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# An Introduction to Some Issues in Transitional Justice

*Tim Kelsall*

### **Introduction:**

According to Jon Elster, transitional justice is, 'made up of the process of trials, purges, and reparations that take place after the transition from one political regime to another' (Elster 2004, p 1), while Ruti Teitel applies the term to 'a shift in political orders... a bounded period, spanning two regimes'(Teitel 2000). It is 'the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes' (Teitel 2003, p. 69).

### **Phases**

Elster's study, incorporating examples from Ancient Greece, Revolutionary France, post-war Europe and elsewhere, demonstrates that today's transitional justice initiatives have a long lineage.<sup>1</sup> However, most

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<sup>1</sup> Though there are no important cases of transitional justice in new democracies between Athens and the mid 20<sup>th</sup> century (Elster 2004, p. 47)

historical treatments of the term trace its foundation, at least in the international sphere, to the post-World War II Nuremburg and Tokyo tribunals. Following these two landmark tribunals, the Cold War ensured that there were no new examples of international transitional justice for over half a century, the stage being left to domestic experiments associated with transitions to democracy in Southern Europe and Latin America; experiments in which criminal justice often played understudy. Then, following the end of the Cold War, there occurred a rash of transitional justice processes in Eastern Europe, and, in the aftermath of the war in Yugoslavia, another international tribunal, the ICTY, was created, followed rapidly by the ICTR. Following these two tribunals international criminal law gathered pace, with the establishment of 'hybrid' tribunals in Sierra Leone, East Timor, Bosnia, Cambodia, and Kosovo.

Ruti Teitel has outlined a three-stage transitional justice genealogy. Nuremburg and Tokyo represent an extraordinary foundational stage, while post-89 transitions marked a second wave. We are currently in a 'third phase' that she calls 'steady state' transitional justice, in which the latter has moved from being the exception to the norm (Teitel 2003). This phase is characterised by an expansion of international humanitarian law, crystallised in such moments as the NATO bombing of Kosovo and the empanelling of the International Criminal Court in The Hague. Transitional justice has even extended to a 'pre-emptive' right of self-defense, legitimating most notably the war in Afghanistan, and the subsequent delegitimation and displacement of the regime in Saddam Hussein's Iraq. The law has become increasingly politicized (Teitel 2003, p. 90). Another author to have noticed, at least implicitly, the normalization of transitional justice, is Mark Duffield. For Duffield, transitional justice has been incorporated into the international development industry, which in turn is merging with the security industry. War, poverty and impunity are thought now to form a nexus which transitional justice initiatives seek to separate. Wilson regards the proliferation of transitional justice mechanisms as part of a process in which 'crumbling economies and fractured social orders grasped for unifying social metaphors, and human rights talk seemed to provide an ideological adhesive through terms such as 'truth' and 'reconciliation' (Wilson 2001, p. xv)

These developments have occurred alongside a conceptual stretching of the transitional justice term. Applied originally to transitions from authoritarian rule to democracy, transitional justice actors now work, 'in societies emerging from repressive rule *or armed conflict*, as well as in established democracies where historical injustices or systemic abuse remain unresolved' (author's emphasis) (ICTJ). As Weinstein implies, this limitlessly expands the range of countries to which transitional justice policies may be applied (Weinstein et al. 2006, p12).

## **Methods**

Transitional justice may take a variety of forms. According to Martha Minow:

'Potential responses to collective violence include not only prosecutions and amnesties, but also commissions of inquiry into the facts; opening access to secret police files; removing prior military officials and civil servants from their posts and from the rolls for public benefits; publicizing names of offenders and names of victims; securing reparations and apologies for victims; devising and making available appropriate therapeutic services for any affected by the horrors; devising art and memorials to mark what happened, to honour victims, and to communicate the aspiration of "never again": and advancing public educational programmes to convey what happened and to strengthen participatory democracy and human rights' (Minow 1998, p. 23)

While the International Center for Transitional Justice, the leading NGO in the field, claims that

As a political transition unfolds after a period of violence or repression, a society is often confronted with a difficult legacy of human rights abuse...In order to promote justice, peace and reconciliation, government officials and nongovernmental advocates are likely to consider both judicial and nonjudicial responses to human rights crimes. These may include: prosecuting individual perpetrators; offering reparations to victims of state-sponsored violence; establishing truth seeking initiatives about past abuse; reforming institutions like the police and the courts; and removing human rights abusers from positions of power. Increasingly, these approaches are used together in order to achieve a more comprehensive and far-reaching sense of justice

In this paper, I will concentrate mainly on trials and truth commissions.

## **Trials**

Criminal trials are a retributive response to the wrongdoings of a previous regime. A common reaction to wrongdoing, notes Elster, is the desire to extract an 'eye for an eye': to impose a corresponding suffering on the perpetrator of harm (Elster 2004, p. 166). Wilson distinguishes between vengeance (the desire to impose a reciprocal punishment on an offender, revenge (unchecked violent acts against a perpetrator, un-governed by any notion of proportionality), and retribution (revenge exacted through more institutionalized forms of mediation and adjudication) (Wilson 2001, p. 162)

By providing some emotional consolation to victims, retributive justice, then, aims to satisfy this desire. The Eichmann trial in Israel, for example, is said to have acted as kind of 'national group therapy' (Osiel 1997, p. 16). High ranking prosecutions in Eastern Europe appear to have dissipated further calls for retribution, suggesting that 'trials lead to a "thick line" being drawn under the past through the ritual purification of the political centre' (Wilson 2001, p. 27, discussing John Borneman). Yet retributive justice must be distinguished from unmediated vengeance, that is, 'the impulse to retaliate when wrongs are done' (Minow

1998, p. 10), since trials are an attempt to retaliate within the constraints of the law. For Weber:

The modern view of criminal justice, broadly, is that public concern with morality or expediency decrees expiation for the violation of a norm; this concern finds expression in the infliction of punishment upon the evil doer by agents of the state, the evil doer, however, enjoying the protection of a regular procedure (Weber 1968, p. 647)

The idea is only to impose punishments that are seen to be fair, regular, and just, in distinction to the unrestrained violence that private or public vengeance can bring.

