results.

When we have to ask ourselves then is: the two approaches irreconcilable? In theory perhaps but in practical reality they work more than well together, filling out each others weak spots and complementing each other. Of course both has to be negotiated in order to fill this function, if used strictly they will in fact clash. But in situations where it is possible to do so, depending on the circumstances of the transition of course, they can, and should, be combined for the best results, since the benefits of this will outweigh the costs, the costs mostly being practical problems like some small issues with combining them as well on the level of national or international law, for example evidentiary rules and rules of due process in cases where they deal with the same situation.<sup>153</sup> But these are problems that are easily solved with good preparation.

## 5.2 Achievements of Set Goals

When it comes to the question of which measure excels at the achievements of the goals set up, the answer of course depends on how you define those goals. If you look at the basic goals as in what they should in fact do, then the goal of a tribunal is simply "prosecute criminals" which is much easier to do than "find out the truth about a certain situation" which is a far more complex task since "the truth" is something subjective. Of course there is a subjective element in the prosecution of criminals but once someone is prosecuted he or she is in fact prosecuted, it is not a subjective question anymore but a fact, unlike 'having found the truth' which can still be perceived completely different by different persons.

If we look at the bigger purposes, the indirect goals that we actually set out to achieve, this feat seems to be equally hard to manage for both approaches and both sadly fails, leaving unfinished processes and incomplete results in their wake.

When it comes to values like appeasing the victims, or letting society move on from past violations, it seems to be more about choosing the right measure for the specific situation and being well prepared and effective at what you do, than the actual measure that matters.

This is however dependant on the exact goals as well, some measures are simply better at answering to some needs. Truth Commissions are for example better at finding the truth, while Tribunals, at least in the short run, are better at protecting from criminals. So it is also a matter of which values you prioritize, or which values that are more important in a situation, because they are not equally good at everything.

When it comes to retributive justice we know that it is not a perfect solution; we use it and still crimes continue to happen in all societies employing this

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<sup>153</sup> Buergenthal, *supra* note 125.

approach; we can ask ourselves the question, is a society without crime even possible? The answer is probably no. However, these crimes are far from the 'ordinary' crimes that all societies have to struggle against; these are the worst crimes that are conceivable to the human mind. Societies where these crimes are eradicated are very possible, in fact, most, if not all, of the worlds democracies are free from this type of crimes. Does that then mean that the retributive justice system used in these states is effective in preventing those crimes? I would argue that that is hardly a feasible conclusion in itself. It is rather a mixture between a multitude of factors of which democracy itself and respect for human rights are not the least.

Restorative justice on the other hand is, as I have already accounted for above, perhaps more used in our personal relationships but is a rather new addition to the domestic and international legal systems. It is so far harder to see what the more general effects are of using it to address crime since the instruments are more diverse and compared to retributive justice it is still relatively untried. What we can see is that it is clear that it can make a difference and that it can even, if properly used, be an alternative to retributive justice.

What they have in common is the fact that, when put to practice, we tend to have situations where the success is limited due to flaws in planning and implementation as much or even more than due to any inherent inadequacy of the chosen approach. Since they are used in situations that tend to be far from stable or at least far from ideal and are often under a time pressure, they often show a lack in this area. This may be hard to address on a national level making this something that should be even more discussed on an international level in order to improve the achievement of results.

## **5.3 Prevention of Future Human Rights Violations**

This is the section where I am supposed to give the answer to my question I posed in the beginning of this thesis. I set out writing thinking that I would be able to answer the question of whether Tribunals or Truth Commissions were the most effective measure in preventing future human rights violations in a transitional society.

I thought that maybe there would be something intrinsic to one of the measures that would set it above the other when it came to effectiveness, something that would tell us "this philosophy and this mindset is the right one if I want to prevent human rights violations". To discover this I have looked both at the theories behind and at the practical work, trying to discover which of those two would 'vanquish' the other.

Instead I find that successful results in this area are more dependent on the context and on how well the measure was carried out. I can not, from the



information I have found, deduce any special feature that sets one over the other in all situations.

It may be possible to do so from a moral point of view, valuing one mind set over the other, but from a practical point of view and from the information I have managed to gather it is difficult to do so from an “effectiveness in preventing future human rights violations-perspective”. It is of course possible that the reason for this is that I have looked at too few actual cases; maybe, with a larger foundation of cases it would be possible to give a clearer answer to that question. Nevertheless, I maintain the opinion that the cases chosen are representative enough to give at least an indication if there would exist a clear cut answer.

In addition to this I want to note that the organs that have reached the best results as I can discover are the ICTY and the South African TRC. This is however dependant as I have discussed in chapter 2 on a variety of things that all affect the transition. But, problematic as the situation still might be in the states, the situation in those places are still considerably improved and at least some of it can be contributed to successful work in the respective organs.

