Filling the gap - Or: The role of restorative transitional justice mechanisms?¹

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Introduction

The last thirty years have witnessed a great proliferation of approaches to doing justice and restoring community after civil conflict in and outside the courtrooms. Dealing with past human rights violations may involve choices between establishing national, international, or hybrid tribunals, negotiating amnesties or prisoner releases, organizing truth and reconciliation commissions and assisting in providing reparations for victims of human rights violations. Depending on the particular circumstances of the conflict, prosecutions and punishment or using amnesties as a means of getting at the truth, as in South Africa, or developing restorative justice alternatives, as in Rwanda, may be strategy for securing long-term peace and stability. Yet it is far from clear how these mechanisms can co-exist without undercutting the effectiveness of the other.

This paper aims at highlighting issues arising from the promotion of a complementary approach to post-conflict justice that comprises both, retributive and restorative components. Is one component to give primacy? Are both equal in contributing to peace and justice? Can one undermine the outcome of the other?

In the search for an answer to these questions, this paper limits itself to raising awareness and sensitivity in relation to three main issues:

- The limitations of international criminal justice
- The victims rights and inclusion in transitional justice mechanisms
- The implications of International Human Rights Law in relation to i.e. procedural fairness within Truth Commissions

This writing is part of a PhD research project that focuses on societies attempting to overcome an intra-state conflict with high societal involvement. These are countries challenged by mass victimisation, such as Bosnia Herzegovina², Sierra Leone and Timor Leste, to name just a few of the recently settled conflicts.

¹ This paper was presented at the 8th annual conference of the European Society of Criminology in Edinburgh, 3-5 September 2008. Presenter can be contacted at: heinrich.st@gmail.com
² co-presenters in this workshop were Prof. Stephan Parmentier, Criminology Department, Katholieke
Universiteit Leuven, Belgium and Prof. Elmar Weitekamp, University of Tübingen, Germany (presentation entitled: “Dealing with the past in Bosnia: Results of a population-based research”)
1. What is the post-conflict environment this presentation aims to address?
When a violent conflict ends or a harsh totalitarian state collapses, perpetrators and victims of violence most often have to live side by side. In such a scenario the term “mass victimisation” is used to describe as “victimisation directed at, or affecting, not only individuals but also whole groups. In some cases the groups are very diverse, the members have nothing or not much in common, and the group is not targeted as a specific entity. More often, however, the acts of victimisation are directed against a specific population”\(^3\). In such a situation, with the presence of struggling state institutions, the pursuit of justice and reconciliation becomes quite complex. Within these settings, societies are not only challenged to find ways of how to deal with their violent past, in addition, the successor regime needs to find ways of constructing better relationships between the previously warring factions.

2. Theoretical starting point for this presentation?
The international legal order, personified in the United Nations Organisation and its Charter does not embrace criminal justice as its primary concern or objective. International peace and security rank highest on the UN’s explicit list of priorities. The Security Council of the United Nations in its report of a meeting on “The rule of law and transitional justice in conflict and post-conflict societies”\(^4\) explicitly stated: “Justice, peace and democracy are not mutually exclusive objectives. They are rather mutually reinforcing imperatives”. A state of peace and justice should, at a minimal, entail a common presence as a minimal form of reconciliation. This requires changing the social and political order, recognition of suffering and tolerance of diversity\(^5\). As an entire community begins to reorient itself from the adversarial, antagonistic relations of war towards more respect-based relations of cooperation, there is a need to find more than one way to live alongside former enemies, to coexist with them, and develop a degree of cross cultural cooperation\(^6\).

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Bringing perpetrators to account

Through prosecution, perpetrators are brought to account for the atrocities committed. Such prosecution can take place either in front of national courts, international or internationalised tribunals or, if covered by the Rome Statute, by the International Criminal Court. The hope is, that the Tribunals or Trials will succeed in calling vicious criminals to account and send a loud and resounding message to the international community that persons who order or commit the sorts of crimes under jurisdiction run the risk of punishment.

