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SPECIAL ISSUE ON TRANSITIONAL JUSTICE

Dragan Simeunović
Judith Renner
Gabriel Twose
Klaus Bachmann
Patricia Lundy
Rosalia de la Cruz Gitau
Seidu Alidu

Symposium on a book by

Nir Eisikovits

SYMPATHIZING WITH THE ENEMY:
RECONCILIATION, TRANSITIONAL JUSTICE, NEGOTITATION

Co-editors

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Editors' note

Societies, which undergo a transition process following a sudden or slow, often negotiated regime change, tend to reevaluate their recent past: After a regime falls, in many cases past atrocities committed by that regime and its followers, are revealed, victims of abuses demand recognition and compensation, a new political establishment strives for legitimacy and thus tries to strip the fallen regime of legitimacy. Such a situation confronts every transitional society with a number of dilemmas, which could be observed during the subsequent waves of democratization throughout the eighties and nineties in Europe, Latin America, and Africa and, in some cases, Asia.

One of the basic dilemmas of transition societies is a certain tradeoff between stability and peace on one hand, and popular demands for justice on the other hand. When transition is rapid, sudden and radical and deprives the ancien regime of all its power, justice may be done swiftly and consequently. The dictator and his supporters, the worst perpetrators of atrocities and human rights violations may be put on trial and punished, if they are not too numerous. When atrocities are committed by too many perpetrators, justice becomes a tricky issue and the country faces another tradeoff: That between justice and democracy. Rwanda is the best example for this dilemma: Introducing democracy would risk to bring perpetrators back to power. After 1945, Germany faced the same dilemma, which then was partly solved through foreign intervention and "victor's justice", partly through clemency for middle and low ranking perpetrators, who underwent large scale, but rather superficial vetting procedures.

When transition was negotiated between the old and the new political establishment and when the number of perpetrators is limited, the reconciliation dilemma emerges. Victims of the ancien regime demand compensation and in many cases punishment for perpetrators, whose power is often strong enough to prevent retributive justice. Punishment is then put at halt in the name of regime stability and the need to rebuild the country and reestablish trust and reliability in society. This is the moment, when reconciliation is put forward as the overarching goal, for which immediate demands for justice and the delegitimization of the old regime — and sometimes even calls for establishing the truth about the past — are postponed.

Since the South African Truth and Reconciliation Commission reconciliation in transitional societies has become an increasingly attractive paradigm in social sciences, political antropology, social psychology, philosophy, political sciences, history and even law. The very notion of reconciliation stems from theology and it is therefore no surprise, that the South African Truth Commission was headed by a bishop, who frequently introduced notions of forgiveness into its deliberations. Theological definitions of reconciliation, mostly referring to the relationship between a god and his believers, are impossible to operationalize in social sciences and difficult to apply in philosophie, law and history. Political discussions and media coverage of transitional justice often lack even basic understandings of reconciliation. The reconciliation paradigm in transitional justice is a fuzzy one in itself: Purely restorative transitional justice schemes like many of the more than 40 truth commissions in the world aspire to contribute to reconciliation as well as totally retributive mechanisms, like the two international criminal tribunals (for Rwanda and the former Yugoslavia) and the International Criminal Court. In her article about the many faces of reconciliation Judith Renner points at the public use of the term, which is often deprived of any deeper contents. Reconciliation can be everything: Blaming perpetrators without judging them, judging them, without punishing them but also putting them on trial. Amnesties are justified by the need to bring about reconciliation as well as trials. Against this inflationary use of the notion, Gabriel Twose proposes a concise definition of reconciliation, based on experiences from social psychology. He provides empirical evidence showing, that even the scarcely contested "truth telling" procedures of truth commissions do not necessarily contribute to reconciliation, if an appropriate context is absent. His findings contribute a lot to the ongoing discussion about reconciliation and restorative transitional justice schemes, since truth telling ("giving victims a voice") is commonly regarded as an indispensable element of reconciliation even in the absence of punishment and reparation for victims.

Most of the more than 40 truth commissions, which emerged during the last twenty years all over the world, comprise truth telling (publicly or "in camera"), the exposure of past human rights abuses and recommendations for institutional reform. In his article, Klaus Bachmann et al. examine, weather the activities of these truth commissions can reasonably be regarded as contributions to reconciliation of divided societies. Their findings are rather somber: Only 3 of more than twenty commissions investigated can show a record, that made reconciliation more likely. In many other cases, commissions had no outreach and hardly any impact on public opinion, were regarded as biased or instruments of the ancien regime or started their actions too late to be trustworthy.

The four fundamental contributions to this special issue of RIA are then followed by case studies from different parts of the world: The ongoing process of dealing with the past of a deeply divided Northern Ireland are examined in Patricia Lundy's contribution, Rozalia de la Cruz Gitau presents her findings on the peace process in post conflict Liberia, Seidu Alidu assesses the activities of the National Reconciliation Commission in Ghana. The overwhelming majority of these contributions is based on empirical findings from field studies and original research, often from researchers with long and intense connections to the country they studied. Dragan Simeunović's contribution on the origins of the notion of "collective guilt" is the only theoretical and normative one in the first part of this issue and constitutes a kind of introduction. The third part of this special issues documents a discussion organized by RIA on Nir Eisikovits' recent book "Sympathizing with the ennemy", which is wholelly dedicated to the dilemmas and problems linked to reconciliation. This discussion once again referes to the debate in some of the articles in the first part of this issue, which deal with the meaning and definition of reconciliation.

We deem it worth mentioning, that this special issue was a collaborative project of several people and institutions: The Foundation for European Studies (FEPS) in Poland and Institute of International Politics and Economics, Belgrade.

At the beginning of 2010, they had the idea to distribute a call for papers on "transitional justice and reconciliation" which led to an impressive number of applications. The editors are proud to present the best of the contributions in this special issue. We are very satisfied with the response to this call and are planning another one in the near future. RIA remains committed to contribute to the ongoing academic discussion on transitional justice.

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Professor Dragan Simeunović, Ph.D.[1]

The Tradition of Collective Guilt

ABSTRACT

Collective guilt, i.e. ascertaining "guilt" to large social groups, whether they may belong to religious, ethnic, class, or simply "dangerously different" collectives, has been present in all environments, but, some nation states have developed it as a tradition.

The first phases of this phenomenon existed since pre-Christian times on the basis of religious schisms. This may be considered from the aspect of the development of the civilization as a specific way of building ethnic and especially religious identities based upon a drastic form of distinction as well.

Since those earlier days the natural basis of thinking and determination of guilt was the guilt of resistance and of being different, even present today.

Added to this structure of collective guilt is the domination of the winner over the defeated, common for all environments and all outcomes of war. The general domination of Christianity in Europe and frequency of religious schisms intensified the aspect of sin and need for atonement, thence the Jews became the first collective sinners in Europe.

In time, the accent of collective guilt became more secular and of this world.

Punishment for religious differences more and more grew into punishment for exclusivity and of not fitting within the concepts of the social establishment — especially for resisting those dominating the society.

Ideology ever more substituted religion for political interests as a reason for ascertaining collective guilt. This was especially affected by the state of absolute political domination of one political power. Therefore the next great guilt was the guilt of class. Following the October Revolution all those who somehow belonged to the bourgeoisie, even children, were considered guilty.

The collective guilt of the Germans was a mixture of the guilt of the defeated and the guilt formed by the dominant ideological circles of liberalism and socialism over fascism. Their guilt was then expressed as the guilt of "threatening harmony" which was mapped out by both winning sides.

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Collective punishments ranging from excommunication and eviction to extermination. Proofs of guilt and innocence are unnecessary. The strong trust themselves and judge.

Modern America (USA) like Europe suffers from an exaggerated aestheticism of politics. It is in that context that the tradition of collective guilt is developing a new dimension. The position of total superiority is possible even without totalitarism. In order to be bad, it is enough to be a collector of unfavorable qualities.

The Serbs are such an example. First of all, they negatively provoked by their behavior the modern conception of European harmony imposed by the dominating powers and thereby directly threatened these interests. The religious difference of the Serbs was not in itself sufficient, so they were forced to accept the status of losers in a war which in fact they militarily survived if not won. As in the ancient inquisition, or not so long ago in the days of fascist and Stalinist totalitarianism, they were openly satanized as a collective. The practice of isolation by the powerful was once again repeated. The guilty are also required to degrade themselves obediently thereby acknowledging and giving legitimacy to the violence committed upon them. Transfer of guilt is also present. Old sinners are always active in pursuit of new ones, as they believe that it washes away their guilt and leads towards distribution onto other subjects.

Today as before, no distinctions are made in collect guilt thereby compromising and destroying the innocent as well which is evidence that this ritual still survives in Europe.

Key words: colective quilt,christianity, Balkan, punishment, justice

Individual guilt, as well as a feeling of guilt due to committing a sin, are an integral part of the life of all human beings. Since the earliest days, man has arranged by a mechanism of taboo the identification of sin and its repentance through sanctions which implies and admits the feeling of guilt. Even today "the ability to feel guilt ... is not fear of revenge, but the feeling of fear before man's own activity which affected world harmony, anxiety which comes after breaking not laws but taboos".[2]

Collective guilt is a far more artificial phenomenon than individual guilt. Except for cases when there is the attributed collective guilt of small collectives, like criminal groups — with respect to the larger community it is more difficult to discuss collective guilt as the guilt of all its members. Which bespeaks more for the graduation of guilt.

Collective guilt has existed since primeval times and does not refer only to small collectivities whose members have been identified per personem, but it has spread to large social groups such as religious and ethnic communities or classes.

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2 Lesek Kolakovski, *Religija,* BIGZ, Beograd, 1987, p. 237–38.

The ascertainment of guilt to large social groups, or "simply dangerous" collectivities is present in other environments, but mostly in Europe did it develop as a tradition.

The beginnings of ascribing collective guilt in Europe existed since pagan times based on tribal conflicts. In classical times defeated tribes carried the seal of collective guilt and often suffered repentance through lifelong slavery. In this regard Europe did not differ from other regions of similar development.

The domination though of a general religion like Christianity was to be characterized by the specific feature of a European tradition of collective guilt.

Religious rifts and armistices, which left a powerful trail in European history like Westphalia, can be seen in terms of civilization development and also considered as a means of building an ethnical and an especial religious identity based on collective sin and guilt as a drastic form of distinction.

Since those earlier times when this pattern arose, it remains present in the determination of guilt as guilt by resistance to the dominating event and identification of holiness as the highest, godlike power, and simultaneously thereby the guilt of being different. Distinction is guilt because it is disobedience. Nonacceptance of the dominating way of religious organization of the society is at the same time nonacceptance of submitting to those with the greatest power within the community.

Because if there were no such power it would not be possible to impose this religious model as taboo. Non-acceptance of such a model, and/or the resistance to it is the resistance against taboo out of which ostracism or destruction is derived. The absolute domination of Christianity as a European religion was achieved more by means of the sword than has generally been known and came as a painful outcome of a long process of oscillation and identity formation by virtue of differences which not insignificantly relied on violence.

Serbs, like other European people were not spared from the destruction of religious schisms. The conversion to Christianity as part of the general European process of Christianizing the continent, brought dilemmas and with it conflicts between the Eastern and Western Church. Also, painful phases like uprooting the Bogomils and later the renunciation of fellow tribesmen who accepted Catholicism and Islam resulted in violent forms of defense and fratricide. In all this the Serbs collectively suffered tremendous loss with absolutely no historical benefit.

Since absolute domination most often brings a totalitarian spirit, the absolute domination of Christianity regardless of the fierce disputes within it, brought the first permanent stigma of collective guilt — that is, the guilt of the Jews. There could be no new transient victories and transient guilt which resulted from instantaneous defeats, however collectively determined. Victory

forever meant the establishment of the eternity of Christianity and it sought out those who were defeated forever.

Old animosities in the social environment and contributing economic circumstances to no small extent determined a Christian Europe that designated the first eternal collective sinners who would repent their "guilt" in various stages in different ways and with different intensity — but always keeping the status of the permanently differentiated.

With time the accent for determining collective guilt moved from the religious into the secular sphere. Collective guilt became not only ever more of this world but also caused by secular reasons. Punishment for religious particularity and resistance because of original sin, "peccatum originale" more and more grew into concepts of the social establishment, especially with reference to resisting those dominating the society both politically and economically. Along with the Catholic overemphasis insisting on original sin, "peccatum originale" a collective guilt of political impurity emerged. The conflict between the Church and the State, which would end by the retreat of the altar before the crown, presented only the beginning of the proliferation of the collective as state and/or antistate guilt. The French Revolution which may be construed in various ways, undoubtedly introduced collective ad hoc revenge for class as collective guilt, which resulted in 700,000 dead in its first historic attack.[3]

As the matrix of guilt recognition ideology more suppressed religion as a basis for determining collective guilt, the reasons became more of class in nature, though still carrying religious and national dimensions. This was especially possible due to the state of absolute domination by one political power.

Since the next great guilt was to be the guilt of class, it is understandable that after the October Revolution all those affiliated or belonging in any way to the bourgeoisie were considered guilty. The Bolsheviks in Russia did not do anything that would stand out from the European tradition of collective guilt and collective punishment. It is only the ideology that was new and perhaps the class which made it possible for socialism as a movement to grow into a system.

The next great designation of collective guilt in Europe was the guilt of the Germans, which followed the failure of the Nazi leadership with their aggressive ambitions during the Second World War.

Attempts and failures to conquer the world by those who are currently militarily, politically and economically most powerful are neither new nor unknown in history. Only what was new was the Nazi ambition to destroy simultaneously all those deemed as collectively guilty — varied racially,

[3] Reinhold Oberlecher, *1789 et les révolutions de l'ère moderne,* Vuloir, Bruxelles, 1989, pp. 54–5.

ethnically and ideologically. In that framework religious distinction was implied and included into at least one of the variants of guilt. Speaking now from this historical distance, a complete and critical consideration of this period makes this framework more clear. And so in losing the war the Germans could not have avoided the destiny of being charged themselves with collective guilt. They were guilty both because of having been defeated and because the winners carried banners of ideologies opposite to the Nazi ones. The collective guilt of the Germans was set as a combination of the guilt of the defeated and ideological guilt determined by the dominating political leaders of liberal and socialist countries. It can also be identified as the guilt of threatening the general harmony, a determination mapped out by both winning sides, each in its own way.

Since the tradition of collective guilt in Europe implies collective punishment ranging from excommunication to extermination, the German people experienced what their political leadership in somewhat different modalities had carried out over those whom they had been punishing in their exercising of collective guilt. Germany was divided up as a country, the way it divided up other countries. The German people were forcibly moved out like the German Army moved out others and even genocidal behavior found its equivalent in the often unnecessary and total destruction of cities such as Dresden and Mannheim with women and children being the commonest victims.

This alteration of positions, of the guilty ones and the ones who punish shows the firmness of this European tradition of collective guilt which does not distinguish the innocent from among the guilty or the collective. Proofs of guilt and innocence are simply unnecessary.

The one who overpowers trusts himself most of all as well as his fated predestination to judge as if he were to judge forever. In the final instance it is nothing else but the expression of civilization's immaturity and of a worldly superiority that believes in the everlastingness of its own position.

The old collective conscience of Europe has not retreated from this pattern even now in the time of the dominating individualistic ideology of liberalism.

War and class conflicts are still bringing mass winners and mass sinners.

The guilty ones are guilty simply because they potentially or in fact do threaten projects and conditions of harmony. What harmony really means is always defined by the strongest, i.e. the most powerful. Since the times of magic rituals up to now collective guilt has been determined only from the very top of the power pyramid — magicians, church leaders and politicians.

A rather overstressed aestheticism of politics is permanently reflected in this domain as well. "Nice" is all that is friendly, "ugly and evil" is all that is not friendly. The dichotomy of "friend — enemy" was defined by Carl Schmidt. In Europe it has always existed on the basis of a civilizational controversy between

the creators of the greatest deeds and culture and the greatest social conflicts ever recorded in history. Political aestheticism finds guilt in these differences of religion, ideology, race and ethnic origin, social position, material wealth, special political aims and interests. Any differences understood as opposition should be eliminated by excommunication, extermination or at least by pointing out the danger coming from the one who is different.

Collective guilt is the expression of the spirit of European totalitarism which has its germ in totalitarian religion and subsequently ideology as well. The totalitarian conscience of collective guilt is the extreme expression of nontolerance towards differences and competitiveness. Harmony must be achieved by military, political or economic means and finally why not culturological means as well! Force is nothing else but the expression of the strivings for total control and subordination of all to the creators of the concept of global harmony and order. However, total superiority is possible even without totalitarism. In order to be designated bad and guilty, it is enough to simply possess unfavorable qualities.

At present the Serbs are such an example. Yet their guilt did not appear overnight, nor is it separate from an environmental treatment. It ought to be considered in the light of the two centuries long European attitude towards the Balkans and sought within the range of Europe's distancing itself from the Balkans in the field of culture while accepting it on geopolitical terms as an important military and strategic part of the European continent.

Since the word "Balkans" was first used by John Morritt in 1794 for the peninsula so far variously called, though most often Haemus, Europe never ceased with its scorn and satanization of these borders with Islam and the East.[4] It is clear that in the general sum of its aesthetic political opinions, Europe did not adore this marginal part of its body. Yet the boundaries as such could guarantee safety for Western Europe and the Balkans provided this protection.

Showing no respect for this advantage forced many Balkan people to make the same mistake Europeans made. They also resorted to an aestheticism when claiming that Europe was evil and ungrateful.

This criticism was directed to Western Europe as being the center of the long standing military, economic and political power of the continent.

The reasons for this negative treatment of the Balkans and its people ought to be looked for in the power interests and not emotions of Europeans.

Accusations against the Serbs are today only the essence of a long history of blaming the Balkans and its people, generally and individually.

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[4] John Morritt of Rokeby, *A Grand Tour, Letters and Journeys 1794–96*, Century Publishing, London, 1985, p. 65.

The discovery of the Balkans and growing interest in it at the end of 18th century, primarily by English explorers and authors who wrote about their travels, coincided with the growth of Russia into a power that wanted to enter Europe over the corpse of the Turkish Empire. Fear of this growing Russian power had the English make efforts to preserve the Ottoman Empire as a defense against Russian threats. A special problem thereby was caused by the people of the Balkans who were striving to achieve their national liberation from the Turks with the help of the Russians.

It was not so much that the Balkan people looked to Russia for help, but that Russia chose the Balkans based on her own strategic interests. In reality Serbs had little choice since it was not in the interests of the European powers that the Balkans should be freed to develop into nation states. But as Serbs learned, even Russian support was not always sincere or reliable. Still, in spite of Russian interference that caused conflicts in Balkan internal affairs, Serbs shared with Russia a common perspective in foreign affairs. There was no other chance.

Europe as usual followed the interest of its strongest power and shared its opinion that the people of the Balkans should be satisfied with their status as border guards.

There should be good order at the border and any insurrection of special interests was seen as opposed to the general European interest and the survival of all empires. In fact England was right in sensing that the collapse of the Ottoman Empire would mean the beginning of the end of all empires. Anxiety and rage due to thwarting these imperial European interests continued as the Balkan people persisted in leading their struggle for freedom and so affected the first views being formed regarding the Balkans. The fact that the realpolitics of Great Britain was supported by scientists with their evaluations only confirms the sad truth that science was then as it is nowadays, a servant to politics.

The frustrations of Europe can be understood. It was difficult to have an impact on the varied, unknown and boiling Balkans and even more difficult to control it. In an historically short period of time, it destroyed the illusions of many powers concerning their omnipotence and for that reason the region continued to be blamed by its critics. So even the term "Balkan" came to have a negative attachment. The pejorative connotation in European and modern usage of the word "Balkan" and "Balkanization" has remained up to this day a derogatory one.

The guilt of the Balkans because of its resistance and particular interests was increased when these people turned to Russia for help. The more they relied upon Russia, the more guilty they became. The negative collective picture of the Balkans and its people was built by virtue of science and the press. No one wanted to be regarded as being "Balkan" and even today the Balkan people themselves waive these traits attributing them to those who live more southward.

A better geopolitical term, Southeastern Europe, was first used as far back as 1869 by the German geographer Johann Georg von Hahn and defined far more precisely the Balkan Peninsula in its geomorphologic boundaries than was done by numerous English and French explorers. The term, mainly used in Germany lost its right to wider popularity because of its favored use in Nazi Germany, though presently this geographic term is being used again. Other reference terms did not survive in the historical political vocabulary because standard usage of the Turkish version, conceded the attachment of this region to the Ottoman Empire.

European praise directed towards the Turks and reproach towards the Balkans was reflected in an aestheticism as well. The Turks were regularly described at that time in many, popular travel books as "noble and kind" while the subjugated peoples were "dirty, illiterate and greedy" (a quality often found in the poor), "inhospitable and uncivilized" (characteristics not uncommon in frightened people).[5]

Nor did the European socialists have a very good opinion of those European people occupied by the Turks. It is enough to recall Marx and Engels' rudeness stating that the Balkan Slavs were "dregs of people" who were better off assimilating with the orientality of Turkey.[6] However, the socialists in the countries comprising the Balkans did not greatly respect Marx and Engels, nor their proposal to assimilate into the Turkish nation. Furthermore, the majority of them like Svetozar Markovic and his fellowthinkers in Serbia did just the opposite and actively participated in the struggle for national freedom.

Serbs as an ethnic and religious group had already irritated European sensibilities because of the Great Serbian Migration under Carnojevic during the 17th century when they penetrated deeply and planted their wedge in the present day Tokai region, on the Hungarian, Ukrainian and Slovakian borders. Orthodox Serbs had massively entered uninvited into the Catholic and Protestant territory of Europe.

Out of the general condemnation of the Balkans, the Serbs would be especially singled out as guilty because of the the two Balkan Wars and the First World War. In addition to characteristics such as primitivism, tribalism, progress incapability, commonly attributed to the Balkan people, the Serbs were given one more — irrational aggressiveness!

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5 John Morritt of Rokeby, *A Grand Tour, Letters and Journeys 1794–96*, ed. G.E. Martin (Century Publishing, London, 1985), p. 65.

6 Fridrih Engels, *Madjarska borba*, in: Karl Marx/Fridrih Engels: *Dela*, tom 9, Prosveta, Beograd, p. 143.

This growing negative European attitude appeared back in the wake of the 1903 May coup in Serbia, with the violent murders of members of the ruling Obrenovic family, when international sanctions were for the first time imposed on Serbia and the same condemnation by all European powers was reinforced again after the Second Balkan War.

So too Gavrilo Princip's guilt in assassinating Austria's Archduke Ferdinand in 1914 (the shot heard round the world) that triggered the First World War was not only his, but the the guilt of all Serbs.

Gavrilo Princip should be remembered in that he differs from most other assassins who have attempted to kill important political figures because while others may want to believe they are changing the course of history, he was one of the very few who actually succeeded. Kings and presidents can be replaced, but the regimes remain. It is the tragic misconception of assassins who believe that injustice can be resolved by the simple elimination of certain individuals. However when Gavrilo Princip, a Serbian high school student shot the Austrian Archduke, it did precipitate actions that endangered the stability and harmony of Europe, already on the brink of a great war. It should be noted too, that Princip never imagined his act of murder would be the cause of world turbulence. Europe had already split into two sides at odds with each other for a long time. The real problem Serbs faced was not because they belonged to one of these sides, but because they were drawn unwillingly into the conflict as the pretext to spur these powerful camps to war.

American literature also shared European feelings about the harmony spoiled by "Serbian madness". John Gunther in his after war best seller, "Inside Europe", deemed that it was an "unbearable offense that those poor and unfortunate small countries in the Balkans could and even are managing to cause by their conflicts an outbreak of world war. Some 150,000 young Americans were killed because of the events happening in 1914 in a muddy and primitive village of Sarajevo".[7]

However, proving that interest overpowers repulsion Gunther himself admitted that it is "loathsome and almost impertinent to interfere in the politics of the Balkans, which could hardly be grasped by Western readers, (and yet was) still of great importance for peace in Europe, and maybe in the world as well ".[8]

Serbs, bearing the imputation of being a violent people found few authors like the Grimm brothers who extolled the Slavic culture, or politicians like William Gladstone who rightly condemned Turkish terror over the Slav people

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[7] John Gunther, *Inside Europe*, New York, Harper and Brothers, 1940, p. 245.

[8] Ibidem.

and defended their right to freedom, especially expressing sympathy for the people of Bosnia and Hercegovina.

The collective guilt of the Serbs appeared again during the Second World War on two levels of the European tradition of collective guilt. Firstly, the strongest power of Europe (Germany) faced resistance from Yugoslavia in the form of guerrilla war, with Serbs in the lead and secondly, the harmony of Europe was being wracked in its war efforts against Germany. There were divisions everywhere.

Yugoslavia itself split and Serbia, although an ally, took a separate position acting outside of the generally accepted conditions of subordination. This caused the Allies to look down on the Serbs with a certain reserve and to even entice rifts among them.

After the Second World War the Serbs were subject to another dimension of collective guilt. The Balkans became mainly communist. The Serbs took a leading role in this, many having been partisans during the war. In any case, the seeds of socialism in the Balkans were traditionally and still are the strongest in Serbia going back to the 19th century. All this combined to stamp a new, ideological dimension to be added to their guilt.

The present collective guilt of the Serbs is also a result of European realpolitic. The Serbs in recent time have by their aspirations and legitimate concerns expressed desires which are directly opposed to the interests of the most powerful. The Serbs were accused by these same powers of threatening European peace. The Serbs have again spoiled the harmony of the most cultivated continent that despises violence, although it is not adverse to using it. The wrongful accusations that Serbs were interlopers in Croatia, Bosnia and even Kosovo in relation to the Albanians, grew into an accusation against them — of an aggression over innocent native people — although the war was led by these very people close to Serbian houses in traditional Serbian lands — while Serbs fought mostly to protect themselves. The result of this opposition to the interests of the dominating powers called for another assignation of Serbian collective guilt.

Those who mold public opinion, politicians and the media helped to shaped this image, always fixing blame on the Serbs. Bullets fired by Albanian terrorists in Kosovo were ignored or played down, while every bullet fired by the Serbs had the echo of a committed crime. Guilt based upon being different has also become the guilt of nonattendance to the winning party and separation from the political trend of the triumph of transition in the countries of Eastern Europe. Namely, it is was in Serbia, among all other former socialist countries that the same party remained in power, although having changed its name. This increased suspicion and accusations on the level of an ideological clash.

Serbia in the collapse of Yugoslavia was constantly apostrophized as communist.

The status of the guilty one was very quickly prepared in the broader media for the service of politics.

Renunciation of communism was esteemed as too slow and insincere.

Unwillingness to cooperate, meaning subordination, was seen as resistance.

Punishment was inevitable.

The current punishment for Serbian collective guilt, still in effect was to be a combination of the punishments so far implemented in Europe for this sin. Because of the betrayal of the Son of God, the Jews were exterminated and expelled. And for the sin of getting rich, the bourgeoisie in socialist countries paid by losing both their possessions and lives. The Germans for their collective guilt were exclusively fixed with the labels of genocide and fascism although these were practiced by others, including the Italians and Croats.

So too, the Serbs were exterminated, expelled and divided. They paid a large price — the loss of their lands, possessions and lives — all for their wish to be safely united in a Serbian state. They have never learned that what a small nation needs besides wishes, are political know how and luck. Twice within the 20th Century the Serbs had the good wind of history blowing at their backs and they did not know how to use it. They had the support of the great powers and frankly speaking, they did not reach Maribor by themselves. Now the good wind of history is helping Croats, Muslims and Albanians whose fortunes are rising at the expense of the Serbs.

It is the misfortune of the Serbs that the United States, apt to copy Europe in various ways, adopted this concept/tradition of European collective guilt in dealing with the Serbs and their "difference". The global interests of the U.S. were directly opposed to the nationalist interests of the Serbs. Serb nationalists make a mistake when they say that the U.S. "hates the Serbs". Because the underlying reasons and what is really at stake are interests and tradition based on practice.

Since the beginning of American colonization, racially white America imposed a model of collective guilt with all the attendant consequences. The Indians were guilty because they resisted submission, and because they were racially different. Their religion and customs were not part of the tradition and values of the colonizers. America, lacking its own indigenous tradition and coming from European stock was inclined to copy Europe, adopting the tradition of collect guilt and manifesting it in its own skewed way.

For when a bigger entity bends over a smaller one, the shadow becomes more visible than the original The European tradition of collective guilt was in

time transferred to America which was to practice this speciality with most favorable results on European soil.

For instance the International Court for the Far East, established after World War II was never accepted by the Japanese as the Germans accepted denazification, implemented by the American led Nuremberg Court. In a poll done among the members of the Japanese parliament in June, 2006 and published in the Mainichi Daily News (26 June, 2006), sixty one percent said that the Tokyo Court had to be accepted, but that it was unjust. The Japanese never having developed a tradition of collective guilt have maintained a resistance to the condemnation.

In a continuity of the Nuremberg Trials, the Hague War Crimes Tribunal, though international in face has had a strong American profile. And though the conflict at the collapse of Yugoslavia was a civil war, the court proceedings have been directed mostly against the Serbs.

America's initial doubts about a nationalist led Serbia being the potential military ally and possible fist of Russia in the Balkans set it in opposition to the Serbs, Because of this Serbia was progressively punished by isolation and nonsignificance, easily achieved by diminishing her economy, military, communications and necessary resources. What is new is not that Serbia passed through this prison of sanctions and the fact that many people, even the innocent and vulnerable such as children (who are always absolutely innocent) were also severely punished — but that the right to progress was also denied them. To make an enemy insignificant in this way is more severe than narrowing his territory, because it intends ultimate harm.

In order to confirm the guilty status of Serbs and make it indisputable, the Serbs had to lose the war on paper, their leadership was paralyzed and they had to become cooperative to the extent of subjugation. This tradition of collective guilt imposed on the Serbs is unimaginative and caste on the imitative destiny of the Germans, insisting first on making Serbs the international aggressors and later, the defeated. The paradox is that the Serbs, from a military aspect, were not defeated. Just politicly.

If the modern understanding of Serbian sin and guilt is analyzed from the aspect of political anthropology, it is easy to see that not much has changed since ages past. Former rule breaking concerning entering forbidden places are sins attached to Serbs because they “entered” the interest zones of the great powers and had contacts with the impure, therefore with the enemies of the masters of the world. The consumption of forbidden food has been transposed into the consumption of forbidden ideology — both socialism and nationalism.

Accusations against the Serbs as well as ascertaining their collective guilt were not so much based upon Christian tradition, but on an even earlier Neolithic form.

Such repentance requires abject submission and the readiness of the victim to fall on his knees.

Even the abolishment of progress is of pre-Christian origin, mentioned in a pagan curse, though rejected by Christianity in which the sins of the father must be atoned for by the descendants.

The pagan institution of a mediator between the deity and sinner is also present — they being the only ones who have the right to judge who is guilty and to what extent and to estimate whether the repentance is sincere and effective.

The function of supervision requires supervisors. By virtue of this medium an anathema is invoked whereby God is asked to punish the sinner.

The function of punishment is primarily reflected as in Neolithic magical rituals. The guilty one is condemned first and must admit his guilt although guilt need not be apparent or proven. What matters most is that the guilt must be believed in. Pronouncing a sentence is the equivalent of crown evidence.

Repentance is experienced as ritual. Admitting guilt regardless of commission is considered a duty towards the divine power and community for remedial purposes. The recorded agreement on repentance like the text imposed onto a sinner about sin and punishment is more about proving the power of the one who is punishing than a true metamorphosis of the sinner. As a warning to others as well as a ritual element, it includes open confession, repentance and public display.

Without a victim there is no forgiveness and catharsis for sin. The most valuable punishments require blood sacrifices. A strict respect for the repentance ritual is a condition for removing the punishment of being excommunicated from the community. It requires sacrificing things near and dear in exchange for one's own life and doing so willingly and in humility.

The problem at stake is that the ritual of sacrifice implies the innocence of the victim, and that is something the present day great powers and level of civilization cannot accept, unless this falls into being a non-selective practice.

An example of this are the innocent victims largely and non-selectively sacrificed during sanctions when due to shortages of medicine, food and heating fuel, children and elderly people were dying in far greater numbers.

On the whole, the way collective guilt is ascertained, accusations of sin and the methods of repentance are more likely to prove a retardation as the American involvement draws the whole ritual towards the spectacle and

recovery of superstition, (äεισιδαιìοíια) rather than towards Godfearing (ευσεβεια).

Even participation in a ritual requires some mutuality and approximate level of being civilized for the sake of communication, since after all there is a real and implied responsibility for success due to the selection of punishment and of having presumed the status of God's emissary. The issue concerning the effectiveness of repentance is particularly delicate if constant and humiliating obedience is required from the sinner in which he not only admits his guilt but must also provide the legality of the violence made upon himself.

So too, the concept of guilt transfer is persistent. Old sinners are always active, hunting new ones because as they believe, it washes away their own guilt feelings leading towards a distribution onto as many other subjects as possible.

True justice in contradistinction to that of ritual atonement and ascribing collective guilt should isolate individuals by name. All those who committed war crimes and crimes against the innocent should be held responsible, whatever their ethnicity.

If it is any comfort to the bearers of collective guilt — though punishments are destructive and can give the illusion of being everlasting — they do not necessarily have an absolutely destructive effect. If the Jews managed to survive a prolonged history of antisemitism, if the bourgeoisie survived the revolution and if the Germans have become once again the greatest power in Europe — things may not look so bad in the future for the Serbs either if they succeed in learning the lessons from their own still living past and from the experience of others. For then the stigma of guilt can gradually be turned into an historically and often profitable advantage to those once stigmatized.

Who is going to be next?

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Forgiving, *Healing*, or Simply *Forgetting*?

The Many Faces of "Reconciliation' in Political Transitions

ABSTRACT

Vagueness is a characteristic feature of "reconciliation" in the discourse on transition. While "reconciliation" has been a central term in numerous transitions over the last 30 years, its interpretations and implementations varied profoundly across the cases.

This article explores comparatively the reconciliation policies pursued in the transition processes of Spain, Chile, South Africa, and Sierra Leone. It argues that the dominant interpretations and political implementations of "reconciliation" can be understood as the products of the particular framing conditions set by the transitional context in each case. It concludes that vagueness might actually be the central contribution "reconciliation" makes to political transitions. It turns "reconciliation" into a flexible and interpretable discursive device which can be embraced by politicians and society and adjusted to the requirements of the particular transitional situation.

Key words: reconciliation, political transitiona, spain, Africannational Congres, Chile

I. Introduction

"Nothing is more dangerous than reconciling two people.
Disuniting them is much safer and easier".

This warning by the German novelist Jean Paul of the hardness and sheer impossibility of reconciliation went unheard in the discourse on political transition. In the past 30 years the hope to reconcile divided societies and to restore

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peace and harmony where violence and hatred prevailed has become a popular goal among scholars and practitioners alike. Authors writing on transition have praised reconciliation as "probably the most important condition for shifting the current peace toward stable peace" and as "a regulative ideal in political discourse".[2] In practice reconciliation has featured prominently in a number of transitions. Spain, Chile, South Africa, Peru, and Sierra Leone, they all made "reconciliation" the explicit goal or principle of their transition processes. In all cases, however, the idea of "reconciliation" was realized in profoundly different ways which raises the question whether we can speak and think of reconciliation as one particular concept or policy programme at all.

This article argues that the different interpretations of reconciliation which emerged in these countries can be better understood when they are seen as the product of the conditions set by the particular transitional context in each case. The vagueness that surrounds reconciliation renders it flexible enough to be adjusted to the particular needs of political actors in a transitional situation. In the following section, the article will assess the transition processes of Spain, Chile, South Africa and Sierra Leone. It examines the specific interpretations and implementations of "reconciliation" in each case as well as the processes in and the framing conditions under which these interpretations were negotiated. The article concludes with two central observations in regard to the interpretations and implementations of reconciliation in transitional politics: Firstly, it finds a historical trend to politically realise reconciliation through the institution of a truth commission. Secondly, explicitly or implicitly, reconciliation policies have mostly been combined with an amnesty law of some sort. In particular the developments of the Sierra Leonean case suggest, however, that this is not a necessary social fact and that the relationship of reconciliation, amnesty and justice remains a topic for further research.

II. The Many Faces of Reconciliation in Political Transitions

While "reconciliation" has featured prominently in the transitions of Spain, Chile, South Africa and Sierra Leone, no consistent policy programme can be identified across the cases. Instead, all countries had their own understanding of reconciliation and implemented it in different ways. While in Spain, for example, "reconciliation" was understood as drawing a curtain over the past and politically realized through a far-reaching amnesty law, Chile pursued an opposite approach and sought to reach reconciliation through an ambitious

[2] Yaacov Bar-Siman-Tov, ed., *From Conflict Resolution to Reconciliation*, Oxford University Press, New York, 2004, pp.3-4.
Emilios A. Christodoulidis and Scott Veitch, "Introduction", in *Law and the Politics of Reconciliation*, ed. Scott Veitch, Ashgate, Aldershot, 2007, p.3.

quest for the "truth" about past human rights violations. In South Africa, the incoming government built upon the Chilean approach to reconciliation but added the ideas of healing and forgiveness to their reconciliation concept. The result was a complex political institution, the South African Truth and Reconciliation Commission (TRC), which became the most discussed precedent of political reconciliation in the scientific debate on transition.[3] In Sierra Leone, reconciliation was also sought through the institution of a truth commission and a strong understanding of reconciliation as therapeutic healing dominated the transition process. While the interpretations and implementations of reconciliation vary more or less across these cases, all understandings can be read as products of their particular transitional contexts.

Reconciliation as "Forget and Forgive" in Spain

In Spain, the dominant interpretation of "national reconciliation" that emerged was to "forget and forgive" the past for the sake of peace and consensus. This understanding of reconciliation was politically realized through a far-reaching amnesty law passed in 1977 which covered all political crimes committed before 15 December 1976 and all crimes related to the restoration of public liberties or autonomies which were committed before 15 June 1977.[4] Insofar the amnesty law comprised the crimes committed by Francoists during the dictatorship as well as those committed by republicans during the civil war and afterwards.[5]

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[3] See for example: Lyn S. Graybill, *Truth & Reconciliation in South Africa. Miracle or Model?* Lynne Rienner Publishers, Inc., London, 2002. Claire Moon, *Narrating Political Reconciliation, South Africa's Truth and Reconciliation Commission,* Lexington Books, Plymouth, UK, 2008. Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa,* Cambridge University Press, Cambridge, 2001. Tristan Anne Borer, "Reconciling South Africa or South Africans? Cautionary Notes From the TRC", *African Studies Quarterly* 8, no. 1, 2004.

[4] The 1977 amnesty law was not the first one to be passed, but it was the most far-reaching one. Qualified amnesty laws had already been passed in July 1976 and in March 1977. See: Julia Macher, *Verdrängung um der Versöhnung willen? Die geschichtspolitische Auseinandersetzung mit Bürgerkrieg und Franco-Diktatur in den ersten Jahren des friedlichen Übergangs von der Diktatur zur Demokratie in Spanien (1975–1978)*, ed. Dieter Dowe, *Gesprächskreis Geschichte* Historisches Forsochungszentrum der Friedrich-Ebert-Stiftung, Bonn, 2002), 49ff. Paloma Aguilar, "Collective Memory of the Spanish civil war: The case of the political amnesty in the Spanish transition to democracy", *Democratization* 4, no. 4, 1997.

[5] Paloma Aguilar and Katherine Hite, "Historical Memory and Authoritarian Legacies in Processes of Political Change: Spain and Chile", in *Authoritarian Legacies and Democracy in Latin America and Southern Europe*, ed. Katherine Hite and Paola Cesarini, University of Notre Dame Press, Notre Dame, Indiana, 2004.

The Spanish interpretation of reconciliation as "forget-and-forgive" can be understood the result of a long interpretation process, which began in the time of the Franco regime and continued during the transition period. The idea of reconciliation was introduced to Spanish politics in the 1950s through the Communist Party (PCE) and the Catholic Church. In 1956, the PCE released a party programme called "Declaration of the Communist Party of Spain for national reconciliation, for a democratic and peaceful solution of the Spanish Problem".[6] In this manifesto the party called out to bury "the hatred and anger of the civil war, because feelings of revenge are not constructive" and announced that it would cooperate with all those parties that opposed the Franco regime and pursued the goal of national reconciliation.[7] While no explicit understanding of reconciliation was advanced, the term was yet used to facilitate consensus and cooperation in the name of this vague social ideal. After the introduction of the term as a political goal, the Catholic Church was crucial for the particular interpretation of "reconciliation" that was to emerge. In most of its publications the Church associated reconciliation with "olvido" (forgetting) on the one hand and with the Christian understanding of "perdon" (forgiveness) on the other. In particular the monthly journal *Cuadernos para el Dialogo* communicated these interpretations of reconciliation to the Spanish society.[8] As the Church had been a supporter of the Franco regime and traditionally stood close to conservative circles, its ideas and concepts crucially influenced these parties" later understanding of reconciliation and contributed profoundly to the interpretation of reconciliation that gained hegemony in Spain.

The idea of national reconciliation gained widespread popularity in particular during the Spanish transition to democracy, when the question came up how to deal with the repressive past and proceed into the future. Spain was caught in a power-political deadlock between the moderate democratic opposition who demanded a break with the old regime on the one hand, and the Francoist reformers who tried to reorganize the existing structures and keep at least some control over the country, on the other hand.[9] In this situation the idea of national reconciliation, or "*reconciliación nacional"*, served as an important device to bring together both camps and to reach a consensus on the political proceedings, namely the passing of the amnesty law as a minimal mechanism of dealing with the past. Here, reconciliation functioned as the glue that brought together the

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[6] Original Title: "Declaración del Partido Comunista de Espana Por la reconciliación nacional, por una Solución democrática y pacífica del problema Espanol".

[7] Macher, *Verdrängung um der Versöhnung willen?*, pp. 20-21.

[8] Ibid. Aguilar, "Collective Memory of the Spanish civil war".

[9] John F. Coverdale, "Spain from Dictatorship to Democracy", *International Affairs* 53, no. 4, 1977. Macher, *Verdrängung um der Versöhnung willen?*

different political parties as it provided a common reference point in the name of which the amnesty law could be agreed on. As Paloma Aguilar points out, "[d]uring parliamentary debates, almost all groups praised the law precisely because it was an instrument of "national reconciliation", intended to "close the past", "forget", and start a new phase. Even the Communists boasted of wanting to forget the past and "bury the dead" and called for an amnesty that excluded no one".[10] Similarly, Joan Ramon Resina considers the vision of reconciliation as the means through which unity among the polarized political parties could be realized: "the need for reconciliation and a broad consensus determined the mutation of the Spanish left towards positions bordering on and finally indiscernible from those of their conservative antagonists".[11]

The question remains why "reconciliation" in general and "forget and forgive" in particular gained hegemony in the Spanish transition. This article suggests two possible reasons for this development, both of which are located in of the specific framing conditions of the Spanish case. Firstly, the collective memory of Spain's more recent violent past, which comprises four civil wars over two centuries, was still vivid in the Spanish society and there was a renewed outbreak of violence during the early times of the transition.[12] "Reconciliation" therefore vaguely signified some absent state of peace and stability that was particularly valuable to the Spanish elites and society at the time; it was a vague yet desired goal on which the political elites as well as the Spanish public could agree.[13] Second, the particular interpretation of reconciliation as "forgive and forget" could become hegemonic, as it served the political interests of all parties involved. Francoists, republicans and the church, they all had an interest in the amnesty law as all of them had to fear prosecution after the regime change. Members of the Francoist elite could be held responsible for widespread human rights violations during the dictatorship; members of the republican opposition could be held responsible for numerous crimes and killings that were committed

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[10] Paloma Aguilar, "Justice, Politics, and Memory in the Spanish Transition", in *The Politics of Memory. Transitional Justice in Democratizing Societies*, ed. Alexandra Barahona de Brito, Carmen Gonzaléz-Enriquez and Paloma Aguilar, Oxford University Press, New York, 2001, p. 102.

[11] Joan Ramon Resina, "Short of Memory: the Reclamation of the Past Since the Spanish Transition to Democracy", in *Disremembering the Dictatorship. The Politics of Memory in the Spanish Transition to Democracy*, ed. Joan Ramon Resina, Editions Rodopi B.V., Amsterdam - Atlanta, 2000, p. 91.

[12] Coverdale, "Spain from Dictatorship to Democracy".

[13] Aguilar, "Justice, Politics, and Memory in the Spanish Transition". Laura Desfor Edles, *Symbol and Ritual in the New Spain. The Transition to Democracy After Franco*, ed. Jeffrey C. Alexander and Steven Seidman, *Cultural Social Studies,* Cambridge University Press, Cambridge UK, 1998.

during the early years of the civil war, and the Catholic Church had been a strong supporter and a stable source of legitimacy for the Franco regime.[14] As the interpretation of reconciliation as "forget and forgive" could well be linked to an amnesty law, all three groups could agree on such an understanding and establish it as the dominant reconciliation concept of the Spanish transition.

All the Truth and Justice as far as Possible — Reconciliation in Chile

In the Chilean transition to democracy the prevalent understanding of reconciliation, and accordingly the implementation of a political reconciliation programme, differed profoundly from that in Spain. Not "forgive-and-forget" emerged as the core interpretation of reconciliation but reconciliation was associated with the necessity to know and acknowledge the "truth" about the past. When Patricio Aylwin became the new president of democratic Chile in 1990, he announced in his inaugural speech "that dealing with the past and promoting national reconciliation would be the priorities of his government".[15] In that same year, the Chilean government established the Comisión Nacional de la Verdad y la Reconciliación (CNVR), the commission for truth and reconciliation, as a specific institution for pursuing that goal. The CNVR was supposed to establish a detailed picture of the past human rights violations and to find out about the fates of the numerous victims of the Pinochet regime. As Alexandra Barahona de Brito reports, "[n]ine commissioners were charged with analyzing the system of repression under military rule, focusing on human rights violations resulting in death, finding the bodies of the disappeared, and recommending reparations and measures to prevent future violations".[16] Two years after the creation of the CNVR, the government established another institution, the National Reparation and Reconciliation Corporation (Corporación Nacional de Reparación y Reconciliación, CNRR), which should complement the CNVR and "legally established the 'inalienable right' of relatives to find the 'disappeared'".[17] The work of both institutions was framed by a far-reaching amnesty law which had been passed by Pinochet in 1978 and protected the members of his regime from criminal prosecution and punishment. This amnesty law, which was repeatedly contested by the political opposition and reinforced by Pinochet, was a crucial framing condition under which the prevailing understanding of reconciliation was negotiated.

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14 Macher, *Verdrängung um der Versöhnung willen?*

15 Alexandra Barahona de Brito, "Passion, Constraint, Law, and Fortuna: The Human Rights Challenge to Chilean Democracy", in *Burying the Past. Making Peace and Doing Justice after Civil Conflict*, ed. Nigel Biggar, Georgetown University Press, Washington D.C., 2001, p. 178.

16 Ibid., p. 179.

17 Ibid.

The general understanding of reconciliation underlying the CNVR and the CNRR was "reconciliation through truth". In its final report, the CNVR remarks that "from the beginning the Commission understood that the truth it was to establish had a clear and specific purpose: to work toward the reconciliation of all Chileans".[18] The emergence of the concept "reconciliation through truth" can be understood as the result of a long interpretation process which was strongly influenced by the political conditions during the transition. In 1989, while Patricio Aylwin was still member of the political opposition, he promoted an understanding of reconciliation which was inextricably linked with (punitive) justice. At this time, Aylwin emphasised that "[t]here cannot be reconciliation without justice and we all know that there cannot be justice without truth".[19] While Aylwin opposed the criminal prosecution of institutions, he nevertheless promoted trials against individuals.[20] With these demands, however, Aylwin challenged the amnesty law and raised strong resistance from Pinochet and his followers. Pinochet announced to protect his people in case that the amnesty would be ignored: "no one, who is subject of such charges, will remain unprotected. In fact, he can rely on the necessary juridical support in order to confront such unjustified accusations. Even more, he will have the support of the full force of all armed units of the republic".[21] The heated debate on the amnesty law began to pose a threat to peace in the country and led the Christian Democrats and the Church to suggest a compromise interpretation of reconciliation. According to this formula, the demand for full criminal justice was incommensurable with the necessity of full reconciliation. The aim of any policy should therefore be to find out what happened in the past and disclose the "truth" about the past, but dispense with criminal prosecutions and punishment.[22]

Thus the idea of "reconciliation through truth" coupled with "justice as far as possible" became the leading strategy of the Chilean transition, which later became known as the "Aylwin Doctrine".[23] The compromise character of the political reconciliation programme can again be understood by looking at the

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[18] Final Report of the Comisión Nacional de la Verdad y la Reconciliación, Part I, Chapter 1. The report is available at: http://www.usip.org/library/tc/doc/reports/chile/chile_1993_pt1_ch1.html#F [01 September 2008].

[19] Ena von Baer, "Die Rolle der Vergangenheitsbewältigung im Systemwechsel: Fallbeispiel Chile", PhD Thesis, Rheinisch-Westfälische Technische Hochschule, 2004, p. 65.

[20] Ibid.

[21] Ibid., p. 66.

[22] Ibid.

[23] Barahona de Brito, "Passion, Constraint, Law, and Fortuna: The Human Rights Challenge to Chilean Democracy", p. 180.

conditions set by the political context in Chile: On the one hand, the new government acted under a considerable external constraint, as the military retained a high degree of power even after the regime change. Insofar, challenging the amnesty law and prosecuting the perpetrators in the name of national reconciliation would have meant risking social peace in the country. As a consequence, Aylwin's initial interpretation of reconciliation through justice and truth could not be maintained for practical reasons. At the same time, however, reconciliation remained a central buzzword of the Aylwin administration. The government was driven by an "overwhelming desire for accommodation in the name of 'reconciliation'"[24] and a passion for human rights, the combination of which served as an incentive to develop some sort of accountability programme without necessarily including criminal prosecutions. Eventually, these conditions set by the transitional framework in Chile led to the compromise interpretation of reconciliation and paved the way for the pursuit of truth and accountability while simultaneously dispensing with full criminal justice.

Reconciliation through Truth-telling and Healing in South Africa

The South African reconciliation process is probably the most popular case of reconciliation politics and is often treated as a reconciliation precedent in the scientific literature on reconciliation. It is outstanding insofar, as a particularly elaborate and multilayered understanding of reconciliation was developed and the Truth and Reconciliation Commission (TRC) was created as a complex institution for the facilitation of reconciliation. During the working process of the TRC, two interpretations were dominant in the public representation of reconciliation in South Africa: One was spiritual in character and constructed reconciliation predominantly in terms of contrition and forgiveness, while the other was therapeutic in character and constructed reconciliation in terms of therapeutic healing.[25] Both interpretations were reflected in the proceedings of the TRC.

The TRC, which was established in 1995 through the Promotion of National Unity and Reconciliation Act no. 34, had the objective "to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past".[26] Its mandate was to establish "as complete a picture as

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[24] Ibid.

[25] Claire Moon, "Prelapsarian State: Forgiveness and Reconciliation in Transitional Justice", *International Journal for the Semiotics of Law* 17 (2004). Claire Moon, "Reconciliation as Therapy and Compensation: A Critical Analysis", in *Law and the Politics of Reconciliation*, ed. Scott Veitch, Ashgate Publishing Limited, Aldershot, 2007.

[26] The Promotion of National Unity and Reconciliation Act is available at: http://www.doj.gov.za/trc/legal/act9534.htm [04 September 2008].

possible of the causes, nature and extent of the gross violations of human rights", to facilitate amnesty "to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective", and to "restore the human and civil dignity" of the victims by giving them a possibility to tell their stories and suggesting reparation measures.[27] The TRC process consisted predominantly of public hearings, in which the victims of human rights violations could tell their stories and sometimes confront their perpetrators personally to ask them about their motives and feelings. Different kinds of hearings were organised for perpetrators, where they could disclose of their deeds and ask for amnesty in return. In the end, the TRC compiled a report about all the hearings.[28]

The design of the TRC process was closely related to the two dominant interpretations of reconciliation mentioned above. However, as in the cases discussed above, these interpretations of reconciliation underlying the TRC can be understood as the result of a discursive construction process, which centrally took place during and after the transitional negotiations and was shaped by the political demands of the two major parties, the National Party (NP) and the African National Congress (ANC), and several actors from civil society.

Reconciliation was brought up as a central political buzzword long before the TRC, even before the start of the transitional negotiations between the NP and the ANC. In his inaugural address in September 1989, President Frederik Willem de Klerk referred to reconciliation as the only possible path to a peaceful South Africa:

"Protest regarding past injustices or alleged injustice does not bring us closer to solutions either. Nor do unrest and violence. There is but one way to peace, to justice for all: That is the way of reconciliation; of together seeking mutually acceptable solutions; of together discussing what the new South Africa should look like; of constitutional negotiations with a view to a permanent understanding …".[29]

The reconciliation ideal which was suggested by de Klerk was subsequently picked up by Nelson Mandela and continuously reappeared in the communication

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[27] Ibid., 3(1) a).

[28] Wilson, *The Politics of Truth and Reconciliation in South Africa*. Moon, *Narrating Political Reconciliation. South Africa's Truth and Reconciliation Commission*. Clarissa Ruge, *Versöhnung durch Vergangenheitsbewältigung? Die südafrikanische Wahrheits — und Versöhnungskommission und ihr Versuch zur Friedenssicherung*, Peter Lang GmbH, Frankfurt am Main, 2003.

[29] De Klerk, quoted in Erik Doxtader, "Easy to Forget or Never (Again) Hard to Remember? History, Memory and the "Publicity' of Amnesty", in *The Provocations of Amnesty: Memory, Justice and Impunity*, ed. Charles Villa-Vicencio and Erik Doxtader, Africa World Press, Inc., Trenton, NF, 2003, pp. 121-55.

between these two politicians. Three month after de Klerk's speech, in December 1989, Mandela sent a *Document to Create a Climate of Understanding* to de Klerk, in which he agreed that reconciliation was a central goal of the South African transition, but interpreted it as the end of apartheid legislation and government led violence.[30] Throughout the transitional negotiations, both parties, the ANC and the NP, referred to reconciliation as a desirable but absent state of society, and interpreted reconciliation in terms of their particular political demands at the time. In this phase, reconciliation was interpreted rather in political, than in spiritual or therapeutic terms, and alternately understood as bringing an end to (government led) violence, the release of political prisoners or political cooperation and unity among the two antagonistic parties.[31]

After the institutionalisation of the reconciliation ideal in the South African Interim Constitution from 1993, where "reconciliation" served as the official goal of the amnesty provision that was agreed on,[32] the interpretation of reconciliation changed profoundly. "Reconciliation" was now predominantly discussed and interpreted by actors from civil society, who step by step constructed reconciliation rather in terms of forgiveness and truth-telling. In particular two conferences organised by the non-governmental organisation Institute for a Democratic Alternative for South Africa (IDASA)[33] were crucial for the further interpretation of reconciliation in South Africa. Here, politicians and civil society actors from South Africa and other transitional countries got together and discussed possibilities for the implementation of the amnesty provision. In the course of these conferences, more and more actors came to interpret reconciliation in terms of

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[30] Nelson Mandela, "A Document To Create a Climate of Understanding. Document forwarded by Nelson Mandela to F.W. De Klerk on 12 December 1989", Pretoria, 1989.

[31] See e.g. Frederik Willem de Klerk, "Letter from State President FW de Klerk to Nelson Mandela President of the ANC, 24 September 1992", Pretoria, 1992. Frederik Willem de Klerk, "Address by the State President, Mr. FW de Klerk, DMS, at the Opening of the Second Session of the Ninth Parliament of the Republic of South Africa, Cape Town, 2 February 1990", Cape Town, 1990, Frederik Willem de Klerk and Nelson Mandela, "Record of Understanding, passed at the Meeting between the State President of the Republic of South AFrica nd the President of the African National Congress Held at the World Trade Centre on the 26 September 1992", Johannesburg, 1992. Frederik Willem de Klerk, "Statement by President F.W. de Klerk on the Timetable for Further Constitutional Reform, 26 November 1992", Johannesburg, 1992.

[32] Interim Constitution of South Africa (1993), available at: http://www.servat.unibe.ch/icl/sf10000_.html.

[33] IDASA was founded in 1989 by Alex Boraine, a former President of South Africa's Methodist Church and former South African parliamentarian together with his parliamentary colleague Frederik van Zyl Slabbert. In the time before the transitional negotiations, IDASA had the major objective to work towards negotiation politics and a just political system. See Alex Boraine, *A Country Unmasked,* Oxford University Press, Cape Town, 2000.

truth-telling, forgiveness and therapeutic healing and demanded the creation of a truth commission in the name of reconciliation.[34] Kader Asmal, professor of human rights law and member of the ANC's constitutional committee, for instance emphasised the importance of forgiveness for reconciliation:

"Truth alone is not enough to attain the further goal of national reconciliation. Forgiveness is also indispensable. (…) It is the commission's hope that the sense of justice that truth gives voice to, will in time help them to forgive".[35]

Mamphela Ramphele, deputy vice-chancellor of the University of Cape Town, in turn, brought up the healing metaphor and emphasised the need to heal and to clean the wounds from the past in order to reach reconciliation:

"A medical metaphor best captures what I perceive to be the issue facing us in relation to "appeasing the past". An abscess cannot heal properly unless it is thoroughly incised and cleaned out. But the process of incision and cleansing is not without pain, even with modern anaesthesia. Pain is thus an integral component of the cleansing process which precedes healing (…) If the desired goal is reconciliation then the incision must be wide enough yet it must spare the vital organs".[36]

During the workshops, civil society actors repeatedly referred to healing and forgiveness, as two essential paths to reconciliation, and eventually demanded the creation of a truth commission in the name of this ideal.

When the TRC was finally inaugurated in 1995, its proceedings were based on these spiritual and therapeutic understandings of reconciliation constructed before. The Christian concept of reconciliation as a sequence of confession, contrition, atonement, and forgiveness has often been used to understand and describe the TRC amnesty process, for instance. Perpetrators were supposed to tell the whole story about their wrong-doings (confession), to regret them (contrition), ideally to apologize to the victim and maybe offer atonement (this was possible as victims and perpetrators were brought together in some of the hearings), and finally receive amnesty (forgiveness).[37] The realization of this

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[34] The contributions and speeches delivered at these two conferences are published in two edited volumes. See Alex Boraine and Janet Levy, eds., *The Healing of A Nation?* Justice in Transition, Cape Town, 1995. Alex Boraine, Janet Levy and Ronel Scheffer, eds., *Dealing with the Past. Truth and Reconciliation in South Africa*, IDASA, Cape Town, 1997.

[35] Kader Asmal, "The Challenge Facing South Africa", in *The Healing of a Nation?,* ed. Alex Boraine and Janet Levy, Justice in Transition, Cape Town, 1995, 29.

[36] Mamphela Ramphele, "The Challenge Facing South Africa", in *The Healing of a Nation?*, ed. Alex Boraine and Janet Levy, Justice in Transition, Cape Town, 1995, pp. 34-36.

[37] Lyn S. Graybill, "South Africa's Truth and Reconciliation Commission: Ethical and Theological Perspectives", *Ethics & International Affairs* 12, no. 1 (1998). David Little, "A Different Kind of Justice: Dealing with Human Rights Violations in Transitional Societies", *Ethics & International Affairs* 13, no. 1, 1999.

sequence was flawed however, as only the first step, full disclosure of the deeds and the political motivation thereof, was a necessary precondition for amnesty.

