



**THE RELATIONSHIP BETWEEN THE INTERNATIONAL
CRIMINAL COURT AND TRUTH COMMISSIONS: *SOME
THOUGHTS ON HOW TO BUILD A BRIDGE ACROSS
RETRIBUTIVE AND RESTORATIVE JUSTICES***



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The relationship between the International Criminal Court and Truth Commissions: Some thoughts on how to build a bridge across retributive and restorative justices

*By Yav Katshung Joseph**

INTRODUCTION

I came across this topic when I attended the JICA conference at the Lord Charles Hotel.¹ After a presentation of the Chief prosecutor of the ICC, Luis Moreno Ocampo, I asked him to give us his view on the relationship between the ICC and Truth Commissions based on the principle of complementarity. The prosecutor responded that it is an open question that we should all try to answer. Therefore, this paper attempts to share some thoughts on that question and discuss future ways in order to build a bridge across trials, prosecutions (retributive justice) and truth commissions (restorative justice).

Considering that very often, when a country wish to move from dictatorship to democracy or from war to peace various ways may be tried and those includes

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¹ Transitional Justice and Human Security Conference organised at the Lord Charles Hotel /Cape Town/South Africa (28 March-1 April 2005) by the International Center for Transitional Justice and sponsored by the Japan International Cooperation Agency (JICA)/Japanese Government.

trials in an international or national court of law and truth commissions. Thus, "...a country's decisions about how to deal with its past should depend on many things: the type of dictatorship or war endured, the type of crimes committed, the level of societal complicity, the nation's political culture and history, the conditions necessary for dictatorship to reoccur, the abruptness of the transition, and the new democratic government's power and resources."²

I may add the interests of the country.

Different countries have chosen widely different strategies to deal with the past and may be classified in retributive justice (prosecutions, trials) and restorative Justice (truth commissions). Although justice is crucial after violations of human rights, it may not be possible or practical. International tribunals are useful, but they are not the full solution. They are hugely expensive and can try only a small group of perpetrators, the most "responsible". Ironically, many times, those who are tried are not the most responsible but the most "available" in the country, to use the terms of Alex Boraine³. Therefore, justice become extremely selective and seems to be the way of granting *de facto amnesty* to those who fled the country and those responsible. Then come the necessity of truth commissions not as a panacea for all the challenges of transition, or an alternative, but as a complement way to be used by broken societies, in order to bring the benefits of justice to the victims and the to the political culture.

However, this is challenging and there are always tensions between the requirements of the criminal justice system and those of non-punitive approaches to gross and systematic human rights violations. Rightly, Charles

² Tina Rosenberg, "Afterword: Confronting the Painful Past", in Martin Meredith, *Coming to Terms: South Africa's Search for Truth*, 1999, p 328

³ Alex Boraine used the term "most available" during course sessions for the Fellowship in Transitional Justice/Cape Town/2005

Villa-Vicencio pointed out that, “the tension between justice and reconciliation and revenge, prosecution and amnesty is grounded as much in principled debate as in a tug-of-war between deep emotions, unresolved memories and uncertain futures it is a tension that is best not collapsed into an attempted neat synthesis of a complex set of contradictions. The contradictions need to be sustained. The demands of the one side need to impact on the other. It is through honest encounter that opposing groups stand the best chance of knowing that they need one another. It is then that new possibilities begin to be imagined-and sometimes realised.”⁴

This paper attempts to draw a line of collaboration, complementarity, between trials and truth commissions and tries to conclude that all are two sides of the same coin: transitional justice mechanisms. In practical terms, dealing with atrocities many countries in the world have started to look more for mechanisms which deals with acknowledgement, forgiveness and reparation or/and reconciliation. The problem actually is how the ICC will deal with those other mechanisms. Are they complimentary or contradictory? Our concern here is to discuss if the principle of complementarity of the ICC could cover internal processes, which do not necessarily involve prosecutions of individuals, like Truth Commissions? However, this paper is not pretending to be able to cover all the questions.

⁴ Charles Villa-Vicencio, “Reconciliation as Political Necessity: Reflections in the wake of Civil and Political Strife”, p.3

I. BASIC CONCEPTS

1. Justice

Defining justice it is a difficult task. Is it justice in the narrow sense of criminal justice, or justice in the broader, restorative, sense? Therefore, talking about “justice”, we should note that it is a flexible concept. Justice in situations of transition is not self-defining. It is about what is required and what is possible in a given situation. There are different kinds of justice: *retributive justice, deterrent justice, compensatory justice, rehabilitative justice, exonerative justice and restorative justice.*⁵ Each has a time and a place in a given situation and no one model of justice covers all needs. In this paper we are going to use only the two kinds of justice: *Retributive and Restorative Justices.*

2. Retributive Justice

Retributive Justice is essentially concerned with crime as a violation of the law. It administers justice primarily as a corrective due to the state as the custodian of the rights of its citizens.⁶ It seeks to apply the established law as a basis for reaffirming the legal basis for human decency. It is concerned with

⁵ Charles Villa-Vicencio, “Restorative Justice”, in Charles Villa-Vicencio and Erik Doxtader (Ed) 2004, *Pieces of the Puzzle: keywords on reconciliation and transitional justice*, Cape Town, p.33

⁶ Ibid, p.35

punishment for an infraction or abuse of law and largely focuses upon the treatment that should be given to the offender or perpetrator. It is a retroactive approach in which legal proceedings play a central role and is based upon the contention that mechanisms such as courts, national criminal laws and international criminal tribunals are essential for dismantling impunity and for putting in place measures for the non-repetition of rights abuses in the future.

