

International Criminal Justice and Truth Commissions

From Strangers to Partners?

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Abstract

International criminal justice and truth commissions both experienced strong growth during the past two decades. At the international level, the initial opposition displayed by these two mechanisms, illustrated by the peace versus justice debate, has been replaced by a complementary approach promoting the parallel operation of international trials and truth commissions. Consequently, this collaborative model has become — and is likely to evolve to be even more — frequent, yet no agreed framework has emerged to regulate this relationship, despite several opportunities to develop one. Drawing from past experiences and analysis of the Statute of the International Criminal Court (ICC), this article aims to define the relationship between international criminal justice and truth commissions and identify potential structures of cooperation between these commissions and the ICC. This article shows how the complementary nature of international criminal justice and truth commissions may need to be nuanced to preserve the specificities inherent to the nature of these mechanisms. Following from this analysis, possible models of cooperation between these institutions are explored by this article.

1. Introduction

Transitional justice and international criminal justice have a close and conflicting relationship, considered alternatively as exclusive or mutually reinforcing. The long-standing peace versus justice debate represents an eloquent example of this contradictory relationship. International tribunals — which

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are commonly established remotely from the populations affected by past human rights violations — have been repeatedly criticized, from a transitional justice perspective, for their lack of effectiveness. Despite this, several authors have qualified these same tribunals as transitional justice mechanisms,¹ turning this stance of opposition into a cooperative framework aimed towards achieving a holistic approach to transitional justice.²

Truth commissions, reparation programmes and lustration policies have often worked in close cooperation,³ with some commissions even integrating all these measures into one structure comprising several specialized sub-commissions.⁴ This cannot be said of international courts. These jurisdictions generally operate in an independent manner, disregarding, at times even denigrating, non-judicial mechanisms.⁵ It is, therefore, questionable that international criminal courts could be considered as one among several mechanisms conjointly working towards the achievement of objectives defined under the broad umbrella of transitional justice.

This separation of international criminal justice from transitional justice is partly due to initial misconceptions. French lawyers, for example, may still be reluctant to employ the term ‘transitional justice’,⁶ a field rarely studied by students of law in French universities. The strict separation between law and political science partly accounts for this, as transitional justice is often associated with the latter. Even though this is progressively changing,⁷ this reluctance reveals that transitional justice and international criminal justice

- 1 R. Teitel, ‘Transitional Justice Genealogy’, 16 *Harvard Human Rights Journal* (2003) 69; W.A. Schabas, ‘Conjoined Twins of Transitional Justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court’, 2 *Journal of International Criminal Justice (JICJ)* (2004) 1082.
- 2 J.E. Méndez, ‘National Reconciliation, Transnational Justice, and the International Criminal Court’, 15 *Ethics & International Affairs* (2001) 25.
- 3 Truth commissions commonly dedicate a significant part of their reports to reparations, including recommendations regarding the amount and form. The naming of those individuals responsible for human rights violations in such reports can also be seen as part of a lustration process, since the stigma accompanying the identification in the report may force individuals to resign from their position.
- 4 The Moroccan Equity and Reconciliation Commission comprised a sub-commission tasked with evaluating the appropriateness and amount of reparations on an individual basis.
- 5 P.B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd edn., Routledge, 2011), at 112. In her autobiography, Carla Del Ponte underlined the uselessness of a truth commission for the crimes committed in the former Yugoslavia. Del Ponte considered that such a mechanism would operate as a ploy in the service of impunity. See C. Del Ponte, *La traque, les criminels de guerre et moi* (Éditions Héloïse d’Ormesson, 2009).
- 6 In the French version of the report of the United Nations Secretary-General on the rule of law and transitional justice, the expression was translated as ‘*administration de la justice pendant la période de transition*’. See *Rétablissement de l’état de droit et administration de la justice pendant la période de transition dans les sociétés en proie à un conflit ou sortant d’un conflit*, UN Doc. S/2004/616, 23 August 2004.
- 7 Several French transitional justice experts are emerging, which in turn, contributes to the promotion of this field. The use of ‘*justice transitionnelle*’ by the French version of the follow-up report of the United Nations Secretary-General on the rule of law and transitional justice

constitute distinct disciplines, developing in separate spheres, that is, the non-judicial and the judicial.

The development of international criminal justice and transitional justice has led the international community to review its position regarding transitions. Pursuant to the development of the position that past crimes must not go unpunished and addressing the root causes of conflict is an essential feature of ensuring lasting peace, the complementary nature of mechanisms, such as truth commissions and criminal trials, have become central to the success of any transitional justice framework. International tribunals are often the only possible solution in areas where armed conflict has rendered the local judiciary without resources and shattered. It follows that the cohabitation of truth commissions with international criminal jurisdictions becomes logical.

International criminal justice and truth commissions are thus inevitable co-workers in transitional contexts. The, at times, blurry boundary between both mechanisms renders their differentiation complex. Both bodies conduct investigations, which may result in the identification of individuals implicated in the commission of crimes. In addition, both bodies aim to prevent future human rights violations, fight against impunity, uncover the truth about past crimes, bring recognition and reparation to victims, and ultimately, allow for the achievement of national reconciliation.

Past experiences in the joint operation of international criminal jurisdictions and truth commissions have shown that true cooperation between these mechanisms has been impeded by elements inherent to their nature, such as judicial rigidity as opposed to non-judicial flexibility. Questions surrounding the possibility — and even the suitability of such cooperation — remain unanswered. This article submits that international criminal justice cannot, and indeed, should not, act as a transitional justice mechanism. This option represents a serious risk to the neutrality and independence vital to any judicial institution. This observation applies, in particular, to the International Criminal Court (ICC). Nonetheless, the inevitable coexistence of international jurisdictions, particularly the ICC, with truth commissions, renders the elaboration of a framework regulating the interaction between these mechanisms crucial. Drawing upon experience within the system of the ICC, three models of cooperation emerge. A brief analysis of the so-called ‘division of labor’ framework suffices to establish the unsatisfactory nature of this model. This observation leads to analysis of the means and shortcomings of the ICC. In turn, such analysis will effectively explain interactions that are built on either the so-called ‘mutually exclusive existence’ or ‘true cooperation’ models, as both these frameworks are mutually compatible.

confirms this stance. See *État de droit et justice transitionnelle dans les sociétés en situation de conflit ou d'après conflit*, UN Doc. S/2011/634, 12 October 2011.

2. Cooperation Proved Impossible? A Study of Experiences in International Criminal Justice and Truth Commissions

A. From Ignorance to Acknowledgement

1. The Initial Exclusiveness of Truth Commissions and International Criminal Justice

Until relatively recently, impunity, rather than accountability, represented the norm in transitional societies. Amnesties, whether formal or informal, were considered a normal and viable way to turn the page on past violations. Often, the question whether to prosecute former regime members and criminals was not even raised.

Many states in South America passed amnesty laws after, or along with, the creation of a truth commission. At present, the Inter-American Court of Human Rights (IACHR) and several supreme courts are challenging these laws. Nonetheless, such challenges do not change the fact that these states have been living peacefully, under democratically elected governments, for more than 30 years, even though there have not been prosecutions of criminals from the former regime.⁸ Brazil, whose amnesty law remains in force, offers a strong example of a successful transition without prosecutions.⁹ South American illustrations may nonetheless be considered as biased, given that the lack of prosecutions can hardly be considered a choice made by citizens of the respective countries.¹⁰

Examples such as Spain and Mozambique hold greater significance. Both states made a clear choice in 'closing the books' on past violations.¹¹ In Spain, this decision is beginning to be questioned and criticized. However, citizens in Mozambique have not expressed discontent over the resolution reached after the country's bloody civil war. It may be submitted that these two examples constitute relatively successful transitions. Several studies reveal that

8 See, for example, *Barrios Altos v. Peru*, Judgment of 14 March 2001 (Ser. C) No. 75; *Almonacid Arellano et al. v. Chile*, Judgment of 26 September 2006 (Ser. C) No. 154. The supreme courts of Chile, Uruguay, Argentina and Peru have declared domestic amnesty laws null and void, in compliance with judgments of the IACHR. See J.M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge University Press, 2012), at 323, footnotes 180–185.

