

## INTRODUCTION

Social science has been increasingly concerned with issues of political and economic liberalization, democratization, and prospects for peaceful resolutions to state-sponsored violations of human rights and the social consequences of such abuses. Scholarly debates have centered on questions of accountability, jurisdiction, the role of the state versus the individual, and the meaning of reconciliation. Truth commissions have been one answer to some of these questions. Uncovering the *truth* of the past in order to provide a legitimate foundation on which a new society can build has been accepted as a model form for transitional justice. The question to be raised in this paper is whether or not truth commissions, in their many forms, serve as adequate mechanisms for justice in transitional societies. Moreover, how effective and appropriate are truth commissions in establishing and maintaining peace in a society uprooted by civil conflict, despair, fear and mistrust? Based on my research, I argue that truth commissions alone cannot provide the justice sought by members of transitional societies to the degree necessary for sustained peace. Rather, these commissions must occur in combination with other forms of transitional justice, such as prosecutorial trials or international tribunals, to be determined by the specific needs of those societies and their people.

In order to adequately approach the above questions it is important to introduce some of the concepts that intersect in any discussion of transitional justice, and to establish a framework on which this argument builds. Truth commissions are but one form of what is called *transitional justice*. The idea of transitional justice stems from the notion that societies in between, or in transition from, one political period and another are distinct from consolidated democracies and solidified authoritarian regimes. The unique nature of a society confronted by a past impossible to ignore and the desperate need to move forward is only one of many issues confronting societies in

transition. Richard Siegel suggests that the “term transitional justice characterizes the choices made and quality of justice rendered when new leaders replace authoritarian predecessors presumed responsible for criminal acts in the wake of the ‘third wave of democratization.’”<sup>1</sup> This combination of past abuses and future prospects for democratization creates a distinctive social situation, to be dealt with as such.

Donna Pankhurst, in an attempt to conceptualize the issues of justice, reconciliation and peace in transitional times, writes, “During a transition phase between outright conflict and peace, it is common to find that alternative systems of justice to those through formal, national legal proceedings are functioning.”<sup>2</sup> The author continues this discussion of transitional justice as something different from formal conceptions of justice by suggesting that current research supports a “reconceptualisation of the rule of law,”<sup>3</sup> whereby conceptions of the rule of law are separated by their long term versus short term capacities. She explains, “... minimalist versions might be appropriate in the short term, in contrast with a maximalist conception of the rule of law, including human rights, democracy and good governance, which may only be achievable in the long term.”<sup>4</sup> Though this theory that the rule of law can and should be different under different circumstances seems to contradict the common portrayal of law as a reified field, it does support the claim that

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<sup>1</sup> Richard Lewis Siegel. 1998. “Transitional Justice: A Decade of Debate and Experience.” Book Review, *Human Rights Quarterly* 20(2): 433, 435. For a complete analysis of “the third wave of democracy,” see Samuel P. Huntington. 1991. *The Third Wave: Democratization in the Late Twentieth Century*. London: University of Oklahoma Press. Huntington presents an argument that there have been three “waves of democracy”: between the 1820s and 1926, WWII to the 1960s, and 1974 to the present.

<sup>2</sup> Pankhurst, Donna. 1999. “Issues of Justice and Reconciliation in Complex Political Emergencies: Conceptualising Reconciliation, Justice and Peace.” *Third World Quarterly* 20 (1): 4.

<sup>3</sup> Ibid 4.

<sup>4</sup> Ibid 4.

there is something very unique about transitional societies, and that such a difference should be taken into account when applying legal principles.

Applying a constructivist analysis to the understanding of transitional justice, Ruti Teitel argues that, in periods of political transformation,

Law is caught between the past and the future, between backward looking and forward-looking, between retrospective and prospective...law's function is inherently paradoxical. In its ordinary social function, law provides order and stability, but in extraordinary periods of political upheaval, law maintains order, even as it enables social transformation.<sup>5</sup>

Characterizing this period of transition in terms of a *tension* or *dilemma*, where the law is both a source of stability and change, where understandings of justice are both shaped by existing law and shape future law, Teitel provides a complex analysis of the relationship between law, justice and political transformation. Namely, the potential for constructing the law to meet the needs of the society it aims to protect and provide the foundation on which peaceful society can develop.<sup>6</sup>

Just as *truth* and *justice* take on various definitions depending on who defines them and in what context the terms are considered, the ideas of *peace* and *reconciliation* are similarly confounded. What does it mean to talk about peace and at what point does this peace become sustainable? Is it the mere absence of violence that determines periods of peace, or is it something more? Galtung differentiates between negative and positive peace; where negative peace refers to the end of active violence, and positive peace implies that violence is minimal or nonexistent and the causes of such violent action have been dealt with in a way that minimizes the likelihood of future violence.<sup>7</sup> Like that of Galtung, extensive research and scholarship on justice

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<sup>5</sup> Ruti Teitel. 1997. Transitional Jurisprudence: The Role of Law in Political Transformation. *The Yale Law Journal* 106: 2014.

<sup>6</sup> Ibid 2014-2018, 2077-2078.

<sup>7</sup> See J. Galtung. 1985, "Twenty-Five Years of Peace Research: Ten Challenges and Responses." *Journal of Peace Research* 22; Pankhurst 1; see also, M. Cherif

and transitional justice, and their policy implications, suggests that the absence of violence and conflict is only the first of many steps in achieving peace.

In his book, *Overcoming Apartheid*, James Gibson questions the relationship between truth and reconciliation, implicitly accepting that reconciliation in *addition* to the absence of violence is necessary for peaceful political development.<sup>8</sup> Gibson establishes four specific factors that combine to construct the meaning of reconciliation in post-Apartheid South Africa: interracial reconciliation, political tolerance, support for human rights principles, and legitimacy.<sup>9</sup> Each of these factors contribute to the idea that reconciliation is an individual phenomenon, though it is also considered in terms of societies and groups, where individuals and societies reconciled with the past have a greater potential for supporting democracy. In accordance with democratic peace theory, democracies are more likely to interact peacefully, both internationally and domestically, than non-democracies. He writes,

...reconciliation is hypothesized to contribute to democratization...a successful liberal democracy requires a sustaining and reinforcing 'political culture.' The beliefs, values, attitudes and behaviors of ordinary citizens must be, at a minimum, not antithetical to the principles of democratic governance, and maximally they ought to favor and support the main institutions and processes of liberal democracy.<sup>10</sup>

A nation reconciled with its past, at both the individual and societal levels, will be more likely to pursue common political, economic and social objectives, peacefully, than a nation troubled by a history of human rights violations and impunity. Yet the method by which such reconciliation, and therefore peace, is achieved is hotly debated. Can truth commissions alone provide the justice demanded by people of these

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Bassiouni. 1997. "Searching for Peace and Achieving Justice: The Need for Accountability." *Law and Contemporary Problems* 59 (4): 12-13.