3. Restorative Justice

Restorative Justice views crime essentially as a violation of people and relationships between people. Its primary objective is to correct such violations and to restore relationships. As such, it necessarily involves victims and survivors, perpetrators and the community in the quest for a level of justice that promotes repair, trust-building and reconciliation. It draws attention to the need to create a milieu within which all those implicated in crime come to realise the need to uphold the principles of the law, co-operating in an endeavour to discern the best way to achieve this.⁷

To sum up, it is concerned with resolving crime and conflicts. Its focus is upon the end result (harmonious community relations) and is characterised by community participation that involves both the victim and the perpetrator, with a view to restoring rights that have been abused. Moreover, it employs integral responses that focus upon redressing the harm to the victims, holding perpetrators accountable for their actions and engaging the community in a conflict resolution process. It is highly participative, is forward-looking and is based on values of respect for all participants and community empowerment.

⁷ Ibid, p.35

However, Juan Mendez states that: “We also need to be careful to counter attempts to disguise impunity with fanciful adjectives. ‘Restorative justice,’ for example, is a concept that in its proper setting is valuable and does have its place in a transitional justice policy.⁸ Often, however, the term ‘restorative justice’ is used to advocate some alternative to criminal justice, to honest truth telling and full investigation of abuses. When used in such a way it is no more than an attempt to justify or disguise impunity.”⁹

4. The International Criminal Court (ICC) and its complementary nature

The adoption of the treaty establishing the permanent International Criminal Court¹⁰ following a six-week conference, which took place in Rome in 1998, has been characterised as a giant step in the history of mankind. The ICC is expected to play an important role in the future in the battle against impunity and it has jurisdiction over war crimes, crimes against humanity and genocide¹¹. The Court has jurisdiction only with respect to crimes committed after the entry of force of the Treaty-Rome Statute (1 July 2002). A victim is defined as a natural person who has suffered harm as a result of the

⁸ Miriam J. Aukerman, “Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice,” *Harvard Human Rights Journal* 15 (2002): 39-97; Pablo de Greiff, “The Role of Apologies in National Reconciliation Processes: On Making Trustworthy Institutions Trusted,” in *The Age of Apologies*, Mark Gibney and Rhoda Howard-Hassmann, eds. (forthcoming).

⁹ Juan E. Méndez, “How to Take Forward a Transitional Justice and Human Security Agenda: Policy Implications for the International Community”, Cape Town, April 1, 2005

¹⁰ See Rome Statute of the International Criminal Court, A/Conf.138/9, 1998, reprinted in 37 ILM (1998), p. 999.

¹¹ It will also have jurisdiction on the crime of aggression, once a provision is adopted setting out the conditions under which the Court shall exercise jurisdiction

commission of any crime within the jurisdiction of the Court. Victims could participate in the proceedings and they could seek compensation (Trust fund)¹².

The road to Rome was not easy and the question of when the Court will seize jurisdiction is certainly one of the most difficult issues negotiated and is part of the general question of how national and international spheres interact with each other. To address the question of inter-relationship, the principle of complementarity¹³ was put forward. “Complementarity” defines the relationship between the ICC and national courts and determines who should have jurisdiction in a particular case. Under this principle, international proceedings will co-exist with, rather than pre-empt, national mechanisms already in existence. Unlike its predecessors, i.e. the *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda¹⁴, the ICC will not assert its

¹² Victims have a right to seek reparations under Article 75 of the Statute and the Trust Fund for Victims will implement such awards. However, pursuant to Rule 98 of the Rules for Procedure and Evidence, the resources of the Trust Fund may also be used “for the benefit of victims” of crimes “within the jurisdiction” of the Court. Moreover, a role for the Trust Fund can be foreseen in situations where it is impossible for the Court to make individual awards or where the number of victims and the scope, forms and modalities make a collective award more appropriate. In practice, these situations may arise quite often. The potential scope of activity of the Trust Fund has given rise to some concerns among States Parties. For instance, the Assembly of States Parties in September 2004 declined to adopt the Regulations that will govern its operations, indicating that States Parties would need additional time to consider these. The Trust Fund for Victims should be seen as an instrument that will truly complement the work of the Court in respect of victims, rather than simply functioning in the narrow role of administering awards granted by the Court. Read: Marieke Wierda, *The ICC Trust Fund for Victims: A Complementary Role*, The ICC MONITOR, Issue 29 April 2005, p.10

¹³ See Holmes J., *The Principle of Complementarity*, in Lee R. S. (ed.), *The International Criminal Court: The Making of the Rome Statute - Issues, Negotiations, Results*, Kluwer, 1999, pp. 41-78; Brown B.S., *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 *Yale J. Int'l L.* (1998), p. 383; Arbour L.A., Bergsmo M., *Conspicuous Absence of Jurisdictional Overreach*, in Von Hebel H.A.M., Lammers J.G., Schukking J. (eds.), *Reflections on the International Criminal Court, Essays in Honour of Adriaan Bos* Asser Press. The Hague, 1999, p. 129; Schabas W., *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2001, pp. 66-70; See also commentary to relevant articles in Triffterer O. (ed.), *Commentary on the Rome Statute of the ICC*, *Observers Notes, Article by Article*, Nomos Verlagsgesellschaft, Baden-Baden, 1999.

