Should Truth Commissions be Viewed as Second-best Alternatives to Prosecutions?

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This Article provides a comparative analysis of truth commissions and prosecutions as alternative or complementary methods of transitional justice in post-conflict societies. The author considers the theoretical debates around differing aims of transitional societies, and focuses her comparison on justice, peace and truth. This Article critically analyses a complementary approach to transitional justice, whilst ultimately proposing its usefulness instead of the prevalent alternation between truth commissions and prosecutions.

I. INTRODUCTION

Transitional justice actors and commentators have extensively debated whether truth commissions (TCs) should be viewed as a second-best alternative to prosecutions. Proponents of truth commissions argue that they expose and acknowledge truth about past wrongs whilst maintaining peace; those who favour prosecutions advocate criminal trials as the best way to achieve justice. This literature has been criticised for presenting false dichotomies between truth and justice, peace and justice,1 and truth commissions and prosecutions. Instead, recent analyses have suggested that complementary approaches should be adopted in transitional societies. I shall critically analyse both standpoints and suggest that a case-by-case approach is necessary.

I analysed existing literature to conclude that prosecutions are more likely to achieve retributive justice, whilst truth commissions seek restorative justice. In their administration, prosecutions have greater safeguards for procedural justice, but may threaten peace in fragile transitional circumstances. Truth

commissions are able to establish a broader truth, but may be less reliable than the facts ascertained at trial. Neither mechanism is able to achieve justice, peace, or truth alone; I therefore agree that the dichotomous approach is unhelpful and ultimately unrealistic for transitional societies. Whilst I am inclined to support a collaborative approach between transitional justice mechanisms, I acknowledge the practical difficulties of such a proposal. The approach that should be taken will essentially involve a case-by-case examination of the particular circumstances of each transition, with the aim of pursuing justice, peace and truth. I strongly agree with Orentlicher that international law should require prosecutions even though they may not be immediately realisable in all contexts.\(^2\) Truth commissions should not be viewed as second-best to prosecutions because it cannot be said that prosecutions are always best; truth commissions can be beneficial in certain circumstances; and collaboration between a variety of mechanisms can be more advantageous. A comprehensive approach to transitional justice should consider the appropriateness of prosecutions, truth commissions, reparation and other relevant measures for the case at hand.

1.1 The Transitional Justice Context

It is necessary to outline the boundaries of this discussion: the context to which this enquiry relates, perspectives and later the outcomes being measured. This Article will be limited in scope to exploring some key issues around truth commissions and prosecutions. In an attempt to maintain a broad discussion of the relevant literature, I will not focus on an individual case study but explore a variety of contexts relevant to the arguments at hand.

Truth commissions developed as a mechanism for addressing past atrocities in transitional societies emerging from conflict\(^3\) but have recently been formed in established democracies, such as Canada,\(^4\) as secondary to criminal\(^5\) and civil

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\(^4\) For example, the Truth and Reconciliation Commission of Canada, established in 2008 as part of the Indian Residential Schools Settlement Agreement.

\(^5\) For example, former school workers prosecuted for indecent assault of children in Indian Residential Schools: See ‘Ex-residential school worker convicted of abusing boys’ (CBC News, 5 November 2013) <http://www.cbc.ca/news/canada/saskatchewan/ex-residential-school-worker-convicted-of-abusing-boys-1.2415810> accessed 26 March 2014. However, prosecutions have been limited and have not been pursued against those responsible for the Indian Residential Schools and systemic human rights violations.
litigation. Transitional societies face problems that established democracies do not: very limited resources, corrupt or weak judiciaries, damaged infrastructure, and masses of perpetrators and victims; as well as political complications such as negotiated settlements and powerful remnants of former regimes, which complicate the possibility and appropriateness of prosecutions. Therefore, I shall limit the scope of this Article to societies within the ‘standard categories of transition’, i.e. ‘states in transition from war to peace or from authoritarian rule to democracy’. Transitional justice concerns how these societies address the legacies of past abuse.

Whether truth commissions should be viewed as a second-best alternative to prosecutions will depend on the perspective we are considering. We can expect perpetrators to prefer impunity, victims to prefer justice and governments to prefer peace. In practice, transitional justice has been criticised by scholars such as Orentlicher for being state-centric, neglecting victims from policy and implementation. Zalaquett has defended state-centric transitional justice as legitimate, supposing that decisions are made democratically. I recognise the importance of involving victims in forming and implementing transitional justice policy. However, I shall not adopt a particular perspective, but instead endeavour to analyse whether truth commissions should be viewed as second-best alternatives to prosecutions on the basis of justice, peace and truth.

1.2 Examining the Question

To assess whether truth commissions should be viewed as a second-best alternative to prosecutions, we must examine the three questions inherent in

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7 For the purposes of this Article, established democracies such as Canada are not considered to be in transition, though Levinson, quoted by Kiss, says that “every society is in transition”: Elizabeth Kiss, ‘Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice’ in Robert I Rotberg and Dennis Thompson (eds), The Morality of Truth Commissions: Truth v Justice (Princeton University Press 2000) 92.

8 Mark Freeman, Truth Commissions and Procedural Fairness (CUP 2006) 4.

9 Freeman (n 8) 4; Laplante (n 3) 921.


13 I discuss criteria choice at Section 3: How to Measure Transitional Justice.
this enquiry. Firstly, are prosecutions the best option? Secondly, do truth commissions come second-best? Thirdly, should prosecutions and truth commissions be considered alternatives to each other? I shall conclude that truth commissions should not be viewed as a second-best alternative to prosecutions because none of these queries can, in all circumstances, always be answered in the affirmative.

I shall begin by discussing whether international law prioritises prosecutions or truth commissions and then critically examine which criteria should be used to measure transitional justice. I shall address each selected aim in turn to analyse the extent to which they are achievable by truth commissions and prosecutions. I shall then critically analyse arguments that propose a complementary approach and briefly consider other mechanisms in this context, focusing on reparation. I shall present my proposition that truth commissions and prosecutions should not be compared as alternatives. Transitional justice policy needs to be considered on a case-by-case basis to achieve key aims to the greatest extent possible. I seek to critically analyse dilemmas in the current literature to discuss how prosecutions and truth commissions should be viewed.