In brief, lists of the purposes of punishment include the following four: deterrence (general and special), incapacitation, rehabilitation (or reformation), and retribution (or just deserts). All four are based on the principle that people who have committed human rights’ violations, or ordered others to do so, should be punished in courts of law or, at a minimum, publicly confess. Those who uphold this approach\(^7\) contend that punishment is necessary to make perpetrators accountable for their past action. In its reactive manner, prosecutions aim at deterring those who committed the crimes under investigation and function as a general deterrent to others in other countries and other times not to engage in such conducts\(^8\). Special and general deterrence plays a crucial role in determining rights and wrongs, for the past and the future. The renewal of criminal prosecutions against perpetrators of mass abuses can assert or reassert the ethic of the rule of law in a country. A welcoming side effect is, that by expressing public denunciation and deterrence of criminal behaviour through national or international tribunals, these also contribute to a greater public confidence in the state’s ability and willingness to enforce the law. As such, it performs a communicative or “educative” function espousing new common values\(^9\). Further, if advanced by the international community, followed by conviction and punishment, trials can constitute an acknowledgement by the world at large as a response to the suffering of the victims. Simultaneously, the court signifies that it is pronouncing judgement on behalf of all human kind, especially by prosecution and punishment in favour of the United Nations\(^10\). Finally,

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criminal trials also have the potential to establish the truth on the crimes under focus and thereby create a historical record.

**The limitations of criminal trials**

Societies, characterised by widespread victimisation and high societal involvement make it almost *per se* impossible for justice to be done merely in the courtroom. Criminal trials international and national cannot possibly prosecute all those suspected of war crimes and crimes against humanity in devastated societies. The reality is that many crimes will go unpunished and the truth about such crimes, and potential whereabouts or fate of their victims, will be unheard and often ignored. The caseload e.g. of the Bosnian War Crimes Prosecutor’s Office and the Chamber (BWCC) is immense, potentially even overwhelming. One of the prosecutors’ biggest challenges is to select cases so that the public at large is convinced that all major crimes are addressed at the Court of Bosnia-Herzegovina in its current or expanded form—while other cases are tried in the entities11.

In addition, post-conflict societies are characterized by an inadequate criminal justice system or the fact that the courts still are under control of the old regime12. The trend toward internationalisation of individual responsibility for certain heinous crimes reflects the unfortunate fact that states often fail to bring perpetrators to justice. For example, the proper functioning of the justice system in Bosnia-Herzegovina during and immediately after the conflict was severely impaired for a number of reasons. The loss of skilled members of the legal profession and the judiciary throughout Bosnia, coupled with the physical destruction and lack of proper equipment or facilities, hindered the ability of the courts to administer justice effectively. The situation was compounded by complexities in the legal framework and inappropriate procedural laws. Other obstacles included bias of judges and prosecutors, poor case preparation by prosecutors, and ineffective witness protection mechanisms13.

The post-conflict legal environment of Bosnia-Herzegovina is yet far from alone being challenged by such structural incapacities. In Timor Leste, one issue was the lack of co-ordination and co-operation within UNTAET. In addition, the Special Crimes Investigation Units (SCIU) had too few experienced staff and experts. Another drawback was the minimal use of East Timorese in the investigations. The most serious issue until today, however, has

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11 IVANISEVIC, B.: *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court* (2008), ICTJ, Prosecutions Case Study Series, p. 43


been the unwillingness of the Indonesian government to co-operate regarding information, evidence gathering and indictments and to extradite suspects. This has seriously undermined SCIU’s work and raised extensive criticism within Timor Leste’s society. Furthermore, numerous indictments were filed against lower-ranking Indonesian officials, but the primary perpetrators were not indicted.

Trials focus on the perpetrators. Criminal accountability in a post-conflict society mainly means bringing those to account in a just way that have committed gross violations of human rights during the violent past. However, in order to promote enduring peace-building, such large-scale abuses cannot be brought to justice without recognizing the social, psychological, physical or religious factors that surrounded them. More than desiring punishment of the perpetrator, experience has shown that victims are more interested in the restoration of their human and civic dignity. This may be difficult to attain in the adversarial context of trials. Victims have long been the silent partners of transitional justice processes. They have been brought to courts to testify about their very personal and traumatic experiences. Yet, very little has been done to reduce their alienation from the process and to ensure that the experience does not contribute to their further traumatisation. The UN Secretary-General contrary hereto described victims' concerns as the "overriding interest" to drive the Rome Conference, and many delegates heeded his call. None did so more clearly than the members of the Victims Rights Working Group, stating “…Victims need to have the opportunity to speak the truth about what happened to them, however painful that might be. They also need to hear the truth: to receive answers, and official acknowledgement concerning the violations. They need to be protected from further harm. They need to be involved in the judicial process. And they need compensation, restitution and rehabilitation.”