<sup>8</sup> Gibson, James L. 2004. *Overcoming Apartheid: Can Truth Reconcile a Divided Nation?* New York: Russell Sage Foundation.

<sup>9</sup> Ibid 4.

<sup>10</sup> Ibid 5.

societies and the international community, or are punitive trials the only answer? Should these two institutions be combined, or can they exist as separate entities? And, when working toward some form of sustainable peace, is the truth necessary, or will it create deeper social cleavages in already ravaged nations?

Though limited in scope, the above discussion of transitional justice and sustainable peace brings to the fore some of the debates shaping the field of political transition and democratization. Utilizing primary sources such as international organization documents and news articles, as well as secondary sources on political and legal transitions, this paper will investigate the efficacy of truth commissions as instruments for justice in transitional societies.

Beginning with a general overview of truth commissions, I will examine their forms, the legal rationales behind truth commissions, and the precedent set by the South African Truth and Reconciliation Commission (TRC). Throughout the 1990s, truth commissions gained a favored status as a viable solution to the problems faced by transitional societies by international organizations and domestic governments, though very little has been done from the standpoint of the societies themselves. This discussion of truth commissions will be contrasted with a discussion of alternative forms of transitional justice. I will conclude with a general overview of points made throughout the paper and some final remarks about the relationship between truth and justice. As mentioned before, I argue that truth commissions are not always the best option for realizing justice in transitional societies; in other words, truth does not equal justice for all people at all times.

### **TRUTH COMMISSIONS: AN OVERVIEW**

While the idea of a truth commission—its purpose and function—as one particular mechanism for eliciting accountability is generally understood and accepted, scholars of transitional justice have varying definitions of this particular institution.

Priscilla Hayner, in a comparative study of fifteen truth commissions, defines these as “official bodies set up to investigate a past period of human rights abuses or violations of international humanitarian law.”<sup>11</sup> This definition is expanded to include four primary elements of a truth commission: a truth commission is orientated towards the past; it is not focused on a specific event, but aims to create a general understanding of human rights abuses and international legal violations over a period of time; a truth commission is usually temporary, where a pre-determined time period is outlined in the mandate of the commission; and, a truth commission is vested with the authority to access otherwise inaccessible information and to provide more effective reports than individuals or small groups would be able to accomplish.<sup>12</sup> The official, state-sanctioned acknowledgement of a truth that had been long rejected has the capacity to greatly aid in the reconciliation process.<sup>13</sup>

In her 1994 study, Hayner limits the definition of truth commissions to primarily government-sanctioned entities, where NGOs and other international organizations with a similar aim of making public past abuses and violations fall into a different analytical category. However, Juan Méndez considers truth commissions in a broader context, emphasizing the objectives of disclosure and acknowledgement of past abuses rather than the authority granted such entities by government sponsors.<sup>14</sup> Whether one understands truth commissions as strictly defined, government-sponsored institutions, or as more general entities mandated to uncover the hidden truths of the past, questions remain as to what is the truth? Whose truth is being uncovered and by

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<sup>11</sup> Priscilla B. Hayner. 1994. “Fifteen Truth Commissions—1974 to 1994: A Comparative Study.” *Human Rights Quarterly* 16 (4): 598.

<sup>12</sup> See Hayner 1994, 604; Priscilla B. Hayner. 2001. *Unspeakable Truths: Confronting State Terror and Atrocity*. New York: Routledge, 14.

<sup>13</sup> See Hayner 1994, 607.

<sup>14</sup> Juan E. Méndez 1997. “In Defense of Transitional Justice.” In *Transitional Justice and the Rule of Law in New Democracies*, edited by A.J. McAdams. Notre Dame: University of Notre Dame Press; 2.

whom? What is justice? And, can revealing the truth provide justice to societies in transition?

Continuing her scholarship on truth commissions as a response to state terror and atrocity, Hayner makes a significant contribution to how we understand the objectives and varieties of these bodies. She identifies the following five basic functions of truth commissions. They aim “to discover, clarify, and formally acknowledge past abuses; to respond to specific needs of victims; to contribute to justice and accountability; to outline institutional responsibility and recommend reforms; and to promote reconciliation and reduce conflict” resulting from past violence.<sup>15</sup> In other words, truth commissions have emerged as one way to publicly uncover a past likely kept secret by those responsible for human rights violations, in order to provide a sense of justice and accountability, for the purpose of mending a nation from which people can begin to look forward and to develop cohesive political, economic and social plans for the future.

Stephen Landsman provides an additional distinction between truth commissions and trials as mechanisms for achieving justice. He writes, “The truth commission does not prosecute but rather devotes its energies to assembling a full record concerning prior misdeeds. It seeks to describe what happened, who was responsible and what motives were at work.”<sup>16</sup> Once these records are published, they can operate as “a guide to avoid future infringement on human rights.”<sup>17</sup> Similarly, the Kenyan Justice Minister, Mr. Murungi, said, “Kenyans wanted to know where the country went wrong, what atrocities were committed, who committed them and why

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<sup>15</sup> Hayner 2001, 24-31.

<sup>16</sup> Landsman, Stephen. 1996. “Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions.” *Law and Contemporary Problems* 59(4): 82.

<sup>17</sup> See Landsman 92; see also, Hayner 1994, 609.

they were committed.”<sup>18</sup> With respect to truth commissions, the chairman of the Kenyan task force identifies the purpose of the truth commission as “one meant to build, not to destroy. It is to heal, not to cause disruption.”<sup>19</sup> The work of truth commissions serves to recognize past abuses, thus validating the experiences of survivors, victims, and their families, as well as provide a tool for future prevention of such abuses.

#### *TRUTH COMMISSIONS AND THEIR MANY DIFFERENT FORMS*

In response to the vast number of states undergoing democratization processes since “the third wave of democracy”<sup>20</sup> in the latter part of the twentieth century, and the abuses of authority and human rights violations experienced under previous regimes, truth commissions have emerged as one possible answer to the quest for justice. Truth commissions have developed as national or state-sponsored solutions, international requisites for continued assistance, conditions for peace agreements ending violent conflicts, from non-governmental organizations seeking accountability for past wrongs, or as any combination of the above.

Priscilla Hayner provides an extensive appendix tracing the many different truth commissions that have emerged since the 1970s. Some of the most well known commissions have been government initiated, like the 1983-1984 *Comisión Nacional para la Desaparición de Personas* in Argentina, the 1990-1991 Chilean *Comisión Nacional para la Verdad y Reconciliación*, the Truth and Reconciliation Commission (TRC) in South Africa, which took place from 1995-2000, and most recently, the Truth and Reconciliation Commission in Sierra Leone.<sup>21</sup>

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<sup>18</sup> “Truth Commission for Kenya.” *BBC News*, Wednesday, October 15, 2003.

<sup>19</sup> See “Truth Commission for Kenya”.

<sup>20</sup> See Huntington 1991.

<sup>21</sup> See Hayner 1994, 601-603; Hayner 2001, 291-297.