II. DOES INTERNATIONAL LAW VIEW TRUTH COMMISSIONS AS SECOND-BEST TO PROSECUTIONS?

International law does not provide a clear answer as to whether truth commissions should be viewed as second-best to prosecutions, though there is a strong emphasis on states’ obligations to prosecute the most serious crimes and gross violations of international human rights law, along with a proliferation

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14 I include international, domestic, and hybrid criminal tribunals in ‘prosecutions’.
15 For the purposes of this Article, I use Hayner’s 2011 definition of ‘truth commission’: [A] truth commission (1) is focused on past, rather than ongoing, events; (2) investigates a pattern of events that took place over a period of time; (3) engages directly and broadly with the affected population, gathering information on their experiences; (4) is a temporary body, with the aim of concluding with a final report; and (5) is officially authorized or empowered by the state under review. See Priscilla B Hayner, Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions (2nd edn, Routledge 2011) 11-12.
16 ‘Complementarity’ is given its natural meaning throughout this Article; it does not refer to ICC jurisdiction, unless stated otherwise.
of international tribunals. I agree with Orentlicher that it is beneficial for international law to require prosecutions of the most serious crimes because of the effectiveness of international legal obligations in supporting human rights advocates striving for criminal accountability.

International law requires states to prosecute certain serious crimes but also demands state responses to atrocities that fall within other transitional justice mechanisms. States are obliged to: prosecute certain serious international crimes including genocide, crimes against humanity, torture and war crimes; at least investigate other human rights violations; provide individuals with the right to seek remedy and reparation for violations of human rights; and comply with victims’ and peoples’ rights to know the truth. International law prohibits blanket amnesties, but is less certain on the extent to which prosecutions must be pursued; commentators such as Robinson acknowledge that transitional justice mechanisms can be adequate alternatives to prosecutions.

For example: International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), International Criminal Court (ICC); and regional courts: Inter-American Court on Human Rights (IACtHR), European Court of Human Rights (ECtHR); and hybrid tribunals: Sierra Leone, East Timor, and Cambodia.

Orentlicher (n 2) 22.


Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, art 7; now customary international law.


Under various treaties, including the International Covenant on Civil and Political Rights (ICCPR), Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) and American Convention on Human Rights (ACHR); and many national laws. See Orentlicher (n 10) 2568, pt II.


Orentlicher (n 12) 6-11; ECOSOC ‘Report of Diane Orentlicher, independent expert to update the Set of principles to combat impunity - Updated Set of principles for the protection and promotion of human rights through action to combat impunity’ (8 February 2005) E/CN.4/2005/102/Add.1 7-8; William Schabas, Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals (OUP 2012) 170-71; OHCHR (n 17) 1.

Robinson (n 20) 491.
governments are not obliged to prosecute all perpetrators and prosecutions may be waived in strict cases of ‘necessity … grave and imminent threat’.29

International law on transitional justice can also be viewed from a rights perspective, with three overarching principles: the right to know, the right to justice and the right to reparation.30 Orentlicher expands on each principle with reference to a specific mechanism: truth and truth commissions, justice and prosecutions and reparation.31 Freeman similarly understands states’ obligations to correspond to transitional justice mechanisms.32 These correlations imply that such mechanisms are best suited to satisfying each right or obligation; I shall examine whether this is correct in detail later. The connection also suggests that a complementary approach may be most appropriate to satisfy all rights and obligations under international law.

III. HOW TO MEASURE TRANSITIONAL JUSTICE

It is essential to consider what criteria are being measured to determine whether truth commissions should be viewed as second-best to prosecutions. The literature rarely discusses reasons for criteria choice, with an abundance of desired outcomes, including justice, peace, truth, reconciliation, deterrence, accountability, dignity, democracy, rule of law and human rights protection.33 Alternatively, Robins argues that victims should be central;34 however, victims’ demands are not necessarily united and may undermine justice and peace for wider society. Mendez requires specific mechanisms rather than abstract aims,35 but this is not useful for assessing truth commissions and prosecutions. I agree with Van der Merwe et al that many transitional justice goals conflict and it is impossible for any one mechanism or society to achieve them all.36

I have selected the criteria of justice, peace and truth to measure whether truth commissions should be viewed as second-best alternatives to prosecutions. My

29 ibid 493.
30 Orentlicher (n 27).
31 ibid.
32 Freeman (n 8) 6.
35 Mendez (n 26) 11-12.
36 Van der Merwe, Baxter and Chapman (n 33) 3.
reasoning is that these three aims are of primary importance to transitional societies, are pervasive in the literature and incorporate many other goals. For instance, accountability is encapsulated by justice, restoration of dignity can be necessary for justice and peace and deterrence fall within the underlying aim of peace. Societies ultimately aim for democracy, rule of law and protection of human rights for the overarching goal of ‘positive peace’. Reconciliation is discussed in the context of deterrence and ‘healing’, placing it within the broader aim of peace. Even justice and peace overlap; justice may be required to secure long-lasting peace, whilst peace may facilitate the necessary conditions for the pursuit of justice. Some definitions of justice, such as Biggar’s, define truth as part of the justice process; however, I have decided to approach truth as a separate aim because of the breadth of literature on truth and particular demand from victims for truth, independent of justice. I acknowledge that in practice any classification of aims is arbitrary because they are interdependent and it is not possible for transitional societies to separate each goal; but I find this approach useful for discussing the extent to which prosecutions and truth commissions may in turn be able to achieve justice, peace and truth.

