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**“Truth and reconciliation commission models and
international tribunals: a comparison”**

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1 Introduction: Definition of Truth commissions

This presentation will address the following topics:

- * Definition of truth commissions
- * A comparison of the aims of TRC’s and tribunals
- * The judicial relationship between TRC and international tribunals
- * The dilemma’s pertaining to the relationship between TRC’s and tribunals
- * The antagonistic position of TRC’s and international courts

Followed by some conclusions and recommendations.

Truth commissions are commissions established to research and report on human rights abuses which have occurred over a certain period of time in a particular country under a particular regime or in relation to a particular conflict.¹ They are created, vested with authority, sponsored and/or funded by governments, international organizations like the U.N. (for example the El Salvador Truth Commission) and non-governmental organisations (for example the truth commissions of Rwanda and Paraguay).

Between 1974 and 1994 more than 20 truth commissions were created.²

Those initiated by national governments were usually transitional governments (newly established democracies) which sought to “present a formal accounting of the violence, crimes and civil and human rights abuses of the previous regimes.”³

¹ See <http://www.usip.org/library/truth.html>. The United States Institute of Peace (USIP) is an independent non partisan national institution established and funded by congress. Their goal is to help prevent and resolve violent international conflict, promote post-conflict stability and democratic transformations, and increase peacebuilding capacity, tools, and intellectual capital worldwide. The Institute does this by empowering others with knowledge, skills, and resources, as well as by its direct involvement in peacebuilding efforts around the globe.

² See [http://www.trinstitute.org/pk\[cr/4_2recon.htm](http://www.trinstitute.org/pk[cr/4_2recon.htm) The Online Journal of Peace and Conflict Resolution (OJPCR) issue 4.2 spring 2002.

³ OJPCR issue 4.2 spring 2002

As said earlier, most Truth and Reconciliation Commissions were established during a political transition phase after a period of civil war or military rule/dictatorship. For example, the peace agreement between the government of Sierra Leone and the rebel Revolutionary United front required the creation of a truth and reconciliation commission within 90 days after the signing of the agreement on July 7, 1999. In 2000, the commission was enacted by the President and Parliament. The commission's mandate was to provide a report on human rights violations since the start of the conflict in 1991 as well as provide recommendations to facilitate reconciliation and prevent a repetition of past violations. Furthermore, the commission was to "address impunity" and provide a forum for both victims and perpetrators of past abuses. The Commission was to produce its report and recommendations within a year (with the possibility of an extension). The final report was sent to the President of Sierra Leone on October 5, 2004 and presented to the United Nations Security Council October 27, 2004.⁴

Closely related to truth commissions are certain "commissions of inquiry into specific events" which mandates are more narrowly circumscribed in terms of duration, location and persons involved {example; the investigation into post-electoral violence in Abidjan, Ivory Coast}.

2 Aims of TRC's and tribunals: a comparison

The first and general aim of truth commissions is to officially investigate and provide an accurate record/analysis of the broader pattern of abuses committed during repression and civil war.⁵ Inherent to this investigation is the hearing of victims and perpetrators. In that sense a truth commission can also be seen as a non-judicial approach to achieve some form of justice to victims as it provides a forum for victims (as well as perpetrators) to give evidence of human rights abuses. The subsequent report itself forms a first official acknowledgement of the past human rights abuses these people have suffered.

In most instances, truth commissions are also required by their mandate to provide recommendations on steps to prevent a recurrence of such abuses. Truth Commission's mandates may also include the aim to facilitate reconciliation (such as the South African Truth and Reconciliation Commission (1995-8) by means of exchange of information, creating dialogue, mediation by third parties (arbitrage) or even via court procedures. This reconciliation process might also require - as in the case of the East Timor Commission - to facilitate reintegration of minor criminal offenders who submit confessions.⁶

Additionally, Truth or Truth & Reconciliation Commissions (TRC) can, by means of their report, directly or indirectly contribute to reparations of victims; the financial, medical, social and other consequences of these human rights abuses must, after all, be born by those responsible.

⁴ See www.usip.org/library/truth.html

⁵ See Paavani Reddy, Truth and Reconciliation Commissions Instruments for ending Impunity and Building Lasting peace, United Nations Chronicle on line edition issue 4, 2004.