The interpretation of reconciliation as therapeutic healing was equally central to the processes of the TRC.[38] Based on this interpretation, it was assumed that speaking out in public and telling one's personal story to an empathetic audience, as it was supposed to happen in the victims" hearings of the TRC, was liberating and would heal the traumas inflicted on the victims by their past sufferings. For the perpetrators it was assumed that talking about their deeds had a cathartic effect and would eventually ease feelings of guilt. In the end, it was supposed that bringing together victims and perpetrators and having them talk honestly about their experiences and feelings would restore their relationship and reintegrate them into a morally healthy community.[39]

As in the cases discussed above, the interpretation of reconciliation in South Africa can also be understood as the product of a discursive construction process which was shaped by the political actors and conditions of the transition. However, one particularity can be observed in the South African case: In contrast to the Spanish and the Chilean interpretation and political realization of reconciliation, the South African understanding was more complex and led to a particularly *active* reconciliation policy which was the central part of the transitional programme. As in the cases mentioned above, an amnesty law was passed and was — as in Spain — closely related to the reconciliation process. It did not lead to a policy of forgetting, however, but was integrated into the reconciliation process as a means to make perpetrators confess their deeds and thus, supposedly, to contribute to the all-over goal of reconciliation.

Reconciliation and Justice in Sierra Leone

The South African precedent served as an influential example when Sierra Leone was trying to realize "reconciliation" from 2000 to 2002. Sierra Leone also established a TRC as determined by the *Truth and Reconciliation Commission Act 2000*.[40] The proceedings resembled the South African TRC process. The commission held public hearings and organised private and public encounters of victims and perpetrators and eventually produced a final report which contained a

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[38] Moon, "Reconciliation as Therapy and Compensation: A Critical Analysis".

[39] Michael Humphrey, *The Politics of Atrocity and Reconciliation. From Terror to Trauma* Routledge, London & New York, 2002. Moon, "Reconciliation as Therapy and Compensation: A Critical Analysis".

[40] William A. Schabas, "The Sierra Leone Truth and Reconciliation Commission", in *Transitional Justice in the Twenty-First Century. Beyond Truth Versus Justice*, ed. Naomi Roth-Arriaza and Javier Mariezcurrena, Cambridge University Press, Cambridge, 2006.

detailed narrative of the country's past, "with a focus on the brutal civil war of the 1990s, analysis of various dimensions of political, economic and social life with a view to understanding the causes of the conflict, and a series of findings and recommendations".[41] During the transition process, a particularly strong interpretation of reconciliation as healing through truth telling was advanced. As Rosalind Shaw reports, "a recurring image [of the transition process] was [the South African] Archbishop Tutu's metaphor of truth telling as the re-opening and cleansing of festering wounds, which would lead to real healing".[42] The then-Attorney General Solomon Berewa stated, that "far from being fault-finding and punitive, it [the TRC] is to serve as the most legitimate and credible forum for victims to reclaim their human worth; and a channel for the perpetrators of atrocities to expiate their guilt, and chasten their consciences. The process was likened to a national catharsis, involving truth telling, respectful listening and above all, compensation for victims in deserving cases".[43] Just as in the aforementioned cases, the Sierra Leonean reconciliation process was accompanied by an amnesty law; however, this law was *not* an integral part of the reconciliation concept itself, such as in South Africa or Spain. Instead both transitional components, the amnesty law and the reconciliation programme, were established simultaneously in the so-called *Lomé Peace Agreemen*t from 1999, the cease fire agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF).[44] In its final report, the TRC shortly discussed the amnesty law and came to the conclusion that it was an indispensable part of the peace process: "[t]he Commission is unable to declare that it considers amnesty too high a price to pay for the delivery of peace to Sierra Leone, under the circumstances that prevailed in July 1999".[45] The report did not deliberate on the complicated relationship between amnesty and reconciliation in detail, however.[46]

Two aspects of the Sierra Leonean case are striking: Firstly, the reconciliation initiative, i.e. the plan to initiate an *active* reconciliation programme in order to

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41 Ibid. See also: Rosalind Shaw, "Memory Frictions:Localizing the Truth and Reconciliation Commission in Sierra Leone", *International Journal of Transitional Justice* 1, 2007.

42 Rosalind Shaw, "Rethinking Truth and Reconciliation Commissions. Lessons from Sierra Leone", in *United States Institute of Peace Special Report*, United States Institute of Peace, Washington D.C., 2005, p. 8.

43 Schabas, "The Sierra Leone Truth and Reconciliation Commission", p. 25.

44 See e.g. Ismail Rashid, "The Lomé Peace Negotiations", in *Paying the Price. The Sierra Leone Peace Process,* ed. David Lord, Accord (Conciliation Resources), London, 2000.

45 Final Report of the Sierra Leonean TRC, Volume 3B, Chapter VI, pp. 10-12. The Act is available on: http://www.trcsierraleone.org/drwebsite/publish/index.shtml [01 September 2008].

46 Schabas, "The Sierra Leone Truth and Reconciliation Commission", p. 30.

deal with the past, was advanced by the Sierra Leonean government against the will of the population, who would have preferred a forgive-and-forget-policy.[47] Insofar, the decision to establish a TRC was not the easiest way to go for the government and the particular interpretation of reconciliation as truth-telling and healing was imposed on society in a top-down process. Secondly, the Sierra Leonean TRC existed simultaneously with the UN Special Court for Sierra Leone, which is outstanding in comparison with the cases discussed above. Despite the amnesty provision from 1999, the government of Sierra Leone 'reassessed' its position with respect to the amnesty, and requested that the United Nations establish a special tribunal" in 2000, when renewed fighting shook the country.[48] Insofar the Sierra Leonean case demonstrates that from the point of view of the actors involved reconciliation was *not* incommensurable with punitive justice. Instead, as soon as the circumstances allowed it punitive justice was seen as a necessary addition to the ongoing reconciliation process. Despite the "healing" metaphor of reconciliation and the assurance of Solomon Berewa that the TRC should be an institution for both, the healing of victims and the cleansing of perpetrators, the Special Court was established as a special institution for dealing with perpetrators.

The coexistence of the TRC and the Special Court and the potential risk of this combination to inhibit both, the reconciliatory and the juridical function of the institutions, has been much debated.[49] But apart from this discussion, the Sierra Leonean case is "deviant" insofar, as it seems to contradict the widespread opinion in the transition discourse that reconciliation is necessarily incommensurable with punitive justice. Although the Special Court and its juridical proceedings were not part of the reconciliation process, the central actors of the Sierra Leonean transition process did perceive them as inhibiting each other. Insofar, the Sierra Leonean case would be an interesting case for more research and a closer examination of the emergence of different transitional mechanisms under certain framing conditions.

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47 Shaw, "Rethinking Truth and Reconciliation Commissions". Shaw, "Memory Frictions".

48 Schabas, "The Sierra Leone Truth and Reconciliation Commission", 33. William A. Schabas, "The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone", *Human Rights Quarterly* 25, 2003.

49 See e.g. Sigall Horovitz, "Transitional Criminal Justice in Sierra Leone", in *Transitional Justice in the Twenty-First Century. Beyond Truth Versus Justice*, ed. Naomi Roth-Arriaza and Javier Mariezcurrena Cambridge University Press, Cambridge, 2006, Schabas, "The Relationship Between Truth Commissions and International Courts", Schabas, "The Sierra Leone Truth and Reconciliation Commission".

III. Conclusion

Reconciliation is no clearly delineated term in the context of political transition. Instead, as the cases presented above demonstrate, it rather serves as a vague label which can be adjusted to the requirements of a particular transitional context. The Spanish and the South African cases suggest that reconciliation can help to create political or public support for a political programme. On the one hand, reconciliation it is indeterminate enough to serve as a vague reference point on which different parties can agree while actually maintaining their profound political differences. On the other hand, reconciliation vaguely signifies an absent state of peace and harmony which is particularly valuable in the unstable time of political transition and which is therefore an easily acceptable goal. The Chilean case demonstrates in particular clarity how flexible "reconciliation" is and how well it can be adjusted according to the requirements of the political situation.

Despite the semantic vagueness and flexibility of reconciliation, a development can nevertheless be observed in regard to its political implementation. While the Spanish case, which was one of the earlier transitions among the so-called "third wave of democratizations", was guided by a relatively one-dimensional interpretation of reconciliation as "forget-and-forgive" and accordingly realized reconciliation solely through a far-reaching amnesty law, all the other cases examined here constructed a close association between reconciliation, remembering and truth-telling, and sought to realize reconciliation through the institution of a truth commission.[50] This development is also reflected in the scientific discourse, where the truth commission has come to be perceived as the paradigmatic institutionalization of reconciliation in transition processes.[51]

Besides this development, a continuity can be observed across all cases in regard to the amnesty law that always accompanied a political reconciliation programme. In all the transition processes reviewed above "reconciliation", independent of the prevailing interpretation, was somehow linked with an amnesty law. While in the Chilean case amnesty was one of the framing conditions under which the reconciliation programme was negotiated and launched, in Spain and South Africa the amnesty law was deeply intertwined with and integrated into the understanding of reconciliation, albeit in different

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[50] The same can be said about the Namibian transition to democracy in the late 1980s, where the SWAPO government also relied on a "forgive and forget" interpretation of reconciliation to implement an amnesty law and public amnesia to maintain social peace. See Lauren Dobell, "Silence in Context: Truth and/or Reconciliation in Namibia", *Journal of Southern African Studies* 23, no. 2, 1997. John S. Saul and Colin Leys, "Lubango and After: "Forgotten History" as Politics in Contemporary Namibia", *Journal of Southern African Studies* 29, no. 2, 2003.

[51] Humphrey, *The Politics of Atrocity and Reconciliation. From Terror to Trauma*. Moon, *Narrating Political Reconciliation. South Africa's Truth and Reconciliation Commission*.

ways. While the Spanish government implemented the amnesty law as the only and central "reconciliation mechanism" of the transition, South Africa developed a very complex understanding of reconciliation and combined the — conditional — amnesty law with a multilayered truth process. Sierra Leone and Chile in contrast seem to demonstrate that amnesty and reconciliation do not necessarily go hand in hand. In Chile, President Aylwin had originally promoted an interpretation of reconciliation which was closely intertwined with punitive justice. Due to the framing conditions of the transition, he was forced to change this understanding, however, and to fall back on the compromise formula suggested by the Catholic Church. In Sierra Leone, finally, while amnesty and the reconciliation commission were both decided on in the Lomé Peace Agreement, punitive justice was nevertheless added later as a complement to the reconciliation process. The Sierra Leonean case therefore demonstrates that reconciliation and criminal punishment are not generally incommensurable, but can be combined as parallel transitional mechanisms.

One last interesting observation across the cases, which is closely linked with the point discussed above, is that not once were criminal prosecutions and punishment considered as *profoundly necessary* for the successful pursuit of reconciliation. This reality goes hand in hand with one particular strand of the scientific discourse which identifies reconciliation programmes with "restorative justice" as an alternative concept of justice.[52] Restorative justice builds upon a communitarian understanding of ethics rather than on individualism and individual guilt. It assumes that it is social relationships in the first place which enable humans to live a humane life. Accordingly "justice" can be understood as the rebuilding of social relations between victim and perpetrator and among the wider community. Advocates of restorative justice who see reconciliation as different from and incommensurable with punitive justice are countered by voices like that of Lorna McGregor or Juan Méndez, however, who consider the non-judicial kind of reconciliation as a threat to the rule of law in transitional countries and demand the development of a reconciliation concept that relies on and is inextricably intertwined with criminal justice as one strong column of

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52 See e.g. Carrie Menkel-Meadow, "Restorative Justice: What Is It and Does It Work?", *Annual Reviews of Law* 3, 2007. Jennifer J. Llewellyn and Robert Howse, "Institutions for Restorative Justice: The South African Truth and Reconciliation Commission", *The University of Toronto Law Journal* 49, no. 3, 1999. Rama Mani, "Does Power trump Morality? Reconciliation or Transitional Justice?", in *Atrocities and International Accountability: Beyond Transitional Justice*, ed. Edel Hughes, William A. Schabas and Ramesh Thakur, United Nations University Press, Tokyo, 2007, Charles Villa-Vicencio, "Restorative Justice in Social Context: The South African Truth and Reconciliation Commission", in *Burying the Past. Making Peace and Doing Justice After Civil Conflict*, ed. Nigel Biggar, Georgetown University Press, Washington D.C., 2001.

reconciliation itself.[53] In the scientific discourse on transition as well as in the empirical cases presented above, however, it appears that the restorative understanding of reconciliation remains dominant. The exact relationship between reconciliation, justice and amnesty is therefore certainly an issue that needs to be explored in more detail in the future.

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[53] Lorna McGregor, "Reconciliation: Where is the Law?", in *Law and the Politics of Reconciliation*, ed. Scott Veitch, Ashgate, Aldershot, 2007). Juan E. Méndez, "National Reconciliation, Transnational Justice, and the International Criminal Court", *Ethics & International Affairs* 15, no. 1, 2001.

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Running Head: GOING BEYOND TRUTH Going Beyond Truth in Reconciliation

ABSTRACT

Many truth commissions assume that publicizing a history of violence aids reconciliation. This research hypothesizes that violent truths must be told in a certain context to encourage the acceptance of reconciliatory values. Study 1 shows that exposure to violent narratives publicized at South Africa's Truth and Reconciliation Commission (TRC) decreased students' acceptance of reconciliatory values, but placing the narratives in the context of the healing purpose of the TRC ameliorated negative effects. Study 2 finds that among South Africans, more understanding of the healing purpose of the TRC was associated with greater endorsement of reconciliatory values, particularly among black respondents.

Keywords: Truth Commissions, Reconciliation, Conflict Resolution, Forgiveness, Common Humanity

INTRODUCTION

In recent years, the idea of societal reconciliation has become of increasing interest to social scientists, particularly psychologists.[2] Despite, or perhaps due to, the continuing prevalence of violence and human rights abuses, concepts such as forgiveness, healing, and reconciliation have more commonly come under the academic microscope. Often considered unrealistically "humanistic," processes of reconciliation are nevertheless becoming an accepted topic of

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[2] E.g., Yaacov Bar-Siman-Tov, , "Why Reconciliation?". in Yaacov Bar-Siman-Tov (Ed.), *From conflict resolution to reconciliation,* Oxford University Press, New York, NY, 2004, pp.11-38.Nadler, Arie, Malloy, Thomas E., & Fisher, Jeffrey D., *The social psychology of intergroup reconciliation: From violent conflict to peaceful coexistence*, Oxford University Press, New York, NY, 2008.

scientific study.[3] Questions of morality and victimhood have become central, adding another dimension to the prominently realist analysis of political upheaval and accompanying transitional justice. However, there is still a vital need for further empirical research, particularly in the social sciences, to better inform policy-makers as to how to best further aims of reconciliation.[4]

Although it is a theoretically fluid concept, reconciliation, in a fuller sense, is generally thought of as moving beyond conflict resolution and can be defined at a very basic level as the restoring of harmony and a more positive relationship between rivals after some conflict.[5] It involves the formation of a new psychological repertoire, encompassing a change in beliefs, attitudes, motivations, goals, and emotions resulting in new norms, opinions, values, and collective memories.[6] Bar-Tal separates this definition into several components, the most relevant of which for this study will be socio-emotional reconciliation: the construction of general positive affect and emotions in a society.[7]

One of the most common recent approaches to advance societal-level reconciliation has been the implementation of truth commissions, of which there have been at least 25, the majority of which have been in Africa and Latin America.[8] Since South Africa's Truth and Reconciliation Commission (TRC), almost all of them aspire to promote reconciliation. Truth commissions aim to reveal systemic past abuse, hoping to aid in resolving societal conflict. They focus on the past, investigate a pattern of abuses over a period of time, typically last 6 months – 2 years, and are usually officially authorized by the state. They aim to discover and acknowledge past abuses, respond to needs of victims, contribute to justice and accountability, and outline institutional responsibility.[9] In addition to

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[3] Brandon Hamber, "Forgiveness and reconciliation: Paradise lost or pragmatism?", *Peace and Conflict: Journal of Peace Psychology, 13(1)*, 2007, pp. 51-69.

[4] Neil Kritz, "Policy implications of empirical research on transitional justice", in Hugo van der Merwe, Victoria Baxter, Audrey R. Chapman (Eds), *Assessing the impact of transitional justice,* United States Institute of Peace, Washington D.C., 2009.

[5] Tamar Hermann, "Reconciliation: Reflections on the theoretical and practical utility of the term", in Yaccov Bar-Siman-Tov (Ed.), *From conflict resolution to reconciliation*, Oxford University Press New York, NY, 2004, pp. 11-38.

[6] Daniel Bar-Tal, & Gemma Bennink,"The nature of reconciliation as an outcome and a process", in Yaacov Bar-Siman-Tov (Ed.), *From conflict resolution to reconciliation,* Oxford University Press, New York, NY, 2004, pp. 11-38.

[7] Daniel Bar-Tal, "Reconciliation as a foundation of a culture of peace", in Joseph de Rivera (Ed.), *Handbook on building cultures of peace,* Springer, New York, NY, 2009, pp. 363-78.

[8] United States Institute of Peace, *Truth commissions digital collection,* 2005. Retrieved fromhttp://www.usip.org/library/truth.html.

[9] Priscilla B. Hayner, *Unspeakable truths: Facing the challenge of truth commissions,* Routledge, New York, NY, 2002.

issues of legality and punishment, there has been a recent focus on the social impact of these commissions, particularly relating to societal reconciliation.[10] That is, while addressing perpetrators' and victims' needs is clearly important in reconciliation efforts,[11] bystanders' perception of reality is also crucial in influencing peaceful or antagonistic relations.[12] In terms of sheer numbers, a truth commission's audience (society at large) is who must be affected in order to achieve widespread societal reconciliation.

The most extensively mandated and funded of these bodies has been South Africa's Truth and Reconciliation Commission (TRC). Established following the end of apartheid in 1994, the TRC officially began functioning in 1995, and although it was expected to last just two years, continued working until 2001. It is difficult to establish causation, but in all likelihood, the TRC contributed to holding the post-apartheid country together and preventing further systematic bloodshed and even civil war. It provided a means to establish a shared national narrative, as well as mechanisms to address victims' grievances and perpetrators' crimes. Its success at some of these aspects can be and has been debated widely, but following the TRC, there was a significant drop in the retaliatory violence characteristic of the apartheid years.[13] The worst of this escalating violence occurred in the early 90s, directly before the socio-political transition (see the stark contrast between the average of 44 deaths a month due to political violence in the mid-1970s, 86 in the mid-1980s, and 250 in the mid-1990s).[14] The Commission's efforts to "promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past" seem likely to have been part of a somewhat successful intervention.[15] Most relevant for this study, the

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[10] Brandon Hamber, "Forgiveness and reconciliation: Paradise lost or pragmatism?", *Peace and Conflict: Journal of Peace Psychology, 13(1)*, 2007, pp. 51-69.

[11] Nurit Schnabel & Nadler, A. "A needs-based model of reconciliation: Satisfying the differential emotional needs of victim and perpetrator as a key to promoting reconciliation", *Journal of Personality and Social Psychology, 94(1*), 2008, pp. 116-32.

[12] Ervin Staub, *The roots of evil: The origins of genocide and other group violence,* Cambridge University Press, Cambridge, UK 1989.

[13] E.g., Brandon Hamber, "Who pays for peace? Implications of the negotiated settlement in a post-apartheid South Africa", in Daniel Chirot & Martin Seligman (Eds.), *Ethnopolitical warfare: Causes, consequences, and possible solutions*, American Psychological Association, Washington, DC, 2001, pp. 235-58. Chapman, Audrey, "Truth commissions and intergroup forgiveness: The case of the South African Truth and Reconciliation Commission", *Peace and Conflict: Journal of Peace Psychology, 13(1),* 2007, pp. 51-69.

[14] South African Institute of Race Relations, Fast facts, No. 6. Johannesburg, South Africa, Author, 1993.

[15] South African Department of Justice, Office of the President. *Promotion of national unity and reconciliation act (Electronic version),* 1995. Retrieved from http://www.doj.gov.za/trc/legal/act9534.htm.

Commission promoted reconciliation through attempts to alter South Africa's psychological repertoire, drawing upon an alternative value system that combated the existing emphasis on violence and revenge.

Of course, truth commissions, including South Africa's, have also been criticized. They have been accused of being pragmatic compromises, preventing true justice,[16] of being biased,[17] of failing to deliver sufficient financial reparations to victims,[18] and of failing to paint a complete picture beyond individual violations.[19] Most significantly for this research, through exposing violent truths, it has been asserted that truth commissions may re-traumatize victims, their family members, and society at large.[20]

Many have also criticized the Chair of the Commission, Desmond Tutu's[21] conceptualization of reconciliation, stressing forgiveness and *ubuntu* (common humanity, togetherness) as implausible, creating unfair expectations of victims.[22] In the cases of relationships between specific perpetrators and victims, they are quite possibly correct to do so. However, if taken to apply to society at large, constructing general positive affect and emotions through promoting values such as forgiveness and *ubuntu* seems a more reasonable goal. Forgiveness has been shown to heighten interpersonal closeness, inhibit avoidant behaviors, facilitate conciliatory behaviors, and encourage communication and cooperation.[23] Additionally, it has effects that go beyond the relevant interindividual relationship: someone who forgives a specific offense is more likely to have a general "we" frame of mind and greater feelings of relatedness towards others in general.[24] Similarly, belief in a common humanity has been shown to be associated with

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16 Catherine Jenkins, A truth commission for East Timor: Lessons from South Africa? *Journal of Conflict and Security Law, 7,* 2002, pp. 233-51.

17 Richard Wilson, *The politics of truth and reconciliation in South Africa: Legitimizing the post-apartheid state*, Cambridge University Press, London, UK, 2001.

18 Catherine Jenkins, A truth commission for East Timor: Lessons from South Africa? *Journal of Conflict and Security Law, 7,* 2002, pp. 233-51.

19 Mahmood Mamdani, "A diminished truth", *Siyaya!, 3,* 1998, pp. 38-41.

20 Alfred Allan, "Truth and reconciliation: A psychological perspective", *Ethnicity and Health, 5,* 2000, pp. 191-204.

21 Tutu, Desmond, *No future without forgiveness.* Ebury Press, London, UK, 2000.

22 Richard Wilson, E.g., *The politics of truth and reconciliation in South Africa: Legitimizing the post-apartheid state*, Cambridge University Press, London, UK, 2001.

23 Michael E. McCullough, Everett L. Worthington, Terry L. Hight Jr. d, K. Chris Rachal, Steven J. Sandage, Susan Wade Brown, "Interpersonal forgiving in close relationships: II. Theoretical elaboration and measurement", *Journal of Personality and Social Psychology, 75 (6),* 1998, pp.1586-603.

24 Johan C. Karremans, Van Lange, & Holland, Rob W., "Forgiveness and its associations with prosocial thinking, feeling, and doing beyond the relationship with the offender", *Personality and Social Psychology Bulletin, 31(10),* 2005, pp.1315-26.

more generous reward allocations, positive personal evaluations, empathic, helpful cognitions, behaviors and emotions, and a reduction of prejudice.[25] It appears fair to say that societies emerging from conflict should stress values such as these, aiding socio-emotional reconciliation.

What effect might unveiling a history of violence — a particular kind of "truth" — have on societies working toward reconciliation, advancing values such as *ubuntu* and forgiveness? Although it is a culturally specific assumption,[26] it is widely accepted that truth-telling and -publicizing is inherently a positive tool: The International Institute for Democracy and Electoral Assistance includes truth-telling as one of four necessary mechanisms for achieving reconciliation, and the Center for Strategic and International Studies declared truth-telling to be one of four pillars of peace building.[27] But there has been little empirical investigation of this claim. Both in an immediate and in a longer-term time-frame, truth commissions aim to bring about positive societal change, but how might this occur? This paper asserts that truth, in itself, may not contribute. The potentially divisive facts must be told in a certain context, emphasizing the particular healing goals of the Commission, in order to contribute to the desired reconciliatory aims.

STUDY 1
Introduction

Publicity

As popularized by the South African model, many truth commissions attempt to advance reconciliation. One of the ways in which they do this is through attempting to alter the societal psychological repertoire, drawing on an alternative value system that combats the existing emphasis on violence and revenge. For this to take place, the population must become aware of what the stressed values actually are. The Truth and Reconciliation Commission has been described as "a performance (in which) the actors have already configured the purpose of the play and there is a hope that other participants and viewers will also understand its message"[28] (p. 114), and a "theatrical display" of what therapy aims to accomplish

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[25] Sam Gaertner & John Dovidio, *Reducing intergroup bias: The common intergroup identity model,* Psychology Press, Newark, DE, 2000.

[26] Rosalind Shaw, "Memory Frictions: Localizing Truth and Reconciliation in Sierra Leone", *International Journal of Transitional Justice, 1,* 2007, pp. 183-207.

[27] Michele Flournoy & Michael Pan, "Dealing with demons: Justice and reconciliation", *The Washington Quarterly, 25(4)*, 2002, pp. 111-23.

[28] Ebrahim Moosa, "Truth and reconciliation as performance: Spectres of Eucaristic Redemption", in Charles Villa-Vicencio & Wilhelm Verwoerd (Eds.) *Looking back, reaching forward: Reflections on the Truth and Reconciliation Commission of South Africa,* University of Cape Town Press, Cape Town, South Africa, 2000, pp. 113-22.

(p. 128).[29] It is not enough to simply uncover the truth; people must understand *why* the truth is being revealed.

A performance such as this needs a wide audience, and hence, one of the most innovative facets of South Africa's truth commission was its publicity. One of the purposes of the human rights hearings was explicit: they aimed to restore the "human and civil dignity of (such) victims by granting them an opportunity to relate their own accounts to the violations of which they are the victims".[30] Additionally though, there was a goal beyond aiding victims — the Commission aimed to engage the country in a process of reconciliation. Only 2,000 of the 22,000 hearings were publicized, suggesting the publicity was to benefit more than the individuals who testified. Those hearings that were publicized were broadcast as widely as possible: National newspapers ran about 1.4 articles on the TRC per issue for the course of commission hearings; there was extensive radio coverage; the Commission regularly featured on evening news; and the South African Broadcasting Corporation aired a special report every Sunday which was regularly in the top-10 favorite programs of the week (unprecedented for a political program).[31] It seems clear that the TRC aimed to reach the South African populace (and was somewhat successful in doing so), drawing them into a reconciliatory dialogue.

There have been a great many studies on the impact of testifying on the victims themselves,[32] but far fewer on the impact on those who were exposed to the testimony.[33] John Stuart Mill, in Utilitarianism (1861) writes. "[i]t is natural to resent and to repel or retaliate any harm done or attempted against ourselves or against those with whom we sympathize…The sentiment of justice, in that one of

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[29] Martha Minow, *Between vengeance and forgiveness: Facing history after genocide and mass violence*. Beacon Press Books, Boston, MA, 1998.

[30] South African Department of Justice, Office of the President. *Promotion of national unity and reconciliation act (Electronic version)* 1995. Retrieved from http://www.doj.gov.za/trc/legal/act9534.htm.

[31] Theissen Gunnar, "Object of trust and hatred: Public attitudes toward the TRC", in Audrey Chapman, & Hugo van der Merwe (Eds.) *Truth and reconciliation in South Africa: Did the TRC deliver?* University of Pennsylvania Press, Philadelphia, PA, 2008.

[32] Catherine Byrne, E.g., "Benefit or burden: Victims' reflections on TRC participation", *Peace and Conflict: Journal of Peace Pyschology, 10(3)*, 2004, pp. 237-56.

Brandon Hamber, Traggy Maepa, Tlhoki Mofokeng and Hugo van der Merwe, *Survivors' Perceptions of the Truth and Reconciliation Commission and Suggestions for the Final Report.* 1998. Retrieved from http://www.csvr.org.za/wits/papers/papkhul.htm.

B. J. Pillay, "Providing mental health services to survivors: A Kwa Zulu-Natal perspective", *Ethnicity & Health 5(3-4).* 2000, pp. 269-72.

[33] Two notable exceptions are Gibson's *Overcoming Apartheid* and Wilson's *The Politics of Truth and Reconciliation in South Africa.*

its elements which consists of the desire to punish, is thus, I conceive, the natural feeling of retaliation or vengeance" (p. 76).[34] In the same vein, it seems plausible that, through heightened negative affect, regular exposure to explicit narratives of violence might in fact work in opposition to the national reconciliatory goals of the Commission. Scholars have speculated to this end. According to Gibson for example, many people doubt that specific information about atrocities leads to reconciliation of any sort.[35] A public opinion poll in 1998 revealed that 65% of South Africans felt that hearing what went on in the past would make people angrier and result in worse feelings[36] and a closer analysis of several townships found similar results.[37] While stories of trauma do have the potential to aid peace, they can be misused to instigate violence.[38] It becomes clear then, that hearing specific, personalized stories of violence may not in fact aid societal ills.

Media

More support for this position is given through the large body of literature on the effects of violent media. The Truth and Reconciliation Commission, if thought of as performance, fits directly into this line of research. The American Psychological Association, the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American Medical Association, the American Academy of Family Physicians, and the American Psychiatric Association have signed a joint statement on the hazards of TV violence.[39] Experimental studies demonstrate a causal link; field experiments demonstrate causal effects in naturalistic settings; cross- sectional studies demonstrate a positive association between media violence and types of real world aggression (e.g., assault); and longitudinal studies reveal long-term effects of early media violence exposure on later aggressive acts.[40] Although not all researchers agree,

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34 John Stuart Mill, *Utilitarianis,* Dover Publications, Mineola, NY, 1861, 2007.

35 James L. Gibson, , *Overcoming apartheid: Can truth reconcile a divided nation,?* Russell Sage Foundation, New York, NY, 2004.

36 Theissen Gunnar, "Object of trust and hatred: Public attitudes toward the TRC", in Audrey Chapman, & Hugo van der Merwe (Eds.) *Truth and reconciliation in South Africa: Did the TRC deliver?* University of Pennsylvania Press, Philadelphia, PA, 2008.

37 Richard Wilson, *The politics of truth and reconciliation in South Africa: Legitimizing the post-apartheid state*, Cambridge University Press, London, UK, 2001.

38 Rajmohan Ramanathapillai, "The politicizing of trauma: A case study of Sri Lanka", *Peace and Conflict: Journal of Peace Psychology, 12(1),* 2006, pp. 1-18.

39 Congressional Public Health Summit. Joint statement on the impact of entertainment violence on children. 2000. Retrieved from http://www.aap.org/advocacy/releases/jstmtevc.htm, October 4 2009.

40 Craig A. Anderson, & Brad J. Bushman, "The effects of media violence on society", S*cience, 295,* 2002, pp. 2377-79.

Anderson et al go as far as stating, "the scientific debate over whether media violence increases aggression and violence is essentially over" (p. 81).[41]

Of course, media can also have prosocial effects. Public service announcements and commercials are regularly utilized to combat prejudice, ignorance, and unhealthy behaviors. Even more directly, a prosocial radio soap opera in Rwanda was able to increase behaviors such as open dissent and cooperation.[42] The conflicting potential of mass media is revealed in a large-scale survey that showed exposure to TRC media predicted psychological distress, but also forgiveness.[43] This raises a crucial issue that has not been systematically addressed: how may the negative impact of these violent accounts be reduced, while strengthening the positive reconciliatory consequences?

Framing

Among several factors that may play a role in influencing the effects of the hearings, the framing of the narratives seems among the most influential. Beginning with Kahneman and Tversky, it has been repeatedly shown that different presentations of essentially identical material can elicit vastly different responses.[44] If framed in a particular manner then, can the potentially negative effects of truth commissions' publicized violent narratives be ameliorated, and can they in fact foster reconciliation? As proposed by Daly and Sarkin[45]:

> If the commission is solely interested in truth, it may present information unvarnished, thereby possibly impeding reconciliation. If the commission is interested in both truth and reconciliation, it may provide more of a context or balance to the same truth, thereby encouraging a conciliatory response to the truth by all sides.

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41 Craig A. Anderson, Leonard Berkowitz, Edward Donnerstein, Huesmann Rowell, L., Johnson, James D., Linz, Daniel Malamuth, Neil M., & Elen Wartalla, " The influence of media violence on children", *Psychological Science in the Public Interest*, 4(3), 2003, pp. 81-110.

42 Elisabeth Levy Paluck, "Reducing intergroup prejudice and conflict using the media: A field experiment in Rwanda", *Journal of Personality and Social Psychology, 96(3),*2009, pp.574-587

43 Dan Stein, Soraya Deedat, Debra Kaminer, Hashim Moomal, A. Herman, J. Sonnega & D. Williams, "The impact of the Truth and Reconciliation Commission on psychological distress and forgiveness in South Africa", *Social Psychiatry and Psychiatric Epidemiology 43(6),* 2008, pp. 462-68.

44 Daniel Kahneman, & Amos Taversky, "Prospect theory: An analysis of decision under risk", *Econometrica, 47(2),* 1979, pp. 263-92..

45 Erin Daly & Jeremy Sarkin, *Reconciliation in divided societies: Finding common ground,* University of Pennsylvania Press Philadelphia, PA, 2006.

What might this context look like? Previous research has shown the benefits of using a restorative justice framing, a concept central to the mission of the TRC. In a 2008 study, participants imagined someone robbing their house and then a set of consequences. Moving from no justice to retributive justice to restorative justice generally reduced negative emotion and unforgiving motivations while increasing positive emotion, empathy, and prosocial forgiveness responses.[46] Other researchers have shown that writing about the benefits of an interpersonal transgression helps people forgive those transgressions,[47] which, while not identical to the current scenario, can certainly be compared to hearing about the benefits of testifying before the TRC. Similarly, cognitive and affective priming can facilitate a common ingroup identity.[48] Hence, the hypotheses were as follows:

- With violence already salient (so as to acquaint participants with the history of conflict), participants exposed to specific violent narratives will espouse less forgiveness and common humanity than those not exposed to the narratives.
- This effect will be reduced or eliminated with a positive framing — an explanation of the healing purpose of the truth commission.

Method

Participants

The study was conducted with 60 undergraduate students in the Northeastern United States, recruited through psychology classes and offering reimbursement of $5. Participants were 48 females and 12 males. Forty seven were European American, five Asian American, two African American, and one Arab-American. Four participants reported as multiracial. Most participants were between 18 and 22, with one outlier of 46.

Procedure

Participants completed the questionnaires in a group testing session. Participants first went through a manipulation designed to heighten emotional

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[46] Charlotte V. O. Witvliet, Everett L. Worthington, Lindsey M. Root, Amy F. Sato, Thomas E. Ludwig, & Julie J. Exline, "Retributive justice, restorative justice, and forgiveness: An experimental psychophysiology analysis", *Journal of Experimental Social Psychology, 44*, 2008, pp.10-25.

[47] Michael E. McCullough, Lindsey M. Root, and Adam D. Cohen, "Writing about the benefits of an interpersonal transgression facilitates forgiveness", *Journal of Consulting and Clinical Psychology, 74(5),* 2006, pp. 887-97.

[48] Sam Gaertner & John Dovidio, *Reducing intergroup bias: The common intergroup identity model,* Psychology Press, Newark, DE, 2000.

closeness to victims.[49] This manipulation consisted of seeing pictures of three South African individuals and hearing a brief description of their lives (see Appendix A), and then writing a paragraph about one of these individuals. Participants were then all given a recorded statement describing background information on the types of violence characteristic of the apartheid years, so as to acquaint participants with the history of conflict. Then:

- *Group 1* received no narratives, as a neutral control condition
- *Group 2* received three violent narratives taken from the TRC website (see appendix B) in recorded oral form corresponding to the three people they had been introduced to. This was to simulate a truth commission presenting unframed, unvarnished narratives.
- *Group 3* received the same violent narratives, but the healing purpose of the Truth and Reconciliation Commission was also explained to them (see Appendix C), also in recorded oral form. This was to simulate a truth commission presenting narratives in the broader context of the goals of the Commission.

As dependent variables, each participant subsequently filled out the TRIM-18 forgiveness scale,[50] asking how willing participants were to forgive someone who had recently wronged them in their own lives, and a common humanity scale assessing a more abstract belief in a common humanity (a proxy for *ubuntu*, for American participants, likely unaware of the Bantu concept).[51] The forgiveness scale assessed people's willingness to forgive someone who had wronged them in their own life; covariates therefore were the closeness of the relationship with wrongdoer and the perceived severity of the offense, as well as the compassion scores.

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[49] Saeid S. Jafari, *Global Connectedness.* Unpublished manuscript, Clark University, Worcester, MA, 1997.

[50] Michael E. McCullough, Everett L. Worthington, Terry L. Hight Jr. d, K. Chris Rachal, Steven J. Sandage , Susan Wade Brown, "Interpersonal forgiving in close relationships: II. Theoretical elaboration and measurement", *Journal of Personality and Social Psychology, 75 (6),* 1998, pp. 1586-603.

[51] Mathew Motyl, *Perceptions of a common humanity,* Unpublished manuscript, University of Colorado, Colorado Springs, CO, 2007.

Results

Table 1: Means and standard errors for levels of the independent variables

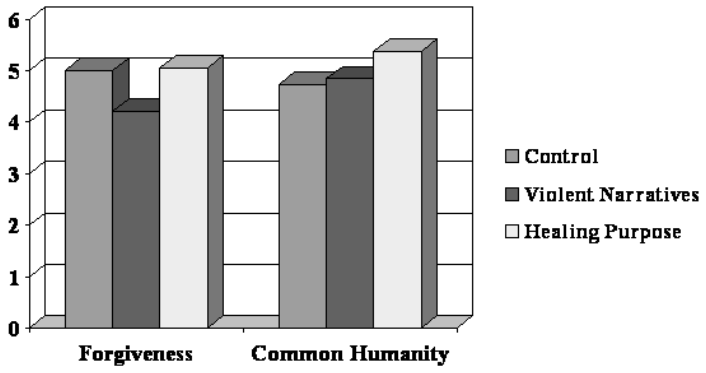
	Forgiveness Scale		Common Humanity Scale	
Group	M	SE	M	SE
Control	5.01[a]	.19	4.73[a]	.25
Violent Narratives	4.21[b]	.19	4.85[a]	.25
Healing Purpose	5.05[a]	.19	5.38[b]	.25

*Note: Means with different superscripted letters were significantly different at the .05 level by means of an LSD post hoc test.

A one-way between subjects multivariate analysis of variance (MANCOVA) was utilized to test the model of interest. There were 19 subjects in the control group, 20 in the violent narratives group, and 21 in the healing purpose group. The levels of the independent variable were the groups (control, violent narratives, violent narratives with healing purpose) and the dependent variables were the forgiveness and common humanity scales.

The dependent variate was significantly affected by group, Wilks' Lambda = .709, $F(4, 104) = 3.460$, $p = .011$, partial $h^2 = .117$. Follow-up univariate ANOVAS revealed that TRC-framing significantly influenced both forgiveness, $F(2, 53) = 3.564$, $p < .05$, partial $h^2 = .119$, and perceptions of a common humanity, $F(2, 53) = 3.686$, $p < .05$, partial $h^2 = .122$. Levels of the independent variable were then analyzed by means of the LSD post-hoc test; results are displayed numerically in Table 1 above and graphically in Figure 1 below.

Figure 1: Comparison of levels of the independent variable



Specifically, and as expected, exposure to the violent narratives decreased participants' willingness to forgive offenses against themselves in their own lives, but this effect was ameliorated with an explanation of the healing purpose of the Truth and Reconciliation Commission. Surprisingly, there were no significant differences in belief in a common humanity between the control group and those who were exposed to the violent narratives, but most importantly, the group that heard the violent stories in the context of the healing framing were significantly more likely to endorse a belief in a common humanity.

Discussion

In sum:

- A negative effect (less forgiveness) of exposure to violent narratives was ameliorated with a positive framing of the Truth and Reconciliation Commission, stressing "unburdening of grief," "transforming anger," and "healing wounds."
- A positive effect (greater belief in a common humanity) of exposure to violent narratives was obtained with a positive framing.

Framing

When they heard the violent stories alone, participants were less inclined to forgive someone in their own life. As described above, this is not entirely surprising. When exposed to aggressive, violent stimuli, we often desire retaliation are thus less likely to forgive. What is more interesting, however, is that this generalizes to other wrong-doers in other, more personal situations. After being faced with stories of graphic violence, people's general frame of mind appears to be affected and they are less likely to forgive wrongs that they have personally suffered, a finding which has clear implications for a body aiming to effect broad change in a society's value system. Interestingly, this same effect did not hold true for the other dependent variable, belief in a common humanity. On this measure, there was no difference between the group who were exposed to the violent narratives alone and the control group. This unexpected finding can perhaps be explained by a balancing between sympathy with the victims and horror at the existence of such brutality.

Most importantly, the healing framing had extremely encouraging results, removing the negative effects of the violent narratives, and actually encouraging positive sentiments, above and beyond the control group. The negative effects of the explicit stories were nullified through the context of the positive aims of the Truth and Reconciliation Commission, emphasizing "unburdening of grief,"

"transforming anger," and "healing wounds." Participants seemed to believe in the healing potential of the TRC, which had a spillover effect onto their emotions and beliefs. Those who heard the healing framing were more willing to forgive than the group that heard the violent narratives alone, and were more likely to believe in a common humanity than even the control group. The importance of framing becomes clear.

Truth of a certain kind then, in and of itself, may actually be harmful. It is not, as some have implied, a social panacea, curing all ills. Many have qualified the possible benefits of truth-telling, citing it as a step on the road to reconciliation, but the results of this study indicate that in actuality, even this refined statement may not be valid: truth by itself may work in the opposite direction to that desired. Explicitly violent, personalized narratives, however truthful, may negatively affect the likelihood of reconciliation. To combat this possibility, people must understand why these stories are being told, the purpose of their publicizing.

Performance

As argued above then, truth commissions that aim to aid reconciliation — such as the Truth and Reconciliation Commission — can be thought of as a performance, a kind of moral theater.[52] Through staging the performance on a national scale, commissions are able to reach entire nations, thus spreading their message as widely as possible. There is a specific message that the "audience" is to understand. If this message is not communicated though, the performance can have the opposite result to that intended. The purpose must be transmitted clearly and consistently in order to ensure that it is understood and hopefully accepted. In this way, the negative effects of the violent narratives may be ameliorated, and they can in fact add to the benefits that truth commissions may bring to a conflict-ridden society.

Generalization

The primary limitation of this study is the issue of generalizability. American participants do not have personal ties to violent events in South Africa, and results in a laboratory may not mirror the "real world." This can be preliminarily approached through the methodology chosen. The justifications for using a more distanced population are twofold: First is the issue of

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[52] Ebrahim Moosa, "Truth and reconciliation as performance: Spectres of Eucaristic Redemption", in Charles Villa-Vicencio & Wilhelm Verwoerd (Eds.) *Looking back, reaching forward: Reflections on the Truth and Reconciliation Commission of South Africa,* University of Cape Town Press, Cape Town, South Africa, 2000, pp. 113-22.

sympathetic involvement, which was addressed through the relatively successful emotional manipulation. In viewing pictures and life-stories of the victims and writing a paragraph on one of them, participants did become relatively "close" to the individuals, as displayed by closeness ratings (M = 4.5 on a 7-point likert scale, SD = 1.4) and powerful paragraphs describing their reactions to the testimony (available upon request). Second is the relevance of personal involvement. When thinking about this issue, it must be kept in mind that societies are heterogeneous – some portions of the South African population were undoubtedly more affected by apartheid and the TRC than others and yet the victim narratives may have triggered emotional responses not based on experience. Supporting this point, a large, representative survey by James Gibson revealed that 57.6% of South Africans (including 39.4% of Blacks) reported no specific injuries from apartheid.[53] This is not intended to downplay the widespread suffering that was undoubtedly involved, but rather to highlight a potentially confounding variable in responses to the Commission's violent narratives. The TRC obviously affected South African society in intersecting ways, many of which were related to people's experiences under apartheid. In removing this personal emotional context, the current study establishes a valuable baseline for future research to build upon, possibly taking on the difficult task of quantifying people's experiences of suffering.

However, none of these reasons deny that further research is necessary to complement the initial findings. The relationship might not be found in a context where people had personal ties to the events, and in general, people are not exposed to violent stories in a laboratory. It would be impossible to causally test every method by which individuals in an affected society come across truth commission media. However, its effects can be examined. To address these issues, a correlational study, outside of the lab, was undertaken with South African students who have been more directly affected by the violence of apartheid and by the TRC. In this way, we remove the constraints due to the "falseness" of the laboratory and to the distance of the American sample.

STUDY 2

The previous study indicated that the healing purpose of the Truth and Reconciliation Commission must be understood in order to internalize its value system, and thus overcome the negative impact of the violent narratives. If this were to hold true in a more "real-world" context, one would expect to find the same relationship between exposure to the healing purpose of the TRC and

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[53] James L. Gibson, *Overcoming apartheid: Can truth reconcile a divided nation,?* Russell Sage Foundation, New York, NY, 2004.

acceptance of its reconciliatory values of *ubuntu* and forgiveness 1) outside of the laboratory, 2) among a population more directly affected by a truth commission. Hence, this hypothesis was tested among a group of South African students. Although many were too young to have personally attended hearings, they have all been impacted by the longer-term effects of the Commission and by its entry into the nation's collective memory.

Additionally, it seemed likely that there would be differences between ethnic groups on degrees of understanding of the healing purpose of the Commission. As the TRC was generally received more favorably by black South Africans,[54] it was likely that they would have a greater understanding of its purpose, and hence, were more likely to have internalized its value system.[55] The TRC had a starkly different meaning to black and white South Africans: Black South Africans were more likely to see it as an acknowledgement of suffering, while whites were more likely to view it as a threatening tool to highlight the immorality of past actions, and would therefore pay it less attention. Hence, the contrast between these two groups was predicted to be particularly apparent.

Hypotheses

- Increased understanding of the healing purpose of the Truth and Reconciliation Commission will be associated with a higher level of attitudinal endorsement of its promoted values: *ubuntu* and forgiveness. This relationship will be mediated through perceived success and importance of the Commission. For example, "I understand that the TRC promoted forgiveness, therefore I think forgiveness is important, particularly if I believe that the TRC was important to South Africa."
- As the TRC was more favorably received by black South Africans, they will have greater understanding of its healing purpose than other ethnic groups, particularly white South Africans. This understanding of the healing purpose of the Commission will lead to greater endorsement of its values of *ubuntu* and forgiveness.

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[54] James L. Gibson, *Overcoming apartheid: Can truth reconcile a divided nation,?* Russell Sage Foundation, New York, NY, 2004.

[55] Of course, other variables are also influential in explaining intergroup differences in acceptance of reconciliatory values. See Discussion for a fuller explanation.

Method

Participants

The sample was comprised of 100 university students in Johannesburg, South Africa. Participants were 46 males and 48 females. Thirty-eight respondents were black, 19 white, 15 coloured, and 18 Indian (the common ethnic categories in South Africa). The age range was from 16-24 (M = 21.71, SD = 2.80).

Procedure

Participants were recruited in classrooms and volunteered with the inducement of a lottery with a 400 rand (approximately $54) prize to be distributed to three participants. The survey assessed:

- People's healing understanding of the TRC (multiple choice, 7 items), e.g., "Which of the following was a goal of the TRC? A: To initiate national reconciliation."
- Personal involvement with the TRC, e.g., "Did/do your parents ever talk to you about the TRC?"
- Opinion of the TRC's success and importance (1-7 rating scale, six items), e.g., "TRC brought about reconciliation."
- Agreement with TRC-related values of forgiveness and *ubuntu* (1-7 rating scale, 11 items), e.g. "To what extent do you think forgiveness is important?"

See Appendix D for full survey.

Results

Scales: **Healing understanding** (e.g., understanding that the goal of the TRC was to bring about reconciliation, not punishment; that victims were to be financially compensated, not gain revenge), was left as a simple additive scale, consisting of seven questions. An exploratory factor analysis showed that the six items assessing opinion of the TRCs success and importance (e.g., the TRC brought about reconciliation," "the TRC was important to South Africa") failed to form a scale, so they were kept separate. **Reconciliatory values** (of *ubuntu* and togetherness) were analyzed using an exploratory factor analysis with a maximum likelihood extraction method and a direct oblimin rotation. Somewhat unexpectedly, eight variables loaded on a single factor, rather than the expected two. The final scale achieved a Cronbach's Alpha of .622, which while lower than ideal, was significant enough to proceed with the analysis. All contributing items are highlighted in Appendix D.

Table 2: Intercorrelations for relevant items and scales among entire sample

Item/Scale	1	2	3	4	5	6	7
1. Healing Understanding	-	.53**	.03	-.06	-.27**	.27**	.28**
2. Reconciliatory values		-	.06	.02	-.13	.26**	.25*
3. Reconciliation				-	.26**	.16	.43**
4. Justice						-	.25*
5. Success						-	.17
6. S.A. Importance							-
7. TRC mistake (reverse)							-

*$p < .05$
**$p < .01$

Correlations: As can be seen in Table 2 above, as hypothesized, healing understanding was significantly positively correlated with agreement with reconciliatory values; this connection remained highly significant ($p < .01$) even when variance according to the TRC-opinion questions was controlled. As questions assessing opinion of the TRC's success and importance failed to form a reliable scale, they were entered as separate items. Significant interrelationships among these variables are mentioned below in *Exploratory Findings.*

Intergroup differences: Interestingly, the correlation between understanding of the healing purpose of the TRC and agreement with its value system existed only among black South Africans, and as a trend for white respondents, $p = .059$ (possibly explained by the smaller sample size). Healing understanding failed to interact with any TRC-opinion questions to predict the espousal of reconciliatory values among other ethnic groups. (Table 3)

Univariate ANOVAs (and follow-up LSD tests) showed black respondents understood more about the healing purpose of the Commission, and as seen above, also accepted more of its values. If, among other ethnic groups, the former variable is not correlated with the latter, why might they be less likely to endorse reconciliatory values? To explore this issue, multiple ANOVAs were conducted, adding those TRC opinion questions that correlated with reconciliatory values as covariates. As indicated by the correlational trend between healing understanding and reconciliatory values among white

Table 3: Differences between ethnic groups' espousal of reconciliatory values

	Reconciliatory Values	
Ethnic Group	M	SE
Black	5.20^{a}	.17
White	4.45^{b}	.24
Coloured	4.58	.27
Indian	4.41^{bb}	.24

*Note: superscripted *a* vs. *b* were significantly different at the $p < .05$ level by means of an LSD post hoc test. Subscripted *a* vs. *bb* were significant at the .01 level.

respondents, when healing understanding was added as a covariate, the difference between black and white respondents was eliminated. With the subsequent addition of "the TRC importance to South Africa," and "the TRC was a mistake," the difference was reduced to black (5.04) vs Indian (4.49), which while still significant ($p = .045$), is far less so than the covariate-less model shown in Table 3 above.

Exploratory Findings:

Healing understanding of the TRC was positively correlated with opinion of the Commission's importance to South Africa. Interestingly, there was no correlation between healing understanding and opinion of whether the TRC brought about either justice or reconciliation. Healing understanding was actually negatively correlated with opinion of the TRCs success, implying that those who understood more about the healing purpose of the Commission were less likely to view it as a success (although they still seemed to agree that it was important).

Discussion

The results of this study support the hypothesis that healing understanding of the TRC is associated with agreement with the reconciliatory values of *ubuntu* and forgiveness, but only among black and white South Africans. Among these groups, respondents who scored more highly on the questions testing understanding of the healing purpose of the Commission were more likely to agree with statements asserting reconciliatory values. Ethnic identity in itself was also a significant predictor of agreement with reconciliatory values, with black respondents significantly more likely to agree with their importance than either white or Indian respondents. Much of this variance was accounted for by inter-group differences in understanding of the healing purpose of the TRC and opinions of the importance of the TRC to South Africa.

Reconciliation Implications

If one of the goals of the TRC was to aid reconciliation through altering South Africa's psychological repertoire and emphasizing certain values, understanding of the healing purpose of the Commission itself seems an influential, though not sufficient step to this end. Of course, other considerations must also be taken into account. More immediate concerns such as the huge wealth disparity, housing shortage, and high levels of violent crime distract South Africans from the seemingly higher-level needs of reconciling with one another, no matter the degree of remembrance and value-promotion.

Interestingly, in a recent study analyzing both transcripts and follow-up interviews, the majority of TRC deponents spoke of neither reconciliation nor forgiveness, placing conditionalities on the concepts when they did so, and choosing to focus rather on discovering the truth about violations, public acknowledgement, restoration of dignity, obtaining justice, encountering perpetrators, and receiving reparations.[56] It is asserted that the TRC did not successfully develop a model to promote intergroup forgiveness and reconciliation. In fact, many respondents felt that revelations stemming from the Commission had complicated race relationships and made people angrier. If this is indeed the case, does it mean memory of the TRC should be minimized? Not necessarily. In actuality, it may have been far from perfect, but the societal *goals* of the TRC, particularly reconciliation and *ubuntu*, remain the goals of the country as a whole. Although the individual benefits may in some cases have been limited, the aims and ambitions of the Commission can still be held up as inspirational markers of how the country attempted to face its demons.

At the same time, many theorists have considered justice one of the primary components of reconciliation, and indeed, there was a significant positive correlation between opinion of whether the TRC brought about justice and whether it brought about reconciliation.[57] Although those that had a greater healing understanding of the Commission were more likely to say it was important to South Africa, they were no more likely to opine that the TRC had brought about justice. And although healing understanding did lead to acceptance of reconciliatory values, it did not predict agreement that the Commission had brought about reconciliation itself, perhaps due to the perceived lack of justice. Without this component, even with increased acceptance of healing values such

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[56] Audrey Chapman, "Truth commissions and intergroup forgiveness: The case of the South African Truth and Reconciliation Commission", *Peace and Conflict: Journal of Peace Psychology, 13(1),* 2007, pp. 51-69.

[57] E.g., Louis Kriesberg, "Comparing reconciliation actions within and between countries", in Yaacov Bar Siman Tov, (Ed.), *From conflict resolution to reconciliation,* Oxford University Press, Oxford, 2004, pp. 81-110. Lederach, John Paul, *Building peace: Sustainable reconciliation in divided societies,* United States Institute of Peace, Washington, D.C., 1997.

as forgiveness and *ubuntu*, it may be difficult to speak of true, lasting reconciliation.

Collective/Cultural Memory

Most participants in this study were mostly too young to have attended hearings themselves, which raises the importance of the society's collective memory of the truth commission. Collective or cultural memory is a representation of the past that is shared by members of a group. It constructs and reconstructs a social identity; rather than the biological survival of the ethnic or social grouping, the survival or decay of a collective depends on the continuance of this shared memory. If one changes one's identity, one must also alter one's cultural memory, and if one changes one's cultural memory, one's identity will be concurrently adjusted.[58] It becomes clear then, that to emphasize a South African identity based on values of forgiveness and community, if that is indeed what South Africans desire for themselves, the TRC and particularly its value system must seep into the collective as part of a historical narrative. As Booth has described the importance of a collective memory: "the threatened loss is of the community as a subject of moral imputation across time; we are not only creatures of the moment, but also bearers of our past and have a responsibility to our future as a community" (p. 261).[59] In order to maintain the community as a source of morality and desired values into the future, we must hold onto our past.

However, the classroom is only one source of this collective memory. Similarly important are non-institutionalized forms of knowledge transmission such as oral or written stories, rumors, or cultural styles.[60] This study attempted to define collective memory through concrete knowledge of factual and conceptual concepts, which, while objective and relatively easy to measure, is an inherently imperfect concept. Historical knowledge becomes part of a "cultural curriculum" even if such knowledge is not retrievable by students taking a quiz.[61] Knowledge of what was to happen to perpetrators who testified

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[58] A. Heller, (2001). A tentative answer to the question: Has civil society cultural memory? *Social Research, 68(4),* 1031-1040.

[59] James W. Booth, "Communities of memory: On identity, memory, and debt", *The American Political Science Review, 93(2),* 1999, pp. 249-63.

[60] Dario Paez, Nekane Basabe & Jose Louis Gonzalez, "Social processes and collective memory: A cross-cultural approach to remembering political events", in Pennebaker, James W. & Rime, Bernard (Eds.), *Collective memory of political events: Social psychological perspectives*, Lawrence Erlbaum Associates, Inc. Mahwah, NJ, 1997, pp. 147-74.

[61] Sam Wineburg, Susan Mosborg, Porat, D., & Duncan, A. "Common belief and the cultural curriculum: An intergenerational study of historical consciousness", *American Education Research Journal, 44(1),* 2007, pp. 40-76.

at the TRC can be thought of as an indicator of successful transmission of some form of a collective memory, but this memory could also manifest itself in other fashions, for example through "charismatic highlighting," as embodied by leaders such as Nelson Mandela or Desmond Tutu. Further research should explore other measurements of collective memory.

Intergroup Differences

As expected, black respondents understood more about the healing purpose of the Truth and Reconciliation Commission, and this was correlated with increased acceptance of Reconciliatory values of *ubuntu* and forgiveness. The same relationship existed among white relationships as a trend, almost reaching statistical significance. However, among coloured and Indian South Africans, there was no relationship between understanding of the Commission's healing purpose and agreement with its values. Why might this be so? There appears to be no solution in this dataset, with variables such as opinion of the TRC's justice, reconciliation, success, and importance all failing to interact with healing understanding to predict reconciliatory values. It is likely that the Commission holds a very different meaning to different ethnic groups; future research should further investigate this question, perhaps qualitatively enquiring as to why some groups seemingly reject a more reconciliatory value system, despite understanding its promotion by the TRC.

Additionally, there was a difference between ethnic groups on agreement with reconciliatory values of forgiveness and *ubuntu*, with black respondents espousing the values more than either white or Indian South Africans. The correlational trend between healing understanding and reconciliatory values among white respondents did not reach statistical significance, but the relationship was still strong enough to account for much of the differences between black and white respondents: lower scores among whites on the former led to lower scores on the latter. Additionally, several other variables led to differences between black and Indian South Africans: 1) Black South Africans felt that the TRC was more important to South Africa than did Indians, leading to higher levels of agreement with reconciliatory values. 2) Indian South Africans were more likely to feel that the TRC was a mistake than black South Africans, leading to lower levels of agreement with reconciliatory values. When these variables were taken into account, the majority of the intergroup differences disappeared.

Of course, as stated above, these variables only explain some of the differences between groups. Other factors such as structural inequality, cultural differences, and historical injustices are hugely important in value formation, and are not addressed with this data. However, despite the undeniable

importance of external factors, these results do imply that understanding the healing purpose of the TRC, as well as accepting its importance to the country, leads to agreement with the Commission's values of *ubuntu* and forgiveness. The obvious follow-up "why" questions (e.g., why do black South Africans feel that the TRC was more important to South Africa than do other ethnic groups?) can be speculated upon, but demand further systematic, empirical research.

Alternative Explanations

There are several alternative explanations for these findings. It is possible that those who possess relevant values are more likely to remember the Commission that embodied them or that some third variable could explain the correlation. However, the inclusion of the first study shows that knowledge of the TRC's healing purpose does in fact lead to agreement with values of forgiveness and common humanity; the reverse explanation, although plausible, is merely speculative. Additionally, South Africans who know about the healing purpose of the TRC may be more likely to succumb to relevant social desirability in terms of agreeing with "PC" values. Again as displayed in the first study though, this pattern occurs in a situation where the social desirability is far less prescriptive. Although there are alternative explanations, the balance of the evidence indicates that it is most likely that understanding of the healing purpose of the Truth and Reconciliation Commission is influential in subsequent acceptance of its promoted values of forgiveness and *ubuntu*.

CONCLUSION

Studies 1 and 2, correlational and experimental, are highly complementary. The limitations of each are answered by the strengths of the other. Study 1 establishes a causal link between understanding of the healing purpose of the Truth and Reconciliation Commission and agreement with its promoted values of common humanity and forgiveness, but has issues of generalizability to populations directly affected by a history of violence and by a truth commission. Study 2 establishes a correlation between understanding of the healing purpose of the TRC and agreement with its promoted values among a population affected by apartheid. What it cannot do is establish a causal link. When the two are combined, the evidence becomes persuasive that knowledge of the healing purpose of truth commissions is necessary in order to further reconciliatory value promotion.