9 *Gomes Lund et al. v. Brazil*, Judgment of 24 November 2010 (Ser. C) No. 219. Even though the IACHR declared this amnesty law null and void, Brazil has not yet complied with the judgment, nor expressed the intention to do so. The amnesty is thus still considered valid in the internal legal order.

10 Uruguay represents an exception to this rule as its amnesty law has been approved through referendum. Nevertheless, this particularity did not prevent the IACHR from declaring this law illegal, thus opening the way for the Supreme Court to declare it null. See *Gelman v. Uruguay*, Judgment of 24 February 2011 (Ser. C) No. 221.

11 J. Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge University Press, 2004).

amnesties, both as national measures and contained within international peace agreements, have been more frequently implemented than prosecution policies.¹² In Spain and Mozambique, these amnesties were considered indispensable measures towards achieving peace and reconciliation.

In contrast, international criminal justice has developed nearly exclusively outside any transitional framework. The international military tribunals (IMTs) at Nuremberg and Tokyo represent the foundations of the contemporary approach taken by international criminal justice. Although the IMTs were not integrated into a transitional justice framework — as the notion of transitional justice did not yet exist — it is notable that these tribunals were neither aimed at reconciling former enemies, nor bringing closure to victims. The negotiations held between allied forces before the decision to create the Tribunal in Nuremberg establish that the prime concern, as expressed by states, was to deter future crimes.¹³ The IMTs did not follow a victim-centred approach, nor did these tribunals place importance on their integration into, and adaptation to, local contexts. In Nuremberg, the role of victims was limited. Testimonies represent an exception, for the reason that most evidence was already available through written documents. In Tokyo, no attention was accorded to customs of Asia regarding the conduct of criminal trials or, in general, the local legal system.¹⁴ These brief remarks fall within other documented characteristics of the IMTs, which have led to criticisms of victor's justice, and are not compatible with transitional justice values.

The international criminal tribunals, established by the Security Council in 1993 for the former Yugoslavia (ICTY),¹⁵ and in 1994, for Rwanda (ICTR),¹⁶ represented a breakthrough in the development of international criminal justice. There is an abundance of literature and discussion on the ad hoc tribunals and their relationship to transitional justice. Arguments such as their remoteness to victims, the issue of re-traumatizing witnesses through cross-examination and the failure to successfully reach civilians through proper outreach programmes are well known and do not require further exploration here.¹⁷ However, the position laid down by judges and the prosecution of the

12 L. Vinjamuri and A.P. Boesenecker, *Accountability and Peace Agreements: Mapping Trends from 1980 to 2006* (2007), available online at <http://mercury.ethz.ch/serviceengine/Files/ISN/39727/ipublicationdocument/singledocument/c5ac185e-b56b-4bc9-b08c-6a888b40326a/en/0907.Accountabilityreport.pdf> (visited 3 December 2014); T.D. Olsen, L.A. Payne and A.G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (United States Institute of Peace Press, 2010), at 39.

13 United States Department of State, 'Allied Declarations Condemning German Atrocities in Occupied Territories: Proposal for the Creation of a United Nations Commission for the Investigation of War Crimes', 1 *Foreign Relations of the United States Diplomatic Papers* (1942) 45.

14 Z. WanHong, 'From Nuremberg to Tokyo: Some Reflections on the Tokyo Trial (on the Sixtieth Anniversary of the Nuremberg Trials)', 27 *Cardozo Law Review* (2006) 1673.

15 See SC Res. S/Res/827, 25 May 1993.

16 See SC Res. S/Res/955, 8 November 1994.

17 See, for example, E. Stover and H.M. Weinstein, 'Introduction: Conflict, Justice and Reclamation', in E. Stover and H.M. Weinstein (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge University Press, 2004) 1; E.E. Stensrud,

ICTY on the creation of a truth commission for former Yugoslavian states to address crimes committed during the armed conflict is noteworthy. Carla Del Ponte and Louise Arbour, both former prosecutors — along with former President Gabrielle Kirk McDonald — vigorously rejected the idea of establishing a truth commission. This standpoint arose mainly from the fear that this parallel institution would weaken the work of the ICTY.¹⁸ These reactions reveal the tense connection held between international criminal justice and truth commissions during the initial years of the ad hoc tribunals. In this regard, neither the ICTY Statute, nor Security Council Resolution 827 (1993), integrate the notion of national reconciliation, which is central to transitional justice policies.¹⁹ Moreover, this notion failed to be raised during the debates between members of the Security Council before the adoption of the ICTY Statute. Victims, themselves, are almost absent from those elements taken into consideration when this decision was reached and implemented. The principal objectives of the ICTY are found in the re-establishment of peace and security, instead of addressing the needs of victims for truth and closure. At the same time that an international tribunal was established at the exclusion of transitional mechanisms in the former Yugoslavia, the United Nations was actively involved in the implementation of the Commission on the Truth for El Salvador, pursuant to which, a general amnesty was adopted by the government of El Salvador. This demonstrates the perceived exclusivity of truth commissions and international criminal justice at this time.²⁰

2. *Acknowledging the Limits of the One-sided Approach*

Influenced by the introduction by Boutros Boutros-Ghali of the concept of ‘peacebuilding’,²¹ and South American experiences in transitional justice, the United Nations commenced diversification of its peace operations in the mid-1990s. To reflect this, United Nations mandates were expanded to encompass issues related to human rights, institution building and national reconciliation.

‘New Dilemmas in Transitional Justice: Lessons from the Mixed Courts in Sierra Leone and Cambodia’, 46 *Journal of Peace Research* (2009) 6.

18 Hayner, *supra* note 5, at 112.

19 This may represent the major difference between the ICTY and ICTR, since the latter was overtly tasked with contributing to national reconciliation in Rwanda. The decision to incorporate this objective into the Security Council resolution was not unanimous. Several member states strongly criticized the rapprochement of two notions — criminal justice and reconciliation — and considered this to attribute goals to criminal justice that it was not meant to attain.

20 This approach was not limited to the United Nations. As noted by Priscilla Hayner, in the 1990s, it was argued ‘that truth commissions were likely to weaken the prospects for proper justice in the courts, or even that commissions were sometimes intentionally employed as a way to avoid more serious accountability’. See Hayner, *supra* note 5, at 91.

21 *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping*, UN Doc. A/47/277, 17 June 1992, §§ 55–59 (hereinafter ‘Agenda for Peace’).

This new doctrine of peacebuilding acknowledged the specific and multiple needs of post-conflict societies. In this context, the model of international criminal justice adopted by the ad hoc tribunals, flawed by remoteness, rigidity and financial constraints, could no longer hope to meet the ambitious aims of restoring peace and security in transitional societies. The hybrid courts, created between 2000 and 2007, represent an attempt to adapt international criminal justice to these specific contexts.²²

By integrating hybrid courts into national judicial systems through the incorporation of national judges and prosecutors into the courts' chambers and the conduct of trials in-country, the hybrid model participates in the reconstruction of the judicial system as well as building a rule of law culture. The courts' outreach programmes endeavour to include the population and advocate for a judicial approach towards the truth of past violations. In addition, they are designed to provide closure to victims through the recognition of those crimes that were committed and identification of the individual responsibility of former leaders. The attribution of multiple objectives to these hybrid courts reveals a renewed vision of international criminal justice, which goes beyond the IMTs' stated aim of deterrence and the fight against impunity, and even, to some extent, the ad hoc tribunals. The hybrid courts may thus be seen as an attempt to include transitional justice issues within criminal justice institutions. This, in turn, reveals a renewed open-mindedness of international criminal justice towards the idea of transitional justice.