The punishment courts mete out, in addition to providing emotional satisfaction to the victims or to society at large, is also supposed to have a deterrent effect. The painful or shameful expiation of guilt on the part of the convicted is supposed to act as a deterrent to other potential wrongdoers. Trials are intended to have a powerful demonstration effect, making it clear to potential wrongdoers that the violation of certain norms will bring punishment, not advantage. Defenders of criminal trials often speak of 'ending the culture of impunity', an objective with which the deterrent effect is closely linked. By publicly punishing criminals, the expectation is that of creating a culture in which laws are upheld. As Thomas Scanlon has said, 'to achieve a general state of mind in the country in which the unacceptability of these acts is generally recognized, so that the perpetrators become pariahs' (cited in (Osiel 1997, p. 18). Geo-politically, international criminal trials attempt to mould a world in which international criminal law and human rights norms are universally upheld.

Strengthening the rule of law, even creating the rule of law, then, is a common claim for trials. For Minow, 'The rule of law creates a community in which each member is both fenced in and protected by the law and its institutions' (Minow 1998, p. 25). To respond to mass atrocity with prosecutions is to 'embrace the rule of law' (Minow 1998, p. 25). Mark Osiel is another who has argued that trials can be powerful dramas, foundational moments for the social inscription of liberal values: 'trials, when effective as public spectacle, stimulate public discussion in ways that foster the liberal virtues of toleration, moderation, and civil respect' (Osiel 1997, p. 2). He claims that trials for mass atrocity have 'captured the public imagination in several societies' and that their proceedings 'indelibly influence collective memory of the events they judge' (Osiel 1997, p. 2). At Nuremburg, for example, the Allies sought to '*dramatize* the implacable contradiction between the methods of totalitarianism and the ways of civilized humanity through a worldwide *demonstration* of fair judicial procedure' (Osiel 1997, p. 7). Writing in the same vein, Judith Shklar has described Nuremburg as 'a positive ideological contribution to legalism. It was a legalistic way of coping with violence, vengeance, disorder, and even the future of German politics' (Shklar 1964 and 1986, p. 147).

Trials can also be exercises in setting the historical record straight. The adversarial system in particular provides for a constant testing of different narratives about or explanations for war and atrocity, against the evidence, including forensic facts. Successful prosecutions, then, hold the potential to obliterate denialism, self-serving mythologies, and flimsy excuses. One of the greatest claims for Nuremburg was that following the trials, the German people could never realistically deny the crimes that had been committed in their name; the first time many Germans heard about the Nazi death camps, apparently, was at the Nuremburg trials (Osiel 1997, p. 192). And even where agreement is impossible to reach, trials are instructive in the sense of forcing groups to listen to the stories of their opponents in a civilized, constrained environment (Osiel 1997, pp. 42-43). Former opponents, while not reconciling their differences, are at least drawn into 'discursive solidarity' through 'civilized debate' (Osiel 1997, p. 292).

President of the ICTY Antonio Cassese summarizes the arguments for criminal justice thus:

Trials establish individual responsibility over collective assignation of guilt....justice dissipates the call for revenge, because when the Court metes out to the perpetrator his just deserts, then the victims' calls for retribution are met; by dint of dispensation of justice, victims are prepared to be reconciled with their erstwhile tormentors, because they know that the latter have now paid for their crimes; a fully reliable record is established of the atrocities so that future generations can remember and be made fully cognizant of what happened. Cited in (Stover and Weinstein 2004, pp. 3-4)

Trials, according to Mark Osiel, 'present moments of transformative opportunity in the lives of individuals and societies' (Osiel 1997, p. 2).

Yet all of the claims commonly made for trials can be contested. There is, 'a paucity of objective evidence to substantiate claims about how well criminal trials achieve the goals ascribed to them' (Stover and Weinstein 2004, p. 27). What evidence there is, is not encouraging. Let us take first the idea that retributive justice heals the wounds of victims and society. Stover and Weinstein, for instance, suggest that giving evidence in trials may be a kind of "injudicious catharsis" for victims, a process that causes more long term harm than good: 'healing is a long term process that involves significantly more than emotional abreaction and testifying at a trial'(Stover and Weinstein 2004, p. 13). While Osiel admits that 'Obsession with memory can be as perilous as its repression' (Osiel 1997, p. 145). Minow observes that 'Victims and other witnesses undergo the ordeals of testifying and cross-examination, usually without a simple opportunity to convey directly the narrative of their experiences' (Minow 1998, p. 58). Longman and Rutagengwa report that their Rwandan interviewees showed little interest in criminal trials, because they neither required penitence on the part of the guilty, did not provide for compensation of victims, and did not encourage face to face confrontations between victims and perpetrators(Longman and

Rutagengwa 2004, p. 173). While in a study of witnesses at the ICTY, Stover found that 'The few participants who experienced cathartic feelings immediately or soon after testifying before the ICTY found that the glow quickly faded once they returned home to their shattered villages and towns' (Stover 2004, p. 107).