How might a populace gain knowledge or understanding of the healing purpose of a truth commission? There are a variety of answers to this question, for example the Commissioners themselves, the government, or simply word of

mouth. Likely one of the most influential factors though is the media. As indicated earlier, the South African Truth and Reconciliation Commission was publicized widely, a seemingly positive endeavor. However, this does not indicate how the Commission was framed. In a detailed study of the journalistic coverage of the TRC, Evans has found that despite the Commission's best efforts, much of the exposure mirrored that of mainstream "if it bleeds, it leads" reporting.[62] This sensationalistic treatment was probably not helpful in furthering the TRC's reconciliatory aims, and future commissions should endeavor to train media in how to most effectively report on hearings, balancing integrity with responsibility. Many such bodies do seem to be attempting to do so. The Liberian Truth and Reconciliation, for example, conducted widespread journalistic training and established a department of media affairs, hoping to ensure that the media would help engage the Liberian populace in the reconciliatory movement.[63]

As has been noted, ideas such as forgiveness and common humanity fit into Bar-Tal's notion of socio-emotional reconciliation: the creation of general positive affect. Additionally, other theoretical and empirical work supports the link between the concepts. Previous longitudinal research has highlighted empathy (community/*ubuntu*) and common ingroup identity (national pride) as predictors of forgiveness, which subsequently predicts reconciliation.[64] Of course, even given these values, there is no guarantee of any practical change; economic and development indicators consistently correlate more highly with peace indexes than do values (Fischer & Hanke, 2009).[65] The excavation of truth, even in a healing framework, must take place alongside a host of other changes: economic, political, structural, and cultural, at multiple levels of society.[66] Even so, exposing truth and attempting value change does seem to contribute to reconciliation above and beyond other factors. Hence, unveiling a

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[62] Martha Evans, *Looking the beast in the eye: The media's handling of the TRC and the implications for nation-building,* Paper presented at Beyond Reconciliation Conference, Cape Town, South Africa, 2009.

[63] TRC of Liberia, *Final Report*, Monrovia, Liberia, 2009, Author.

[64] Masi Noor, Rupert Brown, Gonzalez, R., Manzi, G., & Lewis, C. W. On positive psychological outcomes: What helps groups with a history of conflict to forgive and reconcile with each other? *Personality and Social Psychology Bulletin, 34,* 2008, pp. 819-32.

[65] Ronald Fischer & Katja Hanke, "Are societal values linked to global peace and conflict?", *Peace and Conflict: Journal of Peace Psychology, 15*(3), 2009, pp. 227-48.

[66] E.g., John Paul Lederach, *Building peace: Sustainable reconciliation in divided societies,* United States Institute of Peace, Washington, D.C., 1997.; Bar-Siman-Tov, Yaacov, "Why Reconciliation?". in Yaacov Bar-Siman-Tov (Ed.), *From conflict resolution to reconciliation,* Oxford University Press, New York, NY, 2004, pp.11-38.; Chigas, Diana & Ganson, Brian, "Grand Visions and Small Projects: Coexistence efforts in Southeastern Europe", in Antonia Chayes & Martha L. Minow (Eds.), *Imagine Coexistence: Restoring humanity after violent ethnic conflict,* Jossey Bass, San Francisco, CA, 2003, pp. 59-84.

history of violence must be done carefully. It has potentially damaging results, and if the goal is to aid reconciliation, the context of the truths uncovered, as well as the importance of uncovering them, must be stressed both at the time of the hearings and beyond.

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Appendix A: Descriptions

Priscilla is a 46-year-old South African woman. Married at the age of 19, she had 5 children, but only 3 remain. She works hard (along with her husband) to support her family, just managing to pay the bills every month. She is deeply religious, attending church every day, and donating to religious charities when she is able. She sings in a choir regularly which provides much of her social support, and is also directly involved in her local community, particularly worried about schooling and safety due to political divisions

Lakoo is a 57-year-old South African man. He is unmarried and has no children, dedicating his life to the African National Congress (ANC) and its socio-political struggle for freedom. Originally peaceful, the ANC was banned by the powerful National Party and was forced to take up a campaign of sabotage, a cause which Lakoo supported wholeheartedly, while always following the primary rule to avoid any loss of life, civilian or otherwise. He has very little money and most of his friends stem from the political struggle. He is generous to a fault, distributing money and food to those in need, sometimes to his own detriment. He considers himself a strong, courageous person, willing to sacrifice everything for what he believes is a just cause.

Gary is a 53-year-old South African man. He has a wife and 2 children, aged 16 and 19. He considers himself a family man and spends as much time as he can with his kids. He is a career police officer, and has risen through the ranks to the position of detective. Dedicated and thorough, he is a popular figure at work, and has had a successful career. In his spare time he enjoys sports – previously a keen rugby player, he now coaches a youth team, and watches professional games every weekend. He has started to think about retirement, hoping to finish working within 5 years and spend more time with his wife.

Appendix B: Violent Narratives

PRISCILLA: When I got married I had two children and those are the ones who died in 1993. The first one died on the first of October. The police came at night, between 12pm and 1am. We were still asleep when we heard the windows being hit and they were knocking, shouting "Open up, we are the police. I woke up and went to my son Stephen and asked him what was happening. He asked me not to be afraid and to open for them. I suggested that I should perhaps hide him but he didn't agree, and he said he would open if I was scared. They opened and got inside, three white policemen and one black person but his face was covered and we could only see his eyes. They asked where Stephen was and he identified himself to them. They told him to get dressed and to go with them. It was very cold as it was in winter and he asked me for a polo neck. They got out and left with him, and I took a pen and paper with which to write out the registration number of the truck but the one white guy covered the number plate with a boot so I couldn't see it and they left. I stayed behind crying.

A lot of comrades then arrived and told me that we must go to the camp nearby. We went there, my sister, her husband, my husband and I, and on arrival my husband told them that he had lost his child. They asked his name and what he was doing and my husband said he was a scholar. They asked his age and they asked him to go to one side where they had put the people. After a while my husband called me and I saw my child. I couldn't believe it and I even slapped him on his cheeks to find that he was already cold. My husband said they found him facing downwards on a tray. His one hand — I cannot remember whether it was the left or the right one — it was completely burned. On the side of his face was a dark mark and when I touched him I found that the bones were broken... (http://www.doj.gov.za/trc/hrvtrans/methodis/gama.htm)

GARY: On the night of the 22nd April 1988 I reported for duty. At that time I was doing crime prevention duties — I was in the uniformed branch. My job was to patrol the area of Soweto, and we had warrants for people who took part in the rent boycotts. I was the sergeant in charge, accompanied by three other

constables. At about midnight we had already arrested three civilians. I was supposed to take them to the rental office where they would get further instructions on how to go about paying the arrears of their rents.

On my way to the office at about five minutes before one o'clock in the night, we were ambushed. It was very dark and I couldn't see anything. I suddenly heard the sound of rapid machine gun fire. Then I heard screams at the back - one civilian was hit through the neck. And then suddenly I heard shots all around me, concentrating on my position as the driver. The shots riddled through the bodywork of the vehicle, past my body, past my head, and shattered the windscreen and windows of the vehicle. I accelerated to pick up speed in order to get the people to safety but I was hit through the right leg several times and I could hear my bones breaking. I had a portable radio in my hand and radioed for assistance. The members of the control room sent reinforcements as well as an ambulance to the scene. I was hospitalised for about approximately a year and I had to be retrained to walk. My right leg is shorter than my left leg. I still suffer severely. (http://www.doj.gov.za/trc/hrvtrans/methodis/beck.htm)

LAKOO: When I entered the room I found approximately eight or nine White males…They started assaulting me, punched me, kicked me and in the process my face was badly bruised. They wanted to know who my contact was in MK. I pleaded ignorance. I told them that I didn't know anything. I told them that actually there must be some sort of a serious mistake that they were making.

The assault must have lasted half-an-hour or so. It is very, very difficult for me to assess the passage of time. But what was to follow was far more serious. From behind, someone threw a wet hessian sack over my body so that half my body was covered and I was partially strait-jacketed. I was then flung onto the floor. My shoes and socks were removed and I could feel electric wires being tied to my toes, to my fingers, my knuckles and so on.

They wanted to know who my contact was. I pleaded ignorance. Every time I resisted answering the questions, they turned on the dynamo and violent electric shocks started passing through my body. They did so every time I refused to answer. All I could do was to scream out in pain. I could only scream and scream and plead ignorance…

(http://www.doj.gov.za/trc/hrvtrans/soweto/chiba.htm)

Appendix C: Healing Framing of Truth and Reconciliation Commission

Much of what had transpired during the past conflict was shrouded in secrecy. The truth had been concealed and was not easily accessible. The TRC sought to address this massive problem by encouraging a public unburdening of

grief on the part of the survivors and families of victims so that they could be helped to discover what in truth had happened, and to receive the collective recognition of a new nation that they had been wronged. The truth which was so desperately desired would be more likely to be forthcoming if the perpetrators of past violations were encouraged to disclose the whole truth with the incentive that they would not receive punishment if they did. In the process, families of victims and the survivors would be better enabled to discover the truth; perpetrators would also have the opportunity of relieving themselves of a burden of guilt or anxiety with which they might have been living for many years. In the process the country would begin the process of healing the wounds of the past, transforming anger and grief into an understanding and thereby creating the climate essential for reconciliation and reconstruction. Through exposing the truth and lifting the veil of silence and secrecy, citizens could leave the past behind them and gradually move on to a democratic future.

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Do Truth Commissions make a difference? When and how truth commissions contribute to reconciliation*

ABSTRACT

In this contribution, we analyze 18 different truth and reconciliation commissions, which have dealt with past atrocities during the last 30 years. Based on publicly accessible documents and already existing literature, we assess, if and eventually how they were able to contribute to reconciliation of divided societies, on whose behalf they were acting. We define reconciliation as the inclusion of former political enemies into the new political order and as the absence of radical and armed political contestation against this new order. We test some theoretical approaches about vetting procedures and transitional justice and conclude, that the way, transition societies deal with perpetrators from a fallen regime depends mainly on the distribution of power after transition and the degree of radical change, transition brought about. The character and scope of atrocities, for which the old regime is responsible, does not seem to affect the scope and intensity of retribution after regime change. Compared with the impact of the transition process itself and the power distribution between old and new regimes, the activities of truth commissions are only minor and hardly autonomous factors shaping transitional justice. We find, that only three truth commissions were able to contribute significantly to reconciliation in their countries: the commissions of Chile, South Africa and El Salvador.

Key words: truth commissions reconciliation transnational justice, transition retributions, punishment.

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Introduction

Between October 1999 and Summer 2002, Alex Boraine, the former vice-president of the South African Truth and Reconciliation Commission spent several times in Belgrade in order to negotiate the establishment of a Serbian Truth Commission. The idea had been tabled by president Vojislav Kostunica and supported by several human rights initiatives, including the Open Society Institute in Budapest, whose main sponsor, Georgy Soros, already had backed Boraine's earlier efforts to establish links between the South African opposition and the decaying apartheid regime in the early nineties. Boraine, who later became the director of the New York based "International Center for Transitional Justice", withdraw from Kostunica's initiative, after the latter had attempted to create the commission without prior consultation with the human rights community in Serbia. In his memoirs, he suggests, that Kostunica's initiative aimed at avoiding sanctions against Serbia for its lack of cooperation with the International Criminal Tribunal for the former Yugoslavia in The Hague.

It would be vain to speculate, if a Truth and Reconciliation Commission, modeled according to the South African precursor, would have influenced the situation in Serbia. It is not very likely. Even a cursory overview shows that the South African TRC was a purely internal solution to a purely internal conflict, whereas the conflicts following the breakdown of Yugoslavia were strongly internationalized. At the time, when Kostunica promoted the idea of a TRC, there was already an important international Transitional Justice scheme in force — the ICTY, whereas in South Africa, no external juridical body had accompanied the Transition from a repressive regime to a more inclusive and democratic one. The South African TRC was a restorative solution in a situation, where none of the conflict side was strong enough to impose its own retributive schemes. The result was a compromise: truth telling, deligitimization of apartheid and healing for the victims on one side, but only very limited punitive measures against perpetrators, with the "big fish" remaining untouched. Such a compromise was already off the table, when Kostunica made his move, since avoiding retribution for high ranking politicians and militaries was no longer possible, due to the establishment of the ICTY and the international pressure on Serbia to extradite suspects to The Hague.[2]

The failed attempt for a Serbian TRC provokes further questions, though. Behind it lays the conviction, that TRCs can contribute to reconciliation in deeply divided society, that they can stabilize post conflict situations and facilitate transition. However, there are also examples of TRCs, which were not

[2] Alex Boraine, *A life in transition*, New Holland Publishing, Cape Town, 2008, pp. 237-38.

able to influence the situation in their country in such a way. There are examples of TRCs hijacked by powerful governments, created only in order to avoid sanctions or criticism from outside. TRCs are criticized as attempts to prevent retributive justice in environments with strong punitive tendencies; they are accused to be unfair, since they mostly lack the rigid provisions, which govern court proceedings.[3] In some cases, TRCs ended up with nothing, they were disbanded without producing or publishing a report, in some cases, they did publish reports, but without any recommendations. In other cases, Commissions issued recommendations, which were ignored.[4]

Despite this patchy record, TRC's are still being promoted and highlighted by a large part of the epistemic and non — governmental Human Rights community as a means to achieve reconciliation. The latter, however, is rarely defined and often put on an equal foot with stabilization and peaceful transition.

In this chapter, we examine, if TRCs can contribute to reconciliation and eventually, which conditions should be fulfilled in order to enable TRCs to provide reconciliation. In a first step, we define reconciliation, in a second step; we present a simple quantitative model, which is based on an analysis of 18 different Truth Commissions all over the world. This analysis is conducted on the basis of their final reports (where the latter were accessible) and secondary literature dealing with the actions of the commissions and the transition context. From our analysis, we exclude cases, were no transition — and therefore no reconciliation impact — could be observed (like the first Truth Commission of Uganda in 1973 and the commissions established in Rwanda). We also exclude the East Timor commission, since it dealt with a very different situation than the one, where the conflict had taken place. Our notion of reconciliation cannot be applied to East Timor, since the latter ceased to be part of Indonesia as a result of the transition process. We also exclude cases, where a Commission bears the name of a "Truth and Reconciliation Commission", but does neither have the typical tasks of one nor comply with basic theoretical requirements. From 22 commissions, four cases are therefore excluded: the first (but not the second) Ugandan commission, both Rwandan commissions and East Timor.

We then code information from the remaining 18 commissions into crosstabs in order find correlations between theoretically established variables. In a final step, we test these hypotheses against our empirical evidence. By doing so, we check the connection between the character of the old regime and its atrocities, the character of the transition on one hand and the way, transitional

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[3] R. W. Johnson, *South Africa's brave new world. The beloved country since the end of apartheid,* Allen Lane, Penguin Books, Cape Town, 2009, pp. 272-305.

[4] See the slightly outdated, but still instructive overview of Priscilla B. Hayner: *Unspeakable truths. Confronting state terror and atrocity,* Routledge, New York, 2001.

justice is applied after transition on the other hand. We treat truth commissions as intervening variables in transition and examine, how likely it was, that their proceedings contributed to reconciliation. This leads us to conclusion about the conditions, which should prevail in order to enable a truth commission to contribute to reconciliation.

Truth Commissions and reconciliation

Truth and Reconciliation Commissions, which started to spread all over the world during the final stage of the cold war, have triggered a rising bulk of scientific and popular literature, especially during and after the main wave of transitions from repressive and autocratic regimes to more democratic and liberal ones. Despite the intense attention, researchers are paying to transitional justice and mechanisms of public "truth telling", it is difficult to find a clear cut and universally applicable definition of what a Truth Commission is. As the example of Uganda shows, a body may be called a truth commission, but not function like one.[5] Other examples show, that certain bodies act like truth commissions, but are never labeled as such. The "Eppelmann — commitee" of the Bundestag, which dealt with atrocities and persecutions of opposition members during the final phase of the GDR is such an example and we included it into our research, though it was never officially named a truth commission.[6]

For the purpose of this project, we define a truth commission as a body, which is established during or after a transition process in order to investigate past atrocities and severe Human Rights violations, but — contrary to court proceedings — does not have the right to carry out retribution against perpetrators and therefore is not obliged to apply customary measures of procedural fairness. It may or may not have the right to subpoena witnesses. It may or may not have the right (or obligation) to recommend punishment, amnesty or other actions, which remain with the discretion of law enforcement agencies and the judiciary. A Truth Commission can, but need not necessarily act in public in order to be regarded as a truth commission, however, it will always be only a temporary body, whose main objective it is, to facilitate transition and compromise between two or more conflicted groups in a country. Truth commissions

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5 Joanna R. Quinn, "The Politics of Acknowledgement: An Analysis of Uganda's Truth Commission". *YCISS working paper* 9 / 2003. p.23. www.yorku.ca/yciss/publications/WP19-Quinn.pdf.

6 United States Institute of Peace Website, "*Truth Commission Germany 92, Germany 95'* Available at http://www.usip.org/resources/truth-commission-germany-95 andhttp://www.usip.org/resources/truth-commission-germany-92.

may start to act right after a conflict in a context of ongoing transition, they also may start their proceedings years later. In the latter case, their aim will be more to help a society to cope with past atrocities than to ease transition. Transition is understood here as a change of power relations within a country, ranging from a fast and sudden regime change by a revolution or coup d'état to a slow and peaceful negotiated settlement between opposition and government, leading to power sharing agreements or inclusive coalitions ("governments of national unity").

For the purpose of this chapter, we define reconciliation in a rather simple way as the level of inclusion of recently conflicted parties into the post — transition political system and the absence of open violence. This is certainly neither the most compelling, nor the best measurable criteria, but it is a definition, which can be applied to all transitions and commissions under scrutiny. More insightful data such as opinion polls, media analyses and discourse analyses of political speeches and field studies are available only in some of the cases and they hardly allow for comparisons.

Theories of transitional justice

The increasingly popular "transitional justice" — paradigm has triggered a lot of popular accounts about atrocities, genocide and the juridical dealing with the latter. It also gave rise to scientific debates on mechanisms of transitional justice, their function and appropriateness. There still is a lack of comprehensive, explanatory theories, which could be used to build hypotheses for empirical research, since the lion's share of theoretical reasoning stems from law and philosophy, with only scarce contributions from International Relations and Social Science.[7]

Some authors, however, have developed hypotheses about the interdependence between certain features of transition and the likelihood of retributive and restorative justice to occur after transition. Three basically different approaches can be distinguished: One, which construes the "regime type" as the independent variable and regards the way, the "torturer problem" (Huntington) is solved, as the dependent variable.[8] The second approach sees

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[7] For example: Naomi Roht-Arriaza, Javier Mariezcurrena: *Transitional Justice in the twenty-first century. Beyond truth versus justice.* Cambridge University Press 2006 and Ruti G. Teitel: *Transitional Justice.* Oxford University Press 2000; Jon Elster: *Closing the books. Transitional Justice in a historical perspective.* Cambridge University Press 2004.

[8] Nadya Nedelsky, "Divergent Responses to a Common past: Transitional Justice in the Czech Republic and Slovakia", *Theory and Society,* Vol. 33, No. 1 (Feb., 2004), pp. 65-115.

Samuel P. Huntington, *The Third Wave. Democratization in the Late Twentieth Century*, Norman and London, 1991, passim.

the "type of transition" as the main factor able to explain variance across countries in dealing with perpetrators of the former regime.[9] A third group of scholars tries to explain variance of vetting and punishment measures by referring to the character of the post-transition order.[10]

In the first group, we find Nedelsky, who (referring only to five countries) finds the character of the "old regime" decisive for the way, post — transition societies deal with the past. "Exit type" regimes, which allow channel contestation and opposition into emigration, are more likely to be held accountable after transition than "voice type" regimes, which allow protest and opposition to be uttered publicly. If we adopt this presumption to our research, we should expect the level of repression of a regime to explain the variance in post — transit retribution: The more repressive a regime, the more severe and widespread will be the persecution of its leaders and supporters after transition.

The second approach is represented by authors like Dahl and Huntington, who expect the transition process itself to play the major role in influencing post transition punishment. A peaceful transition will — according to Dahl — lead to a more consensus based post transition order. "Justice was a function of political power. Officials of strong authoritarian regimes that voluntarily ended themselves were not prosecuted; officials of weak authoritarian regimes that collapsed were punished if they were promptly prosecuted by the new democratic government", Huntington argues.[11] This assumption is more or less consistent with Welsh's claim, according to which the power relations after transition decide about the variance in retribution: Perpetrators are not punished, provided they keep enough power to prevent prosecution. From these approaches, we can adopt the following hypotheses for this chapter: The higher the degree of inclusion of the transition process, the more likely amnesty becomes (understood here as a consensual solution). And the stronger former members of the government are engaged in the post — transition political establishment, the less likely they will be held accountable for past atrocities.

The claims above are based on examinations of different transition countries. They lack any reference to truth commissions, though. For the purpose of this chapter, we treat them as intervening variables. In other words: We test, under which circumstances they interfere with the dependant variable "reconciliation".

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[9] Helga A. Welsh, "Political Transition Processes in Central and Eastern Europe". *Comparative Politics,* Vol. 26, No. 4 (Jul., 1994), pp. 379-394. Philippe C. Schmitter, "Democratic Dangers and Dilemmas", *Journal of Democracy,* 5, 2, 1994, pp. 57-74.

[10] Helga A. Welsh, "Dealing with the Communist past: Central and East European Experiences after 1990", *Europe-Asia Studies*, Vol. 48, No. 3, (May, 1996), pp. 413-428

[11] Huntington, *The third wave*, p. 228.

Table 1: Truth Commissions on four continents

Country	Truth Commissions official name	Start of TRC's proceedings	End of TRC's proceedings	Temporary jurisdiction
1. Uganda 1*	"Commission of Inquiry into the Disappearance of People in Uganda since the 25th of January, 1971"	1974	1974	1971-1974
2. Uganda 2	"Ugandan Commission of Inquiry into violations of Human Rights"	1986	1994	1962-1986
3. Germany	"Commission of Inquiry for the Assessment of History and Consequences of the Socialist Unity Party's dictatorship in Germany"	1992	1994	1949-1989
4. Burundi	"International Commission of Inquiry for Burundi"	1995	1996	1993-1995
5. Nigeria	"The Judicial Commission for the Investigation of Human Rights Violations"	1999	2002	1966-1999
6. Uruguay	"Peace Commission"	2000	2002	1973-1985
7. Argentina	"National Commission on the disappeared"	1983	1984	1976-1983
8. South Africa	"Commission of Truth and Reconciliation"	1995	1998	1960-1994
9. Sri Lanka	"Commission of Inquiry into the Voluntary Removal or Disappearance of Persons"	1995[12]	2002	1988 – 1994
10. Nepal	"Commission of Inquiry to locate the Persons disappeared during the Panchayat Period"	1990	1991	1961-1990
11. East Timor*	"Commission for Reception, Truth and Reconciliation"	2002	2005	1974-1999
12. Guatemala	"Commission for the elucidation of History, Truth and Justice in Guatemala"	1997	1999	1960-1996
13. El Salvador	"Truth Commission for El Salvador"	1992	1993	1980-1991
15. Chile	"National Commission of Truth and Reconciliation"	1990	1991	1973-1990
17. Chad	"Commission of Inquiry into the Crimes and Missappropriations committed by Ex-President Habré; his accomplices and / or accessories"	1990	1992	1982-1990
18. Ghana	"National Reconciliation Commission"	2003	2004	1957-1993
19. Sierra Leone	"Truth and Reconciliation Commission"	2002	2004	1991-1999
21. Rwanda 2*	"National Unity and Reconciliation Commission"	1999	Until now[13]	Present and future
22. Haiti	"National Commission for Truth and Justice"	1995	1996	1991-1994

*) excluded from further analysis

[12] Defacto, the Sri Lanka Commission consisted of three "zonal" commissions with different territorial jurisdictions and one "all islands" — commission, charged with the follow up investigations of facts established by the zonal commissions. Therefore, the

The main features of truth commissions

There are 18 Truth Commissions, which fulfill the criteria of our definition and can be analyzed according to the model described above. The following table 1 shows the countries, the relevant commission and the basic data about each commission. In the final column, we explain, why we decided to exclude certain cases.

Some basic common features of truth commission are visible at first hand: the majority of them claim to establish "the truth and provide reconciliation", many deal with the elucidation of past disappearances. Such cases occurred not only in Latin America, but also in Uganda. All except one commission are temporary bodies; all are dealing with severe human rights abuses in the past. There is only one commission (the Rwandan NURC), which bears the name of a Truth Commission, but does not fulfill its typical tasks. NURC is a permanent body, charged with the mission to strengthen unity and reconciliation among Rwandans, which, in the actual context of the country, means to replace divided and conflict — prone identities of "Tutsi" and "Hutu" by a shared identity of being "Rwandan". Opposite of typical truth commissions, which are occupied with elucidating the past, the NURC is busy with shaping the present and the future.[14]

The model

In order to analyze the interaction between Truth Commissions, the transition process and the degree of post — transition inclusion, we transformed the necessary qualitative information into quantitative variables. In a subsequent step, we inserted the values of these variables into cross tables, in order to make potential correlations visible. The table below presents the way of transposing the information into variables.

Contrary to the way, truth commissions are presented in large parts of the transitional justice literature, we found, that they should not be treated as instruments of pure restorative justice. All truth commissions comprise mechanisms of truth telling, "giving victims a voice" and in many cases also promote reparations to victims, however, they do neither exclude nor preempt

three zonal commissions and the "all islands" commission had different starting and ending dates: The zonal commissions started in 1995 and ended in 1998, the "all islands" commission started in 1997 and ended in 2000. Final reports were delivered in 1998 (by the three zonal commissions) and in 2002 (by the "all islands"— commission).

13 Since 2002, the NURC is a permanent institution.

14 See the webpage of the NURC: www.nurc.gov.rw.

Table 2: The variables and their value

Variable	Operationalization	Character of variable
1. Integration of conflict parties into the political system after transition	All conflict sides were integrated / not all conflict sides were integrated	binary(only yes or no)
2. Degree of inclusion of the transition process	Scale of different degrees of inclusion, ranging from no change (compared to pre-transition), to "minor part of opposition was integrated" and "major part of opposition was integrated" and ending with "whole opposition was integrated"	Scale from 0 to 3
3. Degree of radicalism of transition outcome	Scale ranging from no change, through "power sharing agreement between government and opposition", "free elections, won by former government", "free elections won by opposition (but former government forces remain legal)", "free elections, won by former opposition with former government forces ousted and criminalized" ending with "opposition wins by armed struggle, revolution or coup d'etat"	Scale from 0 to 5
4. Scope of jurisdiction of the truth commission	Scale ranging from "only one side", to "the major conflict sides", ending with "all conflict sides"	Scale from 0 - 2
5. Scope of commission's personal jurisdiction	scale ranging from "only former political establishment (few people)", to "only former political establishment (many people)", to "former establishment and opposition", "all perpetrators"*, ending with "all perpetrators"[15]	Scale from 0 - 4
6. Punitive instruments of the truth commission	Scale ranging from "only truth finding", through "truth finding an publishing it", "only blame, but no legal consequences", possibility to demand punishment" ending with "possibility to punish on its own"	Scale from 0 to 4
7. Possibility of the commission to grant amnesty to perpetrators	Only yes / no	binary
8. Degree of acceptance of the commission's final report by the political establishment	Scale ranging from "unanimous support" over "rejection by one or more conflict parties", "rejection by majority of conflict parties", "rejection by majority of public and conflict parties" ending with "unanimous rejection"	Scale from 0 – 4
9. Scope of recommended punishment[16]	Scale ranging from "small group from one conflict side", over "large group from one conflict side", "small group from major conflict side", "large groups from major conflict side" ending with "large groups from all conflict sides"	Scale from 0-4
10. Recommendation for reparation to victims by commission	Yes / no	binary
11. Recommended amnesty	Yes / no	binary
12. Scope of recommended amnesty [17]	Scale from	According to scale from variable 9
13. Subsequent punishment	Some kind of punishment / no punishment [18]	Binary
14. Reaction of the international community	Scale ranging from "no reaction" over "unanimous support", "unanimous reaction (by countries which reacted)" to controversial (some endorsed final findings, others did not)"	Scale from 0 to 3[19]

15 "All perpetrators" means low level perpetrators, too and regardless of adherence to a conflict side. Basically, the last part of the scale means general amnesty, including non political crimes.

16 Only refers to cases, where punishment was actually recommended.

17 Refers only to cases, where amnesty was actually recommended.

18 "No punishment" means either perpetrators were covered by previous or subsequent amnesty, or were not punished due to the weakness of the legal system or political bargaining.

19 Scale does not indicate linearity.

punishment for perpetrators. None of the commissions under scrutiny actually recommended punishment for perpetrators. In cases, where perpetrators were not punished, amnesty had already been in force before (f.e. in Argentina and Chile), was granted contrary to the position of the commission or punishment was never enacted upon perpetrators because of shortcomings of the legal system and the leverage, representatives of the old regime still possessed. In our analysis, we were able to identify some correlations, which are not based on theoretical assumptions, but are instructive, though. A short time elapse between transition and the launch of a commission correlates strongly with a high degree of inclusion of the transition outcome. The underlying assumption can be twofold: Either the establishment of a truth commissions by a post transition government convinces the former opposition to engage in the process of reconciliation and not to contest the transition outcome, or inclusive post transition governments regard truth commissions as a better means of overcoming political cleavages than do less inclusive governments. It is somehow surprising and counter-intuitive, that "swift" truth commissions, which start working right after the fall of an ousted government, can expect less internal and external support than commissions, which start their proceedings more than a year after transition. This may happen, because commissions working in an immediate — and highly polarized — transition context are more likely to arouse protest and controversy than commissions dealing with atrocities and crimes from a more distant past.

We also found, that a high degree of inclusion of the political system after transition correlates with a large scope of a commission's personal jurisdiction. Radical transition outcomes seem to lead to a higher scope of jurisdiction, too. This, however, does not mean that inclusive political systems (comprising all major political forces of the conflict) are more likely to punish perpetrators of past atrocities. The opposite is true: A high degree of inclusion after transition makes punishment less likely and — in cases, where punishment is carried out — makes it more selective. Truth commissions, acting in an inclusive environment, are more likely to refrain from recommending punishment than are commissions working in politically polarized and instable societies. The latter will most probably ask for more punishment, which, however, not necessarily will take place, since it depends to a large extend of the political will and capacity of the actual government to prosecute and judge perpetrators.

Testing the theory

On the basis of existing literature, we can build different hypotheses about possible links between independent variables like "transition type", "type of the fallen regime" and "level of regime repression" and the way, transitional justice

is applied after the transition process. Whereas Dahl, Schmitter and Huntington regard the way, transition takes place, as the main factor influencing post transition justice, Nedelsky argues, that regime type is the most important factor in shaping transitional justice. Other authors find, that "dealing with the past" depends on the character of the past itself and transitional justice is more severe and extensive, the higher the degree of repression of the fallen regime.[20] Welsh argues, that the actual power relations between former opposition and former government decide, if retribution can be applied.

Post transition inclusion and punishment of perpetrators

Based on Welsh's assumption, we should therefore expect a link between the level of inclusion of the political system after transition and the likelihood of amnesty or lack of prosecution. In other words: the more powerful representatives of a fallen regime still are after transition, the less likely will retribution take place.

However, among 20 cases investigated by us, only in five cases, amnesty was actually granted. The overall picture shows, that higher degrees of political inclusion make a lack of amnesty more likely, which does not necessarily mean, that punishment is carried out against former perpetrators. They may not be punished, because the new government lacks the will to prosecute them. It may not be possible to find the evidence needed for putting perpetrators on trial, since "old boys' networks" often survive transition for a long time. In Poland, prosecutors have tried again and again, to dismantle networks of former perpetrators and put on trial policemen and secret service agents, who were suspected of murder and torture — but they were unable to overcome political deadlocks and find witnesses ready to give evidence in court. Perpetrators also may be punished, but only in a very selective way and in some countries; punishment is limited to "small fish", whereas superiors and commanders can use their resources to avoid prosecution. Using these resources is more efficient in a situation, where powerful leaders of the fallen regime are integrated into the political system after transition, since they are often pivotal for coalition building or running key sectors of the administration and economy. The inclusion of all conflict parties into the new system makes punishment less likely and, if enforced, more selective.

In order to test the link between the integration of the fallen regimes representatives into the new system and the likelihood of punishment, we examine the cases, when punishment actually was applied. Truth commissions' proceedings were followed by punishment of perpetrators in Sri Lanka, Haiti, Peru, Germany, Uruguay, Chile, Bolivia and Sierra Leone, Chad and Uganda.

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[20] Nedelsky, *Divergent Responses*, p. 4.

We exclude Argentina from this list, because the few perpetrators prosecuted there were amnestied only years after they had been put on trial.[21] However, some of these cases are very specific: In Haiti, after a few prosecutions, the government enforced a general amnesty XXX, in Chad, former dictator Hissen Habre retained so much power over the country, that prosecution remained inefficient. Legal action was restricted only to him, leaving his supporters and accomplices without charges. He finally was tried in Belgium, after a complicated sequence of intrigues and diplomatic action, which led to his extradition. Therefore, "punishment" in his case was carried out, but not in the country itself, but abroad and only to him, not to other perpetrators. In many cases, de facto amnesty and lack of prosecution were overcome by external influences. In Chad, US-pressure on neighboring governments was an important factor leading to Habre's extradition. The same happened in Chile, were former military dictator Augusto Pinochet enjoyed an amnesty he had granted to himself and the leaders of his junta before they had passed their power to a civilian government. After legal action of prosecutors in Britain and Spain, Chile finally decided to start a case against him, too. This, however, was neither a recommendation of the Chilean truth commission, nor a purely internal initiative, but a reaction to foreign influence.[22] Chile constitutes a kind of "transitional justice import": Punishment was carried out, but a very selective one (limited only to disappearances and high ranking junta leaders) as a reaction to prosecutions abroad — mainly in Spain, where judge Balthazar Garcon initiated investigations and in Britain, where Augusto Pinochet was apprehended. The British House of Lords had finally to decide about the Spanish extradition demand for Pinochet and agreed to surrender him to Spain, but the British government allowed him to go back to Chile because of poor health.[23] Later on, he was prosecuted there too, but died before the verdict in 2006.

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[21] The Argentinean truth commission could not recommend punishment for perpetrators, because it was not allowed to interfere with law enforcement and the judiciary. However, the commission decided to hand over its documents to the prosecution, which brought five high ranking generals of the former junta to trial. They were sentenced but later amnestied. Hayner, unspeakable truths, pp. 33-4.

[22] Opinion polls show, that public opinion shifted as a consequence of foreign pressure. Instead of rallying behind the former dictator, more and more respondents felt, that Pinochet should be held accountable in Chile instead of being tried by and in foreign countries. As a result, public opinion turned against him and foreign pressure increased support for transition justice. This is a striking difference compared with the reaction of the Croatian and Serbian publics towards to external pressure for war crimes trials, as exercised by the US, EU and the ICTY.

[23] Frances Webber, "The Pinochet File: A Declassified Dossier on Atrocity and Accountability"*, Race & Class*, N°46, 2005, pp. 85. F. Webber, "Justice and the General: People vs Pinochet"*, Race & Class,* N° 41 / 2000, p. 44.

In Uganda, events following the work of the truth commission, turned out to be even more opaque. In a reaction to the accounts of atrocities committed by soldiers of his army against civilians, Uganda's strong man, Yoweri Museveni, decided to launch a campaign of punishment against these soldiers. However, evidence from different sources suggests, that this took place mainly in order to strengthen discipline of the army, not necessarily in order to comply with Human Rights requirements.[24] Museveni himself and higher ranking members of his military staff remained untouched. Also in South Africa, the question of punishment and amnesty is a tricky one, since the branches of the TRC carried out both. Punishment was restricted to perpetrators, who did not take part in the "truth telling process" or were not regarded as politically motivated. However, refusing to "tell the truth" during the TRC's proceedings did not automatically lead to prosecution. Inkatha Freedom Party leader Mangosuthu Buthelezi, who openly rejected the truth telling process and refused to testify before the commission, was never punished, despite huge evidence about atrocities committed by his party militia against civilians and rival activists from the African National Congress (ANC). Inkhata had acted in cooperation with the secret services of the apartheid regime. But Buthelezi was never bothered by criminal charges. Minor perpetrators were punished, either because their crimes were not regarded as politically motivated or because they did not disclose all the information they possessed to the Truth Commission's amnesty committee. [25]

Also the German case is very specific: Punishment was carried out after the transition process; however, this also was due to a very special "external influence": The German Democratic Republic collapsed and acceded to the Federal Republic of Germany. Then, the institutions of the latter carried out vetting procedures, ousted former supporters and officers of the GDR's repressive organs from public service and launched trials against perpetrators of Human Rights violations. These measured were recommended and supported by the former democratic opposition in the GDR, however, it remains doubtful, if former dissidents and representatives of opposition parties would have been able to impose such measures if reunification had not taken place or had been delayed. [26]

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[24] TRIAL (Track Impunity Always). "*Truth Commission in Uganda*." Available at http://www.trial-ch.org/en/truth-commissions/uganda.html and Center for the Study of Violence and Reconciliation. "*Justice in Perspective - Truth and Justice Commission, Africa - Uganda - Commission of Inquiry into Violations of Human Rights."* Center for the Study of Violence and Reconciliation. Available at http://www.justice inperspective.org.za/index.php?option=com_content&task=view&id=38&Itemid=19.

[25] The whole report of the South African TRC is available on www.justice.gov.za/trc.

[26] About the last days of the GDR see: David Childs: *The Fall of the GDR Germany's Road to Unity.* Longman 2001 and Charles Maier: *Dissolution: The Crisis of Communism and the End of East Germany.* Princeton, NJ, Princeton University Press, 1997.

Sierra Leone is an example for partly "imported" transitional justice, too. After the devastating civil war was stopped by an international intervention in July 1999, a peace agreement signed by both conflict sides with UN involvement called for the establishment of a truth commission. Article XXVI required the Commission for the Consolidation of Peace (CCP) to establish a truth and reconciliation commission ninety days right after the signing of peace agreement. The commission was established in November 2002, three years after the peace agreement. On October 5, 2004, the final report was submitted to Sierra Leonean president, and in the same month, to the United Nations Security Council.[27] Neither punishments nor amnesties were recommended.[28] However, the truth commission coordinated with the internationally mandated Special Court, in which the leaders of Civil Defense Forces (CDF), Revolutionary United Front (RUF) and other 11 defendants were brought to court. The Court is a so called "hybrid court" established and run together by the authorities of Sierra Leone and the UN. It is basically due to foreign influence, that perpetrators could be punished in Sierra Leone. Another striking example for the link between the power of the "old regime" and the likelihood of non — punishment is provided by the case of Charles Taylor, who had to be tried in the Hague in the premises of the ICC by judges of the Special Court for Sierra Leone, since the danger of unrest was regarded as too eminent, should he be put on trial in his country.[29] Only in six out of eleven cases, where punishment followed the transition process, perpetrators were prosecuted without visible external influence. In Peru former leaders have already faced trials. Furthermore, the top two leaders of the Shining Path were sentenced to life in prison in October 2006. Ten other leaders of this movement also received smaller sentences. Former military officials have also faced trial and many cases are still ongoing. Since 2007, the trail of former head of state, Alberto Fujimori has taken center stage. He is accused of violations of human rights, corruption, and abuse of power and is facing multiple charges. The trial heard its closing arguments on January 28, 2009 and a verdict is yet to be announced but is expected soon.[30] In Bolivia, where private law suits and series of trials against members of the former military junta led to a limited juridical reckoning with the past in the mid-eighties and

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[27] Truth Commission of Sierra Leone, United States Institute of Peace, see http://www.usip.org/resources/truth-commission-sierra-leone.

[28] International Crisis Group Africa Briefing, The Special Court for Sierra Leone: Promises and Pitfalls of a "New Model" (Aug. 4, 2003), see http://www.crisisweb.org/library/documents/report_archive/A401076_04082003.pdf.

[29] See the Open Societies Institute special website on Taylors trial: http://www.charlestaylortrial.org/.

[30] See the website of Peru's truth commission: www.cverdad.org.pe/ingles/pagina01.php.

in Uruguay, where former President Juan Maria Bordaberry was sentenced in 2010 to 30 years prison (Uruguay's maximum sentence). A year earlier Uruguay's last military dictator before transition Gregorio Alvarez was also sentenced to 25 years imprisonment.[31] Roughly 8 other lower level military and police officers have also been put on trial.[32] In South Africa, only minor perpetrators were punished, as the "truth telling" in that country was based mainly only a compromise between the main conflict parties of the apartheid times, whose followers fell under the amnesty provisions. In Sri Lanka, after a delay of about 2 years after the completion of the truth commission's report, 150 people were accused of human rights violations. [33]

In all other cases, foreign influence was important or even crucial for retribution. These findings lead us to important conclusions. Welsh's assumption about a link between the political situation after transition and the likelihood of no retribution for perpetrators should be supplemented by the factor "external influence". External influence can significantly increase the likelihood that punishment of perpetrators takes place, even in situations, where the "old regime" still is powerful. However, in absence of external influence, punishment seems to be rather unlikely in societies, where all major political forces are included into the post transition order.

The character of the transition process and the likelihood of punishment

Inclusion of former enemies into the new political order may not be a big problem and may not be a hindrance for punishment in cases, where the power of the old regime has considerably been reduced by a revolution or a coup d'etat. In cases, where a violent coup or a clear victory of one party in a civil war forced the other side to emigrate or to surrender unconditionally, the integration of its supporters and the punishment of its leaders may not constitute any major problem for the new government. In such a case, the underlying reason for applying punishment to perpetrators would therefore not be the level of inclusion of the new order, but the radicalism of the transition process.

In ten cases, where at least some measures of punishment followed transition, the change causend by the transition process was quite radical, ranging from free elections, which brought about a regime change to power

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31 Legal News, "*Former Uruguayan dictator gets 30 year prison sentence'.* 2010. Available at http://blog.taragana.com/law/2010/02/12/former-uruguay-dictator-gets-30-year-prison-sentence-20156/.

32 Louise Mallinder, "*Uruguay's Evolving Experience of Amnesty and Civil Society's response*.' 2009. p. 68.

33 Hayner, *Unspeakable Truths*, p. 64-6.

change through armed struggle and revolution. In Peru, free elections were won by the incumbent president and the degree of subsequent inclusion remained low, since parts of the armed opposition were still active. Only in a few cases, low intense regime change like power sharing agreements or elections won by the former regime were followed by retribution. This was the case in South Africa and Sierra Leone. The low level of retribution in South Africa should be kept in mind, though. In post apartheid South Africa, there was no institution comparable to Sierra Leone's Special Court, and there was no trial comparable to the one against Charles Tailor. There was neither foreign pressure for retribution in South Africa.

The level of regime repression and post transition retribution

As Huntington and Moran claim, the level of repression of a regime is a decisive factor influencing the severity of transitional justice. We test this hypothesis by investigating, if high levels of punishment correlate with a comparatively high level of repression by the regime, which was ousted by transition. We observe the highest degree of punishment in reunified Germany, where members of the former GDR leadership were held accountable for numerous violations of Human and Civil Rights and soldiers shooting at refugees at the Berlin Wall were put on trial.[34] Large scale vetting procedures followed, however, at the same time, the degree of political inclusion remained high. The hereditary to the dissolved "Socialist Unity Party", which had ruled the GDR until 1990, were able to take part in elections and subsequently became even coalition partners in some of the German Länder. This relatively high degree of retribution does not at all correspond to a high level of repression. The GDR was a repressive dictatorship, however, it lacked many features typical for other regimes dealt with in this chapter: Different to the governments of Peru, Guatemala, Uganda, Chad, Sierra Leone and Bolivia, it did neither conduct "dirty wars" against its own population, nor commit acts of genocide or widespread atrocities. [35] The complete lack of correlation between the degree of pre-transition repression and post transition punishment also

[34] John A. McAdams, "The Honecker Trial, The East German Past and the German Future", Review of Politics 58(1)1996. Available at New York Times Website, *"German Ex-police Chief is Guilty in 1931 Murders'* Available at http://www.nytimes.com/1993/10/27/world/german-ex-police-chief-is-guilty-in-1931-murders.html

[35] Acts committed by communist forces and institutions after World War II on the territory of the Soviet occupation zone of Germany did not fall under the jurisdiction of the judiciary of reunited Germany. Some of these acts, like widespread terror against political opponents, random imprisonment and torture and show trials would be somehow comparable to crimes committed in some South American countries.

becomes evident, when we look into the countries, which did not punish any perpetrators after a transition process. In many of them, the "old regime" had been highly repressive and cruel and its persecutions had been widespread and intense. This was the case in El Salvador as well as Guatemala. In Burundi massacres of 50 000 people were investigated. However, in all these countries, no retribution for perpetrators followed, either due to internal constraints, like the power of political forces linked with perpetrators or the weakness of the legal system. South Africa provides a striking illustration for this lack of correlation: The apartheid regime was highly repressive over a long period and the vast majority of South Africa's population. It was repressive not only for political opponents, but also for neutral citizens, provided they belonged to the "wrong" race. However, among the few people, who were punished, there was hardly anyone who had to answer for participation in apartheid crimes. [36]

The role of Truth Commissions in Transition

From a normative point of view — and from the perspective of the goals attributed to truth commissions by those who create them (mostly governments and presidents), truth commissions are expected to achieve or help to achieve two basic objectives: to enhance or even bring about reconciliation and thus stabilize the new political order, and to "find and tell the truth." Both aims are difficult to conceptualize for researchers, since there is no compelling, coherent and measurable definition of reconciliation, which could be applied in order to establish, if the actions of a commission contributed to reconciliation and stabilization. The same is true for "finding and telling the truth": Accounts about past atrocities and the actions of repressive regimes are mostly very controversial and disputed between former conflict parties and the people who side with them. In most cases, there is no "truth" a commission could tell, since there are always contesters, who dispute, that a certain version of the past really is actually "true." This is why the notion of "truth" in commission reports and scientific literature is mostly used in a way, that indicates, that the authors do not have in mind any "objective truth" which would be independent of context and time, but rather a process, which "gives victims a voice" and empowers them to demand restorative justice. "Giving victims a voice" includes public hearings and the

[36] The contradiction of this politically motivated process of "Reckoning with the Past" becomes obvious, when compared to transitional justice measures, which were imposed from outside, like international criminal tribunals. If such a tribunal applied the same criteria, it would have to acquit perpetrators who admit participation in crimes and could judge only suspects, who are guilty of crimes other than the crimes over which the tribunal would have jurisdiction. That is why the South African transition is much more a political process, aiming at the reintegration of all political forces, than a juridical one.

disclosure of a commission's final report to the public. We are now going to deal with these aspects separately, starting with the issue of "giving victims a voice".

In camera or in public?

Of all truth commissions, we examined, only a few did not "go public" and refrained from recommending restorative measures for former victims. Table 4.

Only in Bolivia, the truth commission did not produce a final report. In all other cases except Haiti, the final reports reached the public and could be discussed broadly. In some cases, truth commissions also held public meetings and hearings with victims and sometimes perpetrators, too. The most popular example comes from South Africa, where the TRC conducted public meetings which were broadcasted on TV and radio and later published as video-tapes and education material for schools. The hearings also were widely covered by the press and since then, many popular accounts and books were published dealing with the TRC. In Haiti, people lined up in order to testify. Even in situations, where public hearings were not planned, people often addressed investigators in public, in order to be heard. In Guatemala, local people went to the mass graves, which were examined by forensics, in order to tell them, what had happened to them and to the corpses in the graves. [37]

In one third of the cases commissions did not recommend reparations to victims. In Bolivia, the commission could not do such a thing, since it had been disbanded before it could finish its investigations and publish a final report. In Germany, the commission's task was more academic: Instead of making clear recommendations to the government, the commission gathered evidence and analysis about the functioning of the GDR political system and its organs, discussing issues of repression and resistance. However, in the overwhelming majority of cases, commissions supported claims from victims for some kind of compensation. The latter does not mean that victims actually received aid and reparations. The larger was the number of people entitled to such payments, the longer the process takes and the smaller are usually the amounts, which can be handed out. Once again, South Africa, where the majority of the population can be regarded as victims of apartheid, is a good example: Reparation schemes are enforced, including the redistribution of land and "affirmative action" for the worse educated and largely unemployed black population. However, due to bureaucratic problems and the large cope of potential beneficiaries, even 10 years after transition, there are still many black settlers waiting for their share of the redistribution schemes. [38]

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[37] Hayner, *Unspeakable Truths*, pp. 135-7.

[38] Hayner, *Unspeakable Truths*, pp. 180-2.

Table 4: Did truth commissions "give victims a voice"?

Country, where commission was established	Did the commission produce a final report?	Was the final report public or confidential?	Did the truth commission recommend reparations?
1. Uganda 2	yes	Public	No
2. Germany	yes	Public	No
3. Burundi	yes	Public	No
4. Nigeria	yes	Confidential (but later disclosed by an nongovernmental organisation)	Yes
5. Uruguay	yes	public	No
6. Argentina	yes	Public	Yes
7. South Africa	yes	Public	Yes
8. Sri Lanka	yes	Public	Yes
9. Nepal	yes	Public	No
10. Guatemala	yes	Public	yes
11. El Salvador	yes	Public	Yes
12. Bolivia	no	No	No
13. Chile	Yes	Public	Yes
14. Peru	Yes	Public	Yes
15. Chad	Yes	Public	Yes
16. Ghana	Yes	Public	Yes
17. Sierra Leone	Yes	Public	Yes
18. Haiti	yes	No (only 75 copies. A second edition was published in French, a language not all Haitians can read)	Yes

Truth commissions and reconciliation

In scientific literature, there are many different notions of reconciliation, which are extremely difficult to apply in empirical research. Most of them regard reconciliation rather as a process than a situation or outcome and the requirements for such a process include a change of identities and mutual acceptance.[39] By initiating symbolic actions of empathy, acknowledging own wrongdoings and asking for forgiveness, former conflict parties engage in a process, which may lead to frictions and conflicts within each party, because it potentially leads to one sided or mutual compensation (and hence requires some kind of redistribution among the members of each side). If the process is efficient, we can observe a shift in identities: Instead of speaking of "us" und "them" in antagonistic terms, an increasing part of the members of each side may begin to speak about "us" with respect to the other group and engage in negotiations about common tasks and responsibilities. Such processes can be observed between groups as well as between societies and states. [40]

Truth commissions and truth commissioners usually do not conceptualize reconciliation for their work. In most cases, theoretical discussions start during the truth commissions proceedings and last much longer than the commission deliberates. Only in a few cases do we possess information about opinion polls, which could be used in order to assess, if a transition process led to "changes in identity" and the replacement of antagonistic discourses by talk about shared goals and responsibilities. What we can assess, though, is the scope of inclusion of a political system after transition. We use the degree of openness of a political system after transition for recent enemies as a proxy for reconciliation, assuming that a political system cannot reasonably be expected to bring about reconciliation, if a large part of political forces either contest the new order or are excluded from it. It is rather unlikely to regard a society as reconciled, when at the same time its political order is tormented by armed guerillas, who attempt to overthrow the government, incite a revolution or provoke a civil war.

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[39] See: Pumle Gobodo-Madikizela, *A human being died that night: A South-African story of forgiveness*. New York: Houghton Mifflin 2003, passim; Clint van der Walt, Vije Franchi, Garth Stevens: "The Truth and Reconciliation Commission, historical compromise and transitional democracy". *International Journal of Intercultural Relations* 27 / 2003, pp. 251-67.

[40] Herbert C. Kelman, *Reconciliation as identity change: A social-psychological perspective,* in: Yakov Bar-Siman-Tov (Ed.), *From conflict resolution to reconciliation,* Oxford University Press, Oxford, England, 2004, pp. 111-24. Leon Kriesberg, *Coexistence and the reconciliation of communal conflicts,* in Eugene Weiner (Ed.), *The handbook of interethnic coexistence*, Abraham Fund, New York, 2000, pp. 182-8.

Among the cases here under scrutiny, Germany, Bolivia, Peru, Uruguay, Chile, South Africa, Nigeria, Argentina, Nepal, Guatemala, El Salvador and Ghana show the highest degree of stability and inclusion. Uganda may be regarded as reconciled, too, but only with respect to the conflict parties of the period, the truth commission dealt with. Until today, there is still a strong opposition movement, the Lord's Resistance Army, which haunts large parts of the country, withdrawing from time to time to neighboring regions, clashing with government troops and devastating the countryside. In most cases, we examined, either all, or the major part of the former opposition was integrated into the new political order. As "integration" and "inclusion", we do not understand that all former opposition forces are actually ruling the country or taking part in a coalition government. These notions only describe, that they are legal and legitimate participants in processes of political decision making, they can take part in elections and their candidates can run for public offices on the same basis as candidates from other parties. We also preclude, that in such a "reconciled" society, political forces are neither acting clandestinely nor using violence in order to achieve their goals. [41]

On top of the list is certainly Germany, whereas on the bottom we would place Nigeria, Peru, Uruguay and Ghana. The relative stability and inclusion of these countries may be due to the activities of their truth commissions, however, it is more likely, that this state of affairs was caused by the transition process itself. This is the case in Germany, where the radicalism of the transition outcome made one of the two conflict parties (the GDR) disappear overnight. The high degree of inclusion, the fact, that the successor of the former communist parties today can participate in national elections and coalition governments, is certainly not the consequence of Germany's short-lived, quite academic and therefore largely ignored (by the wider public) truth commission, but the result of the swallowing of the GDR by the preexisting and already quite inclusive political system of the Federal Republic of Germany.

It is difficult, if not impossible, to assess the putative contribution of a truth commission to political reconciliation in a country and to separate the influence of a commission from the general outcome of the transition process. It is much easier, to do the opposite: Truth commissions with only a very limited scope of jurisdiction, who did not finish their work, did not "go public" and did not "give victims a voice", can rather not pretend to contribute to reconciliation. The same is true for commissions, whose final report was rejected by a large part of the political establishment. These criteria exclude Bolivia, where the commission only had a mandate limited to

[41] Organized crime organizations, like drug cartels in Mexico, are not regarded as political despite their often strong influence on politics and politicians.

disappearances and never published a final report. It also makes it unnecessary to examine the cases of Nepal and Uruguay, since the scope of personal jurisdiction of the commissions there was limited only to one conflict side. Like its Bolivian predecessor the Uruguayan and Argentinean commission could only investigate disappearances and not all past atrocities which had taken place in the country. Additionally, the commission report in Uruguay and Nepal was contested by a large part of the political establishment. The report in Nigeria could not be rejected by the political establishment, because it was declared confidential and leaked out much later. This reduces the scope of cases, where truth commissions could have reasonably contributed to reconciliation to the cases of Chile, South Africa, El Salvador and Ghana. In these cases, we examine in depth through case studies, how likely it is, that truth commissions in these countries contributed to political reconciliation.

El Salvador

The conflict in El Salvador consisted of 12 long years of civil war between the Farabundo Martí National Liberation Front (FMLN) and the right-wing government's military forces and soon thereafter, a government backed "death squad.' After many failed attempts at peace talks, the UN intervened and sponsored the Chapultepec Peace Talks in Mexico, 1992. The Commission on the Truth for El Salvador (La Comisión de la Verdad Para El Salvador) was mandated by this very peace agreement in January 1992, which put an end to this war. The Commission began to work in July 1992 and ended March 15, 1993 after eight months of proceedings.[42] It recommended neither amnesty nor punishment because the commissioners believed the Salvadoran justice system incapable of successfully carrying out these prosecutions. Only five days after the report was released, the legislature passed a general amnesty law, which encompassed all crimes related to the civil war. This decision was made largely under the threat of a coup from those in the military, as the Commission had determined that state agents were responsible for 95% of the violence. However, the decision about amnesty was made independent of the Commission and its report. Furthermore, when questioned, the commissioners were not surprised or dismayed by this decision and even saw it as a chance for reconciliation. The final report, *"From Madness to Hope: the twelve-year war in El Salvador*" was well received by human rights groups and other organizations operating

[42] El Salvador's truth commission report can be found on: www.derechos.org/nizkor/salvador/informes/truth.html.

in El Salvador. As could be expected, the military denounced the report, but became less hysterical when the legislature passed an amnesty law. Despite the widespread interest and support for the report, the commission was criticized for failing to elaborate on certain aspects of the war such as the role of the death squads (in contrast to what the name suggests, they were only responsible for a small portion of the violence) and the role of the United States in funding the government forces.

The main government opposition during the war, the FMLN, was a collection of various left-wing political groups that formed together in violent opposition. In 1992, the FMLN disbanded all guerilla activity and was fully integrated into the political system as an opposition part following the Chapultepec Peace Accords between the guerilla FMNL and the government. In the post-war period, the FMLN was still a collection of parties, so people were indirectly members by joining the affiliated parties. In 1995, four of the five parties decided to join together to make the FMNL one party. Today, the FMLN, along with ARENA, is one of the largest political parties in El Salvador, typically receiving about 30-40% of seats in the legislature in free elections. For the twelve years following the peace agreement, voters have preferred ARENA, the moderate right-wing party in each election and presidency. However, in 2004, FMLN began to win more seats and won a majority in the 2009 election and the presidency. This was the first time ARENA lost a presidency since 1989. Thus, the current president of El Salvador is Mauricio Funes, the FMNL candidate. According to our criteria, the political system of El Salvador can be regarded as totally inclusive now. The truth commission and its activities have certainly contributed to national reconciliation, despite the fact, that the military despised the report, which was well received but the public and the political establishment.

Ghana

The political disputes which weakened the effectiveness of truth commission can be dated back to the transitional period. Ghana went through a peaceful transition from military regime to democracy under the pressures led by a group identified with the Danquah-Busia tradition together with external pressures from Ghana's development partners in the early 1990s. J.J. Rawlings, an air force official who seized power in the 1981 coup' état, thus formed the National Commission of Democracy for the preparation of a presidential election.[43] In April 1992, a draft democratic constitution of the Fourth Republic was overwhelmingly approved in a national referendum. The ban on multi-

[43] The J. Rawlings website, see http://jjrawlings.wordpress.com/about/.

party politics was lifted by the PNDC government in the following month. An independent interim National Electoral Commission was established, and an open presidential election monitored by international observers was held in November 1992. Rawlings himself participated in the election as the candidate of the newly-established party National Democratic Congress, and won 58.3% votes. Though boycotted by opposition groups, the democratically-elected government of Ghana's Fourth Republic was inaugurated in January 1993. [1] Having successfully won the second election in 1996, Rawlings stayed in power until 2001. According to the constitution, he withdrew from the third election and endorsed his vice-president John Atta Mills as the candidate of NDC, but Mills lost the election to John Agyekum Kufuor, the candidate of New Patriotic Party.

As the newly-elected president of Ghana Kufuor promised a policy of national reconciliation in his 2001 acceptance speech, the first truth commission since Ghana's independence in 1957 was set in agenda. On 9th January 2002, President Kufuor signed a parliamentary act to establish the National Reconciliation Commission. According to the Act, the truth commission should be composed of nine members, whose duties are "seeking and promoting national reconciliation among the people of this country". [44]

On 14th January, 2003, Ghanaian NRC was established It submitted its report to parliament in October 2004, and it was published publicly in April 2005. In this report, neither punishment nor amnesty was recommended. As a matter of fact, the setting of a time frame covered by NRC aroused severe controversies in both domestic fields and international community. To establish a truth commission nine years after the transitions from military regime to democracy was considered as a political revenge towards the former president Rawlings and the National Democratic Congress, the heir to Rawlings' Provisional National Defense Council. Before the discussion about the time frame in parliament, the new government of President Kufuor had made it clear that the investigation would focus solely on the military regimes of former president Rawlings. Nevertheless, pressures from both domestic and international civil society forced the government to compromise, and the final Act was the reflection of recommendations of continuous time frame, but the possibility was allowed for those who wanted to report the human right violations under any other regimes out of the frameworks. The final Act was condemned by opposition party as "witch hunt" to discredit the

[44] The National Reconciliation Act 2002, Act 611, Parliament of the Republic of Ghana, available at http://www.ghanareview.com/reconact.html. Truth Commission: Ghana, United States Institute of Peace, from http://www.usip.org/resources/truth-commission-ghana.

opposition before the next election. Consequently, the disputes between ruling government and oppositions plagued the truth commission and made it relatively less effective.