These courts, although better equipped than the ad hoc tribunals in addressing post-conflict issues, still display the limits inherent to international criminal justice — namely, limited capacity in terms of prosecutions due to lengthy and costly trials — as well as lack of political will from governments in post-conflict societies to fully cooperate with prosecutions. Although efforts have been made towards overcoming these limitations through further integration of hybrid courts into national judicial systems — such as in Bosnia and Herzegovina and Kosovo²³ — some limitations, inherent to the judicial nature of criminal courts, would appear insurmountable.

22 During the 2000s, the following six hybrid courts were established in chronological order of creation: the so-called 'Regulation 64 Panels' in Kosovo; Special Panels for Serious Crimes in Timor-Leste; Special Court for Sierra Leone; Extraordinary Chambers in the Courts of Cambodia; War Crimes Chamber in Bosnia and Herzegovina; and Special Tribunal for Lebanon. For further information see P. Pazartzis, 'Tribunaux pénaux internationalisés: Une nouvelle approche de la justice pénale (inter)nationale?' 49 *Annuaire français de droit international* (2003) 641; A.-C. Martineau, *Les juridictions pénales internationalisées: Un nouveau modèle de justice hybride?* (Pedone, 2007); S. Linton, 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice', 12 *Criminal Law Forum* (2001) 185.

23 Both the War Crimes Chamber in Bosnia and Herzegovina and the Regulation 64 Panels in Kosovo were fully integrated into the national judicial system, to a point where the presence of foreign judges — the number of which has been progressively reduced until their total suppression — represented the only international aspect remaining in these courts. See Martineau, *ibid.*

Claude Jorda, former President of the ICTY, considered that there were four elements impeding the role of the ICTY in national reconciliation.²⁴ That is, the incapacity of the ICTY: first, to deal with secondary offenders; second, to provide reparation to victims; third, to establish the overarching causes of the massacres; and finally, to conduct a genuine '*travail de mémoire*'.²⁵ These limitations may apply to the hybrid courts and, additionally, to the ICC, with the exception of the system of reparation.

The punitive aim of criminal justice restricts the search for the truth to the prosecution of individuals and crimes under the courts' jurisdiction. This is particularly accurate with regard to international courts as their jurisdiction is limited to serious crimes. Accordingly, criminal courts will only take into account elements, such as evidence or testimony, relevant to the establishment of the criminal liability of an indicted individual. What has been termed the 'social truth' or 'social causes' of past crimes are irrelevant.²⁶ The responsibility of the state concerned is equally disregarded by criminal courts. The collapse of economic, educational or social institutions as well as widespread corruption are considered important factors in the emergence of armed conflicts. It follows that, to construct lasting peace, establishing the political responsibility of former leaders is as important as determining criminal liability.²⁷

Moreover, many authors have pointed to those restrictions inherent to rules of evidence adopted by criminal courts.²⁸ The strict regulation of testimony and establishing facts rather than providing space for victims to tell their stories and their own truth, constricts the cathartic potential of such discourse.²⁹ Moreover, victims do not have the same opportunity to confront, and eventually forgive, perpetrators in a courtroom as during a truth commission hearing. Acknowledging these limitations implies that the complementary role of judicial and non-judicial mechanisms must be recognized.

24 ICTY Press Release, 'The ICTY and the Truth and Reconciliation Commission in Bosnia and Herzegovina' (JL/P.I.S./591-e), 17 May 2001, available online at <http://www.icty.org/sid/7985> (visited 3 December 2014) (hereinafter 'ICTY Press Release').

25 *Ibid.*

26 For an analysis of the various types of truths which may be sought regarding past events see A.R. Chapman and P. Ball, 'The Truth of Truth Commissions: Comparative lessons from Haiti, South Africa, and Guatemala', 23 *Human Rights Quarterly* (2001) 1.

27 Several authors have advocated for the extension of transitional justice policies to the violation of social and economic rights as a way of emphasizing the political responsibility held by former regimes and opening the way towards reparation. See, for example, L.J. Laplante, 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework', 2 *International Journal of Transitional Justice* (2008) 331.

28 Hayner, *supra* note 5, at 107.

29 For a critique of the cathartic argument used to promote the creation of, and the participation in, truth commissions see R. Shaw, *Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone*, United States Institute of Peace, 13 February 2005, available online at <http://www.usip.org/sites/default/files/sr130.pdf> (visited 3 December 2014).

3. Acceptance of the Parallel Operation of Judicial and Non-Judicial Mechanisms

In Cambodia, Sierra Leone and Timor-Leste, the United Nations recognized the potential benefits of the parallel operation of judicial and non-judicial mechanisms. Operating a truth commission and a hybrid tribunal at the same time was either experimented with, or at least envisaged, in these three countries, with diverging expectations.

In Cambodia, it was expected that the lack of political will to prosecute a large number of former Khmer Rouge leaders responsible for the massacres occurring from 1975 to 1979 would lead to few cases being heard by the Extraordinary Chambers in the Courts of Cambodia (ECCC).³⁰ The truth commission, envisaged by the International Commission of Inquiry, was seen as a way to address the numerous cases that would not be investigated by the ECCC.

In Sierra Leone, the Special Court for Sierra Leone (SCSL) was attributed jurisdiction *ratione personae* restricted to 'the persons who bear the greatest responsibility' in the perpetration of crimes under its jurisdiction.³¹ In limiting the Court's jurisdiction, the United Nations Secretary-General and Security Council took into account the future creation of the Sierra Leonean Truth and Reconciliation Commission (TRC), noting that this institution would be better suited to deal with secondary offenders. The TRC was also intended to address the issue of child soldiers, whom United Nations actors were reticent to prosecute at the SCSL despite the requests of citizens of Sierra Leone to proceed in this manner.³²

In Timor-Leste, the Commission for Reception, Truth and Reconciliation (CAVR) was established by the United Nations Transitional Administration in East Timor (UNTAET) as a response to the population's wish to have a more victim-centred and reconciliation-oriented mechanism working alongside the Special Panels for Serious Crimes (the Special Panels). The CAVR also provided a way for UNTAET to anticipate the expected failures of the Special Panels and the Indonesian Commission for Human Rights Violations — established by Indonesia in Jakarta — to successfully prosecute those most responsible for the massacres in Timor-Leste during, and immediately after, the end of Indonesian rule.³³

30 *Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135*, UN Doc. A/53/850, 16 March 1999, §§ 199–209.

31 See Art. 1(1) SCSLSt.

32 Jurisdiction over children aged 15 years and over is mainly symbolical, given that first prosecutor of the SCSL, David Crane, declared that child soldiers would not be indicted, an approach consistent with the expressed will of the United Nations Secretary-General. See *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, UN Doc. S/2000/915, 4 October 2000, §§ 32–38; *Letter dated 31 January 2001 from the President of the Security Council addressed to the Secretary-General*, UN Doc. S/2001/95, 31 January 2001, § 3. SCSL Press Release, 'Special Court Prosecutor Says He Will Not Prosecute Children', 2 November 2002, available online at <http://www.rscsl.org/Documents/Press/OTP/prosecutor-110202.pdf> (visited 3 December 2014).

