

**EVALUATING TRANSITIONAL JUSTICE MECHANISMS’
EFFECT ON RECONCILIATION
CASE STUDY – SIERRA LEONE**

Master of Arts in Law and Diplomacy Thesis

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FOREWARD

This work is inspired by various disciplines and sources – Nancy Rosenblum’s challenge to look more closely at how reconciliation is working on the ground in post-conflict nations;¹ Oona Hathaway and others’ efforts to ask the hard questions about the efficacy of multiplying legal frameworks to solve human rights violations utilizing political science methodology;² David Kennedy and the “New Stream” legal theorists’ critical posture towards the substantive debates of international law and willingness to look behind the curtain of human rights practice to reveal its harmful effects;³ and post-conflict reconstruction practitioners’ project to establish measurable outcomes to evaluate how post conflict stabilization and reconstruction efforts are working so to make them better.⁴

The idea of evaluating how well transitional justice mechanisms are achieving reconciliation in post conflict nations began to germinate during my first year at The Fletcher School of Law and Diplomacy. The early reports on the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda

¹ Nancy L. Rosenblum, *Justice and the Experience of Injustice*, in MARTHA MINOW, *BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR* (Rosenblum ed., 2002).

² Oona Hathaway, *Do Treaties Make a Difference? Human Rights Treaties and the Problem of Compliance*, 111 *YALE L. J.* 1935 (2002); Linda C. Keith, *The United Nations International Covenant on Civil and Political Rights: Does it Make a Difference in Human Rights Behavior?*, 36 *J. PEACE RES.* 95 (1999); TODD LANDMAN, *PROTECTING HUMAN RIGHTS: A GLOBAL STUDY* (2004).

³ David Kennedy, *A New Stream of International Law Scholarship*, in *INTERNATIONAL RULES: LAW AND INTERNATIONAL RELATIONS* (Beck, Arend, & Vander Lugt, eds., 1996); David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 3 *HARVARD HUM. RTS. J.* 101-25 (2001).

⁴ Association of the United States Army (AUSA) and Center for Strategic and International Studies (CSIS), *Post-Conflict Reconstruction: A Task Framework* (May 2002), at <http://www.csis.org/isp/pcr/framework.pdf>; US Institute of Peace (USIP) and CSIS, Special Report: *Measuring Progress in Stabilization and Reconstruction* (preliminary draft, not to be cited without author’s permission) (on file with author).

(ICTR) all seemed to revolve around how the decisions coming out of the tribunals were breaking new international legal ground.⁵ Furthermore, the public diplomacy wings of the tribunals were fervently courting international opinion, while the outreach departments in the post-conflict nations were almost non-existent.⁶ It made me wonder who the actual constituencies of the tribunals were, and whether the rhetoric of the tribunals' mandates about contributing to national reconciliation and establishing a means to move past atrocities through rule of law instead of vengeance were just that – rhetoric. I also wondered how these Western projects in international justice that were run based on the idea of the universality of human rights norms functioned within the African context. Did the local constituencies of the tribunals see them as another remnant of post-colonialism, or did they somehow transcend hegemonic western modalities?⁷

So I went to the ICTR in Arusha, Tanzania and Rwanda to examine the relationship between the tribunal and the domestic population, and then to Sierra Leone the following summer for continued research on the Sierra Leonean Truth and Reconciliation Commission (TRC) and the Special Court for Sierra Leone (SCSL). Spending time on the ground in these post conflict nations served to complicate the picture of to what degree these transitional justice mechanisms were contributing to

⁵ See Kingsley Mochiedu Moghalu, *Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda*, 26:2 FLETCHER F. OF WORLD AFFAIRS 21 (2002); David Tolbert, *The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26:2 FLETCHER F. OF WORLD AFFAIRS 7 (2002); Kingsley Mochiedu Moghalu, *Peace Through Justice*, WASHINGTON POST, July 6, 1999.

⁶ *Id.*

⁷ See, Eve Darian-Smith, *Postcolonialism: A Brief Introduction*, 5 SOC. & LEGAL STUDIES 291 (1996) (explaining how the United Nations and other international organizations operate under the “myth of universality” – that transference of legal order to formerly colonized nations is a neutral imperative).

reconciliation on the ground, whether it was merely a matter of better outreach or whether these tribunals were too Western to have much meaning for local definitions of reconciliation and justice.

While in-country I worked with local NGOs concerned with governance, reconciliation, and human rights issues, which allowed me access to dozens of NGO leaders both in the respective capitals and up-country. I also attended trials at the ICTR in Arusha, and TRC hearings in Freetown and Tonkolili District in Sierra Leone. The NGOs represented differing local constituencies and needs, thus providing a decent range of local perspectives within the transitional justice community. I interviewed dozens of local NGO leaders and workers, who provide the basis for local opinion in this paper.

Initially I hoped to arrive at a range of quantitative indicators by which one could measure whether national reconciliation was occurring in other transitional justice mechanisms (TJMs). I tried to do this by distilling the operational goals from the mandates of all the tribunals and TRCs, and then devising corresponding outcomes measurable in the domestic population. I quickly ran into some core institutional theory problems James Wilson had identified in his seminal work, *Bureaucracy*, including that TJMs' goals were vague and even contradictory.

Institutional theory provided me with a means by which to understand and tackle problems facing TJMs head on. It also provided a means by which to separate what might be called case-specific impediments to the success of TJMs from conceptual problems inherent in the model of TJMs. Since I have not seen work in the field of transitional justice that grapples with the issue of self-evaluation head-on taking into

account institutional problems, this paper is an attempt to do so. I hope to begin a conversation between the fields of transitional justice theory and institutional theory. This paper focuses merely on one potential outcome of TJMs – reconciliation – in an effort to keep its scope reasonable (instead of including promoting rule of law and delivering justice and accountability, for example). In the process of trying to evaluate reconciliation it focuses on the case study of the Sierra Leonean TRC, discussing other transitional justice mechanisms along the way in order to draw comparative lessons.

CHAPTER 1 – INTRODUCTION

Overview

Transitional justice is a concept whose moment of proliferation has arisen.⁸ In response to periods of massive atrocities the international community now responds in what can be considered increasingly stylized ways. Since the end of World War II the concept of international or domestic tribunals dedicated solely to adjudicating the crimes arising from the horrors of war has taken hold as a working model.⁹ More recently, truth and reconciliation commissions present another structure a country, NGOs, or international organizations can promote towards the ends of promoting national reconciliation in a country.¹⁰ Collectively international tribunals and truth commissions are known as transitional justice mechanisms (TJMs), since they both work to aid the transition of a nation from a period of conflict to a period of peace through legal or quasi-legal means.

Recently, though, expectations of transitional justice mechanisms are being lowered. People now talk of them as “contributing to reconciliation” or as “safety valves” instead of directly achieving their stated goals as initially enunciated in their mandates.¹¹ Adjusted expectations indicate on the one hand a healthy maturity of actors administering such mechanisms, having learned that the day to day workings are more

⁸ Scholarship and practice in the field have multiplied in recent history, as will be illustrated below. Prominent scholarship includes PRISCILLA HAYNER, *UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS* (2001); NEIL KRITZ, *TRANSITIONAL JUSTICE* (Neil Kritz ed., 1995); RUTI TEITEL, *TRANSITIONAL JUSTICE* (2000).

⁹ See GARY BASS, *STAY THE HAND OF VENGEANCE* (2000).

¹⁰ See HAYNER, *supra* note 8.

¹¹ Judge Patricia Wald of the ICTY, *Accountability for War Crimes: What Roles for National, International, and Hybrid Tribunals?*, Proceedings of the American Society of International Law (ASIL) Annual Conference (April 2, 2004).

difficult and the exalted goals more hopeful than first imagined. But solely lowering expectations of how effective these mechanisms should be, while maintaining the same actions signals a profound missed opportunity to learn from TJMs' workings on the ground, to assess their relationships with their domestic constituencies, and to re-evaluate their theoretical underpinnings.

I take up this challenge by posing the question: How are transitional justice mechanisms doing in achieving their objective of contributing to national reconciliation? To answer this question I must first construct a framework of observable outcomes of reconciliation that these mechanisms were meant to achieve. To do so I utilize the transitional justice literature to arrive at a series of discernable goals of reconciliation, and then I evaluate empirically to what degree these outcomes are observable on the ground. My methodology is to apply first hand field research in the most recently completed transitional justice experiment, the Sierra Leonean Truth and Reconciliation Commission (TRC), to observe whether the outcomes of reconciliation are occurring. Analyzing Sierra Leone's TRC comparing other TJMs along the way, I am able to draw some conclusions with an eye towards future policy recommendations.