Alternatively, the 1992-1993 Salvadoran commission following a peace agreement between government and opposition forces, the *Comisión de la Verdad para El Salvador*, was the first commission to be sponsored by, paid for and staffed by United Nations. Prior to the 1994 Rwandan genocide, four international NGOs instituted the International Commission of Investigation on Human Rights Violations in Rwanda. Since October 1, 1990. And in 1995-1996, the UN Security Council authorized an International Commission of Inquiry to account for mass human rights violations that took place earlier in the decade. Finally, the 1997-1999 Guatemalan *Comisión para el Esclarecimiento Histórico* stemmed from a United Nations-moderated peace accord, thus meshing domestic and international concerns for accountability. As evidenced by this abbreviated listing of truth commissions, their origins and sponsors vary dramatically, though the objective remains the same—to reconstruct a truth that has been gravely misconstrued over time.

*LEGAL ARGUMENTS SURROUNDING TRUTH COMMISSIONS AND THE ROLE OF INTERNATIONAL LAW*

International law has developed much of the framework in which the concepts of transitional justice and truth commissions exist. Debates over the feasibility of truth commissions as a source of justice, and the legality of transitional justice more generally, have come to the fore in the past decade. Professor of Law, Ruti Teitel, writes extensively on the subject of transitional justice and its many complexities, and approaches these debates in her article, *Transitional Jurisprudence: The Role of Law in Political Transformation*.<sup>22</sup> One particular issue Teitel confronts is that of successor justice; namely, the extent to which a successor regime is bound by the laws of the

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<sup>22</sup> See Teitel 1997.

previous regime. In examining the Hart-Fuller academic debate of 1958,<sup>23</sup> which tackled the problem of justice after the fall of the Nazi regime, Teitel addresses the tension commonly referenced between positive and natural law, between procedural and moral rights.<sup>24</sup>

Hart, a legal positivist, argues “adherence to the rule of law included recognition of the antecedent law as valid.”<sup>25</sup> Regarding the Nazi crimes tried following the fall of the regime, Hart supports the idea that if an act is committed and considered acceptable under standing law, whether morally acceptable or not, that act is not to be classified as a crime. In opposition to this view, Fuller maintained that adhering to the rule of law required a break from prior Nazi law, and the classification of such law as illegal.<sup>26</sup> Teitel explains, “The natural law position [that of Fuller] highlights the transformative role of law in the shift to a more liberal regime. On this view, putative law under tyrannical rule lacked morality and hence did not constitute a valid legal regime...the role of law is to transform the prevailing meaning of legality.”<sup>27</sup> Because, as Fuller would argue, the rule of law constructed and adhered to by the Nazi regime lacked necessary morality and violated some of the most basic notions of legality, acts committed in the name of Nazi law, though in violation of some fundamental moral rights, are to be considered crimes.

The contemporary international community (both political and legal) appears to have adopted the latter understanding of transitional justice as something different

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<sup>23</sup> See H.L.A. Hart. 1958. “Positivism and the Separation of Law and Morals.” *Harvard Law Review* 71: 593; Lon L. Fuller. 1958. “Positivism and Fidelity to Law—A Reply to Professor Hart.” *Harvard Law Review* 71: 630.

<sup>24</sup> Teitel 1997, 2018-2021.

<sup>25</sup> Ibid 2019.

<sup>26</sup> Ibid 2019.

<sup>27</sup> Ibid 2021.

than the more clearly-cut legal systems of established regimes.<sup>28</sup> One approach taken by numerous scholars in reference to this tension is that of finding a balance between the stability of established law and the necessity for legal reform. Ruti Teitel puts forward the idea that transitional justice implies a balance between two understandings of the rule of law—between how it is ordinarily understood and its transformative, socially constructed, understanding.<sup>29</sup> Similarly, Diane Orentlicher discusses the necessity for balancing,

...we would do well to resist the tendency to address the wisdom of amnesties in terms of stark dichotomies...These dichotomies present unduly narrow options, detracting from more constructive efforts to balance the demands of justice against those of reconciliation and, ultimately, to promote reconciliation within a framework of accountability.<sup>30</sup>

Rather than approach transitional justice in terms of *either* maintaining the old legal system *or* building a new one, Orentlicher and Teitel recognize the need for finding a compromise between the two, for maintaining the legal stability required for the maintenance of a tentative peace, and recognizing the need for reform—for constructing a legal framework that takes into consideration the specific context of the transition under examination.

In addition to the ongoing debates within the field of international law, it is equally important to recognize the influential role of international law in shaping the

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<sup>28</sup> From the International Military Tribunal after WWII to the recent establishment of the International Criminal Court, individual responsibility for crimes against humanity, war crimes, crimes or aggression and genocide has been explicitly stated. Regardless of the legality of such crimes under previous domestic regimes, international standards have emerged that deal with how states and representatives of the state act towards others, including citizens of the state in question. For example, see “Principles of the Nuremberg Charter and Judgment,” Formulated by the International Law Commission, G.A. Res. 177 (II)(a), 5 U.N. GAOR, Supp. No. 12, at 11-14, para.99, U.N. Doc. A/1316.

<sup>29</sup> Teitel 1997, 2025.

<sup>30</sup> Orentlicher 1997, 714.

demands for transitional justice; and more relevantly, how truth commissions form. Despite their lack of concrete authority and enforcement power in the international system, international legal norms (primarily set forth by the United Nations and various other regional organizations) provide strong guidelines for the way individual states should operate in terms of their relationships with other states, foreign citizens and their own people. The Geneva Conventions, the Universal Declaration of Human Rights, the Genocide Convention, the Torture Convention, among a multitude of other formal international human rights agreements, demonstrate the pervasiveness of human rights norms throughout the international community. Whether or not the standards presented in these agreements are adhered to does not change the reality that they are recognized as such by a majority of states around the world. It is this idea that international law serves as a guide, providing a set of guidelines for how states should treat the individuals they are responsible for. And, as evidenced by the increasing number of human rights agreements, the standard is getting higher. Richard Siegel writes, “Truth commission reports and compensation of victims may be the maximum response that is immediately feasible in a given national context. But the human rights regime requires, and is beginning to actually demand, a greater degree of accountability.”<sup>31</sup> He continues this line of argument by asserting that such accountability can be better achieved by greater adherence to existing international legal standards.

International law may also exist as a mediator between pre-transition legal systems and those systems of transitional societies. International law can be viewed as an “alternative construction of law that...is continuous and enduring...[and is] frequently invoked as a way to bridge shifting understandings of legality.”<sup>32</sup>

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<sup>31</sup> Siegel 1998, 454..

<sup>32</sup> Teitel 1997, 2028.