¹⁴ See Statute of the ICTY annexed to S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 and Statute of the ICTR annexed to S.C. Res. 955, U.N. SCOR, 49th Sess.,

primacy¹⁵ but will, in fact, supplement the domestic proceedings. The adoption of complementarity is regarded as a product of a compromise which emerged in the negotiations for the ICC and serves the delicate balance between the competing interests of state sovereignty and judicial independence¹⁶.

Thus, the complementary nature of the ICC is one of the central features of the Rome Statute, which is of fundamental importance to the overall functioning of the ICC and is likely to have implications beyond the Statute. There have been many researches on the aspects of the principle of complementarity in different parts of the world. In this paper we are going to discuss if this principle can be applied to truth commissions.

Since the formal establishment of the ICC on 1 July 2002, the Prosecutor has received more than 1000 communications on possible investigations. Three States Parties to the Rome Statute (Uganda, the DRC and the Central African Republic) have referred a situation to the OTP according to article 13 litera (a) Rome Statute. All three situation have been assigned to Pre-Trial Chambers, the Prosecutor has opened two formal investigations on the Republic of Uganda and the Democratic Republic of Congo, whereas the Pre-Trial Chamber has already held a Status Conference for the latter. Only recently by Resolution 1593 (2005) the Security Council referred the situation of Darfur (Sudan) to the OTP.

3453 dmtg., U.N.Doc.S/RES/955, respectively.

¹⁵ See article 9(2) for the ICTY and 8(2) for the ICTR.

¹⁶ See McKeon P.A., *An International Criminal Court: Balancing the Principle of Sovereignty against Demands for International Justice*, 12 St. John's Legal Commentary (1997), p. 535; see also Bachrach M., "The Rome Statute Explained", 12 SPG Int'l L. Practicum (1999), p. 37 at 40; Pejic J., "Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness", 29 Colum. Hum. Rts. L. Rev. (1998), p. 291 at 311. Arguably, the protection the ICC will provide will compensate for the relinquishment of whatever sovereign rights. On this particular issue see Bhattacharyya R., "Establishing a Rule-of-Law International Criminal Justice System", 31 Tex. Int'l L. J. (1996), p. 57 at 75; See also Brand R. A., "External Sovereignty and International Law", 18 Fordham Int'l L. J. (1995), at 1696, 1697.

5. Truth Commissions

Truth commissions have been multiplying rapidly around the world and gaining increasing attention in recent years.¹⁷

They are established to officially investigate and provide an accurate record of the broader pattern of abuses committed during repression and civil war. There have been more than thirty truth commissions worldwide, including in Argentina, Chile, Timor-Leste, El Salvador, Guatemala, Sierra Leone, DRC, and more importantly South Africa. “Truth commissions today”, according to Jose Alvarez, Professor of International Law at Columbia University, “are inescapable tools in establishing the truth of past crimes and a means for victim recompense and instruments to promote peace and reconciliation.” Most recently, the United Nations Secretary-General’s report on *“The rule of law and transitional justice in conflict and post-conflict societies”* praised them as “a potentially valuable complementary tool in the quest for justice and reconciliation” and in “restoring public trust in national institutions of governance”.¹⁸ The increased interest in truth commissions is, in part, a reflection of the limited success in judicial approaches to accountability, and the obvious need for other measures to recognise past wrongs and confront, punish or reform those persons and institutions that were responsible for violations. Successful prosecutions of perpetrators of massive atrocities have been few, as under-resourced and often politically compromised judicial

¹⁷ Priscilla Hayner, Same species, different animal: how South Africa compares to truth commissions worldwide, in Charles Villa-Vicencio and Wilhelm Verwoerd, “Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa” UCT Press, 2000, p 34; see also Andre du Toit, “The South African Truth and Reconciliation Commission (TRC): Local History, Global Accounting”, in *Politique Africaines* 92 (2003), p5

¹⁸ Paavani Reddy, “Truth and Reconciliation Commissions Instruments for Ending Impunity and Building Lasting Peace” in *The Chronicle*, See <http://www.un.org/Pubs/chronicle/2004/issue4/0404p19.html> (accessed on 2 May 2005)

systems struggle to confront politically contentious crimes. With an eye on building a human rights culture for the future, many new governments have turned to mechanisms outside the judicial system to confront, as well learn from the horrific crimes of the past.¹⁹

However, a truth commission should at the same time never be allowed to circumvent international human rights law or, more specifically, to ignore the punitive demands of the ICC.