IV. ARE TRUTH COMMISSIONS SECOND-BEST TO PROSECUTIONS FOR JUSTICE?

I shall consider whether truth commissions should be viewed as second-best to prosecutions in the pursuit of justice. It is usually assumed that prosecutions are best at achieving justice. However, without clarifying ‘justice’, this is an assumption criticised by Van der Merwe for leading to misconceptions in the current debate. Even scholars who define ‘transitional justice’ neglect to explain ‘justice’. The common assumption appears to be that justice is synonymous with criminal justice, prosecutions are understood as ‘complete justice’, but criminal justice could be retributive or restorative. Justice could be distributive or procedural, or more literally focused on fairness. But the literature continues to affiliate, if not synonymise, justice with retributive criminal justice and

37 I explore the meaning of ‘negative peace’ and ‘positive peace’ at Section 5: Are Truth Commissions Second-Best to Prosecutions for Peace?
39 Hayner (n 15) 6.
40 Orentlicher (n 2) 16.
41 Defined in each relevant Section.
42 Van der Merwe, Baxter and Chapman (n 33) 4.
43 For example, LaPlante (n 3) 921.
44 Mendez (n 26) 1; Sriram (n 1) 2.
victims demanding justice intend criminal trials;\(^{46}\) as Hayner notes, ‘[j]ustice in the courts is usually the first and most prominent of demands’.\(^{47}\) Some scholars appear to understand justice according to their preferred mechanism, but if one understands justice as criminal justice it is inevitable that this will be best served by prosecutions. Alternatively, Snyder and Vinjamuri justify amnesties because ‘justice does not lead; it follows’,\(^{48}\) without defining justice; and truth commission sympathisers do not define the ‘different kind of justice’ this mechanism can allegedly provide.\(^{49}\) More usefully, Biggar’s definition is less mechanism-specific and based on the vindication of victims, which requires acknowledgement of injury, reparation and truth.\(^{50}\) Biggar’s definition considers that non-prosecutorial mechanisms do ‘considerable amounts of the different parts of criminal justice’,\(^{51}\) including restorative, reparative and historical justice.\(^{52}\)

I shall analyse the role of prosecutions and truth commissions in the pursuit of retributive and restorative justice in turn. Distributive justice is a concern for transitional societies because of discriminatory resource-distribution as seen in apartheid South Africa, but I shall not discuss it because a ‘fair allocation of resources’\(^{53}\) should form part of any government’s responsibilities to promote and protect individuals’ social, economic and cultural rights\(^ {54}\) and I am concerned it should not be used as an alternative, or excuse for failing to provide retributive and restorative justice.\(^{55}\) I shall briefly discuss procedural justice because it is pertinent to both retributive and restorative processes.

\(^{46}\) Orentlicher comments on victims’ ‘thirst’ for justice as prosecutions. See Orentlicher (n 2) 22.

\(^{47}\) Hayner (n 15) 8.


\(^{50}\) Biggar (n 38) 10-11.

\(^{51}\) ibid 16.

\(^{52}\) LaPlante (n 3) 928.


\(^{54}\) Obligations under international and national law, for example: International Covenant on Economic, Social, and Cultural Rights 1966 (ICESCR).

4.1 Retributive Justice

Retributive justice dominates the literature and debates on transitional justice. It is consistently argued that prosecutions are best suited for retributive justice and truth commissions are second-best or not even an acceptable alternative. Retributive criminal justice seeks retribution for wrongs by holding perpetrators accountable through punishment. This accountability is the most pertinent element of retributive justice and also forms a lesser part of restorative justice demands.

Ardent criminal justice advocates propose prosecutions as the best or only way of achieving accountability and most transitional justice scholars appear to understand accountability as synonymous with trials. However, the extent to which trials in transitional societies can provide accountability may be restricted by a variety of factors: limited resources, weakened judiciaries, evidence issues and the impracticalities of prosecuting mass perpetrators and those still wielding political power. Therefore even when transitional societies do pursue prosecutions, these will not hold all perpetrators to account; often prosecutors will decide to pursue only the most serious crimes or the most culpable accused due to the constraints faced by a country emerging from turmoil. Sometimes even those who are known to be guilty are not convicted.

Prosecutions may be best for holding perpetrators accountable in established democracies with stable judiciaries but they are not necessarily ideal in many post-conflict societies.

In circumstances where prosecutions were unsuitable, states have adopted a truth commission in an effort to secure some accountability. Laplante describes truth commissions as a second-best alternative to prosecutions in Latin American states where former regimes’ continued hold on power undermined the viability of prosecutions at the time. Hayner also acknowledges that truth commissions

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57 Minow (n 56) 9; Hayner (n 15) 14.
58 Sriram (n 1) 5.
60 As prescribed in the Statute of the Special Court for Sierra Leone 2002, art 1.
61 Hayner (n 15) 8.
62 Snyder and Vinjamuri (n 48) 19.
63 Kiss (n 7) 75.
64 LaPlante (n 3) 917, 925.
pursue the advancement of individual accountability; however, this is not necessarily to the extent demanded by retributive justice as truth commissions will have to be as selective in their victim and perpetrator choice as prosecutions due to time, resource and expertise constraints and having lesser penal powers. Truth commissions can worryingly provide perpetrators an opportunity to justify their crimes whilst ‘avoiding serious accountability’. I find greater strength in the argument that truth commissions can play an important complementary role in the pursuit of accountability, as precursors to, or supportive of prosecutions, as suggested by Hayner.

Prosecutions are better suited for retributive justice than truth commissions, although truth commissions can play a complementary role towards accountability when trials are unfeasible. It is useful to adopt Sriram’s approach to this dilemma; transitional societies should strive for the highest ‘point on the accountability continuum’ that can be achieved at a given time. Thus it is inappropriate to order transitional societies to apply a ‘one-size-fits-all prescription’, because what is possible and appropriate in each context and at different intervals in time, will vary. Instead, it should be understood that prosecutions are best-suited to deliver retributive justice, but they may not be feasible at a given time and their potential in future may be supported by a truth commission. Truth commissions should not be considered second-best as they may not secure sufficient accountability and prosecutions are not best if circumstances are not right. Meanwhile, retributive justice is problematic for transitional societies as it largely ignores victims and is difficult to effectively achieve in a post-conflict society.