Particularly, international law provides valid options for transitional societies in which competing regimes are asserting their claims for representation and power in government. Where the *politics* of these regimes shape the way in which societies handle their transition, adherence to, and integration of, international law provides a solution for possibly avoiding purely political resolutions to transitional problems.<sup>33</sup>

#### *THE SOUTH AFRICAN PRECEDENT*

The South African Truth and Reconciliation Commission is the most researched and referenced commission of its kind. Established in 1995 under the *Promotion of National Unity and Reconciliation Act*, producing a final report of its activities in 1998, and completing its amnesty hearings in 2000, the TRC interviewed thousands of apartheid victims and granted amnesty to hundreds of human rights violators. In turn, the South African TRC is looked to by other countries in transition as a potential model for dealing with their own pasts of violence and abuse.<sup>34</sup> The TRC is comprised of three committees: the Amnesty Committee, the Human Rights

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<sup>33</sup> See Teitel 1997. For a discussion of the relationship between democracy and international law see, Gregory H. Fox and Brad R. Roth, (ed). 2000. *Democratic Governance and International Law*. New York: Cambridge University Press. Alternatively, Hans Köchler discusses some of the limitations of past efforts at international justice, where the political motivations of the sponsoring states prevent any rational assessment of what really happened, Hans Köchler. 2003. *Global Justice or Global Revenge: International Criminal Justice at the Crossroads*. New York: Springer-Verlag Wien, 10-13; also see Jeremy Rabkin. 1999. "Nuremburg Misremembered." *S AIS Review* 19(2): 81-96; Christopher Simpson. 1995. *The Splendid Blond Beast: Money, Law, and Genocide in the Twentieth Century*. Monroe, ME: Common Courage Press.

<sup>34</sup> The International Center for Transitional Justice is one particular resource available to various countries making choices between *types* of transitional justice. Because many of the staff for the ICTJ were involved in the South African transition from apartheid, there are some important similarities between the TRC and other projects under the guidance of the ICTJ. See <http://ictj.org/> for more information.

Violations Committee [or, the “truth committee”], and the Reparation and Rehabilitation Committee.<sup>35</sup>

One particular characteristic of the South African truth commission was its far-reaching powers for acquiring information, influencing the government, and for granting amnesty to those who confessed violations of human rights under the apartheid regime. Perhaps the most significant power granted the TRC in its search for the truth was the ability to grant amnesty from prosecution in exchange for testimony of personal involvement in the apartheid regime, which provided the enforcement unavailable to prior truth commissions. A 1996 case, *Azanian Peoples Organization (AZAPO) and Others v. President of the Republic of South Africa*, references this power stating,

The [TRC’s Amnesty] Committee has the power to grant amnesty in respect of any act, omission or offence to which the particular application for amnesty relates, provided that the applicant concerned has made a full disclosure of all relevant facts and provided further that the relevant act, omission or offence is associated with a political objective committed in the course of the conflicts of the past...<sup>36</sup>

Conditioning the amnesty on a full disclosure of the truth granted the TRC more authority than truth commissions mandated to gather information, but with no real bargaining power. Grounded in the idea that uncovering the truth would or could influence a peaceful reconciliation, amnesties created an opportunity by which more of the truth could be revealed.

## **DEMANDS FOR JUSTICE**

As stated continuously throughout this paper, transitional societies are faced with complex problems stemming from long periods of human rights violations, abuse

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<sup>35</sup> Dan Markel. 1999. “The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States.” *The University of Toronto Law Journal* 49(3): 396.

<sup>36</sup> Jeffrey L. Dunoff, Steven R. Ratner, and David Wippman. 2002. *International Law: Norms, Actors, Process*. NY: Aspen Law & Business, 633; also see Markel 1999, 396.

of power, and abandonment of the rule of law or adherence to an authoritarian rule of law that protects certain groups at the expense of others. In response to these issues arises a demand for justice and accountability by the people of the society and/or by the international community, whereby truth commissions offer one possibility.<sup>37</sup>

#### *AN INHERENT RIGHT TO TRUTH*

As international human rights and humanitarian law expand, covering issues such as child rights, torture, genocide, conduct in war, and a state's treatment of its own citizens, there have also been discussions of an inherent right to know the truth. This right provides individuals access to information, especially information concerning grave violations of human rights. Priscilla Hayner writes, "International human rights law obliges states to investigate and punish violations of human rights; within this is the inherent right of the citizenry to know the result of such investigations."<sup>38</sup> She cites Frank LaRue and Richard Carver who work in this field and who refer to existing international law to support the reality of a right to truth. Each of these scholars argue that human rights declarations and agreements, such as the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights, include articles pointing to a right to receive and spread information. According to some scholars, this right implies an inherent right of all peoples to know the truth about their own experiences and those of their family members.

In 1998, in paragraphs 88 and 97 of a case brought before the Inter-American Commission and Court of Human Rights<sup>39</sup>, it is documented,

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<sup>37</sup> One example of this is the recent Brazilian discovery of documents incriminating former regime members for past abuses, which has induced a popular demand for acknowledgement of these crimes. See Larry Rohter. 2005. "Hidden Files Force Brazil to Face Its Past." *New York Times*, Section A, Page 6, Column 4.

<sup>38</sup> Hayner 1994, 611.

<sup>39</sup> OAS Doc. OEA/Ser.L/V/11.98, at 512 (1998)

88. The right to truth constitutes both a right of a collective nature which allows society as a whole to have access to essential information on the development of the democratic system, and an individual right which allows the families of the victims to have access to some kind of reparation in those cases in which amnesty laws are in force...

97. ...Through the amnesty decree, the Chilean State impeded the realization of the right of the survivors and the families of the victims to know the truth.

While this stated right to truth has not become international law as determined by treaty, agreement or declaration, Juan Méndez rightfully argues that this right has become customary international law—a standard of conduct recognized by much of the international community as being legally binding, though not definitively set out in a written document.<sup>40</sup> With international legal norms supporting an inherent right to the truth, truth commissions have emerged as one method for guaranteeing this right once it has been violated.

#### *TRUTH COMMISSIONS: ARGUMENTS FOR AND AGAINST*

As truth commissions have become a favored solution to the question of transitional justice, scholars have been increasingly focused on why policymakers and institutional designers favor these commissions, and whether or not this is a wise choice. This section will address some of the issues facing students of truth commissions and the explanations meant to account for them.

Throughout Ruti Teitel's study on transitional justice she refers to the tension between the predecessor and successor regimes, between stability and transformation, between backward and forward-looking policies, between "the law as written and the law as right."<sup>41</sup> In response to this tension, Teitel supports the idea of what she calls a *transitional criminal sanction*.<sup>42</sup> Rather than attempt sweeping prosecutions in the name of justice or impart full amnesty in the name of reconciliation, a transitional

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<sup>40</sup>See Méndez<sup>a</sup> 262; U.N. Doc. E/CN.4/Sub.2/1995/20/Corr.1, 1995.

<sup>41</sup> See Teitel 1997, 2016-2018.