II. DISCUSSING POSSIBLE RELATIONSHIP BETWEEN THE ICC AND TRUTH COMMISSIONS

1. The ICC and Truth Commissions: some fears

While welcoming the creation of the ICC, some authors have expressed concerns that its approach may prove to be too blunt in dealing with the varied and complex situations facing democracies in transition. For example, Charles Villa-Vicencio greets the ICC as “both morally impressive and legally a little frightening” because “it could be misinterpreted, albeit incorrectly, as foreclosing the use of truth commissions”.²⁰

Similarly, Alex Boraine observes that: “It is to be hoped...that when the ICC comes into being, it will not, either by definition or by approach, discourage attempts by national states to come to terms with their past...It would be regrettable if the only approach to gross human rights violations comes in the

¹⁹ Priscilla Hayner, *op.cit* p34-35

²⁰ Villa-Vicencio, “Why Perpetrators Should Not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet”, 49 *Emory Law Journal* (2000) 205, at 205

form of trials and punishment. Every attempt should be made to assist countries to find their own solutions provided that there is no blatant disregard of fundamental human rights.”²¹

These fears were justified. There is a cause for celebration that, the majority of nations resolved to create a court (ICC) to pursue criminal accountability for gross violations of human rights. However important, prosecution and punishment should not be viewed as the only, or even the most important, means to end impunity. If we confine to courts the struggle to guarantee human rights, we ignore many other important initiatives designed to assist victims, rebuild societies and defend democracies.²² Therefore, we should try to sequence the use of the ICC and national mechanisms such as truth commissions to cover the entire gap.

2. The ICC and Domestic Transitional Justice: Reaching forward

As stated previously, prosecution is not always the right way to deal with all situations, especially when a country makes the transition from conflict/war to peace or from oppression to democracy, it should be allowed to choose its own method of confronting its past. This section will use the South African TRC like a case study in order to respond to the question: *Whether the ICC could interfere in domestic transitional justice?* This question led to the complementarity principle of the ICC.

²¹ A. Boraine, “A Country Unmasked: South Africa’s Truth and Reconciliation Commission” (2000)

²² See Paul Van Zyl, “Justice without punishment: guaranteeing human rights in transitional societies”, in Charles Villa-Vicencio and Wilhelm Verwoerd, “Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa” UCT Press, 2000, p 42

The *Rome Statute* provides that the principle of complementarity is inapplicable when States are “unwilling genuinely” or “unable” to investigate and prosecute an accused (article 17). “Unwillingness” means that proceedings were undertaken for the purpose of *shielding an individual from criminal prosecution*, there was undue delay, or that there was no independent and impartial tribunal.²³ Further, the case must have been conducted in a manner inconsistent with the intent to bring an individual to *justice*. Also, the principle of complementarity is inapplicable where a State is *unable to genuinely carry out an investigation* or prosecution. The word “genuinely” implies a measure of good faith on behalf of the State.²⁴

Related to the South African case, where there was a TRC with a possibility to grant a conditional amnesty²⁵ in exchanging of a full disclosure and shown remorse, could we say according to the Rome Statute that, the TRC decisions or proceedings were taken for the purpose of shielding the person concerned from criminal responsibility?

The South African example is more relevant and the ICC should take in account this fact and acknowledge that the South African TRC was democratic and genuine. The purpose was not to shift or to hide someone or a group from prosecution. It was in the interest of peace, reconciliation, etc. In my view and for many others, the South African TRC was not there to shield perpetrators

²³ Rome Statute, Article 17(2).

²⁴ Leila Nadya Sadat, “The New International Criminal Court: An Uneasy Revolution” (2000), 88 Georgetown L.J. 381 at 418.

²⁵ Boraine, Alexander, “Amnesty in exchange for truth: Evaluating the South African model” in “*A country Unmasked*” Pgs 258-275

but to seek the truth for national reconciliation. South Africa acted in good faith; the TRC was established by the best efforts of negotiators to end violations of human rights. This is justice, to my view and I may say in the interests of the entire country/society, not in the interest of prosecuting some few and other not, and still walk free as if they were granted *de facto amnesty*²⁶.

Emphasising on this argument, Juan Mendez in his presentation at the JICA conference, stated:

“In most parts of the world, the South African example stands out as an attempt to achieve reconciliation and forgiveness without impunity. Others decry the fact that most perpetrators of the worst crimes of *apartheid* did evade justice. In my view, however, the South African exercise with truth, justice and reconciliation is notable for its insistence on hearing the victims, consulting with all members of society, allowing participation by all stakeholders, and conducting the exercise in complete transparency. It is in this sense that the South African example

²⁶ Sharing ideas on *de facto amnesty* with Tyrone Savage, currently Africa Programme Co-ordinator at the Institute for Justice and Reconciliation (South Africa), he said: “In a situation where legal infrastructure is either decimated by war or underdeveloped-or both- impunity already exists; the state simply does not have the capacity to prosecute all it rightfully should. There will be those who walk among the population every day and everyone will know, this is the man who did *x* or *y* on that day in that place. This is a situation that sadly will not be fully or even adequately resolved through transitional institutions like TRC. In other words, *de facto amnesty* exists-it has not been granted by any institution but it exists. In light of this, the work of a TRC is not about providing amnesty as a way of legitimating impunity – the impunity exists and generally mass violators don’t feel a need to obtain legitimacy. They cannot share why they did, what they did, and they simply try and survive when times change. De facto impunity is therefore all they need. The function of a TRC is much more strategic than to challenge violators wherever they may be: this is hard because one wants to address the intimacy of every violation, to say that every evil act should be accounted for. but in most post-conflict societies, this is simply not going to happen. Or rather, it is necessary to work with this political reality strategically, in a sequenced way: first go after the command structure, the ideologues, the most notorious figures; include some smaller cases – to show that all small cases are significant - but don’t try and do everything all at once. Get a sequence going. Why? Not only because the alternative is practically, literally impossible, but because the point of a TRC is to create possibilities for transformation – not to solve literally everyone’s pain. To expect the latter is to invite disaster; nevertheless, what a TRC can do is very real.”