33 This was mainly due to a clear lack of political will displayed by Indonesia to either cooperate with the Special Panels or prosecute the main perpetrators. See H.D. Bowman, 'Letting the Big

The three principal examples of the recognition of potential benefits arising from the joint operation of a truth commission and an international criminal court are outlined above. However, it should be noted that even former President Jorda of the ICTY recognized, although with some reserve, the potential for a truth commission in Bosnia and Herzegovina, working in a complementary manner with the ICTY.³⁴

B. Dealing with Competing Mechanisms

1. Fear of Confusion Arising from Parallel Operation

Despite the numerous characteristics shared by truth commissions and criminal courts, these two mechanisms remain fundamentally different in nature. Confusion born from similarities and misconceptions of these two mechanisms may create — and has done so in the past — tensions and defiance between truth commissions and institutions of international criminal justice.

Truth commissions can be conferred powers of a judicial nature, such as subpoenaing witnesses, ordering search and seizure as well as the transmission of documentation and imposing penalties for failure to comply with such orders or subpoenas.³⁵ The CAVR could shield an individual from prosecution through the Community Reconciliation Process (CRP).³⁶ Other truth commissions granted rights to perpetrators and victims resembling those provided for by criminal courts, including assistance from a lawyer or testifying under oath.³⁷ The attribution of such powers to truth commissions carries risks, namely, making these mechanisms resemble criminal courts and thus creating confusion regarding the distinct roles of the two institutions.³⁸

Fish Get Away: The United Nations Justice Effort in East Timor', 18 *Emory International Law Review* (2004) 371.

34 ICTY Press Release, *supra* note 24.

35 The broad powers held by some truth commissions led Carsten Stahn to qualify them as having a 'quasi-judicial' role. See C. Stahn, 'Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor', 95 *The American Journal of International Law* (2001) 959; Hayner, *supra* note 5, at 27–44.

36 Under this procedure, a perpetrator could be granted immunity from civil and criminal prosecutions for criminal and non-criminal acts committed during the period, and in relation with the events, covered by the CAVR Statute. Crimes under the jurisdiction of the Special Panels ('serious crimes') were excluded from the CRP procedure. CRP statements had to be transmitted to the prosecution, which could decide to investigate the disclosed crimes, where it considered that they qualify as serious offenses. The CRP would then be abandoned in respect of those crimes under investigation. See Section 22 Regulation No. 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor (2001) (hereinafter 'CAVR Statute').

37 For an example of a robust truth commission, in Sierra Leone, see Art. 8.1 Truth and Reconciliation Commission Act 2000.

38 This fear has justified Judge Geoffrey Robertson of the SCSL to reject the request of the TRC to hold a public hearing with the former Prime Minister of Sierra Leone, Samuel Hinga Norman, who was in the custody of the SCSL. See Decision on appeal by the truth and reconciliation

Given the delicate environment in which international criminal courts function, comprehension of, and support for, their work by the local population is indispensable. Moreover, the distinct nature of truth commissions and courts must be properly understood to prevent confusion.

There are several elements occurring when a truth commission operates conjointly with an international court, which may impact negatively on the former's work. Some experts refer to the so-called 'witness fatigue', which materializes when court witnesses refuse to re-tell their story in front of a truth commission, depriving this institution of potentially important elements.³⁹ Other factors include the difficulty for truth commissions to access court detainees and the potential use by the court of information given to these commissions by victims or perpetrators.

Both of these issues will be further developed later in this article. However, one important factor must be underlined here. Both the CAVR and TRC have recognized the negative impact — mainly in relation to the issue of information sharing — the hybrid court, which they operated together with, had on their work.⁴⁰

2. Acknowledging the Need for a Regulated Relationship

Sierra Leone represents the most significant improvement with respect to lessons learned from the joint operation of a truth commission and a hybrid court. The framework envisaged by the United Nations Secretary-General and the Security Council for the relationship between the TRC in Sierra Leone and the SCSL implied that the TRC would take over when the Court did not hold, or did not wish to exercise, jurisdiction. The approach taken failed to anticipate numerous cases in which the interests of the two institutions would overlap. In addition, it demonstrated a lack of understanding by the United Nations of processes for truth commissions.

It was clear from the start that the most delicate issues would arise when the TRC sought to address cases involving perpetrators that the SCSL may have

commission for Sierra Leone and chief Samuel Hinga Norman JP against the decision of his Lordship, Mr Justice Bankole Thompson delivered on 30 October 2003 to deny the TRC's request to hold a public hearing with chief Samuel Hinga Norman JP, *Norman* (SCSL-2003-08-PT), President of the SCSL, 28 November 2003, §§ 30–31.

39 D. Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court', 14 *European Journal of International Law* (2003) 484, at footnote 11.

40 *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, Vol. 3B, Truth and Reconciliation Commission (2004), available online at <http://www.sierra-leone.org/TRCDocuments.html> (visited 3 December 2014), at 374 (hereinafter 'Witness to Truth'). See also Part 2, 'The Mandate of the Commission', in *Chega! Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste*, January 2006, available online at <http://www.cavr-timor-leste.org/en/chegaReport.htm> (visited 3 December 2014), at 24. This report is cited in A. Bisset, 'Rethinking the Powers of Truth Commissions in light of the ICC Statute', 7 *JICJ* (2009) 971.

jurisdiction over. Since the extent of the jurisdiction *ratione personae* of the SCSL had not been clearly defined, the number of such cases was potentially high. The issue of confidentiality of information given to the TRC had not been clearly addressed. As a consequence, many perpetrators refused to give statements to the TRC fearing that this would be later used against them by the SCSL, thus undermining the TRC's work. In addition, the capacity of the TRC to reach perpetrators under the custody of the SCSL was a major source of strain between the two institutions.⁴¹

In the end, the relationship between the TRC and SCSL functioned at its best when these two institutions did not have to cooperate. By way of example, these mechanisms successfully addressed perpetrators not subject to the Court's jurisdiction and child soldiers as well as cases of indicted perpetrators to whom the TRC did not wish — or at least did not express the wish — to have access.

In Timor Leste, the United Nations was able to learn from past experience. Rules regulating the relationship between the CAVR and Special Panels were included in UNTAET Regulation 2001/10, which established the CAVR. First, the confidentiality issue was regulated in favour of the prosecutor, whom, pursuant to Section 44.2 of the CAVR Statute, had full power to obtain any information collected by the CAVR. As previously stated, the CAVR considered that this power held by the Special Panels impacted negatively on its work. Second, the CRP, founded under the CAVR Statute, represents one of the most important cooperative frameworks between a truth commission and a criminal court to date. This procedure allowed room for interaction and dialogue between the Special Panels and CAVR — a key aspect where the mechanisms in Sierra Leone failed.