15 For the South African experience e.g.: McLAUGHLIN, C.: Reparations in South Africa – a visit to Khulumani in Race & Class 2002, pp. 81-86
This is probably why many argue, that committing such horrendous crimes should call for other particular forms of organised responses than public trials of guilt followed by sanctions calibrated to communicate an offender’s blameworthiness.

**A Victim-centred Approach**

The importance of asking victims cannot be stressed enough. There has been some imaginative tinkering with tribunals in this direction. As described, attempts were made to include the victims into the criminal procedure and to have an impact on the potential outcome of a trial. However, attempts to include victims into the criminal justice process will always, as a prerequisite, require a functioning criminal justice system and prosecution of the perpetrator. This makes justice inaccessible for many victims all over the world.

Restorative Justice has raised many hopes in filling the gaps, or providing mechanisms to step in where the limitations of criminal trials, such as described, have become evident. Restorative Justice itself cannot be described in a general, every-restorative-process-covering way. This is probably one of its main characteristics and main potentials making it flexible and adjustable to the setting it is supposed to deal with. Its advocates have proposed in many occasions that restorative justice be viewed as a "third way", representing a break from the elements associated with retributive and rehabilitative justice. The UN Basic Principles on Restorative Justice are characterized by an absence of a general agreement on restorative justice. The text first refers to a “restorative justice programme” which can be any program that uses restorative processes or aims at achieving restorative outcomes. This relates to processes whereby all parties affected by the crime actively participate together in the resolution of matters arising from the crime, often with the help of an impartial third party. Restorative outcome on the other hand means an agreement reached as the result of a restorative process. Braithwaite and Pettit have suggested that, from a republican perspective, restorative outcomes would include the restoration of property loss, injury, a sense of security, dignity, a sense of empowerment, deliberative democracy, harmony and social support. The parties included in any restorative justice program are the victims, the offender and any other individual or community members affected by a crime.

What both, restorative processes and outcomes have in common is that they both focus on the offence and the offender while concerned with censuring past and changing future behaviour. The aim is, to react with sanctions or outcomes that are proportionate and make things right in individual cases. As such, restorative justice practices embrace retributive justice assumptions of individual culpability but include a wider notion of community responsibility for acts committed. Ideas of "reintegrating" offenders by members of relevant communities of care, promote a stronger vision of rehabilitation in which broader networks of people associated with a lawbreaker, not just state activists, get involved and have a role. As a systematic means of addressing wrongdoings that emphasizes the healing of wounds and rebuilding of relationships, restorative justice does not focus on punishment for crimes, but on repairing the harm that has been caused by the crime. Truth telling and the meeting of victims and perpetrators are therefore important in any restorative justice process, as are expressing remorse and making restitution to the victim and his or her family.

**Truth Commissions as complementary restorative justice mechanisms?**

One way to enhance restoration is through the establishment of a Truth Commissions. To date there were approximately thirty truth commissions established around the world. Truth Commissions are generally temporary, national bodies with a statutory mandate lasting six months to two years. The aim is to help a nation overcome a period of conflict, intense human rights abuses or authoritarian rule and to assist the society in moving forward psychologically, legally, politically, culturally and in some cases, spiritually. In order to achieve such higher objectives, truth commissions employ a number of means and methods such as statement-taking from victims and perpetrators of human rights abuses, investigations into the causes of the conflict or abuses, witness interviews and historical enquiries. The end product will often be a report, distributed to the focus country; coupled with a set of recommendations, public hearings and awareness campaigns that take place throughout this process and upon the release of the final report.