4.2 Restorative Justice

Truth commissions are frequently criticised for not doing justice because of the assumption that justice is retributive; but truth commissions with victim-centred public hearings can be powerful mechanisms for restorative justice. Leebaw summarises restorative justice based on four principles: participation;

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65 Hayner (n 15) 20.
66 Twose (n 49) 1.
67 Kiss (n 7) 74-75.
68 Hayner (n 15) 92.
69 Sriram (n 1) 5.
70 ibid; See also Orentlicher (n 2) 18.
71 Kiss (n 7) 68.
personalism, reparation and reintegration, whilst Kiss notes the aims as: restoring dignity to victims, holding perpetrators accountable, promoting human rights and reconciliation.73 The key difference between restorative and retributive justice that is common to all definitions is restorative justice’s focus on victims compared to retributive processes’ punishment of offenders as retribution for wrongs.74

Prosecutions largely neglect victims from the trial process; this neglect can be heightened at geographically removed international tribunals, such as the ICTR.75 However, the ICC provides for victim involvement, keen to pursue both restorative and retributive justice.76 Involving victims in truth-telling can restore some dignity.77 However, apparently, victim-focused truth commissions have not always satisfied victims; for instance, apartheid victims’ families challenged the legality of the South African Truth and Renconcilation Commission (SATRC) in the Supreme Court because they felt that justice would not be done without prosecutions.78 Restorative justice can be compromised at truth commissions because perpetrators are not required to apologise, the East Timor Commission being an exception,79 undermining arguments that truth-telling can be ‘healing’ for victims and society. However, the evidence for ‘healing’ powers is inconclusive;80 Leebaw criticises analogy to therapeutic justice as undermining restorative justice81 and this train of argument unduly overemphasises the SATRC, around which most discussions on ‘healing’ revolve.82

Reconciliation is often assumed to be within truth commissions’ capabilities and, according to Kiss, is outside the restorative reach of trials.83 However, I am

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73 Bronwyn Anne Leebaw, Judging State-Sponsored Violence, Imagining Political Change (CUP 2011) 120; Kiss (n 7) 79.
74 Hayner (n 15) 22.
77 Minow (n 56) 60; Hayner (n 15) 22.
78 Azanian Peoples Organization (AZAPO) & Others v President of the Republic of South Africa & Others (CCT17/96) [1996] ZACC 16.
80 Twose (n 49) 6.
81 Leebaw (n 73) ch 5.
82 For discussions on healing and truth commissions, see: Leebaw (n 73) ch 5; Hayner (n 15) ch 11; Minow (n 70) 61-83; Charles Villa-Vicencio and Fanie Du Toit (eds), Truth & Reconciliation in South Africa: 10 Years On (David Philip 2006).
83 Kiss (n 7) 79.
wary of the assumption that truth commissions contribute to reconciliation because firstly, there is no accepted definition for reconciliation and secondly, there is insufficient empirical evidence. Even Archbishop Tutu acknowledged in the SATRC report that ‘reconciliation is both a goal and a process’ not achievable by a truth commission alone. Furthermore, reconciliation is not always the goal of truth commissions, exemplified by Hayner explicitly excluding reconciliation from her definition and to understand it so would be a gross overemphasis of the SATRC.

Restorative justice processes have been criticised for not being the retributive justice victims actually want and for raising concerns of procedural fairness; the SATRC has been subject to further specific criticisms. Problematically, many criticisms and alleged successes of truth commissions for restorative justice are limited to the SATRC, which are unlikely to be transplantable elsewhere. We must be wary not to overemphasise the capacity of TCs by reference to the SATRC; before this project it was not even common for truth commissions to hold victim-centred public hearings. Whilst restorative justice may be a desirable goal for transitional societies and their victims, it is less clear whether truth commissions are generally able to deliver this form of justice; more empirical research is needed on the goals and successes of restorative justice at truth commissions and prosecutions.

4.3 Procedural Justice

Issues of procedural justice arise in the context of how trials and truth commissions are executed. Prosecutions have the most stringent procedural standards with due process rules and fair trial guarantees, some of which are universal. However, transitional justice trials have been criticised for failing to

85 Hayner (n 15) 183-90; Van der Merwe, Baxter and Chapman (n 33) ch 5; Twose (n 49) 9.
86 Truth and Reconciliation Commission of South Africa (n 84).
87 Hayner (n 15) 11, 23.
88 It is not within the scope of this Article to delve further into reconciliation. For an authoritative discussion, see Hayner (n 15) ch 13.
89 Anthea Jeffery, The Truth About the Truth Commission (South African Institute of Race Relations 1999); Freeman (n 8). I discuss procedural fairness in-depth under ‘procedural justice’.
90 Kiss (n 7) 83-90.
91 ibid 91.
92 Freeman (n 8) 24.
93 Rights of fair trial and due process guarantees are legislated nationally, as well as in international treaties such as the International Covenant on Civil and Political Rights 1966 (ICCPR), arts 14-15. For in-depth analysis of international standards, see: Freeman (n 8) 89-108.
meet these standards. For example, the Nuremberg trials were criticised as ‘victors’ justice’ with selective prosecutions for crimes implemented retroactively against the rule of law. Furthermore, judiciaries in post-conflict societies may be corrupt or weak and thus unable to provide procedural justice. Strict procedural rules are necessary in criminal trials because defendants’ rights and liberty are at stake.

Truth commissions have been criticised for not following such strict procedural guidelines and undermining procedural justice in their processes. However, there are lesser risks at stake. For instance, Jeffery condemns the SATRC for distorting truth due to flawed methodology lacking satisfactory procedural safeguards. However, it is important to realise that truth commissions do not have the same powers as courts to order criminal or civil penalties; although as Freeman acknowledges, there are undoubtedly other impacts on the accused. I agree with Freeman that it would be ‘unreasonable, as well as illogical, to hold truth commissions up to the standards of full due process’, because of the lack of binding criminal or civil sanctions. It is logical that the greater the sanction at risk, the more stringent the procedural safeguards must be. Freeman proposes a flexible methodology of procedural fairness because the ‘guiding principles’ can conflict, so truth commissioners must employ discretion whilst ensuring to ‘place a premium on fairness’. Truth commissions do need to ensure a greater level of procedural fairness, but not to the same standards as prosecutions. Meanwhile, transitional justice trials must adhere to the rules for procedural justice.

V. ARE TRUTH COMMISSIONS SECOND-BEST TO PROSECUTIONS FOR PEACE?

Prosecutions are often seen to be best for retributive justice, but if they threaten peace, truth commissions may be considered as a second-best alternative. Many politicians, activists and scholars have argued that prosecutions in fragile new democracies can threaten stability, especially where ‘spoilers’ wield political

94 Minow (n 56) 27-47; Schabas (n 27) chs 2-3.
95 Hayner (n 15) 8-9.
96 I discuss criticisms of truth commissions’ truth below at Section 6: Are Truth Commissions Second Best to Prosecutions for Truth?
97 Jeffery (n 89).
98 Freeman (n 8) 71.
99 ibid 109.
100 ibid 131.
101 ibid 154-55.
power and oppose criminal trials. Conversely, human rights advocates and lawyers defend prosecutions’ capacity to re-establish the rule of law and democracy and deter future abuses, playing a stabilising role in the long-term. I consider it essential that each situation be considered on a case-by-case basis, as whether prosecutions are best for a society scarred by atrocity will depend on the particular circumstances and whether it appears possible that peace can endure criminal trials.

