



## Introduction

Within the field of transitional justice, truth commissions and criminal prosecutions have emerged as the primary mechanisms for responding to a legacy of serious human rights violations. Discourse on the establishment of these bodies, their operation, strengths and weaknesses, and the merits of one over the other, has dominated the transitional justice literature,<sup>1</sup> as much as their use has monopolised transitional justice practice. Recent times have seen a move away from the traditional ‘either/or’ approach to the establishment of these bodies. Truth commissions have shaken off the perception that they are ‘inferior substitutes for prosecution’<sup>2</sup> and are increasingly recognised as an important element of transitional justice strategies to address past abuses.<sup>3</sup> There is a growing consensus that truth commissions and criminal trials bring distinct

<sup>1</sup> M. Cherif Bassiouni (ed.), *Post-Conflict Justice* (New York: Transnational Publishers, 2002); Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge University Press, 2006); Priscilla B. Hayner, *Unspeakable Truths. Facing the Challenge of Truth Commissions* (New York: Routledge, 2001); Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd edn) (London and New York: Routledge, 2010); Martha Minow, *From Vengeance to Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998); Robert I. Rotberg, and Dennis Thompson (eds.), *Truth v. Justice. The Morality of Truth Commissions* (Princeton University Press, 2000); Jane Stromseth, *Accountability for Atrocities: National and International Responses* (New York: Transnational Publishers, 2003); Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy* (London and New York: Routledge, 2010); Tristan Anne Borer (ed.), *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies* (University of Notre Dame Press, 2006).

<sup>2</sup> Miriam Aukerman, ‘Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice’ (2002) 15 *Harvard Human Rights Journal* 39, 40.

<sup>3</sup> Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies*, 5–6; Janet Cherry, ‘Truth and Transitional Justice in South Africa’, in Hugo Van der Merwe, Victoria Baxter and Audrey R. Chapman (eds.), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (Washington DC: United States Institute of Peace Press, 2009), 249–65.

benefits to transitional states and that they ought to be viewed, not as mutually exclusive alternatives, but as contemporaneous complements.<sup>4</sup>

The theoretical compatibility and complementary nature of these mechanisms has been affirmed by the United Nations (UN), non-governmental organisations (NGOs) and academics alike.<sup>5</sup> However, the focus on the consistency of the benefits assumed to be delivered by truth commissions and criminal trials has resulted in a failure to assess whether their actual modes of operation are compatible. Despite overlapping subject matter mandates and requirements to access the same evidence and witnesses, studies on coordinating their proceedings are lacking, and policies and guidelines to enable their effective coexistence have not been forthcoming. The academic and NGO attention that has been directed towards the practical operations of these bodies has focused on cooperation arrangements between simultaneously operating truth commissions and criminal courts.<sup>6</sup> Proposals have typically centred upon the contribution that truth commissions might make to trials through the sharing of the information they may uncover during truth-seeking operations.<sup>7</sup> Little consideration has been given to the compatibility of such an arrangement with the non-judicial character of truth commissions. Beyond the possible inhibition of perpetrators,<sup>8</sup> the potential impact of information sharing on the wider truth-seeking process has not been addressed and the

<sup>4</sup> Naomi Roht-Arriaza and Javier Mariezcurrena (eds.), *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* (Cambridge University Press, 2006); Charles Villa-Vicencio, 'Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet' (2000) 49 *Emory Law Journal* 205; Charles Villa-Vicencio, 'The Reek of Cruelty and the Quest for Healing: Where Retributive and Restorative Justice Meet' (1999–2000) 14 *Journal of Law and Religion* 165; UN Security Council, *Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616, 23 August 2004; Amnesty International, *Truth, Justice and Reparation: Establishing an Effective Truth Commission*, 11 June 2007.

<sup>5</sup> See all the works cited in note 4.

<sup>6</sup> Human Rights Watch, *Policy Paper on the Interrelationship between the Sierra Leone Special Court and Truth and Reconciliation Commission*, 18 April 2002; Marieke Wierda, Priscilla B. Hayner and Paul van Zyl, *Exploring the Relationship between the Special Court and the Truth and Reconciliation Commission of Sierra Leone*, International Center for Transitional Justice, June 2002; William A. Schabas, 'The Relationship between Truth Commissions and International Courts: The Case of Sierra Leone' (2003) 25 *Human Rights Quarterly* 1035; Patrick Burgess, 'Justice and Reconciliation in East Timor: The Relationship between the Commission for Reception, Truth and Reconciliation and the Courts' (2004) 15 *Criminal Law Forum* 135.