continues to inspire all those who decide to turn a page in a country's history without forgetting the plight of those who suffered."²⁷

Therefore, we may conclude with Naomi Roht-Arriaza that, if perpetrators appear before an independent and democratic truth commission that hears applications for conditional and accountable amnesty, they should not face prosecution by the ICC. In this case, amnesty (conditional) is granted for the purpose of domestic reconciliation and not to shield him from criminal prosecution.²⁸ However, can all truth commissions have the same purpose of not shielding perpetrators? It is important to draw the line in order to avoid some contradictions between truth commissions and ICC. The next point will deals with that.

3. The question of adequate Truth Commissions in order to comply with the ICC principle of complementarity

Having submitted that truth commissions are proposed for different reasons and driven by diverse motives. They can be used firstly, for the purpose of national reconciliation and in the interests of the society; secondly, sometimes can be used to avoid accountability or prosecution and merely to shield an offender from justice. Then, we should ask ourselves if all truth commissions

²⁷ Juan E Mendez, "Transitional Justice in Historical Perspective", Outline, Somerset West Conference, March 28, 2005 Inaugural Address

²⁸ Naomi Roht-Arriaza, "Amnesty and the International Criminal Court", *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (Ardsey, New York: Transnational Publishers Inc., 2000) at 79.

should be considered as genuine and serve the interests of the country and therefore is complementary to the ICC.

As we may know, in some countries the purpose of a truth commission may be not genuine and reasonable. This is challenging and it will be useful to deal at the case-by-case level. Rightly, Professor James Crawford of the University of Cambridge has said in relation to Article 17:

"I think there is a question about truth commissions, because you can't say a priori which ones are a reasonable response to the situation, and which ones are a cover-up. It's going to require extreme care by the prosecutor. There may be some problem there with the capacity to subvert those processes if they are reasonable, and we'll just have to hope that the institutions within the court take a sensible view about it. But complementarity extends to covering internal processes which don't necessarily involve prosecutions of individuals, so there's no reason why the principle of complementarity ought not to cover an appropriately constituted truth commission."²⁹

Moreover, Charles Villa-Vicencio, talking about truth commissions states that: " ... They demand fewer resources than courts and, *if designed properly*, can provide some accountability³⁰." Using the words such as "if designed properly", meant that we may find some not properly designed and therefore, the need for benchmarks in order to comply with international law. Can we say that the South African TRC was able to provide accountability and was consistent with international law?

²⁹ James Crawford, See <http://www.crimesofwar.org/onnews/news-us-icc.html> (accessed on 4 May 2005)

³⁰ Charles Villa-Vicencio and Erik Doxtader (Ed) 2004, *Pieces of the Puzzle: keywords on reconciliation and transitional justice*, Cape Town, pp.89-90

Despite some few critiques, the South African TRC is internationally recognised, and has been favourably endorsed by numerous international human rights organisations and commentators. The TRC was passed pursuant to a valid Act of Parliament and imposes a form of public procedure and accountability for the actions of perpetrators. It was country's decision in favour of peace. This is not impunity because there was political consensus in South Africa that getting as much of the truth out as possible and having fewer, but more effective prosecutions, was a just result. Given that, this was what the majority of the public wanted, that is not impunity.

In this line, speaking on the relationship between the prosecutorial mandate of the ICC and the amnesty administered by the South African TRC, the Secretary-General of the United Nations has observed:

“The purpose of the clause in the Statute (which allows the Court to intervene where the state is ‘unwilling or unable’ to exercise jurisdiction) is to ensure that mass-murderers and other arch-criminals cannot shelter behind a State run by themselves or their cronies, or take advantage of a general breakdown of law and order. No one should imagine that it would apply to a case like South Africa’s, where the regime and the conflict which caused the crimes have come to an end, and the victims have inherited power.

It is inconceivable that, in such a case, the Court would seek to substitute its judgement for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future”.³¹

As noted, the South African TRC has been recognized and even endorsed as a valid means of dealing with crimes arising out of apartheid.³² Moreover, state

³¹ Charles Villa-Vicencio and Erik Doxtader (Ed) 2004, *Pieces of the Puzzle: keywords on reconciliation and transitional justice*, Cape Town, p 91

practice³³, international jurisprudence³⁴ and authors³⁵ confirm that the Rome Statute does not preclude a state from utilizing amnesty as an effective means of prosecution. However, what about the Congolese TRC? Someone could say that it is too early to assess the DRCs TRC at this stage. However, even at this stage, we need to see the actual design of the Congolese Truth Commission.