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Phebs highlights the importance of giving testimony for the individuals involved. In a post-conflict society, characterised by manipulation of language and denial of people’s ability to speak words for themselves, the retrieving of language and the restoration of the ability to speak in one’s own voice can go a significant way in balancing the harm done. The stories made public through a truth commission can communicate the experience of pain and suffering between people who normally cannot understand each other. Such stories can translate events and emotions in a way that other forms of discourse cannot, can overcome the different that bars both justice and understanding. By doing so, in particular the victim’s testimony about the horrific events they have undergone facilitates their recovery. During years of oppression, violence, fear, and silence, many people lose not only their personal voices but also their place in society. A Truth Commission, maybe even more than a judicial authority, plays an important role in redefining the individuals place in society. By encouraging people to come forward and tell their stories and providing an official setting in which their stories are heard and acknowledged, a renewed state invites them back in and incorporates their stories as part of a new national narrative. This reflects an attitude that the country desires its citizens to be responsible moral agents and no longer passive victims.

From a victim perspective, sharing experiences of trauma can translate into collective experiences, and thus into political formations. This process plays a crucial role in shaping processes of reconciliation and, in a more general sense, influences whether conflict or peace will prevail in the long run. Emotions are of particular importance here, strongly shaping the collective agency needed to reconstitute key social and political institutions in the wake of widespread atrocity and violence.

**Filling the gap?**

While Truth Commission can uncover witnesses and evidence for prosecutions in some situations, trials can close the impunity gap often discussed as the downside of a Truth Commission’s process. In the past, the information gathered by Commissions has also, in some situations, led to subsequent prosecutions: To the extent that Truth Commissions are seen by the community as connected to tribunals, they can lend legitimacy to, and encourage

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29 NESBITT, M.: *Lessons from the Sam Hinga Norman Decision of the Special Court for Sierra Leone: How Trials and Truth Commissions can co-exist* in German Law Journal 2007, p. 977
cooperation with, the tribunals' actions. The co-existence of criminal prosecution with the work of the South African TRC has e.g. proven supportive for the work of the commission. On the other hand, Truth Commissions can generally provide for a broader enquiry into historical causes of conflicts beyond the scope of individual trials--even beyond those that delve into a level of historical enquiry: Precisely because Truth Commissions are not judicial bodies with complex rules of procedure and evidence, they may be able to set about their work more swiftly than tribunals, with greater participation of the community. In comparison to criminal trials, Truth Commissions provide a larger forum for more victims and witnesses to testify and otherwise become involved with the peace process, as well as an opportunity for them to have the world acknowledge the wrong that has been done. Through such personalisation there is much potential to create satisfactory outcomes particularly for all stakeholders involved. This process is not limited by the requirement to reach a verdict on the guilt or innocence of any one person, but rather has greater room for flexibility in providing conclusions, which can be broader than the findings of courts. By doing so, Truth Commissions aid and support the political reconstruction by signalling and adding momentum to a shift in political power away from perpetrators and toward victims and human rights defenders. Understood as such, a Truth Commission can be undoubtedly a valuable approach in promoting restoration and reconciliation, in re-establishing moral values for rights and wrongs and the victim’s position within the emerging society.

**Tensions that can be created by applying a complementary approach to post-conflict justice?**

If Truth Commissions are to co-exist and probably even step in where criminal trials do not reach most victims and perpetrators, situations can be foreseen in which both mechanisms could undermine the functioning and outcome of the other:

1. Unless closely coordinated with other institutions, Truth Commissions may be subject to their own organizational dynamics in ways that send them off on unanticipated paths. The South African Truth Commission's objectives i.e. shifted as different actors and constituencies became involved in the process. Although amnesty to the perpetrators was initially the central objective, at later stages, the victims became the focal point. As religious leaders and churches

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became increasingly involved in the commission's work, the influence of religious style and symbolism supplanted political and human rights concerns. Such changes in motive and method may serve worthy purposes, yet they clearly put Truth Commissions in tension with the judicial and adversarial method of establishing evidence and dispensing justice.