The Puzzle – How Can One Evaluate Transitional Justice Mechanisms?

When a nation or international organization with scarce resources creates a new mechanism of justice or reconciliation one imagines it would begin with such definitional questions as: "What is justice to our/their nation and its citizens?" and "What is reconciliation to our/their nation and its citizens?" After these terms are defined then a state would fit an organizational framework from the domestic constituency's cultural

and historical tradition to fulfill these goals, taking into account political and financial realities. While it would be exaggeration to say that currently these mechanisms are born full-grown as Athena out of Zeus' head, it is not unfair to point out that there is scant historical record of why precisely they took on the forms that they did, except to look at particular cases to find that usually international actors present the form as a viable experiment for the nation at hand.¹²

Furthermore, with goals as broadly defined as “promoting national reconciliation”¹³ and “bringing those who bear the greatest responsibility to justice”¹⁴ how is one to measure whether these institutions are succeeding? Should the measure be decided by international lawyers and scholars asking whether the cases that are coming out the tribunals are well thought-out and provide consistent holdings? Should the measure be political in nature, to be seen in relative success or failure based on whether the institution is achieving its necessary operating budget? Should the measure be based on public opinion in the post-conflict nation that composes the domestic constituency of the institutions? Or should there be no measure at all – just a vague recognition that all of these factors are involved along the long, difficult road of post conflict healing, and that goods that accumulate along the way occur through an inevitable trickle down or constructivist manner of instituting what are largely democratic judicial or quasi-judicial structures?

¹² See HAYNER, *supra* note 8, Appendix 1.

¹³ Truth and Reconciliation Commission Act, art. 6(1), <http://www.sierra-leone.org/trcact2000.html> [hereinafter TRC Act].

¹⁴ Statute of the Special Court for Sierra Leone, August 14, 2000, art. 1(1), U.N.-S.L. at <http://www.sierra-leone.org/specialcourtstatute.html> [hereinafter SCSL Statute].

The difficulties of evaluating TJMs, and in particular measuring whether they are contributing to post conflict reconciliation are, to say the least, numerous. In an attempt to overcome instead of being engulfed by these difficulties, though, I turn to institutional theory to provide a means to identify what makes analyzing TJMs so difficult. Chapter 2 provides a background history of TJM development and identifies the problems of evaluating TJMs. Once the difficulties of measuring TJMs are addressed head on, it is possible to construct some observable outcomes of reconciliation. Chapter 3 does so through a close reading of the reconciliation literature. Chapter 4 thereafter applies observational evidence on how these models are working in practice based on first-hand research in Sierra Leone, where the most recent TJM has just come to a close. Finally, Chapter 5 draws conclusions about both the viability of the model TJMs currently take and their implementation, reflecting on their continued and future efficacy.

CHAPTER 2 – DEFINING A METHOD TO EVALUATE TRANSITIONAL JUSTICE MECHANISMS

Background: Historical Evolution of the Transitional Justice Model

International Tribunals

Ushering in the experiment of modern international justice in response to large scale atrocities was the International Military Tribunal of Nuremburg (IMT), established in August 1945.¹⁵ Its charges consisted of: 1. conspiracy, 2. crimes against peace (planning and waging wars of aggression), 3. war crimes (actions violating the laws of warfare), and 4. crimes against humanity (violation of general principles of criminal law as derived from the criminal law of all civilized nations).¹⁶ Its creation was nothing short of revolutionary in that, “Four great nations, flushed with victory and stung with injury, [stood] the hand of vengeance and voluntarily submit[ted] their captive enemies to the judgment of the law.”¹⁷ With Nuremburg four victor states made a political decision to deal with the undesirables of the Nazi regime through a legal process over which they did not control the ends.¹⁸ On the one hand this decision is categorized as the pursuance of a liberal democratic and principled idea of legalism and on the other hand it is also seen as slightly limited in that the legalist idea did not extend to actions of its own soldiers.¹⁹

¹⁵ Although, as Gary Bass points out, Nuremburg was hardly the first war crimes trial; earlier tribunals include Leipzig at the end of World War I where the Allies put the Germans on trial, and Constantinople at the end of World War I, where the Armenian genocide and Ottoman war crimes committed during WWI were to be tried. Rather, Nuremburg is noted as introducing the modern phase of international justice and stands as a model in that it was the first successful war crimes tribunal. *See* BASS, *supra* note 9 at 5, 58, and 106.

¹⁶ Charter for the International Military Tribunal, August 8, 1945 art. 6(a)(b)(c), <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm>.

¹⁷ Justice Robert Jackson, Opening Statement Before the International Military Tribunal (Nov. 21, 1945).

¹⁸ BASS, *supra* note 9 at 6-8.

¹⁹ *Id.*

While Nuremburg is still remembered as overwhelmingly successful in its adherence to legalistic principles, including most prominently fair trials, its sister tribunal, the International Military Tribunal for the Far East (IMTE) begun in Tokyo in May 1946 is generally overlooked in modern history. As opposed to Nuremburg, here legalism's principles failed as General McArthur handpicked the judges, oversaw the proceeding, and in the end commuted sentences with the secret agreement of Emperor Hirohito.²⁰

The tribunal model lay dormant for several decades until the International Criminal Tribunal for Yugoslavia (ICTY), created this time not by the victors but by the United Nations Security Council, in May 1993.²¹ Comparable to IMT, though, is that again a political organization created a legal structure as part of a solution to large-scale atrocities. The Security Council imposed this tribunal on the perpetrators of war crimes by invoking its Chapter VII authority to handle threats to international peace and security. Its structure of international judges picked by the UN General Assembly and charges as analogous to those of the IMT (excluding crimes against peace) formulate a noticeable model of post conflict justice solidifying.

Soon after the ICTY, in response to the Rwandan genocide, the Security Council extended ICTY's structure to what is known as its sister tribunal, the International Criminal Tribunal for Rwanda (ICTR). The ICTR is commended with several

²⁰ M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM RTS. J. 11, 32-33 (1997).

²¹ See Statute of the International Tribunal for the Prosecution on Persons responsible for serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827, U.N. SCOR, 3217th mtg., Doc. S/RES/827 (1993) [hereinafter ICTY Statute].

groundbreaking international legal precedents,²² but is faulted with allegations of slowness, inefficiency, and disconnection with its Rwandan constituency.²³ Together, the ICTY and ICTR are known as the international ad hoc tribunals, and as structures overseen by the UN Security Council are known as bureaucratic behemoths, with individual yearly budgets of over \$100MM.

Partially in response to what are recognized administrative shortcomings of the ad hocs (time, distance, budget), the international judicial model was refined first in East Timor in 1999 and then in 2001 in Sierra Leone to a “hybrid tribunal.” These hybrid tribunals are composed of both international and domestic judges and prosecutors, as opposed to the ad hocs that were staffed by mainly expatriates and are located in the home countries where atrocities occurred and evidence remains. The Special Court of Sierra Leone (SCSL) is structured further as “hybrid” since its charges include not only the traditional war crimes, crimes against humanity, and other violations of international humanitarian law, but also crimes committed under Sierra Leonean law specific to the way killings were perpetrated during the ten year civil conflict. These include specific allowance to convict children from ages fifteen to eighteen and arson. Finally, as a means by which to limit the ad hocs burgeoning budgets, it is organized as a joint operation of the UN and the government of Sierra Leone (GoSL), overseen by specific

²² See Moghalu, *supra* note 6 at 25 (arguing that despite being the first international tribunal to convict a head of government for genocide and the first to hold that rape is in certain circumstances is an intrinsic part of genocide the ICTR receives scant news coverage and public approval).

²³ See *The International Criminal Tribunal for Rwanda: Time for Pragmatism*, INTERNATIONAL CRISIS GROUP, Africa Report No. 69, September 26, 2003, at <http://www.crisisweb.org/home/index.cfm?id=2303&l=1>.

member states of the UN that compose an organizing committee that raises funds entirely by voluntary contributions from other UN member states. As the appointed Registrar puts it, the SCSL is a, “lean, mean, justice-giving machine.”²⁴

Truth Commissions

Contemporaneous to the development of a model of post conflict adjudication described above, another means of response to mass atrocity has taken shape in the form of truth commissions. While the tribunals are experiments in legalist retribution as opposed to retributive bloodletting, truth commissions are experiments in truth telling as a means toward healing. They are generally premised on two objectives meant to prevent the recurrence of such abuses and to repair the damage they caused. First is that the truth must be known; the nature and extent of the violations that occurred must be publicly exposed as a necessary means to prevent deep resentments by the victims of abuses and their relatives.²⁵ The second objective is that their specific form must be representative of the will of the people, preferably through popular referendum, approved by democratically elected representatives.²⁶

Beginning in 1974 with Uganda’s Commission of Inquiry into the Disappearance of People in Uganda since 1971 through the most recent Truth and Reconciliation Commission (TRC) in Sierra Leone of 2001, there have been twenty-one truth

²⁴ Interview with Robin Vincent, Registrar, Special Court for Sierra Leone, in Freetown, Sierra Leone (June 2003).