Many felt deserted by the Tribunal, especially in view of some of the light sentences handed down (Stover 2004, p. 107).

Tribunal justice, they said, was capricious, unpredictable, and inevitably incomplete: defendants could be acquitted; sentences could be trifling, even laughable, given the enormity of the crimes; and verdicts could be overturned. (Stover 2004, p. 115).

As Elster notes, 'the desire for revenge and the desire for substantive justice often fuse', (Elster 2004, p.235), meaning that some victims often feel cheated by the criminal trial: 'We expected justice, but we got the rule of law instead' lamented East German dissident Barbel Bohlet (Elster 2004, p. 235). Stover and Weinstein find that for many survivors, tribunal justice, with its complicated lengthy procedures and frequently lenient sentencing failed 'to palliate the injustice of losing family members and neighbours and of witnessing the destruction of their communities' (Stover and Weinstein 2004, p. 333).

Questioning its claims to promote reconciliation, they argue that the law is ill-equipped, indeed has not been designed for, the complex social and psychological processes that govern how people form attachments to groups and communities (Stover and Weinstein 2004, p. 14). Minow opines that 'Reconciliation is not the goal of criminal trials except in the most abstract sense' (Minow 1998, p. 26). Rather than promoting reconciliation, Stover and Weinstein find some evidence that criminal trials drive communities further apart 'by causing further suspicion and fear' (Stover and Weinstein 2004, p. 323).<sup>2</sup>

While supporters of trials believe they can forge a common sense of history, the legal assumption of personal culpability, the idea that guilt pertains to individuals, and the procedures put in place to prove this, produces an impoverished history and sociology of atrocity. Judges focus on 'a very small piece of what most observers will inevitably view as a larger puzzle' (Osiel 1997, p. 61). They may make, 'poor historians and lousy storytellers' (Osiel 1997, p. 84). Minow observes that 'Trials following mass atrocities can never establish a complete historical record, despite all hopes' (Minow 1998, p. 47). Even at Nuremburg 'History had to be tortured throughout' (Shklar 1964 and 1986, p. 147). Trials cannot, 'convict an entire society, unmask the international economic system responsible for the dirty war [in this case in Argentina], or bring back the dead' (Osiel 1997, p. 162).

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<sup>2</sup> Osiel notes the divisiveness of the Dreyfus trials in French history (Osiel 1997, p. 35).

Another problem relates to how the populations of the societies concerned actually absorb these imperfect histories, or if they even absorb them at all. Stover states bluntly that: 'It is an illusion to suppose that the ICTY, located over a thousand miles from the former Yugoslavia, can forge a common version of the history of the Yugoslav conflict that would be accepted by all sides (Stover 2004, p. 116). The ICTY was 'removed physically, culturally, and politically from those who would live most intimately with its success or failure'(Fletcher and Weinstein 2004, p. 33). While In Rwanda, 87% of respondents were not well informed or not informed at all about the international trials being held for their benefit (Stover and Weinstein 2004, p. 324, 334). Fletcher and Weinstein claim their study showed that trials fall short of establishing an incontrovertible record of history: 'Each national group reinterpreted the "facts" according to the views held by that group' (Fletcher and Weinstein 2004, p. 44 ). Osiel confesses that the trials of the Argentine junta 'did not, by any means, put an end to the wilful blindness about the pervasiveness of public sympathy for despotic rule' (Osiel 1997, p. 160). Another problem is simply that the 'liberal-legal' stories told by trials 'may become dull', dwelling on what many listeners regard as 'meaningless minutiae' (Osiel 1997, p. 90, 91). Nuremburg and Tokyo appear to have been 'both boring and illiberal at once, on many accounts' (Osiel 1997, p. 91)

As we have seen, one of the claims for international tribunals is that they are foundational moments for establishing the rule of law. Yet this claim has been criticised too. According to Elster, 'pure legal justice' is characterised by unambiguous laws, an independent judiciary, unbiased interpretation of the law, and due process. Transitional justice almost always deviates from these standards (Elster 2004, p. 129). 'The attempt to impose accountability through criminal law often raised rule of law dilemmas', writes Teitel, 'including retroactivity in the law, tampering with existing laws, a high degree of prosecutorial selectivity, and a compromised judiciary' (Teitel 2003, pp. 76-77). Elster argues that 'Transitional justice...is characterized not only by its dramatic and traumatic substance but also by numerous deviations from due process' (Elster 2004, p. 118). Common deviations include illegal internments, presumption of guilt, lack of adversarial proceedings, arbitrary selection of indictees, retroactivity of legislation, and justice unduly expedited or delayed (Elster 2004, pp. 129-135).

Nuremburg, today lauded by most international lawyers, was much criticised at the time precisely for these reasons. Minow summarises the charges:

'The International Tribunal operated without precedent and thus lawlessly; it was merely a front for the Allies' military power; it violated liberal notions requiring separation of the function of lawmakers, prosecutors, judge, and jury; it applied new norms to conduct occurring before the norms were announced; it wrongly prosecuted individuals for acts of state; and it neglected to prosecute the Allies for bombing Dresden, Hiroshima, Nagasaki, or anyone

from the Soviet Union for conduct that was arguably as reprehensible as conduct committed by the Germans' (Minow 1998, p. 30).