NDC still played a strong opposition role in the parliament. Though lost in the 2000 and 2004 presidential elections, the party took 92 seats out of 200 after 2000 election, and 94 out of 230 after 2004. Moreover, it regained power in the 2008 election. Being the second largest opposition party as well as the heir of PNDC during the operation period of truth commission, NDC contested hotly with the ruling NPP in terms of time frame, list of defendants, etc, a result of which is the weakened role of truth commission. Due to the partisan conflicts, truth commission members had to adopt "second best options" in their work. The NPP government also officially approved such "second best option" strategy. In his speech on the occasion of receiving the NRC final report, President Kufuor addressed that all the perpetrators must have lived with their conscience, implying there would be no persecutions. Former Attorney General Otto expressed similar opinion. He stated the newly-established democracy is too "fragile"; hence the main concern at present is to stable the system but not to "rock the boat". [45]

The public opinion in Ghana is however not in tune with the official discourse. As the Commission's public hearings drew to a close, a radio poll was conducted in Accra with callers phoning in to voice their views on the NRC's contribution to national reconciliation. Approximately 80 percent thought that the NRC had contributed to further dividing the country rather than reconciling it. According to our criteria, Ghana is a fully inclusive country, where changes of government occur without frictions and violence and where no political force is excluded from the political system. It is, however, not very likely, that the truth commission contributed to this, since it took place nearly a decade after transition, was designed as a one-sided body aimed at delegitimizing political opponents and ended up with dividing public opinion more than reconciling it.

Chile

In 1973, General Augusto Pinochet overthrew the civilian government of Chile, presided by the leftist politician Salvador Allende, and established an oppressive military government that lasted until 1988, when Chilean people

[45] The report of the Ghana truth commission can be found on: http://www.nrc ghana.org/aboutus.php.

Most truth commissions' reports are stored at the Library of Congress, Washington D. C.: http://www.loc.gov/rr/amed/africanreconciliation/TruthandReconciliationCommissions.html.

disapproved his continued rule in a plebiscite provided by the 1980 Constitution. Although the plebiscite was preceded by popular demonstrations against the military rule, transition to democracy resulted from compromises between political elites, notably between the authoritarian government and the left-wing alliance *Concertación*. Therefore, Pinochet was successful not only in retaining a part of his personal political power — materialized, for instance, in his command over the army until 1998, but also in assuring the maintenance of authoritarian enclaves both in the country's Constitution and political institutions — examples of these enclaves include a number of designated senator sits and an institutional framework that provides for the over-representation of the political right.

Despite the "pacted" character, the Chilean transition originated a political regime that is said to be one of the most successful newly established democracies of the world. In fact, the country has scored high both economically and politically during the past two decades. The institutionalization of a democratic regime allowed most oppositional groups to resume their participation in the country's political life. Moreover, it significantly diminished the level of political violence, as most extreme leftist groups decided to abandon violent means. Since the transition to democracy, five disputed presidential elections were held and, despite clear dominance of the center-left alliance in the early years, right wing coalitions have progressively gained more stage in the political arena — a tendency that became evident in 2009, after the election of the country's first right-wing president since the end of the authoritarian rule. [46]

Nevertheless, subsequently to the transition, the center-left alliance *Concertación* was supreme in capturing voters' trust: in 1989, Patricio Aylwin was elected president with a campaign based on the defense of democratic values, the respect of human rights, and the promotion of social reconciliation throughout the country. It was in this spirit that Aylwin created by presidential decree the National Commission on Truth and Reconciliation (also known as Rettig Commission) in 1990, with the main goals of investigating and establishing the truth about the past, particularly about human right violations committed during the authoritarian regime. However, the Commission's mandate was narrower than the declared objectives, as it only encompassed cases of disappearances leading to death and therefore, excluded a great part of the human rights violations carried out during the dictatorship, such as cases of torture that did not result in death. Lack of clarity results from this

[46] Karen Sikking, Booth, "The Impact of Human Rights Trials in Latin America", *Journal of Peace Research*, vol. 44, N°4, 2007, pp. 427-45.

limitation and it is one of the most commonly cited shortcomings of the Commission workings.

The Chilean Truth Commission started its workings on May 1990, and its eight Commissioners were given 6 months to complete the proceedings; however, a 3 months extension was required, therefore the report was delivered only on February 1991. As a result of the aforementioned limitation in its mandate, the Commission investigated a relatively small number of cases (approximately 3400 cases were analyzed). Yet, this allowed the commissioners to make a thorough investigation of each case, and the final report provided a detailed account of the happenings.

Despite extensive investigations, the commission did not disclose the names of the perpetrators of human rights violations (which are to be revealed in 2016) and remained silent about amnesty and punishment. Concerning the later topic, it must be noted that the commission's silence had two clear origins: first, its narrow mandate, which restricted its punitive instruments to truth finding and publishing; and second, the blanked amnesty approved in 1978 that did not allow for most perpetrators to be punished. In spite of that, the report contains an extensive list of recommendations, some of which suggest reforms in the country's legal system in order to avoid similar problems in the future. For instance, some of the proposed reforms aim at impeding amnesty before proper investigations can be carried out; moreover, the commissioners stressed the importance of the government's power to mete out punishment, even though most crimes had been amnestied. Although the truth commission did not have a saying about these matters, a few years later, when some of the main figures of the military period were prosecuted, its workings ended up being very important, as they provided evidence for some prosecutions. [47]

During the Commission's brief existence, it had to cope with challenges emerging not only from its own limitations, but also from the country's political establishment: whereas right-wing parties were reluctant to help, the military were more than unwilling; they were boycotting the Commission's workings. Eventually, however, representatives of the political right agreed to collaborate, recognizing that there had been "excesses' during the authoritarian regime; the military, conversely, remained unhelpful and critical to the Commission. Indeed, after the report was made public, President Aylwin urged the military — group considered responsible for 95% of the human rights violations — to recognize the pain they had inflicted on the Chilean people. However, this never happened: even though the police and the air force acknowledged the report's

[47] The Chilean truth commission's report, the so called Rettig-Report can be found on: Rettig Report, National Truth and Reconciliation Commission, Feb 8, 1991.http://www.ddhh.gov.cl/ddhh_rettig.html.

validity and conclusions, the army and the navy condemned it as biased and incomplete. Pinochet himself expressed fundamental disagreement with the conclusions and kept on contending that the military had saved Chile's freedom and sovereignty. Critics to the report were not circumscribed to the country's right and to the military; in fact, even the families of the disappeared regarded the Commission as partial and biased. Yet, this does not change the fact that the Chilean Truth Commission is considered, in general, successful and a model to be followed. During the last years, public opinion became increasingly supportive to transitional justice. Today, Chile is a stable country with no armed opposition and the whole specter of political orientations represented in its political system. The truth commission has strongly contributed to this outcome; it helped to get the political right "on board" and thus contributed to the political isolation of the former military establishment and Pinochet.

South Africa

South Africa delivered the model of a truth commission to the world, and due to the huge public impact, the TRC had on the South African, African and worldwide public, it became a forerunner for many other truth commissions and triggered the emergence of a huge amount of transitional justice literature. The TRC started working in the middle of a negotiated transition, whose main partners were the weakened apartheid government of Frederik de Klerk and the ANC leadership, with Nelson Mandela on top. The TRC was the result of a negotiated constitutional reform and constituted a compromise between retributive justice (which the supporters of the Klerk wanted to avoid) and a full scale amnesty (which the ANC wanted to avoid). Finally, an amendment to the constitution stipulated, that amnesty would be granted to politically motivated crimes committed in the course of the conflict of the past. It was the basic task of the TRC, to separate such acts from purely criminal ones, to assess, if a perpetrator, who applied for amnesty, had disclosed all facts relevant to the crime he reasonably could possess and to draw a report assessing the "wrongs of the past". Despite the large scope of the amnesty, many people, perceived as perpetrators did not take part in the process and refused to apply for amnesty, since this would have required them to disclose information about crimes. Many, including Mangosuthu Buthelezi from the Inkharta Freedom Party, Pieter W. Botha, former prime minister and high ranking members of the military, turned their back to the TRC. For fear of a civil war and assassinations from minor radical groups on the margins of each conflict side, the TRC never used its power to subpoena high ranking suspects. Nevertheless, the TRC could contribute to individual healing and reconciliation and was widely praised for its effort, in South Africa and abroad. Criticism remained scarce and limited to

disappointed milieus of South African whites and black radicals, like Nelson Mandela's wife Winnie, who appeared in front of the commission, but later rejected the whole transition process. Opinion polls, carried out in several waves before, during and after the TRC hearings, show, that the TRC contributed to reconciliation among the black population (where a deep cleavage had emerged between ANC supporters and Inkhata activists, who had sided with the secret services of the apartheid regime in order to weaken the ANC), but much less affected the white population of South African. South Africa became one of the most stable and inclusive countries in Africa. The new, "shared" identity of the "Rainbow nation" began to replace former divisive identities of "black", "white", "coloured" and "Asian" (whose origins are to be found in the apartheid nomenklatura). The main parties, the ANC and the Democratic Party, underwent divisions and secessions and become increasingly racially and culturally pluralistic. All pre-transition forces are today legal and represented in the federal and regional parliaments. No radical armed opposition remained. Due to the scope of its jurisdiction, its outreach to the public and the support it enjoyed from the media and the political establishment, the TRC can be regarded as a main contributor to this process. [48]

Conclusions

From a statistical point of view, truth commissions can only scarcely contribute to reconciliation, since the outcome of a transition process is more shaped by the power and the resources, the conflict parties are able to mobilize. Truth commissions are much more a result of transition, than an autonomous actor influencing transition. When truth commission try to be independent and issue recommendations, which are difficult to implement or run contrary to the interests of major conflict parties, they are ignored and marginalized. Truth commission work best in an inclusive context. Truth commissions are quite successful in establishing the truth (understood as the disclosure of previously unknown facts) about a past conflict, past atrocities and the character of a repressive regime, but they rarely trigger reconciliation and inclusion of former enemies. Despite the fact that the majority of commissions examined in this chapter recommended punishment, truth commissions are best understood as instruments of restorative justice. The three most successful commissions in Chile, South Africa and El Salvador, did not act as punitive instruments, but concentrated on truth finding, truth telling and "giving victims a voice". The

[48] On South Africa and its TRC: Richard A. Wilson, The politics of truth and reconciliation in South Africa. Legitimizing the post-apartheid state. Cambridge University Press 2005. Antje du Bois-Pedain, Transitional Amnesty in South Africa, Cambridge University Press, 2009.

actions of truth commissions usually do not further retributive justice. Weather perpetrators are punished or not depends much more on the outcome of the transition process (and their own weakness) and external pressure on the new political establishment than on the activities of truth commissions. In order to be effective, commissions should start their work early. Truth commissions serve their tasks best in an already inclusive environment, when they are equipped with a large jurisdiction. Under such conditions, it is rather unlikely, that a truth commission will recommend punishment.

With respect to the Serbian commission, mentioned at the beginning, it must be said, that its potential for reconciliation was rather limited: The main cleavages, it could probably heal, were not situated in the internal Serbian context, but rather in the post — Yugoslavia context. In order to deal with Kosovo, it should have been initiated earlier, probably in 1998. A commission dealing with the Milosevic regime could have eased internal conflicts, however, one should keep in mind a certain contradiction: If such a commission were established right after Milosevic lost power, it would have had to work in a very polarized political climate. Despite that, its contribution to national reconciliation would have been stronger compared to a commission dealing with Milosevics rule after years. On the other side, its ability to "establish the truth" would have been severely reduced by the mere existence of the ICTY, which would have prevented any attempt to achieve a "South African" trade-off between truth disclosure and retributive justice. A truth telling process, modeled after the South African example, still could probably ease tensions between the former republics and nations of Yugoslavia — if conducted by a neutral and supranational body consisting of representatives of all former conflict parties and if accompanied by mutual obligations to refrain from any lawsuits for reparation and compensation.

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Commissioning the Past in Northern Ireland*

ABSTRACT

At the end of conflict societies are often faced with difficult choices about whether and how best to deal with the past. In Northern Ireland a Legacy Commission has been proposed. This article explores in what ways, if any, a truth commission might add value to the existing past-focused mechanisms in Northern Ireland, with a particular emphasis on the Historical Enquiries Team (HET). It further considers the dilemmas and tensions the proposed Legacy Commission has generated and what this tells us about the contested nature of transitional justice claims both in the international context and in one transitional society, Northern Ireland.

Key words: Truth Commissions, Consultative Group on the Past, Historical Enquiries Team, Northern Ireland.

Introduction

Northern Ireland presents an interesting case study into how a settled European liberal democracy has approached questions of transitional justice "post-conflict". In January 2009, the British government appointed a Consultative Group on the Past to consult widely and recommend how best Northern Ireland could deal with its past.[2] The Consultative Group surprised

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[2] "Report of the Consultative Group on the Past", Consultative Group on the Past (CGP), *Belfast, 2009*; stable internet address: http://www.cgpni.org/fs/doc/Consultative%20Group%20on%20the%20Past%20Full%20Report.pdf.

many and generated considerable debate, by proposing a five-year Legacy Commission (or truth commission). If adopted the proposals would supersede the "package of measures" already put in place by the British authorities to deal with legacy issues. According to some, the Legacy Commission would "supplement or supplant an investigative and criminal justice apparatus that is fully operational and, in the official view, up to the task."[3] In this context, the article explores why a Legacy Commission was proposed and what benefits, if any, it might offer Northern Ireland's "post-conflict" transition. In order to examine these issues the article is divided into six parts. Part one, examines the wider theoretical debates and contested nature of truth commission claims. Part two provides an overview of developments in dealing with the past in Northern Ireland since the signing of the 1998 Good Friday Agreement.[4] Part three unpacks the main features of the proposed Legacy Commission and aspects of existing measures. It is beyond the scope of this article to carry out a detailed analysis of the "package of measure". Instead it draws upon over four years' empirical research on a central component of the measures, the Historical Enquiries Team (HET).[5] Part four examines a range of contentious issues and considers a way forward on a number of key concerns. Part five discusses responses to the proposals; followed in Part six by an examination of the value and likely contribution of a Legacy Commission. This exploration provides the opportunity to explore the benefits, challenges and dilemmas that are indicative of commissioning the past internationally.

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[3] Northern Ireland Human Rights Commission (NIHRC), Response to Northern Ireland Office Consultation on the Consultative Group on the Past, September 2009, at para 59, 23.

[4] The Good Friday Agreement was reached by all but one of the major political parties in Northern Ireland, and the British and Irish governments. Good Friday Agreement (1998) Agreement reached on multi-party negotiations, April 1998, available online at: http://www.nio.gov/agreement.pdf.

[5] The author has been conducting research on the HET since it was set up in 2005. Unfettered access was granted to observe its work and to interview all level of staff. The day-to-day observation phase ended in December 2008. The research is ongoing and includes meetings with the HET and interviews with key personnel. In addition, in-depth interviews with families/ stakeholders and analysis of HET reports remain ongoing.

[6] See, for example, Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, Routledge, London, 2002; Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*, Beacon Press, Boston, 1998; "Rule-of-Law Tools for Post-Conflict States: Truth Commissions", United Nations, High Commissioner for Human Rights, 2006 *[HR/PUB/06/1]*.

Part 1. The Contested Claims of Truth Commissions

The literature on truth commissions has developed extensively over the past few decades.[6] Such initiatives are now endorsed internationally as an effective and necessary component of successful peace building. The United Nations in particular has embraced and employed transitional justice discourse and truth commissions in its interventions in "post-conflict" situations.[7] The benefits attributed to truth commissions include their ability to help victims, establish an authoritative record of the past, promote accountability, draw a clear line between past and present, deter future abuses and encourage reconciliation. These claims are however the subject of intense debate.[8] As David Mendeloff puts it, they are based more on faith than fact.[9] While an in-depth examination of the concept of "truth" is outside the limits of this article; its multiplicity, subjectivity and partiality make the goal of establishing a common narrative, or claim to "*the* truth", highly contested. As Erin Daly notes, the problem is that the truth neither *is* nor *does* all that we expect of it.[10] Advocates argue the rationale for seeking to establish an authoritative record is to reveal the extent and nature of violations and establish responsibility. This will in turn inform the population about the events of the past and challenge denial. An example of this is the South African Truth and Reconciliation Commission, which challenged denial and established beyond doubt the full extent of the horrific nature of apartheid. Critics point out that in other instances the findings of truth commissions have been ignored or even disputed. In a recent poll in Serbia, half of the respondents said they did not believe Serbs had committed war crimes

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[7] Patricia Lundy, Mark McGovern, "Whose Justice? Rethinking Transitional Justice from the Bottom Up", *Journal of Law and Society*, vol. 35, no. 2, 265-92, 2008, pp. 265-92; Secretary-General's Report, "The rule of law and transitional justice in conflict and post-conflict societies," *UN doc. S/2004/616,* 3 August 2004.

[8] See for example, Audrey Chapman, Hugo Van Der Merwe, *Truth & Reconciliation in South Africa: Did It Deliver?*, University of Pennsylvania Press, Philadelphia, 2008; Audrey Chapman, Patrick Ball, "The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa and Guatemala", *Human Rights Quarterly*, vol. 23, 2001, pp. 1-43; Colm Campbell, Catherine Turner, "Utopia and the Doubters: Truth, Transition and the Law", *Legal Studies*, vol. 28, no.3, 2008, pp. 374-95; Erin Daly, "Truth Skepticism: An Inquiry into the Value of Truth in Times of Transition," *International Journal of Transitional Justice*, vol.2, 2008, pp. 23-41; David Mendlloff, "Truth-Seeking, Truth-Telling, and Post-Conflict Peacebuilding: Curb the Enthusiasm?", *International Studies Review*, vol.6, 2004, pp. 355-80; Elizabeth Stanley, "Truth Commissions and the Recognition of State Crime," *British Journal of Criminology*, vol. 45, 2005, pp. 582-97.

[9] David Mendlloff, "Truth-Seeking, Truth-Telling, and Post-Conflict Peacebuilding: Curb the Enthusiasm?", *International Studies Review*, vol. 6, 2004, p. 356.

[10] Erin Daly, "Truth Skepticism: An Inquiry into the Value of Truth in Times of Transition," *International Journal of Transitional Justice*, vol.2, 2008, p. 23.

during the 1990s despite the findings of the International Criminal Tribunal for the former Yugoslavia (ICTY).[11] Proponents further claim that by learning from the mistakes of the past it will prevent a repetition of human rights abuses in the future — the "never again" maxim. The assumption is "truth" recovery helps develop democracy by establishing respect for human rights and the rule of law. Again, this assertion is open to question. If future abuses do not occur it would be difficult to establish a clear causal relationship between the two. A fundamental question is whether truth commissions facilitate reconciliation. What reconciliation is and what it entails is unclear. Such a process is likely to require long-term policy initiatives and depend on a range of social factors unrelated to a truth commission. Indeed, establishing the "truth" is no guarantee that beliefs and attitudes change. Groups within society may support "truth" recovery because it serves to cast blame on other groups; Croatians tend to support the ICTY because they believe it demonstrates that the Serbs committed more crimes against Croatians. In these circumstances, and as we will see in Northern Ireland, "truth" recovery can play directly into the hands of ethnic divisions and hatred.[12]

Advocates make further claims that by acknowledging suffering and wrongdoing and allowing victims to tell their story it will help restore dignity and assist the healing process. Elizabeth Stanley makes the point that the healing function is dependent upon recognition and truth commissions can actually inhibit recognition of victims, particularly those of state violence. Typically most perpetrators tend not to present themselves, or disconnect from transitional processes, as in South African Truth and Reconciliation Commission.[13] This is compounded by the fact that victims are often disappointed and frustrated because their case is not investigated, despite having given testimony. The most marginalised victims are often excluded; "stories" of the injured, tortured, or those who have suffered forced removals and economic hardships are frequently not incorporated or "given voice" in truth commissions. And, while in some cases hearing the "truth" may be beneficial and can ultimately help individuals heal; in others the "truth" can re-traumatise victims and make their suffering worse.[14]

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[11] Bronwyn Anne Leebaw, "The Irreconcilable Goals of Transitional Justice," *Human Rights Quarterly,* vol.30, no.1, 2008, pp. 95-118, p.104.

[12] David Mendlloff, "Truth-Seeking, Truth-Telling, and Post-Conflict Peacebuilding: Curb the Enthusiasm?", *International Studies Review*, vol.6, 2004, p. 374.

[13] Elizabeth Stanley, "Truth Commissions and the Recognition of State Crime," *British Journal of Criminology*, vol.45, 2005, pp.583 & 591; Deborah Posel & Graeme Simpson, *Commissioning the Past: Understanding African Truth & Reconciliation Commission*, Witwatersrand University Press, South Africa, 2002.

[14] David Mendlloff, "Truth-Seeking, Truth-Telling, and Post-Conflict Peacebuilding: Curb the Enthusiasm?", *International Studies Review*, vol.6, 2004, p. 365.

Perhaps the most damming criticism is the ability of truth commissions to achieve accountability and combat impunity. Amnesties and incentives were justified as a means to reconciliation in Latin America in the 1980s and "90s. The dilemma for these fledging democracies was a trade off between "justice" versus "peace". Unqualified or blanket amnesty for those accused of serious violations have been held to be in violation of international human rights law.[15] The need to resort to such compromises has been questioned. It has been argued that when properly pursued justice and peace can promote and sustain one another; and there is no intrinsic incompatibility. [16] In countries where huge international support has been given to promote transitional justice, progress towards accountability is frustratingly low. In Guatemala, the criminal justice system has failed to investigate and address serious past human rights abuses, known abusers remain in positions of authority and human rights violations continue, in spite of having had two truth commissions.[17] This realisation has given rise to an argument that *de facto* impunity prevails in circumstances where the recommendations of truth commissions can be largely ignored without sanction. It raises further serious questions about the usefulness of truth commissions to prime transitional states for change and foster reform as claimed. [18]

This was not intended to be a comprehensive evaluation of truth commissions but rather to illustrate the conflicting and contested nature of truth commission claims. It is evident that after more than two decades of infatuation with truth commissions there is very little empirical research to substantiate competing claims of either benefits or harmful effects. This is not to say that "truth" recovery should not be pursued. On the contrary, what has been argued is policy-makers and practitioners should exercise more caution in promoting the capabilities of commissions and ambitious expectations should be curbed.[19] The possibility of a truth commission for Northern Ireland will be explored through the prism of past international experience.

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[15] Diane. F. Orentlicher, "Settling Accounts Revisited: Reconciling Global Norms with Local Agency," *International Journal of Transitional Justice*, vol.1, 2007, pp. 10-22.

[16] The May 1999 indictment of Slobodan Milošević by the ICTY and the 2003 indictment of Charles Taylor by the Special Court for Sierra Leone, Priscilla Hayner, "Negotiating Justice: Guidance for Mediators Report," *Centre for Human Dialogue and ICTJ*, February 2009, p. 5-6.

[17] "Recognizing the Past: Challenges in the Combat of Impunity in Guatemala," *Impunity Watch, 2009*, available at stable Internet address www.impunitywatch.org.

[18] Elizabeth Stanley, "Truth Commissions and the Recognition of State Crime," *British Journal of Criminology*, vol.45, 2005, p.593.

[19] David Mendlloff, "Truth-Seeking, Truth-Telling, and Post-Conflict Peacebuilding: Curb the Enthusiasm?", *International Studies Review*, vol.6, 2004.

Part 2: The Local Context: Developments in Dealing with the Past

Between 1966 and 1999 approximately 3,636 people died as a result of the conflict in Northern Ireland and many more suffered injury and loss.[20] During this period there were widespread and systematic violations of human rights by state and non-state actors and allegations of collusion between state agencies and Loyalist paramilitaries. Unlike many other "post-conflict" societies, "truth" recovery was not envisaged as part of the initial Northern Ireland peace deal. The Good Friday Agreement (hereafter the Agreement) was reached by all but one of the major political parties in Northern Ireland, and the British and Irish governments in 1998.[21] It was a complex, multi-faceted document dealing with a wide range of issues that had both caused and arisen as a result of over thirty years of conflict. The creation of a comprehensive past-focused mechanism was not part of the discussions. The Agreement itself was more forward facing in respect of providing practical support for victims than dealing with the past. In order to achieve agreement, the "constructive ambiguity" that defined the peace process placed a premium on avoiding broaching anything as contentious and potentially divisive as a truth commission. Instead issues that in other circumstances might have fallen under the remit of a truth commission (reform of the police force, a review of the criminal justice system, prisoner releases, and so forth) were disaggregated and dealt with incrementally.[22] Considerable tension and debate did emerge and continues today over the early release of conflict-related prisoners, the fate of the "disappeared", and calls for further investigations into state killings and allegations of collusion between the security forces and Loyalist paramilitaries. Twelve years have passed since the Agreement was signed, and there have been dramatic changes that have transformed society. However it is notable that the legacy of the past remains an outstanding issue of the peace process.

Transitional justice strategies have traditionally been associated with transition from authoritarian and undemocratic states to democracy. The supposition is systematic human rights violations would not happen in a liberal democracy, committed to the rule of law. Northern Ireland demonstrates that

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[20] In Northern Ireland there are differing estimates of the number of people who have died as a result of the conflict. David McKittrick (ed.), *Lost Lives*, Mainstream, Edinburgh, 1999, p. 1476.

[21] Good Friday Agreement Agreement reached on multi-party negotiations, April 1998, available online at: http://www.nio.gov/agreement.pdf.

[22] Christine Bell, "Dealing with the Past in Northern Ireland." vol. 26, n. 4, *Fordham International Law Journal, 2003,* pp. 1095-1147; Patricia Lundy, Mark Mc Govern, "Truth Justice and Dealing with the Legacy of the Past in Northern Ireland, 1998-2008," vol. 17, no.1, *Ethnopolitics,* 2008, pp. 177-93.

this is not confined to underdeveloped dictatorial regimes and can occur in western highly developed democracies with a plethora of human rights protections, legislation and institutions designed to detect and protect victims of such violations within an ostensible democracy.[23] Indeed this context may constrain acknowledgement of abuse as government is less willing to accept institutional failure.[24] The British state has resisted acknowledging its role in the conflict and sections of society in Northern Ireland have difficulty in recognizing that the State may have been involved in more than a neutral role. The Consultative Group on the Past found: "This is one of the crucial issues facing us as a Group, difficult as it may be for some in our society to hear; that elements of the State, on occasions, acted outside the law."[25]

The British government has taken steps to address some of the most contentious historic killings and breaches in the rule of law, often as a result of vigorous campaigns by relatives of victims. There have been a number of important inquiries into disputed killings and into both general and specific allegations of collusion between the police and other state agencies and loyalist paramilitary groups against the Catholic population during the conflict.[26] These separate inquiries found grounds for further investigations and inquiries into collusion. The UK government also has certain commitments and obligations arising from international law including those emanating from the European Convention on Human Rights and Fundamental Freedoms and its implementation domestically through the Human Rights Act 1998. The UK government has been found in breach of Article 2, the right to life, in a number of cases in Northern Ireland. In a joint judgment delivered on 4 May 2001 the

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[23] Fionnuala Ni Aolain and Colm Campbell, "The paradox of transition in conflicted democracies," vol. 27 *Human Rights Quarter,* 2005, p. 213; Bill Rolston, "An effective mask for terror': Democracy, death squads and Northern Ireland, 44 Crime, vol. 44, *Law and Social Change*, 2005, pp.181-203.

[24] Fionnuala Ni Aolain and Colm Campbell, "The paradox of transition in conflicted democracies," vol. 27 *Human Rights Quarterly,*2005, p. 213.

[25] Lord Robbin Eames and Denis Bradely, Full Text of Speech Given at the Innovation Centre, Titantic Quarter Belfast, 29 May 2008, p. 5, available at stable Internet address http://www.cgpni.org.

[26] The Bloody Sunday Inquiry; this is the longest running and most expensive inquiry in British legal history; it is expected to cost £190 million.

Peter Cory, Cory Collusion Inquiry Report into the cases of — Finucane, Nelson, Hamill, Wright, 2004, available on line at:http://www.nio.gov.uk/cory_collusion_inquiry_report, "stable internet address"; Steven, Sir J, Stevens Inquiry 3: Overview and Recommendations, 2003, available at http://www.patfinucanecentre.org/; Police Ombudsman Public Statement and Report on Operation Ballast – RUC/PSNI Collusion with the UVF in North Belfast, 2007 available at http://www.patfinucanecentre.org/collusion/ballast.html.

court set out the elements which must be adhered to for an investigation to be Article 2 compliant — effectiveness, independence, promptness, accessibility to the family and sufficient public scrutiny.[27] In 2002, in response to the above judgments, the UK Government presented the ECHR with a "package of measures",[28] which it claimed were necessary steps to address the issues raised in the Court's judgment and would ensure future Article 2 compliant investigations.[29] A key component of the "package of measures" presented to the Committee of Ministers was the Historical Enquires Team (HET).

The HET is a special unit of the Police Service of Northern Ireland (PSNI). Its remit is to re-examine all deaths attributed to the Northern Ireland conflict between 1968 and 1998;[30] 2,002 of which were never solved.[31] The HET is unique in policing internationally and is breaking new ground as an innovative transitional justice mechanism.[32] The primary objective is to provide a family-centred approach, to identify and address unresolved questions from the families' perspective, working to the principle of maximum permissible disclosure. It is funded by the Northern Ireland Office (NIO) to the tune of £32 million over a six-year timeframe and was launched January 2006. In order to meet Article 2 requirements, and build confidence and trust, an independent team was established to work alongside retired RUC officers from Northern

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27 Which encompasses the cases *Jordan v UK* (No. 24746/94); *McKerr v UK* (No.28883/95); *Kelly and Others v UK* (No.30054/96*); Shanaghan v UK* (No.377715/97).

28 The "package of measures" taken include establishment of the Police Ombudsman's Office; "calling in" of other police forces to investigate deaths; the establishment of the Serious Crime Review Team [now Historical Enquiries Team]; the option for families to judicial review of decisions not to prosecute; new practices relating to verdicts of coroner's juries at inquests & disclosure at inquests; measures following reviews of the coroners' system; legal aid requests; and the Inquiries Act.

29 Importantly, the UK government has strongly resisted the suggestion that the cases, which were the subject of the judgments from the Court, should now be reopened for Article 2 compliant investigations. The House of Lords, in *McKerr,* found Article 2 is not enforceable domestically in relation to deaths that occurred before the 1998 Human Rights Act came into force on 2 October 2000. However, the state remains obligated regarding Article 2 under the Convention.

30 All cases indicating police involvement are referred to the Police Ombudsman's Office.

31 Sir Hugh Orde, "War is easy. Peace is the difficult prize", Eight Longford Trust Lecture at Church House, Westminster, Dec 2009, p. 3, http://www.longfordtrust.org.

32 See Patricia Lundy, "Can the Past Be Policed? Lessons From the Historical Enquiries Team Northern Ireland," vol. 11, *Law and Social Challenges*, 2009, pp. 109-171; also available at Transitional Justice Institute Research, Paper No. 09-06. download at SSRN: http://ssrn.com/abstract=1425445, Patricia Lundy, "Exploring Home-Grown Transitional Justice and Its Dilemmas: A Case Study of the Historical Enquiries Team, Northern Ireland", *International Journal of Transitional Justice*, vol.3, no.3, 2009, pp. 321-40.

Ireland. The "independent" team is staffed entirely by retired police officers from forces outside Northern Ireland (England, Scotland and Wales) and deals exclusively with cases that require independence. Policing has been high on the political agenda in the context of the Northern Ireland peace process. The nature of the Northern Ireland State has been contested and the perceived role of the police in buttressing it created a legitimacy crisis for the Royal Ulster Constabulary (RUC), renamed PSNI.[33] Lack of acceptance of the police has been greatest among the Catholic/ Nationalist community. The force has traditionally been Protestant/ Unionist dominated. As noted above, the RUC has been the focus of allegations of human rights abuses and collusion with loyalist paramilitary groups during the conflict. This created a legacy for its successor, the PSNI, and has remained a significant impediment to building public confidence in policing. The HET is regarded as the litmus test that policing had been transformed and is capable of dealing with the past.

After a period of monitoring how the UK has responded to its Article 2 obligations the Committee of Ministers of the Council of Europe, has allowed some matters to close, and others to remain open; the Secretariat reported that the HET can be considered as a useful model for bringing "a measure of resolution" to those affected in long-standing conflicts, and reiterated that it awaited evidence of "concrete results".[34] As posited elsewhere, the ECHR cases have been a key "driver" in the HET process.[35] The "package of measures" has not received universal acceptance: human rights organisations, victims groups and others have raised concerns about independence, capacity, quality or "patchiness of outcomes", differentiation in treatment, unreasonable delays and Article 2 compatibility in general.[36]

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[33] The RUC has been the state police force in Northern Ireland since 1922. It underwent a process of fundamental reform including a name change to the Police Service of Northern Ireland (PSNI) in 2001.

[34] Committee of Ministers of the Council of Europe, Interim Resolution: "Action of the Security Forces in Northern Ireland," *CM/ResDH, 2009, 44*, Adopted by the Committee of Ministers on 19 March 2009 at the 1051st meeting of the Ministers' Deputies.

[35] Patricia Lundy, "Can the Past Be Policed? Lessons From the Historical Enquiries Team Northern Ireland," vol. 11, *Law and Social Challenges*, 2009, pp. 109-171; also available at Transitional Justice Institute Research, Paper No. 09-06, download at http://ssrn.com/abstract=1425445, p. 33.

[36] Committee on the Administration of Justice (CAJ), "Dealing With the Legacy – a human rights perspective," Submission from CAJ to the Consultative Group on the Past, September 2008, at 6-10; CAJ, "Preliminary Response from CAJ to the "package of measures" submitted by the UK to the Committee of Ministers," 8 October 2002; Northern Ireland Human Rights Commission (NIHRC), "Comments on the UK Government's Package of Measures Intended to Address the Issues raised by the ECHR in its Article 2 Judgments of 4

A final point under this section is that in the absence of a coherent official strategy to address outstanding issues of the past a range of unofficial initiatives have been undertaken by a number of well- organised human rights and victims' non-governmental organisations (NGO) and other community-based processes. Traditionally, but not exclusively, such initiatives emerged and garnered support within the nationalist community. They have included "truth" recovery, story telling, memorial projects and a range of justice campaigns. Taken together, such "bottom-up" processes constitute a substantive civil society response to the imperatives of post-conflict "truth" recovery. Against this background, in June 2007 the British government set up the Consultative Group on the Past to consider the landscape of initiatives that have already been undertaken by Governments and NGOs to deal with the past, consult widely, and to come up with the best way forward. It is to this issue that the article now turns.

Part 3: Commissioning the Past: Options in Northern Ireland

The Consultative Group on the Past was co-chaired by Lord Robin Eames (former Archbishop of Armagh and Primate of All Ireland), Denis Bradley (former Vice-Chairman of the Policing Board); and six other individuals broadly representative of the various political and religious communities in Northern Ireland. Two internationals advised the Group, Martii Ahtisaari, former President of Finland, and Brian Currin, a South African attorney involved in the creation of the South African Truth and Reconciliation Commission. The Group was initially greeted with a certain amount of scepticism within sections of the community. The British government appointed its members and for some this cast doubt on its independence and legitimacy. During eighteen-month consultation the Group consulted widely and demonstrated a willingness to listen sensitively to a range of voices and concerns.[37] This earned it credibility and respect from some of its former critics.

May 2001" (2002), http://www.caj.org.uk/publications/most_recent_publications.php, "stable internet address"; British Irish Rights Watch (BIRW) "Submission to NIO Consultation on Consultative Group on the Past Proposals," Oct 2009, at paragraph 19.1,23, http://www.birw.org/Dealing%20with%20the%20past.html, "stable internet address"; Patricia Lundy, "Can the Past Be Policed? Lessons From the Historical Enquiries Team Northern Ireland," vol. 11, *Law and Social Challenges*, 2009, pp. 109-171, download at http://ssrn.com/abstract=1425445.

[37] The CGP received 290 written submissions and 2,086 letters. Public meetings were held across Northern Ireland. Over 500 people attended the public meetings. The Group met privately with 141 individuals and groups. "Report of the Consultative Group on the Past", Consultative Group on the Past (CGP), Belfast, 2009, p.45-7; http://www.cgpni.org/fs/doc/Consultative%20Group%20on%20the%20Past%20Full%20Report.pdf.

The Group's Report was launched in January 2009 and contained thirty-one recommendations. Given the contested nature of the past in Northern Ireland it is perhaps unsurprising that the Report generated considerable controversy and at times hostility.[38] As discussed later, particular anger was directed at the proposal for a one-off "recognition payment" of £12,000 to be made to the nearest relative in all conflict related deaths.[39] In June 2009 the Secretary of State launched a Northern Ireland Office (NIO) consultation process on the Group's recommendations which was completed in October 2009.[40] At the time of writing, the outcome of the NIO consultation is unknown.

The Proposals for a Legacy Commission

The Consultative Group's core proposal is the establishment of an independent Legacy Commission that would create processes of reconciliation, justice and information recovery. It would have the overarching objective of promoting peace and stability in Northern Ireland with a budget of £300 million and within a timeframe of 5 years. An International Commissioner is proposed as Chair and two other Commissioners with separate responsibilities. The mandate would consist of the following four strands of work; to help society towards a shared and reconciled future, through a process of engagement with community issues arising from the conflict; review and investigate historical cases; conduct a process of information recovery; and examine linked or thematic cases emerging from the conflict.[41] It is not possible to consider all thirty-one recommendations in this article; the focus will be primarily on Strands 2, 3 and 4 and proposals related to justice and information recovery. Figure 1 below illustrates the proposed Legacy Commission structure and the four strands of its mandate.

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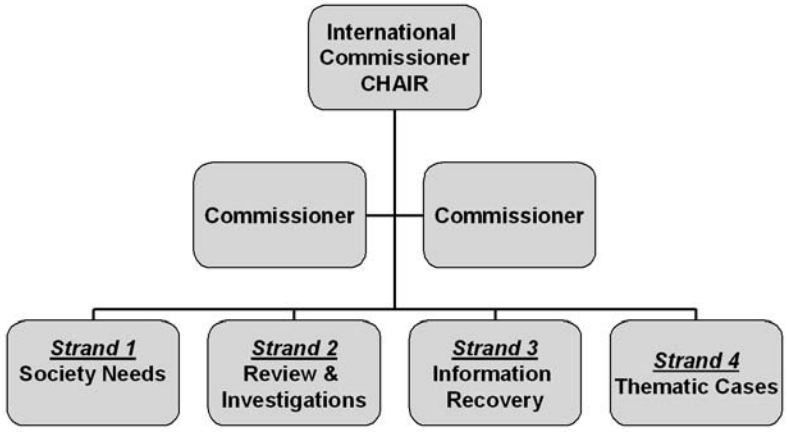
[38] Reuters, NI Conflict Victims Clash at Launch of Report, http://www.reuters.com /article/idUSTRE50R4GU20090128.

[39] See, for example, Nigel Dodds MP (DUP), Prime Ministers Questions, House of Commons, 28 January 2009: available at: http://www.publications.parliament.uk/pa/cm200809/ cmhansrd/cm090128/debtext/90128-0003.htm.

[40] Northern Ireland Office (NIO) Consultation Paper, "Dealing with the Past in Northern Ireland: The Recommendations of the Consultative Group on the Past', June 2009; NIO, available at: http://www.nio.gov.uk/consultation_paper_-_dealing_with_the_past_in_ northern_ireland__the_recommendations_of_the_consultative_group_on_the_past-2.pdf.

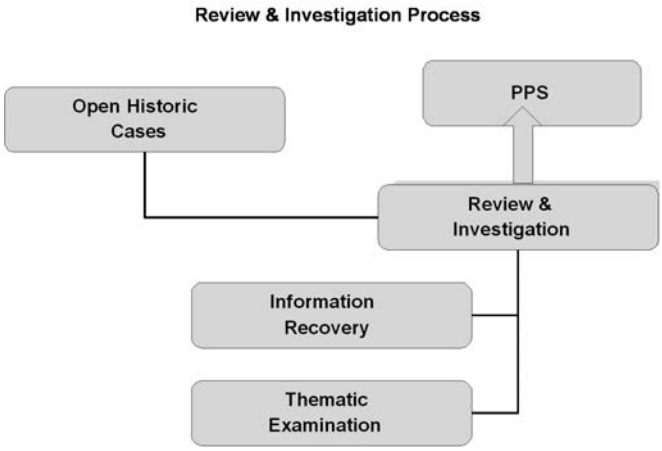
[41] "Report of the Consultative Group on the Past", Consultative Group on the Past (CGP), *Belfast, 2009*;, p. 134, http://www.cgpni.org/fs/doc/Consultative%20Group%20on%20the %20Past%20Full%20Report.pdf.

Figure 1: Independent Legacy Commission Structure



The Group's Report indicated that many families that spoke to its members expressed a desire for prosecutions. Even though the Group had come to the view that there was a need for greater realism about the prospects of securing prosecutions, it was judged important to keep this avenue open to families. Thus, a new independent Review and Investigation Unit was proposed to replace the HET as Strand 2 of the Legacy Commission's work. This Unit would review and investigate all historical cases with a view to prosecution, backed by police powers. Essentially this is a normal police investigation working to normal policing standards. Thus, the process was designed to comply in the first instance with the demands for criminal justice to the highest evidential standards. Once the investigative process was exhausted, a separate and sequential process with different powers and procedures would aim to maximise the chances of obtaining information for families. The Review and Investigation Unit [Strand 2] would therefore be kept separate from the Information Recovery Unit [Strand 3] and Thematic Unit [Strand 4]. A number of safeguards were built in with regard to the tensions between truth and justice that aimed to ensure cases with significant evidence came to court. That is, only when individual cases had been reviewed/ investigated, and when there were no evidential opportunities and prosecution to be pursued, would a case progress to the information recovery or thematic processes. If evidential opportunities emerged, the case would be forwarded to the Public Prosecution Service for consideration. If evidence emerged outside the process about a particular crime, the suspect would still face criminal prosecution before the court. Figure 2 below illustrates the sequential stages.

Figure 2: Independent Legacy Commission Sequential Processes



At this point it is important to reflect on the viability of prosecutions in Northern Ireland. A number of influential commentators have publicly acknowledged that prosecutions are likely only in a small number of historic cases, because they would not meet current evidentiary standards.[42] In many historic cases witnesses have died, files have been misplaced or destroyed, and exhibits and forensic evidence contaminated are no longer credible. The former Chief Constable, Sir Hugh Orde, has repeatedly stated that in an evidential sense the PSNI will struggle to secure convictions.[43] After meeting a wide range of experts and officials, the Consultative Group concluded that it was their duty to tell the public that this was the reality of the situation and not to perpetuate false hopes of convictions. Some families and a number of NGOs working mainly (but not exclusively) within the nationalist community have reached a similar conclusion. "Truth" and acknowledgement are what these families seek.[44] This article contends, and will discuss in detail later, that if the prospects of securing

[42] Queen v. Hoey, NICC 49, we17021 (N.Ir), 2007, available at http://www.bailii.org/nie/cases/NICC/2007/49.html last viewed 25/13/2010; Healing Through Remembering (HRT), "The Validity of Prosecutions based on Historical Enquiry, Observations of Counsel on Potential Evidential Opportunities,"(2006, http://healingthroughremembering.org; Lord Robbin Eames and Denis Bradely, Full Text of Speech Given at the Innovation Centre, Titantic Quarter Belfast, 29 May 2008, p. 5, available at http://www.cgpni.org.

[43] Simon Doyle, "Orde Told "Truth & Justice Won't Work", Irish News, 11 June 2003 available at http://www.nuzhound.com/articles/irish_news/arts2003/jun10_truth_and_justice_wont_work.php.

[44] Press Release, Relatives for Justice, Victims Groups Unit to call for Truth Commission, January 14, 2008, available at http://www.relativesforjustice.com/victims-groups-unite-to-call-for-truth-commission.htm.

prosecutions and convictions are limited, then alternative forms of justice are valid in order to meet victims' needs.

The Consultative Group's Report stated, while complete truth might be unattainable, they believed it might still be possible to recover information of importance to families and society. It recommended that the process of recovering information of importance to relatives (information recovery) would be subject to a distinct process within the Legacy Commission under a separate Commissioner. This would constitute Stand 3 of the Commission's work (as illustrated in Figure 1 above). The Information Recovery Unit would only review a case if the consent of the next-of-kin were obtained. The Unit would not have the power to compel witnesses but could compel documents. While an amnesty was ruled out, a protected statement was proposed to encourage cooperation (discussed in detail below). The Report noted that, "there is a potential tension between the remit of the HET to pursue a normal police investigation while combining this with a process of information recovery."[45] As argued elsewhere, the HET methods hinge on fresh evidential opportunities, which according to the informed view, appear to be largely unachievable.[46] It is important to understand that the HET is located within the criminal justice system, and the re-examination of cases is therefore conducted to criminal standards of proof. The process is driven by the identification of new evidential opportunities and this underpins the progression of cases. This, it has been argued, has a delimiting effect in the pursuit of information recovery.[47] The re-examination of historical cases and answering families' questions does not demand the same approach or methods as a "live" police murder investigation. "Truth" recovery is about taking a much broader view than a typical police-style investigation. This legalistic approach sits alongside a more "cathartic" process of "truth recovery"; which includes answering a wide range of often-untypical investigation questions that are of interest to families. Traditional policing methods, namely assessing old cases for investigative opportunities, sit uneasily within this process.[48] The proposed separation of Units proposed by the Consultative Group could overcome this problem and allow a less restricted or unencumbered approach to answering families' questions. Indeed, in order to achieve the aim of information recovery a separation of tasks and units, operating under distinct rules and guidelines, is

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45 "Report of the Consultative Group on the Past", Consultative Group on the Past (CGP), *Belfast, 2009,*p.127-128, http://www.cgpni.org/fs/doc/Consultative%20Group%20on%20the%20Past%20Full%20Report.pdf.

46 Patricia Lundy, "Can the Past Be Policed? Lessons From the Historical Enquiries Team Northern Ireland," vol. 11, *Law and Social Challenges*, 2009, p.129-132. See internet adress: http://ssrn.com/abstract=1425445, 20/01/2010/.

47 Ibid , p. 155-162.

48 Ibid, p.161.

necessary and desirable. The process would be further strengthened and wider public confidence restored if government demonstrated political will for rigorous investigation by providing the Legacy Commission with access to official documents that have been previously withheld.[49] The proposed new independent Information Recovery and Review and Investigative Units would be one way of addressing Article 2 compliant concerns that some NGOs and families have in relation to the HET. There are lessons that have been learned and these need to be taken into account in the development of Strands 2 and 3 of the Legacy Commission.

The Consultative Group also recommended that a new Thematic Examination Unit should be set up as the fourth strand of its work. The Group considered that alongside information recovery on a case-by-case basis, there was a need to examine linked cases and themes arising from the conflict that remain of public concern. Some cases have raised particular concern or touch on a theme, including "specific areas of paramilitary activity, or alleged collusion."[50] The thematic examination would take place without public hearing or formal parties to proceedings and no cross-examination other than by the Commissioners. The Group argued this would facilitate more open and frank disclosure and avoid the constant publicity of present inquiry proceedings. As there would be no formal parties, there would be no general circulation of all documents. The logic here appears to have been to avoid overly adversarial and costly legal proceedings associated with some public inquiries in Northern Ireland. The Unit would, however, have the power to compel witnesses unlike the Information Recovery Unit; it would also have the power to compel documents. The Group's Report states that "participants in these processes would need to have access to independent legal advice and would have the right to legal representation", but does elaborate further.[51] The following section explores a number of contentious issues that the proposals have generated including amnesty, the Commissions powers and processes and independence. A way forward on some of these key concerns is proposed.

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[49] Stalker/ Sampson/ Stevens Reports into contentious killings by the State. Barry McCaffrey, "Orde Aims to keep File From Coroner," *Irish News*, July 9, 2008, p.13; Relatives for Justice, Press Release "Coroner questions MOD and PSNI in gagging orders concerning collusion of 76 year old pensioner", http://www.relativesforjustice.com/coroner-questions-mod-and-psni-on-gagging-orders-concerning-collusion-killing-of.htm.

[50] "Report of the Consultative Group on the Past", Consultative Group on the Past (CGP), *Belfast, 2009,* p.147; http://www.cgpni.org/fs/doc/Consultative%20Group%20on%20the%20Past%20Full%20Report.pdf.

[51] Ibid, p.148.

Part 4: Contentious Issues and Seeking a Way Forward

Amnesty: Pragmatic or Principled Approach?

The Consultative Group as noted has ruled out a general amnesty but proposed a protected statement. According to this process confidential statements could be made to the Information Recovery Unit and the Thematic Examination Unit when prosecutions are deemed unlikely due to lack of evidence. Such statements would not be admissible in criminal or civil proceedings. It is the statement that is protected and not the person. The aim is to "encourage free and frank disclosure of information" relevant to a particular case.[52] It is now crystal clear that unqualified or blanket amnesty for those accused of serious violations are regarded as in violation of international human rights law. The international "community" has also moved away from granting conditional amnesties for serious human rights violations similar to the one adopted in the South African TRC.[53] Yet empirical data on amnesty provision between 2001 and 2005 shows that amnesties have continued to be a political reality despite international efforts to combat impunity.[54] Thus international debate continues on, whether measures short of an amnesty could be considered as an acceptable compromise in certain circumstances. Priscilla Hayner notes that, "there remain many areas not prescribed by law, and which allow a range of policy options for national actors."[55] While in principle there are legally binding international standards, it would appear there is room for flexibility that does not preclude a form of amnesty in certain circumstances (other than for gross human rights abuses), if accompanied by alternative mechanisms to fulfil victims' rights and in the interest of peace and stability. The important questions that then arise are: under what circumstances, and for what crimes, are amnesties permissible? What are the alternative forms of justice that would not be perceived as "second best" to prosecutions? These are the major dilemmas of transitional justice.

In Northern Ireland amnesty is not without precedent; in May 1969 a general amnesty was granted aimed at de-escalating the conflict around civil rights

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[52] Ibid, p. 148.

[53] Francesca Pizzutelli, Amnesty International, "What is required to make the Legacy Commission compliant with human rights obligations?" Panel 2, *Reflecting on the Report of the Consultative Group on the Past*, Seminar 14 & 15 May, 2009, Seminar Report, produced by CAJ, at 16-17, available at http://www.caj.org.uk/news/2009/06/seminar_reflecting_on_the_report_of_the_consultative_group_of_the_past.php.

[54] Louise Mallinder, "Can Amnesties and International Justice be Reconciled?" *International Journal of Transitional Justice*, vol. 1, no.2, 2007, pp. 208-230.

[55] Priscilla Hayner, "Negotiating Justice: Guidance for Mediators Report," *Centre for Human Dialogue and ICTJ*, February 2009, p. 9.

unrest,[56] and immunity was permitted in the work of the Independent Commission for the Location of Victims' Remains,[57] the Bloody Sunday Inquiry and the decommissioning of paramilitary weapons. The Early Release Scheme introduced in NI Sentences Act 1998, which could be regarded as an amnesty, provided for the release of prisoners who belonged to paramilitary groups that had signed up to ceasefires. In addition, there is a perception within sections of the community that a *de facto* amnesty has existed for certain perpetrators of human rights abuses during the conflict in Northern Ireland. State security forces killed 350 people, but only twenty-four prosecutions and eight convictions have resulted;[58] these figures exclude cases where collusion between state forces and loyalist paramilitaries may have occurred. The paucity of criminal sanctions resulting from these incidents has created the perception that state agents operated with virtual impunity.[59] The human rights community in Northern Ireland appears divided over whether a form of amnesty could be human rights compliant and what *can* or s*hould* be done in this regard. To some the Consultative Group's proposed protected statement (as discussed above) is totally unacceptable and "tantamount to amnesty". Public opinion, as recently gauged in the Northern Ireland Life and Times (NILT) survey, appears to indicate that there is little appetite for amnesty. In a representative sample of 1,800 across Northern Ireland, only 19.4% agreed or strongly agreed with the suggestion that "people should be free from possible prosecution for past actions including killings" if they gave evidence to a truth commission. 60.5% disagreed, including a third (31.1%) who strongly disagreed. Protestant respondents were notably more antagonistic towards the idea of amnesty than Catholics.[60]

The UN Rule-of-Law Tools for Truth Commissions states that "the granting of amnesty should not be confused with granting use immunity which is acceptable under international law".[61] There are different sources of information

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[56] The general amnesty was for events associated with, or arising out of, political protests, utterances, marches, meetings, demonstrations occurring between 5 October and 6 May 1969.

[57] The operation of the ICLVR is covered in the UK by the Northern Ireland (Location of Victims' Remains) Act and in Ireland by the Criminal Justice (Location of Victims' Remains) Act, 1999.

[58] Fionnuala Ni Aolain, *The Politics of Force: Conflict Management and State Violence in Northern Ireland*, Blackstaff Press, Belfast, 2000, p. 72-134.

[59] Ibid, p.72

[60] Patricia Lundy & Mark McGovern, "Attitudes Towards a Truth Commission for Northern Ireland", A research report submitted to the Northern Ireland Community Relations Council based on research conducted as part of the Northern Ireland Life and Times Survey, p. 12-13, 2006, NILT survey is conducted annually by an independent non-governmental agency; data and research update at http://www.ark.ac.uk/publications/updates/update46.pdf.

[61] "Rule-of-Law Tools for Post-Conflict States: Truth Commissions", United Nations, High Commissioner for Human Rights , *2006 [HR/PUB/06/1,* p. 10-12. Use immunity does not

that Commissions rely upon to inform their work. Official documentation is one source and as discussed below this is highly problematic. The HET does not have the power to compel witnesses and arrests cannot be made unless new evidential opportunities emerge. Even if an individual is compelled, there is no guarantee that he or she will participate. In such circumstances information retrieval is dependent upon voluntary co-operation. Why would someone volunteer to come forward and run the risk of self-incrimination? An incentive or guarantee is therefore likely to be required in order to encourage ex-combatants to cooperate with the proposed Commission. As discussed later, it is imperative that the granting of immunity as a "carrot" for the recovery of "truth" is assessed alongside the reality of securing prosecutions in Northern Ireland and the perceived *de facto* amnesty. Concern has also been expressed that information in protected statements would not be verified and/or corroborated, and this would result in misinformation being fed into the processes. It is common practice internationally for truth commissions to corroborate and verify information submitted (albeit to varying efficiency). What the Consultative Group's Report proposes is no different; it states "the Commission would have both the power and indeed the duty to test information given to it".[62]

Powers and Processes: Opening Avenues or Closing Doors?

In addition to protected statements the Consultative Group proposed a unique strategy of formal and informal processes to obtain information from a range of state and non-state actors in the conflict. "Procedures in the Information Recovery and Thematic Examination Unit would be flexible and might include contacts with suspected offenders, or paramilitaries, or government agencies."[63] The purpose is to establish institutional responsibly, as opposed to "naming or blaming individuals", and in doing so "obtain a greater understanding of the conflict, of what went wrong and why".[64] This has prompted a critical response that what the Group is proposing, "when it speaks of not naming or blaming, is an amnesty by any other name and impunity on a massive scale."[65] The alternative view is that,

extinguish criminal responsibility and should not be mistaken for amnesty. It merely makes certain evidence inadmissible in court. Use immunity is similar to the protected statements proposed by the Consultative Group on the Past in Northern Ireland.

62 "Report of the Consultative Group on the Past", Consultative Group on the Past (CGP), *Belfast, 2009,* p.148; http://www.cgpni.org/fs/doc/Consultative%20Group%20on%20the%20Past%20Full%20Report.pdf.

63 Ibid, p. 147

64 Ibid, p. 152

65 British Irish Rights Watch (BIRW), "The Report of the CGP: Initial Reactions", Feb 2009, p. 9, copy on file with author.

rather than individualising guilt, institutional responsibility might encourage former combatants on all sides to cooperate with the Commission. The Consultative Group's proposed use of alternative processes (informal means) could create the conditions to encourage voluntary cooperation and facilitate access to information that would otherwise be inaccessible. Given the clandestine nature of much of the activities of paramilitary groups and various agents involved in counterinsurgency violence, it makes it difficult to trace certain activities via a paper trail. This is compounded by the reality that HET has inherited empty files, particularly for cases in the early years of the conflict; over the passage of time documents have been destroyed and misplaced; and there have been ineffective investigations in some cases. The integrity of exhibits has also been called into question and the lost forensic opportunity of decommissioned weapons has compounded difficulties.[66] In such circumstances, oral evidence from witnesses or those who were directly involved in incidents is a primary source of knowledge and record of past events. Understandably, there are doubts in some quarters that paramilitary groups will come forward with information and equal scepticism that the security forces will cooperate. This cynicism is reflected in the NILT survey finding that 84% of people felt that a truth commission would "not necessarily get to the truth".[67] For some, only the full rigour of the law with the power to subpoena and robust cross-examination will get to the "truth". The power to subpoena has undoubtedly symbolic value and inferences can even be drawn from "silences". It is however, as already noted, not possible to make someone talk if they choose to forget, or genuinely do not remember, or develop selective amnesia. Since the principle underpinning Strand 3 is voluntary cooperation, the Unit does not require the power to compel (although the Strand 4 Thematic Investigations Unit does have this power).

If a *de facto* amnesty already exists for ex-security force personnel and ex-paramilitaries released from prison under the Early Release Scheme, the question then arises: what would be the incentive for such individuals to disclose information to a Legacy Commission? Evidence from other transitional societies tends to indicate that perpetrators are generally reluctant to come forward publicly to official processes. Whether or not ex-combatants are likely to co-operate in informal processes in Northern Ireland remains to be seen; but it is entirely possible that some might come forward for moral reasons, or to "get

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66 Patricia Lundy, "Can the Past Be Policed? Lessons From the Historical Enquiries Team Northern Ireland," vol. 11, *Law and Social Challenges*, 2009, pp. 109-171: http://ssrn.com/abstract=1425445.

67 Patricia Lundy & Mark McGovern, "Attitudes Towards a Truth Commission for Northern Ireland", A research report submitted to the Northern Ireland Community Relations Council based on research conducted as part of the Northern Ireland Life and Times Survey, 2006, p. 6, NILT survey update at http://www.ark.ac.uk/publications/updates/update46.pdf.

things off their chest". Moreover, there are examples of informal processes securing a "measure of resolution" for families in Northern Ireland. These include the Ardoyne Commemoration Project (ACP)[68] and the Independent Commission for the Location of Victims (ICLV).[69] Informal processes are already taking place on the ground within republican/nationalist and loyalist/unionist communities, but these initiatives are unstructured and un-co-ordinated. In a number of cases ex-combatants, including a small number of ex-security forces, have co-operated with informal processes.[70] In comparison to other post-conflict transitions, in Northern Ireland ex-combatants are to the forefront in leading discussions on the issue of "truth" within their own communities. There are international examples of informal processes achieving a "measure of success"; in El Salvador a number of senior-level members of the security forces were willing to meet quietly and confidentially with the commission to provide critical inside information – sometimes agreeing only to meet with the commission outside the country.[71] It is fully acknowledged that evidence received in secret through informal processes runs a far greater risk of being viewed as less trustworthy than those disclosed through official judicial means. It is also true historical memory has weaknesses. It can be unreliable, subjective and partial and there are likely to be competing "truth" claims. Despite these caveats, it is a valuable source that has played a significant role in most truth commissions internationally. Acceptance of such testimony would undoubtedly require achieving trust and a significant leap of faith for some victims on all sides of the conflict to accept the authenticity or truthfulness of claims being made. This goes to the heart of "truth" recovery claims; that creating the space for testimony and the recovery of "truth" can in itself help build trust (obviously this will hinge on validity). This article argues that the incentive of a protected statement and informal processes could open up a "space" (or create the conditions), which would enable new possibilities in

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68 The Ardoyne Commemoration Project (ACP) was a community-based "truth" recovery process that resulted in the publication *Ardoyne: The Untold Truth*, Beyond the Pale, Belfast, 2002; See, Patricia Lundy & Mark McGovern, "*Community, "Truth-telling', and Conflict Resolution"*, 2005, available to download at http://cain.ulst.ac.uk/issues/victims/ardoyne/lundymcgovern05.htm.