²⁵ José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints*, in *STATE CRIMES: PUNISHMENT OR PARDON* 31 (Aspen Institute ed., 1989).

²⁶ *Id.* at 34.

commissions around the world.²⁷ The emergence of a model of a truth commission can be traced to the proliferation from only five established in the 1980s all by either the President or Parliament of the nations where crimes occurred, to fourteen begun in the 1990s four of which were spearheaded in part by the United Nations.

The nature and scope of truth commissions since 1971 have ranged from narrowly focused historical inquiries to full blown, quasi-judicial structures. South Africa's TRC has emerged as a prominent large-scale example as it was mandated to examine over thirty years of crimes of the apartheid regime and there was a judgmental aspect of the hearings whereby case by case individual amnesty of the perpetrators was granted contingent on commissioners' adjudication that the truthfulness of the testimony was sufficient to fit the crimes.²⁸

The TRC in Sierra Leone was in part modeled after the South African TRC. Its objective was first enunciated in the Article XXVI of the Lomé Peace Agreement of 7 July 1999. Although Lomé dictated a general amnesty to perpetrators in Sierra Leone, the TRC was to be established, "to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, [and to] get a clear picture of the past in order to facilitate genuine healing and reconciliation."²⁹

²⁷ HAYNER, *supra* note 8 at Appendix 1.

²⁸ *See id.* at 40-45.

²⁹ TRC Act, Art. 6(1), *supra* note 13.

Obstacles to Defining a Method of How to Evaluate Transitional Justice Mechanisms’
Effect on Reconciliation

It is difficult to evaluate TJMs since they are bureaucracies. Many of their institutional characteristics comport to those James Wilson observes in American administrative agencies in his work, *Bureaucracy*, even if they are not created by the US Congress.³⁰ What categorizes them as such is that they are governmental or quasi-governmental – sometimes TJMs are created by national governments themselves so are closest to the notion of an administrative agency; but other times the creating body is the United Nations Security Council such as for the ICTY and ICTR; a branch of the UN such as the UNHCR as for the Sierra Leonean TRC; or a coalition of governmental and non-governmental actors.³¹ The important fact is not who the actor creating the institution is per se, but rather that what is created is a public rather than private institution. Public institutions created by legislation – or in the case of TJMs, mandates – suffer from certain bureaucratic difficulties that make them prone to the typical negative connotations the word “bureaucracy” evokes.³² Some of these difficulties that are relevant to TJMs include that the goals in the mandates are vague and contradictory,³³ there is a professional and attitudinal bias at play among the workers;³⁴ the institution is

³⁰ JAMES Q. WILSON, *BUREAUCRACY* (1989).

³¹ See HAYNER, *supra* note 8, Appendix 1; Michael O’Flaherty, *Sierra Leone’s Peace Process: The Role of the Human Rights Community*, 26 HUM. RTS. Q. 29, 55 (2004).

³² *Id.* at 33.

³³ *Id.* at Chap. 3.

³⁴ *Id.* at Chap. 4.

beholden to a UN hierarchy or national government that restricts its freedom of action,³⁵ and the outcomes it is meant to achieve are inherently difficult to measure.³⁶

I introduce each of these institutional difficulties that applies to TJMs here for two reasons. First, discussing them up front helps to provide a baseline of pitfalls typically associated with public agencies. It frames critical analysis of the TJMs generally since it is applicable to a broad range of institutions. This framework provides the reader a constructive lens through which to view the specifics of our case critically – one which will be revisited later in the paper when trying to draw conclusions of whether limitations of the Sierra Leonean TRC are isolated to its own circumstances or have implications about the TJM model more broadly. Second, these difficulties that are typical of large bureaucratic organizations make it all the more challenging to evaluate TJMs on the organizations’ own terms. For example, is not sufficient for me to take TJMs’ mandates at face value for a premise of what their operational tasks are since such mandates are characteristically vague and contradictory. Rather, I must be careful not to fall into the pitfalls in my own scholarship that institutional theory helps me to see beforehand.

Since mandates are meant to be both proscriptive and descriptive of the institutions’ goals and means by which to achieve them, they are the source of the institutional imperative and natural starting point by which to examine whether an institution is 1. meeting its own goals, and 2. whether these goals are efficacious. In the case of TJMs, mandates present some difficulties since they do not reference precisely

³⁵ *Id.* at Chap. 5.

³⁶ *Id.* at Chap. 9.

what normative framework they mean to import, nor define their terms of reference. The ICTR's mandate declares that it sets out "to put an end to such crimes, to contribute to the process of national reconciliation and the restoration and maintenance of peace."³⁷ The SCSL's mandate is to "prosecute persons who bear the greatest responsibility" for war crimes.³⁸ And the Sierra Leonean TRC mandates that it, "address impunity, break the cycle of violence, provide a forum for both victims and perpetrators of human rights violations to tell their story, [and] get a clear picture of the past in order to facilitate genuine healing and reconciliation."³⁹ On the one hand these phrases have direct analogs to common and civil law traditions and thus fall softly on Western ears as viable goals for justice-producing and truth-telling mechanisms. Yet they are laden with strong normative assumptions, such as presupposing agreed-upon definitions of what justice, reconciliation, and truth are to actors involved in and the constituencies affected by, these institutions. Such broad and high-minded mandates make it extremely difficult to pin down what the operational goals of TJMs are both to evaluate it from the outside, as well as for the workers, or operators, within the organization to define what they should do day to day.

Furthermore, these mandates as a source for qualitative evaluation also present difficulties on account of their conclusory construction. There is no explicit structure spelled out whereby one gets from a trial - in many eyes seen as a rather divisive method of dispute resolution with its reliance on an adversarial process - to "contribut[ing] to the

³⁷ U.N. Res. 1329, 4240th Mtg at 1, U.N. Doc S/RES/1329 (2000) [hereinafter ICTR Mandate].

³⁸ SCSL Statute, *supra* note 14.

³⁹ TRC Act, Art. 6(1), *supra* note 13.

process of national reconciliation” – both goals which are simultaneously enunciated in the ICTR’s mandate.⁴⁰ Implicit though undefined is a notion or series of steps of what is needed for a state and its citizens to break with a past filled with conflict to move towards a future of peace. Implicit though undefined is a theory of post conflict justice and healing meant to bring about the end result of reconciliation that these organizations are working to achieve.

Wilson points out that when a public agency has vague or inconsistent goals it is more prone to other bureaucratic vagaries – if operational goals are lacking, the workers (or operators) are left to cope with the circumstances that arise on a daily basis.⁴¹ Additionally, when the goals are vague, the operators are more prone to revert to their own professional and attitudinal biases when coping with their everyday circumstances.⁴² These problems can be seen in the example of tribunals, where even though contributing to national reconciliation is a part of their mandates, officials at the ICTR and Special Court of Sierra Leone were hard-pressed in interviews with me to imagine how it could actually be accomplished. They repeatedly reverted to their job being one of conducting trials, finding a safe haven in their professional biases as lawyers. This issue also relates to the problem of to whom TJMs cater – the international community or the local constituency. TJMs’ legal or quasi-legal nature seems to perpetuate TJM operators to handle their tasks according to their legal training, e.g. to perpetuate rulemaking or bring another case to judgment. There is plenty of room in this scenario of estrangement from

⁴⁰ ICTR Mandate, *supra* note 37.

⁴¹ WILSON, *supra* note 30 at 36.

⁴² *Id.* at 59.

the workers' goal of reconciling the local constituency, which one would imagine must come first if the task to be achieved is to aid reconciliation.