Chief Justice Stone of the US Supreme Court privately described the tribunal as 'a high class lynching party' (Minow 1998, p. 30). Tokyo was even worse, described by Elster as a piece of pure political justice, a case where, 'the executive branch of the new government (or an occupying power) unilaterally and without the possibility of appeal designates the wrongdoers and decides what shall be done with them' (Elster 2004, 84). The decision not to prosecute Emperor Hirohito at Tokyo was perhaps only the most glaring political decision in a process permeated by politics. For international lawyers 'Politics is regarded not only as something apart from law, but as inferior to law. Law aims at justice, while politics looks only to expediency' (Shklar 1964 and 1986, p. 111). Yet politics inevitably intrudes into international tribunals in a multitude of ways. The more recent wave of tribunals are no exception. In the Rwanda tribunal, for example, the prosecutor lacked an overall strategy, lower level perpetrators were arraigned at the expense of bigger fish, evidence was presented poorly in individual cases, the quality of some of the judges was poor, and the Rwandan government has obstructed investigation of crimes committed by its own supporters (Forges and Longman 2004). One critic of the ICTY describes it as 'a weapon of war just as a bombing or an economic blockade can be...a trial of the "vanquished" putting the finishing touches to the justification of the war' (Pierre Marie Gallois cited in (Hazan 2006, pp. 2-3). In East Timor, David Cohen describes a lack of political will to provide resources and support, failure to meet basic international standards, failure to address the needs of victims, lack of competence of judges, failure to provide a clear mandate for the prosecution, and the defeat of international justice efforts by the real world of international politics, unrealistic goals and expectations (as quoted by (Weinstein et al. 2006).

As for the supposed deterrent effect of these trials, the evidence appears weak. The ICTR has done nothing, for example, to prevent continuing conflict in the Great Lakes region of Africa, where millions of people have died (Hazan 2006). The trial in East Timor did not deter further outbreaks of violence. And even if, as Elster notes, the psychology of political wrongdoing and wrongdoers is an undeveloped field (Elster 2004, p. 142), we can speculate that individuals willing to risk torture, mutilation and death in the course of the wars they foment are unlikely to be too strongly deterred by the remote and uncertain prospect of a lifetime's incarceration in a Western penitentiary. Further, there is abundant social science evidence to, in Osiel's view, suggest the relative impotence of the law in changing social norms. At best one might say that the effect of the law is likely to be glacial (Osiel 1997, p. 209)

Under the weight of these criticisms many supporters of criminal trials today demand that expectations of them are scaled down. Minow thinks it unwise 'to claim that international and domestic prosecutions for war

crimes and other horrors themselves create an international moral and legal order, prevent genocides, or forge the political transformation of previously oppressive regimes' (Minow 1998, p. 49). Trials should have more modest ambitions: 'justice bit by bit by bit', quoting Tina Rosenberg (Minow 1998, p. 51).

Yet it would be similarly unwise to regard trials as having no value: 'Even when marred by problems of retroactive application of norms, political influence, and selective prosecution, however, trials can air issues, create an aura of fairness, establish a public record, and produce some sense of accountability' (Minow 1998, p. 50). Shklar argues that while political trials like Nuremburg typically fall short of pure justice, they nevertheless represent an advance, given the context in which they are set: 'Where there is no established law and order, in a political vacuum, political trials may be both unavoidable and constructive. They represent, under these conditions, an obviously lower level of legalism than domestic trials (even political ones) within a constitutional system. That does not mean that they cannot embody and promote some legalistic values' (Shklar 1964 and 1986, p. 220). The fact that three of the Nuremburg defendants were acquitted was crucial in this respect cf (Elster 2004, p. 85). Osiel accepts that some deviation from due process may be necessary in what are essentially, 'liberal show trials' (Osiel 1997, p. 3). That judicial process has been penetrated by politics is not a problem, so long as that politics is of *the right kind* (Osiel 1997, p. 66). Trials are at least in part an attempt to make liberal citizens: 'By representing men as autonomous choosers, liberal law seeks to *make* them so' (Osiel 1997, p. 67, 68).

There is also the question of cost. Given the revised expectations for international criminal trials, their scaled down ambitions, one is justified in asking, 'Are they worth it?' - since their expense is huge. At one point the ICTR and ICTY were consuming over 10% of the UN's entire resources; at ICTR, each conviction has come at a cost of tens of millions of dollars; the staff budget for the Special Court for Sierra Leone is greater than that for the entire Sierra Leonean civil service.

Returning to the issue of culture: arguments for criminal justice tend to fall into two categories: those that are oblivious to culture, regarding international law as being somehow 'natural', self-evidently applicable to all peoples; and those that acknowledge law to be culturally specific. Representing the latter group, Osiel states that 'The criminal law is widely and correctly thought to embody assumptions about human nature and society that are primarily liberal' (Osiel 1997, p. 9) [see reference to article by Moore]. This liberal worldview includes notions of a secular universe governed by laws of mechanical causation, forensic or empirical indicators of evidence and truth, plus the idea of an individual self, ontological site of autonomy, agency and free will, the bearer of certain inviolable rights. But there is good reason to think that these

notions do not hold cross-culturally. A case in point is the Tokyo trials. In the estimation of Judith Shklar:

'When...the American prosecutor at the Tokyo trials appealed to the law of nature as a basis for condemning the accused, he was only applying a foreign ideology, serving his nation's interests, to a group of people who neither knew nor cared about this doctrine. The assumption of universal agreement served here merely to impose dogmatically an ethnocentric vision of international order. It was the claim that these universal rules were "there" – the assumption of general agreement, which was so contrary to the cultural realities of the situation' (Shklar 1964 and 1986, p. 128).