69 The ICRV has employed informal processes with a "measure of success'; Interview with the Senior Investigating Officer, ICRV, September 2009, Belfast.

70 There is a very small number of former security force personnel turned "whistle blowers" and others co-operating informally in past-focused investigations. In addition to the "successes" of the ACP and ICRV, this information is based on interviews and "conversations" with activists working in this field.

71 Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, Routledge, London, 2002, p. 39.

seeking answers to questions of importance to families' and society. The integrity of this process, and in particular the conduits, is imperative. Assurances of confidentiality are crucial and must be adhered to.

A number of other proposed procedures have generated considerable criticism, particularly from lawyers, sections of the human rights community and others with regards to Strand 4 and thematic investigations. Thematic investigations are about institutional responsibility and as such offer a form of accountability. Much of the Legacy Commission's deliberations would take place behind closed doors (incidentally, this also pertains to HET procedures). The closed nature of the thematic investigations raises issues of lack of transparency and the public interest aspect of information recovery; it should not be just for the benefit of families but also to meet societal needs. For these reasons it is argued that, there should be public hearings for thematic examinations. This sentiment appears to correspond with public opinion. The NILT survey found that there was overwhelming consensus in favour of the idea that if a truth commission was set up it should be held in public (82%) and have the power to compel people to appear (77%).[72] Indeed, in spite of earlier comments about the drawbacks of selective memory, it could be argued that the power to compel witnesses should be available to the Thematic Unit. In this instance the symbolic value is important. The lack of transparency arising out of the closed nature of the process is reinforced by the proposal not to allow cross-examination by anyone other than the Commission. This has alarmed members of the legal profession in particular. As one lawyer put it, "if you're not able to use the tools of the trade, *the lawyer's trade*, to seek the truth and to challenge versions of events, then why pretend that the Legacy Commission is a proper information recovery process, because it isn't."[73] All parties must have the same legal representation to ensure there is a level playing field. That is, the principle of equality of arms must apply. Research has shown that the HET process and the quality and depth of reports (RSR) improved when NGOs or other representatives with experience in casework assisted families.[74] It would

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[72] Patricia Lundy & Mark McGovern, "Attitudes Towards a Truth Commission for Northern Ireland", A research report submitted to the Northern Ireland Community Relations Council based on research conducted as part of the Northern Ireland Life and Times Survey, 2006, p.60-63, NILT survey update at http://www.ark.ac.uk/publications/updates/update46.pdf.

[73] Peter Madden, "What powers will the Legacy Commission need in order to get to the heart of the issues?' Panel 3, Reflecting on the Report of the Consultative Group on the Past, Seminar 14 & 15 May 2009, Seminar Report, produced by CAJ, at 20-21, available at http://www.caj.org.uk/news/2009/06/seminar_reflecting_on_the_report_of_the_consultative_group_of_the_past.hp.

[74] Patricia Lundy, "Can the Past Be Policed? Lessons From the Historical Enquiries Team Northern Ireland," vol. 11, *Law and Social Challenges*, 2009, pp. 109-171, http://ssrn.com/abstract=1425445.

be beneficial to include a role for victims and their representatives to ask questions in any "truth" recovery process in Northern Ireland.

The Commission discretion over the decision about how much information can be disclosed to families or made public is another issue of concern. The Group's Report discusses possible reasons why the Commission might withhold information from families and society generally. In addition to obligations to protect life it lists, "the interests of national security" and "the objective of promoting reconciliation".[75] This is highly problematic; particularly the notion that information disclosure should be withheld on the basis of "reconciliation". The aim should be maximum disclosure except in exceptional and clearly defined circumstances, and not partial disclosure.

Legitimacy and Independence

The independence of the Legacy Commission is vital to its success and will determine whether key stakeholders will give support to the process and participate. The Consultative Group proposed that the Commission should be independent and the Chair should be an international of standing.[76] There are clearly defined core principles for establishing a truth commission set out in the UN Rule of Law Tools for Post-Conflict Societies, and operational independence is a fundamental requirement. "The legitimacy and public confidence that are essential for a successful truth commission process depend on the commission's ability to carry out its work without political interference."[77] In Northern Ireland there appears to be almost universal distrust of all the organisations, parties and agencies that were perceived as having any involvement in the conflict, to run a truth recovery process. This was reflected in the NILT survey; the only statistic that lifted the all-pervading sense of suspicion was that, 46.6% people felt that an international organisation like the UN should be trusted to run a truth commission.[78]

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[75] "Report of the Consultative Group on the Past", Consultative Group on the Past (CGP), *Belfast, 2009*, p. 151, http://www.cgpni.org/fs/doc/Consultative%20Group%20on%20the%20Past%20Full%20Report.pdf.

[76] Ibid, p. 136.

[77] "Rule-of-Law Tools for Post-Conflict States: Truth Commissions", United Nations, High Commissioner for Human Rights , *2006 [HR/PUB/06/1],* p. 6.

[78] The interviewees were asked whom they did not trust to run a truth commission; the list of groups included; the British government (91.%), Irish governments (97.1%), the Northern Ireland Assembly (89.2%), republican and loyalist organizations (99.4%), judges (95.1%), churches (87.8%), international organizations like the UN (46.6%). See, Patricia Lundy & Mark McGovern, "Attitudes Towards a Truth Commission for Northern Ireland", 2006, p.45-52, update at http://www.ark.ac.uk/publications/updates/update46.pdf.

While all three Commissioners should be independent, they do not necessarily need to be internationals. It is crucial to the Commission's success that Commissioners have the confidence of all sections of society and have sufficient personal authority to "open doors" and accomplish the task. There is a pool of suitably qualified people of status in Northern Ireland that would bring local knowledge, expertise and experience to the role of Commissioner. The process of selecting and appointing Commissioners is crucial. More than any other factor the Commission will be defined by who its members are. The selection process should be independent of political interference, transparent, and involve consultation with civil society. A person (or persons) of international standing could assist in the selection of Commissioners; or in drawing up a list of recommended national and international commissioners that could be used in an open selection process. In Sierra Leone the UN High Commissioner for human rights at the time, Mary Robinson, assisted in such a process.[79] There are examples from other countries of creative ways to do this. A person of international standing could be appointed to act as an Independent Interim Oversight Commissioner to take the Consultative Group's proposals forward. If an Interim Commissioner were to be appointed he/she could select an independent multidisciplinary team to advise and assist in defining the terms of reference, the selection process of Commissioners and other matters. This might help alleviate concern in some sections of the community that the British government will determine the Commissioners and the terms of reference. The formation of a Commission selected through an independent process will build greater public confidence and create a sense of legitimacy in the process from the outset.

However, independence goes much deeper than the appointment of commissioners. Staffing and the secretariat of the Legacy Commission are equally fundamental to the integrity of the process; this was not addressed in the Consultative Group's Report. It is imperative that the Review and Investigation Unit is demonstrably independent. If independence is compromised this has the potential to undermine the other consecutive stages of information recovery and thematic investigation and leave it open to challenge. The lack of independence of the HET has led to criticism of staffing arrangements, the role of gatekeepers, influence of "RUC corporate memory" and "cross-contamination" of organisational linkages.[80] Consequently it has not managed to build cross-community trust and support to the degree anticipated. Sections within the mainly

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[79] Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, Routledge, London, 2002, p. 216-17.

[80] Patricia Lundy, "Can the Past Be Policed? Lessons From the Historical Enquiries Team Northern Ireland," vol. 11, *Law and Social Challenges*, 2009, p. 138-50, update at http://www.ark.ac.uk/publications/updates/update46.pdf.

Catholic/Nationalist community, continue to mistrust the process and question its independence to investigate sensitive issues that may touch upon the police themselves. In the absence of a viable alternative some non-aligned NGOs have taken a pragmatic approach and engage with the HET on behalf of "clients".[81]

It was proposed that the Commission would directly recruit its own staff for the Review and Investigation Unit, "which would need to combine both police and administrative expertise'.[82] This article argues that the Review and Investigation Unit should not be staffed solely by police personnel. A multidisciplinary team is more appropriate and in keeping with international transitional justice practice. It is accepted that police have particular investigative skills and expertise; however this is not the sole preserve of policing, other professionals have invaluable local knowledge and ability to investigate historical cases, represent and support victims. As noted earlier, the re-examination of historical cases and answering families' questions does not demand the same approach or methods as a "live" police murder investigation. A Review and Investigation Unit could include police from outside Northern Ireland, preferably with experience and knowledge of the conflict. This should be balanced against a more central and active role of non-state actors. Such a structure might include representatives from Human Rights Organisations, NGOs, research organisations and the legal profession. Internationally there are many examples of non-state actors assisting truth commissions extensively in key aspects of their work, including investigations. Issues of security, confidentiality and privacy would need to be carefully considered. However, this should not be insurmountable. Previous truth commissions in other countries have successfully dealt with this challenge and managed to achieve the right balance. There are a number of civilian staffed and multi-disciplinary investigation models including the various Ombudsmen and public inquiries in Northern Ireland and Great Britain that draw upon employees from a variety of backgrounds. Numerous tasks in the HET do not require a policing background. Non-state actors and organisations could carry out such functions equally well and act in an advisory role. Notwithstanding earlier comments about the importance of local input, internationals (not necessarily high profile figures) could help assist with the legacy of the past in Northern Ireland in the following ways. Suitably skilled internationals could be employed as investigators, database specialists, analysts, and policy-advisers, as well as in a range of other positions. This is common practice

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[81] Ibid; Patricia Lundy, "Exploring Home-Grown Transitional Justice and Its Dilemmas: A Case Study of the Historical Enquiries Team, Northern Ireland", *International Journal of Transitional Justice*, vol.3, no.3, 2009, pp.321-340, http://ssrn.com/abstract=1425445.

[82] "Report of the Consultative Group on the Past", Consultative Group on the Past (CGP), *Belfast, 2009*, p. 144, http://www.cgpni.org/fs/doc/Consultative%20Group%20on%20the%20Past%20Full%20Report.pdf.

internationally. It is suggested that internationals would be part of a multi-disciplinary team, a "mixed" model, of locals, UK and international staff that would complement each other. This would provide the opportunity for skills sharing and knowledge transfer and minimise the risk of over dependence on a few key individuals with specialist knowledge and expertise.

The role of the Public Prosecution Service (PPS) in any likely Commission should be addressed. According to some sections of Northern Ireland society, the PPS (formally Director of Public Prosecution) played a non-neutral role in the conflict; its decisions whether to prosecute were not transparent and it was an unaccountable organisation. Indeed, it has been argued that the PPS itself should be the focus of examination under any future truth commission; and that an independent PPS should be set up to run alongside the Commission to ensure the independence and integrity of the process. The Consultative Group stated that to compensate for this, the PPS should include guidance to the Legacy Commission based on established criteria whether a prosecution would be in the public interest.

Part 5: Responses to the CGP Proposals

Trust and Consensus

The Northern Ireland Affairs Committee (NIAC) concluded that there is insufficient "cross-community consensus" at present for the Consultative Group's proposal.[83] According to this perspective, it would "do more harm than good" and open up further divisions. In the NIAC's view, victims' interests would be better served by providing practical services and storytelling could offer a more suitable and cathartic opportunity to come to terms with the past. This analysis seems to be based on the assumption that storytelling is non-contentious, and not as some have argued, linked to victims' agency and the struggle for justice.[84] The stipulation for cross-community consensus raises a number of issues. In Northern Ireland there appears to be a polarization of views on "truth" recovery generally along traditional community and political lines. There is a perception that the Protestant/Unionist/Loyalist communities are unwilling to engage with the past and that "truth" recovery is mistrusted as part of a "republican agenda" or "Trojan

[83] The Northern Ireland Affairs Select Committee is a select committee of the House of Commons in the Parliamnet of the UK. The NIAC has been criticized by some as being a "cold house" for those who do not share a particular Unionist perspective on the past.

[84] Claire Hackett & Bill Rolston, **"**The burden of memory: Victims, storytelling and resistance in Northern Ireland", *Memory Studies*, vol.2, no.3, pp.355-376; Patricia Lundy & Mark McGovern, "*Community, "Truth-telling', and Conflict Resolution"*, 2005, available to download at http://cain.ulst.ac.uk/issues/victims/ardoyne/lundymcgovern05.htm.

horse".[85] However, Loyalist and Unionist families engage with the HET process in order to find answers to unresolved questions about the death of their loved one. The findings of the NILT survey tends to suggest that views are not as polarized as is sometimes thought. When asked whether they thought a truth commission was important or very important for the future of Northern Ireland more people agreed (50%) than disagreed (28%). Catholics were more inclined to favour a truth commission (59%) than Protestants (43%), but even in the latter case this represented more people than those that disagreed (33%).[86] The survey indicates that members of the Unionist community might like to find out the "truth" about the past, but they do not regard it as a priority nor are they convinced that a truth commission is the best way of getting it. Nonetheless, there is deep-seated antagonism towards the idea of "truth" recovery within sections of Unionism. There is particular hostility towards public inquiries on the grounds of cost and their state-centricity. Certainly the strongest criticisms has come from former members of the security forces and their families who believe they have been the brunt of investigations into the past; and feel let down by a government that does not appreciate the sacrifices they have made holding the line during the conflict. Equally contentious is the demands on the PSNI to service historic investigations that diverts scarce resources and compromises ability to effectively police the present.[87]

Who are the victims?

The initial public reaction to the Report concentrated on the widely criticised "recognition payment", overshadowing the other 30 recommendations, and dominated the early days of the debate. Such was the hostility, mainly from sections within the Unionist community, that shortly after the Report was published the Secretary of State Shaun Woodward announced that the "recognition payment" would not be implemented.[88] The Unionist community

[85] EPIC, Truth Recovery: A Contribution from Within Loyalism, 2004; Patricia Lundy & Mark McGovern, "A Trojan Horse? Unionism, Trust and Truth-Telling in Northern Ireland", International Journal of Transitional Justice, vol.2, no.1, 2008.

[86] Patricia Lundy & Mark McGovern, "Attitudes Towards a Truth Commission for Northern Ireland", 2006. Interestingly, 83% felt that such a mechanism would "not necessarily get to the truth', and 81% felt there were more important things to spend money on, and (65%) agreed there were better ways to deal with the past, update at http://www.ark.ac.uk/publications/updates/update46.pdf.

[87] House of Commons, Northern Ireland Affairs Committee, "Policing and Criminal Justice in Northern Ireland: the Cost of Policing the Past in Northern Ireland: Government Response to Committee's Third Report of Session 2007-08", October 2008, HC 1084.

[88] BBC News, "Woodward rules out Troubles cash", 25 February 2009, available at: http://news.bbc.co.uk/1/hi/northern_ireland/7909625.stm, accessed 15 December 2009.

were angered at the moral equivalence being made between victim and perpetrator and challenged the Group's non-hierarchical definition of victim.[89] The level of negative public reaction to the proposed "recognition payment" by some victims and politicians reflects the highly contentious nature of who is a victim and in many respects underpins perceptions of the conflict. Indeed, the very concept of victim can prove an obstacle to dialogue. However the "recognition payment" was viewed by others as a bold and courageous decision by the Consultative Group.

Principled or Pragmatic Approach?

The response from the human rights community in Northern Ireland to the Consultative Group's proposals has been mixed. Human rights actors and others have applied, to varying degrees, a series of legal and human rights benchmarks against which they have assessed the proposed Legacy Commission. These benchmarks have included ECHR obligations, customary law, international customary law and international treaty law, and a number of UN soft law standards and principles.[90] While some see merit in the Consultative Group's proposals, they are critical of its "minimalist" approach to human rights and the primacy given to compliance with ECHR law to the exclusion of other legal standards that pertain.[91] According to one human rights lawyer, "there are very significant deficits in the way in which it frames and understands the relevant international legal universe that applies to the questions it has set itself."[92] Lawyers in particular have been scathing of the legal framework adopted by the Consultative Group.[93] This overly legalised approach to dealing with the past

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[89] The CGP used the legal definition of a victim contained within the Victims and Survivors (NI) Order 2006. This definition of victim focuses on those left behind rather than those who died.

[90] Fionnuala Ni Aolain, "What is required to make the Legacy Commission compliant with human rights obligations?" Panel 2, *Reflecting on the Report of the Consultative Group on the Past*, Seminar 14 & 15 May 2009, Seminar Report, produced by CAJ, at 16-17, available at http://www.caj.org.uk/news/2009/06/seminar_reflecting_on_the_report_of_the_consultative_group_of_the_past.php.

[91] Committee on the Administration of Justice (CAJ), Submission by CAJ to the Government Consultation on: "Dealing With the Past in Northern Ireland: The Consultative Group on the Past", September 2009, p. 4, http://www.caj.org.uk/publications/most_recent_publications.php.

[92] Fionnuala Ni Aolain, "What is required to make the Legacy Commission compliant with human rights obligations?" Panel 2, *Reflecting on the Report of the Consultative Group on the Past*, Seminar 14 & 15 May 2009, Seminar Report, produced by CAJ, at 16-17, available at http://www.caj.org.uk/news/2009/06/seminar_reflecting_on_the_report_of_the_consultative_group_of_the_past.php.

[93] Frank Millar, "QC stresses need for legal protection for Troubles commission witnesses". Irish Times, Feb 25, 2009.

has given rise to a critique of "legalism",[94] as well as calls for a more "holistic legal model" employing social science methodologies.[95] While it is laudable to strive for the highest human rights standards attainable when examined through a non-legal lens, the benchmarks appear at times to evoke an overly legalistic approach to the human rights requirements that should underpin a truth commission. This article in no way seeks to question the centrality of long fought for human rights, and concurs that there are standards and obligations that cannot be set aside. What is suggested is that a balance needs to be struck. In practice, a truth commission has to have a realistic chance of gaining co-operation and the participation of all parties to the conflict. What is the point in designing a gold standard human rights mechanism that nobody participates in? As Diane Orentlicher notes, decisions must be made in the face of real-world dilemmas of transitional justice.[96]

Part 6: Is the Proposed Legacy Commission an Improvement on Current Arrangements?

This article set out to examine whether or not the proposed Legacy Commission might be an improvement on aspects of the current arrangements in Northern Ireland. Restricting my analysis to a comparison with the HET, the latter has strengths and limitations as discussed above and detailed elsewhere.[97] There are a number of very skilled investigators and highly professional members of the HET who have clearly built good relations with families and NGOs. There are examples of good practice including a family centred approach and a template for historical cases appears to have been recently achieved. Undoubtedly some families are satisfied with the process they have received, others are not. There are however numerous structural limitations.[98] The HET has acknowledged that mistakes have been made and this is reflected in the decision to set up a new Transitional Resolution Team to look afresh and bring up to standard some 85 previously completed Review Summary Reports.

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[94] Kieran McEvoy, "Letting Go of Legalism: Developing a "Thicker' Version of Transitional Justice," *Journal of Law and Society*, vol.34, 2007, pp. 411-440.

[95] Colm Campbell & Catherine Turner, "Utopia and the Doubters: Truth, Transition and the Law," *Legal Studies*, vol. 28, no.3, 2008, pp. 374-95.

[96] Diane. F. Orentlicher, "Settling Accounts Revisited: Reconciling Global Norms with Local Agency," *International Journal of Transitional Justice*, vol.1, 2007, p. 21.

[97] Patricia Lundy, "Can the Past Be Policed? Lessons From the Historical Enquiries Team Northern Ireland," vol. 11, *Law and Social Challenges*, 2009, pp. 109-171, http://ssrn.com/abstract=1425445.

[98] Ibid, p.33.

In addition, 157 Royal Military Police cases ("RMP cases") have been "recalled" and are currently being re-examined under a revised process. While this clearly indicates willingness to address and "put things right"; these difficulties have not been made public in the majority of cases. Assessment of a significant sample of Review Summary Reports carried out by the author indicates that only in the more recent reports do the HET draw conclusions and offer deeper analysis (this relates to the template). Analysis and drawing conclusions are surely the added value in the process; otherwise it is simply a regurgitation of material that is already available.

The three Legacy Commission Units will devote time, expertise and resources to the separate but intimately connected tasks of investigation, information recovery and thematic issues. The HET has struggled to manage these "competing" demands since its inception.[99] This article argues that none of the current arrangements are equipped, and have a remit, to deal comprehensively with thematic issues or macro-analysis.[100] Requests from families and their representatives for thematic investigations and a series of complex linked cases created a "bottleneck" in the HET system. In addition, these cases took the lion's share of resources and resulted in a general backlog of cases. The Operation Ballast cases are a case in point.[101] Thematic investigations are much broader than simply analysing patterns related to deaths. As the UN has stated, "the question *why* certain events were allowed to happen can be as important as explaining *what* happened.'[102] This requires a different skill set outside the police experience and a more social scientific approach based on statistical analysis that can provide a broader overarching picture and explanation about the causes, trends and nature

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[99] Ibid, p.33.

[100] The HET has carried out thematic examination into a series of linked cases on the insistence of families' and their representatives. These cases are monitored by the ECHR with regards to Article 2 obligations.

[101] Interestingly, the new Chief Constable Matt Baggott made a decision in December 2009 to remove Operation Ballast cases from the HET and place directly under PSNI serious crimes branch. See, "PSNI Pledge Over Operation Ballast Investigation", http://news.bbc.co.uk/1/hi/northern_ireland/8420137.stm, accessed Dec 19, 2009. At the time of writing, a senior loyalist has strongly criticised historic investigations such as Operation Ballast. He has claimed that an unwritten "amnesty"(for state and non-state actors) was part of the Good Friday Agreement; and continuing investigations and pursuit of prosecutions into events that predate that agreement could destabilise the loyalist community, see "Mo Mowlan loyalist terror amnesty claim", Tuesday 22 March 2010, http://www.belfasttelegraph.co.uk/news/local-national/mo-mowlam-loyalist-terror-amnesty-claim-14737136.html, accessed March 23, 2010.

[102] "Rule-of-Law Tools for Post-Conflict States: Truth Commissions", United Nations, High Commissioner for Human Rights, *2006 [HR/PUB/06/],*p.2.

of the conflict. In deeply divided societies where policing itself has been contested, attempting to police the past is highly problematic.

A final point under this section and central to this paper, there needs to be more informed analysis on whether the Legacy Commission would be an improvement on what is currently on offer. Essentially what this means is a stock-take and systematic evaluation of existing mechanisms. This has not happened to date. The same benchmarks used to assess the Legacy Commission should be applied to the HET (and other existing mechanisms). What, appears to have happened is a "check list approach" and/or "tick box" assessment of current arrangements, rather than empirical research. Many of the criticisms of the proposed Legacy Commission could equally apply to the HET and other aspects of the "package of measures". There are many lessons that have been learned and this puts Northern Ireland in a very unique position. The challenge is to build on the learning and shape a new process that will address the needs of all victims in society equally.

Conclusion

The future of the proposed Legacy Commission remains undecided. This article has argued that it represents a genuine and imaginative contribution to finding a mechanism that could address more comprehensively the legacy of the conflict in Northern Ireland. The current piecemeal and fragmented strategy would be replaced by an integrated and holistic approach. Justice is a contentious issue in any analysis of transitional processes. The proposed Legacy Commission was designed to comply in the first instance with the demands for criminal justice to the highest evidential standards. In view of the unlikelihood of achieving prosecutions and convictions in the majority of cases in Northern Ireland, and a *de facto* amnesty, the proposed Legacy Commission could offer victims an alternative form of justice. Along with its strengths the proposed Legacy Commission has limitations; these are not insurmountable and could be attended to if the political will exist. This article posits the view that the existing measures, and principally the HET, while providing a "measure of resolution" for some families does not offer Northern Ireland a systematic and comprehensive exploration of the legacy of the past. The existing mechanisms are not designed or equipped to understand the extent and patterns of violations, their causes and consequences and analyse why things were allowed to happen. This is precisely what truth commissions' offer and it is probably what they do best.

Northern Ireland presents a valuable case study which can be used to explore how a settled democracy and relatively successful peace process has dealt with the legacy of its conflict. A prevailing view amongst policy-makers has been that the "time was not right" and "truth" recovery would have to be

preceded by political stability in the peace process, if it were ever to happen at all. In the twelve years since the signing of the Good Friday Agreement significant changes have transformed the political and social landscape in Northern Ireland; most, if not all, of the difficult issues have been resolved. However, the constant drip-feeding of contentious information about the past, or seeping out of "truth", has the potential to destabilize efforts to build public confidence in policing and the political institutions more generally. "Truth" recovery will continue unmanaged and without structures that would lend support. Dealing with the past comprehensively remains the last piece of the jigsaw and challenge to Northern Ireland's Peace Process.

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Rosalia de la Cruz Gitau[1]

" The Price of Peace, the Costs of War: Addressing Anti-Social Passions in Post-Conflict Liberia"[2]

ABSTRACT

The Truth and Reconciliation Commission of Liberia was established in 2005 with an ambitious mandate: to document the suffering of the victims of the 14-year conflict and recommend perpetrators with amnesty or prosecution. As the only venue charged with investigating the crimes committed during the war, the TRC-Liberia became the de facto tribunal for those crimes. Using the research she gathered whilst working at the Commission, the author examines the methods used by the Commission in achieving their mandate, ultimately questioning whether justice was ever achieved for the victims.

Key words: truth, reconciliation, Liberia

On 18 August 2003, The Comprehensive Peace Agreement was signed, bringing an end to Liberia's civil conflict.[3] An estimated 250,000 people were killed during the 24-year conflict, and approximately one million displaced.[4] The war has caused an incalculable amount of political, social, and economic damage to this

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[2] This paper in completion of a *Juris Doctorate* thesis at New York University, School of Law and does not represent the views of Transparency International or its affiliates.

[3] CPA a.k.a The Accra Accord.

[4] Approximately half-a-million Liberians were internally displaced (*see* Internal Displacement Monitoring, Center "Liberia: Focus for IDP Returnees Moves from Conflict to Development", Internet, http://www.internal-displacement.org/8025708F004CE90B/%28httpCountries%29/78D50A458CC54720802570A7004B5690?OpenDocument) and 400,000 were classified as refugees (*see* Unidentified Author, "Liberia Refugees Return Home, *The BBC*, 1 October 2004, at http://news.bbc.co.uk/2/hi/africa/3706268.stm.

fragile state nestled in an already unstable West African region.[5] As a signatory to the International Covenant on Civil and Political Rights, Liberia has an obligation to provide truth, justice, and reparation to its surviving citizenry. The obligation extends beyond international mores regarding the rights of the individual. As Kofi Annan noted in his a speech given on the Rwandan genocide, "…we have little hope of preventing genocide, or reassuring those who live in fear of its recurrence, if people who have committed this most heinous of crimes are left at large, and not held to account…".[6] That the instruments used to facilitate the states obligation — viz. truth, justice, and reparation- serve to preclude such impunity from occurring, demonstrate that conflict prevention is a major justification for the existence of such an obligation. If preventing future conflict in Liberia is at issue, there are significant theoretical and practical shortcomings in the post-conflict efforts currently underway in Liberia. As will be further elaborated, there exist certain anti-social passions that threaten to compromise social stability. Truth, justice, and reparation, respectively, address and can manage three particularly salient anti-social passions, namely shame, revenge, and envy. However, any attempt to use available instruments to address anti-social passions have been implicit at best. Should these instruments be operationalized to explicitly address anti-social passions, sustainable peace will be more accessible. However, conventional post-conflict mechanisms do not sufficiently fulfill the Government of Liberia's ("GoL") post-conflict obligation. The closest attempt to address emotive experiences of war is the establishment of a truth commission. However, as will be discussed, there are practical and theoretical limitations to such an institution in Liberia. Further impeding the fulfillment of the obligation – and arguably most troubling- is the limitation imposed by the peace bargain that produced the Truth and Reconciliation Commission in Liberia ("TRC-Liberia"). That the Liberian TRC is a product of a political bargain with dubious validity presents a sizeable obstacle to sustainable peace in Liberia and to other post-conflict societies with similar bargained-for agreements. I propose a radical departure from conventional approaches to peace, grounded in lessons from the Cold War. I include such an alternative less to advocate for this approach than to demonstrate the serious shortcomings of post-conflict efforts in Liberia, and similar situations the world over.

My paper will proceed as follows: first, I will discuss the phenomenology of anti-social passions-describing their relevance to truth, reparation, and justice, respectively, and their role in the Liberian conflict. Second, I will discuss the contractual shortcomings of peace agreements that ground the remedies of such theories. Third, I will discuss the shortcomings of the Liberian Peace

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[5] Liberia borders Sierra Leone, Cote d'Ivoire and Guinea (*see* CIA Factbook, "Liberia", Internet, https://www.cia.gov/library/publications/the-world-factbook/geos/li.html, 21/5/2010.

[6] Kofi Annan, "Action Plan to Prevent Genocide" Speech, commemorating the 10th anniversary of the 1994 Rwandan Genocide, Internet, http://www.preventgenocide.org/prevent/UNdocs/KofiAnnansActionPlantoPreventGenocide7Apr2004.htm, 7/4/2004.

Accord's legacy, namely the Truth and Reconciliation Commission, Liberia, and why it lacks the capacity to fulfill Liberia's state obligation.

The Phenomenology of Anti-Social Passions: Shame, Envy, and Revenge

To speak of anti-social passions, is to refer to those emotions that are incompatible with the peaceful coexistence of man in a civil society. By its terms alone — "anti-social" means that such emotions are contrary to society. Thomas Hobbes is popularized for his articulation of the hazardous conditions men find themselves in when they refuse to cooperate. He describes the natural condition as a state where man's life is "…poor, nasty, brutish and short" since advances in technology and science necessarily require cooperation, and men's natural state, to the contrary, is uncooperative.[7] For Hobbes to construct such a bleak state, he need only assume that all men have an interest in preserving their lives — and in the struggle to pursue this self-interest they distrust other men and hence cannot benefit from the fruits of cooperation.

Hobbes is not alone in warning of the dangers of the isolated man. His intellectual contemporary Jean-Jacques Rousseau paints a similarly discontent picture of man's condition before civil society. Although he believes that man's first condition is one of peace, Rousseau contends that scarcity ultimately occurs, forcing men to compete. This competition, again, breeds distrust where men necessarily conflict towards the pursuit of their self-preservation. Like Hobbes, Rousseau believes that cooperation is necessary in order to adapt to a condition of scarcity and allow all men to collectively have a better chance at survival. Naturally cooperation is wrought with problems of coordination (*i.e.* prison's dilemma) and free-riding, among other problems. Similar to Hobbes, Rousseau contends that in order to overcome such obstacles, men agree to contract away their capacity to act on their own volition to an outside authority. Once this agreement- *i.e.* the social contract — is made, any emotion or passion that threatens to weaken that bond is considered an anti-social passion; the behaviour that results from such passions run counter to social cooperation.

The list of anti-social passions to be discussed in this work are: shame, envy, and revenge. I choose these three emotions because the content of truth, reparations and justice respectively, have the capacity to mitigate shame, envy, and revenge, respectively. Furthermore, where allowed to occur, these passions are hazardous to social stability. Indeed, the catalysts and contents of the Liberian war are best characterized by shame, envy, and revenge. The Liberian conflict is characterized by the brutal mistreatment of civilians, the economic exploitation of the country's

[7] Thomas Hobbes, *The Leviathan*, Prometheus Books, Buffalo, 1988, p. 183.

leadership over the past nearly 200 years, and recurrent armed movements that capitalized on popular disillusion with the state. It is important that such anti-social passions are addressed and managed if sustainable peace is to be realized in Liberia.

Shame

Professor Halbertal distinguishes between two types of shame, which he calls Primary shame and Secondary shame.[8] Whereas for Primary shame an audience is constitutive to the sentiment, with Secondary shame, the audience can act as a trigger, although the audience is not necessary. Halbertal asserts that our self-identity relies on our capacity to conceal and control our self-presentation. One's capacity to conceal himself/herself allows for a differential allocation of one's interiorities in the social space around him/her. This allows for one to form different types of relationships (*i.e.* husband, friend, acquaintance, stranger). In cases of Primary shame, we experience a blow to our capacity to control our self-presentation. With Primary shame, it is not self-esteem that is harmed but rather one's very self. The audience exposes the individual, and this exposure compromises his/her control of self-presentation. Hence, our initial desire to disappear when we are experiencing shame. Note that the opposite of shame is intimacy (*i.e.* the voluntary exposure of self). Intimacy is the highest form of self-empowerment whereas shame is the damaging blow to self.

With a victim of violence, shame stems from the loss of one's ability to determine their presentation. There is a way in which one chooses to exhibit themselves and any other demonstration of that person by another prompts shame; the violation lies in another taking away the power of self-presentation. Truth can ameliorate shame if the truth that is sought after reveals this violation. In Liberia, the American Refugee Commission estimated in the summer of 2007 that approximately 90% of the female population experienced some form of sexual violation. The following is testimony from a female survivor taken from the TRC's archive.

> Testimony by: Ma Krubo Eyea
>
> *Source*: TRC Transcripts[9]
>
> Krubo Eyea said she witnessed the slaughter of about 21 civilians in the town of Salayea, Lofa County after they were pilled up in a house which was set ablaze by fighters of the now defunct National Patriotic Front of Liberia (NPFL) in 1990.

[8] Professor Moshe Halbertal is a philosophy professor at NYU School of Law. References to his material in this text were extracted from a seminar he co-taught (with Professor Stephen Holmes) in the Fall of 2007 at NYU School of Law, entitled "Anti-Social Passions".

[9] Truth and Reconciliation Commission, Liberia- Testimony Transcripts, Internet, https://www.trcofliberia.org/hearings/transcripts/transcripts, 21/5/2010.

> "One morning when we woke up we saw the town surrounded by NPFL rebels who claimed to be searching for government troops known during the war as "Doe soldiers", but there was none to be found," she explained.
>
> The witness who has scars from fire burn all over her body explained that she was abandoned by her husband because another rebel commander, one Mohammed of ULIMO, made her a sex slave after which her husband, one Forkpa, contracted gonorrhea from her. The victim said she was tortured by fighters of ULIMO and the NPFL during the war.[10]

In a society that values chastity and/or fidelity — such as the marital relationship — removing a woman's ability to present herself as chaste is the violation that prompts shame in the victim, and her subsequent exclusion from the revered social relationship that is marriage. The shame is a function of what society deems as acceptable, and the victim being unable to present herself in such a way due to the intervention of the perpetrator. Revealing the truth about the violation allows the victim to demonstrate that it is not her own promiscuity that has compromised her chastity but rather a forced act (*i.e.* the rape). The shame associated with the rape is mitigated once the society knows the truth about the circumstances and the victim is able to reassert an acceptable representation of herself towards a knowing society.

Should truth successfully address shame, it must do so in a way that addresses the violation as described, and not simply lay down a set of facts. Establishing the truth in accordance with a state's obligation only requires that a set of facts be established about the violations of human rights that occurred in the past.[11] However, restoring the victim's ability to present her desired place in society is fundamental to alleviating the shame associated with the violation. Recall that to live a collectively good life, cooperation among the membership of society is necessary. Shame makes its victims want to disappear, which runs counter to living in a collective and working towards the collective benefit. If 90% of the female population in Liberia felt compelled to disappear from the shame of their experiences, nearly half of the country's population would be absent from those productive tasks which require cooperation. It is hence necessary to reintegrate such a population within society; this requires more than establishing a roster of facts — the violation that spurs shame (as articulated above) needs to be specifically addressed.

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[10] ULIMO stands for the United Liberation Movement for Liberia and NPFL stands for National Patriotic Front of Liberia.

[11] Amnesty International, "Truth, Justice, and Reparation: Establishing an Effective Truth Commission", Amnesty International, London, 11 June 2007, Internet, http://asiapacific.amnesty.org/library/Index/ENGPOL300092007?open&of=ENG-382, 22/5/2010, p. 3.

Envy

In her article, "Jealousy, Attention, and Loss", Leila Tov-Ruach explores the content of jealousy and envy. Tov-Ruach claims that jealousy requires "that the loss be experienced as someone else's gain: that there is a direct transfer".[12] There is similarly a strong visualization component to the jealous agent, where he fantasizes about seizing that which he has lost. Whether he actually acts to reclaim his lost object depends on how the jealous person gauges his own capacity to enact the fantasy. As Tov-Ruach notes, the jealous individual necessarily doubts his own capacity to enact his fantasy — which can subsequently hinder his capacity to act. Tov-Ruach asserts that "a person is jealous only when the perceived deprivation makes him doubt himself, forces him to reassess his style or ability or power in a way that generates obsessive thought of the rival relation".[13] As a result of his self-doubt, an agent can either suppress the jealousy or sublimate to it. The latter is the motor for action. In moderate doses, sublimation can lead to healthy competition towards the object of obsession — which will ultimately make the jealous individual more attractive.[14] However, when taken to the extreme, sublimation could lead to a desire to destroy the object.

The civilian population in Liberia suffered greatly at the hands of a political leadership that has been exploiting the majority since the inception of the state. The financial exploitation dates back to the founding of the colony, when former American slaves first instituted the socio-economic order in their favour and to native people's detriment. It was not until 1946 that indigenous persons were allowed to vote.[15] Indeed, this socio-economic order has persisted to this day where the less than 2.5% of Americo-Liberians (as the former slaves are called) own the majority of the country's wealth.[16] Successive presidents have only sought to reinforce their claims to public coffers over the public good.

Tolbert, famously instigated his own demise by trying to increase the price of rice. A rice plantation owner, he provoked his own downfall in 1979 by announcing an increase in the Liberian food staple that prompted a public outcry. Demonstrations followed, then riots. Unable to curb the popular

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12 Leila Tov-Ruach (pseudonym for Amelie Oksenberg Rorty, "Jealousy, Attention, and Loss", in: Amelie Oksebger Rorty (ed.), *Explaining Emotions* University of California Press, Los Angeles, 1980, pp. 223-50 (p. 466).

13 Ibid., 467.

14 Ibid., 470.

15 US Library of Congress, "History of Liberia: A Timeline", Internet, http://lcweb2.loc.gov/ammem/gmdhtml/libhtml/liberia.html, 21/5/2010.

16 Tulane University, "Liberia Country Profile", Internet,http://www.tulane.edu/~internut/Countries/Liberia/liberiaxx.html, 21/5/2010.

resentment, Tolbert buckled and rescinded the price hike, but not before he exposed himself as vulnerable to public pressure- a weakness no previous regime had demonstrated.[17] This facilitated the successive leadership of Samuel Doe, a murderous leader who stifled civil liberties and economic growth in the country during his ten-year reign. But not before profiting an indeterminate but sizeable fortune before he was murdered. Doe was followed by Charles Taylor, the warlord-statesman who banked on a disillusioned electorate to usher in his leadership- and won. Garnering 73% of a national vote, deemed free and fair by international monitors, Charles Taylor stole an estimated $368 million whilst in his short tenure in office. The thieving manner of Liberia's leadership is well-known in the country — and conspicuous consumption does little to assuage virulent envy on behalf of a population, that lives in a resource-rich country but lives on less than a dollar a day.[18] Reparations function explicitly to counter the desire for the exploited public to recapture ill-gotten gains in a socially destabilizing way.

In the Liberian context, those who are most responsible for the travesties committed during the war have not been held to account for their crimes. The majority of the population subsists on less than a dollar a day whilst the elite who facilitated and carried out the repression during the conflict are quite literally driving through the capital city in expensive cars and living in gated manors. Such impunity is more than tolerated, it was intended, as will be further discussed when examining the CPA in greater detail. Charles Taylor still owns a controlling share of the country's largest mobile service provider Lonestar and his right-hand man in business, Benoni Urey, owns a sprawling country-club estate just outside of Monrovia.[19] That perpetrators have gained to the detriment of the masses and are now flaunting this wealth in the face of those from whom said wealth was stolen is conducive to fostering a dangerous degree of jealousy. Measures need to be instituted to rectify this economic imbalance.

Reparations entail "providing full and effective reparation to the victims and their families, in its five forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition…".[20] Giving victims of the war significant financial compensation would assuage some of the latent envy that

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[17] Global Security Center, "The Rice Riots", Internet, http://www.globalsecurity.org/military/library/report/1985/liberia_1_riceriots.htm, 21/5/2010.

[18] UNICEF, "Addressing Severe Malnutrition in Liberia", Internet,www.unicef.org/har08/files/har08_Liberia_featurestory.pdf, 21/5/2010, p.1.

[19] Coalition for International Justice, "Following Taylor' Money: A Path of War and Destruction", Coalition for International Justice, May 2005, at allafrica.com/.../00010642: e0bc9e66f665f2c7b2fb8a942ff328ea.pdf.

[20] Amnesty International, p. 4.

they likely feel towards the elites who explicitly stole from them over the last two decades. The visualization component stressed by Tov-Ruach would decrease if the relative visual disparity is lessened. That is, the fantasy of reclaiming what the jealous agent has lost would be satisfied (if what the agent has lost is significant financial potential) were he able to see his financial status significantly improve. The healthy manifestation of jealousy that Tov-Ruach describes, namely, competition, is unlikely to occur in Liberia given the lack of access to socially mobilizing factors, such as education.[21] Where competition is impossible for the victim, Tov-Ruach's unhealthy sublimation is the alternative-where the victim seeks to destroy the object of jealousy. Such a cycle of violence characterizes the history of conflict in Liberia: where exploitative leaders foster discontent among the population, who pave the way for political opportunists, who, in turn, shed their populist rhetoric once in office and behave indistinguishably from the old guard. Sustainable peace in Liberia depends on satiating the dangerous envy to which Tov-Ruach refers.

Revenge

In his discourse on revenge, Professor Halbertal describes this passion as an attempt to "restore weight". When a person is wrongly victimized, he experiences a sense of weightlessness. Restoring this weight requires that the victim be able to exact an identical wrong to the perpetrator and that the perpetrator know that the act was committed by the victim. However, the victim's capacity to accomplish this within a legal order is limited. Removing the capacity for an agent to directly confront his aggressor is the state.

In is book, *Eye for an Eye*, Miller describes the negative implications of permitting revenge in the state. His detailed discussion of talionic societies-where the price of a crime is determined by the victim — illustrates both the benefits of such a system relative to contemporary systems, and the social and economic costs of imposing such an order. The benefits of such a system would be the high value that individuals would place on injuries to others and the heightened standard of care they would adopt when interacting in such a state. However, the costs associated in a system where the judge, the jury and the prosecutor are but one person can include social chaos or stunted progress. If everyone were to set the price of a limb at a subjectively determined cost, not only would punishment be unpredictable but limitless as well. Incentives to engage in any activity that carries a remote risk of injury would be demonstrably lessened. Social productivity would be stymied as a result. Similarly, there are pragmatic concerns with permitting such property-rule protection.

[21] 58% of the country is literate (*see* CIA Factbook, Liberia).

Misidentification of the perpetrator, or punishment in the absence of perfect identity would spur an inescapable cycle of revenge to the detriment of social cohesion and productivity. However, despite the costs of a revenge order, we see acts of revenge nevertheless occur within legal orders. This implies that legal orders do not sufficiently satiate this need. The following is testimony from a member of a rebel group in Liberia; Mr. Blayee describes what motivated him to commit the types of crimes he confesses to conducting:

> Milton Blayee, a.k.a. General Butt Naked
>
> *Source*: Mike Pflanz[22]
>
> The feared rebel commander earned his nom de guerre for charging into battle dressed only in his boots, at the head of a gang of fighters known as the Butt Naked Battalion.
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> The nude gunmen became known for terrorising villagers and sacrificing children whose hearts they would eat before going into battle during Liberia's 14-year on-off civil war which ended in 2003. Mr Blayee, 37, told the truth commission that he was initiated into the occult priesthood of the Krahn tribe at the age of 11, when he was first exposed to killing. After the brutal videotaped torture and murder by rebels of Liberia's Krahn president, Samuel K. Doe in 1990, Mr Blayee took up arms in revenge on behalf of his tribe.
>
> "The political leaders and myself came to a term that if they wanted me to fight they should allow me make ... human sacrifices [sic]…" he said
>
> The sacrifices included "the killing of an innocent child and plugging out the heart which was divided into pieces for us to eat. More than 20,000 people fell victim (to me and my men). They were killed."

In *Eye for an Eye*, Miller opens his discussion of revenge by describing the scales of justice. Much like Halbertal's description of the restoration of balance function of revenge, justice similarly assumes that a balance exists and that violations distort such a balance. Calls for justice and calls for revenge hence are calls for the same end — namely to restore an expected order of balance. The state's obligation to exact justice calls for "…investigating past violations and…prosecute perpetrators [subject to the evidence]…".[23] Such a movement towards justice ignores the identity requirement described above- namely, that the perpetrator experiences a similar harm as he/she exacted on the victim, and that the victim exact the punishment. Although the end of the state's obligation to

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[22] Mike Pflanz, "General Buttnaked Confesses to Nude Killings", *The Telegraph*, 22 Jan 2008 at http://www.telegraph.co.uk/news/worldnews/1576088/Gen-Butt-Naked-confesses-to-nude-killings.html.

[23] Amnesty International, p. 3.

promote justice is the same as that of revenge, the means are substantially different, and hence insufficient to satiate the victim's revenge desire. To prevent the type of revenge-seeking that motivated the actions of such warring parties as Blayee's, the identity requirement of the individual should be taken into greater account.

As Hobbes suggests, life in civil society requires that men give up their natural right to self-preservation without constraint. In the Liberian context, once the Accra Accord was signed, a move away from a state when men could aggressively pursue his self-preservation occurred towards a cooperative social state where the government is solely authorized to act with limited constraint. The Liberian masses hence have no recourse to legitimate revenge, and must entrust those adjudicatory institutions to deliver the necessary retribution. Miller writes that "There is a theory of justice in our most routine conversion, and it is a theory of justice as getting even, a theory in which measuring and balancing are the name of the game".[24] If Miller is right, the capacity of the Liberian government to deliver such justice falls short of what is necessary to quell the revenge passion in the post-conflict state.

In addition to the theoretical limitations of truth, justice, and reparation to address anti-social passions, are the practical realities of the Liberian government to fulfill its state's obligation through such means. As noted the truth function requires that facts be established about the violations of human rights that occurred in the past.[25] Fact-finding is a costly endeavor that requires resources. This is particularly true when human rights violations date back over two decades. Unearthing mass graves, interviewing witnesses, and following up on allegations require an institutional capacity that is lacking in the country. As will be further discussed, there is, to date, only one post-conflict institution charged with carrying out such a mandate, viz. the TRC. The TRC is ill-equipped financially to run its day-to-day operations, let alone embark on serious investigative missions.[26] Per the reparations requirements, once again, this is an issue of resources: namely in identifying who qualifies for such reparations and distributing them accordingly. The TRC is duly charged with such a mission,[27] but again, it is unlikely that it will

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[24] William Ian Miller, *Eye for and Eye*, Cambridge University Press, New York, 2006, p. 15.

[25] Amnesty International, p. 3.

[26] The author spent 3 months working at the TRC-Liberia in the summer of 2007, where she observed severe resource constraints. Electricity was sporadic at headquarters, office supplies such as computers and paper were scarce, and mobility was hampered but with too few vehicles available and even less petrol to operate them. Part of the constraints stemmed from the donors' when they refused to further fund the TRC-Liberia absent a showing of improvement by the lackadaisical institution.

[27] Truth and Reconciliation Commission, Final Liberia TRC Act, Internet, www.ictj.org/static/Africa/Liberia/liberiatrcact.eng.pdf, 21/5/2010, at Art. VII, Sec. 26(j).

have enough money to realize this aspect of its mandate to each and every victim of the conflict. The justice requirement will likely remain most notorious for both practical and ontological reasons. Per the practical constraints, justice systems as punitive mechanisms are more than courtrooms alone (though even these are in seriously dire straits in Liberia). Equitable adjudication requires due process safeguards, such as adequate fact-finding capacity, and an accessible defense for the accused. Also, post-conviction apparatuses (*i.e.* prisons) with sufficient security to hold the convicted in a safe and secure manner are requisite parts of a justice system. Again, the TRC is responsible for the justice component, since formal adjudication is unable and not yet willing to fulfill this order. The ontological difficulties with fulfilling the justice component have to do with the notion of justice itself.

A discussion of justice requires that we first explore the theoretical underpinnings of the notion. There are the skeptical accounts that dismiss the existence of justice as understood to connote fairness or equality. A notable proponent of such a view is Nietzsche. Nietzsche discusses the inherent inequalities of legal orders — where the interests of a few are protected to the detriment of the many. He demonstrates a history of the development of our moral structure- dismissing any notion that right and wrong is derivative of a natural order. That a society's morality is that morality which trumps over competing moralities, its institutionalization in the form of law reflects such domination and inequality. Nietzsche notes the following:

"Everywhere that justice is practiced and maintained, the stronger power can be seen looking for means of putting an end to the senseless ravages of *ressentiment* amongst those inferior to it… *The most decisive thing,* however, *that the higher authorities can invent* and enforce against the even stronger power of hostile and spiteful feelings… *is setting up of a legal system,* the imperative declaration of what counts as permissible in their eyes, as just, and what counts as forbidden, unjust: once the code is in place… they distract attention from the damage done by such violations, and ultimately achieve the opposite of what revenge sets out to do, which just sees and regards as valid the injured party's point of view — from then on the eye is trained for an evermore *impersonal* interpretation of the action, even the eye of the injured party".[28]

Common notions of justice seem to befit the assumption that justice connotes fairness, equality, and a restoration of some balance between members of society.[29] Yet Nietzsche places doubt in such a conception by demonstrating

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[28] Friedrich Nietzsche, *On the Geneaology of Morality*. Cambridge: Cambridge University Press, 2007 (pp. 49-50).

[29] Oxford dictionary defines justice as "…conduct that is acted or done in accordance with what is morally right or fair; fairness; the exercise of authority in the maintenance of right" (Oxford American Edition, 2010 at www.askoxford.com).

how "justice" can be constructed pursuant to ends that are unequal and tyrannical. If the "justice" necessary to fulfill a state's obligation is predicated on notions of equality and fairness, but a legal order facilitates inequality and unfairness then the "justice" demanded by victims of conflict is not the same as the "justice" that a state can provide in furtherance of fulfilling its obligations. We see that Nietszche's skeptical stance becomes more persuasive when analyzing the peace agreement that ended Liberia's conflict.

To reiterate, Hobbes warned of the dangers of man's natural conditions- where he is unable to benefit from the fruits of cooperation in a world of scarcity. In Hobbes' construct man's natural right is to preserve himself at all costs, yet this right can obstruct cooperation. Ultimately men acknowledge such a shortcoming and they convene and agree to relinquish such a right to a sovereign in order to enforce their cooperation with one another.[30]

Contractual Shortcomings of the Liberian Peace Agreement

At the heart of post-conflict efforts in Liberia is the defective peace agreement that founded the civil state as it is today. Sixteen peace agreements failed to meet expectations in Liberia before the CPA was signed. In his article, "Civil Society and Security Sector Reform in Post-Conflict Liberia: Painting a Moving Trains without Brushes", Alex Loden launches an intense critique of the lack of inclusion of civil society in the post-conflict process.[31] Although civil society groups bore witness to the discussion of the Accra Accord, they played a lesser role in the negotiations of the Agreement's terms.[32] Rather, several failed precedents and the urgent need to end civilian casualties seemingly trumped the need to exact the requisite instruments to fulfill the state's obligations, viz. truth, justice, and reparation. We can infer the purposeful exclusion from the text of the CPA itself: Art. XXVII(2) of the CPA calls for the *resignation* of the Supreme Court of Liberia (*i.e.* the Chief Judge and all its Associate Judges), and Art. XXXV(1)(b) mandated the *suspension* of the Constitution, statutes, and all other Liberian laws which relate to the establishment, composition, and powers of the Executive, the Legislative, and Judicial branches of the Government during the mandate of the National Transitional Government of Liberia (NTGL) until the elections slated for January 2006. Political circumstances similarly support the argument that the

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30 Hobbes, 1988.

31 Alex Loden, "Civil Society and Security Sector Reform in Post-Conflict Liberia: Painting a Moving Trains without Brushes", *The International Journal of Transitional Justice*, vol.1, no. 2, 2007, pp. 297-307.

32 Ezekiel Pajibo, "Civil Society and Transitional Justice in Liberia, a Practitioner's Reflection from the Field", *The International Journal for Transitional Justice*, vol. 1, no. 2, 2007, pp. 287-96.

exclusion was purposeful: President Johnson-Sirleaf narrowly won the 2006 elections with 54% of the vote over her principal opponent, George Weah. Security was a running theme through the elections, with Charles Taylor supporters still threatening to destabilize the peace should the new administration overstep its boundary.[33] The combination of security, and political stability concerns, resulted in a peace agreement that is clearly biased in favour of those groups most responsible for the conflict. The result of such an exclusion is that Liberians were never given the opportunity to lay down their anti-social proclivities (whether they be natural right or merely a natural condition) towards terms that would benefit them in the post-conflict state. Shame, envy, and revenge likely remain present among an electorate that finds themselves in as familiar socio-economic conditions as they were before the war ended.

Upon careful scrutiny of the Peace Accord, one can infer there was little concern in retribution on behalf of the masses that suffered at the hands of those in power. Shy of doling out blanket amnesty, the conviction of rebels was put on hold until the elections, slated for three years thereafter.[34] Furthermore, there is no mention of the establishment of any formal adjudicatory body to address the heinous crimes committed against civilians during the conflict. Indeed, the only semblance of punishment for violators was the establishment of the TRC-Liberia. Even the TRC-Liberia's authority was limited to only being able to *recommend* amnesty or prosecution.[35]

The CPA was a political compromise negotiated between those most responsible for the war and those in the disadvantageous position of being desperate to end the violence. Rebel groups contracted the terms of their agreement with, literally, a gun held to the counter-parties' heads. To view the agreement as anything more than a political compromise ignores the fact that many of those involved in the war still govern the country. In his article, "Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past", Luc Huyse notes that when faced with a devastating past, new regimes must begin the construction of the new order by first asking "…two key questions: whether to remember or forget the abuses — the issue of acknowledgement — and

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[33] A principal reason that Charles Taylor was tried at the Hague rather than in the Special Court of Sierra Leone or in Liberia was owed to security reasons (*see* Unidentified Author, "Taylor Flies in for Hague Trial", *The BBC*, 20 June 2006 at http://news.bbc.co.uk/2/hi/5098070.stm). Whilst in exile in Nigeria (following his leave from office), Taylor remained heavily involved in the political situation in Liberia, funding civil disturbance (Coalition for International Justice).

[34] TRC-Liberia, Act, Art. XXXV(1)(e), CPA (2003), dismantles the Liberian judiciary until the next presidential elections, which would occur at the end of 2006.

[35] TRC-Liberia Act, Art. VII(g).

whether to impose sanctions on the individuals who are co-responsible for these abuses — the issue of accountability.[36] Signatories to the CPA opted for compromise — answering "yes" to acknowledgment and "no' to sanctions. Amid a text addressing ceasefires, disarmament and elections, Art. XIII of the CPA calls for the establishment of a truth and reconciliation commission.[37] That the trade-off turned largely in favour of those most responsible for the conflict is evidenced with a particularly notorious example: former rebel leader, also the man who mutilated and murdered former President Doe on video, is currently standing Senior Liberian Senator, Prince Johnson.[38]

In addition to the failure by the state to address antisocial passions, we see from an analysis of the Accra Accord, that there was an express attempt to exclude the acknowledgment of such passions towards impunity. The sole institution charged with addressing crimes committed during the conflict was the TRC-Liberia. A product of the peace agreement, the creation of the TRC-Liberia was an attempt by the government to fulfill its state obligation to curb impunity.[39] In theory, truth commissions purport to address the emotional underpinnings of war more so than formal adjudication permits. The psycho-social components of truth commission have made them an increasingly popular institution in transitional states; over 33 have been established in 28 countries since 1974.

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[36] Luke Huyse, "Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past*", Law and Social Inquiry*, vol. 20, no. 1, 1995, pp. 51-78 (p. 52).

[37] Government of Liberia, et. al., "Liberia Comprehensive Peace Agreement" (CPA), Internet, www.iansa.org/.../Liberia_Comprehensive_Peace_Agreement.doc, 21/5/2010, Art. XIII: Truth and Reconciliation Commission.

> A Truth and Reconciliation Commission shall be established to provide a forum that will address issues of impunity, as well as an opportunity for both victims and perpetrators of human rights violations to share their experiences, in order to get a clear picture of the past to facilitate genuine healing and reconciliation.
>
> In the spirit of national reconciliation, the Commission shall deal with the root causes of the crises in Liberia, including human rights violations.
>
> This Commission shall, among other things, recommend measures to be taken for the rehabilitation of victims, including human rights violations.
>
> Membership of the Commission shall be drawn from a cross-section of Liberian society. The Parties request that the International Community provide the necessary financial and technical support for the operations of the Commission.

[38] Prince Johnson was recently re-elected to this position after engaging in dubious campaign practices; he has announced his intention of running for President in the 2011 national elections.

[39] CPA, Art. XIII(1).

Shortcomings of the TRC-Liberia in Addressing Anti-Social Passions

Truth commissions purport to account for that which post-conflict and traditional justice systems leave out. Truth commissions assume that beyond the economic and political costs of war, there are costs to society that cannot be measured with statistical indices. These "scars" to society's collective conscious contribute to conflict and are the target of the TRC process. Whether these claims are true in theory or practice is questionable- particularly in the Liberian context. To be discussed are both the theoretical justifications for the use of truth commissions and the way that the TRC-Liberia in particular was tailored to the Liberian conflict. I will argue that like the instruments used to fulfill the state's obligation, the TRC-Liberia similarly fails to address those anti-social passions which facilitate war, despite the rhetorical justification for such institutions.

Much of the support for truth commissions lies in the problems with formal prosecutions. Procedural pitfalls are the brunt of the support.[40] Trials are argued to be lengthy, unpredictable, and costly for all entities involved (*i.e.* the state, the victim and the perpetrator). Moreover, formal adjudication tends to focus on the perpetrator more than the victims- with the state assuming the role of injured party and prosecuting for the costs it has incurred. Furthermore, formal trials require that a security sector exists to deal with those prosecuted- and apprehension and incarceration are costly, not to mention the degree of investigation necessary to meet the burden of proving "without a reasonable doubt".

Unlike formal trials, truth commissions exchange amnesty for admission, with some qualifications.[41] As a result, resources can be spent on the process rather than the preparation and aftermath of conviction — as is the case with formal trials. Whereas trials remove the victim from the procedural aspects of the case- truth commissions center their processes on the victim. Not only is the victim given an opportunity to speak uninterruptedly, but the presumption of innocence granted to a defender in formal trials no longer applies. Hence the audience does not to filter the victim's testimony through a skeptical stance. Victims in truth

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[40] Minow suggests the truth commission method might be better than methods employed by formal prosecution. Litigation "is not an ideal form of social action…" Trials have procedural pitfalls. If resisting the dehumanizing of victims is a societal objective, then trials are inadequate. Hence, for public acknowledgement of what happened and who did what to whom, a truth commission provides a safe and effective setting for explicating the truth (Martha Minow, "The Hope for Healing: What can Truth Commissions Do?", in: Robert Rotberg & Dennis Thompson (eds.), *Truth v. Justice*: *The Morality of Truth Commissions*, Princeton, 2000, pp. 235-60, (p. 16).

[41] Amnesty is excluded for genocide, war crimes, crimes against humanity, and other crimes against international law; this is an obligation of all states (Amnesty International, 21). The TRC-Liberia addresses this obligation (*see* TRC-Liberia Act, Art. VII, Sec. 26 (g)).

commissions are thus able to recount their traumatic experiences to an audience of listeners that presume that what is being said is true.