⁶ www.usip.org/library/truth.html

As to the main purpose of international tribunals: one can say that they are primarily focussed on retribution and deterrence through prosecution of international crimes. Truth and reconciliation commissions, however, are not engaged in prosecution although their mandate are related to investigation into human rights violations and abuses, such as the case with respect to the Sierra Leonean TRC. Moreover, international tribunals may form a response to amnesty granted by national authorities. To a large extent the Special Court for Sierra Leone is such a response to amnesty granted by the Lomé peace agreement of 7 July 1999 between the government of Sierra Leone and the Revolutionary United Front of Sierra Leone, which officially ended Sierra Leone's 8 year civil war. This agreement granted amnesty to the combatants, a rather controversial amnesty, while at the same time providing for the establishment of the TRC to facilitate the country's healing process. Following renewed fighting, the government of Sierra Leone, with the assistance of the U.N. established a special tribunal to try those who had the greatest responsibility of violations of international humanitarian law.

Contrary to the TRC, the Special Court's jurisdiction and investigations aim at those persons who bear the greatest responsibility while the TRC can also examine the responsibility of groups instead of persons.

Interestingly, the reference to international humanitarian law in Article 1 of the Statute of the SCSL is shared by the TRC Act. In the case of the TRC, it is to examine violations and abuses of international humanitarian law while the SCSL is to prosecute serious violations of international humanitarian law. The somewhat more limited subject matter jurisdiction of the SCSL is further narrowed down by the specific enumeration of crimes that it may prosecute, similar to Article 3 of the Statute of the ICTR. The Statute of the SCSL contemplates serious violations of Common Article 3 of the Geneva Conventions and Additional Protocol II as well as three additional serious violations (attacks against civilians, against peace keepers and recruiting child soldiers).

Unlike the Statute of this Court, there is no direct reference to these offences in the TRC act.

In conclusion, as to the differences in goals between TRC's and international courts, the following observation can be made. *"For many, the proper response to the perpetrators of human rights abuses, violence, ethnic cleansing, or genocide, must be criminal proceedings by some sort of tribunal, a court of law (international law, perhaps) duly authorized to render judicial dispositions: to establish justifiable facts of the matter, to render verdicts and, if called for, to punish. But truth commissions (including the more ambitious truth and reconciliation commissions) cannot by their nature deliver this sort of justice."*⁷ In other words truth and reconciliation commissions can not prosecute and try alleged human rights abusers and so justice is not actually done. They can only offer alternative forms of justice such as restorative justice.

⁷ See OJPCR

3 Judicial Relationship between TRC and International Tribunals

A fundamental discussion relates to the issue of the relationship between TRC's and international tribunals.

Also here the example of the TRC in Sierra Leone and the Special Court may shed light on how to perceive this judicial relationship. In this regard three principles were formulated in December 2001 during an expert meeting between the High Commissioner for Human Rights and the office of legal affairs of the UN.

These principles include the following:

(i) The TRC and the Special Court were established at different times, under different legal bases and with different mandates. Yet they perform complementary roles in ensuring accountability, deterrence, a story-telling mechanism for both victims and perpetrators, national reconciliation, reparation and restorative justice for the people of Sierra Leone.

(ii) while the Special Court has primacy over the national courts of Sierra Leone, the TRC does not fall within this mould. In any event, the relationship between the two bodies should not be discussed on the basis of primacy or lack of it. The ultimate operational goal of the TRC and the Court should be guided by the request of the Security council and the Secretary-General to "operate in a complementary and mutually supportive manner fully respectful of their distinct but related functions." [S/2001/40, para. 9; see also S/2000/1234].

(iii) The modalities of cooperation should be institutionalised in an agreement between the TRC and the Special court and, where appropriate, also in their respective rules of procedure. They should respect fully the independence of the two institutions and their respective mandates.⁸

4 Dilemma's Pertaining to the Relationship between TRC's and Tribunals

The functioning of TRC's parallel to international tribunals may invoke several practical dilemmas. The following problems arise in law practice on this junction.

1. The issue of confidentiality for members of the TRC in case information is given to it in confidence by for example ex combatants who testify about potential crimes committed by their commanders or other individuals. This creates the dilemma in that central to the mandate of TRC's is that perpetrators tell their stories publicly while a

⁸ See Schabas, *The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone*, *Human Rights Quarterly* 25 (2003) 1048-1049.