She goes on to say that the Tokyo defendants themselves appeared to struggle with the trial, rejecting legal advice and pursuing their own legally irrelevant patterns of thought. One Asian judge castigated the tribunal for its cultural narrowness, ethical dogmatism, and historical emptiness (Shklar 1964 and 1986, pp. 156-157). The prosecution justified its mission by reference to the Christian-Judaic ethic, but 'What on earth could the Christian-Judaic ethic mean to the Japanese?' (Shklar 1964 and 1986, p. 183). The result was that the Tokyo trial was 'a complete dud' (Shklar 1964 and 1986, p. 124), its impact on the popular memory of the Japanese has been 'virtually nil', the bodies of the executed housed today in official shrines (Osiel 1997, p. 181, 182)

Thus in producing histories that will resonate locally, feed into popular consciousness, and influence the collective memory, trial officers must be culturally aware. In one sense such observations chime with those of critics who believe that criminal trials deliver an unhelpfully circumscribed version of justice. For Stover and Weinstein, 'justice' can mean many things to a community that has suffered atrocity, including: 'returning stolen property; locating and identifying the bodies of the missing; capturing and trying *all* war criminals, from the garden-variety killers in their communities all the way up to the nationalist ideologues who had poisoned their neighbours with ethnic hatred; securing reparations and apologies; leading lives devoid of fear; securing meaningful jobs; providing their children with good schools and good teachers; and helping those traumatized by atrocities to recover' (Stover and Weinstein 2004, p. 324).

But observations about cultural specificity have more radical implications than this, implications that impinge upon the procedures and protocols of trials themselves. Osiel argues that 'it is helpful for prosecutors to be familiar with accepted genres of storytelling. In other words, prosecutors must discover how to couch the trial's doctrinal narrative within "genre conventions" already in place within the particular society. These conventions are by no means universal and will often require some rather fine-grained "local knowledge" of "the plot structures of various story types cultivated in a given culture" (Osiel 1997, p. 85, citing Hayden White).

## Truth Commissions

I turn now to a discussion of truth commissions. Truth commissions are 'official bodies set up to investigate and report on a pattern of past human rights abuses' (Hayner 2001, p. 5). In the post-Nuremburg period there has been a 'turn toward truth' (Hayner 2001, p. 14), with more than twenty such truth-seeking bodies - most occurring in Africa and Latin America - and the number continues to grow.<sup>3</sup>

Truth Commissions have taken various forms: some have been fact-finding missions intended to feed into criminal prosecution; others have been an attempt to provide an accurate historical record as a kind of substitute accountability in political situations where prosecutions were impossible; others, like the South African TRC, were organically linked to an amnesty process; in others, notably the East Timorese Commission, truth telling was accompanied by expectations of interpersonal restitution; some have recommended extensive reparations.

Various claims have been made for truth commissions, among the most notable being that they can create an accurate historical record of human rights abuses; that they provide a cathartic vehicle for the victims of atrocities, and even for society at large; and, most ambitiously, that they can be a forum for reconciliation. I will examine each of these claims in turn.

We have encountered in the discussion above various criticisms of trials' ability to write an accurate historical record of a conflict. Hemmed in by the need to prove individual culpability, by limited mandates, and by the procedures of the courtroom, tribunals tend to produce a narrow account of the truth: '...trials are limited in the truth that they are able to tell as they must comply with rules of evidence which often exclude important information' (Hayner 2001, p. 100) says Hayner. By contrast, truth commissions typically suffer no such constraints. According to Minow:

A truth commission is charged to produce a public report that recounts the facts gathered, and render moral assessment. It casts its findings and conclusions not in terms of individual blame but instead in terms of what was wrong and never justifiable. In so doing, it helps to frame the events in a new national narrative of acknowledgment, accountability, and civic values. Trial records do not seek a full historical account beyond the actions of particular individuals. A commission, though, can try to expose the multiple causes and conditions contributing to genocide and regimes of torture and terror (Minow 1998, p. 78)

And some of the Commissions, for example Argentina, Guatemala, El Salvador, and South Africa have been lauded for the historical stories they told, both in their degree of detail and their depth of interpretation. Such contentions are backed by Ignatieff's modest claim that, 'All

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<sup>3</sup> Hayner details 21 commissions, a figure that excludes some prominent unofficial initiatives, such as the Brazilian *nunca mas* report (Hayner 2001)

that a truth commission can achieve is to reduce the number of lies that can be circulated unchallenged in public discourse' (quoted in (Gibson 2004, p. 68). One such lie, vanquished by the South African TRC, was that apartheid was a just system. Gibson finds that a large majority of South Africans accept that Apartheid was a crime, or involved crimes against humanity, perpetrated by both sides, and also that 'the consequence of the "truth" as produced by the TRC is that it is now difficult for South Africans to characterize the struggle in terms of absolute good vs absolute evil' (Gibson 2004, p. 76), concluding that 'to at least some degree, a common understanding of the country's past has emerged', the Commission seems to have moved whites and blacks closer together in their understanding of the nation's history (Gibson 2004, p. 115). And that, 'Without an obvious and explicit ideological veneer, many of the messages and stories of the TRC were attractive and palatable to South Africans of many different ideological persuasions' (Gibson 2004, p. 165). Minow claims that 'The commission can help set a tone and create public rituals to build a bridge from a terror-filled past to a collective, constructive future' (Minow 1998, p. 89). In sum, the data suggest that 'the TRC's revelations played some role in producing a common understanding among all South Africans of the country's apartheid past' (Gibson 2004, p. 329)