The functions of truth commissions vary according to the unique experiences of each country. However, a common attribute of truth commissions is that they are intended to be both restorative and preventive.[42] Proponents of the restorative value of truth commissions argue that there is cathartic value for the victim, society, and even the perpetrator in the process. In her article, "The Hope for Healing: What can Truth Commissions Do?", Minow notes that "…telling and hearing narratives of violence in the name of truth can promote healing for individuals and for society".[43] Moreover, the crimes discussed at truth commissions are often crimes of society on the whole; tacitly permitting the exploitation of certain groups are those who live under the oppressive regime who do nothing to alter the *status quo*. For victims, perpetrators, and society to be able to live with the roles they played in tumultuous pasts, they have to come to terms with their pasts.

"Coming to terms with…" is a figure of speech that provides the rationale for many truth commissions.[44] "There is an assumption that a society emerging from an intrastate cataclysm of violence will remain stable, and prosper, only if the facts of the past are made plain".[45] Implicit in the act of coming to terms with the past is a looking forward to social stability in the future. Hence the restorative and deterrence functions of truth commissions are mutually reinforcing: restoration is not done for its own sake, but as a means to deterring the recurrence of socially destabilizing acts in the future. The emotional aspects of conflict have become cemented in international post-conflict practices, as evidenced by the diffusion of truth commissions. However, whether such institutions sufficiently addresses the anti-social passions discussed above in a way that both satisfies the state's obligation and ameliorates individual desires to act out such passions, is questionable. As noted above, the fact that the TRC-Liberia arose from a political bargain that excluded the majority of the country, limits the extent to which the TRC-Liberia can assuage society's capacity to act out in ways that threaten social stability. Furthermore, the TRC- Liberia is the only institution addressing the conflict; it has no institutional support in the form of national or international courts.[46] Furthermore the TRC-Liberia is racked by practical limitations in realizing its ambitious mandate.

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[42] Minow, 3.

[43] Ibid., 241.

[44] Ibid., 6.

[45] Ibid., 6.

[46] International institutions are emphatically clear that truth commissions cannot substitute formal adjudication, but rather, they are complimentary. *See* CCPR which "…obliges states

As noted above resources are in limited supply at the TRC-Liberia. However, other factors limited the efficacy of the organization. Relationships among the nine Presidentially-appointed Commissioners were tense. There was constant fighting for influence and the use of resources. Furthers tensions existed between the Commission and its international donors, with the former insisting on the sovereignty of Liberian institutions and the latter demanding results from their sizeable investments. Productivity was minimal in the institution's first year which was followed by a funding freeze from donors on the conditions of structural adjustment at the TRC-Liberia. The request was met but growing pains followed. The change resulted in a separation of the Commission into a political side and an administrative side that would run the Commission's day-to-day operations. Disagreement ensued between the two sides of the TRC-Liberia. Because of these practical limitations at the Commission, it is questionable whether the TRC-Liberia has the capacity to sufficiently address anti-social passions towards the sustainable peace of the country. Note, that since the publication of the TRC-Liberia's final report, the Executive has been reluctant in implementing the recommendations of the Commission, in large part due to the allegations made against current Liberian President Johnson-Sirleaf.[47] Testifying at a TRC-Liberia hearing, Johnson-Sirleaf admitted to assisting Charles Taylor's efforts to oust then-President Samuel Doe, but contends culpability saying she was "fooled" by Taylor. Her testimony and alleged lack of remorse were enough to place her on a list of perpetrators banned from public office in Liberia for the next several decades. In the wake of the TRC's final report, Johnson-Sirleaf backtracked on her previous pledge to serve only one term as President and announced her intention of running for re-election in 2011. The TRC-Liberia's final report is a legacy of the war's victims. Ignoring the report ignores the victims' only means of constructively expressing their anti-social sentiments stemmed from said conflict. As previously discussed, anti-social passions left to their own devices

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to develop judicial remedies over other types of remedies. Decisions made solely by political organs or subordinate administrative organs (including a truth commission established by a government) do not by themselves constitute an effective remedy for victims of human rights violations…" (Amnesty International, 8 from Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (Kehl-Strausbourg-Arlington: N.P. Engel Published, 2nd revised edition 2005), p. 64, para. 65.

47 President Johnson-Sirleaf is listed in the TRC-Liberia report as complicit in the Liberian civil conflict and the Commission recommended that she be barred from running for a second presidential term. In the face of these allegations, and contrary to her campaign promise, President Johnson-Sirleaf recently announced her intent to run for the 2011 Liberian presidential elections (Doreen Carvajal, "The Nation Full of Strong Women", *The New York Times*, 5 March 2010, at http://www.nytimes.com/2010/03/06/world/africa/06iht-ffellen.html.

can de-stabilize and disrupt the goals of a society with ambitions of economic productivity. Further efforts to convince the GoL to institute the TRC-Liberia's reports should be pursued.

Conclusion

We can conclude that anti-social passions are important insofar as they can motivate socially destabilizing acts. In contexts where sustaining peace is important, taking these emotions into account is fundamental to lasting peace. Furthermore, a state is under an obligation to respect, protect, and satisfy human rights victims in the form of legal justice and reparations; the victim should have more choice in bargaining over the terms of what lasting peace will encompass.[48] Justice should be read *vis-à-vis* anti-social passions: giving the public a say as to whether they can exchange their anti-social passions for the benefits of living in society is necessary to fulfill such an end. However, we have discussed the mechanisms currently at work in Liberia to prevent conflict and fulfill the state's obligation; they fall seriously short of addressing anti-social passions in a way that is "just' and likely to promulgate peace.

If we apply Nietzsche's claim to post-conflict Liberia- where a ruling elite established the legal order to end the conflict- any appeal for justice by the masses through formal channels in unattainable. To say that a Nietzschean morality is popularly understood to comprise morality is inaccurate. However, we can infer what the civilian population thought *did not constitute* justice. As Collier concedes, some popular support is needed to incite a rebellion, and such rebellions use populist rhetoric to gather such support. Rebels promise change since the *status quo* often means elite domination at the expense of the masses.[49] In Nietzschean terms, the Liberian elite dictated what was "right" and consequently what was "just". That popular support was gathered under a disparate concept of justice demonstrates that the masses think of justice differently — and that their repression was not "just". The question then remains is whether justice — as understood to include the majority's interests in the construction of the legal order — can occur?

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[48] In addition to the Liberian government's existing obligation as a signatory to the International Covenant on Civil and Political Rights, it, all states are under an obligation to respect International Humanitarian law with respect to war victims under several international treatises and customary law (*see* https://www.law.duke.edu/journals/djcil/downloads/djcil7p411Tables.pdf outlining the stat's obligation to search and arrest war criminals); part of this obligation requires the swift pursuit of violators of international humanitarian law.

[49] Paul Collier, "Doing Well out of War". Paper prepared for Conference on Economic Agendas in Civil Wars, London, April 26-27, 1999.

Kofi Annan noted the following: " There are times when we are told that justice must be set aside in the interests of peace. It is true that justice can only be dispensed when the peaceful order of society is secure. But we have to come to understand that the reverse is also true: without justice there can be no lasting peace." It is the majority of the country with the capacity to destabilize the fragile peace that Liberia has finally attained after two decades of war. It is their understanding of justice that hence needs to be addressed in prospective post-conflict agreements and arrangements, lest the cycle of violence continue.

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The National Reconciliation Commission and Reconciliation in Ghana: an Assessment

ABSTRACT

Ghana is a relatively peaceful country with a bitter past in terms of human rights abuses. It has established fair and transparent electoral processes, claims a better judiciary and legislative institutions. The promulgation of a liberal Constitution in 1992 and the establishment of horizontal institutions of accountability all contributed to the protection of individual human rights. It also experienced four military regimes during which many human rights abuses occurred. The NRC was therefore established to promote reconciliation in the country. But was a reconciliation process necessary at the time it was established and has it contributed towards reconciliation in Ghana?

Key words: Reconciliation, TRC, Justice, Ghana, Apology, Reparation, Human Rights

Introduction

Ghana, which became a republican state in1960, is a relatively peaceful and stable country surrounded by conflict-torn neighbours. One reason for this peace and stability is the success it has had in establishing fair and transparent electoral processes. This is arguably one of the most crucial tests of democracy and one that many other African states have failed. It has held five successful and peaceful elections since its return to multiparty democracy in 1992, following the troubled times on which this article focuses, and has experienced two alternations of power between political parties, when in 2000 and 2008 the opposition successfully unseated the incumbent government.[2] This is very rare

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[2] In 1992, 1996, 2000, 2004 and 2008.

in African electoral history, in which state resources and institutions are usually placed at the disposal of the government in power.

It is not only in electoral processes that Ghana stands unique. It also claims a better judiciary and hierarchical court structure, both in relation to its neighbours and arguably in comparison to its own past. As with the judiciary, the Ghanaian legislature has developed and expanded over time: from 104 representatives to 230 since gaining independence. The coming into force of a liberal Constitution in 1992 and the establishment of horizontal institutions of accountability, such as the Commission on Human Rights and Administrative Justice (CHRAJ) the National Commission for Civic Education (NCCE) and the National Media Commission (NMC) all contributed to the protection of individual human rights, which is essential for democratic development. In addition to these factors was the repeal of the Criminal Libel Law in 2001, which was used to incarcerate journalists who were critical of the government and its policies. These developments saw the country rise in the 2006 Press Freedom Index ratings, placing it fourth in Africa and thirty-fourth in the world. The removal of this obstacle to press freedom generated a corresponding explosion in the media industry, with several new newspapers and radio stations being established. The long-term effects of these initiatives have enabled the emergence of a vibrant civil society together with an independent media that increasingly demands accountability from the government, on behalf of citizens.

In spite of the gains made through democratic governance, Ghana has a bitter past in terms of human rights abuses. It has experienced four military regimes during which many human rights abuses occurred, including restrictions on press freedom and the right to assembly, the widespread arrest and torture of suspected enemies of the respective regimes.[3] The periods under the Armed Forces Revolutionary Council (AFRC) and the Provisional National Defence Council (PNDC) witnessed particularly extensive use of repressive measures. For example, during both periods mass arrests, abductions, torture, trials by "kangaroo courts' and "disappearances" were very common, and the PNDC period witnessed many occasions when market women were publicly humiliated and flogged for the low-level crime of selling commodities at prices that were greater than the regime's controlled prices. These excesses gave birth to the so-called "house cleaning" campaign, a code name for a time when the abduction and disappearance of people who were thought to be enemies of the regime was common. During this period three high court judges, two former heads-of-state and many citizens were murdered and, as a result, a "culture of silence" developed in which people became afraid to criticize the policies and

[3] In 1966, 1972, 1979 and 1981.

excesses of the military government.

Given these political experiences, was a reconciliation process necessary at the time it was established? Given that a reconciliation process was deemed to be necessary, which particular periods in Ghanaian history should such a process have covered? Was the process fair enough to have promoted the Commission's objectives? Has the NRC contributed towards reconciliation in Ghana? In this paper, I aim to critically examine the depth of the contribution the NRC made towards reconciliation in Ghana. This is important because it highlights the challenges faced by the Commission's work; seeks to explore how those challenges were dealt with, and examines the extent to which its primary goal of reconciling the nation was achieved. Before I do this, I will first examine some of the challenges faced by the Commission.

Challenges faced by Commission

TRCs, like many transitional justice mechanisms, are not magic bullets that can solve all of the problems of past human rights abuses. In many parts of the world, TRCs have often faced several challenges including lack of finance, political interference, lack of transparency, and the unwillingness or inability of governments to implement the recommendations resulting from their work. For example, Hayner argues that the commission into the "Disappearance of People in Uganda Since the 25th of January 1971" established by President Idi Amin to investigate human rights abuses during his administration, including a wide range of "disappearances", could not achieve its set objectives because of political pressure and interference.[4] She notes that in Bolivia, the "National Commission of Inquiry into Disappearance" established in 1982 by President Hernan Zuazo, following the country's return to democratic rule, collapsed before its report was written due to a lack of efficient resourcing and political support. Also, in the Philippines, the "Presidential Committee on Human Rights" established by President Corazon Aquino in 1986 collapsed due to a lack of staff and resources.

It may be argued that the Ghanaian TRC became unfashionable, even before assuming the responsibilities reposed to it. This is because it faced specific challenges, which similar programmes in other parts of the world were able to avoid. Based on the limited academic studies[5] available, together with

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[4] Priscilla Hayner, "Fifteen Truth Commissions: A Comparative Study", *Human Rights Quarterly,* Vol. 16, No. 4, pp. 597-655, 1994.

[5] See Boafo-Arthur (2005, 2006) Ameh (2006, 2006a) Valji (2006) and Attefuah (2004).

Ghanaian media reports on the work of the Commission, the following challenges stand out as being significant:

1. the timing of the Commission
2. the mandate of the Commission
3. the politicization of the work of the Commission, and
4. perceptions of bias towards some political party members.

I have briefly examined these challenges below. The first challenge is the time at which the Commission was established. Hayner (1996) argues that truth commissions (and other transitional justice mechanisms) need to be implemented immediately after the event that they have been established to address.[6] The rationale for doing this is that TRCs can play an important role in the process of transition by either affirming change in the human rights practices of the country concerned, or by helping to legitimize the authority of a new government in terms of respect for the rule of law. And yet, the Ghanaian transitional justice programme only began to address human rights violations that had been committed under various Ghanaian governments in 2002. Indeed, bearing in mind that military rule in Ghana ended in January 1993, the Ghanaian transition programme was in effect intended to address human rights abuses that had been committed at least a decade previously, and in some cases since 1957. The implication of this was that Ghana did not stand to benefit from the work of the Commission, because it had already achieved most of the intended benefits of the transitional programme (as per Hayner's argument).

The mandate of the Commission became another source of challenge to its work. The mandate of the Commission was initially limited to human rights abuses committed under military regimes, neglecting similar violations that had occurred under constitutional governments.[7] This created a great deal of tension between the ruling and opposition parties at that time. The members of parliament for the main opposition party, as a result, walked out of parliament before the Bill of the Commission was passed into law. The lack of consensus between the ruling and opposition parties not only set a bad example with regard to the work of the Commission, but also initiated accusations against the ruling party for injecting political interest into an important national exercise.

The third major challenge of the Commission was the allegation of politicization. The work of the Commission was believed to have been influenced

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6 Priscilla Hayner, "Commissioning the Truth: Further Research Question", *Third World Quarterly*, Vol. 17, No. 1, pp.19-29, 1996.

7 Some of the human rights violations that occurred under constitutional rule included detentions without trial, illegal dismissals of workers from work, violations of the rights to freedom of association, etc.

more by political expediencies than by a genuine desire to reconcile the nation. The main opposition at the time, the National Democratic Congress (NDC) was the main advocate of this idea. This was done by both formal and informal means. Informally, party members openly discredited the work of the Commission by calling it the "Nail Rawlings Commission", in reference to the NRC abbreviation for the Commission. The term was used by radio stations and opposition newspapers to portray the Commission as being anti-NDC. Formally, the NDC used its members of parliament to constantly argue that the Commission was politically motivated during the debate of the Bill in parliament. When these techniques seemed unlikely to turn many Ghanaians against the Commission, they abandoned parliament when the Bill was passed. The party formally petitioned the President not to sign the Bill into law and when their attempt failed they petitioned the Commission to desist from using their platform to serve the interests of the ruling party. Their arguments in relation to this were twofold. First, contrary to the powers of the Commission, the opposition party (at that time) believed that the Commission had been established to target its own members, and in particular the former President who had successfully masterminded and overthrown two previous governments. Second, they also believed that by focusing solely on military regimes, the Commission was concentrating on exposing past atrocities committed by both the AFRC and the PNDC, with whom the party was directly associated. The implication was that the opposition party would be presented to Ghanaians as being the worst violators of human rights in the country, whilst similar crimes committed by the ruling party at the time would be hidden from the public since they could not be directly linked to any specific coup in the country.

The perception that the Commission was biased also affected its smooth operation. The Commission's work was viewed by some Ghanaians as not being "fair enough" to reconcile offenders and victims. Allegations of bias, especially from the chairman of the Commission towards witnesses from the main opposition NDC, were highlighted during its process. For example, Valji (2006)[8] notes that the chairman of the Commission acted in ways that could be described as being unfair towards victims who were either members of the opposition NDC or were perceived to be sympathisers of its founder, Jerry John Rawlings.[9] Similarly, Captain Kojo Tsikata, Peter Nanfuri and many other members of the NDC complained of the "unwelcome" attitude of the chairman of the

[8] Nahle Valji, "Ghana's National Reconciliation Commission: A Comparative Assessment", ICTJ Occasional Paper Series, New York, 2006.

[9] Jerry John Rawlings is the last military ruler in Ghana. He has ruled the country for 18 years as both a military leader during the AFRC and PNDC periods (1981-1992) and a constitutionally-elected President of the NDC (1992–2000).

Commission towards them. These incidents prompted the former chairman of the Ghana National Petroleum Corporation, Tsatsu Tsikata, to file a writ at the Accra High Court of Justice with the aim of compelling the chairman of the Commission to conduct himself in a manner that was devoid of bias towards witnesses who appeared before him.[10]

The Ghanaian National Reconciliation Commission (NRC)

The NRC was established by Act 611 of the Parliament of Ghana in 2002 to "seek and promote national reconciliation among the people of Ghana"[11] and to "make recommendations to the President for redress."[12] Specifically, section 4(a-g) of Act 611 empowered the Commission to:

1. Investigate human rights abuses related to killings, abductions, disappearances, detentions, torture, ill-treatment and seizure of properties during past military regimes in Ghana
2. Investigate the causes and contexts within which those abuses occurred
3. Identify perpetrators and victims of such abuses
4. Make appropriate recommendations for redressing such abuses
5. Make the work of the Commission a source of public education.

Functions and Powers of the Commission

The Commission was granted several powers by Act 611 to enable it carry out the task assigned to it. For example, sections 10 and 11 of Act 611 granted the Commission the powers of the Ghana Police Service to "enter any place to conduct an investigation, and remove from any place any item or object that it believed was relevant to its investigation" and in some cases could search even without a warrant (NRC Report, pp. 4-5). Also, sections 13 and 16 gave the Commission the powers of a court which could compel, by the act of subpoena "any person to appear before it and testify…or produce any document or article" relevant to the process of investigation (NRC Report, p. 5). Further, Section 8(1) gave the Commission immunity from interference and control by "any person or

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[10] The Ghanaian Court structure is mainly derived from the British judicial system, its former colonial master. It includes the Supreme Court, the Court of Appeal, the High Court of Justice and Regional Tribunals. For more information on the Ghanaian judicial system visit the official Ghana website at http://www.ghana.gov.gh/index.php?option=com_content&view=category&layout=blog&id=44&Itemid=183 [accessed 10/05/2010].

[11] See National Reconciliation Act, Act 611, Section 3(1).

[12] Ibid, Section 3(1) (b).

authority" (p. 5) whilst Section 8(2) required officials and staff to perform their duties "impartially and independently…notwithstanding their personal opinions, preferences or party affiliations" (Vol. 2, Ch1, p. 5).

The establishment and scope of the Commission generated much debate, particularly among high-level politicians from the two leading parties in the country. This debate could be attributed to the concerns that each party had about the possibility of the Commission exposing records of their past human rights violations should its mandate include them. Gyimah-Boadi argues that the prospects of reconciliation commissions may be threatened by perpetrators of past human rights violations who do not want to be exposed and/or punished.[13] He notes that when such perpetrators wield enough power — politically, economically or militarily — they could sabotage the process of reconciliation. Indeed, being a member of parliament offered enough political power to derail an exercise that might get you exposed, because the Bill of the NRC was very clear that the process would be restorative rather than retributive.

Most of the members of parliament for the NPP and NDC were ministers of state in previous governments in the country and have been associated one way or another with human rights violations. Therefore the exercise, if allowed to investigate the periods they were in power, might be very embarrassing for them. This circumstance was more applicable to members of the NDC, who Gyimah-Boadi (2002) argues preferred an "opaque reconciliation agenda" that covered only "selective de-confiscation of properties illegally seized in the previous Rawlings-led regimes" (p. 2).[14] According to Gyimah-Boadi, this choice of reconciliation was informed by the constant anxiety among supporters of Rawlings and his erstwhile AFRC, PNDC and NDC governments that the Commission was "deliberately aimed at harming them collectively and individually" (p. 3)

The functions assigned to the Commission were limited only to past military regimes of the National Liberation Council (24th February 1966 – 21st August 1969) the National Redemption Council including the Supreme Military Councils I, II and the Armed Forces Revolutionary Council (13th January 1972 — 23rd September 1979) and the Provisional National Defence Council (31st December 1981 — 6th January 1993). The debate was therefore focused on which past governments the Commission should investigate. Boafo-Arthur[15] identifies three arguments put forward by the then ruling NPP in support of the Commission's

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13 Emmanuel Gyimah-Boadi, "National Reconciliation Commission in Ghana: Prospects and Challenges", CDD-Briefing Paper, Vol. 4, No. 1, 2002.

14 See footnote 10 at 14.

15 Kwame Boafo-Arthur, "National Reconciliation or Polarisation: The Politics of the Ghana National Reconciliation Commission", in Fawole, W.A. and Ukeje, C. (eds.) *The Crisis of State and Regionalism in West Africa: Identity, Citizenship and Conflict,* CODESRIA, Dakar, 2005.

mandate. First is the argument that reconciliation is an exercise involving the living, and considering the fact that most of the victims of past human rights abuses were no longer alive then it is worthless extending the mandate to the period their rights were violated. Second, human rights violations during periods of civilian governments were fully documented in law courts and also through investigations conducted by Commissions of Inquiries and do not need further investigation. Third, unlike military regimes where the constitutions were suspended, victims of human rights abuses under civilian governments could have sought redress in law courts.

On the other hand the NDC, then the largest opposition party in parliament, thought differently, arguing that reconciliation not only involves the living but also the victims' families and the entire community in which the crime is committed. Further, the NDC argues that human rights violations were perpetrated in both military and constitutional governments throughout the history of the country and therefore limiting the mandate to only military regimes would undermine the integrity of the Commission. The NDC walked out of parliament the day the NRC Bill was passed into law since their arguments did not persuade the NPP to change the periods that the Commission would investigate.

However, pressure from civil society organisations and the walk out staged by the NDC members of parliament later prevailed on the ruling NPP to include what became known as a "window of opportunity" (Section 2 of Act 611) that enabled the Commission to receive petitions on events outside the specified periods but within the period of 6th March 1957 to 6th January 1993.

The Commission's Process

In order to ascertain the truth about past abuses, the Commission took statements from victims, perpetrators and witnesses who wished to testify before it. This was carried out in two ways. First, members of the general public who wished to testify before the Commission were given permission to walk into any of its offices and complete a standard statement form together with a declaration of their grievances. Second, they could also write their statements and mail them to the Commission. In all, a total of 4,240 people petitioned the Commission with grievances covering killings, disappearances, abductions, sexual abuse, torture, detentions, ill-treatment, hostage taking and seizure of properties.

Kwame Boafo-Arthur, "The Quest for National Reconciliation in Ghana: Challenges and Prospects' in Boafo-Arthur, K. (ed.) *Voting for Democracy in Ghana: The 2004 Elections in Perspective,* Thematic Studies, Vol. 1, Accra: Freedom Publications, 2006, pp. 127-155.

According to the report of the Commission, it did not accept petitions concerning abuses and victimization at face value but carried out further investigations. Indeed, section 4(b) of Act 611 mandated the Commission to "investigate the context, causes and circumstances of violations and abuses" in order to uncover the "factors that underpinned, enabled and accounted for the specified forms of human rights violations and abuses during the relevant historical periods". In this context, therefore, investigations were significant in achieving the goal of reconciliation particularly relating to issues of alleged crimes.

However, in reality the Commission performed poorly in its investigative functions, partly because it mentioned "lack of need for investigations" (NRC Report, p12) as one of the requirements for hearing a case. This suggests that no further investigations were conducted into most of the cases that were selected for hearing before the Commission. Perhaps another reason was the lack of young and energetic researchers who could live up to the challenges of investigating human rights violations that covers the length and breadth of the country. According to Mensa-Bonsu investigators of the NRC Investigation Unit were recruited upon recommendations from the Inspector General of Police.[16] She notes that they were mainly drawn from the most senior investigators of the Ghana police service who were "retired but were in good condition" (p.12).

In Ghana, whilst the retirement age is 60, the average life expectancy rate of an adult, according to the United Nations Development Programme (UNDP) Human Development Report (HDR) is 56.5 years. Therefore, the number of people who were recruited to carry out the Commission's investigation will have been relatively inadequate.[17]

This problem affected the work of the Commission greatly. For example, a case involving a witness, George Agyekum, who petitioned the Commission over an allegation made against him by Lance Corporal Sampson Darkwah, exposed its ineptitude in relation to investigation. In a letter addressed to the Commission on 8th June 2003, George Agyekum challenged most of the "facts" presented by L/Cpl Sampson Darkwah to the Commission.[18] Agyekum wrote that the times and period of the day stated by L/Cpl Sampson Darkwa was not true. Whereas Sampson Darkwa told the Commission he was tried during the nights between the

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16 Mensa-Bonsu, H.J.A.N. "Gender, Justice and Reconciliation: Lessons from the Ghana's NRC', Unpublished paper delivered at the CDD-CI Workshop on "Gender, Justice and Reconciliation' at the Fiesta Royale Hotel, Accra, 7th June, 2007.

17 See http://hdrstats.undp.org/en/countries/country_fact_sheets/cty_fs_GHA.html accessed on 10/10/09.

18 See http://www.ghanaweb.com/GhanaHomePage/education/artikel.php?ID=37506 last accessed on 12/06/2008.

times of 8pm to 2am, Agyekum argued that the witness was tried during the day and within the normal working times of the tribunal, i.e. 9am to 5pm.

Indeed, as Agyekum has suggested in his letter, the Commission could have easily ascertained the veracity of L/Cpl Samson Darkwah's testimony by checking the daily occurrence book of the prison in which he was kept to see the times recorded for his transport from the prison to the tribunal. Also, the Commission could have cross-checked, from the court proceedings, the times that L/Cpl Darkwah was tried. Yet nothing of this sort was done and his testimony was taken and recorded as the true representation of what happened. Similar cases like this happened during the work of the Commission.

After receiving these petitions, the Commission began public hearings on 14th January 2003 at the Old Parliament House in Accra and then continued this exercise throughout the country over a period of 18 months. Witnesses were allowed to be heard in camera when testifying on issues relating to national security and also in cases that could expose them to danger. It heard cases from over 2000 victims and about 79 perpetrators, which were selected from over 4000 written petitions to the Commission.

Criticism of the Process

A number of criticisms were raised in relation to the work of the Commission. One of them was that its process was too legalistic. The CDD-Ghana (2003) observed that the Commission's procedure for hearing cases resembled that of a court rather than a reconciliation commission.[19] CDD-Ghana argued that Commissioners sat on a dais overlooking the witnesses who were testifying, as though they were more important than them. It argued that the procedure could have been made more informal, relaxed and victim-supportive, if victims' families and relations had been allowed to be with them during their testimonies before the Commission.

Although the Commission was supposed to be victim-friendly it did not mean it should sacrifice formality and the correct way of doing things. Regarding this criticism, witnesses would not have taken the Commission seriously if those formal seating arrangements were not in place. Indeed, witnesses came with their families and friends, and counselling sessions were provided to those who needed them. Commissioners, though on a dais, received and greeted witnesses politely and were always willing to assist them to tell their stories. In fact, the Commission did all it could to portray to witnesses that the process was restorative.

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[19] CDD-Ghana "NRC: Matters Arising' in *Democracy Watch,* Vol. 4, No. 1, pp. 1-5, March, 2003.

Another criticism of the Commission's process was the extent to which Commissioners raised the expectations of witnesses by asking them, as part of the procedure, to indicate what relief might redress their grievances. Although it may play a significant role, reparations alone do not necessarily bring about reconciliation. It is important to point out that creating the right environment for witnesses to share what they have experienced has proven to be therapeutic. It is impossible to compensate people when lives have been lost. This action later haunted the Commission when it attempted to pay reparation to victims of human rights abuse. Some victims did not understand why the Commission made a request that they should state what they needed to heal their wounds but did not include their names in the list of those to be compensated. Others were dissatisfied that the amount of money paid to them as compensation was far below what they had suggested to the Commission.

The most damaging of all the criticisms brought against the Commission was of its perceived bias against the political opponents of the then ruling NPP, notably the NDC, PNDC and the AFRC. The NDC argued that it had reasons to believe the Commission was set up to target the party and its members, especially former President Rawlings. Acting on these fears, the party petitioned President John Kufour to withhold his assent to the Commission's Bill. The President turned down this request and signed the Bill into law.

When the Commission began hearings, the NDC again petitioned the Commissioners on 24th February 2003 on what it believed was unfair treatment of former state appointees and officials of the PNDC and AFRC regimes.[20] The petition notes the potential of the NRC being used "wittingly or unwittingly…to achieve the political objective of the NPP government" (CDD-Ghana, 2003, p. 3).[21] It raised a number of allegations of the Commission's unfair treatment of members of the NDC, including Mr Peter Nanfuri who was the former director of the Bureau of National Investigation and Naval Captain Baffuor Assassie-Gyimah (Rtd). It alleged that they were denied fair opportunity, as accorded to other witnesses who raised allegations against them, to publicly respond to those allegations.

Most of these allegations were challenged by the Commission, some members of the NPP administration and the CDD. In relation to the first allegation, CDD-Ghana[22] argued that the Commission notified the lawyers of both Assassie-Gyimah and Peter Nanfuri about all allegations made against them

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[20] The petition was titled "Memorandum to the National Reconciliation Commission on AFRC and PNDC Appointees and State Officials Appearing Before the Commission".

[21] See footnote 16 at 20.

[22] Ibid.

and invited them to appear before the Commission to refute them. None of them responded.

Notwithstanding the fact that the Commission invited both Peter Nanfuri and Assassie-Gyimah to respond to the allegations made against them, some analysts still believe the Commission was not totally fair in dealing with witnesses perceived to be PNDC or AFRC ex-officials or sympathisers. For instance, Valji argues:[23]

> During its operation, the NRC was plagued with accusations of bias, in particular from members of the opposition...The Commissioners have been criticized for being biased in their treatment of witnesses at the public hearings, with accusations that some witnesses were given time and space to tell lengthy stories — including stories that went beyond the Commission's mandate — whilst others were made to feel less welcome and hurried through their testimonies. This attitude was reportedly more pronounced when an individual appeared to be defending the previous Rawlings regimes or was a respondent (as opposed to a petitioner)....The chairperson of the Commission, Justice Kweku Etrew Amua-Sekyi, in particular attracted criticism for allegedly exhibiting bias in his treatment of witnesses. Some have concluded that because of his political background and his personal grievances against former regime [members], the treatment he meted out to those thought to be Rawlings supporters were unfair (p. 8-9).

Similarly, the former chairman of the Ghana National Petroleum Corporation, Mr Tsatsu Tsikata, filed an application against the chairman of the Commission at the Accra High Court of Justice on the 28th June 2004 for being biased against him. Mr Tsikata asked the court, among other things, to compel the chairman of the Commission to conduct himself in a manner that would not compromise the independence of the Commission and to allow him access to the original handwritten petition of Mr Justice G.E.K. Aikins who made allegations against him. Although the court rejected the application, it highlighted the level at which people perceived the nature of the Commission's process to be biased.

It is important to point out that allegations can be subjective, especially when they are made by people perceived to be perpetrators of human rights abuses. The NDC was formed by Jerry Rawlings and people who have a relationship with past military regimes and therefore its members are often perceived as perpetrators of human rights abuses. On this basis, some supporters of the Commission believed the allegations made by the NDC were attempts to

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[23] See footnote 7 at 12.

disrupt and/or divert public attention from revelations of the Commission that might be embarrassing to them.

Indeed, truth seeking commissions like the type established in Ghana are susceptible to this kind of allegation wherever they are established. For example, some former white South African government officials believed the South African Reconciliation Commission was established to embarrass them and therefore leading members of the National Party, including the former President P.W. Botha, defied three subpoenas to appear before it.[24] In Guatemala too, the Commission for Historical Classification, established to "clarify" human rights violations following thirty years of war between anti-communist government and leftist rebels, received less co-operation from the military which believed they were being targeted.[25]

In Ghana, however, the consistency of some of these allegations should have forced the Commission to institute some form of investigation to at least bring on board those sceptics.

The allegations of the Commission being biased continued to haunt it after it had finished its hearings. Several incidents occurred that raised questions about the motive of the NPP government in relation to the establishment of the Commission. For example, the CDD-Ghana condemned the leaking of sections of the report to pro-government newspapers, especially those which were very damaging to both the PNDC and the opposition NDC.[26] The CDD notes that since government had sole access to copies of the report at that time, it could not deny responsibility for the leaks. It then cautioned the government not to use the exercise to gain political capital over other parties in the 2004 elections which was just months away. Although both the government and the Commission denied being behind the leaks, the CDD went on to vindicate the position taken earlier by the NDC that the Commission was not just aimed at embarrassing them but was intended to boost the political capital of the ruling NPP in the 2004 elections.

Report and Findings of the Commission

The Commission submitted its report to the government of Ghana in October 2004 but it was not released to the public until 22nd April 2005.

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[24] See the *New York Times* "Tutu Asks Botha to Give an Apology, but in Vain" written by Suzanne Daley on June 6, 1998 at http://www.nytimes.com/1998/06/06/world/tutu-asks-botha-to-give-an-apology-but-in-vain.html [accessed on 12/05/2009].

[25] See Amnesty International's report "Justice and Impunity: Guatemalan Historical Commission 10 Years On" at http://www.amnesty.org/en/library/info/AMR34/001/2009/en [accessed on 02/08/2009].

[26] CDD-Ghana (2004) "NRC Report Leakage; Reparation and the Way Forward' in *Democracy Watch,* Vol. 5, No. 4, p. 11, December.

Following its receipt, the government issued a white paper indicating its commitment to implementing the recommendations made by the Commission. The key findings of the Commission include the following:

1. that human rights violations were not confined to only military regimes but always peaked during those periods
2. that the military (responsible for 53% of the total abuses committed) the police (responsible for 17% of the abuses committed) and prison services (responsible for 9% of the abuses committed) stood up as the main perpetrators of human rights violations during the Commission's investigations
3. that 8,686 victims suffered 12,517 violations. It added that this figure indicates that some victims suffered more than one violation and, on average, a victim suffered a minimum of 2 violations and the maximum number of violations was 55
4. that about 79 percent of the victims of human rights violations were males, 19 percent females and the rest were victims whose gender was not specified to the Commission
5. that victims of executions in particular were all males, and the type of violations in which the number of female victims was about the same as their male counterparts were forced sale (43.9%) sexual abuse (42.9%) head shaving (33.7%) and psychological torture (30.4%)
6. that the following reasons accounted for the number of petitions it had received:
   - Compensation – 89%
   - Setting Records Straight – 29.2%
   - Justice – 6.4%

However, the Commission notes that the figures describing the proportion of petitions were more than 100% because victims typically gave more than one reason for petitioning it. In one of the sections that follows, I will discuss the reparation scheme and the extent to which it was implemented, since the majority of people petitioned the Commission because of compensation.

In line with Section 20(2) (e) and (g) of Act 611, the Commission made several recommendations, including the following:

- Reforms in the Ghana Armed Forces, the Police Service and the Prison Services
- Apology from the President, as Commander-in-Chief of the Ghana Armed Forces, for the brutalities committed by the military and other security services
- Payment of reparation to deserving victims of past human rights abuses.

The Role of Civil Society in the Ghanaian Reconciliation Process

Civil society groups played a fundamental role during the work of the NRC, particularly the CDD, which assumed the lead role in mobilising other non-state actors to influence the work of the Commission. It succeeded in bringing together twenty-six civil society organisations to form the Civil Society Coalition on National Reconciliation, under the chairmanship of a former retired High Court Judge, Mr Justice V.C.R.A.C Crabbe. The Coalition consisted of the media (both international and local) religious and trade union organisations, and student groups. Other members included teachers, lawyers, traditional leaders and many other professional groups.

The CDD in conjunction with the Coalition conducted a nationwide survey on the opinions of the public about a prospective reconciliation commission in the country. The results of the survey indicated an overwhelming support among Ghanaians (89% of respondents) for such an exercise. This indication from the public led the CDD and the Coalition to organize a national conference, followed by a series of focus groups in the Northern, Ashanti, Brong Ahafo and Volta regions to discuss ways in which such a Commission could productively function.[27] Also, in partnership with the Parliamentary Committee on Constitutional, Legal and Parliamentary Affairs, the Coalition organized public hearings in Accra to critically review the draft Bill of the NRC and also to recommend, where necessary, modifications and additions to the Bill before its Second Reading in parliament.

Undoubtedly, the work of the Coalition brought policy making to the door step of the average Ghanaian whose representatives in parliament took a rather partisan approach to this important national exercise. By engaging the public to contribute to the direction of the reconciliation process, it became more participatory and people-centred. One interviewee notes that the Coalition was a "useful conduit for the exchange of information instrumental in articulating, on one hand, public sentiments and perceptions on the Commission's performance to the Commission; and, on the other hand, enlisting public support for the Commission by fostering a wider societal appreciation of the Commission's enabling statute, its work and the challenges and prospects it faced".[28] This two way flow of information created consensus and unity of purpose between the Commission and the civil society which was lacking among the country's political elite. This suggests that an open, comprehensive dialogue between stakeholders can influence the prospects of reconciliation better than decisions taken unilaterally.

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[27] The theme for the conference was "National Reconciliation: International Perspectives".

[28] Interview at the CDD-Ghana on 10/02/2008.

Notwithstanding the significant role that civil society groups played in the work of the Commission, it was seen as a pawn in a highly charged political gamesmanship. Valji for example argues that the media was politically influenced to report the work of the Commission in a manner that favoured their partisan leanings.[29] She points out that some newspapers selected stories from the Commission that either added to the political capital of their parties or were very damaging to rival political parties. This way of reporting the Commission's hearings took away the important information that the citizens were supposed to know and heightened the accusations that the Commission was politically established to target certain people in society. It also undermined the credibility of the independent media as a watchdog over government activities.

The NRC and Gender Sensitivity

The Commission, in both its design and process, was gender supportive. The President appointed three women – Prof H.J.A.N. Mensa-Bonsu, former law lecturer at the University of Ghana, Prof Abena Dolphyne, former Chancellor of the University of Ghana, and Dr Sylvia Boye, an educationist – as Commissioners of the Commission. The counselling unit was also headed by a female counsellor and supported by other female staff. This was designed to give confidence to female victims, especially those who were sexually abused, to feel comfortable in discussing their problems with the Commissioners and counsellors.

Mensa-Bonsu avers that the choice of hearing victims either in camera or in public was also influenced by the gender of the victim.[30] For instance, she argues that women were discouraged from reporting or testifying about rape because of the disgrace that it would bring to the family. Therefore, the decision to hear sensitive cases such as rape in camera was partly to protect victims' identities and also to encourage them to testify before the Commission.

Notwithstanding this support, Mensa-Bonsu argues that there was weak representation and lobbying for women during the work of the Commission. As discussed in the last section, the civil society coalition influenced some of the decisions the Commission took and became a link between it and its members. There was no similar organization to represent the interests of women. According to Mensa-Bonsu, two reasons may explain this. First, she argues that the "political heat surrounding" (p. 20) the establishment and work of the Commission was a significant deterrent to people who might have wanted to be involved in it. Second, she notes that most of the female victims were illiterate

[29] See footnote 7 at 12.

[30] See footnote 13 at 18.

or semi-literate and were "operating under a combination of illiteracy and years of official abuse" (p. 10) that had the potential to deter them from participating in the work of the Commission. Though the Commission by design was gender sensitive, women advocacy groups did not take advantage of this design to get their views incorporated into the Commission's work.

The NRC's Contribution to Reconciliation in Ghana

What stands out as unique in these exercises was the fact that victims were given much of their lost voice in participating on issues that had affected them. The Commission provided victims of human rights violations the opportunity to speak about their experiences to the whole world. Many victims saw this alone as being therapeutic, liberating and in defiance to all forms of oppression. Victims do not get the same opportunity in criminal trials to deliberate on issues that they have experienced, known and remembered better than the judges and lawyers who speak on their behalf. The Commission therefore placed victims at the centre stage in rewriting the history of human rights violations in the country and that, indeed, is a big achievement.

Another important contribution of the Commission towards reconciliation in the country was the provision of a national template for human rights violations. There have been many commissions of inquiries and court documents relating to human rights abuses in the country but none has been as comprehensive as that of the Commission. Apart from being deep enough in focus, from Ghana's date of independence in 1957 till the return to democracy in 1993, the Commission was also established through an act of parliament (Act 611) thereby giving it legal powers which many similar commissions in the country did not have. The work and report of the Commission will forever remain a public archive for referencing the history of human rights violations. Regarding this function of the Commission, its report has been written in abridged forms for study at schools. There were even suggestions that the findings of the Commission should form part of the national academic curriculum so that young men and women in the country will always be reminded of the atrocities in the past and how they happened. This could deter them from repeating similar acts in future.

Further, the work of the Commission helped in emphasizing the rule of law, tolerance and respect for the rights and viewpoints of others. This was demonstrated during the public hearings in which people who considered themselves as enemies shared the same platform and expressed their experiences and opinions about human rights violations in the country. Ghana's history has gone through periods when the opportunity for citizens to express their personal and civil liberties were greatly circumscribed. This became a

great obstacle for development in that freedom of expression is seen as not only a civil right but also an integral component of development. Indeed, Sen (1999) argues that development is not only about economic growth but also promoting the liberties and freedom of the people.[31] He averred that in doing this, people are given the opportunity to be responsible and innovative and to contribute positively towards the development of their countries. Boafo-Arthur (2005) concurs that the development of every nation is "influenced by the collective historical experience of the people", which to some extent forms an "important barometer for policy formulation and implementation" (p. 107).[32] Therefore, the Commission became a channel through which development was promoted in the country.

The most significant contribution the Commission made towards reconciliation was the payment of reparation to deserving victims. It took the position that monetary compensation "can never restore victims to the status quo ante" (NRC Report, p. 174) yet it recommended that victims be given some form of monetary reparation. Three reasons, perhaps, may have influenced this decision. First, monetary reparation is a right of victims of human rights abuses as enshrined in both the 1992 Constitution of Ghana and several other international treaties the country is a signatory to. Second, the Commission made this recommendation as a gesture of sympathy and recognition of the sufferings of victims of human rights violations. Third, monetary reparation, as indicated in the diagram below, was the major reason why many people petitioned the Commission. About 89% of witnesses who petitioned the Commission demanded compensation, 29.2% wanted to set the record straight and only 6.4% demanded justice against perpetrators (NRC Report, p. 167).

Indeed, the importance of reparation to the goal of reconciliation is highlighted by Roht-Arriaza.[33] She explains that reparation is a fundamental component of reconciliation and may take several forms including: restoring power back to victims; providing them or their siblings with better education and health care, and restoring back to victims their properties which were unlawfully seized. She further points out that contrary to popular perception, reparation for victims of human rights abuses is a right and not a favour. Certainly, the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the United Nations General Assembly Resolution 60/147, clearly states that victims of

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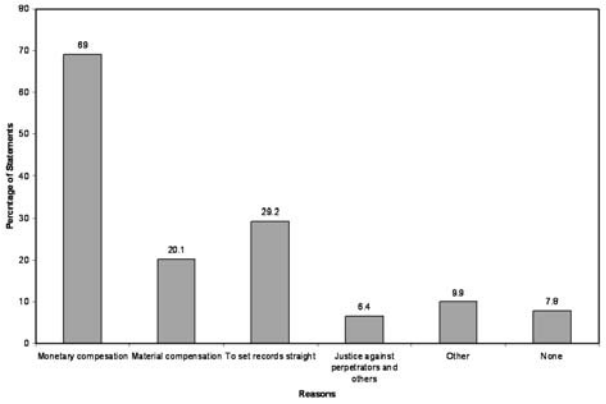
[31] Amartya Sen, *Development as Freedom, Oxford*: Oxford University Press, 1999.

[32] See footnote 12 at 16.

[33] Naomi Roht-Arriaza, "Reparation Decisions and Dilemmas", *Hastings International and Comparative Law Review,* No. 27, Vol. 2, 2004, pp. 157-219.

Figure 1: Reasons for petitioning the Commission [Source: NRC Report]



grave human rights abuses have a right to reparation. This therefore meant that victims were right in demanding that some form of recompense be paid to them for their sufferings.

However, not all victims were aware that it is their right to claim compensation for what they have suffered. Some victims among those who knew it was their right to ask for reparation were reluctant to demand it for the fear that they might be perceived as been poor by the public.

The Government's Reparation Programme

Of the over 4000 petitioners who testified before the Commission, only 2,514 people were selected for reparation. About 2,117 of this figure were eligible for monetary reparation whilst the remaining 397 received other forms of reparation including reinstatement to their previous jobs and the repossession of ceased properties.[34] The government provided a total of ¢13.5 billion to be used in paying victims of human rights abuses who qualified for monetary reparation.[35] The criteria for payment are set out below:

[34] See Ghana Web "NRC: Govt. Pays 5 billion in Compensation" accessed on 22/12/06 at http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=116121.

[35] See Ghana Web "8 Billion Cedis Paid to Human Rights Victims" accessed on 14/06/07 at http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=125571.

Figure 2: Criteria used in paying reparation to victims

INCIDENT	**PROPOSED AMOUNT (¢)***
Loss of Life	10-30 million (1000-3000 GHC)
Torture to Death	15-30 million (1500-3000 GHC)
Torture	5-15 million (500-1500 GHC)
Disability	5-10 million (500-1000 GHC)
Detention	2-15 million (200-1500 GHC)
(i) Over 5 years	15 million (1500 GHC)
(ii) 2-5 years	10 million (1000 GHC)
(iii) 6 months up to 2 years	5 million (500 GHC)
(iv) Up to 6 months	2 million (200 GHC)
Exile	2-10 million (200-1000 GHC)
(i) Over 5 years	10 million (1000 GHC)
(ii) 2-5 years	7 million (700 GHC)
(iii) Up to 2 years	3 million (300 GHC)
Rape	10 million (1000 GHC)
Gang Rape	15 million (1500 GHC)
Ill Treatment	1-5 million (100-500 GHC)
Seizure of Property	1-10 million (100-1000 GHC)

(Source: Report of the National Reconciliation Commission, October 2004)
(* 2.4 GH = 1 British Pounds Sterling as at 08/12/09)

Monetary reparation took place throughout the country between November and December 2006. Payments were made in two different currencies based on the criteria above, with 72 people paid in US dollars to the tune of $44, 271.60 and 2,310 people paid in Ghana Cedi to the tune of 12, 211,000,000. No reason has been given for this decision but most of the beneficiaries who received US dollars were ex-military men. The breakdown for those who received their monies in Cedis are as follows: 31 people were paid 20 million each; 161 people received 15 million each; 297 people received 10 million each; 66 people received 7 million each; 564 people received 5 million each; 13 people were paid 4 million each; 227 people were given 3 million each; 466 people received 2 million each; and 186 people received 1 million each.

However, this exercise was not without problems. Apart from the general problem of impersonation identified by members of the Implementation Committee,[36] there were also several problems of dissatisfaction and allegations of cheating[37] from beneficiaries of the reparation scheme. Most victims were not happy with the amount of money paid to them, notwithstanding the fact that money could not heal what they went through. The problem arose partly because of the expectations created by the Commission regarding monetary compensation and also the level of poverty in the country fed into the need to be compensated monetarily. Though several victims agreed to the idea that reconciliation meant more than financial reward they were compelled to demand money because they had no sources of income and saw the work of the Commission as an opportunity to get reward for their sufferings. The majority of witnesses who testified before the Commission preferred monetary reward. However, not everyone had what they desired from the work of the Commission, particularly, those who demanded money.

Van Zyl argues that in order to achieve justice after human rights violations, five criteria need to be met.[38] These are:

- establishing the truth surrounding victimization
- identifying perpetrators of the crime
- prosecuting perpetrators of the crime
- providing reparation to victims of human rights abuses.
- ensuring non-recurrence of human rights abuses

The achievements discussed above met only the two criteria of establishing the truth about human rights abuses and also the payment of reparation but not the other three criteria. Many victims are still aggrieved by the ways in which the Commission handled some of these issues. The Commission lacked the power of prosecution and even if it had it, the Transitional Provision in the 1992 Constitution criminalizes any action that intends to prosecute former military perpetrators of human rights violations.

However, regarding the criteria of identifying perpetrators and ensuring non-recurrence, the Commission was in a position to do better than it had done. Many victims were angered by the Commission's refusal to name someone as

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[36] The Implementation Committee was set up to help in the payment of reparation to victims of human rights violations as recommended by the Commission. It was chaired by Justice Crabbe.

[37] See "NRC Compensation Beneficiary Complains of Cheating" accessed on 24/11/06 at http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=114436.

[38] Dirk van Zyl, "Unfinished Business: The Truth and Reconciliation Commission's Contribution to Justice in Post-Apartheid South Africa", in Mahmoud Bassiouni, M.C. (ed.) *Post-Conflict Justice,* Transnational Publishers, New York, 2002, pp. 745-760.

responsible for their sufferings and also by the government's inability to implement recommendations for reform within the security services in the country. Also, some victims were devastated by the refusal of the government and, particularly, the perpetrators to acknowledge their sufferings and apologize. Most people protested against this behaviour by refusing to petition the Commission. Others were not perturbed by these actions of perpetrators but were worried that their appearance before the Commission might be seen to mean that they wanted some form of compensation. Therefore, for some victims, the Commission did not play a role towards their healing and eventual reconciliation.

How then will victims of this nature or those who testified before the Commission but were still dissatisfied because some people refuse to apologize to them become reconciled? Most reconciliation initiatives are deemed as necessary between two individuals – the victim and the perpetrator. However, reconciliation can be forged at the personal level of only the victim without necessarily having the perpetrator. This refers to victims making personal commitments to reconcile with themselves. In self reconciliation, or what Colvin (2000) calls "intra-subject" reconciliation, victims confront their past by examining their hopes and fears and finding answers to them.[39]

According to Colvin, this can be achieved in two different ways: psychological and theological. In the psychological aspect, the victim tries to reconcile with "violent and intrusive memories of trauma and manages to integrate them into the psyche" (p. 16). He argues that forgiveness and reconciliation are both psychological processes and cannot be forced on the victim. Therefore victims need to find either answers to, or integrate, some of the experiences they have gone through to enable them overcome the pain. Colvin argues that in relation to the theological approach of seeking self reconciliation, the "victim forgoes a destructive vengefulness by forgiving the perpetrator and subsequently being released from the anger associated with their violations" (p. 16).

The concept of reconciliation is sometimes expressed in theological terms. Most religions, especially Christian and Islamic teachings, place emphasis on forgiveness. When victims of human rights violations understand reconciliation from a religious perspective, they may draw from their religion and choose to forgive their perpetrators. However, it is not a matter of compulsion that victims in a state of self reconciliation forgive those who perpetrated crimes against them. As May (2006)[40] notes, the "decision not to forgive is as legitimate as forgiveness

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39 Christopher J. Colvin, "We are still Struggling': Storytelling, Reparations and Reconciliation after the TRC", Report written for the CSVR, available at http://www.csvr.org.za/docs/trc/wearestillstruggling.pdf (assessed on 13/02/2009).

40 May, A. "Dealing with the Past: Experiences of Transitional Justice, Truth and Reconciliation after periods of Violent Conflict in Africa", London, 2006, Conciliation Resources, last accessed on 13/05/2008 at: http://www.c-r.org/our-work/uganda/documents/Dealing_with_the_Past.pdf.

itself" (p. 9) and therefore victims reserve the right not to forgive perpetrators who are unrepentant of their crimes. Yet, problems may arise when victims accept May's suggestion that they have a "legitimate" right not to forgive perpetrators. It is true that victims can be self-reconciled and co-exist peacefully with the perpetrators of their crimes. However, co-existence is not the same as reconciliation and that implies running away from the problem rather than confronting it. I am not suggesting that victims must forgive the perpetrators their crimes, but what I do recommend is that both victims and perpetrators should devise a way of becoming reconciled, even if that means bypassing forgiveness.

Yet the ways in which victims choose to become reconciled does not address the problem of non-recurrence which has been identified by van Zyl as an important component of justice after human rights violations.[41] Addressing the problem of recurring human rights violations in Ghana is important because the recommendation for reform within institutions identified as perpetrators of human rights violations was not implemented by the government. In order to ensure that similar crimes are avoided in future the Commission should have addressed the root causes of human rights abuses in the country.

Conclusion

The establishment of the NRC was a remarkable decision as far as the records of human rights abuses are concerned. Yet, this does not mean that the chapter of human rights violations in the country closes after the work of the Commission. Serious challenges still remain to the general stability and development of the country. Ghana is gradually mastering the art of conducting peaceful, and to some extent transparent, elections. Many have seen this success as the source of the country's stability and progressive economic development. It is true to some extent that the country's ability to conduct peaceful elections and also its adherence to liberal democracy has helped in managing conflicts. This theory becomes more significant if cases around the world, and particularly Africa, where elections have brought about conflicts, are considered. This however, should not hide the other realities that may lead to the relative calm degenerating into bloody war. When these issues are carefully considered, then it will be realized that the nation needs to tread cautiously. The NRC could have done better in the following areas of its work.

Every transition is different and therefore techniques at addressing them should never be the same. In practical terms, the type and context in which the transition occurs should determine the conflict resolution approach to be used and not the other way round. The imposition of a conflict resolution technique, either

[41] See footnote 33 at 38.

because it is popular or is successful in other place, could pose serious challenges to finding a lasting peace after conflicts and political dictatorships. The NRC could have explore the relatively rich culture of the country and try to adapt it to its work by either integrating Ghanaian cultural values of reconciliation into the process of establishing a traditional reconciliation mechanism to run alongside the TRC. This could have ensured alternative approach to people who were either aggrieved by its work or those who refused to appear before it.

Another aspect of the work of truth commissions that may need improvement is the aspect of truth telling. Most truth commissions work with the assumption that victims get some form of therapy after being given the opportunity to tell their stories about victimization. The importance of truth in what is told before these commissions is also highlighted by the inclusion of truth in the name of these bodies. Therefore, knowing the truth as it is told to these bodies may provide some form of relief and eventually reconciliation between victims of human rights violations and the perpetrators. Yet, from the Ghanaian experience, most witnesses misled the Commission in their testimonies in spite of the fact they were under oath to tell the truth. In future, truth commissions may consider putting in place mechanisms that may either force or induce victims to tell the truth about human rights violations and their role in them.

The South African Truth Commission provided an incentive to perpetrators of human rights abuses of a political kind to trade truth about human rights violations and their role in them, for amnesty from prosecution. Though this worked well at the beginning (as many ordinary perpetrators, particularly those in jail, testified in their numbers for the deal) it was later criticized as a travesty of justice. This was because those who were known to have masterminded apartheid, including P.W. Botha and several white police officers, refused to accept this offer and tell what they knew. The majority of the ordinary criminals who testified were not granted bail or pardoned from prosecution since most of their crimes were seen as not being political.

In future, truth commissions could either refine the South African experiment or be given the legal power to press for perjury against witnesses that lie to the Commission under oath. The Ghanaian Commission was given the powers of the Ghana Police with regard to entry and search, and the powers of the High Court to subpoena people they believed could provide valuable information for its investigation.

Last but not least, the work of future truth commissions should include human rights abuses that are economic, cultural and social in nature instead of focusing on only the political crimes of violations. Most truth commissions focus only on the political crimes associated with transitions, to the detriment of significant economic, social and cultural aspects of the transition. Most wars are caused for economic reasons, especially in developing countries where corruption and economic mismanagement are gradually being considered inimical to development. Countries in transition may find it difficult to sustain their fragile peace without a sound economy. Therefore, just as it is important to address

political crimes relating to transition, it is equally significant to examine other aspects of the transition that may help to sustain peace in the region.

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Symposium on a book
Remarks on Sympathizing with the Enemy

Alice MacLachlan[1]

Seeing Sympathy: Remarks on Sympathizing with the Enemy.

"*How can there be peace without people understanding each other, and how can this be if they don't know each other*?"

Lester B. Pearson, Nobel Laureate
and Prime Minister of Canada
("The Four Faces of Peace,"
Nobel Lecture given on December 11, 1957).

At one point in *Sympathizing with the Enemy: Reconciliation, Transitional Justice, Negotiation* (hereafter SWTE) the author, Nir Eisikovits, remarks: "to some extent, this book is about the benefits of 'seeing' for peacemaking" (85).[2] The self-description is apt, but, given Eisikovits' insistence on the moral importance of conscious choice, a more befitting depiction might be: this book is about the tremendous moral and political benefits of "*choosing to look*". SWTE makes the case for such benefits remarkably well, but what emerges from its pages most strikingly is that the author practices what he preaches. In expounding his account, Eisikovits moves effortlessly through an encyclopedia of examples, ranging from historical accounts of conflict (from the Peloponnesian War between ancient Athens and Sparta to World War II, the Cold War, and its aftermath) to contemporary global politics (both Iraq Wars and the War on Terror, as well as Middle East politics, and race relations in post-apartheid South Africa and the USA); he also draws on fictional narratives and on his first hand experiences as an Israeli citizen. Eisikovits himself has chosen to look — and to look long, hard, carefully, and well — at the intricate and

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[2] The excerpt goes on to explain the description as follows: "part of the argument I try to advance is that something like moral perception is necessary for sympathy, which, in turn, is constitutive of political reconciliation" (SWTE, 85).

intimate details of many slow, painful, and often fragile processes of peacemaking following conflict.

The result is powerful. While SWTE does not purport to provide a systematic, comparative analysis of cases, the reader is consistently reassured that the general theory of reconciliation Eisikovits puts forth never for a moment leaves political and historical reality, but remains firmly grounded in experience — whether these are his own experiences, or experiences recounted by journalists, politicians, survivors, and historians. SWTE is not only a pleasurable and an informative read; it is also — to my mind — a highly persuasive one. While examples are often presented as merely illustrative, their cumulative effect is overwhelming: when it comes to reconciliation, the author knows whereof he speaks. The theoretical literature on reconciliation stands to benefit significantly from his labors.

The purpose of SWTE is to establish and defend a theoretical account of political reconciliation. More precisely, this is the purpose of the first three chapters. In the second part of the text, Eisikovits applies his account of reconciliation to the evaluation of transitional mechanisms such as trials and truth commissions, and considers the implications for conflict resolution. My remarks are focused on the former task; I begin by reconstructing the structural features of Eisikovits' approach to theorizing reconciliation in general, as well as the specific sympathy-based account he presents, highlighting the particular virtues of both. I then focus on one problematic consequence of this approach, evident in the opening pages of Chapter Two ("Objections"). These pages assume a framework in which *other* concepts — in this case, forgiveness, forgetting, and recognition — are cast necessarily as "competitors' against whom sympathy must be defended. Such a framework skews the characterization of these concepts, and as a result, it undermines the persuasiveness of sympathy's defense. It also obscures more complex and potentially illuminating relationships among all four. Ultimately, I argue, these concerns are symptomatic of what I take to be a challenging meta-theoretical question facing all theorists of reconciliation, and this question is where my comments conclude.

Eisikovits has very clear views about what a theory of reconciliation should look like: it must be sufficiently general to apply widely and thus to explain what apparently diverse instances of reconciliation have in common, he argues, yet it must also be explanatorily useful. That is, such a theory ought to give us descriptive insight into the constitutive elements of reconciliation and ought also to tell a story about how such elements might come about. At the same time a successful account, for Eisikovits, "should be both normative and descriptive. It will provide both the minimum conditions of what *should* count as reconciliation and illuminate the successes and failures of specific cases" (7). Ultimately, his aim is to describe reconciliation such that it is both a desirable

and a feasible goal for the realities of post-conflict, and to define reconciliation — so described — in terms of several key identifiable features that are both necessary and sufficient for its achievement and which, in turn, tell us something about its desirability.