<sup>7</sup> Amnesty International, *Truth, Justice and Reparation*, Part V.

<sup>8</sup> PRIDE, *Ex-Combatant Views of the Truth and Reconciliation Commission and the Special Court for Sierra Leone*, A Study in Partnership with the International Center for Transitional Justice, Freetown, 12 September 2002.

compatibility of information sharing with the exercise of quasi-judicial powers by truth commissions has received scant examination. Proposals advanced to date have verged on the simplistic, arguing either that truth commission information ought to be available to prosecuting authorities<sup>9</sup> or that it ought to be protected from disclosure.<sup>10</sup>

The equilibrium in the relationship between truth commissions and trials faces new and additional challenges as a consequence of the renewed importance placed upon prosecution under the Rome Statute of the International Criminal Court.<sup>11</sup> As the operation of the International Criminal Court (ICC) moves transitional justice practice into a new era, there is a pressing need to thoroughly question afresh whether truth commissions and criminal trials are truly complementary and, if so, to identify conditions under which they can operate effectively together. The establishment of the ICC with its far-reaching powers to prosecute genocide, crimes against humanity and war crimes,<sup>12</sup> coupled with the founding principle of complementarity,<sup>13</sup> has prioritised prosecution as the primary response to the commission of the most serious human rights crimes, at national and international levels. The dynamics of the field of transitional justice have been altered by the creation of an international treaty regime which demands the prosecution of 'core' crimes and which elevates the pursuit of criminal trials over the successful operation of other transitional justice mechanisms where these crimes have been committed. The creation of this transitional justice hierarchy means that in investigating the most serious human rights crimes, future truth commissions will fulfil not only a complementary role to prosecutions, but a secondary one. Where core crimes have been committed, the relationship between truth commissions and prosecution can no longer be seen as one of equals: the truth commission has become subordinate.

The status of truth commissions under the ICC, an issue the Statute itself is silent upon, has attracted much scholarly debate.<sup>14</sup> Commentators

<sup>9</sup> Freeman, *Truth Commissions and Procedural Fairness*, 252; Human Rights Watch, *Policy Paper on the Interrelationship between the Sierra Leone Special Court and Truth and Reconciliation Commission*; Wierda et al., *Exploring the Relationship between the Special Court and the Truth and Reconciliation Commission of Sierra Leone*.

<sup>10</sup> Schabas, 'The Relationship between Truth Commissions and International Courts'.

<sup>11</sup> Rome Statute of the International Criminal Court, A/Conf.183/9, 17 July 1998, (1998) 37 *International Legal Materials* 1002.

<sup>12</sup> Rome Statute, Art. 5. <sup>13</sup> Rome Statute, Arts. 1 and 17.

<sup>14</sup> Carsten Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court' (2005) 3 *Journal of International Criminal Justice* 695; Anja Seibert-Fohr, 'The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions'

have sought to find loopholes within the Rome Statute that might allow for the establishment of truth commissions as alternatives to criminal trials. Discussion has centred on whether ‘accountable’ truth commission models might satisfy the complementarity criteria and prevent the ICC exercising jurisdiction.<sup>15</sup> It has been questioned whether the ICC might defer to truth commission initiatives where prosecution does not appear to be ‘in the interests of justice’.<sup>16</sup> Others have considered whether the UN Security Council might use its powers to ‘defer’ prosecutions in favour of national truth commission proceedings.<sup>17</sup> Why the search for loopholes has been the main focus of scholarly attention on the relationship between truth commissions and the ICC remains unclear to this author. As the ICC Statute entered into force, transitional justice practice had already moved beyond this ‘either/or’ approach and truth commissions and prosecutions were being used as a multifaceted approach to past violations in East Timor and Sierra Leone. The pertinent question is not, therefore, whether there is still some back door through which to surreptitiously create a truth commission and avoid carrying out criminal trials where serious human rights crimes have been committed. The issue that warrants consideration is *how* truth commissions and prosecutorial institutions can operate effectively together in the ICC era. This is the question that this book seeks to answer.