Peace should be understood as more than just the absence of violence, known as ‘negative peace’; to truly prevent further conflict a society needs to strive for ‘positive peace’, which entails eliminating the root causes of war, violence and injustice. However, ‘positive peace’ is a great feat that has not been truly achieved by any modern society. Transitional justice literature discusses the appropriateness of prosecutions in relation to ‘negative peace’ and separately, the goals of nation-building, rule of law and democracy, which I incorporate into ‘positive peace’. I suggest that both should be taken into account; prosecutions may be inappropriate if they would spur the outbreak of further conflict, but may be necessary to secure long-term ‘positive peace’. My position is that prosecutions will not necessarily be the best immediate response for addressing past wrongs if they are likely to threaten peace but may be necessary long-term goals.

International law appropriately requires prosecutions for serious international crimes and gross human rights violations, but allows flexibility in circumstances of necessity.

Firstly, let us consider whether it is correct that prosecutions can threaten peace, such that alternative transitional justice mechanisms may need to be considered. If a former regime still maintains power, for example when a democratic government emerges from a negotiated settlement, they may threaten further outbreaks of violence if not granted impunity. Arguments are then made for abandoning prosecutions and adopting truth commissions. In these circumstances, I do not see truth commissions as second-best, because if prosecutions threaten peace they are not the best option. Orentlicher has argued that because prosecutions are required by international law, this reduces their potentially

102 Sriram (n 1) 8.
103 ibid; Orentlicher (n 10) 2542.
104 Orentlicher (n 2) 18; Sriram (n 1) 12.
107 Orentlicher (n 2) 11-13.
destabilising effect. I am not satisfied that former regimes would accept punishment because international law prescribes it; in fact, I am more concerned, though not convinced, by the argument that if international law demands prosecutions then repressive regimes are less likely to relinquish power. Instead, I favour Orentlicher’s recent position that international law should require prosecutions because this can assist societies in eventually securing trials.

Outgoing Latin American juntas provided themselves with self-amnesties and threatened violence if these were not subsequently adhered to. For example, in Chile, Pinochet and his right-wing military threatened a coup if their impunity was challenged with prosecutions. Chilean leaders had to measure their response to past atrocities against the threat of breach of peace, which meant they could only secure partial justice, responding with the Truth and Reconciliation Commission. Prosecutions were not the best option for transitional justice in Chile at the time, because there was a very high chance that pursuing criminal accountability would have thrown the country into another civil war, undermining both peace and justice. Similarly, in Argentina, President Alfonsin had to abandon prosecutorial goals because of violent military resistance. Argentina’s Truth Commission became the ‘acceptable way to fill the gap left by compromised criminal justice’. Though recognised as second-best, many now see truth commissions as being more than just that; Laplante comments that TCs were considered ‘at least as important as criminal justice in the transitional justice movement’. It seems that TCs do not risk the same threat to immediate ‘negative peace’ as prosecutions but may limit long-term ‘positive peace’ if they are not followed with retributive justice.

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108 Orentlicher (n 10) 2606.
109 Snyder and Vinjamuri (n 48).
110 Orentlicher (n 2) 22.
111 ibid 11.
113 LaPlante (n 3) 925.
114 ibid 112) 1464-85.
115 ibid 1463.
117 LaPlante (n 3) 924.
118 ibid 928.
119 Hayner (n 15) 14.
It is apparent that in some circumstances prosecutions may not be the best immediate response to atrocities. Transitional societies should not neglect prosecutions altogether however, as they can play an important role in the pursuit of justice and ‘positive peace’. There should be a flexible approach to the timing of transitional justice; prosecutions may become possible and desirable at a later date and can be facilitated by the progress of peace and stability. Argentina had to abandon trials in the 1980s. It conducted a Truth Commission and was then subsequently able to prosecute crimes committed during the “Dirty War” fifteen years after transition.121 Similarly, Chile lifted Pinochet’s immunity and began the process of prosecution ten years after his dictatorship.122 It is important that even if trials are not undertaken during transition, they remain a future aim and that other transitional justice mechanisms work towards accommodating prosecutions, due to the justice achievable once impediments of a new democracy have decreased. Therefore I do not support arguments that defend amnesties, such as those proposed by Snyder and Vinjamuri,123 because this tells victims, society and perpetrators that prosecutions are not an aim. Instead, I can accept putting prosecutions informally on hold, until developments facilitate trials as appropriate in future. I agree with Orentlicher that it is appropriate for international law to require prosecutions, because even though there are situations where these ‘norms cannot be enforced, it has seemed preferable to say ‘not yet’ than to reframe global norms in terms that suggest prosecuting atrocious crimes is nothing more than an option’.124

Pro-trial advocates have defended prosecutions as securing long-term peace by acting as a deterrent to future serious crimes.125 I could consider advocating this position only in circumstances where ‘spoilers’ do not directly threaten peace. However, it is unlikely that prosecutions will deter perpetrators who have acted for political motives that they continue to see as justifiable.126 Critics also argue that history has taught us that prosecutions can perpetuate the ‘us vs. them thinking’ that divides a society, preventing reconciliation and long-lasting peace127 and accordingly ‘perpetuating societal schisms’.128 For example, Snyder

122 Kritz (n 121) 32.
123 Snyder and Vinjamuri (n 48) 5-44.
124 Orentlicher (n 2) 22.
125 Sriram (n 1) 8-9.
126 ibid.
127 ibid 7.
and Vinjamuri’s examination revealed that domestic trials may only play a marginal deterrent role and the ICTR and ICTY did not deter subsequent atrocities. I appreciate the potential problem that prosecutions may perpetuate divisions, but rather than impunity I suggest that there may need to be passing of time before prosecutions become feasible and beneficial. In the meantime, other mechanisms to address divisions should be employed. It may thus be necessary to have truth commissions that expose and acknowledge past abuses, reparation and other measures as precursors to prosecutions in fragile democracies.