What account emerges from this approach? In Eisikovits' view, reconciliation is composed of both formal and informal (motivational) factors. Both sets of factors are necessary, though their relative weight may shift across cases.[3] He takes the formal elements of his definition to be less contentious, and thus they occupy very little of the discussion: roughly, they include the formal resolution of key questions or disputes (e.g. land-claims or citizenship) and the establishment of whatever rights, responsibilities and other elements of law are required for the reconciling groups to exist fairly alongside or amidst one another. Since the content of these rights will vary depending on the conflict and context, a theoretical account need not provide an exhaustive list (10). Nevertheless, we can glean from the discussion of reconciliation as "fair co-existence" (8) that Eisikovits understands formal rights broadly; they include economic and social rights, and some (but not all) recognition claims made by victims (39).

The second, motivational, aspect of reconciliation is the focus of SWTE, and represents Eisikovits' significant contribution to the literature. Two groups reconcile, he argues, once they begin to *sympathize* with one another. Eisikovits finds inspiration for his notion of sympathy in the moral philosophy of Adam Smith; like Smith, he takes sympathy to be a conscious effort that combines judgment and imagination.

Smith famously bases his much of his moral philosophy on a mechanism of sympathy. When I sympathize with someone, I first project myself into his circumstances – that is, I imagine what I would do in his situation, were I carrying his history and faced with his choices – and then judge his responses and behavior on that basis. If I find these correspond with my own, that is, *not* with my responses as they are here and now, but with what they would be were I in his position, then I almost necessarily find myself approving of his actions,

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[3] The varying importance of the formal and motivational aspects of reconciliation raises questions about their respective necessity that remain unaddressed because of the exclusive focus given to the latter. Eisikovits mentions the Falklands conflict as an example in which sympathy played little role, because of the geographic distance and relative independence of Britain and Argentina. Indeed, one might wonder if sympathy played *any* role of significance here — or, assuming it did, it is not hard to imagine a relevantly similar example in which it did not. Is there perhaps a limit case at either end of the spectrum, in which reconciliation becomes *only* a formal or *only* an attitudinal matter? The implications of such cases for the requirements Eisikovits demands of a general theory of reconciliation are discussed later in my remarks.

at least on some level and to a certain degree — Eisikovits draws a much less conclusive connection between sympathy and moral approval than Smith does, and a strict Smith scholar might well take issue with the extent to which sympathy in SWTE should be understood to be "Smithean'. The Israeli official who admits the sympathetic claim that, had he been born into a Palestinian camp, he might too have joined Hamas does not thereby express moral approval for members of Hamas. Rather, what he expresses is more akin first to the recognition of *intelligibility* — there is at least one way in which the position of the other (the enemy) makes a kind of sense — and this is, admittedly, a not-insignificant achievement in the context of entrenched conflict. Second, and most important for Eisikovits' purposes, the admission presupposes the recognition of sameness or similarity. To make the same kinds of choices and have the same kinds of responses in a given situation, two beings must have certain key needs, capacities, and qualities in common; the imaginative effort of sympathy offers proof of such similarity to those who most probably felt themselves to be diametrically different.

Ultimately, the proof of similarity may be as, or more, important as the recognition of intelligibility. Both contribute to a newly focused and detailed picture of the abstract enemy as a living, breathing individual, complete with her own perspective. Taken together, Eisikovits argues, the effects of sympathy are uniquely important for reconciliation: they fight the moral blindness, apathy, and dehumanization endemic to group conflict (19-20), they create a "useful buffer against the [destructive] temptations of absolute justice" (24), and they contribute to the kind of social, economic and community ties that make it hard for conflict to re-emerge (21). Of course, sympathy itself is a psychological tie; Eisikovits never actually claims that imaginative identification necessarily or even probably results in the sympathizer having pro-attitudes of concern and compassion toward the sympathized-with, as is the case with many everyday, non-philosophical connotations to sympathy. But he does draw on numerous examples in which these do result, noting that considerations of sympathy can lead to settled identification with the other, itself a pro-attitude, and also lead to the motivating recognition of injustice, since similar human needs do not always result in similar entitlements (16).

Members of combatant groups can only sympathize once they know — or as Eisikovits puts it, once they *see* — one another; that is, "sympathy requires specific, detailed knowledge about the lives of others" (11). Such knowledge is individual, concrete, and detailed; its content concerns the lives of individual, not the general features of groups. Most importantly, it is "actively obtained rather than passively encountered" (64). Former enemies do not just "become' sympathetic, except in rare cases: rather, appropriate sympathy begins with a "self-conscious, isolated, deliberate act" of looking and learning (86). The will

to look in the right way finds its source in a moral motivation which Eisikovits titles political generosity, composed of several related dispositions: i) "the willingness to forgo… the vindictive dynamics of action", ii) "the ability to move one's focus of attention… partially, and at least temporarily, from one's self", and iii) "the readiness to offer an enemy more… than they can minimally expect" (75). Several things about political generosity are worth noting: first, it has fairly modest aims and can even conceivably develop even in the context of war (76). Second, it is asymmetrical: we expect and demand generosity more from victors than losers, from the fortunate and the powerful more than the underdog (76). Finally, despite its modest aims, political generosity remains a deliberate effort to go against what is expected and even invited by the dynamics of conflict. This is no easy task. Eisikovits does not dwell on it, but there is an element of contingency and chance at the heart of his otherwise comfortingly modest developmental story. Chapter Three, in which political generosity is discussed in detail, is titled "Becoming Sympathetic," but while political generosity may show us the route to cultivating sympathy, it remains unclear how would-be peacemakers and sympathizers might go about creating and cultivating the initial disposition of generosity. There remains some mystery at the heart of reconciliation.

That the widespread inculcation of sympathy is, all things being equal, a boon to the process of peacemaking is of course an intuitively plausible claim. The argument in SWTE goes far beyond this intuitive plausibility, as the author argues that not only does sympathy provide the numerous individual benefits previously listed, but furthermore, each of the earlier stages leading to sympathy also contributes to the motivational aspects of reconciliation. First, "sympathy presupposes exposure to the ways and conditions under which others live, and such exposure is the basis for creating personal, commercial and cultural connections between the parties" (20). Second, the source of this actively chosen exposure — political generosity — has its own significant benefits (78): for example, weakening negative stereotypes about the generous, changing the dynamics of a conflict (81), creating a surplus of goodwill and symbolic capital, and enlisting the support of third parties (82). At every stage of this story, possible bases for reconciliation multiply.

Such praise for sympathy does not yet meet the stringent desiderata Eisikovits outlines for a satisfactory general theory of reconciliation: specifically, the requirement of generality. He must not only prove that sympathy and its precursors are *good* or even *excellent* for [some] processes of reconciliation; he must show that sympathy is crucial to, even partly constitutive of, reconciliation itself, to meet the standards he has set himself. From the structure of his argument, it seems Eisikovits takes this demand to mean that SWTE must persuade readers not only that sympathy is well-suited to play a

central (motivational) role in processes of reconciliation, but that furthermore, nothing else *could* play that particular motivational role; rather, sympathy can be found to play it in all cases. This strategy is most evident when Eisikovits is on the defensive; indeed, he is so vigorous in his arguments against other dispositions which could (arguably) be useful for theorizing reconciliation, I was left with the distinct image of a row of tenpins successfully knocked down by a particularly talented bowler. I wonder, however, if ultimately Eisikovits does his theory a disservice by aiming to clear the terrain so thoroughly.

The second chapter of SWTE is dedicated to the admirable task of tackling possible objections to the theory from several different directions. Over the course of the chapter, Eisikovits considers and answers five possible objections to sympathy, and also offers a comparative defense of his sympathy-based theory of reconciliation against three accounts already available in the literature. Of particular interest for my purposes, however, are the opening pages of the chapter, in which he critiques what he calls three "competitors' to sympathy: forgiveness, forgetting, and recognition. The language of competition is somewhat startling in the context of a project whose practical application is ultimately to encourage peacemaking, conciliation and the acceptance of multiple perspectives. In speaking of "competitors', Eisikovits means to identify these three concepts as potential candidates for the disposition(s) capable of motivating the informal, attitudinal and relational aspects of reconciliation he identified in Chapter One. Ultimately, he argues forcefully that "none of these should be definitive of political reconciliation" (25), and in so arguing, he pretty much dismisses them.

I am in complete agreement with Eisikovits regarding at least one version of his primary claim in this section: it is true that forgiveness, forgetting and recognition do not play the same sustained role in the aftermath of conflict that Eisikovits claims for sympathy in his theory, and furthermore, the case for sympathy's motivational role has been made very convincingly in both the preceding and later chapters. Nevertheless, I found the arguments unpersuasive and ultimately, troublesome for the theory as a whole and even the *approach to theory* it embodies. The root of my discontent can be found in the decision to cast other typical features of reconciliation as "competitors' or theoretical rivals for a single place in the theory, and the effects of that decision on their subsequent analysis and treatment, and it is this decision I explore in the remainder of my comments.

Why is it so strange to see forgiveness, forgetfulness and recognition as rival dispositions to sympathy, from the perspective of theory? In the first place, it is not clear that all three concepts *are* dispositions in exactly the same sense that sympathy is a disposition; such a description is certainly contentious — and contended — among prominent contemporary theories of

forgiveness.[4] Characterizing forgiveness primarily as an emotional or attitudinal disposition tends to obscure salutary experiences of forgiveness that emerge once we understand it as an *act*, for example, or a set of practices. Certainly, the potential benefits of public acts of either seeking or granting forgiveness, performed by a public figure and undertaken in the service of either reconciliation or basic peacemaking, go well beyond the four arguments for forgiveness-qua-disposition which Eisikovits considers.[5] A publicly enacted request for forgiveness, issued by a public figure, can have remarkable effects on public opinion, as can a symbolic gesture or ritual offering the same. Such events have much in common with the gestures of political generosity described in Chapter Three as initiating the development of sympathy: when done well, acts of public forgiveness undermine negative stereotypes, change the dynamics of conflict, create goodwill and symbolic capital, and lend moral legitimacy to (potentially) both factions.

In fact, the text of SWTE itself provides an excellent example of just such an event, in describing how in 1997, following the killing of seven Israeli schoolgirls by a Jordanian soldier, King Hussein of Jordan went to all seven homes and "knelt before a woman sitting on the floor, took her hand,

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[4] It is true that for several decades, theorists of forgiveness were nearly unanimous in their willingness to follow Jeffrie Murphy (1988, 2003) as Eisikovits does, and define forgiveness wholly or primarily in terms of the gradual effort, undertaken on moral grounds, to overcome attitudes of resentment and anger. But there are now multiple accounts available which argue convincingly that this definition fails to acknowledge social and performative dimensions to forgiveness beyond a change in reactive attitudes (or the disposition to undergo the same), not to mention plausible cases of morally significant forgiveness in which forgivers did not experience resentment at all, or forgave without renouncing it. Murphy's approach also underestimates the significance of rituals of forgiveness, and the potential importance — to both victim and perpetrator — of changes in behavior and external relationship, rather than deep emotional change. This is especially true in cases of conflict between non-intimates. See, for example, Claudia Card (2002), Glen Pettigrove (2004), Margaret Urban Walker (2006), and Kathryn Norlock (2009).

[5] I agree with Eisikovits that this particular list of arguments for forgiveness (that it averts revenge, eliminates resentment, acknowledges moral complexity, and respects persons) ranges from inconclusive to undesirable and even incoherent and furthermore, that they are, taken together, uncompelling to say the least. I am less convinced than he is that it also represents a fair sample of arguments for the benefits of forgiveness available in the literature. For instance, when forgiveness is understood more widely to include acts and practices as well as attitudes – such acts and practices, on occasion, contribute to the repair of relationships as well as to the psychological and moral relief of victims and release of perpetrators a variety of concrete and symbolic ways. These contributions to repair and reconciliation are, in particular instances, essential — even if forgiveness does not have the definitive or constitutive role in *all* instances which would, according to the requirements outlined in SWTE, grant it a place in a general theory of peacemaking.

and begged for forgiveness", thereby dissipating potentially violent tension (79). Eisikovits wishes to frame this as an act of political generosity and to explain its impressive reconciling effect in terms of sympathy. I have no problem with this theoretical move. But Eisikovits appears to endorse a framework that appeals to concepts of political generosity and sympathy *to the exclusion of forgiveness and other alternatives*. To achieve this, he must first define forgiveness narrowly, and thus consider it only as a *rival* disposition and not a potential complement or subordinate to sympathy. Second, and more worrying, he must also skip over the reported words of the King himself, and the framework in which (again reportedly) those words were heard and taken up. I do not know the exact words the King uttered or even the language in which he spoke them; I am quoting Eisikovits who in turn cites an American newspaper's characterization of the incident. But it does appear that Hussein offered a *personal apology* and not merely an official statement. A personal apology — uttered in supplication ("begging") and spoken on one's knees while grasping the hand of the addressee — can reasonably be interpreted as a request for forgiveness without significant interpretative intervention. At this point, the admirable faithfulness to the detail and nuance of individual examples that characterizes Eisikovits' approach in SWTE falters.[6]

I have similar concerns about the treatment of forgetting and, to a lesser extent, recognition: namely, that the decision to discuss them only as potential "competitors' to sympathy affects the discussion of each for the worse, and thus the account as a whole. The description of forgetting seems almost deliberately extreme, for example: surely an appropriate disposition to "forget' need not result in collective amnesia or the even the appearance of such, anymore than a disposition to sympathize requires that former combatants live their lives in constant and reciprocal role-playing, or that they find time to imaginatively engage comprehensively and exhaustively with every aspect of the others' lives. The disposition of sympathy is defined normatively in the pages of SWTE, as a virtue; it is at least possible to conceive of a normatively defined disposition of forgetfulness.

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[6] Furthermore, insofar as this gesture was offered by Arab royalty and received positively by the individual Israeli families and by a wider Israeli public, it at least suggests that the association between Christianity and forgiveness is not as limiting as Eisikovits implies (34-35). Jacques Derrida chooses to describe the religious heritage of forgiveness as "Abrahamic" rather than Christian (2001), and recent work by David Konstan suggests that the moral concept as it has developed in the west has Hellenistic as well as Judeo-Christian roots (Konstan 2010, forthcoming).

The discussion of recognition is the most balanced of the three, but the variants of recognition Eisikovits identifies are still relatively thin.[7] I suspect that Eisikovits, while aware of the rich and varied texture of victims' demands, sees them as far too ambitious to be constitutive of any feasible general theory of reconciliation. He is not wrong here — but again, that need not be the end of the story. Once again, appropriate gestures of acknowledgment and recognition may contribute significantly to an atmosphere of political generosity and sympathy, albeit from a less central position in the theory. And crucially, recognizing this supplemental role requires we see them not merely as dispositions, but as acts that can contribute to the same.

Finally, this competitive framework obscures several potentially illuminating and fruitful ways in which sympathy may interact and even overlap with all three of its supposed rivals, or each rival with the others. I have already suggested that the example of King Hussein illustrates how an act of forgiveness can be a watershed moment in a longer process of learning to sympathize. The relationship between recognition and forgetting is perhaps equally relevant, though ultimately more a matter of dynamic or dialectical tension than straightforward assistance. It is telling that Eisikovits first notes how "forgetting… is destructive on both the individual and collective level" and that "a government advocating forgetfulness commits the political correlate of suicide" (37) in arguing against a central role for forgetting in reconciliation processes. Then, only a few pages later, he cites with approval the African proverb, "truth is good, but not all truth is good to say" and admits that sometimes, an ongoing search for joint narratives and mutually acceptable histories can be destructive of peace, in arguing against a similar place for recognition (40). The irony here is that while each argument appears to contradict the other, in fact both points are well taken — but this is hard to see if these concepts are subjected to a zero-sum game.

My issue with this competitive framework is partly a question of rhetorical strategy. Throughout the early stages of Chapter Two, Eisikovits varies between a stronger and a weaker version of his claim in defense of sympathy. The weaker

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[7] Eisikovits rightly notes that for many victims, a central demand is for "the harm done to them to be acknowledged" (38) but the depth and content of this acknowledgment goes well beyond both the "weak' variant ("that she has been wronged") and the "strong' variant ("that you have wronged her") Eisikovits identifies. Those who theorize acknowledgment and the communicative gestures that typically express it — apology, reparation, and memorial, for example — emphasize that, like forgiveness, acknowledgement has multiple dimensions: these include making sense of *what* exactly was done, the particular nature of its wrongfulness, the texture and phenomenology of its impact on the victims' bodies, lives and communities, the appropriate determination of responsibilities for that wrongfulness, and evidence that those responsible have heard and appreciated the victim's narrative.

version is that, unlike sympathy, forgiveness, forgetting and recognition are neither necessary nor sufficient for reconciliation. The stronger claim, of course, is that all three are actually detrimental or destructive to reconciliation, in all or most cases. Eisikovits needs only to make the weaker claim to support his theory, and the theory, once defended, can still easily make room for the other concepts in less central and decidedly contingent roles, relegated to subordinate or supplemental positions. Put simply, for sympathy to be best, forgiveness etc. need not be *bad*, only less good. Yet he appears to argue for the stronger claim for most of the discussion, as when, for example, arguments against forgiveness are presented as generally conclusive, or a single reason *for* forgiveness that holds water fails to be found. Similarly, forgetfulness is described rather starkly as "political suicide'. Only the discussion of recognition allows for nuanced conclusions regarding its desirability.

The strategic and rhetorical appeal of the stronger claim is understandable, and it is petty (at best) to chide a particular theorist for failing to give every related concept the same attention as that paid to the cornerstone of the theory — I know that I and others who write on forgiveness, for example, have certainly fallen embarrassingly short of anything like the clarity and nuance with which Eisikovits defines and describes reconciliation, although clarifying reconciliation is certainly relevant to our purposes. In part, the very virtues of SWTE that make it vulnerable on this front; the terrain-clearing activity found in Chapter Two stands out because it is the exception to a general rule, in this case, sensitivity to nuance and also a degree of subtlety and even ambiguity — consider, for example, the modesty of political generosity described on pp. 75-76, the initial adjustment to Smith's conclusion that sympathy always results in moral approval, or the distinction between sympathy and affinity to be found on pp. 12-13.

The problematic framework in which forgiveness *et al* are discussed is important because it raises an interesting meta-theoretical question, one that is perhaps particularly relevant to theorists of conflict and its resolution, given the notoriously messy and ungoverned nature of the subject matter.[8] As I began my remarks by noting, Eisikovits' purpose in SWTE is to provide a theory of reconciliation that meets certain criteria, which he lays out. And these criteria reveal a great deal about what he thinks *theory*, in general, ought to be able to

[8] Much of the terrain covered by moral and political philosophy — concerning, as it does, the social relationships and behaviors of human beings — is messy. The areas of transitional and historical justice are perhaps particularly so, however, as they concern those moments when familiar structures (legitimate government, rule of law, recognizable institutions of justice) are tragically absent, and also span individual and group wrongdoing, cultural, historical and religious identities. Furthermore, theorists in these areas have been more willing to consider the personal, emotional and relational aspects of the moral and political problems that emerge. Suffice to say, they operate squarely in the realm of the non-ideal.

do. A theory must be clear enough and sufficiently definitive to offer an appropriate explanatory story of the phenomenon in question. And the same time, a successful theory must perform a delicate balancing act between generality and particularity – a good theory applies widely, but the abstractions of generality inevitably risk doing damage to the subtlety and nuance of the particulars. In his initial desiderata, Eisikovits appears to favor reach over detail, emphasizing the need for generality. Indeed, this orientation towards generality explains the desire to find one central disposition, itself both necessary and sufficient, whose operations can account for the complex, messy and slippery informal elements of reconciliation and whose activation results in a picture of reconciliation that is simultaneously desirable, feasible and recognizable *as* reconciliation.

At the same time, in the execution of his theory and its defense, Eisikovits demonstrates himself to be remarkably appreciative of particularity, in his reliance upon and choice of concrete individual examples, for instance, and in his analysis and use of the same – not to mention his affinity for the moral perception theories of Lawrence Blum and Iris Murdoch (83-86). For the most part, the ensuing balancing act between generality and particularity is navigated deftly; the opening section of Chapter Two was the only point at which it resulted in tension. Indeed, I wonder if ultimately, Eisikovits sees room in an expanded version of this theory for some more of the particularities of reconciliation, or reconciliation(s). Of interest to me, for example, are the processes and practices that, while perhaps not *definitive* of reconciliation in the way that the two sets of factors described in SWTE are (i.e. formal elements + the inculcation of sympathy), can nevertheless be found with sufficient regularity to be considered at the least *characteristic* or *typical*, and whose recurring place in multiple instances of successful reconciliation goes beyond the coincidental. I suspect that several of the so-called competitors dismissed in Chapter Two might find their way back into an expanded version of this theory. If they did, I could look forward to learning a great deal from the insightful, precise and careful analysis I am almost certain they would be given, just as I have learned from the analyses of sympathy and political generosity offered in the present text, and the vast and knowledgeable array of examples provided along the way. *Sympathizing with the Enemy* does an utterly commendable job of providing a theoretical framework that deserves to be taken seriously in ongoing conversations about reconciliation.

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Jamie Terence Kelly[1]

Transitional Justice and Equality: A Response to Eisikovits

This article responds to Nir Eisikovits' *Sympathizing with the Enemy: Reconciliation, Transitional Justice, Negotiation* (Martinus Nijhoff Publishers, 2010).

In his recent book, Nir Eisikovits argues for an approach to political reconciliation centered upon the inculcation of sympathy between adversaries. After developing this approach to political reconciliation in the first part of his book, Eisikovits applies it by evaluating common transitional institutions and negotiation styles. In my response, I focus on the relationship between sympathy and transitional justice. I argue that if Eisikovits' argument in favor of sympathy is convincing, it ought to be applied beyond the confines of transitional justice as it is traditionally understood. More specifically, the process of inculcating sympathy should be extended to address issues of substantive inequality, and ought not be limited to formal concerns.

Introduction

In his recent book, Nir Eisikovits provides a rich and detailed description of the role and importance of sympathy in our understanding of international conflict.[2] His most important theoretical contribution consists in developing an account of political reconciliation centered upon two related processes: the resolution of formal questions and the inculcation of sympathetic attitudes between adversaries. On Eisikovits' account, former adversaries can be said to

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[2] All page references are to the original.

be reconciled just when they have resolved all formal disputes between them (e.g., questions regarding rights, borders, and political responsibilities), and they have — broadly though likely not uniformly — developed dispositions to sympathize with each others' actions and circumstances. I take this to be a useful and compelling way to understand political reconciliation. Eisikovits then goes on to apply this account of political reconciliation to both transitional justice and negotiation. In this response, I will focus upon Eisikovits' account of transitional justice, arguing that sympathy should be used beyond the narrow confines of political reconciliation. More specifically, I argue that the institutions and processes of transitional justice ought to mobilize sympathy in order pursue the full social and economic equality of citizens.

Transitional Justice

"Transitional Justice" can be understood in a number of different ways. One dominant understanding takes it to be the sort of justice that obtains during the transition from violent conflict to civil society.[3] More simply, we might describe it as the sort of justice that obtains in a society that is transitioning from a state of war to a state of peace. This is not, however, the only way one might understand transitional justice. Here are some other candidate understandings: transitional justice might obtain in societies making the transition to democracy, it might describe the transition to a society where all members are given equal consideration and respect, or it might describe the kind of justice that regulates the transition of a society characterized by widespread human rights abuses or mass atrocity to a more humane one. None of these understandings, however, seem to precisely capture the import of transitional justice as it has developed in the last few decades. For example, South Africa's Truth and Reconciliation Commission (TRC) is often taken to be a paradigmatic example of transitional justice in action, but the abomination of apartheid, whatever else it might have been, does not seem to be accurately described as a state of war. It might be more apt to characterize apartheid as a state of violent conflict, but even that does not seem to capture what is essential about the situation.[4] Further, attempts to characterize transitional justice in

[3] See, for example, the introduction to Eisikovits' entry on "Transitional Justice" in the *Stanford Encyclopedia of Philosophy*.

[4] For example, we could imagine a society relevantly like apartheid South Africa where the use of outright violence had been replaced by subtler forms of oppression and domination. In transitioning away from such a society, it seems plausible to think that the society would similarly be in need of institutions and processes of transitional justice.

terms of democracy or human rights seem to unduly restrict the purview of transitional institutions.[5]

What seems to unify all of the above cases is the fact that they all represent a transition from a state of widespread injustice to one of greater justice. If this is correct, then all of the pre-transition states listed above ought to be recognizably unjust. This seems accurate. Insofar as we take states characterized by non-democratic government, human rights abuses, mass atrocity, or war as being fundamentally unjust, then this characterization of transitional justice would seem to capture what is essential about the role and importance of the transitional justice movement: institutions of transitional justice are designed and implemented in order to help a society move beyond a past characterized by widespread injustice toward a more just future. So understood, however, I will argue that there is an important ambiguity in our understanding of transitional justice.

If transitional justice obtains in the transition from a state of widespread injustice to a state of justice, then we are still left with the question of what sorts of justice and injustice are at issue here. For example, are the pre-transitional states all characterized by *criminal* injustice? And further, what sort justice characterizes the post-transitional states? It seems to me that the first question is relatively unimportant. In cases where calls are made for transitional institutions, the depth and severity of injustice seems sufficient to obviate the need for any subtle or sophisticated conceptual understanding of the kinds of injustice involved. But the question regarding the kind of justice that characterizes post-transitional states seems to me to be of fundamental importance. It is, I take it, the question of when the transition is complete. Until we know what sort of justice transitional justice is a transition toward, we will not know when the utility of transitional institutions has been exhausted. In what follows, I will argue that Eisikovits, in assuming that political reconciliation and transitional justice are coextensive, improperly limits the proper scope of transitional justice.

The Limits of Political Reconciliation

In developing his account of political reconciliation, Eisikovits argues that we should be limited in our aims. He rejects the view that political reconciliation should be geared toward the healing of old wounds, or the promotion of

[5] For example, it would seem possible for transitional justice to play a role in a society transitioning to a more just, but still non-democratic state. Similarly, transitional institutions could play a role in transitioning a society away from a state of war that did not involve gross human rights violations (this assumes that such a war is possible).

solidarity between enemies. He claims that any such maximal theories of reconciliation are "unquestionably noble and unquestionably over-ambitious" (p.49). Similarly, Eisikovits recognizes that while economic prosperity can be both fostered by sympathy and can itself help to inculcate sympathetic attitudes, it should not be the goal of political reconciliation (pp.43-44). Thus, Eisikovits seems to take a narrow view of the scope of political reconciliation: it does not require that adversaries cease to be adversaries, but only that they cease to be enemies. In the case of political reconciliation, this seems fully apt. After all, enemies that are reconciled need not be friends, and the reconciliation aimed at here is explicitly political, rather than economic or social.

With regard to negotiation and conflict resolution, Eisikovits argues for a similarly limited approach: the resolution of specific problems does not depend upon establishing fraternal ties between former enemies, nor does it require eliminating all injustice. Rather, he argues that political reconciliation ought to be an important goal of negotiators (p.135), and that its achievement can carry a great deal of symbolic weight for parties to the negotiations (p.139). Negotiation can be successful, however, even when it falls short of these aims. As a result, the scope of negotiation is, morally speaking, even narrower than that of political reconciliation. While the settling of formal questions and the inculcation of sympathetic dispositions are necessary conditions for political reconciliation, they are not strictly speaking required for successful negotiation.

In the case of transitional justice, Eisikovits takes a similarly limited approach, arguing that the justification of transitional institutions is tied to their ability to promote political reconciliation (p.131). He rejects broader justifications of transitional institutions (especially TRCs) based in deliberative democracy, social unity, and restorative justice, arguing instead that:

> …a South African-style truth commission can be justified because it creates the preconditions for sympathy, which in turn, is constitutive of political reconciliation. More specifically, I shall argue that such bodies are morally defensible because they can generate the detailed information and the kind of political generosity required for the development of sympathetic attitudes. (p.126)

For the purposes of this article, I will concede Eisikovits' claim that the justification of transitional institutions is tied to their ability to promote sympathy, but I dispute his assertion that the point of such sympathy must be limited to the goals of political reconciliation. I do not see why political reconciliation and transitional justice must have the same moral scope. Political reconciliation is necessarily political, whereas transitional justice need not be. Indeed, it seems odd to restrict the scope of transitional institutions to the same goals as political reconciliation. As Eisikovits notes, the moral ambitions of the South African TRC greatly outstrip the purview of political reconciliation

(p.131), and seem to be geared toward the promotion of political and social equality (p.10). It seems plausible to me that political reconciliation and transitional justice are quite different in scope: reconciliation extends only to the realm of politics, whereas transitional justice ought to be much broader, encompassing political, social, and even economic equality.

Stated another way, I take it that the appropriate end points of political reconciliation, negotiation, and transitional justice are quite different from one another. As Eisikovits maintains, two enemies are reconciled when they have settled all formal questions between them, and have developed the proper sort of sympathetic dispositions toward one another. Negotiation, on the other hand, is complete when it provides a solid foundation for a lasting peace. But I take it that institutions and processes of transitional justice ought to aim higher, and ought to continue working beyond the end points of either negotiation of political reconciliation. I will argue in the next section that institutions of transitional justice ought to aim for not only the establishment of a lasting peace, and for the resolution of formal questions and the inculcation of sympathy, but should also attempt to bring about social and economic equality.

Perhaps an example will be helpful here. I think it is reasonable to suppose that Israelis and Palestinians could be politically reconciled without achieving substantive equality. Imagine the case of two future children: a young Israeli boy from Tel Aviv and a young Palestinian girl from Gaza. I claim that they could be politically reconciled even though they might still have substantially different life prospects (e.g., their ability to go to the best universities, their opportunity to open a business, and the likelihood that they will become prime minister). Political reconciliation does not seem to require that sort of equality, but I take it that transitional justice should aim precisely at such lofty goals.

Sympathy and Equality

One of the great strengths of Eisikovits' account of political reconciliation is his recognition of the role and importance of political generosity in reconciling former adversaries. He argues very convincingly that there can be no reconciliation unless individuals are willing to forgo the moral book-keeping of past transgressions, and set aside their vindictive or vengeful motivations. In order for political reconciliation to be successful, individuals must cultivate a set of moral dispositions: they must be willing to put an end to the cycle of violent reprisals, they must shift their focus away from their own pain and the wrongs they have suffered, and they must be ready to offer an enemy more than they can minimally expect (p.75). An essential part of sympathy, according to Eisikovits, is comprised of actions that serve to develop these dispositions. Political generosity requires effort. It requires that individuals work on their own motivations, actively

shaping them to be more generous. The process of becoming sympathetic, according to Eisikovits, is thus tied up with the collection and acceptance of information describing the conditions and experiences of others.

It should be recalled that according to Eisikovits, political reconciliation is not possible through the inculcation of sympathetic dispositions alone. Instead, it also requires the resolution of formal questions between adversaries (p.10). Political reconciliation requires that rights and responsibilities be fairly allotted amongst former enemies. As a result, we need to be wary of mischaracterizing Eisikovits' position as blind to issues of inequality.[6] But the sorts of inequalities that seem to be central to political reconciliation on Eisikovits' account concern formal questions regarding the distribution of political rights. As Eisikovits understands it (p.1), political reconciliation requires answers to questions like: who has a right to what? Answers to such questions thus specify the formal terms of political reconciliation.

It ought to be obvious, however, that persistent injustice can endure even where individuals enjoy formally equal political rights. Informal barriers to employment, public office, and various sorts of opportunity can endure even if, as a matter of political rights, everyone has the same set of permissions and entitlements. The experiences of minority groups in the U.S., Europe, and elsewhere should suffice to demonstrate that formal equality is all too compatible with social inequality and injustice. If we take this to be the case, then why should transitional justice focus exclusively on formal questions? Even if we concede, as I think we should, that political reconciliation is so limited, we might want to extend the scope of transitional justice and its institutions beyond merely formal considerations to substantive issues governing, for example, distributive justice.

As Eisikovits rightly emphasizes, rights and sympathy are mutually supporting, and it is this very synergy that seems to animate much of the literature on transitional justice. As Eisikovits says when discussing political reconciliation:

> If sympathy is understood as the ability to identify imaginatively with another, and if this other is endowed with the same rights that I possess, the identification becomes easier. In other words, if having a set of rights constitutes part of my self-understanding, it is easier to identify with someone who possesses the same set of rights, since by the fact of possessing them she becomes more like me. On the other hand, if I begin to sympathize with another, and make an effort to place myself in

[6] For Eisikovits' discussion of structural inequalities, see his response to what he calls the Marxist critique (p.70), and his discussion of distributive justice (p.114).

> her circumstances, this can serve as an independent motivation and encouragement for endowing her with the same rights I have. (p.14)

The above comments are all the more convincing when we move beyond formal political questions, and begin to consider the role of transitional institutions in promoting substantive (rather than merely political) equality. I take it that the intellectual energy and excitement that has developed around the transitional justice literature in the last few decades is due to the potential of transitional institutions to serve as new tools in the service of social justice. Whether or not such institutions can live up to this promise remains to be seen, but their potential to promote justice beyond mere formal rights should not be ignored.

Conclusion

Much of the promise of transitional institutions stems from the fact that they require communities to balance considerations of justice that pull in disparate directions. In order to succeed, such institutions must make trade-offs between, for example, retribution for past wrongs, and social stability. Transitional justice requires that societies work toward a more just future by making difficult sacrifices (e.g., allowing murderers to go free, so that the community can move on). Despite, and because of the injustices of the past, a way must be found toward a more just future. In this way, transitional institutions like South Africa's TRC require the development of a kind of political generosity that is elsewhere unheard of. When one finds oneself in the midst of such political generosity, when one confronts a society that is willing to focus its attention on the common project of promoting justice, and when one finds a community willing to make such sacrifices in order to promote sympathy, it seems a great and unconscionable waste to lower one's goals from full equality. Once the moral urgency of such situations has dissipated, and the regular political book-keeping settles in, opportunities for concerted political action predictably recede. As a result, we ought to emphasize the moral difference between political reconciliation and transitional justice. Although they both may rely upon the mechanism of sympathy, it seems that the latter has appropriate to it egalitarian aspirations wholly absent from the former.

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Aleksandar Fatić[1]

Sympathy as Dynamic Social Capital

The specific role of sympathy in effecting political reconciliation

A refreshing study of the psychological, epistemological and moral conditions for a realistic reconciliation of political conflicts, Nir Eisikovits's *Sympathizing with the Enemy: Reconciliation, Transitional Justice, Negotiation*, plays with a number of potentially highly explanatory notions in the broad field of ethics (sympathy, restorative justice, generosity, empathy), and focuses sympathy in its functional sense on the practical contexts of political reconciliation.[2] Unlike numerous institutions-centred accounts of how the resolution of chronic political conflicts such as those in the Middle East, Eisikovits's approach suggests that providing enemies with sufficiently detailed information about the life and predicament of the other increases their

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[2] This paper specifically refers to "political reconciliation" in relation to Eisikovits's book, for two main reasons. First, Eisikovits's argument is focused more or less exclusively on political reconciliation, although it does occasionally suggest that the principles under discussion may be applicable in the broader context of human relationships. Secondly, much of what he says, while indeed valid for political reconciliation, does not necessarily hold for reconciliation more broadly conceived. Perhaps the best example is the key idea that adequate familiarity with the circumstances of the other is necessary for political reconciliation; while probably being able to contribute to reconciliation more broadly conceived, such as that in inter-personal contexts, familiarity with another's circumstances is by no means a *precondition* for such reconciliation, as it may be replaced by strongly held value-systems that require forgiveness and even fraternization, based on the presumed deeper commonalities, regardless of the circumstances. Such values systems are provided by the Christian ethic of human fraternity includes even a commandment of love. While this point implicitly broaches a much broader theme than can be discussed in this paper, suffice it to mention that the term "political reconciliation" in the present discussion, with which I tend to agree in most aspects, serves as a partial disclaimer when such broader issues of reconciliation are concerned.

propensity to sympathise and thus the likelihood of reconciliation. In an institutional context, conflict-resolution more often than not goes alongside political change, and such change usually involves increased enfranchisement for marginalized groups.

> "Oppressive regimes don't collapse at once, just because those previously oppressed are now enfranchised. Instead, the slow process of enfranchisement, which was generated by some level of sympathy, then becomes a catalyst for sympathy, which in turn promotes further enfranchisement."[3]

Political change, however, may rest on various value-standards, the most common of which is that subsumed under what we ordinarily call "justice". While justice as a value reigns supreme over the myriad of emancipatory and revolutionary movements around the world, the actual feasibility of reconciliation in most existing political conflicts requires, as Eisikovits rightly points out, that both sides compromise on what ideal justice might entail in their case:

> "The Palestinian refuges may be morally justified in claiming a right of return to the properties they left behind in 1948. But insistence on the straightforward implementation of this right may be destructive. Many of the places Palestinians want to return to are now populated by Jews. Removing them would address one tragedy by creating another. Furthermore, the unyielding demand for a right of return is one of the factors blocking the prospects for peace in the region. For Israelis "return" is code for creating an Arab majority in their territory, thus eradicating the Jewish nature of their state. That is an idea that even the most moderate Israelis, those who are both willing to accept responsibility and participate in a compensation program for Palestinian refugees, cannot commit to."[4]

A willingness to compromise on ideal or "historic" justice for one's community, along with an ability to perceive some of the intimate detail of the other community's living conditions, generates the broad context within which political reconciliation becomes a strong practical possibility:

> "Exposing oneself to the circumstances under which others live, attempting to imagine how their world works and what their routines look like, introduces shades of grey into the black and white world of absolute justice. To the uncompromising cry "I am right!' sympathy replies with a more hesitant question, "how do I make life bearable'."[5]

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[3] Eisikovits, p. 16.

[4] Ibid, p. 23.

[5] Ibid, p. 24.

This, indeed is the starting point for Eisikovits's theory of reconciliation that mirrors many of the key points of modern restorative theories of justice and Nils Christie's "limits to pain" tradition that attempt to provide an alternative to the perspectives arising from strictly formalized conceptions of justice understood as either "just deserts" or as various models of proportionality between rights and entitlements.[6] The legion of literature on these more traditional perspectives of justice simply falls beside Eisikovits's approach that addresses highly practical issues of what it takes to sympathise with a politically opposed community, and how the conditions for sympathy in this context may contribute to a transformation of perceptions and peace. Seeking justice when reconciliation is the prime goal may be counterproductive, or as Eisikovits puts it when discussing war crime tribunals, "(…) the retributive orientation of trials is antithetical to the prospects of real peace".[7]

Clearly Eisikovits's perspective is functionalist in the sense that, contrary to the strong "structuralist" Kantian ethic of "respect through retribution" (retribution is "due" based on deserts and failure to mete it out is equivalent to not taking seriously one's humanity in its moral meaning — the strong retributive thesis), for him the truth commissions are justified because they are "capable of promoting sympathy between former enemies. Insofar as (they provide) detailed accounts of life under apartheid, and to the degree (they) created an atmosphere of political generosity, the truth commission(s) put in place both conditions for the inculcation of sympathetic attitudes".[8] Thus Eisikovits sides with an entire consequentialist tradition in ethics that considers the functional consequences of the variously value-loaded directions of action as key to justifying the action, rather than basing such justifications on highly formalized deontic and, in a sense, structural views of justice.

Eisikovits' theory is methodologically not very different from the essentially consequentialist methodology that provides a silver lining even in the "strong" versions of utilitarianism (where the requisite concept of "utility" is defined simply as satisfaction in the broad sense, or even as "happiness").[9]

When such consequentialism is couched in values other than satisfaction or happiness, and yet those values contribute to an overall amount of satisfaction of large numbers of people, such as is the case of reconciliation or peace, there

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6 Nils Christie, *Limits to Pain*, Norwegian University Press, Oslo, 1981.

7 Ibid, p. 87.

8 Ibid, p. 110.

9 Jack Smart famously used the metaphor that all humans are "buckets" into which happiness can be "poured"; his theory, however, is anything but banal or trivial — it provides highly subtle methodological guidelines for a proper value-consequentialism. See J.J.C. Smart, *Essays metaphysical and moral: Selected philosophical papers*, Blackwell, Oxford, 1987.

is no reason for not considering the end value of the consequentialist, or functionalist approach, to be equivalent to "utility". Thus Eisikovits's approach can indeed be considered deeply utilitarian, which is not to say that it is in any way contrary to the common intuitions about the role of justice in reconciliation. Simply put, that role is limited while the role of the end "utility", whether it is merely peace as coexistence at the minimum trashold, or the "higher tier" of peace exhibited in fraternity.[10]

The internal conditions for sympathy

If familiarity with another's circumstances is a pre-condition for sufficient empathy to allow reconciliation, clearly, as Eisikovits himself points it out, "(i)t takes a certain kind of disposition to be willing to notice such detail about an enemy's life".[11] While most of the argument in the book is about the external conditions for sympathy (e.g. people without specific anti-discriminatory political views who meet the significant others at road blocks tend to develop politically sensitive views on discrimination and conflict more generally), one wonders what the internal, value-loaded conditions are for being able to sympathise with a particular someone. The first question to be raised with regard to Eisikovits' argument is thus what sort of value-structure it takes for someone to change their views on the Israeli-Palestinian conflict, to acknowledge the consequences of election of Arien Sharon to government in 2000, or the eruption of the second Intifada at much the same time, as opposed to someone who, regardless of encounters at a road block, feels no sympathy at all. Eisikovits's argument seems to suggest that sympathy is indeed an "in-built" sentiment in all of us, and that most of us will simply automatically react by developing sympathy once we are faced with the predicament of others. This may indeed be so in many cases, but there is also ample evidence that some (not so few) people remain unmoved by the suffering of others.

The examination of the values and internal conditions for the effective role of sympathy is an area that remains to be covered by a comprehensive account of the role of sympathy in political reconciliation. The question may or may not be a criticism of Eisikovits's argument: his arguments about political reconciliation are fair enough when one considers all practical circumstances of the Arab-Israeli conflict, or the former Yugoslav wars, or the post-Apartheid South Africa, which are the examples that he discusses. In this sense, the point raised here need not be critical of his account. On the other hand, examining the "internal" conditions for sympathy, while covering a broader field than just

[10] Eisikovits, ibid, p.10.

[11] Ibid, p. 145.

political reconciliation, would almost certainly contribute to an better understanding of the way negotiations between the conflicting sides in the Middle East or in the former Yugoslavia might have been improved.

The civil war contexts are particularly illuminative of the point I raise here. While Eisikovits suggests that a depersonalization of the enemy makes atrocities easier, the warfare in the former Yugoslavia, for example, showed that many of the perpetrators of crimes were in fact former neighbours or co-workers, who had presumably had a highly personalized picture of the victim and certainly could not perceive it simply as a number or a representative of her ethnicity. A similar consideration applies to the perpetrators of mass war crimes: while in that context the perception of the enemy may indeed be couched in a broad view of the enemy collectively, still the ability to shoot at frightened women and children required a considerable internal value-depravity. Similarly, and conversely, what are the internal value conditions for the reverse phenomenon, namely for a person's ability to withdraw all sympathy by "merging" her personal identity in the ranks of her collective ethnic, professional, military or corporate identity?

Travelers departing Israel via the Ben Gurion airport in Tel Aviv may be excused for wondering on the above point while they are repeatedly searched and held in lines for hours and hours by modern-looking young men and women of the Israeli security, whose faces are totally blank to human frustration and pain.

A group of Serbian paramilitaries shooting a group of captured Muslims (regardless of whether they were soldiers or civilians), which was shown on Serbian television in 2008, and led to a war crime trial and convictions in Belgrade, not at the Hague) suggested what most of the Serbian public regarded as a completely socially unacceptable set of personality traits and regarded the punishments as obviously deserved, unrelated to the public's view of the ethnic relations underlying the conflict. However, to what extent did the "corporatisation" or "ethnicisation" of the personal identities make possible the more or less dramatic withdrawals of sympathy? These questions may well be theoretically more challenging and practically more difficult to answer than even the motivations of many suicide bombers whose family members had been killed by Israeli police, the occupation forces in Iraq, or by the coalition troops during the invasion of Afghanistan.

A more comprehensive ethics of sympathy?

Another question that arises in relation to Eisikovits's book is whether sympathy, which in his argument is treated within a strictly limited domain of political reconciliation, may be the basis of a comprehensive ethics. This is especially relevant when the view of the limited role justice has to play in effective reconciliation, which Eisikovits draws convincingly, is taken into account. Can such an ethic be a basis for a broader, decidedly non-retributive, crucially restorative, concept of justice? Much remains to be said about restorative justice, for it is treated only as a subsidiary theme in Eisikovits' book: perhaps the most rewarding angles on restorative justice arise from the various types of "restoration" that may be involved. Restorative justice need not only restore relations between the offending and the injured party; it may well serve to restore the offender's self-esteem or the community's trust in the institutions and their ability to effectively mediate social relations. Depending on the meaning of "restoration" involved restorative justice is an exceedingly rich concept that allows for a plethora of interpretations at least some of which might usefully inform a discussion of political reconciliation.

As far as the restoration involved concerns mainly the parties in conflict, it gives rise to a related ontological question: to what extent can the fraternization that may result for highly successful exercises of restorative justice generate new psychological, but also new "external" realities that influence our world? If sympathy is sufficiently strong to lead to genuine fraternisation, it could be argued that it influences our life both internally and externally, by changing the way we act and perceive others, and thus also by changing the relationships with others.[12] The ability to engage with others based on increased sympathy for their conditions changes not just the perceptions, but the moral and social quality of our lives. This is why the question of whether sympathy could be the basis for a comprehensive ethic is so tempting, though Max Scheller, arguably the most authoritative theorist of sympathy in the western philosophical history, repeatedly claimed that sympathy is the basis for the philosophical elucidation of human relationships generally, and even for the theorizing of cognition, but cannot be a basis for a special ethics.[13] This is probably because Scheller follows Kant in his idea that morality is essentially a "vertical" relationship between ones' self and God, and that the "objective hierarchy of values",

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[12] See Nikolay Loski, *Bog i svetsko zlo*, transl. by Miloš Dobrić, Zepter Books, Beograd, 2001, p. 14–16; Vladimir Solovjov, *Duhovne osnove života*, transl. by Marija and Branislav Marković, Logos, Beograd, 2008, pp. 43–50; Martin L. Hoffman, *Empathy and Moral Development*, Cambridge University Press, Cambridge, 2000.

[13] Max Scheller, *The Nature of Sympathy*, transl. by Peter Heath, Routledge & Kegan Paul, London, 1954.

supposedly internal to the moral agent, does not depend on the "social situation" one finds oneself in:

> "There may be facts of sympathy having a genuine bearing on the metaphysical postulate of a self-same, all-inclusive, supra-individual reality inherent in the existence and nature of all men; but at all events the phenomena of companionate, vicarious and fellow-feeling are not among these facts, and nor are those of love (in the strict sense). (…) There is nothing *essentially* or even exclusively *social* about the moral phenomenon; it would remain standing even if society collapsed, and is by no means a product of our relation to others or to the community. (…) But the notion of an objective hierarchy of values, central to the whole of theoretical ethics, can be elaborated without regard for the facts of the situation between "self and neighbour' or "individual and community'; being valid for man as such, it holds equally for the isolated individual and for the community or any other collective group. There can be no truck with any proposal to set up ethics on a social basis, and none therefore with the attempt to found it on a metaphysics of the "whole' as a sort of reality underlying the appearances of social life."[14]

The starting point of Scheller's argument is clearly opposite to the essentially inter-subjective concept of values and sympathy as their manifestation that is suggested by Eisikovits, along with an entire modern tradition in value enquiry following John Searle's idea that our views, cognition and values arise from a prior, and pre-requisite, "intentional direction" towards each other.[15] Eisikovits would thus most likely part with Scheller on this point, and I would agree with this theoretical divorce from the "systematic" tradition of sympathy and Scheller's views on the morals. However, once we agree to such parting, the question comes back at us of why sympathy would not serve as the basis for a comprehensive "intentional" or, as Scheller says, *essentially social* ethics. If such a role of sympathy would indeed be possible, far more can be said about sympathy as a normative concept than just discussing its systematic contribution to political reconciliation. The important consequence is that such a broader perspective would allow political reconciliation itself to be placed in a highly explanatory context of ethics of negotiations. Such a contextualisation would invite a departure from the strictly instrumentalist and functionalist views on why sympathy works and would include a discussion of why we should be sympathetic on moral grounds when engaged in a political

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[14] Ibid, p. 72.

[15] John Searle, *Intentionalit: An Essay in the Philosophy of Mind*, Cambridge University Press, Cambridge, 1983.

conflict. The question of ethical norms with regard to the need for sympathy appears to be lacking in Eisikovits's account.

Sympathy and a decision to fight

One of the crucial points in Eisikovits' argument about the need for sympathy as a pre-requisite for political reconciliation is that sympathy, while making it more difficult to decide to fight and causing one to think twice, does not ultimately and necessarily *prevent* one from taking a decision to fight. He correctly points out examples where thinking twice would have been a more prudent choice than rushing into violence. This point also marks fertile ground for a broader conceptualisation of sympathy.

While it is true that being sympathetic does not prevent us from fighting, and this is witnessed by the numerous occasions where people fought their loved ones, for whom they surely felt sympathy, based on ideological reasons (Second World War Eastern Europe comes to mind), the main "mechanical" question here appears to be located in the field of decision theory. It seems that the real question in assessing a sympathetic person's ability and willingness to fight is really what factors make that person decide to fight rather than not to fight. Sympathy is a dynamic factor that suggests avoiding the fight; however, this is only one factor. There may be other factors, other desires arising from perceived circumstances and internalised values (such as patriotism) that will be stronger. Frank Jackson's influential analysis is highly relevant here: in his 1984 essay "Weakness of Will", he espouses "an account of how desires can evolve in accord with the agent's reason: weak-willed behaviour being behaviour springing from desires that do not evolve in this way".[16]

Jackson's view is that what constitutes the mechanics of making a decision is a competition of desires of various strength: while a person might be aware that moral requirements entail type of action (a), she may chose action (b) because the desire to achieve some degree of personal satisfaction provided by action (b) is stronger than the desire to conform to the moral requirement. When this perspective is somewhat relaxed, and moral choices *per se* are not involved explicitly, it becomes clear that when one's community is threatened, or terrorist acts need to be prevented, one's sympathy for the individual suspected of plotting the action might well be over-ruled by what Jackson calls "strongest desire", in this case to achieve optimum security for one's community, which entails unsympathetic action towards the suspect. The perspective on desires in

16 Frank Jackson, "Weakness of Will", *Mind*, vol. 93, no 369, January 1984, pp. 1–18, quote from p. 1.

decision-making clarifies that there is no controversy from the point of view of fighting the enemy in Eisikovits' emphasis on sympathy as a tool for reconciliation.

Conclusion

Eisikovits' argument, cogent and persuasive as it is, provides a good normative platform for the design of applicable models of negotiation that would allow greater chances for success. It is a highly practical account that arises from the conceptualization of some of the more intractable political conflicts the world faces today.

What remains as a lingering sentiment after reading this stimulating writing is the feeling that something is left out in the sense of what it takes to cultivate and strengthen sympathy as a natural disposition so as to turn it into a sufficiently "strong desire", or a sufficiently highly positioned value in our value-system, to make greater use of it in political conflicts. Such an account, that departs from the facts of how sympathy works, and ventures into the normative field of how to make sympathy more important, how to make sure that it is the "causally operative" value in deciding how to act in conflicts, would, again, inevitably invite broader considerations of an ethics of sympathy. Perhaps that is the direction of future argument for which this book paves the way.

Nir Eisikovits

Sympathizing with the Enemy: A response to MacLachlan, Kelley and Fatić

It is deeply gratifying and humbling to have one's work read by commentators as intelligent, generous and careful as Professors MacLachlan, Kelley and Fatić. In what follows, I respond to and elaborate on some of the central claims the commentators make. But before I do so, perhaps it is fitting, if not altogether orthodox, to say a few words about what led me to write this book.

Like many Israelis, I grew up with the certainty that my country was engaged in a constant search for peace. "I was born for peace, let it come already," we used to sing in elementary school. Later, in high school, we chanted about " the children of winter, 1973," the first generation born after the traumatic Yom Kipur war, whose parents promised "to do everything [they] could to turn enemies into friends." And then there was "Shir Lashalom," with lyrics that could have been written by Wilfred Owen — an appeal by the war dead to replace the glorification of martial virtue with loud shouts for peace. Now, if we were so committed to peace, how did we end up with perpetual war? If we detested death, if we embraced life, how did we end up with what David Grossman has called "death as a way of life?"

The collapse of the Oslo Accords, and the renewed fighting between Israelis and Palestinians beginning in the fall of 2000, pushed the question of political reconciliation into my face. If peace was a "process", what was it supposed to lead to? If we had been trying to reconcile with the Palestinians for close to a decade, how come most Israelis I know have never met a Palestinian outside of uniform? If, for that matter, we had been at peace with Egypt for more than thirty years, why have most Israelis never seen an Egyptian? What does it mean, really, for two groups to reconcile and to learn to live together?

I have written a book about political reconciliation because my country has failed, for so long, to achieve it; because I have become convinced that we don't

even know what it means, and because it is important, both politically and morally, to figure it out.

It is important, because a coherent idea of reconciliation can give us a yardstick for evaluating just how serious our governments are in their efforts to end war. If, for example, we realize that political reconciliation requires reckoning with the wrongs of the past, such an understanding will make us skeptical of the popular political mantra that peacemaking requires "turning a new page," "looking forward rather than back," or, in the version made famous by Cambodia's Hun Sen, "digging a hole and burying the past."

Similarly, a clear idea of reconciliation helps us evaluate post conflict institutions such as war crime tribunals, truth commissions, and reparation initiatives. The stated aim of many such programs is to promote lasting peace. In order to assess the likelihood of these efforts to succeed, we need a better understanding of just what this aim means. Simply stated, it is hard to evaluate a post war policy that wants to promote political reconciliation, when you are not sure what political reconciliation means — what kind of material, political, and attitudinal changes it requires.

Third, a coherent notion of reconciliation is useful for figuring out when a stable, lasting peace is not an option. If, for example, reconciliation requires the creation of widespread economic opportunity and mutual recognition between former enemies, it may be overambitious, at least for the moment, to speak of a permanent peace between Israel and the Hamas, or between the different ethnic contingents in Iraq. In such cases, aiming too high too soon can be catastrophic. A stable ceasefire, or truce, may be the appropriate goal until current conditions change.

Finally an understanding of reconciliation is important for a degree of political honesty and modesty — for what Vaclav Havel and Gandhi have called "living it truth." Liberal democratic regimes tend to think of themselves as peace loving. Western exceptionalism — the conviction that we are better than our authoritarian, totalitarian, fascist, theocratic and feudal enemies — is in large part about this self-understanding. We want peace, we turn over every rock in order to find it… it's "they" who don't. A serious commitment to this picture requires an idea of what peace entails in the first place. Only after we have examined our actual practices in light of this idea can we determine whether our self-image is real.

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Professor MacLachlan argues, very compellingly, that the book unnecessarily sets up a competition between forgiveness, forgetting, recognition, acknowledgement and sympathy as possible components of political reconciliation. She finds such a competition "startling" in a "project

whose practical application is ultimately to encourage peacemaking, conciliation and the acceptance of multiple perspectives." MacLachlan is completely correct when it comes to acts of recognition and acknowledgement, and I am very much in her debt for her observation. Sympathy and such acts are mutually enhancing rather than mutually exclusive and the book fails to make that connection. Sympathizing with an enemy, trying to imagine what you would have done instead of her, may well lead one to engage in gestures of acknowledgement and recognition (and such gestures, if performed by the appropriate public figure, can lead ordinary people to want to learn more about their political rivals and thus increase the chances of sympathetic identification).

I am less sure, however, whether a "competition" with forgiveness can be avoided. MacLachlan argues that the trouble with my account (and with other traditional accounts of forgiveness) is that it perceives forgiveness too narrowly — as a primarily affective, emotive and attitudinal matter — as a question of the heart. Such a characterization "tends to obscure salutary experiences of forgiveness that emerge once we understand it as an act or set of practices." Many more such acts and practices should count as forgiveness including public "requests for forgiveness."

Maclachlan claims that the book is often too clear for its own good — that it is, occasionally, analytic to a fault. She is right about this too. But in this case, I think the analytic approach is useful. According to Maclachlan, there is no difference between forgiving and apologizing — both are subsumed under the category of "acts or practices" of forgiveness. But that seems intuitively problematic. A request for forgiveness is not the same as forgiving. We can apologize without being forgiven and forgive without first receiving and apology (though perhaps we should not). I am not sure that subsuming all of these under one broad concept is true to our ordinary moral phenomenology. More significantly, we might ask ourselves what it is about forgiveness that makes it such a powerful and alluring way to think about conflict resolution? What, for that matter, makes it the religious heart of Christianity? Isn't it exactly the fact that it *is* a matter of the heart? That it involves genuine, morally motivated attitudinal changes? That it allows us to "love our enemies" and transcend our natural inclinations to resentment and pettiness? Does forgiveness maintain its moral gravity, its imaginary hold, it's religious force, in its democratic reinterpretation as a set of linguistic and performative practices?

MacLachlan claims that my discussion of forgetting suffers from the same fault: it sets up an artificial competition. If sympathizing can be imagined as a virtue promoting peacemaking, so can forgetting. But, surely, there is a great difference between sympathizing with a victim of one's violence and trying to forget what you have done to her. The former often leads to a reconsideration of one's political self-understanding, to a reconfiguration of one's sense of

righteousness, to a growing sense of moral complexity. These are some of the reasons sympathy is worth cultivating. What are the reasons to cultivate forgetting? Yes, there may be cases (Mozambique comes to mind) where both sides have harmed each other so much that neatly accounting for the past is impossible. Or there may be cases, as in Spain after the fall of Franco, where speaking about the past is too dangerous for a long time. It may well be prudent to practice some kind of official amnesia in these circumstances. But such silence would seem to require moral justification (because it is morally problematic to withhold recognition from those who have suffered) whereas the inculcation of sympathy would not. Thinkers like Renan and Burke may be descriptively correct in arguing that a "sacred veil" must be drawn over a painful political past — but they speak from what we may call an external rather than moral point of view. They are realists who may well be correct about transitional realities but one does not necessarily want to turn such necessities into virtues.

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Prof. Kelley thoughtfully and correctly points to the limitations of existing definitions of transitional justice. He suggests, instead, an understanding of transitional justice as involving a shift to a state of greater justice — whether in the aftermath of violence or not. He also calls our attention to the need to come up with criteria for thinking about the kind of justice that should obtain after that shift. If we don't have such criteria we will not know "when the utility of transitional institutions has been exhausted."

According to Kelley, the book mistakenly assumes that transitional justice is coextensive with political reconciliation. That is wrong, he claims, because while reconciliation extends only to the realm of politics, transitional justice ought to be much broader, encompassing not only political but also social and economic equality.

Perhaps it is worth clarifying the distinction between means and ends in overcoming a problematic political past. A society emerging from such a state may have several goals in mind: political reconciliation, justice (retributive, distributive or some combinatio) quiet, economic development and so on. These goals, as Kelley correctly points out, are not always consistent with each other. Our best political theories can offer us post-conflict goals. Or our political systems can do so (by means of referenda, parliamentary debates, elections etc.). The book is agnostic on the question of what the best post- conflict goal might be (I don't think it is possible to decide this in abstraction from circumstances). And the book doesn't argue that reconciliation is coextensive with transitional justice. Rather, it takes its bearings from a political commonplace: the frequent positing of reconciliation as the preferred political

aim, by political actors, and the assumption that instruments of transitional justice always promote such reconciliation. My main concern has been to problematize this practice: political reconciliation is a difficult, ambitious concept; it is not clear that all transitional policies can promote it equally; and it is questionable whether it is always the best or most important goal to pursue.