Although the model in Timor-Leste represents a conclusive example of cooperation between a truth commission and a hybrid court, it was made possible essentially due to the context under which it was implemented. Timor-Leste fell under United Nations administration, and accordingly, the CAVR and Special Panels were created by the same authority, which benefitted from nearly limitless power to legislate. Second, while the Special Panels may qualify as a hybrid court, at its core, the Panels are criminal chambers integrated into the domestic judicial system, to an extent only seen in Kosovo and Bosnia and Herzegovina. This specificity gave the Special Panels greater flexibility than the courts in Cambodia or Sierra Leone. Finally, the prosecution by the Special Panels of only a few high-ranking perpetrators diminished the prospect of serious opposition between the CAVR and the Special Panels.⁴²

41 Witness to Truth, at 382–425.

42 Bowman, *supra* note 33.

3. The Risky Road Towards a Cooperative Framework: The System of the ICC

At the time of adoption of the ICC Statute in 1998, the complementary nature of international criminal justice and transitional justice was far from settled and coexistence of truth commissions and international criminal tribunals had not yet occurred. Nonetheless, the growing importance of transitional justice in post-conflict societies — situations in which the ICC is likely to intervene — demonstrates an inevitable link between the ICC and such mechanisms. It follows that the question which arises is whether the ICC and truth commissions will act as ‘conjoined twins of transitional justice’,⁴³ mutually exclusive mechanisms of post-conflict reconstruction or cooperating partners working towards distinct but mutually reinforcing objectives. The nature of the ICC *a priori* disqualifies it as a mechanism of transitional justice, therefore, excluding the ‘conjoined twins’ model. However, the future coexistence of these mechanisms renders a framework for interaction indispensable. While, under the complementarity regime set out by the ICC, a relationship based on exclusivity may be possible in certain situations, this position cannot provide a global framework governing the interactions between the ICC and truth commissions. Such a framework was not established by the ICC Statute. However, a careful analysis of the ICC Statute and Rules of Procedure and Evidence enables identification of those elements likely to underpin such a framework.

A. *Inadequacy of the ICC vis-à-vis Transitional Justice*

1. *Limits Inherent to the Judicial Nature of the ICC*

In some ways, the ICC may be ill-equipped when it comes to exigencies of transitional justice. Both fields are driven by opposing demands, which are considered vital for their respective effectiveness. Mechanisms of transitional justice, even when international, must maintain a certain degree of flexibility to match the specific needs of the context where the work will be conducted. This is illustrated by the distinctive composition, powers and scope of action contained in the respective statutes governing truth commissions. The aims of truth commissions also differ between each commission, and determine, to a certain extent, their working procedures and findings. As a result, truth commissions in Latin America — which focused on uncovering the truth about forced disappearances and crimes committed by the state as opposed to achieving reconciliation amongst the population — functioned more like commissions of inquiry. The principal objectives were to identify criminals and end impunity, rather than reconcile former enemies. In this example, the hearings were held mainly in private and were intent on uncovering information and evidence against past violators. On the contrary, truth commissions established

43 Schabas, *supra* note 1.

after civil conflicts, which involved a significant section of the population, must focus on establishing a historical record and bringing together victims and perpetrators. Under this configuration, that is, one concentrated on reconciliation, and at times, forgiveness, the commissions' hearings are mostly public and organized to maximize their cathartic effect.

In contrast, with its seat in the Hague, the ICC may not achieve integration into those societies having suffered from the crimes under investigation.⁴⁴ Moreover, the international status of the ICC — more pronounced than any previous international tribunal — is more likely to widen this gap than bridge it.⁴⁵ The focus of the international community's attention on the situation being investigated, which may facilitate the arrest of perpetrators and play a deterrent role through disapproval, also stigmatizes the state and its population. Indeed, some states may be universally recognized as 'unable' or 'unwilling' to prosecute. Should democratically elected governments govern such states, this designation affects the reputation of the population. Moreover, where hybrid courts operate alongside training programmes for local judges and lawyers led by the United Nations, who may subsequently play a role in the trials, the ICC, due to its independence from the United Nations, does not benefit from such structures. When added to the limited scope of trials held by the ICC, this diminishes the Court's impact on the reconstruction of the national judicial system.⁴⁶

The rigidity of the ICC, inherent to its international nature, is also problematic. Individuals indicted by the Court are sentenced for crimes under its jurisdiction, to the exclusion of others which, even though they may not 'shock the conscience of humanity',⁴⁷ may still be extremely important to victims or the local population as a whole. This is one of the reasons why hybrid courts have incorporated crimes as defined by the national legislation of states in which the crimes under investigation occurred.⁴⁸

44 The possibility of trials or proceedings, such as confirmation of charges and hearings, held *in situ* is set out by the ICCSt., although judges of the ICC have, for the moment, rejected such requests primarily on the basis of security considerations. See *infra*.

45 Although the international status of international criminal tribunals is undisputed, the specificity of their jurisdiction, limited to one situation, leaves some room for contextualizing their work. However, the rules of the ICC must apply uniformly to all situations the Court is involved in. This standardization of international criminal law through the ICC is revealing of its enhanced international status. For an analysis and comparison of the degree of internationalization of international courts, see R. Kolb, 'Le degré d'internationalisation des tribunaux pénaux internationalisés', in H. Ascensio et al. (eds), *Les juridictions pénales internationalisées: Cambodge, Kosovo, Sierra Leone, Timor-Leste* (Société de Législation Comparée, 2006) 47.

46 This constricted legacy of the ICC, in relation to the extremely limited number of cases the Court is meant to try in a given situation, has been recognized by the ICC itself. See *Report of the Court on Complementarity*, ICC-ASP/12/32, 15 October 2013, at 30 (hereinafter 'Report of the Court on Complementarity').

47 Preamble ICCSt.

48 For example, the SCSL holds jurisdiction over acts defined in the legislation of Sierra Leone, which covers the abuse of young girls and destruction of property. See Art. 5 SCSLSt. In the same way, the Special Panels had jurisdiction over, and made extensive recourse to, criminal legislation of Timor-Leste. See in general Martineau, *supra* note 22.

The procedural model of the ICC cannot be adapted to national contexts. Even though a balance between common law and civil law procedures has been sought to improve the effectiveness of international trials, the Court's international procedure does not, and was not intended to, correspond to the national procedures of those states where the ICC is conducting investigations and/or may do so in the future. The diversity of procedures and structures applied by hybrid courts shows the value of these characteristics in rendering trials accessible to the local population.⁴⁹ This widens the gap between the ICC and victims.

In addition, the ICC is constrained, as all criminal courts, by its nature. Bound by principles of criminal law, including the principle of legality, the ICC must guarantee a sufficient degree of foreseeability regarding its functioning, jurisdiction and procedure. This undoubtedly limits its capacity to adapt to differing contexts. As mentioned earlier, the role of criminal courts in establishing the truth about past events is limited to the material and personal scope of the investigation at hand. Accordingly, when tasked with establishing the truth, the prosecutor of the ICC only investigates 'all facts and evidence relevant to an assessment of whether there is criminal responsibility under the Rome Statute.'⁵⁰ Even where restrictions on ascertaining the truth related to criminal procedures and rules of evidence are set aside, this limited scope of investigations can hardly be expected to match the broad mandate of truth commissions, which are aimed at establishing root causes underlying past crimes.

In addition, truth, as presented by criminal courts, appears in a binary nature. Such courts distinguish between the guilty and innocent, thus excluding more complex approaches to crimes committed during civil conflicts.⁵¹ This aspect of criminal trials — arising from their objectives, namely, the issuance of a verdict, accompanied by sanctions, such as incarceration and/or reparation — constitutes an impediment to the mission to establish the truth. 'Truth' is a complex and nuanced concept, which implies contextualization and neutrality, whereas international criminal trials are based on a generalization of criminal behaviour and judgments. This incomplete nature of judicial findings has been well illustrated by critiques of the limited nature of judgments issued by the ICC to date.⁵²

49 Accordingly, the Special Tribunal for Lebanon and ECCC follow a more inquisitorial model, whereas the SCSL was created on an adversarial basis.

50 Art. 54(1)(a) ICCSt.

51 The issue of child soldiers, as encountered by the SCSL, is revealing of this complexity and the necessity to adopt a nuanced approach towards criminal liability. These children were, at the same time, victims and criminals during the civil conflict, which constituted a real challenge to the binary approach of international criminal justice. As previously outlined, this issue was evaded by allowing the TRC to address the issue of child soldiers.