Value has been claimed not just for the stories truth commissions tell, but also for the techniques they use to elicit these stories. Supporters of truth commissions often invoke medical, or psychotherapeutic metaphors: 'The best way to close old wounds is to open them again, because.... the wounds were badly closed, and you still have to clean out the old infection' (Timothy Garton Ash in (Hayner 2001, p. xii, also p. 133). The idea is that talking about repressed negative experiences facilitates psychic and emotional release, a prerequisite to healing. For Wilson, the TRC 'constructed a collectivist view of the nation as a sick body, which could then be ritually cured in TRC hearings' (Wilson 2001, p. 15). Anecdotal evidence abounds of victims who felt a sense of well-being or release after having given statements to commissions. The unofficial Guatemalan commission specifically provided scope for this (Hayner 2001, p. 84). This is closely linked to the idea that in having their stories heard, their personal suffering acknowledged, victims experience a kind of restitution or even resurrection. In being recognised as fully human, their dignity is restored and they are able to go on with their lives. This is why truth commissions are sometimes referred to as a kind of restorative justice. 'Some victims and family members of those killed say that just having the full truth publicly told can provide some sense of justice.' (Hayner 2001, p. 106). Indeed, some supporters, most famously Bishop Desmond Tutu, have claimed that this type of justice is more culturally appropriate to some of the societies in which truth commissions are held: 'Retributive justice is largely Western. The African understanding is far more restorative – not so much to punish as to redress or restore a balance that has been knocked askew. The justice

we hope for is restorative of the dignity of the people' (Minow 1998, p. 81)

Finally, it is often claimed that truth commissions can promote reconciliation, and reconciliation is sometimes built explicitly into their goals. Reconciliation is a slippery concept. James L. Gibson, writing about South Africa, distinguishes four different, yet interrelated meanings of the term: interracial reconciliation, including the willingness of different groups to trust each other (in a broader context, 'inter-group'); political tolerance, ie the commitment of people to put up with each other; support for the principles of human rights, including the rule of law and legal universalism; and legitimacy, ie the predisposition to accept the authority of major political institutions (Gibson 2004, p. 4). 'A reconciled South African' he writes, 'is one who respects and trusts those of other races, who is tolerant of those with different political views, who supports the extension of human rights to all South Africans, and who extends legitimacy and respect to the major governing institutions of South Africa's democracy' (Gibson 2004, p. 4). Doubtless we could arrive at slightly different, yet similar meanings of reconciliation for other country contexts, yet what is not yet clear is the connection of reconciliation to truth. It is explained by Brandon Hamber and Richard Wilson: 'a national process of uncovering and remembering the past is said to allow the country to develop a common and shared memory, and in so doing create a sense of unity and reconciliation for its people. By having this shared memory of the past, and a common identity as a traumatised people, the country can, at least theoretically, move on to a future in which the same mistakes will not be repeated (quoted in (Gibson 2004, pp 6-7). Put simply, 'a society cannot reconcile itself on the basis of a divided memory' (Zelaquett, cited in (Gibson 2004, p. 13). According to Hayner to *reconcile* means not only re-establishing friendly relations, but reconciling contradictory facts or stories, "to make (discordant facts, statements, etc) consistent, accordant, or compatible with each other" As one set of South African writers has noted, reconciliation "is the facing of unwelcome truths in order to harmonize incommensurable world views so that inevitable and continuing conflicts and differences stand at least within a single universe of comprehensibility" (Hayner 2001, p. 162). Gibson confidently asserts from his data that the TRC did nothing to harm race relations, contrary to what some had feared, and may even have caused a radically positive shift (Gibson 2004, p. 166). Gibson's data reveals that about 44% of the country's population are at least somewhat reconciled, a statistic he finds remarkable given the recent injustices of apartheid (Gibson 2004, p. 332)

But Truth Commissions are not without their critics. Hayner says that '...truth commissions have caught the wind of popularity long before they have been fully understood, and before the effect of the commissions in the past has even been properly studied' (Hayner 2001, pp. 250-251).

Amnesty International, for example, opposed the South African TRC on the grounds that international law forbade the granting of amnesty for crimes against humanity, using the slogan 'No amnesty, no amnesia, just justice' (Gibson 2004, p. 9). In Wilson's view, the South African constitution and subsequent legislation 'deprived victims of their right to justice' (Wilson 2001, p. xvi). While internationally, the South African commission has been taken as a model, in South Africa it has been subjected to much criticism: 'Critics charge that the process has been characterized by little remorse or penance among the perpetrators, that not all of the guilty came forward to admit their crimes (for example, former state president P.W. Botha), and generally that whites have been unwilling to accept responsibility for apartheid. A host of other criticisms have also been laid against the details of the process employed by the TRC' (Gibson 2004, p. 10). To retributivists, the TRC was bound to fail. It awarded amnesties to more than a thousand miscreants, thereby creating "a retributive justice deficit" (Gibson 2004, p. 22) observing that, 'Many South Africans have been appalled that such vicious perpetrators have received amnesty for their actions'. By branding retribution as 'un-African', the Commission closed down the space in which a legally retributive path to reconciliation could have been pursued (Wilson 2001, p. 11) Moreover, Gibson found that around 60% of respondents thought it better not to reopen old wounds by talking about what happened in the past' (Gibson 2004, p. 46)