2. A government may choose to create a Truth Commission in order to control the investigators and the scope of investigations. As Freeman\(^{32}\) notes, it may end up pursuing its own agenda, call public attention to the States past human rights record and make unexpected findings and rather than providing a sense of historical justice, the Commission could finish by disappointing victims and the general public. In the absence of coordination, the fact that Truth Commissions can move more swiftly can complicate or undermine the effectiveness of international tribunals. Whether responding to a legislative mandate, community expectations, or its own organizational dynamic in shaping its inquiries, a Truth Commission bears the potential to generate a version of "truth" and of appropriate "justice" to which any subsequent tribunal will be compelled to respond if it values its own legitimacy, even though the Truth Commission may have radically departed from judicial rules and procedures that a tribunal must follow. In a worst scenario, a Truth Commission’s impact could be eclipsed by the subsequent passage of a broad amnesty law\(^{33}\).

3. If a Truth Commission performs its tasks badly--due to political constraints, insufficient resources, or errors in judgment--it can generate disillusionment among victims and survivors and increase their sense of vulnerability, undercutting the tribunal's ability to gain their cooperation\(^{34}\). On the other hand, if a Truth Commission offers amnesty to perpetrators in exchange for testimony, or alerts perpetrators to their vulnerability and sends them into hiding, it can impede the tribunal's subsequent ability to gain their custody as defendants or their cooperation as material witnesses\(^{35}\).

5. The amount of ‘punishment’ should be regarded as a serious component of what restorative justice is entitled to impose, if the aim is to promote reconciliation and avoid victimisation. Dignan in relation hereto argues, that unless this issue is addressed, there is no guarantee that even restorative justice will be able to avoid unjust outcomes in which authoritarian figures call the shots. As an answer, he is in favour of a compromise theory of punishment, which sets out a principled accommodation between a form of retributivism, as espoused by the


\(^{35}\) KERR, R.: *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics and Diplomacy*, p. 183
justice model that is associated with von Hirsch and Ashworth, and restorative justice. As a consequence, the amount of reparation, as a form of punishment that we are entitled to impose is itself subject to limits.

6. Truth Commissions are, in almost every sense, human rights investigators. As such they should be expected to uphold core human rights standards and values. Certain rights have the ability, due to their universality and the fact that they are connected to the individual rather than the procedure, to influence the procedure surrounding Truth Commissions, in particular their public hearings. In mind the author has the right to a fair and public trial by an impartial and independent tribunal, not only applying to criminal proceedings but also civil proceedings. In relation hereto, many issues remain unresolved: Can a perpetrator appearing before a Truth Commission insist on his guaranteed rights? Can a person appearing before a Truth Commission claim his right against compelled self-incrimination as guaranteed under Art. 14 (3) (g) ICCPR? What about the right to assistance by a legal counsel? Does this right only protect the accused? Or does it gain importance if one claims that a Truth Commission has the ability to complement or even prepare the work of a tribunal or trial? And how do we deal with a persons privacy and reputation rights? Is this right to be re-negotiated in a nations interest in full disclosure?

Conclusion

This paper is not an attempt to state whether a Truth Commission can work effectively with a court and it is certainly not a call for both Truth Commissions and national or international trials to be used in all situations where methods of transitional justice are employed. To summarise, I promote the following:

1. The higher goals of Truth Commissions and courts do not conflict. The context in which both institutions function in should determine which method best meets peace, justice and reconciliation.

2. A Truth Commissions public hearing should be to such an extent de-instutionalised in order to ensure that a trial cannot replace its investigative procedures with the findings of a Truth Commission. On the other hand, Truth Commission should be to such an extent proceduralised that they can ensure international human rights standards are not infringed.

36 DIGNAN, J.: Towards a systematic Model of Restorative Justice, p. 143
38 Art. 10 of the Universal Declaration of Human Rights; Article 14 ICCPR; Article 12 UN Convention on the Rights of the Child
This only applies if a Truth Commission claims to provide a mechanism to step in where international criminal justice does not outreach.

3. In accordance with Freeman, Truth Commissions should generally focus beyond criminal justice on the objective of providing a measure of impartial, historical clarification to countervail false or revisionist accounts of the past and concentrate on providing a forum where people are able to tell their stories and to be heard. The underlying process should be open, humanized, and procedurally fair. The outcome should be on non-retributive forms of justice not meant to substitute the outcome of a trial.

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