In other words, we must think seriously about our aims after war or civic unrest. Possible aims must be openly debated by academics and politicians (South Africa's transition from apartheid involved an interesting set of such debates. Thus, for example, the transitional authorities set up two conferences to consider these issues. I discuss this in chapter 5 of the book). And the question of choosing transitional institutions must be subservient to the choice of appropriate post-conflict goals. Without first deciding what we want out of our political transition we are unlikely to produce effective transitional institutions.

Finally, Kelley is correct to note that injustices can persist even when formal entitlements are in place. I fail to make this clear. But even if formal entitlements are equally enforced that state of affairs (which could no longer be characterized as unjust) would not count as political reconciliation. Something else (I argue that something is sympathy) is required. Conversely, the inculcation of sympathy may be instrumental in the efforts to equally enforce equal entitlements.

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According to Prof. Fatić's probing commentary the book assumes that "sympathy is …an in-built sentiment… and…most of us will simply automatically react by developing sympathy once we are faced with the predicament of others." Fatić thinks this is assuming too much. The book fails to articulate "what it takes to cultivate and strengthen sympathy as a natural disposition." Prof Fatić is correct to identify this as the central concern of political reconciliation. Chapter 3 focuses on the question of what it takes to sympathize with someone we have been conditioned to hate. Rather than assuming that sympathy arises naturally, the book's argument is that sympathy is a virtue that must be cultivated. We have the potential for it but, along Aristotelian lines, becoming sympathetic requires work and habituation. In chapter 3, I argue that the inculcation of sympathy depends on collecting detail about others and, more importantly and ultimately, on political generosity — the ability, rare in war, to partly shift one's focus from one's own grievances and consider the impact of the conflict on others. In chapters 4 and 5 I argue that some post war institutions are better than others at fostering such generosity and at providing the requisite detail. Whether or not political generosity really can be institutionally instilled or requires

some sort of Kantian moment of decision, a decision springing from the recognition of our (abstract) duties to others, is a question the book doesn't take up. To the extent that the latter is true, if generosity does require such a moral "leap", the account of sympathy I offer is based on vaguely Kantian grounds, and Professor Fatic is incorrect in describing it as essentially consequentialist. But we can leave that matter unresolved for now.

Towards the end of his comments, Professor Fatić insightfully asks whether sympathy is always helpful in preventing violence. What, he inquires, are we to make of cases where aggressors killed neighbors and co-workers: "the warfare in the former Yugoslavia, for example, showed that many of the perpetrators of crimes were in fact former neighbors or co-workers, who had presumably had a highly personalized picture of the victim." I argue in the book that most cases of violence between acquaintances, when examined closely, reveal a process of de-individuation that proceeded and enabled the killings. The neighbors and co-workers are, most often exposed to a campaign that "trains" them in shifting their moral focus. Ethnic killings among people who know each other, as in the former Yugoslavia and in Rwanda, are not spontaneous psychotic combustions. The psychosis, rather, is usually enabled by careful and intensive preparatory work in which actors are gradually moved to begin seeing others as standins for rival ethnic groups.

BOOK REVIEWS

EU AND THE BALKANS

Leila Simona Talani (ed), *EU and the Balkans: Policies of Integration and Disintegration,* Newcastle upon Tyne: Cambridge Scholars Publishing, 2008, 168 pp., ISBN 1847187226

The European Union policy *vis-à-vis* the Western Balkans has been largely discussed. Accordingly, two questions appear to be of particular interest: Is the European Union willing to enlarge? Can the Western Balkans meet the prescribed criteria for the EU membership? Academics and practitioners continue to examine major concerns in regard to European integration and enlargement, and accordingly, propose approaches that will facilitate the European path of the Western Balkans. This book presents a collection of papers which analyze current state of affairs and indicate which aspects both sides should pay attention to if mutual benefit is the final goal.

Maria Bakalova seeks to address Balkan nationalisms. While distinguishing between different concepts of nationalism (as a sentiment, as an ideology and as a political phenomenon), she points out their relevance for the discourse about Balkan nationalisms which prove to be "factors of significant conflict and destructive potential and threaten both the democratic transformation processes in the region as well as regional and cross-regional stability' (p. 8). Having said this, a question of EU impact on Balkan nationalisms is the one that arises. On a normative level, the EU should promote liberal democracy whereas on the political level, the EU can be present through a number of ways: by initiatives, projects, mediation, etc (pp. 13-14). In addition, minority issues which are not codified within the EU should be subjected to conditionality for the future European integration.

Two chapters that follow examine the situation in the Former Yugoslav Republic of Macedonia (FYRoM). Zhidas Daskalovski questions whether Kosovo's independence may undermine the situation in the FYRoM. The tensions between Macedonians and Albanians go back to the period of Yugoslavia's disintegration when the newly established FYRoM constitution did not provide Macedonian Albanians with the status they had expected — a situation to be changed by the 2001 Ohrid Agreement which actually

legitimized the constitution. However, for the author, the republic will continue its European integration path unless the international community decides to support partition of the province. Partition of Kosovo would encourage partitions elsewhere in the western Balkans (p. 22-23).

Dane Taleski focuses on public opinion and its impact on the EU integration. In regard to the attitudes in FYRoM towards the process of integration, public support has been rather high and stable (p. 46). The majority of respondents think that economic development followed and complemented by foreign direct investments, peace, human rights and visa liberalization should be the priority of the Government. In regard to the attitudes in the EU towards its further enlargement, Taleski concludes that the majority of population is in favor of it. There are five main arguments for EU enlargement: United Europe, politically stronger EU, peace and safety, European solidarity and European values. Although some serious concerns which accompanied the 2004 wave have raised doubts about European willingness to enlarge, in FYRoM the public remains optimistic.

The fourth paper deals with minority issues which represent part of a wider Europeanization discourse. For this purpose, Plamen Ralchev examines the capacity of the rational and constructivist approaches of the institutional theory to address Europeanization as transformation and the minority discourse within. In Ralchev's terms, "neither of the two approaches, taken separately, explains those transformations sufficiently' (p. 73). Instead, a merger of both approaches should be applied — a combination which would bring together the EU, national policy-makers and general public. This way, EU conditionality would have more sense. In addition, imposition of minority discourse has both formal and informal impacts: while the first one focuses on institution-building, the second one regards awareness of the majority towards minority.

Claire Gordon writes about the minority issues as well, but within the context of the Stabilization and Association Process (SAP) as the European Union's primary instrument in the post-conflict Western Balkan region. Before dwelling onto the main argument, she briefly evaluates the EU policy *vis-à-vis* the Western Balkans in the period 1990-1999: "the EU's nascent conflict management skills were put on the test and found to be severe lacking. At best the EU's policy could be summed up as a case of reactive ad hoc crisis management' (p. 91). Different regional approaches aimed at post-conflict settlement have focused on political dialogue, economic cooperation, democratization, but unfortunately, none of them made direct reference to minority rights. While relying on the primary goals of the Royaumont Process (1995), Obnova (1996), Regional Approach (1997), and Stability Pact (1999), Gordon questions whether the SAP (2000) has been different. Indeed, what appears striking is that SAP has failed to mention human and minority rights

among its main components. Therefore, while understanding the SAP as "inadequate in facilitating post-conflict reconciliation' (p. 108), the author criticizes the EU which does not provide a foundation for minorities and their conditions within the EU law and which lacks appropriate instruments for monitoring and protection of the minorities (p. 112). Thus, given the lack of standards and benchmarks combined with low levels of funding, improvements in this field are still ahead.

The final paper, written by Leila Simona Talani, editor of the book, examines Bulgarian participation in the European Monetary Union (EMU). While arguing that the country is less likely to adopt the Euro due to its economic performance, the author's main question regards winners and losers within the membership in EMU. In this respect, various sectors are taken into consideration. Talani concludes that multinational companies and financial sector could be the biggest beneficiaries whereas small and medium companies and trade unions would end up as losers (pp. 140-142). However, if and when adopted, the Euro will be followed "by an appreciation of the Bulgarian exchange rate which, given the level of Bulgarian inflation and the inability to devalue, will reduce the competitiveness of domestic industry' (p. 158).

To conclude, the book's contribution lies in the variety of issues it examines. From nationalism and minority issues to European integration and risk of exclusion, the authors analyze the state of affairs in the Western Balkans. In this respect, Susan Woodward, doyen in the field, optimistically ends: "EU membership for states in south-eastern Europe will not only bring economic prosperity, democratic consolidation, and European values of tolerance, multiculturalism, and human rights; even the incentive of membership is enough to cause politicians to cooperate, people to reconcile, and voters to choose alternatives to nationalism' (p. 165).

Branislav RADELJIĆ

GEOPOLITICS OF POST-SOVIET AREA

Dragan Petrović, *Geopolitics of Post-Soviet Area*, Prometej — Institute of International Politics and Economics, Belgrade-Novi Sad, 2008, pp. 250.

"Geopolitics of post-Soviet area" is a continuation or addition of the book "Russia in the beginning of 21st century — geopolitical analyzes" by Dragan Petrović, prolific Serbian author of the new generation devoted to geopolitical studies. After the initial study on Russia, Petrović initiated series of research on the geopolitical elements influencing domestic and international politics in the Post-Soviet area. This study represents sort of introduction for the series of books that are published meanwhile (*Geopolitics of Ukraine*, Belgrade 2009, *Geopolitics of Caucasus*, Belgrade 2010, both with coauthors) or are in planning (like *Geopolitics of the Baltic*). In the context of the post-Soviet area, having in mind the short Russian-Georgian war in 2008 and the strategically most important position of Ukraine in the area (not calculating Russia), Ukraine (pp. 32-57) and Georgia (pp. 71-98) are elaborated more than other states with the exception of Russia.

Book is divided in three uneven parts of which the introduction (pp. 7-16) is the shortest one and explains the theoretical and methodological approach. Second chapter *States of the Post-soviet area* mostly enlists some of the geopolitical elements, such as demographic characteristics and type of the soil, of the states in the question. It provides the general judgment on their relations with Russia in economy and politics. Chapters on Ukraine and Georgia are particular because of the analyses of the political elections in these two countries. This content is more appropriate for the third part *Analyses of the political and social processes in the Post-soviet area*. Election of the Dmitri Medvedev (pp. 134-140) for the president of Russian Federation should also be part of the third part of the book.

Chapter III offers study of various factors concerning region of interest, ranging from the impact of big powers to importance of ethnicity and cultural background, religion, social and political systems and the interstate relations in the *Commonwealth of the Independent Countries* (CIS). The "CIS "members are: Russia, Ukraine, Belarus, Kazakhstan, Moldavia, Azerbaijan, Armenia, Uzbekistan, Turkmenistan, Tajikistan, Kyrgyzstan, while Georgia left this organisation after the armed conflict with Russia in August 2008. Lithuania, Latvia and Estonia became members of NATO never becoming part of the

political and economic integrations with the Russian Federation. All those countries represent post-Soviet area and most of them after disintegration of USSR remain in mutual integrative international relations. Besides (CIS), interstate integrations in this area are *Common Economic Space*, which comprises Russia, Belarus, Ukraine and Kazakhstan; *Shanghai Cooperation Organisation* (SCO) rooted in intertwined interests of Russia and China, and some of CIS members, and finally *GUAM* organisation gathering several countries of European part of USSR with intensive Western influence. Russia kept dominant role in the post-Soviet area, mostly as a result of its own historical-civilisation role, economic consolidation and expansion, grandiosely natural resources, and great military – political power.

In several parts of the text author is indicating crucial importance of the Ukraine, Kazakhstan and Belarus for official Moscow. Belarus is important because of it border with EU and NATO members (Poland and Baltic states that joined NATO). This is country with the predominant usage of the Russian language and shared culture and religion. Ukraine derives importance out of its size, ethnical and religious ties with Russia and due to its strategic position — north coast of the Black Sea and Crimea. Kazakhstan is the biggest ex Soviet republic, second only to Russian Federation. Its population is around 40 percent of the Russian and rusophone origin and it stretches from the Caspian sea (or lake) to China.

Dragan Petrović dedicated smaller chapters to USA, Chinese and of course to Russian role in the region not missing the influence of the European powers (197-208). Big powers influence and interest in the region is studied also elsewhere in the book, in particular those of Russia, as mentioned before. Even though the author mentions NATO, SCO and CSTO (Collective Security Treaty Organisation — Организация Договора о коллективной безопасности) he fails to explain thoroughly their importance and geopolitical logic behind these organisations. In Post-Soviet area many conflicts of interests between USA and Russia occur. Petrović analysed the military conflict in Caucasus area in August 2008 initialised by the regime of Georgian President Mikheil Saakashvily. This conflict resulted in Russian military answer and recognition of the independence for South Osetia and Abkhazia by official Moscow. These events can append to bank of "coloured revolutions" in post-Soviet area in period 2003-2005 but as a change of the tide. Coloured revolutions were all supported and sponsored by many non-governmental organizations (NGO) or even Governmental organizations from USA. Author concludes that the outcome of these "revolutions" is relatively humble and is generally limited in installing pro-American regime in Georgia and in increase of the influence in Ukraine. Ukraine thus became more culturally and politically divided country into two parts — South-eastern which is pro-Russian and North-western which is pro-

EU and pro-USA. Russia gained alliance with China by Shangay Cooperation Organization (SCO) which along with CIS, Common economic area and (merely formal) State Union with Belarus enables keeping of dominant position in the post-Soviet area. In the same time Russia very subtly develops strategic relations with the largest states in Europe like Germany, France and Italy although it has more conventional relations with EU as a whole. Besides that, USA has much influence to many eastern-European states which culminates in the announced installation of the anti-rocket shield. Post-Soviet area (and wider region of Eurasia too) remains field of facing interests of great world powers, providing planetary importance for the richness of natural resources which are placed there.

Interesting and valuable is the issue of the usage of Russian and other languages in public and private. Petrović dedicated particular attention to this issue in presenting geopolitical characteristics of each country in the area. Author also discusses future scenarios in the area, in particular concerning the Ukraine, whether it will bi divided or politically and economically stabilised.

Body of text is 215 pages with the extensive international literature in Russian, English, Serbian and French. The structure of the book and more than it the volume, and above all the content, are indicating that it is necessary to understand it as an introduction and not as a detailed study of the geopolitical processes in the region. Value of it is mostly in the exposure of many of the elements needed to be broadly studied in order to understand economical, demographic, cultural and political and security trends and events in the Post-Soviet area.

Slobodan JANKOVIĆ

DOCUMENTS*

Rome Statute of the International Criminal Court

Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

PREAMBLE

The States Parties to this Statute,

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

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* In view of fact that the text in this section are an official nature, no alternations of any kind have been made to them by the editor of the *Review of International Affairs*.

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows:

Part I Establishment of the Court

Article 1

The Court

An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Article 2

Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

Article 3

Seat of the Court

1. The seat of the Court shall be established at The Hague in the Netherlands ('the host State').

2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.

3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

Article 4

Legal status and powers of the Court

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

Part II Jurisdiction, admissibility and applicable law

Article 5

Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 6

Genocide

For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

Article 7

Crimes against humanity

1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) 'Extermination' includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) 'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) 'Deportation or forcible transfer of population' means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) 'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) 'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) 'The crime of apartheid' means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) 'Enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above.

Article 8

War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, 'war crimes' means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments,

hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Article 9

Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Elements of Crimes may be proposed by:

(a) Any State Party;

(b) The judges acting by an absolute majority;

(c) The Prosecutor.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this

Statute.

Article 10

Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

Article 11

Jurisdiction ratione temporis

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

Article 12

Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Article 13

Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Article 14

Referral of a situation by a State Party

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

Article 15

Prosecutor

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.

2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 16

Deferral of investigation or prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Article 17

Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Article 18

Preliminary rulings regarding admissibility

1. When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.

2. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to

in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.

4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis.

5. When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.

6. Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.

7. A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances.

Article 19

Challenges to the jurisdiction of the Court or the admissibility of a case

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.

2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

(a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;

(b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or

(c) A State from which acceptance of jurisdiction is required under article 12.

3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.

4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).

5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.

6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.

7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.

8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:

(a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;

(b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and

(c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.

9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.

10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.

11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

Article 20

Ne bis in idem

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Article 21

Applicable law

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Part III General principles of Criminal Law

Article 22

Nullum crimen sine lege

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Article 23

Nulla poena sine lege

A person convicted by the Court may be punished only in accordance with this Statute.

Article 24

Non-retroactivity ratione personae

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

Article 25

Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 26

Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Article 27

Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal

responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 28

Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 29

Non-applicability of statute of limitations

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

Article 30

Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly.

Article 31

Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or

the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Article 32

Mistake of fact or mistake of law

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

Article 33

Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

Part IV Composition and administration of the Court

Article 34

Organs of the Court

The Court shall be composed of the following organs:

(a) The Presidency;

(b) An Appeals Division, a Trial Division and a Pre-Trial Division;

(c) The Office of the Prosecutor;

(d) The Registry.

Article 35

Service of judges

1. All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office.

2. The judges composing the Presidency shall serve on a full-time basis as soon as they are elected.

3. The Presidency may, on the basis of the workload of the Court and in consultation with its members, decide from time to time to what extent the remaining judges shall be required to serve on a full-time basis. Any such arrangement shall be without prejudice to the provisions of article 40.

4. The financial arrangements for judges not required to serve on a full-time basis shall be made in accordance with article 49.

Article 36

Qualifications, nomination and election of judges

1. Subject to the provisions of paragraph 2, there shall be 18 judges of the Court.

2. (a) The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate. The Registrar shall promptly circulate any such proposal to all States Parties.

(b) Any such proposal shall then be considered at a meeting of the Assembly of States Parties to be convened in accordance with article 112. The proposal shall be considered adopted if approved at the meeting by a vote

of two thirds of the members of the Assembly of States Parties and shall enter into force at such time as decided by the Assembly of States Parties.

(c) (i) Once a proposal for an increase in the number of judges has been adopted under subparagraph (b), the election of the additional judges shall take place at the next session of the Assembly of States Parties in accordance with paragraphs 3 to 8, and article 37, paragraph 2;

(ii) Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs (b) and (c) (i), it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges, provided that the number of judges shall not be reduced below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure laid down in subparagraphs (a) and (b). In the event that the proposal is adopted, the number of judges shall be progressively decreased as the terms of office of serving judges expire, until the necessary number has been reached.

3. (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.

(b) Every candidate for election to the Court shall:

(i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or

(ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;

(c) Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. (a) Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either:

(i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or

(ii) By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court. Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.

(b) Each State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party.

(c) The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be established by the Assembly of States Parties.

5. For the purposes of the election, there shall be two lists of candidates: List A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i); and

List B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii).

A candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.

6. (a) The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article 112. Subject to paragraph 7, the persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting.

(b) In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph (a) until the remaining places have been filled.

7. No two judges may be nationals of the same State. A person who, for the purposes of membership of the Court, could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

8. (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

(i) The representation of the principal legal systems of the world;

(ii) Equitable geographical representation; and

(iii) A fair representation of female and male judges.

(b) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.

9. (a) Subject to subparagraph (b), judges shall hold office for a term of nine years and, subject to subparagraph (c) and to article 37, paragraph 2, shall not be eligible for re-election.

(b) At the first election, one third of the judges elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.

(c) A judge who is selected to serve for a term of three years under subparagraph (b) shall be eligible for re-election for a full term.

10. Notwithstanding paragraph 9, a judge assigned to a Trial or Appeals Chamber in accordance with article 39 shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber.

Article 37

Judicial vacancies

1. In the event of a vacancy, an election shall be held in accordance with article 36 to fill the vacancy.

2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term and, if that period is three years or less, shall be eligible for re-election for a full term under article 36.

Article 38

The Presidency

1. The President and the First and Second Vice-Presidents shall be elected by an absolute majority of the judges. They shall each serve for a term of three years or until the end of their respective terms of office as judges, whichever expires earlier. They shall be eligible for re-election once.

2. The First Vice-President shall act in place of the President in the event that the President is unavailable or disqualified. The Second Vice-President shall act in place of the President in the event that both the President and the First Vice-President are unavailable or disqualified.

3. The President, together with the First and Second Vice-Presidents, shall constitute the Presidency, which shall be responsible for:

(a) The proper administration of the Court, with the exception of the Office of the Prosecutor; and

(b) The other functions conferred upon it in accordance with this Statute.

4. In discharging its responsibility under paragraph 3 (a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.

Article 39

Chambers

1. As soon as possible after the election of the judges, the Court shall organize itself into the divisions specified in article 34, paragraph (b). The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six

judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.

2. (a) The judicial functions of the Court shall be carried out in each division by Chambers.

(b) (i) The Appeals Chamber shall be composed of all the judges of the Appeals Division;

(ii) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;

(iii) The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence;

(c) Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires.

3. (a) Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in the division concerned.

(b) Judges assigned to the Appeals Division shall serve in that division for their entire term of office.

4. Judges assigned to the Appeals Division shall serve only in that division. Nothing in this article shall, however, preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient management of the Court's workload so requires, provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

Article 40

Independence of the judges

1. The judges shall be independent in the performance of their functions.

2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.

4. Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

Article 41

Excusing and disqualification of judges

1. The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.

2. (a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, inter alia, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.

(b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.

(c) Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

Article 42

The Office of the Prosecutor

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.

2. The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.

3. The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy

Prosecutor to be filled. Unless a shorter term is decided upon at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election.

5. Neither the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence. They shall not engage in any other occupation of a professional nature.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor, at his or her request, from acting in a particular case.

7. Neither the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground. They shall be disqualified from a case in accordance with this paragraph if, inter alia, they have previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted.

8. Any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber.

(a) The person being investigated or prosecuted may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor on the grounds set out in this article;

(b) The Prosecutor or the Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter.

9. The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.

Article 43

The Registry

1. The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with article 42.

2. The Registry shall be headed by the Registrar, who shall be the principal administrative officer of the Court. The Registrar shall exercise his or her functions under the authority of the President of the Court.

3. The Registrar and the Deputy Registrar shall be persons of high moral character, be highly competent and have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The judges shall elect the Registrar by an absolute majority by secret ballot, taking into account any recommendation by the Assembly of States Parties. If the need arises and upon the recommendation of the Registrar, the judges shall elect, in the same manner, a Deputy Registrar.

5. The Registrar shall hold office for a term of five years, shall be eligible for reelection once and shall serve on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided upon by an absolute majority of the judges, and may be elected on the basis that the Deputy Registrar shall be called upon to serve as required.

6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

Article 44

Staff

1. The Prosecutor and the Registrar shall appoint such qualified staff as may be required to their respective offices. In the case of the Prosecutor, this shall include the appointment of investigators.

2. In the employment of staff, the Prosecutor and the Registrar shall ensure the highest standards of efficiency, competency and integrity, and shall have regard, mutatis mutandis, to the criteria set forth in article 36, paragraph 8.

3. The Registrar, with the agreement of the Presidency and the Prosecutor, shall propose Staff Regulations which include the terms and conditions upon which the staff of the Court shall be appointed, remunerated and dismissed. The Staff Regulations shall be approved by the Assembly of States Parties.

4. The Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by States Parties, intergovernmental organizations or nongovernmental organizations to assist with the work of any of the organs of the Court. The Prosecutor may accept any such offer on behalf of the Office of the Prosecutor. Such gratis personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties.

Article 45

Solemn undertaking

Before taking up their respective duties under this Statute, the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall each make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously.

Article 46

Removal from office

1. A judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar shall be removed from office if a decision to this effect is made in accordance with paragraph 2, in cases where that person:

(a) Is found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence; or

(b) Is unable to exercise the functions required by this Statute.

2. A decision as to the removal from office of a judge, the Prosecutor or a Deputy Prosecutor under paragraph 1 shall be made by the Assembly of States Parties, by secret ballot:

(a) In the case of a judge, by a two-thirds majority of the States Parties upon a recommendation adopted by a two-thirds majority of the other judges;

(b) In the case of the Prosecutor, by an absolute majority of the States Parties;

(c) In the case of a Deputy Prosecutor, by an absolute majority of the States Parties upon the recommendation of the Prosecutor.

3. A decision as to the removal from office of the Registrar or Deputy Registrar shall be made by an absolute majority of the judges.

4. A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar whose conduct or ability to exercise the functions of the office as required by this Statute is challenged under this article shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence. The person in question shall not otherwise participate in the consideration of the matter.

Article 47

Disciplinary measures

A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in article 46, paragraph 1, shall be subject to disciplinary measures, in accordance with the Rules of Procedure and Evidence.

Article 48

Privileges and immunities

1. The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes.

2. The judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall, when engaged on or with respect to the business of the Court, enjoy the same

privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.

3. The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court.

4. Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court.

5. The privileges and immunities of:

(a) A judge or the Prosecutor may be waived by an absolute majority of the judges;

(b) The Registrar may be waived by the Presidency;

(c) The Deputy Prosecutors and staff of the Office of the Prosecutor may be waived by the Prosecutor;

(d) The Deputy Registrar and staff of the Registry may be waived by the Registrar.

Article 49

Salaries, allowances and expenses

The judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States Parties. These salaries and allowances shall not be reduced during their terms of office.

Article 50

Official and working languages

1. The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. The judgements of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages. The Presidency shall, in accordance with the criteria established by the Rules of Procedure and Evidence, determine which decisions may be considered as resolving fundamental issues for the purposes of this paragraph.

2. The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages.

3. At the request of any party to a proceeding or a State allowed to intervene in a proceeding, the Court shall authorize a language other than English or French to be used by such a party or State, provided that the Court considers such authorization to be adequately justified.

Article 51

Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Rules of Procedure and Evidence may be proposed by:

(a) Any State Party;

(b) The judges acting by an absolute majority; or

(c) The Prosecutor.

Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.

4. The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.

5. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.

Article 52

Regulations of the Court

1. The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning.

2. The Prosecutor and the Registrar shall be consulted in the elaboration of the Regulations and any amendments thereto.

3. The Regulations and any amendments thereto shall take effect upon adoption unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they shall remain in force.

Part V Investigation and prosecution

Article 53

Initiation of an investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 17; and

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice. If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

(a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;

(b) The case is inadmissible under article 17; or

(c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

3. (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

Article 54

Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor shall:

(a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;

(b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and

(c) Fully respect the rights of persons arising under this Statute. 2. The Prosecutor may conduct investigations on the territory of a State:

(a) In accordance with the provisions of Part 9; or

(b) As authorized by the Pre-Trial Chamber under article 57, paragraph 3 (d).

3. The Prosecutor may:

(a) Collect and examine evidence;

(b) Request the presence of and question persons being investigated, victims and witnesses;

(c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate;

(d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;

(e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and

(f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

Article 55

Rights of persons during an investigation

1. In respect of an investigation under this Statute, a person:

(a) Shall not be compelled to incriminate himself or herself or to confess guilt;

(b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;

(c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and

(d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.

2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and

(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Article 56

Role of the Pre-Trial Chamber in relation to a unique investigative opportunity

1. (a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.

(b) In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.

(c) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall provide the relevant information to the person who has been arrested or appeared in response to a summons in connection with the investigation

referred to in subparagraph (a), in order that he or she may be heard on the matter.

2. The measures referred to in paragraph 1 (b) may include:

(a) Making recommendations or orders regarding procedures to be followed;

(b) Directing that a record be made of the proceedings;

(c) Appointing an expert to assist;

(d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence;

(e) Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons;

(f) Taking such other action as may be necessary to collect or preserve evidence.

3.(a) Where the Prosecutor has not sought measures pursuant to this article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative.

(b) A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.

4. The admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber.

Article 57

Functions and powers of the Pre-Trial Chamber

1. Unless otherwise provided in this Statute, the Pre-Trial Chamber shall exercise its functions in accordance with the provisions of this article.

2. (a) Orders or rulings of the Pre-Trial Chamber issued under articles 15, 18, 19, 54, paragraph 2, 61, paragraph 7, and 72 must be concurred in by a majority of its judges.

(b) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for in this Statute, unless otherwise provided for in the

Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.

3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:

(a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation;

(b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence;

(c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information;

(d) Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9;

(e) Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.

Article 58

Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and

(b) The arrest of the person appears necessary:

(i) To ensure the person's appearance at trial;

(ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or

(iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

2. The application of the Prosecutor shall contain:

(a) The name of the person and any other relevant identifying information;

(b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed;

(c) A concise statement of the facts which are alleged to constitute those crimes;

(d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and

(e) The reason why the Prosecutor believes that the arrest of the person is necessary.

3. The warrant of arrest shall contain:

(a) The name of the person and any other relevant identifying information;

(b) A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and

(c) A concise statement of the facts which are alleged to constitute those crimes.

4. The warrant of arrest shall remain in effect until otherwise ordered by the Court.

5. On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.

6. The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.

7. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. The summons shall contain:

(a) The name of the person and any other relevant identifying information;

(b) The specified date on which the person is to appear;

(c) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and

(d) A concise statement of the facts which are alleged to constitute the crime. The summons shall be served on the person.

Article 59

Arrest proceedings in the custodial State

1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9.

2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:

(a) The warrant applies to that person;

(b) The person has been arrested in accordance with the proper process; and

(c) The person's rights have been respected.

3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender.

4. In reaching a decision on any such application, the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b).

5. The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision.

6. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.

7. Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible.

Article 60

Initial proceedings before the Court

1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber

shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.

2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.

5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of a person who has been released.

Article 61

Confirmation of the charges before trial

1. Subject to the provisions of paragraph 2, within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.

2. The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:

(a) Waived his or her right to be present; or

(b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held. In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.

3. Within a reasonable time before the hearing, the person shall:

(a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and

(b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing. The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.

4. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

5. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

6. At the hearing, the person may:

(a) Object to the charges;

(b) Challenge the evidence presented by the Prosecutor; and

(c) Present evidence.

7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

(a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;

(b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;

(c) Adjourn the hearing and request the Prosecutor to consider:

(i) Providing further evidence or conducting further investigation with respect to a particular charge; or

(ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

8. Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.

9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

10. Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.

11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

Part VI The trial

Article 62

Place of trial

Unless otherwise decided, the place of the trial shall be the seat of the Court.

Article 63

Trial in the presence of the accused

1. The accused shall be present during the trial.

2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

Article 64

Functions and powers of the Trial Chamber

1. The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

(a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;

(b) Determine the language or languages to be used at trial; and

(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

4. The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division.

5. Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

(a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11;

(b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;

(c) Provide for the protection of confidential information;

(d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;

(e) Provide for the protection of the accused, witnesses and victims; and

(f) Rule on any other relevant matters.

7. The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.

8. (a) At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.

(b) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.

9. The Trial Chamber shall have, inter alia, the power on application of a party or on its own motion to:

(a) Rule on the admissibility or relevance of evidence; and

(b) Take all necessary steps to maintain order in the course of a hearing.

10. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar.

Article 65

Proceedings on an admission of guilt

1. Where the accused makes an admission of guilt pursuant to article 64, paragraph

8 (a), the Trial Chamber shall determine whether:

(a) The accused understands the nature and consequences of the admission of guilt;

(b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and

(c) The admission of guilt is supported by the facts of the case that are contained in:

(i) The charges brought by the Prosecutor and admitted by the accused;

(ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and

(iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.

2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.

3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial procedures provided by this Statute and may remit the case to another Trial Chamber.

4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:

(a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or

(b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.

5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.

Article 66

Presumption of innocence

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.

2. The onus is on the Prosecutor to prove the guilt of the accused.

3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Article 67

Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

(c) To be tried without undue delay;

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn oral or written statement in his or her defence; and

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Article 68

Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.

5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

Article 69

Evidence

1. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.

2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

5. The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.

6. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

7. Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

(a) The violation casts substantial doubt on the reliability of the evidence; or

(b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.

Article 70

Offences against the administration of justice

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:

(a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;

(b) Presenting evidence that the party knows is false or forged;

(c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;

(d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;

(e) Retaliating against an official of the Court on account of duties performed by that or another official;

(f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.

2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.

3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.

4. (a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals;

(b) Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

Article 71

Sanctions for misconduct before the Court

1. The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.

2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and Evidence.

Article 72

Protection of national security information

1. This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 56, paragraphs 2 and 3, article 61, paragraph 3, article 64, paragraph 3, article 67, paragraph 2, article 68, paragraph 6, article 87, paragraph 6 and article 93, as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.

2. This article shall also apply when a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.

3. Nothing in this article shall prejudice the requirements of confidentiality applicable under article 54, paragraph 3 (e) and (f), or the application of article 73.

4. If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.

5. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means.

Such steps may include:

(a) Modification or clarification of the request;

(b) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State;

(c) Obtaining the information or evidence from a different source or in a different form; or

(d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of in camera or ex parte proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.

6. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or

disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.

7. Thereafter, if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, the Court may undertake the following actions:

(a) Where disclosure of the information or document is sought pursuant to a request for cooperation under Part 9 or the circumstances described in paragraph 2, and the State has invoked the ground for refusal referred to in article 93, paragraph 4:

(i) The Court may, before making any conclusion referred to in subparagraph 7 (a) (ii), request further consultations for the purpose of considering the State's representations, which may include, as appropriate, hearings in camera and ex parte;

(ii) If the Court concludes that, by invoking the ground for refusal under article 93, paragraph 4, in the circumstances of the case, the requested State is not acting in accordance with its obligations under this Statute, the Court may refer the matter in accordance with article 87, paragraph 7, specifying the reasons for its conclusion; and

(iii) The Court may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances; or

(b) In all other circumstances:

(i) Order disclosure; or

(ii) To the extent it does not order disclosure, make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.

Article 73

Third-party information or documents

If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 72. If the originator is not a State Party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.

Article 74

Requirements for the decision

1. All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.

2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.

3. The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.

4. The deliberations of the Trial Chamber shall remain secret.

5. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.

Article 75

Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

Article 76

Sentencing

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.

2. Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence.

3. Where paragraph 2 applies, any representations under article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.

4. The sentence shall be pronounced in public and, wherever possible, in the presence of the accused.

Part VII Penalties

Article 77

Applicable penalties

1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

2. In addition to imprisonment, the Court may order:

(a) A fine under the criteria provided for in the Rules of Procedure and Evidence;

(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

Article 78

Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b).

Article 79

Trust Fund

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

Article 80

Non-prejudice to national application of penalties and national laws

Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.

Part VIII Appeal and Revision

Article 81

Appeal against decision of acquittal or conviction or against sentence

1. A decision under article 74 may be appealed in accordance with the Rules of Procedure and Evidence as follows:

(a) The Prosecutor may make an appeal on any of the following grounds:

(i) Procedural error,

(ii) Error of fact, or

(iii) Error of law;

(b) The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds:

(i) Procedural error,

(ii) Error of fact,

(iii) Error of law, or

(iv) Any other ground that affects the fairness or reliability of the proceedings or decision.

2. (a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence;

(b) If on an appeal against sentence the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under article 81, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with article 83;

(c) The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under paragraph 2 (a).

3. (a) Unless the Trial Chamber orders otherwise, a convicted person shall remain in custody pending an appeal;

(b) When a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released, except that if the Prosecutor is also appealing, the release may be subject to the conditions under subparagraph (c) below;

(c) In case of an acquittal, the accused shall be released immediately, subject to the following:

(i) Under exceptional circumstances, and having regard, inter alia, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;

(ii) A decision by the Trial Chamber under subparagraph (c) (i) may be appealed in accordance with the Rules of Procedure and Evidence.

4. Subject to the provisions of paragraph 3 (a) and (b), execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.

Article 82

Appeal against other decisions

1.Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

(a) A decision with respect to jurisdiction or admissibility;

(b) A decision granting or denying release of the person being investigated or prosecuted;

(c) A decision of the Pre-Trial Chamber to act on its own initiative under article 56, paragraph 3;

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

2. A decision of the Pre-Trial Chamber under article 57, paragraph 3 (d), may be appealed against by the State concerned or by the Prosecutor, with the leave of the Pre-Trial Chamber. The appeal shall be heard on an expedited basis.

3. An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.

4. A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.

Article 83

Proceedings on appeal

1. For the purposes of proceedings under article 81 and this article, the Appeals Chamber shall have all the powers of the Trial Chamber.

2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

(a) Reverse or amend the decision or sentence; or

(b) Order a new trial before a different Trial Chamber. For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by the person convicted, or the

Prosecutor on that person's behalf, it cannot be amended to his or her detriment.

3. If in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7.

4. The judgement of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgement shall state the reasons on which it is based. When there is no unanimity, the judgement of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.

5. The Appeals Chamber may deliver its judgement in the absence of the person acquitted or convicted.

Article 84

Revision of conviction or sentence

1. The convicted person or, after death, spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that:

(a) New evidence has been discovered that:

(i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and

(ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict;

(b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;

(c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46.

2. The Appeals Chamber shall reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

(a) Reconvene the original Trial Chamber;

(b) Constitute a new Trial Chamber; or

(c) Retain jurisdiction over the matter, with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgement should be revised.

Article 85

Compensation to an arrested or convicted person

1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

Part IX International cooperation and judicial assistance

Article 86

General obligation to cooperate

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

Article 87

Requests for cooperation: general provisions

1. (a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession. Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence.

(b) When appropriate, without prejudice to the provisions of subparagraph (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.

2. Requests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into an official language of the

requested State or one of the working languages of the Court, in accordance with the choice made by that State upon ratification, acceptance, approval or accession. Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence.

3. The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.

4. In relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under this Part shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.

5. (a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

(b) Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.

6. The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.

7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

Article 88

Availability of procedures under national law

States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.

Article 89

Surrender of persons to the Court

1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

2. Where the person sought for surrender brings a challenge before a national court on the basis of the principle of ne bis in idem as provided in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.

3. (a) A State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender.

(b) A request by the Court for transit shall be transmitted in accordance with article 87. The request for transit shall contain:

(i) A description of the person being transported;

(ii) A brief statement of the facts of the case and their legal characterization; and

(iii) The warrant for arrest and surrender;

(c) A person being transported shall be detained in custody during the period of transit;

(d) No authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State;

(e) If an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court as provided for in subparagraph (b). The transit State shall detain the person being transported until the request for transit is received and the transit is effected, provided that detention for purposes of this subparagraph may not be extended beyond 96 hours from the unscheduled landing unless the request is received within that time.

4. If the person sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court.

Article 90

Competing requests

1. A State Party which receives a request from the Court for the surrender of a person under article 89 shall, if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender, notify the Court and the requesting State of that fact.

2. Where the requesting State is a State Party, the requested State shall give priority to the request from the Court if:

(a) The Court has, pursuant to article 18 or 19, made a determination that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State in respect of its request for extradition; or

(b) The Court makes the determination described in subparagraph (a) pursuant to the requested State's notification under paragraph 1.

3. Where a determination under paragraph 2 (a) has not been made, the requested State may, at its discretion, pending the determination of the Court under paragraph 2 (b), proceed to deal with the request for extradition from the requesting State but shall not extradite the person until the Court has determined that the case is inadmissible. The Court's determination shall be made on an expedited basis.

4. If the requesting State is a State not Party to this Statute the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible.

5. Where a case under paragraph 4 has not been determined to be admissible by the Court, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State.

6. In cases where paragraph 4 applies except that the requested State is under an existing international obligation to extradite the person to the requesting State not Party to this Statute, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:

(a) The respective dates of the requests;

(b) The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and

(c) The possibility of subsequent surrender between the Court and the requesting State.

7. Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the extradition of the same person for conduct other than that which constitutes the crime for which the Court seeks the person's surrender:

(a) The requested State shall, if it is not under an existing international obligation to extradite the person to the requesting State, give priority to the request from the Court;

(b) The requested State shall, if it is under an existing international obligation to extradite the person to the requesting State, determine whether to surrender the person to the Court or to extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to those set out in paragraph 6, but shall give special consideration to the relative nature and gravity of the conduct in question.

Where pursuant to a notification under this article, the Court has determined a case to be inadmissible, and subsequently extradition to the requesting State is refused, the requested State shall notify the Court of this decision.

Article 91

Contents of request for arrest and surrender

1. A request for arrest and surrender shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).

2. In the case of a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, the request shall contain or be supported by:

(a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;

(b) A copy of the warrant of arrest; and

(c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.

3. In the case of a request for the arrest and surrender of a person already convicted, the request shall contain or be supported by:

(a) A copy of any warrant of arrest for that person;

(b) A copy of the judgement of conviction;

(c) Information to demonstrate that the person sought is the one referred to in the judgement of conviction; and

(d) If the person sought has been sentenced, a copy of the sentence imposed and, in the case of a sentence for imprisonment, a statement of any time already served and the time remaining to be served.

4. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (c). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

Article 92

Provisional arrest

1. In urgent cases, the Court may request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request as specified in article 91.

2. The request for provisional arrest shall be made by any medium capable of delivering a written record and shall contain:

(a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;

(b) A concise statement of the crimes for which the person's arrest is sought and of the facts which are alleged to constitute those crimes, including, where possible, the date and location of the crime;

(c) A statement of the existence of a warrant of arrest or a judgement of conviction against the person sought; and

(d) A statement that a request for surrender of the person sought will follow.

3. A person who is provisionally arrested may be released from custody if the requested State has not received the request for surrender and the documents supporting the request as specified in article 91 within the time limits specified in the Rules of Procedure and Evidence. However, the person may consent to surrender before the expiration of this period if permitted by the law of the requested State. In such a case, the requested State shall proceed to surrender the person to the Court as soon as possible.

4. The fact that the person sought has been released from custody pursuant to paragraph 3 shall not prejudice the subsequent arrest and surrender of that person if the request for surrender and the documents supporting the request are delivered at a later date.

Article 93

Other forms of cooperation

1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:

(a) The identification and whereabouts of persons or the location of items;

(b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;

(c) The questioning of any person being investigated or prosecuted;

(d) The service of documents, including judicial documents;

(e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;

(f) The temporary transfer of persons as provided in paragraph 7;

(g) The examination of places or sites, including the exhumation and examination of grave sites;

(h) The execution of searches and seizures;

(i) The provision of records and documents, including official records and documents;

(j) The protection of victims and witnesses and the preservation of evidence;

(k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and

(l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

2. The Court shall have the authority to provide an assurance to a witness or an expert appearing before the Court that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the departure of that person from the requested State.

3. Where execution of a particular measure of assistance detailed in a request presented under paragraph 1, is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, the requested State shall promptly consult with the Court to try to resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If after consultations the matter cannot be resolved, the Court shall modify the request as necessary.

4. In accordance with article 72, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.

5. Before denying a request for assistance under paragraph 1 (l), the requested State shall consider whether the assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later date or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, the Court or the Prosecutor shall abide by them.

6. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.

7. (a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:

(i) The person freely gives his or her informed consent to the transfer; and

(ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.

(b) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.

8. (a) The Court shall ensure the confidentiality of documents and information, except as required for the investigation and proceedings described in the request.

(b) The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence.

(c) The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information. They may then be used as evidence pursuant to the provisions of Parts 5 and 6 and in accordance with the Rules of Procedure and Evidence.

9. (a) (i) In the event that a State Party receives competing requests, other than for surrender or extradition, from the Court and from another State pursuant to an international obligation, the State Party shall endeavour, in consultation with the Court and the other State, to meet both requests, if necessary by postponing or attaching conditions to one or the other request.

(ii) Failing that, competing requests shall be resolved in accordance with the principles established in article 90.

(b) Where, however, the request from the Court concerns information, property or persons which are subject to the control of a third State or an international organization by virtue of an international agreement, the requested States shall so inform the Court and the Court shall direct its request to the third State or international organization.

10. (a) The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.

(b) (i) The assistance provided under subparagraph (a) shall include, inter alia:

a. The transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; and

b. The questioning of any person detained by order of the Court;

(ii) In the case of assistance under subparagraph (b) (i) a:

a. If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;

b. If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68.

(c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a State which is not a Party to this Statute.

Article 94

Postponement of execution of a request in respect of ongoing investigation or prosecution

1. If the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates, the requested State may postpone the execution of the request for a period of time agreed upon with the Court. However, the postponement shall be no longer than is necessary to complete the relevant investigation or prosecution in the requested State. Before making a decision to postpone, the requested State should consider whether the assistance may be immediately provided subject to certain conditions.

2. If a decision to postpone is taken pursuant to paragraph 1, the Prosecutor may, however, seek measures to preserve evidence, pursuant to article 93, paragraph 1 (j).

Article 95

Postponement of execution of a request in respect of an admissibility challenge

Where there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19.

Article 96

Contents of request for other forms of assistance under article 93

1. A request for other forms of assistance referred to in article 93 shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).

2. The request shall, as applicable, contain or be supported by the following:

(a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request;

(b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;

(c) A concise statement of the essential facts underlying the request;

(d) The reasons for and details of any procedure or requirement to be followed;

(e) Such information as may be required under the law of the requested State in order to execute the request; and

(f) Any other information relevant in order for the assistance sought to be provided.

3. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (e). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

4. The provisions of this article shall, where applicable, also apply in respect of a request for assistance made to the Court.

Article 97

Consultations

Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, inter alia:

(a) Insufficient information to execute the request;

(b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or

(c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.

Article 98

Cooperation with respect to waiver of immunity and consent to surrender

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Article 99

Execution of requests under articles 93 and 96

1. Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.

2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently.

3. Replies from the requested State shall be transmitted in their original language and form.

4. Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows:

(a) When the State Party requested is a State on the territory of which the crime is alleged to have been committed, and there has been a determination of admissibility pursuant to article 18 or 19, the Prosecutor may directly execute such request following all possible consultations with the requested State Party;

(b) In other cases, the Prosecutor may execute such request following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party. Where the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.

5. Provisions allowing a person heard or examined by the Court under article 72 to invoke restrictions designed to prevent disclosure of confidential information connected with national security shall also apply to the execution of requests for assistance under this article.

Article 100

Costs

1. The ordinary costs for execution of requests in the territory of the requested State shall be borne by that State, except for the following, which shall be borne by the Court:

(a) Costs associated with the travel and security of witnesses and experts or the transfer under article 93 of persons in custody;

(b) Costs of translation, interpretation and transcription;

(c) Travel and subsistence costs of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar and staff of any organ of the Court;

(d) Costs of any expert opinion or report requested by the Court;

(e) Costs associated with the transport of a person being surrendered to the Court by a custodial State; and

(f) Following consultations, any extraordinary costs that may result from the execution of a request.

2. The provisions of paragraph 1 shall, as appropriate, apply to requests from States Parties to the Court. In that case, the Court shall bear the ordinary costs of execution.

Article 101

Rule of speciality

1. A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.

2. The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court and, if necessary, the Court shall provide additional information in accordance with article 91. States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.

Article 102

Use of terms

For the purposes of this Statute:

(a) "surrender" means the delivering up of a person by a State to the Court, pursuant to this Statute.

(b) "extradition" means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

Part X Enforcement

Article 103

Role of States in enforcement of sentences of imprisonment

1. (a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.

(b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with this Part.

(c) A State designated in a particular case shall promptly inform the Court whether it accepts the Court's designation.

2. (a) The State of enforcement shall notify the Court of any circumstances, including the exercise of any conditions agreed under paragraph 1, which could

materially affect the terms or extent of the imprisonment. The Court shall be given at least 45 days' notice of any such known or foreseeable circumstances. During this period, the State of enforcement shall take no action that might prejudice its obligations under article 110.

(b) Where the Court cannot agree to the circumstances referred to in subparagraph (a), it shall notify the State of enforcement and proceed in accordance with article 104, paragraph 1.

3. In exercising its discretion to make a designation under paragraph 1, the Court shall take into account the following:

(a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence;

(b) The application of widely accepted international treaty standards governing the treatment of prisoners;

(c) The views of the sentenced person;

(d) The nationality of the sentenced person;

(e) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement.

4. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in article 3, paragraph 2. In such a case, the costs arising out of the enforcement of a sentence of imprisonment shall be borne by the Court.

Article 104

Change in designation of State of enforcement

1. The Court may, at any time, decide to transfer a sentenced person to a prison of another State.

2. A sentenced person may, at any time, apply to the Court to be transferred from the State of enforcement.

Article 105

Enforcement of the sentence

1. Subject to conditions which a State may have specified in accordance with article 103, paragraph 1 (b), the sentence of imprisonment shall be binding on the States Parties, which shall in no case modify it.

2. The Court alone shall have the right to decide any application for appeal and revision. The State of enforcement shall not impede the making of any such application by a sentenced person.

Article 106

Supervision of enforcement of sentences and conditions of imprisonment

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners.

2. The conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners; in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.

3. Communications between a sentenced person and the Court shall be unimpeded and confidential.

Article 107

Transfer of the person upon completion of sentence

1. Following completion of the sentence, a person who is not a national of the State of enforcement may, in accordance with the law of the State of enforcement, be transferred to a State which is obliged to receive him or her, or to another State which agrees to receive him or her, taking into account any wishes of the person to be transferred to that State, unless the State of enforcement authorizes the person to remain in its territory.

2. If no State bears the costs arising out of transferring the person to another State pursuant to paragraph 1, such costs shall be borne by the Court.

3. Subject to the provisions of article 108, the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the person to a State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence.

Article 108

Limitation on the prosecution or punishment of other offences

1. A sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.

2. The Court shall decide the matter after having heard the views of the sentenced person.

3. Paragraph 1 shall cease to apply if the sentenced person remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it.

Article 109

Enforcement of fines and forfeiture measures

1. States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law.

2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.

3. Property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be transferred to the Court.

Article 110

Review by the Court concerning reduction of sentence

1. The State of enforcement shall not release the person before expiry of the sentence pronounced by the Court.

2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.

3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.

4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:

(a) \The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;

(b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or

(c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.

5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence.

Article 111

Escape

If a convicted person escapes from custody and flees the State of enforcement, that State may, after consultation with the Court, request the person's surrender from the State in which the person is located pursuant to existing bilateral or multilateral arrangements, or may request that the Court seek the person's surrender, in accordance with Part 9. It may direct that the person be delivered to the State in which he or she was serving the sentence or to another State designated by the Court.

Part XI Assembly of states parties

Article 112

Assembly of States Parties

1. An Assembly of States Parties to this Statute is hereby established. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. Other States which have signed this Statute or the Final Act may be observers in the Assembly.

2. The Assembly shall:

(a) Consider and adopt, as appropriate, recommendations of the Preparatory Commission;

(b) Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;

(c) Consider the reports and activities of the Bureau established under paragraph 3 and take appropriate action in regard thereto;

(d) Consider and decide the budget for the Court;

(e) Decide whether to alter, in accordance with article 36, the number of judges;

(f) Consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation;

(g) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.

3. (a) The Assembly shall have a Bureau consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms.

(b) The Bureau shall have a representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world.

(c) The Bureau shall meet as often as necessary, but at least once a year. It shall assist the Assembly in the discharge of its responsibilities.

4. The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.

5. The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly and of the Bureau.

6. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in this Statute, special sessions shall be convened by the Bureau on its own initiative or at the request of one third of the States Parties.

7. Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the Statute:

(a) Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting;

(b) Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.

8. A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.

9. The Assembly shall adopt its own rules of procedure.

10. The official and working languages of the Assembly shall be those of the General Assembly of the United Nations.

Part XII Financing

Article 113

Financial Regulations

Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.

Article 114

Payment of expenses

Expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court.

Article 115

Funds of the Court and of the Assembly of States Parties

The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

(a) Assessed contributions made by States Parties;

(b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.

Article 116

Voluntary contributions

Without prejudice to article 115, the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.

Article 117

Assessment of contributions

The contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.

Article 118

Annual audit

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

Part XIII Final clauses

Article 119

Settlement of disputes

1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.

2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

Article 120

Reservations

No reservations may be made to this Statute.

Article 121

Amendments

1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.

2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.

3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.

4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.

5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.

7. The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.

Article 122

Amendments to provisions of an institutional nature

1. Amendments to provisions of this Statute which are of an exclusively institutional nature, namely, article 35, article 36, paragraphs 8 and 9, article 37, article 38, article 39, paragraphs 1 (first two sentences), 2 and 4, article 42, paragraphs 4 to 9, article 43, paragraphs 2 and 3, and articles 44, 46, 47 and 49, may be proposed at any time, notwithstanding article 121, paragraph 1, by any State Party. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations or such other person designated by the Assembly of States Parties who shall promptly circulate it to all States Parties and to others participating in the Assembly.

2. Amendments under this article on which consensus cannot be reached shall be adopted by the Assembly of States Parties or by a Review Conference, by a two-thirds majority of States Parties. Such amendments shall enter into force for all States Parties six months after their adoption by the Assembly or, as the case may be, by the Conference.

Article 123

Review of the Statute

1. Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any

amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.

2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference.

3. The provisions of article 121, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment to the Statute considered at a Review Conference.

Article 124

Transitional Provision

Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

Article 125

Signature, ratification, acceptance, approval or accession

1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.

2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 126

Entry into force

1. This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification,

acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 127

Withdrawal

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

Article 128

Authentic texts

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

Inwitness whereof, the undersigned, being duly authorized thereto by their respective Governments, have signed this Statute.

Done at Rome, this 17th day of July 1998.

INSTRUCTIONS FOR ASSOCIATES

The Review of International Affairs is a quarterly published in January, April, July and October every year.

The periodical publishes evaluated articles and conference and book reviews in the field of international relations, foreign policy, international public law and international economics.

In writing all contributions for *The Review of International Affairs* authors are kindly asked to respect the following rules.

Instructions for Writing Articles

1. Author contributions (articles) should not be longer than 10 single-spaced pages (single) in *Word* format (up to 28000 characters with spaces).
2. Articles should be written in *Times New Roman* font, font size 12, with page numbers on the right side of the bottom of the page.
3. The title of the article should be written in capital letters, *in Bold*, font size 14. The title is separated from the text with – *spacing before 18 pt*. Below the title is given the author's forename, middle name and surname (including his title, possibly), the name of the institutions he works for as well as its seat. These data are given in *Italic*.

   Example:

   Prof. Dragana Marko Mitrović, Ph.D., Faculty of Political Science, Belgrade

4. If the author has a wish to point to his readers that some of the views presented in the article express his own opinion and not the one of the institution he works for it is necessary to insert at the end of the title a special footnote with the symbol * for this remark.
5. The *Abstract* should contain not more than 100 words, presenting the most significant hypotheses the work is based upon. Below the *Abstract* the author puts up to 12 *Key Words*. Both the *Abstract* and *Key Words* are given below the title of the article and they should be separated from the rest of the text by applying the option *Paragraph-Indentation*.
6. The *Summary* written in the language of the paper (e.g. Serbian) should be placed after the text. The author should give a concise contents of the paper and the most significant hypthesis his work is based upon.
7. The basic text and footnotes should be justified by applying the option *justify*, while titles should be centred by applying the option *center*.
8. Subtitles are written in *Bold*, while sub-subtitles are in *Italic*; in both cases the font size is 12.

9. The first line in every paragraph should by no means be indented by applying tabulator – option *tab*.
10. Latin, Old Greek and other non-English words and terms in the text should be written in *Italic* (e.g. *status quo, a priori*, *de facto*, *acquis communautaire*, etc.). The text should contain full names and not initials.
11. Only the following form of quotation marks should be put in the text – " and ". In case the additional quotation marks are to be put within these ones it should be done in the following way: "Establishing a Serbian Orthodox Monastic Community in Kosovo, as an integral part of comprehensive 'final status' settlement".
12. Footnotes should be written on the bottom of the page (option *Footnote*), and their marks are solely to be put at the end of the sentence.

The details on the quoted bibliographic unit in footnotes should be given in conformity with the following suggestions:

a) *Monographs*

The author's full forename and surname, the title of the monograph (*in Italic*), publisher, place of publishing, year of publishing, p. if one page of the quotation in English is cited, pp. if several pages are quoted. In case several pages are quoted En Dash is applied with no space before and after the numbers (for example 22–50).

When the proceedings in English are quoted and they were edited by more than one editor, then there should be put (eds) in brackets with no full stop after the names of the editors. If there is only one editor then (ed.) is put, including a full stop inside the brackets.

Examples:

John Gillingham, *European Integration 1950–2003*, Cambridge University Press, Cambridge, 2003, p. 221.

Duško Lopandić (ed.), *Regional initiatives in Southeast Europe: multilateral cooperation programs in the Balkans*, Institute of International Politics and Economics, Belgrade, 2001, pp. 24–32.

Theodor Winkler, Brana Marković, Predrag Simić & Ognjen Pribićević (eds), *European Integration and the Balkans*, Center for South Eastern European Studies, Belgrade & Geneva Centre for the Democratic Control of the Armed Forces, Geneve, 2002, pp. 234–7.

b) *Articles in Scientific Journals*

The author's full forename and surname, the title of the paper (with quotation marks), the title of the journal (*in Italic*), the number of the volume, the number of the publication, pp. from–to. The numbers of pages are separated by En Dash (–), with no space. If some data are incomplete it should be clearly stated.

Examples:

Michael Levi, "The Organisation of Serious Crimes", in: Mike Maguire, Rod Morgan & Robert Reiner (eds), *The Oxford Handbook of Criminology*, Oxford University Press, Oxford, 2003, pp. 878–84. (pp. 878–9 or p. 878).

Robert J. Bunker & John. R. Sullivan, "Cartel Evolution: Potentials and Consequences", *Transnational Organized Crime*, vol. 4, no. 2, Summer 1998, pp. 55–76.

c) *Articles in Daily Newspapers and Journals*

There should be given the author's name (or his initials, if they are the only ones given), the title of the article – with quotation marks, the title of the newspapers or the journal (*in Italic*), date – in Arabic numerals, the number of the page/pages.

Example:

John Gapper, "Investor votes should count", *The Financial Times*, 17 April 2006, p. 9.

d) *Document quotation*

There should be given the title of the document (with quotation marks), the article, item or paragraph the author refers to, the title of the journal or official gazette containing the document (in *Italic*, the number of the volume, the number of the publication, the place of publishing and year of publishing.

Example:

"Resolution 1244 (1999)", Security Council of the United Nations, 10 June 1999.

e) *Quotation of sources from the Internet*

It should contain the author's name, the title of the contribution or article, a full Internet Website that enables to access the source of quotation by typing the mentioned site, the date of accession to the Web page, page number (if there is one and if presented in PDF format).

Example:

Maureen Lewis, *Who is Paying for Health Care in Eastern Europe and Central Asia?*, IBRD & World Bank, Washington D.C, 2000, Internet, http://Inweb18.worldbank.org/eca/eca.nsf/Attachments/Who+is+Paying+for+Health+Care+in+Eastern+Europe+and+Central+Asia/$File/Who+is+Paying+text.pdf, 14/09/2004, p. 3.

f) *Repeating of the previously quoted sources*

Ibid. or ibidem is applied only if quoting the previous source in the text, with the page number, and in case the new quotation belongs to the same source (e.g. ibid., p. 11)

Loc. cit. or op. cit. is applied with no page number and only for the previously mentioned source of quotation with the same page number as the previously quoted source.

13. The article may contain tables or some other supplements (such as maps, graphs, and the like). It is necessary to give their number and full title (e.g. *Table 1: Human Development Index among EU members* or *Figure 2: State-Building or Sovereignty Strategy*. If the supplement is taken over from the contribution of some other author or a document its source should necessarily be given.

Instructions for Writing Book and Conference Reviews

1. Conference and book reviews should not be longer than two and a half pages in *Word* format (line spacing *singe*), or they should actually contain no more than 7500 characters with spaces.
2. The bibliographic details should be given at the beginning of the review in accordance with the rules prescribed for monographs in footnotes, and with the total number of pages given at the end (e.g. p. 345).

3. Book and conference reviews must not contain footnotes, while all possible remarks should be put in brackets.
4. The author may also write subtitles of the book or conference review in capital letters – font size 14, although this is subject to changes on the part of the editorial staff.
5. Font size, font and justification of the text should be in conformity with the previously mentioned suggestions on writing of articles.
6. The name of the author of the review is given at the end; it should be in *Italic*, while the whole surname should be written in capital letters (e.g. *Žaklina NOVIČIĆ*).

* * * * *

In case you have some dilemmas do not hesitate to contact members of the Editorial Staff.

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