(2003) 7 *Max Planck Yearbook of United Nations Law* 553; Michael P. Scharf, ‘The Amnesty Exception to the Jurisdiction of the International Criminal Court’ (1999) 32 *Cornell International Law Journal* 507; Declan Roche, ‘Truth Commission Amnesties and the International Criminal Court’ (2005) 45 *British Journal of Criminology* 565; Darryl Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’ (2003) 14 *European Journal of International Law* 481; Laura M. Olson, ‘Provoking the Dragon on the Patio. Matters of Transitional Justice: Penal Repression v Amnesties’ (2006) 88 *International Review of the Red Cross* 275; Jessica Gavron, ‘Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court’ (2002) 51 *International and Comparative Law Quarterly* 91; John Dugard, ‘Dealing with the Crimes of a Past Regime: Is Amnesty Still an Option?’ (1999) 12 *Leiden Journal of International Law* 1003.

<sup>15</sup> Dugard, ‘Dealing with the Crimes of a Past Regime’, 701–2; Stahn, ‘Complementarity, Amnesties and Alternative Forms of Justice’, 711–12; Seibert-Fohr, ‘The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions’, 569; Robinson, ‘Serving the Interests of Justice’, 501–2.

<sup>16</sup> Thomas Hethe Clark, ‘The Prosecutor of the International Criminal Court, Amnesties and the “Interests of Justice”: Striking a Delicate Balance’ (2005) 4 *Washington University Global Studies Law Review* 389, 409–10; Villa-Vicencio, ‘Why Perpetrators Should Not Always Be Prosecuted’, 221.

<sup>17</sup> Scharf, ‘The Amnesty Exception to the Jurisdiction of the International Criminal Court’, 522.

Consideration of the effective coexistence of truth commissions and prosecutions is not limited to the relationship between truth commissions and the ICC, and should not be dominated by it. That said, neither should the wider implications of the Rome Statute model be underestimated. The Rome Statute has not simply created a permanent International Criminal Court with the objective of prosecuting the most serious human rights crimes.<sup>18</sup> The complementarity regime, which underpins the Statute, ensures that prosecution for these crimes has become a national priority as states parties must carry out effective criminal trials if they are to avoid the assumption of jurisdiction by the Court.<sup>19</sup> Additionally, although perhaps an unintended consequence of the Statute, in passing national implementing legislation to ensure their ability to comply with Rome Statute obligations, a number of states have extended their own jurisdictional capabilities over core crimes, increasing the possibility of third-state prosecutions for such violations.<sup>20</sup> There is a sense that the quest for prosecution is gaining momentum, and as a result the role of the truth commission risks becoming marginalised.

Nevertheless, the ICC itself is only one example of the prosecutorial institutions alongside which future truth commissions may operate. Indeed, if the ICC complementarity regime functions as intended, even trials of ICC crimes will occur at the national level and the prosecutorial bodies with which future truth commissions will have to be coordinated will be domestic institutions. States may also hold trials in situations where the crimes concerned do not fall within the jurisdiction of the ICC but where prosecution is necessary to fulfil other treaty or customary international law obligations.<sup>21</sup> Again, truth commissions may be established to operate alongside these prosecutions. Truth commissions may additionally have to coexist with prosecutorial proceedings in different countries, should other states exercise jurisdiction in relation to the crimes being investigated by the truth commission, be these core ICC crimes or violations for which prosecution is required under treaty or customary law. There is, therefore, a broad spectrum across which truth commissions and prosecutorial institutions may coexist, with each situation likely to give rise to its own set of difficulties and challenges.

<sup>18</sup> Rome Statute, Art. 1.      <sup>19</sup> Rome Statute, Art. 17.

<sup>20</sup> See for example, New Zealand's International Crimes and International Criminal Court Act 2000 s. 8(1)(c); German Code of Crimes against International Law 2002, s. 1; Canada's Crimes against Humanity and War Crimes Act 2000, s. 8(b); South Africa's Rome Statute of the International Criminal Court Act 2002, s. 4(3)(iii).

<sup>21</sup> These obligations will be discussed in Chapter 2.