If the ICTY and the TRC are the most successful examples of each approach, where does this lead us? I would say that the most obvious reason for this is the fact that they were the most adapted to their context and also given the most resources and attention. I think that the answer to the question is then that when considering how to approach the transitional justice situation we must be even more careful and more planning in the future, learning from our mistakes, something I will also recommend below.

But to conclude this chapter I must insist that from what I have gathered my answer to the question is that whether Truth Commissions or Tribunals is the most effective measure in preventing future human rights violations depends on the situation. With this answer I will move on to give a few recommendations.

## 6 Recommendations

With the conclusions I have drawn above I will try to give some insight in the results as an analysis of those conclusions. I will do this in the form of recommendations, making it easy for someone who is looking for actual answers on what to think about in a transitional justice situation.

I think that the most important recommendation for a society in the process of transition that is considering its options in the field of transitional justice is to think about the specific situation. What will work best in the context of the society? That is of course dependant on a number of different things:

Firstly: the present situation in the society. The threat of violence breaking out needs different responses than a more stable situation does, just as a society with especially traumatic memories needs this taken into account. The nature of the conflict impacts heavily on the transitional process; in fact this is the problem to be solved and thus forms the basis for the transitional justice measures. Also the nature of the transition has a large impact on what measures are appropriate. In order to achieve goals related to peace and stability it is important to take this into account and try to figure out possible responses to the measures taken.

Secondly: the goals that should be achieved. As mentioned above the different measures are not equally good at achieving all goals and what goals you have thus affects the decision on what type of instrument that is most suitable. The goals can vary from one situation to another, being dependant on different variables like the nature of the conflict, the abuses and the transition itself, making it important to have answered the question of the situation in the society first. In order for the measure to be as effective as possible at preventing future human rights violations, this needs to be consciously put as a goal in itself, something that has been sadly neglected in most cases.

Thirdly: the society itself. What works well in a society in this type of situation is somewhat dependent on the beliefs and the culture of the society. This is what makes it a bad idea for other countries to for example copy the South African, or any other, concept completely without considering how well it goes with the tradition and culture of the people. In a culture that relies heavily on retributive justice in the legal system it may be difficult to introduce a measure that is completely restorative, while in a society where there is a tradition of restorative justice measures the citizenry will find them natural and appropriate.

Fourthly: if there are any practical problems with a certain approach in the specific context. An example of this is the situation that arises when there are too many cases for a court to physically deal with.

Another important recommendation that I have mentioned above is to combine the different approaches whenever it is possible in the specific situation. As mentioned above they complement each other well, each making up for the others weaknesses. In addition to this there may also be other transitional justice measures as well that should be taken into account and maybe used together with both prosecutions and truth commissions.

Lastly I recommend to be well prepared, and having thought about the guidelines given in these recommendations thoroughly. That will in the end be what truly decides how well things go, if they are well prepared and executed. This can, as mentioned above, be a difficult feat to fulfil due to the special circumstances in transitional societies, but the responsibility then lies on the international community to have a ready plan on how to work with the planning and preparations in these cases in order to fulfil those guidelines and effectively work together with the society in question to achieve as successful a transitional justice process as possible.

There are also some recommendations specific to the different measures in addition to those mentioned above. Some things are important to consider when establishing a tribunal or a truth commission respectively.

When establishing a court one should include actual guidelines on sentencing in order for the deterrence effect and the fair trial aspects to be completely satisfied. It is also important to consider the practical and legal problems that international courts have been faced with; distance to evidence and victims, distance to the public and cultural clashes on both a legal and an interpersonal level. It is important to solve those issues before they become a problem that slows down the workings of the courts, making them less efficient or disrupting them altogether.

The same types of considerations are important when establishing a truth commission. The problems that have been faced on a regular basis by truth commissions have to be considered, issues of amnesty, of what actual expectations the commission has to fulfil and what to do with the aggrieved parties to offer reparations and with the criminals to prevent future violations.

If amnesties have to be given, conditional amnesties, that actually still connects the criminal, the crime and the society and asks something in return for forgiveness, a token for the victims, are recommended above blanket amnesties that may destroy the stability as well as strengthen it. These sorts of balancing acts have to be carefully and well orchestrated if the commission is to have any success.

What we always return to, however, are the recommendations first mentioned above. Consider the context, the transition, the goals, the society and the practical problems that have to be overcome. Consider them well and prepare thoroughly, choosing the most suitable approach for the situation and when the situation allows, try to combine them and most

importantly, do not focus solely on the theory behind but consider the practical effect in the society as well when deciding.

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