In assessing if the Congolese TRC met some minimal requirements to approach legitimacy under international law, one can point out that the Congolese TRC was not created and is not operated transparently in order to sustain democratic legitimacy. There is a clear lack of citizen involvement in the creation and functioning of a TRC, and openness to ensure domestic legitimacy. There is no endorsement of the TRC and its work as a mechanism of transitional justice. Moreover, there are many critiques because commissioners comes from different factions, and were not chosen by means of a process which tried to ensure a democratic spirit and practice, and transparency. Therefore, it seems that the purpose of a such commission, is to become a

³² Anntonio Cassesse, *International Criminal Law* (2003) at 9-11; Schwart, *A Functional Equivalent to Prosecution*, *id.* Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 *International Legal Perspectives* 73, 155-156 (2002); Kader Asmal, *International Law & Practice: Dealing with the Past and the South African Experience*, 15 *AM. U. INT'L L. REV.* 1211, 1228 (2000).

³³ U.S. Delegation Draft (Rev.) to the ICC PrepCom (Aug. 1997) in Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 *CORNELL INT'L L. J.* 507 (1999); The National Unity and Reconciliation Act, Act No. 34, (1995), Republic of South Africa, Government Gazette, vol. 361, No. 16579 (Cape Town, July 26, 1995); Statement of the President of the Security Council, U.N. SCOR, 48th Sess., 3238th mtg. at 120, U.N. Doc. S/INF/49 (1993); *Azanian Peoples Organization (AZAPO) v. The President of the Republic of South Africa*, 1996 (4) S.A.L.R. 671, at 30 (South African Constitutional Court);

³⁴ *Prosecutor v. Tadic, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, No. IT-94-1-AR72 (Oct. 2, 1995) at 6

³⁵ Leila Nadya Sadat, *Universal Jurisdiction, National Amnesties, and Truth Commissions: Reconciling the Irreconcilable*, in Stephen Macedo, *Universal Jurisdiction: National Courts and the prosecution of Serious Crimes Under International Law* (2003); Scharf, *Amnesty Exception*, *supra* note 33; John T. Holmes, *The Principle of Complementarity*, in 41-79 *The International Criminal Court: The Making of the Rome Statute* (Roy S. Lee., ed., 1999); Michael P. Scharf, *Swapping Amnesty for Peace: Was there a Duty to Prosecute International Crimes in Haiti?*, 31 *TEX. INT'L L.J.* 1, 4-5 (1996).

“Truth Omission” instead of a **“Truth Commission”** and cannot encounter support by the international community.³⁶

To avoid contradictions between truth commissions and ICC in order to merit international legitimacy, Professor Crawford suggested that one possible test would be whether the procedure in question had been freely ratified by the successor regime, "so it's not just a way that the generals can sign their amnesty on the way out of the door."³⁷ And for that, Charles Villa-Vicencio³⁸ helps us by saying that truth commissions needs at a minimum to incorporate the following:

- There needs to be convincing evidence that the majority of citizens endorse the provision as a mechanism of transitional justice;
- The disclosure of as much truth as possible concerning the gross violations of human rights;
- Accountability of those responsible for gross violations of human rights, recognising that this need not to be in the form of retributive sentencing by the state;
- A mechanism needs to be put in place to provide a form of relief or reparation to victims whose rights are suspended by a qualified amnesty provision;
- The suspension of prosecutions in a transitional situation should not be a pretext for the abrogation of other requirements of international law;

³⁶ Fortunately, a draft for a new Constitution is actually in discussion in parliament and article 212 deals with the replacement and nomination of new commissioners. However there are still some critiques on this article especially in the way of nomination and the issue of openness by involving civil society and other parties.

³⁷ James Crawford, *supra* note 29

³⁸ Charles Villa-Vicencio, Truth Commissions, in Charles Villa-Vicencio and Erik Doxtader (Ed) 2004, *Pieces of the Puzzle: keywords on reconciliation and transitional justice*, Cape Town, p 92

- A forum in which victims and survivors may tell their stories and questions;
- *Prosecutions should remain an option both during and after the TRC against those perpetrators who did not adequately participate in the process.*

Although we agreed with Charles on these criteria, the last one seems not to be consistent. In this paper we have clearly stated that truth commissions are not alternative to prosecutions, all are two sides of the same coin and should be used complementarily but sequencing for their success. Saying that “*prosecutions should remain an option both during and after the TRC against those perpetrators who did not adequately participate in the process*” seems to be too simplistic and could undermine the entire effort to heal the wounds of the nation and to fight against impunity.