52 Several non-governmental organizations (NGOs) have criticized the failure of the ICC to condemn Germain Katanga on charges of sexual slavery. See, for example, Women's Initiative for Gender Justice, *Partial Conviction of Katanga by ICC: Acquittals for Sexual Violence and Use of Child Soldiers* (2014), available online at <http://www.iccwomen.org/images/Katanga-Judgement-Statement-corr.pdf> (visited 1 May 2014).

2. The Risk of Politicization of the ICC through the Assimilation of Transitional Justice Considerations

Through strict procedures, legal definitions of crimes and scrupulous attention paid to the rights of the accused, criminal justice — especially when internationally driven — constantly seeks neutrality. Testimony requires cross-examination and restriction, as far as possible, to the facts. In this regard, criminal justice concerns separating the emotional from the factual and focusing only on the latter. In opposition to this approach, transitional justice focuses on victims' discourse to make healing and forgiveness possible. Recourse by truth commissions to traditional healing rituals reveals this methodology. Transitional justice is focused on victims' personal experiences regarding the crimes committed as opposed to the impartial truth sought by criminal courts. The 'truth' established by the ICC is not solely in the interest of victims but also, and arguably mostly, in that of the international community.⁵³

Another related specificity of international criminal justice is found in its emphasis on individuals rather than societies. This '*individualisme méthodologique*' has formed the leitmotiv of international justice since the founding of the ad hoc tribunals.⁵⁴ These tribunals were overtly aimed at demonstrating that the responsibility for the massacres in the former Yugoslavia and Rwanda lay, not in ancient ethnic hatreds, but in identifiable perpetrators. Frédéric Mégret notes that the penalization of the ICC's concepts and wording intends to depoliticize this institution.⁵⁵ Refocusing the ICC's work on victims and integrating it into those societies having suffered past crimes would thus constitute a re-politicization of the ICC.

By adopting a victim-centred approach, the ICC may itself, to a certain extent, endorse the objectives usually attributed to truth commissions. Holding trials or hearings *in situ* would represent a first step in this direction. The ICC has envisaged this measure, although it has not yet materialized.⁵⁶ Some authors have proposed the establishment of local chambers of the ICC, thus bringing the Court closer to the hybrid model of criminal courts and shifting the main target of its trials from the international community to local populations.⁵⁷ Although appealing, this alternative presents numerous

53 This is underlined by the ICC in its report on complementarity with respect to the legacy and deterrent effect of the ICC's decisions. See Report of the Court on Complementarity, *supra note* 46 at 32.

54 F. Mégret, 'La Cour pénale internationale comme un objet politique', in J. Fernandez and X. Pacreau (eds), *Statut de Rome de la Cour pénale internationale: Commentaire article par article* (Pedone, 2012) 122.

55 *Ibid.*, at 119–133.

56 Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, *Lubanga* (ICC-01/04-01/06-1311-Anx2), Trial Chamber, 24 April 2008; Prosecution's Submission to Conduct Part of the Trial *in situ*, *Bemba* (ICC-01/05-01/08-55), Office of the Prosecutor, 12 October 2009.

57 S. Ford, 'The International Criminal Court and Proximity to the Scene of the Crime: Does the Rome Statute Permit all of the ICC's Trials to Take Place at Local or Regional Chambers?' 43 *John Marshall Law Review* (2010) 715.

complications, even where challenges related to infrastructure, visas and financial implications are set aside. Holding international trials *in situ* raises security concerns, in particular, for trials of influential military or political figures. The SCSL relocated the trial of Charles Taylor to the Hague, illustrating the fear of public disorder expected from this type of high-profile trial. The ICC, by concentrating on the primary figures involved in violations committed in a situation, will be particularly exposed to such pressure and risk, especially considering the growing criticisms expressed against its work and its indictment of several heads of state.

B. Taking into Account Inevitable Interactions: Possible Coexistence Models

1. Inapplicability of the 'Division of Labor' Framework

To prevent confusion between truth commissions and criminal courts, experts have made proposals to adopt the so-called 'division of labor' framework.⁵⁸ This model implies separating leaders and those most responsible for past crimes, on the one hand, from secondary offenders, on the other. The former would fall under the exclusive jurisdiction of an international tribunal while the truth-finding mechanism would address the latter. It has been highlighted — correctly — that the ICC is intended to prosecute only a limited number of main offenders in each situation. As a result, this model may be viable regarding the coexistence of the ICC and truth commissions.

However, Priscilla Hayner persuasively argues that this model 'makes no sense at the operational level, and misunderstands the role of a truth commission.'⁵⁹ Indeed, to establish their report in the most thorough manner, truth commissions must have access to former leaders. Without their testimony, truth commissions could become one-sided, comparative to, what would be considered in a criminal justice context as, victor's justice. This has been confirmed in Sierra Leone, where the 'division of labor' framework was put into practice to a certain extent, causing frustration for the TRC.⁶⁰

2. Mutually Exclusive Existence: The Complementary Nature of the ICC

Article 17 of the ICC Statute provides for configurations under which the ICC may not exercise its jurisdiction thus establishing the principle of complementarity between the ICC and national institutions. Under this provision, the ICC may not exercise jurisdiction over cases 'being investigated or prosecuted by a State which has jurisdiction,' nor over cases having 'been investigated by a State which has jurisdiction ... and that [the] State has decided not to prosecute

58 A. Fröhlich, 'Reconciling Peace with Justice: A Cooperative Division of Labor', 30 *Suffolk Transnational Law Review* (2007) 271.

59 Hayner, *supra* note 5, at 111.

60 Witness to Truth, at 359–426.

the person concerned'.⁶¹ The first difficulty arising from this provision is the term 'state', leaving doubt which national institutions may qualify for the application of the complementarity regime. Although it could be submitted that Article 17 designates only national courts, this line of reasoning fails to acknowledge that if the drafters had intended to limit this provision to national courts, this would have been clearly inserted into the ICC Statute.

Another argument supports this claim. A careful reading of Article 17 reveals that evaluating the admissibility of a case should be grounded in the existence of investigations, not prosecutions. Indeed, the alternative provided for by Article 17(a), 'investigated or prosecuted', offers precision regarding previous investigations, since it would not be logical to envisage prosecutions being held without preliminary investigations. In all cases, these prosecutions would not match the impartiality and independence requirements of Article 17(2)(c) of the ICC Statute.⁶² Under this interpretation, in conjunction with Article 17(1)(b), a case is *a priori* inadmissible if it is, or has been, investigated by a state, regardless which decision was reached by the findings of the investigation. Prosecution should solely be taken into account in deciding upon the inability or unwillingness of the state to 'genuinely' prosecute. Characteristics of investigations should, nevertheless, be carefully examined, and limit the range of possible models of truth commissions matching the complementarity requirements.

The submission that truth commissions should not be considered as 'consistent with an intent to bring the person concerned to justice', pursuant to Article 17(2)(c) of the ICC Statute, reveals a biased understanding of this provision.⁶³ Indeed, inconsistency with intent to bring perpetrators to justice is envisaged in a cumulative manner with the requirement that the investigation be conducted in an independent or impartial manner. Therefore, where a truth commission conducts an investigation in this manner, lack of intent to 'genuinely prosecute' does not suffice to disqualify investigations under the complementarity regime.