<sup>42</sup> Ibid 2049.



criminal sanction, or limited sanction, allows for the two to be combined. Such a compromise could prosecute the wrongs of the previous regime, though it would not have to result in individual punishment. Teitel writes, “Without fully assigning individual guilt, the transitional criminal sanction nevertheless enables societies to recognize and condemn past wrongdoing perpetrated under repressive rule.”<sup>43</sup> In some states where truth commissions have been pursued without any connection to traditional legal channels, they have served this purpose—to recognize the repression of a prior regime, without further unsettling the delicate balance between peace and conflict. Furthermore, such a gesture may serve to validate a new regime’s support for a more liberal rule of law, thus distinguishing it from the previous regime. This is an especially important factor for societies facing transition after violent civil conflict, where all sides were party to the violence and responsible for some degree of abuse. As in the South African TRC, truth commissions have the capacity to legitimate a new regime under the condition that it also faces up to past wrongs.<sup>44</sup>

Teresa Phelps understands justice in terms of individual voice and the creation of a more complete story rather than prosecutions and amnesties, though finds value in the work of truth commissions and their capacity for healing a nation.<sup>45</sup> In her book, *Shattered Voices*, she discusses seven ways truth commissions may provide justice.

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<sup>43</sup> Ibid 2051.

<sup>44</sup> Often, the degree to which institutions, such as truth commissions or other types of tribunals, are evaluated as doing well or poorly or how political actors fulfill their obligations largely depends on how ordinary people perceive such things. Whether or not that perception is accurate, how citizens *interpret* reality, in a way that provides them the information on which to base decisions, is what really matters. This becomes an important factor to consider when looking to solutions for transitional justice, where the misalignment between the perception of what *is* being done compared with what people think *should* be done may prevent such solutions from aiding in peaceful and effective transition.

<sup>45</sup> Teresa Godwin Phelps. 2004. *Shattered Voices: Language, Violence and the Work of Truth Commissions*. Edited by B.B. Lockwood, Pennsylvania Studies in Human Rights. Philadelphia: University of Pennsylvania Press.

First, truth commissions provide foundational benefits. By making and telling stories, humans assert their humanity. For individuals constrained under repressive regimes, where lack of voice signified a reduced recognition of humanity, truth commissions allow those same individuals to reassert themselves as equals. Second, truth commissions, and the stories that they reveal, may provide protection against a repressive regime. Third, they provide the means for uncovering the truth, thus vindicating individuals previously condemned. Fourth, stories can communicate common experiences of pain and suffering between people otherwise unable to understand each other. Fifth, storytelling through truth commissions has the ability to restore the dignity of victims and make them whole again. Finally, stories collected can actualize a radically new kind of constitutive history for an emerging democracy.<sup>46</sup> Through the storytelling process, individuals are given the means to make their personal story known, while contributing to the overarching social history and the way it is understood in a new light.<sup>47</sup>

Where truth commissions provide a venue for individuals to tell their stories, to set the record straight in terms of their personal experience and its place in history, they may also be the only available option for a society in transition.<sup>48</sup> In divided societies, where competing regimes have actively participated in violent conflict, and where a successor regime existed in opposition to the regime in power, a popular

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<sup>46</sup> See Phelps 2004, 55-56.

<sup>47</sup> Similarly, Neil Kritz writes, “what truth commissions can add is a meaningful *acknowledgement* of past abuses by an official body perceived domestically and internationally as legitimate and impartial.” See Neil J. Kritz. 1996. Coming to Terms With Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights. *Law and Contemporary Problems* 59(4): 141; also see Jonathan Allen. 1999. Balancing Justice and Social Unity: Political Theory and the idea of a Truth and Reconciliation Commission. *The University of Toronto Law Journal* 49(3): 316, 331.

<sup>48</sup> Phelps argues that such a process is a necessary condition for individual reconciliation with the past.

mandate to pursue prosecutions is unlikely to exist. In fact, peace agreements and cease-fires may be conditioned upon the absence of such pursuits of justice.<sup>49</sup>

Moreover, the institutional capacity for carrying out large-scale, domestic prosecutions in transitional societies is often limited or nonexistent. Stephen Landsman argues, “Many fledgling democracies have simply not had the power, popular support, legal tools, or conditions necessary to prosecute effectively.”<sup>50</sup> The notion that trials should be both timely and fair is one out of touch with the institutional reality facing these societies.<sup>51</sup> Truth commissions, on the other hand, are well suited to work within such a system. Whether achieved through purely domestic channels or with international support, truth commissions have the potential to deliver the accountability many survivors and victims’ families seek without constraining the transitional legal system to a point of incapacitation.

And for those who support the position that accountability and justice can only be achieved through punishment, truth commissions appear to be inadequate alternatives. Dan Markel contends that truth commissions granting particularized amnesty can be thought of in terms of a plea bargain. Through this analogy it is suggested that amnesty in relation to truth commissions can be viewed as compatible with demands for punishment, just as plea bargaining is an accepted alternative to criminal prosecution. But for many people, plea bargaining is not an acceptable alternative to traditional prosecutions, and truth commissions with (or without)

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<sup>49</sup> See Landsman 1996, 84.

<sup>50</sup> Ibid 84.

<sup>51</sup> As the ICTR example shows, prisoners have been detained for many years, with no guarantee of trial anytime soon. Lack of monetary and technical resources, as well as the institutional infrastructure to deal with the magnitude of prosecutions to be handled, has seriously limited the extent to which justice is being served—from both the position of those detained and the victims of the genocide. See Paul J. Magnarella. 1994. “Expanding the Frontiers of Humanitarian Law: The International Criminal Tribunal for Rwanda.” *Florida Journal of International Law* 9:435.

amnesty clauses fall short of the expectations for justice held by many people of transitional societies.<sup>52</sup>

Juan Méndez discusses the need for acknowledgement and reckoning of past crimes, for the victims of human rights violations and for the society in transition from authoritarianism to liberal democracy. Méndez rejects the idea that states should forego attempts to prosecute criminals, and emphasizes the role of the international community in influencing how such prosecutions should be carried out and under what conditions.<sup>53</sup> Advancing the argument that truth commissions lend a sort of legitimacy to the successor regime, Méndez agrees that holding criminals accountable for their actions is necessary, but that prosecutions rather than truth commissions are the best option for doing this. He writes, “Justifiably, the public expects the truth telling to be a step in the direction of accountability, not a poor alternative to it.”<sup>54</sup> Though Méndez concedes to the idea that there are some circumstances under which prosecutions would be impossible, it is only under these conditions that he believes truth commissions should be used as the only mechanism for providing justice.<sup>55</sup>

An additional argument against truth commissions concerns the prevalence of amnesty clauses in their mandates. When accompanied by amnesty clauses, truth commissions face significant criticism concerning the issues of justice and accountability. Societies coming to terms with a history of mass repression often demand recourse for the large-scale human rights violations suffered under the

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<sup>52</sup> Markel discusses truth commissions in the larger context of retributive justice, concluding that particularized amnesty, like that of the TRC, is compatible with the idea of retributive justice (See Markel 1999, 392). Allen provides the following definitions of retributivism: “...the view that someone who is guilty of transgressing the law ought to be punished and that this punishment should be proportional to the seriousness of the transgression,” (Allen 1999, 327).