Additionally, TJMs are beholden to their creator bodies – typically governments or the United Nations – and are thus restricted in their freedom of action. This makes it difficult for them to change based on their circumstances or can mean that after their creation they are not fully funded.⁴³ This difficulty affects evaluation of TJMs as well since they are modified along the way behind closed doors – the public is not privy to lessons learned from one institution to the next. For example, there exists evidence that actors involved in creating tribunals have learned lessons reflected in the changes made in the change of structure from ad hoc to hybrid tribunals.⁴⁴ But as that process was a political one, undertaken by member states of the UN and the UN's Office of Legal Affairs, the public is not privy to the reasons behind the tribunals' objectives and means of achieving these ends. In relation to the TRCs there is a refinement of a general model occurring as well, undertaken by one of the main actors in the field of transitional justice, the International Center for Transitional Justice (ICTJ). Borne out of South Africa's TRC, the ICTJ sees its role as helping post conflict nations shape their own version of transitional justice mechanisms.⁴⁵ While such an endeavor is meant to be particularized to the circumstances of each country, conflict, and culture, one cannot help but notice a pattern of variations of the same general model of TRC. The fact that TJMS are

⁴³ *Id.* at 115.

⁴⁴ See O'Flaherty, *supra* note 31 at 60.

⁴⁵ See ICTJ's website, at <http://www.ictj.org>.

beholden to larger institutional bodies means that their own workings are overly-restricted by the larger body.

Finally, TJMs as organizations would be categorized according to Wilson as procedural. You can see what the operators do – hold hearings or conduct trials, for example; but it is inherently difficult to observe the outcomes that are desired, for example whether national reconciliation is occurring as a result of what the operators are doing.⁴⁶ Wilson concludes that in procedural organizations management becomes means-oriented, i.e. how the operators go about their jobs is more important than whether doing these jobs produces the desired outcomes.⁴⁷ Also, procedural organizations are much more prone to their operators’ professionalism being the driver behind what the workers do than other types of organizations.⁴⁸ In TJMs this compounds the tasks of operators being vague and disconnected to the desired outcome of reconciliation. Easily definable tasks such as prosecuting the case before him/her becomes more important than deciding how to promote reconciliation to the local population.

One of Wilson’s over-arching observations is that a successful organization focuses on clear tasks rather on goals that are unclear.⁴⁹ Similarly, legislation or mandates that include clearly definable outcomes rather than vague goals are much more prone to effective execution.⁵⁰ Following Wilson’s lead, the analysis in this paper will as much as possible focus on operational outcomes of TJMs as opposed to their vague,

⁴⁶ WILSON, *supra* note 30 at 163.

⁴⁷ *Id.* at 164.

⁴⁸ *Id.* at 163.

⁴⁹ *Id.* at 33.

⁵⁰ *Id.* at 34-44.

broad, and contradictory mandates. This is mainly out of necessity, since by focusing purely on what the TJMs set out for themselves as their goals, enunciated in their mandates, one is prone to make the same mistakes that bureaucracies do. In an effort to provide effective evaluation, I will remain as concrete as possible, and try to distill what are operational outcomes of TJMs as opposed to merely rhetorical hopes.

CHAPTER 3 – MEASURABLE OUTCOMES FROM RECONCILIATION THEORY

To decipher the outcomes implied in the TJMs' often mandates I must reconstruct the intermediary steps that link reconciliation theory to goals enunciated in the mandates. I do so by supplementing the extant mandates with the principles expressed in the accountability and reconciliation literature. I then distill observable outcomes from the goals of reconciliation by extrapolating what means are necessary to get to these goals. Once I pinpoint these means as observable outcomes, it will be possible to confront them with the on-the-ground practice to see whether TJMs are succeeding in promoting reconciliation.

From Truthtelling to Accountability to Somewhere Between Vengeance and Forgiveness

The accountability literature began in the 1980s as a means of theorizing how to break with the past regimes of Latin America and Eastern Europe.⁵¹ It grappled foremost with what type of justice should be brought to bear on past human rights abusers from the perspective of a successor regime, actual victims, and society as a whole. While not invoking Aristotelian forms of justice and neither as categorically neat as his endeavor in Book Five of *Nicomachean Ethics*, the debate certainly mirrors Aristotle's pondering of what kind of justice fits what kind of acts for what kind of ends one hopes to achieve.⁵² Some of his categories include distributive, rectificatory, and retributive justice; the

⁵¹ See HERZ *An Historical Perspective*, in *STATE CRIMES: PUNISHMENT OR PARDON* 31 (Aspen Institute ed., 1989); 1 *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* (Neil J. Kritz ed. 1995); ZALAQUETT *supra* note 25.

⁵² ARISTOTLE, *NICOMACHEAN ETHICS*, Book 5.

accountability literature discusses the pros and cons of trials versus amnesty versus truth telling as options of how to deal with past human rights abuses.⁵³

In the first seminal work on transitional justice, Chilean human rights activist Jose Zalaquett sets out a normative framework for a policy to account for past human rights violations.⁵⁴ He establishes a set of standards inferred from international human rights norms that a new government or international organization can apply with some discretion to fit a situation's political reality.⁵⁵ The two baseline objectives of such policy are preventing the recurrence of such abuses and repairing the damage they caused.⁵⁶ A policy will only prove itself legitimate thereafter if it meets three conditions. First, that the truth of the past abuses be known to all, must be complete, and must be officially proclaimed and publicly exposed. While recognizing that under certain conditions such a high premium on establishing the truth may be practically difficult on the one hand and inimical to the processes of a fair trial on the other hand, Zalaquett values it so much that he recommends truth commissions over trials for this very purpose. This value trumps all others since to him hiding the truth perpetuates the actual suffering and the violation of the rights of the relatives of the victims.⁵⁷

⁵³ See ZALAQUETT *supra* note 25 (defending that truth in the form of commissions is always preferable to justice in the form of trials in times of transition), and *contra* JUAN E. MENDEZ, *Accountability for Past Abuses*, 19.2 HUM. RTS. Q. 255 (1997) (countering that prosecutions are more conducive to future peace in times of transition than truth commissions alone).

⁵⁴ ZALAQUETT, *supra* note 25.

⁵⁵ *Id.* at 5.

⁵⁶ *Id.*

⁵⁷ *Id.*

Zalaquett's second condition of legitimacy is that whatever policy a state undertakes in a time of transition must represent the will of the people.⁵⁸ He envisions that a policy will be developed by experts and then submitted for popular referendum, but finds acceptable that it either be approved by democratically elected representatives or, if necessary, be assumed to have popular backing.⁵⁹ Finally, the policy must not violate international human rights law procedurally or normatively. On account of taking international human rights law as a precondition of legitimacy, Zalaquett dismisses the potential objectives of retribution or revenge (with the death penalty falling into these categories) as out of the question since they would be inconsistent with the preventative purpose of human right instruments, as expressed in the Preamble to the Universal Declaration of Human Rights.⁶⁰

Juan Mendez writes partially in response to Zalaquett and partially to update the analytical framework on account of historical experience.⁶¹ He finds Zalaquett's method of framing the issue of how to deal with past human rights abuses outdated since it was only dealing with transitional democracies as the initiators of transitional justice. Taking into account new atrocities and new actors, one must widen the scope of inquiry to fill a space for states that have experienced atrocities but no clear change of regime on the one hand, and international organizations and NGOs as creators of a tribunal or truth commission on the other. The void is filled to Mendez by importing human rights law

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ MENDEZ *supra* note 53.

not as a guiding framework as did Zalaquett, but rather as the full normative obligation. Mendez charges that the extant transitional justice literature conceded too much to transitional regimes by recognizing them as politically constrained in what they could do to correct past wrongs.⁶²

Rather Mendez bases his theory in the international legal principle that states have affirmative obligations in response to massive and systematic violations of fundamental rights.⁶³ For example, since the UN Human Rights Committee found that amnesties perpetuate "a climate of impunity" and deny the victims a "right to a remedy" Mendez finds deplorable any form of amnesty.⁶⁴ Based upon a reading of human rights instruments, Mendez's list of a state's obligations after crimes against humanity are committed is fourfold: 1. to investigate, prosecute, and punish the perpetrators; 2. to disclose to the victims, their families, and society all that can be reliably established about those events; 3. to offer the victims adequate reparations; and 4. to separate known perpetrators from law enforcement bodies and other positions of authority. While appreciating the inherent value of truth telling, because Mendez imports a newer version of human rights law that repudiates impunity, he favors prosecutions over truth commissions. He is careful to note, though, that truth telling is a necessary aspect of a trial in that plea bargaining is not a procedural option, but that otherwise prosecutions provide a specific contribution to the public's knowledge of the facts.⁶⁵

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 268.