In addition to satisfying the above minimum criteria for international legitimacy, a Truth commission should also be created and operated transparently in order to sustain democratic legitimacy. Citizen involvement in the creation of a truth commission, and an openness to media coverage of its operations, are necessary to ensure domestic legitimacy³⁹. And Juan Mendez put it clearly by saying:

“There are two conditions of legitimacy that we should insist upon for any program of transitional justice. First, transitional justice policy should be developed as part of an open, democratic debate, which includes consultation with and participation of the relevant stakeholders and full transparency of decisions. If decisions about how to reckon with the past are adopted exclusively by the parties to a conflict, without

³⁹ See Andre du Toit, id., p.7

appropriate consultations with the victims of abuse or with society at large, the result will almost always generate dissatisfaction and rejection. Second, transitional justice policy should be contemplated in as comprehensive and holistic an approach as possible. This is not only because there will always be an ‘impunity gap’, meaning that many cases of abuse will not be resolved by trials, thus generating the need for a broader treatment of the universe of violations. It is also because the emerging principles in international law ... establish that the obligations of the State are four-fold: to prosecute perpetrators, to unearth the truth, to offer reparations to victims, and to reform abusive public institutions.⁴⁰

4. (Re)Defining the Interests of Justice: a ground for peaceful coexistence between ICC and truth Commissions

Assessing when it may be useful or not to prosecute, one should look in the scope of article 53 of the Rome statute. In fact, the negotiations leading to the adoption of the Rome Statute were also an opportunity for the delegates to discuss how to deal with national amnesties and national truth and reconciliation commissions. Views on the matter were extremely varied, as some participants felt that prosecution was the only appropriate response whereas others felt that alternative mechanisms were acceptable. The drafters of the Rome Statute decided not to include these in the Statute, and preferred instead to leave a door open to the Prosecutor, with the inclusion, in article 53 of the concept of the “interest of justice”.

⁴⁰ J. Mendez, 1997. “Accountability for Past Abuses”, *Human Rights Quarterly*, 19, pp. 255-282.

Indeed, article 53 provides that the prosecutor may desist from acting either in relation to opening an investigation or in continuing with an investigation that has been opened if it appears to him/her that the decision to desist would be in the interests of justice.

The criteria for a decision not to proceed with an investigation are set out in article 53(1.c) and are different from the criteria for a decision not to proceed with a prosecution, established under article 52(2.c). Article 53(1.c) provides that, *taking into account the gravity of the crime and the interests of victims, the Prosecutor may consider that there are nonetheless substantial reasons not to open an investigation;*

Article 53(2.c) simply provides that *taking into account all the circumstances, including the interests of the victims, the gravity of crime, the alleged role of the accused and his/her age and health, the Prosecutor may decide it would not be in the interests of justice to proceed with a prosecution.*

However, ***is the concept of “interest of justice” limited to retributive justice, or does it encompass larger considerations?***

This problematic raises other questions: What is meant by justice here, what serves the interest of justice. And for whom is justice served? The victims? The state affected? Lawyers? The world?

Although the fact that there is information indicating that X crime in the ICC jurisdiction has been committed, the guiding principle according to the Rome Statute is what serves the interest of justice, and it is a very difficult task. From which and whose perspective is this determination to be made? What serves the interest of a wider society (issues of peace and security, for instance) may not serve the interests of individuals. Therefore, what is meant by justice here?

Justice in the narrow sense of criminal justice, or justice in the broader, restorative, sense?

Talking about “justice”, we should note that it is a flexible concept.⁴¹ The fundamental goals of retribution and reconciliation in criminal justice can be balanced in various ways. An absolute rule that requires prosecution imposes a rigid retributive justice. It could well be decided in a particular case that justice is served not by prosecuting before the ICC or even by stimulating prosecution in particular case but by the encouragement of other mechanisms such as restorative justice. For example, truth commissions such as the South African TRC emphasizes reconciliation between victims, perpetrators and society at large. This satisfies the societal need for justice. For that, *the concept of “interest of justice” is not limited to retributive justice; it does encompass also restorative justice.*

However, one could asks if in the interest of justice, it may be possible to grant amnesty to perpetrators and complying with the Rome Statute. Here, it is important to note that the response may differ depending on the forms of amnesty (blanket amnesty or conditional amnesty; whether granted by a truth commission or by the outgoing or ingoing government as a political act of reprieve).

In principle, according to the missions of the ICC it may be difficult for it, if relevant jurisdictional requirements for prosecution are met, to accept the national amnesties granted to perpetrators and not to prosecute⁴². However, as

⁴¹ Justin M. Swartz, “South Africa’s Truth and Reconciliation Commission: A Functional Equivalent to Prosecution” (1997), 3 DePaul Dig. Int’l L. 13 at 19.

⁴² The Rome Statute is silent on amnesty, and commentators argue that this is because the Rome Statute was never drafted with the intention of allowing amnesty to be raised as a defence. See J Dugard, “Conflicts of Jurisdiction with Truth Commissions”, pp.700–701 in A

we have pointed out previously, sometimes prosecution is not always the right way to deal with all situations especially in countries in transition. Therefore, amnesty granted with conditions may be in the interest of the entire society in order to achieve peace, justice and reconciliation. For that, blanket amnesty (such as passed by the Pinochet regime in Chile or in Sierra Leone by the Lome accord), even in situations of extreme political necessity, should not be allowed, as they are the antithesis of the ICC. While, the South African amnesties⁴³ granted by a quasi-judicial amnesty committee functioning as part of a TRC process established by a democratically elected government, may well do so.⁴⁴

Accordingly, talking about amnesties under international law, J. Dugard suggests that “international recognition might be accorded where amnesty has been granted as part of a truth and reconciliation inquiry and each person granted amnesty has been obliged to make full disclosure of his or her criminal acts as a precondition of amnesty and the acts were politically motivated”.⁴⁵

Cassese, *et al*, *The Rome Statute of the International Criminal Court: A Commentary*, 1, 2002, Oxford University Press, Oxford.