<sup>53</sup> Méndez<sup>a</sup> 254.

<sup>54</sup> Méndez<sup>a</sup> 269, 257.

<sup>55</sup> See Méndez<sup>a</sup> 269; also see Kritz 1996, 141.

previous regime. The idea that the individuals who initiated and implemented this significant repression could go unpunished consequently invalidates the experiences of the victims. Dan Markel writes, “The protests against the amnesty process stem from a fervid antipathy towards the release of perpetrators of gross human rights violations from criminal and civil liability.”<sup>56</sup> In reference to the Sierra Leone commission, established by Britain in 2000,<sup>57</sup> the issue of amnesty has become one of concern. As one condition of the July 1999 peace agreements, war criminals were granted a blanket amnesty. A BBC news correspondent writes, “While some supported the amnesty in the interests of peace, others believed that the UK operated double standards by pursuing war criminals in European conflicts, while telling African victims that they have to forgive, if not forget.”<sup>58</sup> Public accountability for criminal actions is said to be one of the strongest supporting factors for truth commissions. Where commissions promote a trade-off between amnesty and full disclosure of related criminal acts, victims and survivors remain in search of justice.<sup>59</sup>

Perhaps the South African model is worth mimicking. Where the possibility for amnesty exists for perpetrators of grave human rights abuses, it is accompanied by the need to confess, in full detail, to the crimes committed, thereby fulfilling the need for public accountability.<sup>60</sup> Moreover, the TRC may also deny such amnesty if the petitioner’s crime is deemed disproportionate to its political goal, if the perpetrator fails to disclose their actions completely, or if they do not come forward in the first

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<sup>56</sup> Markel 1999, 390.

<sup>57</sup> The Special Court for Sierra Leone, <http://www.sc-sl.org/index.html>

<sup>58</sup> See “Truth Commission for Sierra Leone”.

<sup>59</sup> Also see Allen 321.

<sup>60</sup> Under the Promotion of National Unity and Reconciliation Act of 1995, the mandate for the Committee on Amnesty was as follows: “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.”

See <http://www.doj.gov.za/trc/legal/act9534.htm>

place.<sup>61</sup> In circumstances where amnesty provisions are the only way to achieve peaceful settlement of a conflict, the distinct issues of transitional justice become all too clear.

*JUSTICE: AVAILABLE OPTIONS AND ALTERNATIVES TO TRUTH COMMISSIONS*

Throughout this paper much has been said of the possible relationships between truth commissions and prosecutorial justice. In this section, domestic and international alternatives to truth commissions will be addressed. The concept of justice is one with many understandings and interpretations.<sup>62</sup> Whether one understands justice as punishment, as recognition, as compensation, or in combination, there are different mechanisms for achieving *that* justice.

Much of what has been said about prosecutions thus far has been in recognition of the shortcomings of truth commissions. Whether carried out by international bodies or domestic courts, prosecutions are often the most common and effective means for holding criminals accountable for their actions. One scholar emphasizes six significant contributions prosecutions make to the pursuit of justice. They can enhance the prospects for the establishment of the rule of law, function as a means of educating the public of prior wrongdoing, identify and create the predicate for the compensation of victims, provide a means of punishing wrongdoers for their criminal conduct, deter against future wrongdoing, and prosecutions may be essential to healing the social wounds caused by serious human rights violations.<sup>63</sup> The public nature of prosecution, in addition to the conclusiveness of judgments made, has implications for individual accountability, social recognition, and validation of the rule of law.

Trials offer a forum in which the truth of a specific situation can be drawn out. Méndez argues that, rather than truth commissions, “trials offer their own advantage in

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<sup>61</sup> See Orentlicher 1997, 714.

<sup>62</sup> See Allen 1999, 326.

<sup>63</sup> Landsman 1996, 83-84.

promoting a measure of truth and acknowledgement. The adversarial format, with the ability to compete with equal arms in the establishment of the truth and to confront and cross-examine the opponent's evidence, results in a verdict that is harder to contest."<sup>64</sup> In Chapter II of John Stuart Mill's work, *On Liberty*, the concept of truth is thoroughly examined.<sup>65</sup> Mill argues that truth can only ever really be known in the presence of falsehood. He states, "Complete liberty of contradicting and disproving our opinion is the very condition which justifies us in assuming its truth for purposes of action; and on no other terms can a being with human faculties have any rational assurance of being right."<sup>66</sup> Where truth commissions support the claims of survivors without any place for significant discussion or redress by the accused, trials are formatted in a way that allows all sides to contribute their truths in order to create a more complete and comprehensive truth.<sup>67</sup>

International tribunals are one option for achieving justice through prosecutorial means. The Nuremberg Trials, the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are each examples of prosecutions carried out in response to grave human rights abuses and severe violations of international legal norms committed on a mass scale. In transitional states with few resources, including both monetary and technical resources, the international community may provide assistance. Article 1 of the United Nations Charter outlines the purposes of the UN, the first of which is to "maintain

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<sup>64</sup> Méndez<sup>a</sup> 278.

<sup>65</sup> Mill, John Stuart. 1978 (1859). *On Liberty*, *Hackett Classics of Political Thought*. Indianapolis: Hackett Publishing Company.

<sup>66</sup> Mill 1978, 18.

<sup>67</sup> Reed Brody also discusses the importance of trials, rather than or in addition to truth commissions. See Brody, Reed. 2001. "Justice: The First Casualty of Truth?" *The Nation* April 30, 2001.

international peace and security.”<sup>68</sup> Because of this notion of collective security, the international community has a significant interest in, and responsibility for, assisting states to establish and maintain peaceful societies.<sup>69</sup> Regional organizations such as the Organization of American States (OAS) and the African Union (AU) have established courts in which prosecutions for crimes against humanity and aggression can be tried (i.e. the Inter-American Court). Moreover, the International Court of Justice (ICJ)<sup>70</sup> and the more recent International Criminal Court (ICC) represent the increasing acceptance of international justice, though not universal.<sup>71</sup>

The ICC is one particularly interesting alternative for dealing with violations of international law and human rights violations. By establishing a permanent international court, where individuals can be held responsible for crimes against humanity, war crimes, the crime of genocide and/or the crime of aggression,<sup>72</sup> the international community has acknowledged that such serious violations of human

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<sup>68</sup> United Nations Charter (1945), Article 1.1., The purposes of the United Nations are: “To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace...” See Dunoff, Ratner and Wippman 117; <http://www.un.org/aboutun/charter/>

<sup>69</sup> See Goldstone, Richard. 1995. Exposing Human Rights Abuses—A Help or Hindrance to Reconciliation? *Hastings Constitutional Law Quarterly* 22: 619-620.

<sup>70</sup> The ICJ was set up in 1945 as the official judicial body of the United Nations. See <http://www.icj-cij.org/icjwww/igeneralinformation/ibbook/Bbookframepage.htm>

<sup>71</sup> In his article *Nuremberg Misremembered*, Jeremy Rabkin raises some poignant criticisms of the Nuremberg trials and of international justice. Namely, as with Nuremberg, this type of justice is rarely international. And for this reason, justice should be left for national courts to decide.