Disquiet has also centered on the notion that truth commissions can provide an adequate truth. 'One need not descend into enduring debates over the existence of truth or its accessibility to humans to sense the difficulties in writing a truth commission report' says Minow (Minow 1998, pp. 85-86). Here is Michael Ignatieff criticising Desmond Tutu: 'Look at the assumptions he makes; that a nation has one psyche, not many; that the truth is one, not many; that the truth is certain, not contestable; and that when it is known by all, it has the capacity to heal and reconcile. These are not so much assumptions of epistemology as articles of faith about human nature: the truth is one and if we know it, it will make us free' (quoted in (Gibson 2004, p. 70). Says Hayner "Truth commissions are difficult and controversial entities; they are given a mammoth, almost impossible task and usually insufficient time and resources to complete it; they must struggle with rampant lies, denial and deceit and the painful, almost unspeakable memories of victims to uncover still-dangerous truths that many in power may well continue to resist' (Hayner 2001, p. 23). In South Africa, only a small number of perpetrators is alleged to have come forward, believing perhaps that prosecutions were unlikely to succeed (Wilson 2001, p. 24). In consequence, "They should be called 'fact and fiction commissions' or 'some of the truth commissions'" one person who has long watched these bodies suggested half-seriously' (Hayner 2001, p. 22) quoting a SA statement taker, 'When some people tell their story, he said, they "stand somewhere between truth and dishonesty, because coming up with the

whole truth is still not safe. Some give their statements because they've been told to so by the government or by their church' (Hayner 2001, p. 137). In South Africa, 'the much vaunted truth of amnesty hearings was often the truth of unrepentant serial murderers who still felt that their war was a just one' (Wilson 2001, p. 25). Moreover, the focus of the commission on human rights, dominated by a 'factual-forensic model' to the neglect of other perspectives and methodologies, was, claims Wilson, 'a poor avenue for accessing the experiential dimensions of violence' (Wilson 2001, p. 33, 34). Though the Commission operated with four distinct notions of truth, only forensic-factual truth was granted authority in the writing of the report (Wilson 2001, p. 36-37), other truths being 'so much emotional window dressing' (Wilson 2001, p. 38); hearings had 'no epistemological status at all' (Wilson 2001, p. 41). Wilson describes an 'in-house governmental positivism, [through which] a scientific elite controls society according to principles which the majority may not share or understand' (Wilson 2001, p. 39). Wilson reports deponents being constrained in the kinds of statements they could give by the statement takers' methodology (Wilson 2001, p. 49). The result was a report without an overarching narrative, 'like the compendious work of a nineteenth century Victorian scientist obsessed with a comprehensive social or biological classification' (Wilson 2001, p. 52). The lack of a clear historical or sociological drive allowed the moral story to dominate, a tale dedicated to the denunciation of the evil apartheid system, and prolegomenon to the rebuilding of the nation.<sup>4</sup> Wilson claims that ordinary South Africans participated in the TRC for their own reasons, not necessarily because they accepted its ideological project (Wilson 2001, pp. 152-153); whites often didn't participate at all (Wilson 2001, p. 155). The personal focus of the celebrated public hearings may have served to exculpate institutions for their role in apartheid: 'To the extent that the TRC sought to get people to understand that apartheid was a failure of the state and its institutions, not of specific individuals, it seems to have not been particularly successful' (Gibson 2004, p. 85). Wilson argues that 'the TRC's account of the past was constrained by its excessive legalism and positivist methodology, which obstructed the writing of a coherent socio-political history of apartheid' (Wilson 2001, p. xix). The TRC's 'liminal status' argues Wilson, 'facilitated a contradictory mixing of a narrow legalism and an emotive religious moralizing' (Wilson 2001, p. 20).

The effect of truth commissions on individuals has also been subjected to scrutiny. 'Those who suggest that "talking leads to healing" are usually making assumptions that do not hold true for truth commissions'

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<sup>4</sup> NB Wilson complains variously that the report did not give enough scope to historical or sociological analysis, that it was too fragmented, that it lacked a clear narrative, that it did not give enough scope to the elliptical and complex overlaying of everyday histories, that its story was too complex, that its story was too simple, that it was too bureaucratic-scientific, that it was not anchored in legal retribution. He criticises a highly contradictory organisation that was overly legalistic in some respects and insufficiently legalistic in others.

reports Hayner 'Some anecdotes of the effects on victims of giving testimony to truth commissions are very positive; others are very worrisome' (Hayner 2001, p. 135) 135-141 discusses retraumatisation, emotional detachment, fact that TCs use data only for statistical purposes, etc. 'Nations do not have collective psyches which can be healed' says Wilson, 'and to assert otherwise is to psychologize an abstract entity which exists primarily in the minds of nation-building politicians' (Wilson 2001, p. 15). Moreover, in Wilson's view, there was a gulf between survivors' expectations and the justice the TRC could actually deliver: 'they saw perpetrators getting amnesty straight away while their meagre reparations were many years away' (Wilson 2001, p. 25).

Whether a truth commission can lead to reconciliation depends partly on the type of truth it produces, 'A truth process that points to unilateral blame is not one likely to produce reconciliation' (Gibson 2004, p. 334).