This book undertakes a broad analysis of the interrelationship between truth commissions and prosecutorial institutions at national and international levels, with a particular focus on the practical issues of coordination. The study is carried out on three levels and examines: (1) the relationship between truth commissions and prosecutorial institutions of the same state; (2) the relationship between truth commissions and the ICC; and (3) the relationship between truth commissions and prosecutorial institutions of different states. By analysing past practice and the relevant national and international legal instruments, this book identifies and evaluates the objectives, mandates, exercisable powers and operational procedures of truth commissions and considers them against those of criminal trials, in order to ascertain whether these mechanisms are capable of effective coexistence. This method is used to identify areas of potential difficulty between truth commissions and prosecutorial institutions, to examine the barriers that truth commissions pose to successful prosecution at national and international levels and to analyse the obstacles that the operation of prosecutorial institutions present to effective truth commission proceedings.

The analysis demonstrates that the overlapping investigations of truth commissions and prosecutorial institutions will create situations in which there will be tension surrounding access to information, the exchange and provision of evidence and the role of witnesses. It argues that despite the perceived compatibility of truth commissions and trials, there is a practical discord in their operations, which in some cases will result in conflict and make it impossible to achieve either full, effective truth seeking or successful prosecutions. The book argues that only through the development of guidelines regulating the relationship between truth commissions and prosecutorial institutions can they operate effectively together. Thus, the areas of difficulty uncovered through the analysis inform the formulation of proposals aimed at minimising the risk of conflict to enable truth commissions and prosecutorial institutions to coexist effectively in this new era of transitional justice.

Chapter 1 considers the place of truth commissions and criminal trials within the transitional justice framework. It examines their role in fulfilling the rights of victims of serious human rights crimes and considers the aims and objectives of both bodies. The chapter undertakes a critical analysis of the strengths and weaknesses of both institutions in responding to mass human rights violations in order to ascertain the contribution they make to transitional states and establish the validity of their dual use.

Chapter 2 examines the overlap between international law obligations to prosecute human rights violations and the investigatory mandates of truth commissions. It considers treaty and customary sources requiring the prosecution of serious human rights violations, their overlap with the subject matter mandates of truth commissions and the implications of these obligations for the establishment and operation of truth commissions. The overlap between truth commission mandates and the jurisdiction of the ICC is examined and the implications of the complementarity regime for truth commission operation considered. The specific areas of potential difficulty between truth commissions and prosecutorial institutions identified in this chapter form the subject of analysis in subsequent chapters.

Regardless of whether human rights violations require prosecution at the national level as a result of international treaty obligations, customary international law or in accordance with the complementarity regime of the ICC, questions arise as to whether and how successful prosecutions can be ensured and effective truth commission proceedings carried out. Coordination of these operations poses many practical difficulties. Chapter 3 concentrates on coordination at the national level. The chapter conducts case studies of the strong truth commission model implemented in South Africa, the equality model that was established in Sierra Leone and the weak truth commission model employed in East Timor. Analysis of the different models is carried out in order to ascertain in which situations their adoption might be appropriate or possible and whether there are general lessons to be drawn from all three on how operations can be coordinated optimally.

Chapter 4 undertakes a detailed analysis of the issues likely to create tension between truth commissions and the ICC. The status of truth commissions under the ICC regime is evaluated in light of the provisions of the Rome Statute and the objectives of the Court. The powers of the ICC and obligations imposed upon states parties under the Statute are identified. Analysis of the impact that the powers of the Court may have on the operation of future truth commissions is undertaken. Chapter 4 considers, in particular, the problems that may arise where truth commissions are in possession of confidential or self-incriminating evidence obtained under their powers to grant confidentiality or to compel the provision of self-incriminating information. Evaluation of the possibilities and practicalities of limiting the mandates of truth commissions to overcome potential tensions is carried out. Policy recommendations for coordinating the operations of truth commissions and the ICC are advanced.



Chapter 5 focuses on the difficulties that may occur where a third state exercises jurisdiction in relation to violations that are being/have been investigated by a truth commission in another state. The increased likelihood of overlapping prosecution and truth commission initiatives within different states as a result of the jurisdictional extensions under Rome Statute implementing legislation is analysed. The potential difficulties for national truth commissions and prosecutorial institutions where effective prosecutions are dependent on the exchange of information and transfer of suspects between states under existing mutual legal assistance and extradition arrangements are demonstrated. Analysis of the practical difficulties of operating each initiative effectively given the reliance on existing judicial cooperation agreements is carried out.