<sup>72</sup> See Article 5 of the Rome Statute; Leila Nadya Sadat. 2002. “Appendix 1: Rome Statute of the International Criminal Court.” *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*. Ardsley, NY: Transnational Publishers, Inc: 313-389.



rights and international law will not go unpunished.<sup>73</sup> Some of the proposed advantages of such an entity as the ICC are its pool of resources, technical and financial; its potential for creating a legitimate and consistent legal body, recognized as such around the world; and its projected capacity for efficiency and effectiveness. At this point in its development, these advantages are all very hypothetical. While the technical resources are available, in terms of legal experts willing and wanting to work in the Hague, there is still much to do before many countries accept the ICC as legitimate. Moreover, while the potential for more effective procedures and greater consistency in international criminal law is more likely with the ICC than before its creation, the ICC will need to re-litigate all issues that have been dealt with under the ICTY and ICTR—a process that will take a long time.

As Article 1 of the Rome Statute states, the Court “shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern...and shall be complementary to national criminal jurisdictions.”<sup>74</sup> While this policy of complementarity is critical in any association of sovereign states, it also limits the degree to which the ICC can efficiently and effectively get involved in states where “the most serious crimes of international concern” are taking place. When grave violations of human rights are committed, the speed with which such abuse can be stopped is critical. The complementarity principle, though necessary, slows down the process of international involvement in situations where domestic actors cannot or refuse to take action.

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<sup>73</sup> The recent recommendation by the United Nations Security Council to refer the situation in Sudan to the ICC is one indication of this sentiment; the United States did not veto this resolution, and Sudan is not party to the Rome Statute. See “UN Sets Darfur Trials in Motion.” *BBC News*. Tuesday, 5 April 2005. <http://www.news.bbc.co.uk/1/hi/world/africa/4411497.stm> Also see UN Security Council Resolution 1593 (2005), S/Res/1593 (2005).

<sup>74</sup> See Article 1, Rome Statute of the International Criminal Court.

As with other types of prosecution, the threat of punity at the international level may discourage parties to conflict from agreeing to cease hostilities and enter into peace negotiations in the short term. As this has been one argument used in support of truth commissions, it should also be considered that accountability at the international level could facilitate long-term deterrence from violating laws that can be prosecuted by the ICC.<sup>75</sup> But the scope of crimes admissible under the Rome Statute is limited to only the most egregious—genocide, crimes against humanity, war crimes and aggression. Clearly such crimes should be punished, and the ICC, at this point, will be an appropriate institution for such a task. But such an emphasis on the most serious crimes in international law does not consider the other so-called lesser crimes of murder, rape, abduction and pillaging that regularly accompany violent conflict, which do not fit the requirements of *widespread*, *systematic*, or *large-scale* commission of such crimes.<sup>76</sup> Consequently, this limits the influence of the ICC to only the most serious criminals. Because there are too many crimes that do not fall under this rubric—too many victims, too many perpetrators—the trials of the International Criminal Court serve a more symbolic than practical purpose. The ICC can set the tone that the international community will not tolerate such violent action, but other layers of justice are needed to support that claim; the ICC alone cannot meet the needs of transitional societies, with respect to prosecutorial justice.

Beyond prosecutions, justice can also be thought of in terms of compensation and reparations for past suffering. According to the ICTJ, many discussions about and plans for reparations have occurred within the context of truth commissions—Ghana,

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<sup>75</sup> For more on the debate between those who feel the ICC can counter the “culture of impunity” that has emerged and those who disagree, see Sadat 2002, 50, 74-75.

<sup>76</sup> These terms have been taken from Articles 7 and 8 of the Rome Statute, which define crimes against humanity and war crimes. The lists are long for what constitutes a war crime or crimes against humanity, these terms limit the degree to which the ICC as a legal body has jurisdiction over most crimes.

Guatemala, Morocco, Peru, Sierra Leone, and Timor-Leste. Alternatively, reparations talks have emerged in cases where the primary focus is on demobilization of armed groups, disarmament, and the general introduction of peace and justice into a conflict society, but where truth commissions have not been established.<sup>77</sup> Mahmood Mamdani's argues against the TRC hearings, which he claims do not adequately address the issues facing post-apartheid South Africa. Mamdani argues that "programs of redistributive social justice are a more appropriate response to the past than the TRC hearings."<sup>78</sup> The argument in favor of compensatory justice is based on the idea that reform and transition can only occur when individuals have the resources necessary to make such changes. Whether or not this form of justice could exist apart from prosecutions or truth hearings, among others, seems questionable. Though compensation is warranted and needed, it does not appear to meet the public recognition and social accountability standards that have been deemed so important to the transitional process.

The final alternative to be discussed here is that of lustration, or vetting. Technically, vetting infers a sort of purification process, through which contaminating elements are purged. In terms of transitional justice, this concept indicates a complete purging of all elements from the old, repressive regime. "National lustration is a purging process whereby individuals who supported or participated in violations committed by a prior regime may be removed from their positions and barred from positions of authority or elective positions."<sup>79</sup> For the ICTJ, vetting is,

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<sup>77</sup> "Reparations," The International Center for Transitional Justice, <http://ictj.org/en/tj/782.html>

<sup>78</sup> Mahmood Mamdani. 1996. "Reconciliation Without Justice." *Southern African Review of Books*; and Mahmood Mamdani. 1998. "When does Reconciliation Turn Into a Denial of Justice?" *HSRC Lecture*, 18 February. Also see Allen 1999, 332-333.

<sup>79</sup> M. Cherif Bassiouni. 1997. "Searching for Peace and Achieving Justice: The Need for Accountability." *Law and Contemporary Problems* 59 (4): 21.

...the assessment of individuals' integrity in order to determine their suitability for public employment. Countries undergoing a transition to democracy frequently create processes to remove abusive, corrupt, or incompetent public employees from public office to build more effective, inclusive, and trustworthy institutions. The screening and vetting of individuals, particularly in the security and justice sectors, is widely recognized as a key measure of governance reform essential to: overcoming legacies of past conflict or authoritarian rule; preventing the recurrence of abuses; and building fair and efficient public institutions.<sup>80</sup>

In order to prevent a recurrence of repression, lustration allows successor regimes to start anew, though the justness of the lustration process can also be brought into question. In approaching the problem of past repression from a group level, individuals are consequently deprived of their due process rights, therefore increasing the potential for numerous cases of individual injustice.