VI. ARE TRUTH COMMISSIONS SECOND-BEST TO PROSECUTIONS FOR TRUTH?

Truth commissions are held up as the best mechanism for realising the truth, whilst prosecutions are defended as providing more reliable facts. The desirable outcome of truth in transitional societies involves two components: firstly, the realisation of a true and accurate account of past crimes and systematic human rights violations; and secondly, official acknowledgement of this truth. Truth should be an aim of transitional societies because victims repeatedly requested it, exposing the truth can affect the ‘social understanding and acceptance of the country’s past ‘so as to change policies and practices in the future’, and acknowledging the true narrative may restore some victims’ dignity. Many commentators would also argue that truth-telling can be healing for victims and potentially even a nation, but the evidence is conflicting. Truth is inextricably linked to justice and peace; both retributive and restorative justice require some truth-telling, and acknowledging the truth about the past can contribute to long-term peace. The extent to which truth-telling and acknowledgement is important in a society will depend on the nature of its past; societies emerging

128 Twose (n 49) 2.
129 Snyder and Vinjamuri (n 48) 20-25.
130 Minow (n 56) 58.
131 Hayner (n 15) ch 3.
132 ibid 11.
133 ibid 8.
134 Discussed under restorative justice at Section 4.2: Restorative Justice.
136 Minow (n 56) 87.
from secretive regimes are more likely to demand and benefit from truth-realising mechanisms, as with South Americans’ forced disappearances. In societies where abuses were well-known but perhaps denied, the acknowledgement of history will be pertinent.\textsuperscript{138} Thus in post-apartheid South Africa, the general population was aware of the atrocities that had taken place, even if some specific details remained unknown, but the SATRC allowed victims to tell their own stories and receive acknowledgement of their history that had been denied under National Party rule.\textsuperscript{139}

International law plays a role in the requirement for truth in transitional societies, by way of individuals’ and peoples’ right to truth, but it does not require a particular mechanism to be employed by states to fulfil this obligation. Peoples, victims and victims’ families, have an ‘inalienable right to know the truth vis-à-vis gross human rights violations and serious crimes under international law’,\textsuperscript{140} confirmed in Principles one, two and four of the ‘Updated UN Principles for the promotion and protection of human rights through action to combat impunity’. This right to know the truth has developed from international humanitarian law\textsuperscript{141} into customary international law for both international and non-international armed conflicts, as well as human rights law.\textsuperscript{142} The right to truth is a state obligation in cases of gross human rights violations and serious crimes, which OHCHR reports can be satisfied by establishing and pursuing national prosecutions, international trials, truth commissions, inquiries, national human rights institutions, or other bodies.\textsuperscript{143} OHCHR does not suggest a particular mechanism to be best at fulfilling the right to truth and international law is unclear; it does not prefer prosecutions, truth commissions or other mechanisms. In the \textit{Barrios Altos}\textsuperscript{144} case, the violation of the right to truth was satisfied by a judicial finding against the state.\textsuperscript{145}

I support the view that truth commissions are more likely than trials to contribute to the realisation of truth, because it is inherent in their mandate to

\textsuperscript{138} Gready (n 135) 20.
\textsuperscript{139} ibid 21.
\textsuperscript{141} Additional Protocol I to the Geneva Conventions 1949, art 32.
\textsuperscript{142} OHCHR (n 140) 5.
\textsuperscript{143} ibid 13-15.
\textsuperscript{144} Chumbipuma Aguirre and others v Peru (Barrios Altos Case) Inter-American Court of Human Rights Series C No 87 (30 November 2001).
\textsuperscript{145} ibid [47]-[49].
seek to establish a full narrative of past events. In contrast, prosecutions may only coincidentally draw out such fact, and are thus unlikely to establish a full history, as they focus on individual perpetrators and crimes. However, truth commissions have been criticised as providing less reliable truth than that of a criminal court. Due process guarantees cannot possibly be achieved by truth commissions, which some commentators allege undermines reports’ reliability. Although there have been errors in previous truth commission processes that undermine the truth established, there is potential for a greater understanding of historical truth by way of truth commission than criminal prosecutions. I agree that procedural fairness needs to be tightened at truth commissions, but I do not consider this to entirely undermine truth commissions’ potential for truth. A review of past truth commissions shows how very different they can be; some great successes, others condemned as absolute failures and as a result have not contributed effectively to truth.

Truth commissions may arguably be better than trials for establishing a historical truth narrative, but this does not necessarily mean that they are better at acknowledging the atrocities exposed. Truth commissions acknowledge truth in their final report, which may also include recommendations for public acknowledgement in the form of apologies and memorialisation. Prosecutions acknowledge the truth that a perpetrator had committed a crime by convicting and sentencing guilty defendants, followed by the possibility of governments publicly apologising. However, just as the truth established at trial will be limited to specific crimes and individual perpetrators, acknowledgement of guilt will similarly be restrictive in scope. Trials cannot generally acknowledge systematic human rights abuses, though reference may be made in judicial obiter dicta. Truth commissions provide arguably less reliable, broader truth, whilst prosecutions produce limited, but strictly tested facts.

146 Minow (n 56) 59-60.
147 Hayner (n 15) 8.
148 Jeffery provides a condemning criticism of truth commissions’ truth, see Jeffery (n 89).
149 This is discussed in the context of procedural justice at Section 4.3: Procedural Justice.
150 See Jeffery (n 89).
151 This is also discussed in the context of procedural justice at Section 4.3: Procedural Justice.
152 Hayner compares five successful TCs with others. See Hayner (n 15) chs 5-6 & Appendix 1.
153 See Hayner (n 15) Chart 6, 280-84.
154 For example, Guatemala’s Supreme Court ordered governmental apology following Montt’s conviction for genocide and crimes against humanity. See Mike McDonald, ‘Guatemala Government Must Apologize After Rios Montt Verdict’ (Reuters, 13 May 2013) <http://www.reuters.com/article/2013/05/13/us-guatemala-riosmontt-idUSBRE94C13V20130513> accessed 12 April 2014.
155 Obiter dicta are not legally binding, merely persuasive judicial comments.
VII. SHOULD TRUTH COMMISSIONS AND PROSECUTIONS BE VIEWED AS ALTERNATIVES OR COMPLEMENTARY?