Nevertheless, Anja Seibert-Fohr states that the most problematic element of Article 17 with respect to truth commissions is found in the requirement for individualized investigations.⁶⁴ The terms 'case' and 'person' instead of 'situation' may indicate the inconsistency of certain truth commissions concerning complementarity requirements. However, some truth commissions have

61 See Art. 17(1)(a), (b) ICCSt.

62 To determine whether a state is unwilling to genuinely prosecute, Art. 17(2)(c) ICCSt., establishes the criterion that: "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."

63 See M.P. Scharf, 'The Amnesty Exception to the International Criminal Court', 32 *Cornell International Law Journal* (1999) 525; A. Seibert-Fohr, 'The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions', 7 *Max Planck Yearbook of United Nations Law* (2003) 553.

64 Seibert-Fohr, *ibid.*, at 564–65.

investigated specific cases and named the related perpetrators in their report, thereby potentially fulfilling the required conditions for applying Article 17.⁶⁵

These remarks also clarify the acceptability of truth commissions akin to that of South Africa with respect to the ICC. The South African Truth and Reconciliation Commission (South African TRC) was the first truth commission to include an amnesty for truth disposition in its statute.⁶⁶ Accordingly, an individual guilty of having committed human rights violations could benefit from an amnesty in exchange for full disclosure of the crimes committed. While the South African TRC does not qualify as a model, given that no other truth commission has included this type of disposition, certain states employ truth commissions to promote amnesty policies. The recent case of Nepal justifies a short analysis of the eventuality of the ICC interacting with such truth commissions.⁶⁷

First, it should be noted that not every crime falling within the ICC Statute is subject to a general legal obligation, under international law, to prosecute.⁶⁸ Secondly, several provisions of the ICC Statute result in non-prosecution by the ICC. Article 16 of the ICC Statute confers authority to the Security Council to order the deferral of an ICC investigation for a renewable period of one year.⁶⁹ The recognition by the ICC Statute of the deferral of prosecutions is revealing of the perceived inappropriateness of prosecution in certain

65 The truth commissions of Peru, El Salvador and Timor-Leste, for example, have conducted broad ranging investigations and established individualized responsibilities for human rights violations. See E. Gonzalez Cueva, 'The Peruvian TRC and the Challenge of Immunity', in N. Roht-Arriaza and J. Mariezcurrena (eds), *Transitional Justice in the Twenty First Century: Beyond Truth Versus Justice* (Cambridge University Press, 2006) 70; T. Buergeth, 'The United Nations Truth Commission for El Salvador', 27 *Vanderbilt Journal of Transnational Law* (1994) 497; Stahn, *supra* note 35.

66 Chapter 4 Statute of the Truth and Reconciliation Commission of South Africa.

67 The Truth and Reconciliation Commission in Nepal, mandated to clarify the events that occurred during the 1996 to 2006 civil conflict, could recommend individual amnesties to the government of Nepal. This disposition has been strongly criticized by the former United Nations High Commissioner for Human Rights, Navi Pillay, and several NGOs, and has been declared unconstitutional by the Supreme Court of Nepal.

68 It is considered that there is an obligation to prosecute for the crimes of genocide, torture and grave breaches of the 1949 Geneva Conventions and Additional Protocols. However, such an obligation in relation to crimes against humanity, except for torture, does not yet exist in international law. See, for example, K. Ambos, 'The Legal Framework of Transitional Justice', in K. Ambos, J. Large and M. Wierda (eds), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* (Springer, 2009) 30. L. Mallinder, 'Amnesties', in M.C. Bassiouni (ed.), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization and Post-Conflict Justice* (Intersentia, 2010) 793. The contradictory opinion states that: 'There is powerful authority for the proposition that there is a customary international law duty to prosecute the perpetrators of crimes against humanity'. See M.P. Scharf and N. Rodley, 'International Law Principles on Accountability', in M.C. Bassiouni (ed.), *Post-Conflict Justice* (Transnational Publishers, 2002) 94.

69 For an analysis and critique of this provision and its application by the Security Council, see M. El Zeidy, 'The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power of Deferrals and Resolution 1422', 35 *Vanderbilt Journal of International Law* (2002) 1503.

specific contexts. The ‘interests of justice’ exception included in Article 53(2)(c) of the ICC Statute equally provides for situations where the prosecution of crimes under the jurisdiction of the ICC appears undesirable.⁷⁰ Considering these two exceptions, it would be paradoxical to force states to bring perpetrators to trial in cases where the ICC and Security Council consider prosecutions as inadequate measures. Accordingly, a recommendation to grant amnesties and their granting by a truth commission should not be considered *a priori* illegal or illegitimate.

Additionally, it should be noted that the absence of prosecutions — when decided pursuant to, or along with, investigations that are not flawed by undue delay, partiality or lack of independence — may only be disregarded by the prosecutor of the ICC if the ‘decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court.’⁷¹ Seibert-Fohr states that, regarding amnesties, ‘the purpose is not to shield individual persons but to serve a greater objective at the expense of criminal justice.’⁷² Even if this approach requires fleshing out — since certain amnesties including self-granted amnesties may be seen as shielding criminals from prosecutions — it must be noted that the legitimacy of an amnesty should not be disregarded without a proper analysis of its aim. The prosecutor of the ICC would thus have to determine the adequacy and proportionality of the granted amnesty towards whatever aim is followed by this decision — peace and national reconciliation being the most obvious objectives.⁷³

There are several tools at the ICC’s disposal, particularly for the prosecutor, to avoid interaction with truth commissions. Although this solution may sometimes make sense, it follows that the ICC will refrain from exercising its jurisdiction and this may not lead to satisfactory outcomes. Accordingly, in cases where the ICC exercises its jurisdiction, interaction with truth commissions will inevitably occur. This is why the elements of a potential cooperative framework already existing in the ICC Statute must be analysed.

70 Art. 53(2)(c) ICCSt., provides that the prosecutor may base a decision not to proceed with prosecutions, after having investigated a given situation, should this not be ‘in the interests of justice’. Given the lack of clarity of this disposition and the numerous issues and questions it raises, a development in this article would necessarily be superficial. For further analysis of this clause, see D. Đukic, ‘Transitional Justice and the International Criminal Court — in “the Interests of Justice”?’ 89 *International Review of the Red Cross* (2007) 691; C. Antonopoulos, ‘The ICC, the “Interests of Justice” and National Efforts at Accountability Falling Short of Formal Justice: An Exercise in Prosecutorial Discretion’ (LLM thesis on file at McGill University, Canada).

71 Art. 17(2)(a) ICCSt.

72 Seibert-Fohr, *supra* note 63, at 570.

73 The proportionality test rests on three criteria: the appropriateness of the measure for the researched objective; its necessity to achieve its intended purpose; and its proportionality to the objective. The European Court of Human Rights first adopted this approach in two cases decided in 1976 and 1979. See *Handyside v. United Kingdom*, ECtHR (1976) Appl. No. 5493/72; *The Sunday Times v. United Kingdom*, ECtHR (1979) Appl. No. 6538/74. For an analysis of the proportionality test, see T.J. Gunn, ‘Deconstructing Proportionality in Limitations Analysis’, 19 *Emory International Law Review* (2005) 465.

3. *Mutual Recognition of Potential Benefits: The Cooperative Framework*

As has been explored above, the most problematic aspects within the relationship between international courts and truth commissions occur in relation to the conduct of their respective investigations on past violations. Unlike the case of Timor-Leste, truth commissions operating alongside investigations of the ICC will not necessarily be framed specifically taking into account the ICC, since the decision to investigate cases through the ICC may be taken after a truth commission has been established in a given situation. The ICC Statute does, however, provide for useful information regarding possible models of cooperation.