Until recently, this process has been examined primarily in the context of military and police forces in Eastern and Central Eastern Europe. In 2005, the Center for Democracy and Reconciliation in Southeast Europe published a project on lustration in the Western Balkans, where lustration legislation and procedures in the Western Balkans were evaluated, and proposals for improvement in these areas were made.<sup>81</sup> Many scholars have focused specifically on Poland as a case where lustration and lustration laws have divided many scholars on the effect of this process for democratization.<sup>82</sup>

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<sup>80</sup> See “Approaches to Transitional Justice—Vetting,” <http://www.ictj.org/en/tj/783.html#resources>

<sup>81</sup> See Magarditsch Hatschikjan, Dusan Reljic and Nenad Sebek (Eds). 2005. *Disclosing Hidden History: Lustration in the Western Balkins, A Project Documentation*. Thessaloniki: CDRSEE and Belgrade: Center for Peace and Democracy Development.

<sup>82</sup> For example, see Hilary Appel, ‘Anti-Communist Justice and Founding the Post-Communist Order: Lustration and Restitution in Central Europe’, *East European Politics and Societies*, Vol.19, No.3 (2005), pp.379–405; Herman Schwartz, ‘Lustration in Eastern Europe’, in Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Washington, DC: United States Institute of Peace Press, 1995), pp.461–83; Barbara A. Misztal, ‘How Not to

As I have tried to point out through the course of this paper, and in this section most distinctly, the way in which people understand the concept of justice can differ widely, thus complicating and constraining the transitional judicial process. Though many scholars and policy makers fervently support or condemn single mechanisms of justice without considering any others, I feel the most effective methods for recognizing past abuses and holding individuals accountable can only be achieved by creating context-aware combinations of options for transitional justice, as discussed above, as well as those options not discussed here. Perhaps the reason the South African TRC has been considered so successful is that its mandate *combined* truth hearings, the authority to grant amnesties, and the ability to prosecute. While this combination may not be appropriate across all cases and all times, it is indicative of how incorporating various methods may have a greater ability to deliver justice than any one option alone.

## **CONCLUSION**

Throughout this paper I have tried to provide a framework in which truth commissions can be considered as one outlet for achieving transitional justice. In identifying the different types of commissions, some of the theoretical arguments for and against truth commissions, and the available alternatives to truth commissions, I have argued that truth commissions alone cannot provide the justice sought by societies in transition. Rather, these commissions must occur in combination with other forms of transitional justice, to be determined by contextual factors defining

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Deal with the Past: Lustration in Poland', *Archives Europe'ennes de Sociologies*, Vol.40, No.1 (1999), pp.31–55; Carmen González-Enríquez, 'De-communization and Political Justice in Central and Eastern Europe', in Alexandra Barahona De Brito, Carmen González-Enríquez and Paloma Aguilar (eds.), *The Politics of Memory: Transitional Justice in Democratizing Societies* (Oxford: Oxford University Press, 2001), pp.218–47.

each unique situation.<sup>83</sup> Richard Goldstone discusses the danger of generalizing, asserting, “A solution successful in one country may fail in another. The correct approach to the past will depend upon a myriad of political, economic, and cultural forces which all operate and interact with each other.”<sup>84</sup> While the South African Truth and Reconciliation Commission has set a precedent for combining truth hearings, amnesty and prosecutions, this may not be an appropriate model to replicate all over the world, where the types of hearings, amnesties, and prosecutions could be different under any set of varying circumstances.

The argued strengths and pitfalls of truth commissions imply an exciting future for scholarly debate in the field of transitional justice. While theoretical arguments on both sides are in abundance, there is much to be desired in the area of empirical analysis. James Gibson’s work on the aftermath of the TRC stands alone in empirically considering the question of whether truth commissions can really lead to national reconciliation.

Related to this analysis of truth commissions as a mechanism for achieving justice is the relationship justice has with peace. While both are highly coveted social ends, the following questions persist: Can a society have peace without sacrificing justice, and vice versa? Especially in transitional societies, is it possible to achieve peace without undermining a great demand for justice? Can justice be pursued without threatening the peace? And finally, can one survive without the other?

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<sup>83</sup> It may be that truth commissions are more appropriate under circumstances of *historical* justice rather than *transitional* justice. The distinction I am making here has to do with the amount of time that has passed before such attempts at justice are made. Under the unique conditions faced by transitional societies, truth commissions may not be enough, in terms of justice, in and of themselves. Alternatively, states coming to terms with serious abuses of the past, with no immediate effect on current the political landscape, may view truth commissions as a fitting way to acknowledge and confront the past without threatening the fragile peace that so often accompanies transitional societies.

<sup>84</sup> See Goldstone 1995, 615-616.

For some, justice is the ultimate goal; without justice, peace is impossible. Bassiouni offers a critique to this end, claiming, "...justice is all too frequently bartered away for political settlements. Whether in international, non-international, or purely internal conflicts the practice of impunity has become the political price paid to secure an end to the violence of ongoing conflicts or as a means to ensure tyrannical regime changes."<sup>85</sup> Where this is the case, negotiators must choose either peace *or* justice, but as Bassiouni points out, peace will never last long without a parallel pursuit of justice.

Yet, in contrast to this preferred status of justice, it seems equally unjustifiable to ask leaders to sacrifice peace, if even short-lasting, for the unrelenting pursuit of justice. Jeremy Rabkin advises,

In most cases where tyrannical regimes have given way to new democracies, new national governments have chosen to adopt wide-ranging amnesties as a way of conciliating the supporters of the old regime. Where national governments do, in this way, give preference to internal peace over full justice, we should not be quick to fault them. They are doing what we have done—at Nuremberg and since—in giving more weight to strategies of peace than claims for justice.<sup>86</sup>

No matter where personal preferences exist with concern to this tension, the consequences for choosing one over the other are very real. For countries where peaceful transitions are contingent upon amnesty and other types of judicial relief, peace must come first—without peaceful transition, justice seems hard, if not impossible to attain. Alternatively, international solutions such as the International Criminal Court or ad hoc tribunals may provide the necessary relief to domestic authorities working towards a peaceful transition. International prosecutions have the

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<sup>85</sup> Bassiouni 1997, 11; also see Rakate, P.K. 1999. "International Criminal Justice and Reconciliation: Lessons from the TRC and ICTY." *Institution for Global Dialogue*, Occasional Paper No. 19: 13-14; also see Simpson 1995.

<sup>86</sup> Rabkin 1999, 94.

potential to assert a standard of no tolerance for those who abuse the fundamental human rights of others, and to support an end to hostilities.

Whether or not truth commissions can alleviate this tension between peace and justice, and whether finding the truth signifies an authentic pursuit of justice is still under discussion. Moreover, an additional tension exists that asks, does truth really equal justice, or is there more of a causal relationship between the two? Can finding the truth lead to justice, or must there be justice to find the truth? Will the international community determine the amount of truth needed to reconcile a nation of which they are not a part? Will a successor regime, with its own political motives, make this decision? To what degree will the members of the transitional societies be involved in this decision? And what happens when the truth is not enough? As we try to better understand the uniqueness of transitional societies—those communities that have endured long histories of violence, repression, and a systematic violation of human rights—these are the questions that must be asked in order to better understand when and under what conditions, if any, truth commissions can ever achieve justice, and if that is enough to move forward.



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