⁴³ See the judgment of South Africa’s former Chief Justice, Ismail Mohamed, who in *Azapo v President of the Republic of South Africa* 1996 (4) SA 671, at 681-685, stated: ‘Most of the acts of brutality and torture which have taken place have occurred during an era in which neither the law which permitted the incarceration or persons or the investigation of crimes, nor the methods and the culture which informed such investigations were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. ... That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons to make the disclosure and to reveal the truth ...’. The judge’s observations are applicable to any African state insofar as that country’s history is also not easily capable of objective demonstration and proof, and/or has been denied by the government through various senior officials.

⁴⁴ See Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War*, (2002) Blackwell Publishers Ltd, UK, pp 112–113.

⁴⁵ J Dugard, *ibid*, p.700.

5. Contribution of truth commissions to the ICCs “Zero” (0) case goal

Moreno Ocampo, the Chief Prosecutor of the ICC states that “the 0 case goal” means the absence of trials by the ICC, as a consequence of the effective functioning of national systems. This would be a major success. This is only possible if national mechanisms are neither unable nor unwillingness to investigate and prosecute. Here comes the necessity of truth commissions, if the ICC goal is real to have zero case. If democratic and genuine truth commissions deal with national situation and complement the national criminal justice, then, the ICC goal will be achieved.

This reminds me of the JICA conference, as a member of the Accountability group discussion, we were asked to reflect on “how the role of the ICC can be strengthened?”. Most members of the group agreed that the question should in fact be “how local or national institutions and accountability mechanisms could be strengthened in order to address the question of impunity”. Because if at the national level states are able to deal with human rights violations (through trials or/and truth commissions), then there is no need to strengthen the ICC. In this line, I suggest to the Prosecutor to consider truth commissions as part of national mechanisms and the goal will be achieved.

CONCLUSION

As we may recalled, in many transition periods two methods are used to establish record of grave human rights crimes following a conflict/war: prosecutions at national or international level and truth commissions with various names, which investigate situations and submits reports. Both of those two methods are not sufficient and therefore, the need to complement each other.

In fact, the ICC presents a historic opportunity for the international community to take a stand against large scale violations of human rights. However, even if it achieves its full potential, it realistically will not be able to address all situations in which national courts are unwilling or unable to prosecute all perpetrators. Among other factors, there are temporal and other jurisdictional limitations on what cases the ICC can hear. To maximize these opportunities, we should use truth commissions to fill the gap.

There is a growing demand for transitional justice mechanisms such as truth commissions, around the world. The problem however, it is to test if all those mechanisms implies good faith. Is the effort designed to generate more truth, more justice, reparations, and genuine institutional reform? If so, they are welcome. If the object is to evade the State's and society's legal, ethical and political obligations to their people, they should be rejected. The answer should be found in the design of the process itself, but also in the degree of participation, consultation, and transparency that surrounds them (eg. of South Africa).

Moreover, in order to build a bridge across retributive and restorative justice symbolised respectively in this paper by the ICC and Truth Commissions, we should start by avoiding seeing truth commissions as an alternative to

prosecutions. Even if many of them have been accompanied by grants of amnesty to the major perpetrators of human rights crimes, viewing truth commissions, as substitute for prosecutions is not a right way and can lead to contradictions. Therefore, we should try to consider truth commissions as complementary to national and international prosecutions, not to substitute them. There are two sides of the same coin: transitional justice. However, the processes must be sequenced in a way that one does that not affect the effectiveness of the other. For example, taking the Sierra Leone case, I may propose for the future in other countries, to sequence the work of the Court and TRC. Accordingly, Scharf has said, “ a country should not rush ahead with prosecutions at the cost of political instability and social upheaval or that every single perpetrator must be brought to justice, an impossible task in most countries that have experienced widespread human rights abuses. By documenting abuses and preserving evidence, a truth commission can enable a country to delay prosecutions until the international community has acted, or the new government is secure enough to take such action against members of the former regime.⁴⁶”

Furthermore, to reinforce the relationship between Retributive justice (prosecutions) and Restorative justice (truth commissions), it may be useful to examine the utility of conducting prosecutions after Truth commissions as a means of uncovering more “truth” that was not revealed through the process. Because, like in the South African case, if those people who did not apply for amnesty or those whom the amnesty was refused are not trials, someone could say that there is *de facto amnesty* and therefore, the purpose of a TRC was just to shield some perpetrators. In this hypothesis, the process will violate the international law and will not be in the interest of justice (society as a whole). So, we should look on the possibilities to trials those persons in order to avoid

⁴⁶ Michael P. Scharf, “The Case for a Permanent International Truth Commission”, in Duke J. Comp.& Int’Law, Vol.7:375, 1997, p.399

impunity, contradictions and allow the roots of a just society to take hold. However, as eloquently put by Nelson Mandela: *[W]e have not taken the final step of our journey, but the first step on a longer and even more difficult road. (...) I have discovered the secret that after climbing a great hill, one only finds that there are many more hills to climb.*⁴⁷

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⁴⁷ Meer, F (1999) *Higher Than Hope* London: Hamish Hamilton, 54