Furthermore, Mendez enunciates how prosecutions if not directly, at least secondarily contribute to reconciliation.⁶⁶ He describes preconditions to reconciliation found in the trial process, including that it be “built in the hearts and minds of all members of society through a process that recognizes every human being's worth and dignity”; that it “requires knowledge of the facts” since “forgiveness cannot be demanded (or even expected) unless the person who is asked to forgive knows exactly what it is that he or she is forgiving”; and third, “reconciliation can only come after atonement” so that it only “seems to add a new unfairness to the crimes of the past to demand forgiveness from the victims without any gesture of contrition or any acknowledgement of wrongdoing from those who will benefit from that forgiveness.”⁶⁷

Interestingly, while Mendez recognizes that trials contribute to characteristics of traditional common and civil law penal theory – deterrence, retribution, and rehabilitation – he is not fully convinced that these are reliable justifications for trials as part and parcel of post-conflict justice. He rather prefers prosecutions since they are “the most effective means of separating collective guilt from individual guilt, and thus to remove the stigma of historic misdeeds from the innocent members of communities that are collectively blamed for the atrocities committed on other communities.”⁶⁸

In her thought-provoking book, Martha Minow explores various responses to collective violence between the two poles of vengeance and forgiveness, trying to deepen

⁶⁶ *Id.* at 274.

⁶⁷ *Id.*

⁶⁸ *Id.* at 277.

the vocabulary for assessing the goals and limitations of each kind of response.⁶⁹

Differing from Mendez and Zalaquett she does not draw a conclusion of whether a TRC or tribunal is the optimal response, but rather premises her account on the reality that no response can adequately bring closure to atrocities, and from there settles on the conclusion that some response is better than silence or vengeance.⁷⁰

Discussing the response of trials to collective violence, she points out various baseline premises and goals involved in embracing rule of law. First, trials depend on fair administration of rules and procedures.⁷¹ Thus they attempt to isolate the pressures of politics, personal biases, or the possibility that the tribunal itself be utilized as a new phase in the cycles of revenge and power struggles.⁷² As Mendez, she does not see reconciliation as a direct goal of trials, but does recognize that through the process of separating the adjudicated wrongdoer from others through the retributive process that reconciliation as closure can occur as a potential secondary effect. Minow points out that once deciding that the rule of law must prevail, trials must be careful not to succumb to possibilities of applying laws retroactively, being politicized, or selectivity prosecuting individuals, or else the very *raison d'être* of rule of law will be undermined.⁷³

Establishing the affirmative case for truth commissions, Minow points to two main goals and their underlying premises.⁷⁴ First, the goal of healing hypothesizes that

⁶⁹ MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* (1998) 4.

⁷⁰ *Id.* at 5.

⁷¹ *Id.* at 25.

⁷² *Id.* at 26.

⁷³ *Id.* at 29ff.

⁷⁴ *Id.* at 61.

public testimony of victims and perpetrators affords opportunities for individuals and the nation as a whole to heal. The aim of producing a fair and thorough accounting of atrocities proceeds on the assumption that it helps individuals tell their stories and can create a framework for the nation to deal with its past. “Echoing the assumptions of psychotherapy, religious confession, and journalistic muckraking, truth commissions presume that telling and hearing truth is healing.”⁷⁵

Minow then comes to three fundamental premises of psychotherapeutic work that are found in truth commissions and explains how they can help to bring reconciliation to an individual and a post conflict nation, reconciliation being the second goal of truth commissions. First, the potential restorative power of truth-telling can help the traumatized individuals to distinguish past, present, and future or to know that one’s suffering is not solely private but instead part of a social or political cataclysm.⁷⁶

Psychologists note, though, that in order for truth-telling to have such a therapeutic effect, it must include the traumatic imagery and bodily sensations. “The recitation of facts without the accompanying emotions is a sterile exercise, without therapeutic effect.”⁷⁷

Second, the presence of sympathetic witnesses is necessary for survivors to receive acknowledgement and validation.⁷⁸ Thus therapists, commissioners, and the public as a whole must take a moral stance in solidarity with the survivor, condemning the wrongs s/he suffered. And third, perpetrators and bystanders must take constructive roles to

⁷⁵ *Id.*

⁷⁶ *Id.* at 67.

⁷⁷ *Id.* at 70.

⁷⁸ *Id.* at 70-71.

contribute to social repair.⁷⁹ Whether it is through widespread public broadcast or a final report of human costs that were previously unknown, a national narrative or social acknowledgment is necessary to bring social repair.

Distilled from this accountability and reconciliation literature, certain principles or objectives of TJMs emerge. In the following section the objective is listed first in bold, and the narrative following elucidates certain means that are rationally necessary to achieve the respective goal – the outcome. The outcome that corresponds to each objective is important because it provides a measurable means by which to observe reconciliation on the ground. The principles of tribunals are separated from truth commissions, yet one will notice that many objectives overlap, as so in the reconciliation literature discussed above.

Principles/Objectives of Tribunals & Corresponding Observable Outcomes
Breaks with the past. Trials show for successive democracies the importance of creating a clear and unvarnished picture of the true character of the atrocities, in order to give a moral foundation for the new regime.⁸⁰ The implicit means of achieving this objective is the need for the trial to be a **public ceremony**. For example, if trials occurred but behind closed doors without public knowledge there would be no effect of breaking with the past.

Separates collective guilt from individual guilt and thus removes the stigma of historic misdeeds from the innocent members of communities that are collectively

⁷⁹ *Id.* at 74.

⁸⁰ HERZ, *supra* note 51 at 16

blamed for the atrocities.⁸¹ The notion behind this general retributive goal of trials is that society does not condone behavior that breaks the rules; societies punish because they defeat the wrongdoer who attempts to take advantage of society's rules and thereby elevates himself with respect to others.⁸² The means by which trials achieve separating individual from collective guilt is **accuracy in pinpointing and trying the guilty**. If the individual perpetrators cannot be located and actually tried or all the trials result in acquittals individual accountability seems hard to win. Arguably, if indictments persist without the actual trial the potentially individually guilty are still pinpointed and collective guilt could be alleviated to a lesser extent that the actual trial would achieve.

Preventative/deterrent function. Trials can have a societal deterrent effect and thereby inhibit commission of future crimes; or the deterrent effect may be specific whereby those punished are literally prevented from committing crimes again.⁸³ The causal mechanism that links deterrence to the trial is **eliminating impunity**. Through finding a perpetrator, trying, and punishing him or her, an example is provided to society that impunity will not be tolerated. No one within that society will be exempted from punishment or penalty if he or she engages in such behavior.

Establishes truth. Trials provide a specific contribution to the public's knowledge of the facts.⁸⁴ Through fair trial procedures of due process and transparency a record is created and thereafter available to the public. For a trial to achieve a certain

⁸¹ MENDEZ, *supra* note 53 at 277.

⁸² MENDEZ, *supra* note 53 at 276.

⁸³ ZALAUQUETT, *supra* note 25 at 37.

⁸⁴ MENDEZ, *supra* note 53 at 268.

level of truth, **its procedures must be fair and transparent** – it must withstand political pressures, careful to create a record and verdict that withstands scrutiny. Additionally, to contribute to public knowledge of its factual record, a tribunal must make its information and decisions public and disseminate them among the public.

Means to Evaluate Reconciliation Occurring in Tribunals	
<i>Reconciliatory Goals</i>	<i>Observable Reconciliatory Outcome</i>
Breaks with the past	Ceremony is open to public
Separates collective guilt from individual guilt	Accurately pinpoints and tries the guilty
Prevents/deters future atrocities	Eliminates impunity
Establishes truth	Procedures that are fair and transparent

Principles/Objectives of Truth Commissions & Corresponding Observable Outcomes

Separates collective guilt from individual guilt. Society that is sullied by the commission of large-scale crimes can explore and reckon with who and “what actions large and small made the proliferation of evil possible.”⁸⁵ The implicit means by which truth commissions would have the effect of separating individual from collective guilt is through **societal accounting**. There must be a collective self-examination of the causes and perpetuation of why mass atrocities occurred to remove the stigma of historic misdeeds from the innocent members of communities that are collectively blamed for the atrocities.⁸⁶

⁸⁵ NEIL J. KRITZ, *The Truth and Reconciliation Commission and the Special Court for Sierra Leone: Legal and Policy Aspects of Collaboration and Cooperation 2* (Dec. 20, 2001) (unpublished manuscript prepared for the Expert Meeting on the Relationship between the TRC and SCSL) (on file with author).

⁸⁶ MENDEZ, *supra* note 53 at 277.

Engages all of society and provides a forum for everyone to be heard. Truth commissions begin societal soul searching if the entire public is engaged and invested in the process.⁸⁷ The causal means by which this occurs can be characterized as **societal catharsis**. For as victims and perpetrators testify the nation is brought into the psychological realm of reckoning with its atrocities, all of society is engaged in a collective process of therapy.⁸⁸ Societal attention to a truth commission then encourages more victims and perpetrators to testify, creating a cathartic snowball effect. If a truth commission occurred behind closed doors or if no one comes forward to testify it is difficult to imagine that society is engaged in the process.