Having analysed the literature and arguments on whether truth commissions are second-best to prosecutions for the pursuit of justice, peace and truth, it is now necessary to consider whether it is actually appropriate to dichotomise transitional justice mechanisms in this way. Some staunch advocates of prosecutions argue that they should not be considered as alternatives because prosecutions cannot be replaced with truth commissions whilst others criticise the dichotomy on the basis that a complementary approach to transitional justice should be adopted. I am concerned about whether a complementary approach should be adopted for the purposes of justice, peace and truth. The above discussion leads to my initial conclusion that truth commissions should not be viewed as a second-best alternative to prosecutions, because it is untrue that prosecutions are always the best; truth commissions may not be second-best; and it is unhelpful for these mechanisms to be considered as alternatives because no one mechanism can achieve all societies’ aims.

7.1 Complementarity for Justice, Peace and Truth

As discussed above, prosecutions in transitional societies face many obstacles, which may be best addressed by complementarity rather than alternative approaches to transitional justice. I have discussed how truth commissions can complement prosecutions when they function as precursors in fragile democracies and may also be able to function complementarily alongside each other in the pursuit of justice and maintenance of peace. Truth commission records can be relied on years later in domestic or international courts, as truth commissions usually intend to strengthen prosecutions. OHCHR does not condone truth commissions replacing prosecutions, but acknowledges how truth commissions that take place when prosecutions are impossible may strengthen future trials. Teitel is another scholar who sees truth commissions as leaving open the possibility for future criminal justice. Truth commissions can support prosecutions by revealing patterns of systematic human rights

156 LaPlante (n 3) 982; Hayner (n 15) 8; Philip Alston and Ryan Goodman, International Human Rights: Text and Materials, The Successor to International Human Rights in Context (OUP 2013) 1441.
157 Van der Merwe, Baxter and Chapman (n 33) 3.
158 Hayner (n 15) 13, 22.
159 ibid 6.
160 ibid 13.
161 OHCHR (n 17) 27.
violations, identifying perpetrators, naming names of individuals to be investigated by prosecutors and even recommending prosecutions.

Schabas suggests that the gap in historical record and truth left by prosecutions may be complemented by a truth commission; similarly, Mendez requires prosecutions to function alongside other policies for truth-telling. Schabas explores how a truth commission was employed to complement prosecutions in Sierra Leone; he acknowledges some tension between the two institutions at first, but concludes that the relationship was ‘broadly complementary’. Stahn adopts a similarly positive view of the complementarity of truth commission and prosecutions in East Timor, where he interprets the East Timor TRC as an ‘integrated part of the East Timorese judicial system’. Stahn determines that: ‘[T]ruth commissions have gradually developed into justice-supportive machinery, designed to complement rather than replace national or international prosecutions’. Olsen et al recommend complementarity for the purpose of improving human rights because their research concludes that truth commissions employed alone negatively impact human rights, but used with trials and amnesties can be beneficial for the improvement of standards.

However, I am seriously concerned with the risk of conflict between truth commissions and prosecutions for both truth and justice. Schabas is surprisingly unfazed that the Sierra Leonean TRC and Special Court resulted upon different historical understandings of the causes of conflict. In fact, Schabas considers that ‘diversity in perspectives should be a generally healthy phenomenon’, because no institution should ‘stifle’ the reassessment of past events. Alston and Goodman are less optimistic about differing truths and raise concerns that ‘competing narratives can undermine the legitimacy of both institutions and the goals they serve’. I am similarly unable to dismiss two conflicting official truths as merely acceptable historical discussion. A similar conflict has arisen in terms of justice; for example the SATRC found truth in

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163 Schabas (n 27) 168-69; See also 19-22.
164 Mendez (n 26) 4.
165 Schabas (n 27) 169.
167 ibid 954.
168 Olsen and others (n 120) 457-76.
169 Schabas (n 27) 170.
170 ibid 172.
171 Alston and Goodman (n 156) 1442.
allegations against perpetrators cleared of the crimes by a criminal court.\textsuperscript{172} Such conflicts may suggest that truth commissions and prosecutions cannot function complementarily and should be alternatives; though this is not my own conclusion.

I am inclined to suggest that these early dilemmas should not lead us to disregard the entire complementarity exercise. These issues of conflict may be resolvable with greater clarity of distinct roles between institutions and, or, improving working relationships between truth commissions and prosecutions. There is currently insufficient research to know whether these conflicts can be resolved because the literature tends to ideologically recommend complementarity without discussion of practical implementation, or condemn collaboration as impractical without endeavouring to expose potential solutions. Therefore, further discussion and research is needed to identify whether a complementary approach to transitional justice should be employed on a case-by-case basis. If these obstacles can be overcome then collaborative transitional justice mechanisms could fill many of the voids left by individual measures.

7.2 Criticisms of Complementary Transitional Justice

There are some obvious practical criticisms as to why it may not be possible to view truth commissions as complementary to prosecutions. Primarily, there is concern that it is unlikely that perpetrators will contribute to commission proceedings if their names or evidence can be passed onto prosecutors\textsuperscript{173} because conditional amnesty following truth-telling is unique to the SATRC and, to a limited extent, the TRC in East Timor.\textsuperscript{174} Tepperman raises this concern and criticises Hayner and Boraine’s complementary approach because he sees no evidence that truth commissions support prosecutions.\textsuperscript{175} For example, South Africa has conducted very few successful prosecutions of perpetrators who were denied amnesty at the TRC or did not come forward and Guatemala’s record is even worse.\textsuperscript{176} This then raises questions of whether a TC that only included evidence from victims could provide reliable truth; it would certainly be less likely to achieve accountability and justice.

Furthermore, there are issues of due process and rights to fair trial, including rules of evidence and the overlap of alleged perpetrators between courts and

\textsuperscript{172} Jeffery (n 97) 129-46.
\textsuperscript{173} Alston and Goodman (n 156) 1442.
\textsuperscript{174} Stahn (n 166) 962-65.
\textsuperscript{175} Tepperman (n 59).
\textsuperscript{176} ibid.
TCs. In Sierra Leone, a dispute over whether a defendant before the Special Court could attend a public hearing at the TRC created conflict between the two institutions. The Special Court ruled on appeal that the defendant, Norman could testify to the TRC and concluded that the TRC and Court’s work should be complementary and accommodate each other. Justice Robertson did, nevertheless, require certain measures to be taken to reduce the possibility of the defendant using the TRC as an opportunity to influence witnesses or ‘affect the integrity of court proceedings’. As with other complementarity issues, it is difficult without further research and practice to know whether these obstacles can be overcome.