In South Africa the Human Rights Violation committee staged public hearings in which the interpersonal reconciliation was a metonym for reconciliation at a national level. Says Wilson, 'the HRV hearings became rituals of healing which enacted symbolic reconciliation between victims, but lacked the capacity to follow up individual cases afterwards' (Wilson 2001, p. 109). Individual suffering was acknowledged but then transcended by being written into a wider story of liberation, 'suffering was lifted out of the mundane world of individuals and their profane everyday pain, and was made sacred' (Wilson 2001, p. 111). The 'liberation-redemption' narrative was applied uniformly to witnesses, whether it was appropriate or not (Wilson 2001, p. 117)

Wilson notes the prevalence of ideas about retribution and revenge in South African notions of popular justice, and doubts whether the Commission, with its religious redemptive narrative, was able to engage with popular consciousness, to change concrete social practices. His study of township courts in Boipatong provides evidence, he argues, that 'a retributive understanding of human rights can provide a meaningful basis for creating legitimacy for legal institutions, and that retributive justice can achieve many of the aims of peaceful coexistence sought by advocates of reconciliation and forgiveness' (Wilson 2001, p. 201).

Wilson's analysis represents a deeper form of ideological critique, which regards the law as 'always a form of politics by other means' with legal meaning 'enmeshed in wider value systems, ...caught between other normative discourses which are political, cultural, and more often than not, nationalist'. For Wilson, 'legal ideology is a form of domination in the Weberian sense which is embedded in historically constituted relations of social inequality' (Wilson 2001, p. 5). 'The new values of a human rights culture are formulated primarily by intellectuals and lawyers representing a new political elite which has sought to superimpose

them upon a number of semi-autonomous social fields' (Wilson 2001, p. 129). While at community level, there is support for infractions of certain rights, to establish truth or exact punishment, suggesting, according to one legal analyst, that the subject at township level is not the atomised individual inscribed in the bill of rights, but rather embedded in 'the community' (Wilson 2001, p. 207). Insofar as rights talk is heard in the community, it cloaks 'a variety of claims and entitlements that may not be rights-based at all' (Wilson 2001, p. 217). TRC hearings did little to stop township vengeance: 'The transfer of values' he argues 'from elite to the masses was uneven and equivocal' (Wilson 2001, p. 227)

In sum, what truth commissions can achieve, argues Wilson, 'is a sophisticated historical account of a violent past which integrates a structural analysis with the consciousness of those who lived through it. The rest should either be left to justice institutions, or to non-governmental organizations of civil society with expertise in mediation' (Wilson 2001, p. 228).

Back to the issue of culture once more, Priscilla Hayner questions whether truth commissions are always culturally appropriate: 'indigenous national characteristics may make truth-seeking unnecessary or undesirable, such as unofficial community-based mechanisms that respond to the recent violence or a culture that eschews confronting reality directly' (Hayner 2001, p. 186). Scholars of Cambodia have argued against raking over the truth in a Buddhist culture characterised by high social ideals of forgiveness (Hayner 2001). Rosalind Shaw is another author to have criticised the methodology of truth commissions. In her study of Sierra Leone, she argues that truth commissions stem from a distinct western tradition of confession and cathartic healing that is alien to Sierra Leone. There, as we shall see later, local traditions militate against speaking the truth openly. [provide quotes from USIP article] . Sierra Leoneans were not by and large interested in the truth; they were interested in something else:

For most of my civilian informants, the condition of ex-combatants' "hearts"— their capacity to maintain moral relationships in the present and future—was of greater importance than settling accounts from the past. When I asked survivors of violence in Bombali District what forms of justice they wished to see, some spoke of the need for retribution ("*We you do bad ting na road, na bad ting den go pay you*"). But most responded "I have no power; I leave my case to God." When I then asked what they would want if they had power, they overwhelmingly reiterated "If I had power, I would still leave my case to God, for the sake of peace," regarding retribution as escalating rather than ending the cycle of violence. In the realm of "no peace, no war," when the violence never seems very far away, their priority was to avoid calling it back. While many in the field of transitional justice argue that reconciliation can arise only from a culture of accountability and human rights, in Sierra Leone the achievement of "cool heart" through processes of directed forgetting appears instead to be the product of a long history of *insecurity*.

Observations such as these represent the beginnings of a strand within the transitional justice literature that takes culture seriously. As Alvruch and Vejerano recognise, notions of justice, truth, forgiveness, reconciliation, and accountability are 'always socially constructed and culturally constituted' (Alvruch and Vejerano 2002, pp. 42, 43), yet in their wide-ranging review of the truth commission literature they find that 'the notion of culture hardly arises at all'. This omission is particularly glaring, since most TJ initiatives are designed in the West and then implemented in non-Western societies. As Collier says 'Legal processes are social processes. Law is not above and apart from society, but is an aspect of ongoing social life' (Collier 1975, p. 121). Borrowing from anthropology, we need to 'see the legal system as part of a wider social milieu' (Moore 1969, p. 253).

## Conclusions

We have seen, then, that both trials and truth commissions have distinct advantages and disadvantages, but that neither is without flaws. In general, the claims that are made for both these institutions tend to be exaggerated. The way forward, as I will try to argue, is to embed modified versions of trials and truth-seeking commissions within a wider range of indigenous justice mechanisms, tied to long-term security guarantees and workable programmes for economic development.

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## ABOUT THE AUTHOR

**Tim Kelsall** holds a PhD from the University of London (SOAS), has taught politics at the Universities of Oxford and Newcastle, and is a former editor of *African Affairs*. He is the author of *Contentious Politics, Local Governance, and the Self: a Tanzanian case study* (Nordic African Institute, Uppsala, 2005) and *Culture Under Cross-Examination: International Justice and the Special Court for Sierra Leone* (Cambridge University Press, forthcoming), as well as several articles published in journals including *Africa, Commonwealth and Comparative Politics, Human Rights Quarterly, the Review of International Studies*, and *Development Policy Review*.