Breaks with the past. Creates an historical record that reveals the pain and suffering of victims and the horrors of the previous regime.⁸⁹ Breaking with the past reveals itself slightly differently in the truth commission context than the tribunal concept as described above. For in truth commissions creating an **objective historical account of the conflict** customarily in the form of a report is one of the commission's central tasks. A viable, objective historical account that is well-regarded by the post conflict nation is necessary to create a true break with the past. In contrast, a report that is sullied by allegations of corruption or bias, or one that sits on a shelf with no regard by the public, has very little chance of creating a break with past atrocities.

⁸⁷ *Id.* at 3.

⁸⁸ MINOW, *supra* note 69 at 67.

⁸⁹ HAYNER, *supra* note 8 at 23.

Establishes truth. Creates a vehicle for personal healing and is a prerequisite to individual, interpersonal, or inter-communal reconciliation.⁹⁰ Clearly, to establish a true account of individual and collective atrocities the **truth must be told** during testimonies.

Means to Evaluate Reconciliation Occurring in Truth Commissions	
<i>Reconciliatory Goals</i>	<i>Observable Reconciliatory Outcome</i>
Separates individual guilt from collective guilt	Societal accounting occurs
Engages all of society and provides a forum for everyone to be heard	Societal catharsis occurs
Breaks with past	Objective historical account of the conflict is created
Establishes truth	Truth must be told

⁹⁰ *Id.* at 24ff.

CHAPTER 4 – RECONCILIATION OUTCOMES APPLIED TO SIERRA LEONE’S TRUTH & RECONCILIATION COMMISSION

In comparison with other transitional justice mechanisms, the Sierra Leonean TRC has a rather explicit mandate. It enunciates four goals: “to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, [and to] get a clear picture of the past in order to facilitate genuine healing and reconciliation.”⁹¹ Yet, standing alone these goals are vague and difficult to observe. As discussed above, it is necessary to reconstruct what these phrases mean in the context of the reconciliation literature, and then take the additional step of distilling an observable outcome to provide a concrete means of evaluation. Thus, I will apply the TRC outcomes from the previous chapter, noting how these relate to the TRC’s self-professed goals along the way.

Then, applying the outcomes necessary to observe these objectives, it is possible to evaluate to what extent these goals are being met on the ground in Sierra Leone based on empirical observations. The methodology of empirical observations applied below is based on in-depth interviews with Sierra Leonean NGO leaders. The local NGO community involved in post conflict justice and healing was open to me since I spent several months with them, following their work, and acting at times as a liaison between them and the TRC and Special Court. Since performing large-scale surveys of the Sierra Leonean public is nearly impossible in one of the least developed countries in the world, these domestic NGO leaders in the field of post conflict justice and human rights appear

⁹¹ TRC Act art. 6(1), *supra* note 13.

as a second-best alternative since they act at once in two different ways: as representatives of large groups of Sierra Leoneans constituencies and as first hand Sierra Leonean opinions.

Societal Accounting

The first objective of the TRC – “to address impunity” – standing alone is difficult to fathom as associated with truth commissions since one generally associates confronting impunity with arrests and trials. Combating impunity is the basis for the traditionally retributive aspect of trials, and as Mendez argues, is a good reason why tribunals are more favorable choices than truth commissions in response to mass atrocities. Yet as Neil Kritz elaborates in his study of Sierra Leone, the TRC is attempting to delineate what specific actions made the “proliferation of evil possible.”⁹² This type of addressing impunity is akin to the objective of separating collective guilt from individual guilt described above, to be achieved through societal accounting. For setting the record straight even if not through a trial is a means of combating impunity, just on a larger scale than prosecuting one individual at a time as would be done in trials.

Thus the observable outcome from the chart above that is allied with addressing impunity is **societal accounting**. Societal accounting is observable as a collective self-examination of the causes and perpetuation of why mass atrocities occurred. The aim is to remove the stigma of historic misdeeds from the innocent members of communities that are collectively blamed for the atrocities.

⁹² KRITZ, *supra* note 85.

According to Sierra Leonean NGO leaders whom I spoke with, societal accounting was not achieved in Sierra Leone for two main reasons – the nature of the conflict in Sierra Leone and the TRC’s relationship with the Special Court.

Nature of Conflict

While the exact causes of the conflict are still disputed, a strong argument is made by Sierra Leoneans that the nature of the Sierra Leonean conflict questions the individualized culpability involved in this objective. Many see the causes of war in Sierra Leone as having been a mixture of foreign interference, endemic poverty, and inequitable distribution of resources.⁹³ Discussing this principle behind truth commissions, Neil Kritz mentions that crimes against humanity do not occur in a vacuum and thus society must account for its moral passivity in not preventing their perpetuation.⁹⁴

But as Helen Bash-Taqi represents, some Sierra Leoneans do not see collective moral guilt as having a significant role to play in post conflict healing.⁹⁵ Rather, they respond to Kritz by arguing that regardless of whether you want to label it a vacuum or not, crimes against humanity were perpetuated because of the lack of socio-economic opportunity in the country. Thus almost none of the low-level perpetrators, those who qualify as the guilty before the TRC, should have been held culpable as individual perpetrators. Bash-Taqi argues instead that the construction of individualizing-out the

⁹³ Interview with Helen Bash-Taqi, Programme Coordinator, Network Movement for Justice and Development (NMJD) in Freetown, Sierra Leone (June 27, 2003). Bash-Taqi is a main articulator of this point of view, although many Sierra Leonean NGOs represent this perspective, including Center for Human Rights and Democratic Reform (CHRDR).

⁹⁴ KRITZ, *supra* note 85 at 3-4.

⁹⁵ Helen Bash-Taqi, *supra* note 93.

acts of young men from the collective who should not feel guilt should have been turned on its head.⁹⁶ To her, the collective is more culpable than the individual. To assign moral opprobrium is avoiding the true issue of lack of opportunity for an entire generation of young men to do anything else. Socio-economic degradation combined with the methods of compelling children to fight with drugs and beatings are what perpetuated the impetus of crimes against humanity of Sierra Leonean society, and the ignition that began the killing came from foreign instigators and specific leaders. These leaders, whom proponents of this point of view do see as culpable, were not before the TRC, though, but are being tried by the Special Court.

Relationship with the SCSL

The unclear relationship between the TRC and SCSL was a factor in inhibiting widespread testimony before the TRC and thus made societal self-examination among the public at large almost impossible.⁹⁷ Without extensive participation by both victims and perpetrators it is difficult to see how societal accounting could truly have occurred. Ex-combatants, those who most clearly could provide the testimony necessary to explain why and how they perpetuated crimes, simply did not appear before the TRC in large numbers because they feared retribution in the SCSL.

Testimony was inhibited for fear of it being used in the trials of the SCSL. Despite the prosecutor of the Special Court's public announcements that his office will categorically refuse to look at all testimony before the TRC, this fear of retribution

⁹⁶ *Id.*

⁹⁷ See William A. Schabas, *The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone*, 25 HUM. RTS. Q. 1035, 1064 (2003) (observing that witness confusion about the mandates and the functions of the TRC and Special Court are inevitable and natural).

among Sierra Leoneans persisted. There is knowledge that while the prosecutor's office might make such assurances, this does not mean that the defense will not attempt to introduce one's testimony as evidence to shift the blame from its own defendant. With no means to compel testimony by perpetrators, the TRC was left in the position of not being able to fully confront impunity.

Societal Catharsis

The Sierra Leonean TRC's objective of "providing a forum for victims to tell their story" recalls Minow's discussion of how healing hypothesizes that public testimony of victims and perpetrators affords opportunities for individuals and the nation as a whole to heal.⁹⁸ The restorative power of truth-telling can help the traumatized individuals to distinguish past, present, and future or to know that one's suffering is not solely private but instead part of a social or political cataclysm. The goal of **societal catharsis** is closely tied to the outcome of societal accounting discussed above, since as Minow pointed out, psychologists note that in order for truth-telling to have such a therapeutic effect, it must include the traumatic imagery and bodily sensations, sympathetic witnesses must be present to provide validation to survivors, and perpetrators and bystanders must take constructive roles.⁹⁹ Thus, to a certain extent the observations about societal accounting above apply also to how effective the TRC was to providing victims and perpetrators a forum to tell their story, effecting whether truth-telling that was occurring was sufficient to provide a therapeutic effect.