TRC may need to guarantee confidentiality in order to get perpetrators to confess. How to fulfil this mission?

2. The use of self-incriminating evidence adduced before the TRC in court proceedings. Some of the TRC's do not entail specific provisions to solve this issue. "By contrast the South African legislation specified that self-incriminating evidence given before the Commission could not be used in criminal prosecutions before the courts in South Africa. There is a similar provision in Ghana's truth commission statute. Because the major concern of the TRC is the fear among perpetrators that testimony given to it might eventually find its way to the Special Court and be used to incriminate them, an appropriate solution in this area would go a long way towards resolving the problems in the "relationship"."⁹

With respect to the SCSL there would appear to be no legal guarantee against self-incriminating evidence being used against an accused in a prosecution before the SCSL or national courts. The parliament of SL did not include a provision dealing with self-incriminating testimony before the TRC, maybe in view of the amnesty clause in the Lomé peace agreement. Yet, the threat of self-incrimination may prevent people to come forward to tell their story so the question is whether a solution is thinkable, may be that Rule 90 E of the ICTR RPE may be adopted in similar situations. Rule 90 E reads: "A witness may refuse to make any statement which might tend to incriminate him. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than perjury."¹⁰

3. The third dilemma pertains to the question whether an international tribunal can subpoena confidential information from a TRC. A literal interpretation of section 21(2) of the Special Court Agreement (Ratification) Act 2002, however suggests that the TRC is to comply with all orders of the Special Court. It reads "Notwithstanding any other law, every natural person, corporation, or other body created by or under Sierra Leone law shall comply with any direction specified in an order of the Special court." A literal interpretation seems incorrect as, under those conditions, it would be very unlikely that the TRC would ever come to possess any confidential information at all. Therefore, a purposive interpretation seems more appropriate. After all, the TRC and the Special Court are, according to U.N. sources, mutually supportive and complementary. They can be seen as two different approaches to achieve a similar goal, namely accountability and justice. Both bodies are linked to the U.N. and are expected to be impartial and independent, each having their own set of means to meet these mutual goals. Since the Special Court was never intended to compromise the efficacy of the TRC, the only interpretation that can be made is that the confidentiality

⁹ See Schabas, o.c. at 1052.

¹⁰ See Schabas, o.c. at 1053.

provisions of the TRC are binding and “no order from the Special Court can breach such confidentiality.”¹¹

4. The fourth practical dilemma relates to the question a TRC, in making materials given to it in confidence not available to an international tribunal, should make an exception in the case of materials which go to the guilt or innocence of accused persons. In other words, should a TRC remain passive while an innocent person is charged before a tribunal. The key question of course is how to define “decisive evidence of guilt or innocence.” “What exactly such information might exist of is not always easy to determine. Few examples are given. One suggestion has been conflicting testimony: a prosecution witness says one thing before the court and something else before the TRC. But evidence that somebody has lied can never be “decisive evidence” of either guilt or innocence. The fact that a witness lied before the TRC does not mean he or she is not telling the truth before the Court, or *vice versa*. All that contradictory testimony proves is that the witness has lied at least once, or perhaps only that the witness is confused.”¹²
Therefore, this question seems not to be solved easily. The best solution may be that “should such situation arise, the TRC – like all others in similar circumstances, who possess information taken in confidence: lawyers, doctors, prosecutors, priests and so on – would have to balance a number of conflicting concerns in an attempt to reach a solution consistent with fundamental principles of justice and human rights. Again, like all others in similar circumstances, it might be able to employ a variety of means and mechanisms in order to reach a fair result without compromising its commitment to confidentiality and its integrity.”¹³

Speaking about guilt or innocence, a further problem arises, namely how to define the concept of the Truth. “The issue of the complexity and multiplicity of truth is a central one linking the problematic demands of justice and the hopes for reconciliation. It is also the arena in which the parties’ competing versions of history and the politics of memory play themselves out. Particularly in a dirty war, Lerche (2000) argues, all sides have their own version of the truth of “what really happened.”