The final chapter draws together the findings in each of the three situations examined and again considers the key issue of coexistence in light of the qualitative information generated throughout the study. It demonstrates that in each of the situations investigated there is potential for tension and conflict between the operations of truth commissions and criminal trials, indicating a disharmony between these mechanisms and challenging the assumption that they are truly complementary. In light of these findings, this book calls for the development of targeted policies regulating the relationship between truth commissions and prosecutorial institutions at different levels. It develops multi-level proposals aimed at minimising the potential for conflict and maximising the possibilities for effective coexistence.



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## Truth commissions and trials within the transitional justice framework

### 1 Introduction

Truth commissions and criminal trials form two important components of the field of transitional justice. Along with lustration, public apologies, the erection of memorials to victims and the payment of reparations, both have frequently been utilised by states to respond to past human rights violations. While prosecution has perhaps the highest profile of the transitional justice mechanisms, truth commissions are more commonly used, and although the use of these bodies dominates transitional justice practice, the forms that they have taken have varied widely. Prosecution has occurred in international criminal tribunals, hybrid courts, domestic institutions and, more recently, has been pursued by the ICC. Likewise, truth commissions have been endowed with a diverse range of structures, objectives and mandates.

The establishment of these mechanisms follows no particular pattern. In some situations they have been employed as alternative solutions to past violations. In others, prosecutions have followed the operation of truth commissions, and in others still, they have been created simultaneously as part of a multifaceted approach to responding to the past. The lack of a uniform approach in establishing truth commissions and prosecutorial institutions reflects the variety of national contexts in which transitional justice mechanisms operate. While it is widely agreed that the past must be addressed,<sup>1</sup> there is also an increasing recognition of the need to consider each situation on its own merits and to develop tailored transitional justice policies accordingly.<sup>2</sup> This contextualisation of transitional justice

<sup>1</sup> Hugo Van der Merwe, Victoria Baxter and Audrey R. Chapman (eds.), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (Washington DC: United States Institute of Peace Press, 2009), 2.

<sup>2</sup> Neil Kritz, 'Policy Implications of Empirical Research on Transitional Justice', in Hugo Van der Merwe, Victoria Baxter and Audrey R. Chapman (eds.), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (Washington DC: United States Institute of Peace Press, 2009), 13–23, 13–14.

may go some way to explaining the absence of joined-up policy on coordinating the use and operations of truth commissions and criminal trials.

This chapter will consider the place of truth commissions and trials within the transitional justice framework. It will examine the mandates of both institutions and the aims and objectives assigned to them in order to develop an understanding of the purpose of their respective operations, ascertain their compatibility and establish a platform from which to formulate proposals to coordinate their effective coexistence. The chapter will also undertake an analysis of the strengths and weaknesses of both institutions in responding to mass human rights violations in order to ascertain the contribution they make to transitional states and determine the legitimacy of their contemporaneous establishment.

## 2 Truth commissions and trials as mechanisms of transitional justice

Truth commissions and criminal trials operate within the broad framework of transitional justice. Transitional justice is a multidisciplinary field of study and practice and is concerned with the strategies employed to deal with past human rights abuses in countries moving from conflict or repressive regime to democratic rule.<sup>3</sup> The measures implemented in these states may be judicial or non-judicial in nature and include, ‘with differing levels of international involvement (or none at all) ... individual prosecutions, reparations, truth seeking, institutional reform, vetting and dismissals or a combination thereof’.<sup>4</sup> Transitional justice therefore ‘comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation’.<sup>5</sup>

The term ‘transitional justice’ is in many ways misleading. It refers to ‘justice during transition’ rather than to any particular theory or form of modified or altered justice.<sup>6</sup> ‘Justice’ must be understood broadly and, in this context, has been described as:

<sup>3</sup> Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge University Press, 2006), 4.

<sup>4</sup> UN Security Council, *Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, S/2004/616, 23 August 2004, para. 8.

<sup>5</sup> *Ibid.* See also Louis Bickford, *The Encyclopaedia of Genocide and Crimes against Humanity*, 3 vols. (New York: Macmillan Reference, 2004), vol. 3, 1045.

<sup>6</sup> Bickford, *The Encyclopaedia of Genocide and Crimes against Humanity*.