⁹⁸ MINOW, *supra* note 69 at 67.

⁹⁹ *Id.* at 70-74.

But societal catharsis is a slightly different observable outcome than societal accounting since it pinpoints the societal phenomenon of a snowball effect that is meant to occur as a result of the societal accounting, which should occur at the hearings. This outcome of engaging the society at large in a collective process of therapy is observable in various ways – whether the TRC is being discussed in public spaces and whether more people are coming to testify as the TRC progressed are two means that I paid attention to. Sierra Leonean society was not observably engaged in the TRC process at large – it was not a means that inspired talk about the atrocities and public attendance did not change as the TRC progressed. Two problems that plagued the TRC from inspiring a societal catharsis the NGO leaders spoke to me about were that it was not equipped to reach enough people to spur societal engagement and the commissioners did not inspire a collective process of therapy.

Hit & Run Hearings/Lack of Time & Resources

The most common complaint, recognized by the Director of Reconciliation of the TRC herself, was the TRC's limited effect in inspiring nationwide participation on account of its lack of time and resources, coupled with its organizational structure.¹⁰⁰

The TRC was on a time mandate of one year that was hampered by initial management problems and difficulty raising sufficient funds to enhance its operational potential.¹⁰¹ Additionally, the structure of hearings that occurred one week in Freetown

¹⁰⁰ Interview with Marteen Schozman, TRC Director of Reconciliation in Freetown, Sierra Leone (June 24, 2003).

¹⁰¹ See *Sierra Leone's Truth and Reconciliation Commission: A Fresh Start?*, INTERNATIONAL CRISIS GROUP, Africa Briefing 6, December 20, 2002, at <http://www.crisisweb.org>. [hereinafter ICG SL TRC REPORT]

and one week up-country, while initially seen as a means to ensure fuller national participation, had limited effect. Because of lack of outreach or sensitization before the TRC visited a locality, initial attendance by observers and witnesses was low, and only increased exponentially as the week progressed and the TRC presence in the town became known. Unfortunately, momentum built only in time for the TRC to wrap on Fridays. Then, after the hearings there was little to no follow-up sensitization or local reconciliatory efforts pursued by the TRC. Once the TRC left a locality its presence was no longer felt since there is very limited media that reaches up-country to follow hearings that were ongoing in Freetown or elsewhere.¹⁰²

One reason given for the TRC's limited outreach and sensitization that hampered its ability to create nationwide debate and therefore social catharsis was its lack of resources. Raising donations was difficult because the TRC did not do it directly, but rather the UN's Office of the High Commissioner for Human Rights (OHCHR) asked nations for contributions for the TRC as a choice among all of the other programs it helps administer. Also, since the Special Court of Sierra Leone began its fundraising, attention and monies were diverted from the TRC.

NGOs in Freetown are sympathetic to the reality that the TRC was low on funding, but do not agree that this should excuse its lack of effect throughout the country. They believe that the TRC strived so hard for "independence" from any local Sierra Leonean actors that it purposefully cut off a rich well of pre-existing social networks,

¹⁰² The only real media outlet outside Freetown is radio. Two NGOs, Talking Drum Studios and Forum of Conscience, work on creating radio programs on the TRC and distributing radios upcountry, respectively.

unions, and NGOs working up-country that could have helped facilitate sensitizations, outreach, trauma counseling, and statement-taking. They believe that with minimal costs, much more widespread sensitization could have occurred, which would have directly correlated to greater societal participation and knowledge, and therefore, societal catharsis.

Commissioners

The commissioners have a strong role to play in how well a TRC achieves societal catharsis. In general, commissioners direct investigations, shape commission policy, and write the final commission report.¹⁰³ In Sierra Leone particularly, commissioners were also the lead questioners during all testimony before the TRC. They introduced each day's hearings, and they facilitated reconciliation ceremonies. Importantly, commissioners were the public face of the TRC and in this role they can inspire societal interest, introspection, and debate that can lead to catharsis. In Sierra Leone, though, the commissioners were not capable in their roles as leaders in promoting nationwide societal catharsis.

Desmond Tutu stands out as the epitome of such an inspirational commissioner. He led a process of nationwide contrition in South Africa, represented in daily and extensive newspaper coverage and live hearings broadcast over national radio.¹⁰⁴ The Sierra Leonean commissioner selection panel (composed of representatives of politico/military party affiliation, the Sierra Leonean executive branch, the governmental human rights commission, the non-governmental inter-religious council, and non-

¹⁰³ HAYNER, *supra* note 1 at 216.

¹⁰⁴ *Id.* at 42.

governmental human rights groups) strove to model its commissioners in his likeness.¹⁰⁵ Yet, some on the panel were disappointed with the results.¹⁰⁶ The commissioners were seen as badgering to victims, complacent before ex-combatants, and sometimes oblivious to the testimony before them.

The panel's recommendations, based on interviews of the candidates, were meant to add the domestic Sierra Leonean perspective to the selection process, since the international commissioners were chosen by the UN high commissioner for human rights, Mary Robinson.¹⁰⁷ Yet their process seemed to break down, as their initial intention of deciding by consensus fractured on opposition to certain nominees. Instead, they decided on their recommendations by vote, and upon submission of their results to the UNHCHR's selection coordinator, who made the final decision, were ultimately shocked to find that their recommendations were largely ignored.¹⁰⁸

Unfortunately the international commissioners did not help to make up for the national commissioner's failure to inspire societal catharsis in Sierra Leone. Since they were only seconded to Sierra Leone part time, they did not establish a presence in the country.¹⁰⁹ Trials they did participate in were noted for inspiring greater participation, but these were few and far between. The internationals' absence combined with the nationals' incompetence amounted to the sad reality that the commissioners did not have

¹⁰⁵ Interview with Sheku Lehai, Director and Participant on TRC Commissioner Selection Panel, National Forum for Human Rights (NFHR) in Freetown, Sierra Leone (June 25, 2003).

¹⁰⁶ *Id.*

¹⁰⁷ HAYNER, *supra* note 8 at 217.

¹⁰⁸ Lehai, *supra* note 105.

¹⁰⁹ See ICG SL TRC REPORT, *supra* note 101.

a strong, independent voice as leaders of the TRC, and could not build the momentum necessary to inspire societal catharsis.

While surely it is not solely the commissioners' responsibility to inspire victims and ex-combatants to testify, they can play a significant role in leading public acceptance and participation in the TRC. Without enough of a representative sampling of victims, ex-combatants from all rebel groups, and government forces, it seems difficult to get to the goal of societal catharsis. And further, without public attention to and debate surrounding the TRC, while individuals may be reconciling, its effects to provoke societal catharsis nationwide are doubtful.

The Truth Must be Told

That the TRC should “break the cycle of violence” that helped perpetuate crimes in Sierra Leone is a very broad-based aspiration. By itself it is difficult to imagine what must be accomplished to achieve this goal. But by looking at the accountability literature, that the **truth must be told** surrounding atrocities and making it known to all Sierra Leoneans appears as the most observable goal that could lead to breaking a cycle of violence since telling the truth during testimonies is meant to lay the groundwork for personal healing. Also, achieving societal catharsis by engaging perpetrators and bystanders to take part would also seem to contribute to this goal. To what degree these steps occurred at the TRC is doubtful for two reasons – first, as discussed above the commissioners of the TRC did not lead in a way conducive to societal catharsis, and second there was not much truth-telling (as I understand it to be defined in the reconciliation literature) actually occurring during the TRC testimonies.

What is “Truth”? – Western “truth” was not Told

That the truth be told in order to get to an established truth of the events surrounding atrocities is seen as the overriding principle of TRCs, as Zalaquett sets out.¹¹⁰ Truth is so fundamental a concept to some that it is seen as the absolute, necessary step that creates a vehicle for personal healing and is a prerequisite to individual, interpersonal, or inter-communal reconciliation. Yet, Priscilla Hayner, a founder of the modern era of truth commissions herself, ironically notes that the truth is hardly ever told at truth commissions.¹¹¹ And furthermore, can the reconciliation literature stand for varying definitions of what truth is? For Sierra Leoneans, for example, truth may be defined as an acceptable explanation that satisfies the community in accordance with a divine sense of order. Sierra Leone’s TRC provides an interesting illustration of Hayner’s observation that Western-style truth was not being told.