7.3 Complementarity with Other Mechanisms

Truth commissions should not be viewed as alternatives to prosecutions and may be able to function complementarily; but even working collaboratively there will be gaps in transitional societies’ goals. Many truth commissions and prosecutions complement other transitional justice mechanisms, including reparation. It is the state’s obligation to ensure that victims of human rights violations have a right to reparation. Reparation is most commonly understood as financial compensation, but it also includes restitution, rehabilitation, satisfaction and guarantees of non-repetition, which include reforms. States frequently blame failures to provide reparation on limited resources, but as Hayner criticises, this is no excuse; ‘there may be creative, non-financial reparations’ such as memorialisation or public apologies.

If reparation is the only response to atrocity, then it is unlikely to satisfy victims’ needs. In Brazil financial reparation without prosecution was seen as ‘blood money’. Reparation is best fulfilled alongside and in collaboration with other forms of transitional justice; both prosecutions and truth commissions can contribute to effective reparation. Whilst prosecutions can result in compensation for victims in some national contexts and the ICC has a

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177 Prosecutor v Samuel Hinga Norman (Decision on Appeal of TRC Request for Public Hearing with Chief Norman) (2003) Case No SCSL-2003-08-PT (Special Court for Sierra Leone) [44].
178 Such as prohibiting the TRC hearing from being public.
179 Prosecutor v Samuel Hinga Norman (n 178) [41].
180 Orentlicher (n 27) 16 (Principle 31); UNGA Res/60/147 (n 26) [VII], [IX].
181 Hayner (n 15) 163-64.
182 ibid 178.
184 Freeman (n 8) 72-73.
185 ibid 79.
limited Trust Fund for Victims, generally truth commissions are more closely associated with reparation because ‘[m]ost truth commissions recommend reparations for victims’. The Moroccan truth commission even had the unique power to award reparation. However, truth commission recommendations have a terrible implementation record; in most cases governments have ‘responded slowly or with tepid interest’ on a smaller scale to TC’s recommendations. Nevertheless, Hayner considers it unlikely that many reparation programmes would have been established without prior truth commissions; for example, victims received compensation as a result of truth commissions in South Africa and Chile. Even when not implemented, according to Freeman, truth commission recommendations can form a ‘… benchmark and a focal point for victim advocates’.

States’ obligations to guarantee non-recurrence of human rights violations require undertakings of institutional reforms; ‘both trials and truth commission can make valuable contributions [to reform]’. Freeman explains how ‘plans to hold criminal or civil trials can prompt immediate reforms’ to the justice sector and Hayner discusses commission reports that have recommended judicial, political and armed forces reforms. Wielbelhaus-Brahm criticises poor implementation of recommendations, but nevertheless finds truth commission recommendations to provide a ‘blueprint for change’. Truth commissions are more directly linked to reparation, including reform, though prosecutions can contribute to a reparation-friendly political environment. It is not useful to dichotomise truth commissions and prosecutions in their contributions to reparation, but see all three as mechanisms that can collaboratively contribute to transitional justice.

186 ibid 80.
187 Hayner (n 15) 163; Chart 5, 274-79.
188 Freeman (n 8) 80; Hayner (n 15) 172.
190 Hayner (n 15) 163.
191 ibid.
192 Wielbelhaus-Brahm (n 189) 146.
193 Freeman (n 8) 80.
194 Orentlicher (n 27) 17 (Principle 35).
195 Freeman (n 8) 80.
196 ibid.
197 Hayner (n 15) 192.
198 Wielbelhaus-Brahm (n 189) 146.
199 It is not within the scope of this Article to discuss reparation further. See Max du Plessis and Stephen Pete (eds), *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses* (Intersentia 2007).
VIII. CONCLUSION

I have analysed the literature around prosecutions and truth commissions in the context of transitional justice, highlighting conflicting analyses and presenting my own proposition that there is no ideal typology to be applied in the aftermath of conflict; instead a case-by-case approach should be adopted that seeks to achieve justice, peace and truth to the greatest extent possible. It is thus inappropriate to understand either truth commissions or prosecutions as the best or second-best. While prosecutions that threaten peace may not be appropriate at the time, truth commissions have the capacity to establish broader truth. However, they cannot satisfy the demands of retributive justice to the extent that criminal trials can. There are problems with procedural justice that need to be addressed in the implementation of both mechanisms and distributive justice should remain a key aim of all governments. I have discussed the potential benefits of a complementary approach to transitional justice, as well as the limitations that have emerged. Meanwhile, I have suggested that there are problematic assumptions in the literature that need to be clarified and require further empirical research to justify. I support the focus of international law against impunity for serious crimes and gross violations of human rights, because I agree with Orentlicher that it is ‘preferable to say ‘not yet’ than to reframe global norms in terms that suggest prosecuting atrocious crimes is nothing more than an option’. Therefore, a flexible temporal approach should be adopted by post-conflict societies in the pursuit of justice, peace and truth.

My discussion has been limited to being focused on prosecutions and truth commissions, in a broadly comparative analysis. There are many topics of contention in transitional justice literature that I have only been able to touch on briefly, or have no scope to discuss at all. Within the context of the prioritisation of truth commissions or prosecutions, it would be particularly interesting for there to be further study on two specific enquiries: how victims view these two mechanisms and the extent to which complementary approaches have succeeded in achieving the aims of justice, peace and truth in transitional societies.

Truth commissions are not second-best to prosecutions, because neither trials nor truth commissions are in all circumstances always best or second-best. These principal transitional justice mechanisms should not be viewed as alternatives because they do not provide the same outcomes and no single

200 Orentlicher (n 2) 22.
mechanism can satisfy post-conflict goals. Instead, a complementary approach may better fulfil justice, peace and truth. Despite some practical difficulties that have emerged in early attempts at complementarity, these do not negate the possibility that collaboration may best serve transitional societies as they recover from their past and prepare for the future.
Should Truth Commissions be Viewed as Second-best Alternatives to Prosecutions?

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