In addition “the problematics of truth always circle back in these matters to the exigencies of justice, including punishment (Popkin 2000). Especially when combined with immunity from prosecution, with pardons, or with amnesty, the wages of truth-telling may become contested (e.g., Christodoulidis 2000). In South Africa, where the granting of amnesty by the Commission has been one of the most controversial aspects of its functioning, Bishop Tutu (1999) argued that “freedom was exchanged for truth.” Heribert Adam (1998) writes of “trading justice for truth.” Now is raised the ethically impacted problem of fungibility, the question of whether truth is a commodity

¹¹ See Schabas, o.c. 1059-1061.

¹² See Schabas, o.c. 1062.

¹³ See Schabas, o.c. 1063.

that can be traded -- and if so, for what and at what price (Henderson 2000)?”¹⁴

In conclusion: these four examples illuminate that the relationship between TRC's and tribunals in practice is far from easy. The dilemmas sketched are best to be solved on a case-by-case approach but at the same time, the provisions in TRC Acts should be clear as to the admissibility of evidence before it into tribunal proceedings.

5 The Antagonistic Position of TRC's and International Courts

My last topic relates to the inherent tension and even antagonistic position between TRC's and international tribunals. As of the first of July 2002 the ICC became operative. Three situations have until so far been referred by the State concerned to the ICC prosecutor:

- Uganda (referred on 29 January 2004)
- The Democratic Republic of Congo (DRC) referred on 19 April 2004
- The Central African Republic (referred on 7 January 2005).

The second self-referral was made at the behest of the prosecutor who previously decided to investigate the situation in the DRC.

The striking feature in all the three self-referrals lies in the fact that in each case the referring state requested the ICC prosecutor to investigate crimes allegedly committed by rebels against the central authorities.

The advantages of such self-referrals by states are that they ensure a greater likelihood of cooperation from the national authorities. On the other hand, such referrals might lead to states using the ICC as a tool of disposing of internal political conflicts through the judicial process of the ICC.

The danger of political involvement and danger to the ICC as an independent criminal court instead of a security court, is also envisioned by the security council resolution (1593 (2005) by which the security council, on the 31st of March 2005, acting under Chapter VII of the UN Charter, referred the situation in Darfur (Sudan) to the ICC prosecutor, mainly to investigate alleged crimes.

On the first of June 2005 the ICC prosecutor decided to open investigations into the situation in Darfur, after opening this field document prepared by the UN Commission of Inquiry for Darfur on the 2nd of April 2005, which document contained the names of 51 suspects.

It is debatable whether an international tribunal could be allowed to take cases from an international organ which is primarily concerned with endorsement of international peace and security.

¹⁴ See ojpcr.

The above mentioned developments may also lead to friction with the goals and purposes of TRC's and emphasize the antagonistic positions of these two mechanisms. A clear example forms the mentioned initial voluntary referral to the ICC by the government of Uganda in December 2003 of the situation in the Northern region of this country. While this referral encountered initial euphoria, subsequent events give a different picture. In November 2004, President Museveni proposed that fighters in the Lords Resistant army (LRA) who choose to cease fighting, could engage in internal reconciliation mechanisms, this as an alternative to any future investigations and prosecutions by the ICC. Factually, such proposals are equivalent to a withdrawal of the state referral. Noticeably, the ICC statute does not contemplate the situation whereby a self-referral to the court is retracted.

Be this as it may, the Ugandan situation shows the principal tension and friction between on the one hand the need for internal reconciliation and peace efforts and on the other hand the pressures by the international community to prosecute individuals for international crimes and to end criminal impunity.

Needless to say that this antagonistic situation as exemplified by the Ugandan situation, also puts into question the complementarity concept which underlies the ICC Statute.

This antagonistic situation was reinforced when in October 2005, the first arrest warrants for crimes against humanity and war crimes were issued by the ICC against 5 leaders of the LRA, Joseph Kony and four of his senior commanders. The unsealing of these indictments impacted negatively upon the Ugandan peace process and reportedly endangered national efforts to advance peace initiatives. As a result, this may impact also upon the cooperation of the Ugandan government with the ICC. Additionally, in view of the continued insecurity in Northern Uganda and the fact that the accused commanders are not in physical custody of the Ugandan authorities, this further shows the vulnerability of the ICC and other tribunals, in specific their dependence on the cooperation of national governments.

In conclusion it can therefore be said that both reconciliation mechanisms and the pursuance of international criminal tribunals, endorsed within the same state or region, may have opposite outcomes.