Unlike the SCSL, the ICC does not enjoy unlimited primacy over national institutions. The Court depends on states' cooperation to gain access to documentation. Such cooperation will be carried out under national procedures.⁷⁴ Information sharing has been one of the main conflicting issues arising between truth commissions and hybrid courts. As noted earlier, the Sierra Leonean TRC and the CAVR recognized that the potential use of information gathered by, respectively, the SCSL and Special Panels, may have caused reluctance from some witnesses and perpetrators to testify in front of these commissions.

The main issue here applies to cases where information has been received by a truth commission on a confidential basis. Apart from the unlikely — but not impossible — circumstance in which the ICC would intervene in a state under United Nations administration, the Court relies on states' cooperation regarding the transmission of information held by national institutions and cannot subpoena a state to produce documents, or even have recourse to police or military force, to obtain such information. This differs from the experiences in Sierra Leone and Timor-Leste. As a consequence, the issues which confronted these states' truth commissions and hybrid courts are unlikely to occur before the ICC, since a truth commission refusing to divulge or transmit confidential information may not be directly compelled by the ICC to do so.

Be that as it may, access to information held by truth commissions may be crucial to pending investigations of the prosecutor of the ICC. The absence of a framework regulating the transmission of information may end in the refusal by truth commissions to share their data, thus undermining the investigative work of the ICC.

Even though neither the ICC Statute nor Rules of Procedure and Evidence address the issue of the prosecutor's access to information gathered in a confidential manner by a national institution, it does give the prosecutor means to ensure that the information transmitted is kept confidential. The privileged status granted by Rule 73 of the Rules of Procedure and Evidence to information obtained in the context of a 'confidential relationship' should apply to

74 Art. 99(1) ICCSt.

information received in a confidential manner by truth commissions. Private interviews would match the conditions established under Rule 73(2).⁷⁵

The prosecutor could also employ the powers conferred by Article 54(3)(e) of the ICC Statute and sign confidentiality agreements with the members of the truth commissions. This would provide truth commissions with assurance that any information handed over would remain confidential unless otherwise decided. The prosecution of the ICC has made extensive recourse to these agreements in relation to investigations in the Democratic Republic of the Congo (DRC). In particular, such agreements were used to obtain information from the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), which considered the protection of Article 54(3) as a precondition to nearly any transmission of information to the prosecution.

Although both options offer the same guarantees regarding confidentiality, namely, that the information will not be divulged to any third party unless the provider expressly agrees, they both present serious disadvantages. First of all, the granting of protection under Rule 73(2) to information depends on the appreciation, by the ICC, of the characteristics of the relationship. Accordingly, whether 'the recognition of the privilege would further the objectives of the Statute and the rules' may be challenged by the defence before the Pre-Trial Chamber or Trial Chamber, depending on the phase of the trial. Agreements adopted pursuant to Article 54(3)(e) do not present this flaw and information covered by this Article remains confidential. The issue here is the extensive use of this technique, already denounced by ICC judges in relation to investigations in the DRC.⁷⁶

The ICC Statute does not provide for clear stipulations regarding confidential information received by national institutions. Still, the conditional approach proposed by several authors in the Sierra Leone context may be transposed to the ICC model.⁷⁷ Following this approach, the transmission of confidential information is restricted to cases where this information is essential to the judgment of a case and is not available through other sources. Nevertheless,

75 Following Rule 73(2) RPE, to qualify as privileged, a piece of information must be exchanged 'in the course of a confidential relationship producing a reasonable expectation of privacy and non disclosure', under sub-section (a); its confidential nature must be 'essential to the nature and type of relationship between the person and the confidant', pursuant to sub-section (b); and finally sub-section (c) specifies that the 'recognition of the privilege would further the objectives of the Statute and the rules'. This last criterion is the most ambiguous.

76 See Judgment on the appeal of the Prosecutor against the decision of Trial Chamber 1 entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Art. 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008', *Lubanga* (ICC-01/04-01/06 OA 13), Appeals Chamber, 21 October 2008; Decision on Art. 54(3)(e) documents identified as potentially exculpatory or otherwise material to the defence's preparation for the confirmation of hearing, *Katanga and Chui* (ICC-01/04-01/07-621), Pre-Trial Chamber, 20 June 2008, § 123.

77 P. Hayner, P. Van Zyl and M. Wierda, 'Exploring the Relationship Between the Special Court and the Truth and Reconciliation Commission of Sierra Leone', *Briefing Paper*, International Center for Transitional Justice (2007), available online at <http://ictj.org/sites/default/files/ICTJ-SierraLeone-Court-TRC-2002-English.pdf> (visited 22 April 2013).

as stated above, the decision to transmit this information will ultimately lie in the state and national legislation.

It should be observed that the opposite situation of a truth commission requesting information from the ICC is conceivable under Article 93(10) of the ICC Statute. Given the broad investigative powers as well as the important amount of financial and expertise resources available to the ICC, truth commissions could benefit from this source of information. The extent to which this collaboration will be effective depends on the prosecutor and chamber.⁷⁸

Article 93 of the ICC Statute incorporates the opportunity for a state to question an individual under the custody of the ICC. The benefits of this provision should be granted to truth commissions formulating such a request. The fact that access to detainees has been included in the ICC Statute represents a welcome development in comparison to Sierra Leone, where the failure to anticipate this issue by the drafters of the SCSL Statute caused much harm to the otherwise peaceful relationship between the Court and TRC. Nevertheless, proper procedures regulating access to detainees will have to be determined to avoid having to deal with a similar situation.⁷⁹

4. Conclusion

The development of international criminal justice and truth commissions brings great expectations on the part of victims. The fight for truth, liability and recognition of past crimes would benefit from genuine cooperation between international courts and truth commissions. Although it has been demonstrated that the ICC has the means to develop such a framework, until state parties decide to amend the ICC Statute and Rules of Procedure and Evidence, this can be achieved only in an informal manner. The prosecutor has made recourse to informal policy guidelines to clarify certain dispositions of the ICC Statute. This could also be applied to truth commissions.

Nevertheless, despite apparent similarities, a truth commission and an international criminal court are distinct mechanisms. Both bodies function in fields that carry specificities crucial to the accomplishment of their aims. The ICC cannot move away from its judicial nature. In the same way, truth commissions should not be framed solely according to demands of the ICC, which would present the risk of standardizing a mechanism solely effective when adapted to the local context.

⁷⁸ See Rule 194 ICC RPE.

⁷⁹ The lack of clear rules regulating access to the detainees of the SCSL, and the late and unilateral adoption by the SCSL of the Practice Direction on the procedure following a request by a state, the TRC, or authority to take a statement from an individual in the custody of the SCSL, led to great resentment from the TRC towards the SCSL. See *Witness to Truth*, at 382–425. See also Practice Direction on the procedure following a request by a state, the Truth and Reconciliation Commission, or other legitimate authority to take a statement from a person in the custody of the Special Court for Sierra Leone, adopted 9 September 2003, as amended.

Recognition of these elements is vital to acknowledge both the advantages, which can be expected from cooperation between truth commissions and the ICC, and the need for these mechanisms to function in a wholly independent manner. This implies that conflicts will inevitably arise in future interactions between the two bodies. Yet, the lack of clear procedures may result in any conflicts being resolved by the prosecutor of the ICC or the Pre-Trial Chamber. This implies a degree of uncertainty given scarce, and possibly inapplicable, precedents. Although a comprehensive framework would surely guarantee a certain degree of coherence and foreseeability in these interactions, flexibility is also needed to enable the ICC to apprehend the diversity of truth commissions it will be working with. The challenge, therefore, presenting itself to the drafters of the ICC Statute is to achieve a careful balance between statutory rules and informal means or between the judicial and the non-judicial.