Tim Kelsall takes up this paradox in relation to Sierra Leone’s TRC.¹¹² At TRC hearings in Tonkolili district the victim’s testimony was detached and ex-combatants were evasive, distancing themselves from horrendous crimes that many villagers were well aware that they committed. Kelsall remarks that, “The drama of healing through public confession and grief, which enlists a number of tropes in the Christian imaginary, such as suffering, martyrdom and resurrection, and explains in part the Western fascination with truth commissions, was a story in which most participants seemed

¹¹⁰ ZALAUQUETT, *supra* note 25 at 31.

¹¹¹ HAYNER, *supra* note 8 at 30.

¹¹² Tim Kelsall, Truth, Lies and Ritual: Preliminary Reflections on the TRC in Sierra Leone (forthcoming in HUM. RTS. Q., not to be cited without author’s permission) (on file with author).

reluctant to be enrolled.”¹¹³ Of the five ex-combatants who testified, only one admitted individual responsibility for his actions and appeared genuinely contrite.

Instead of truth-telling as a value unto itself being accomplished in Tonkolili, Kelsall saw the addition of ritual as the motivating factor toward communal catharsis and eventual reconciliation. He observed the four days of quasi-judicial testimony not as a means of getting to the truth but rather as applying psychological pressure on ex-combatants that culminated in the final day of ritual ceremonies where they asked forgiveness by the Magburaka community.

Objective Historical Account of the Conflict

It is too early to tell whether the TRC will produce an objective historical account of the conflict to break with the past.¹¹⁴ Yet the outlook is mixed. On the one hand, the commissioner overseeing its writing was William Schabas, who inspires much confidence in Sierra Leone on account of his stellar international reputation; but on the other hand there is suspicion that the TRC is not confronting conventional wisdom of why and how the war occurred.¹¹⁵ This includes fear that broad historical events such as banning of political parties and the nature of the war as being socio-economic will be left

¹¹³ *Id.* at 11.

¹¹⁴ My research in Sierra Leone was undertaken between May and August 2003, when the TRC was in its hearing stage, so I do not have interviews that post-date the release of the TRC report, which occurred in January 2005. It is possible that I can follow-up with some of my initial interviewees, but was unable to do so in time for this draft of the paper.

¹¹⁵ Interview with Sheku Lehai, *supra* note 105.

out, since the hearings have been specifically focused on the patterns and styles of atrocities.¹¹⁶

Anticipation of whether the TRC report would actually break with the past by providing an objective historical account of the conflict was linked to the emphasis in hearings on individualized guilt being the focus of hearings – the goal of societal accounting.¹¹⁷ There was certainly a fear that the structure of hearings focused on specific patterns of abuses was going to mean that the historical account would ignore the broader causes of the war. This questions whether the structure of a testimony-based model of reconciliation works for a war that is deeply embedded in years of repression and socio-economic degradation.

¹¹⁶ Interview with Helen Bash-Taqi *supra* note 93.

¹¹⁷ Interview with Sheku Lehai, *supra* note 105.

CHAPTER 5 – REVISITING THE CONCEPTUAL FRAMEWORK OF TRANSITIONAL JUSTICE: ACCOUNTING FOR THE EMPIRICAL OBSERVATIONS

Introduction

Priscilla Hayner, a main practitioner in the transitional justice field when faced with practical realities of how certain TJMs turn out labels them “failures.”¹¹⁸ The head of reconciliation for SL’s TRC preferred to characterize its institutional difficulties as circumstantial particularities to Sierra Leone. And a public diplomat of the ICTR once categorized its shortcomings to me as a result of a lack of capacity of developing countries. I posit instead, that based on what we can draw from these observations of how TJMs are working to achieve reconciliation on the ground, coupled with knowledge of how bureaucracies work, we can draw larger conclusions about the model of TJMs in post-conflict nations, what its limitations are, and how to improve it.

This chapter sets out to analyze the results and problems associated with achieving reconciliation in SL’s TRC, sorts out what these results say about the Sierra Leonean case in particular and about the TJM model in general, and makes some policy recommendations about how to better ally the reconciliation goals of TJMs with its institutional forms.

Lack of Societal Accounting

On the one hand, the lack of societal accounting inspired by SL’s TRC since there was not full participation can be traced to factors entirely out of its control, like the fact that the SCSL came into existence just as the TRC was getting underway and therefore

¹¹⁸ HAYNER, *supra* note 8 at 215.

inhibited testimony before the TRC. This observation may have analytical value for future transitional justice joint endeavors between tribunals and truth commissions, but it does not tell us much about the truth commission model on its own.

On the other hand, the nature of the Sierra Leonean conflict raises questions about the structure of a transitional justice model that utilizes societal accounting as a primary objective. When an entire generation's worth of young men perpetuated killings, rapes, and burnings, is the root cause of atrocity these individual's actions coupled with societal complacency? More likely, these atrocities are symptomatic of even deeper societal degradation such as endemic poverty and lack of opportunity for this generation that was forced into killing. The structure of hearings focused on specific pattern of abuses because of its quasi-judicial model left many Sierra Leoneans to suspect that the broader causes of war will be ignored. This questions the structure of a testimony-based model for a war that is deeply embedded in years of repression and socio-economic degradation.

This line of evaluation of the truth commission model at work in Sierra Leone is not limited to its own experience, but I would posit rather re-enacts conditions that a TJM would face in any extremely underdeveloped country. There is great difficulty trying to distill through individualized, testamentary experiences what amounts to decades of economic underdevelopment and political repression. The goal of societal accounting should be changed from its basis in individuals' testimony that is meant to separate the specific guilty individuals from the general population, to a notion of societal accounting that addresses the root causes of the war.

Institutional theory warns us that bureaucracies with vague goals that are inherently difficult to measure are especially prone to have their workers' revert to their professional and attitudinal biases. I believe that this inclination is at play here, for even though the workers at SL's TRC knew that systemic violence plagued the country for years and that an entire cross-section of the population is implicated in the atrocities, the structure of individualized hearings was not adjusted. There was a blind faith by the Western workers – many of whom had a legal background – that reconciliation must be played out through individuals' testimonies. Commissioners at the TRC were so immune to allowing the structural development crisis from entering the hearings, that at the conclusions of a witness's testimony when asked by the commissioner what can be done to help the witness, if s/he responded that s/he needed a job or money, the commissioners would not address this comment. They tried to focus the witness back to the fact that s/he'd be helped if more perpetrators came forward to confess to their atrocities.

A response to these conclusions is that truth commissions are meant to heal a post conflict society in a different method than development aid, and that development agencies are in place to deal with that aspect of social upheaval. Nonetheless, there is room for improvement within the TJM model to provide for expression of these observations. For example, these observations say something about the scope and timing of the commissions. Perhaps a country should not rush into a TJM as an immediate post conflict response, but rather wait until minimum levels of economic development are in place before starting. Also, perhaps the scope of inquiry of the quasi-judicial structure is too narrow for application in countries where violence is systemic. Rather, there should

be space within the TJM model for a frank discussion of deeply underlying causes of underdevelopment and violence. Finally, there should be greater emphasis on aiding particular victims and villages to economically recover from their dire economic straits, such as having reparations built into the structure, instead of reparations only appearing as a potential if distant result of one's testimony.

Lack of Societal Catharsis

Both disappointing commissioners and lack of time and resources appear at first glance as mere obstacles on account of the circumstances in Sierra Leone. But they actually point to the drifting of a truth commission's model from its core principle of being a mechanism of the people. Herz, one of the early accountability theorists, noted that the nature of all transitions is idiosyncratic: "Each case takes place in its own historical environment, under its own, often restraining, circumstances, and what can or cannot be done, especially in regard to state crimes, depends of these circumstances."¹¹⁹

This message was reiterated in South Africa's TRC structure: "The best way for a transitional state to deal with its past so as to achieve a democratic system [is for] each state [to] identify a model that most suits its individual situation and will be most likely to ensure a peaceful and lasting move to democracy. One can never devise a universal model that every transitional state could blindly apply in its pursuit of democracy."¹²⁰ For example, in retrospect it is seen as wise that Mandela took advice of a community

¹¹⁹ HERZ, *supra* note 51 at 21.

¹²⁰ Lorna Megregor, *Individual Accountability in South Africa: Cultural Optimum or Political Façade?*, 95 AM. J. INT'L L. 32, 44 (2001).

panel that commissioners should not be internationals.¹²¹ And, the structure of individual amnesty in retrospect is still regarded as the best compromise for the fragile moment that South Africa was in at the time of its TRC's conception since on the one hand it kept de Klerk at the negotiating table with Mandela, and on the other hand it side-stepped blanket amnesty.

Sierra Leone's TRC seems to have drifted from this premise, as represented in several of the observations above. First, its inception was driven strongly by the influence of the OHCHR and experts it hired to help Sierra Leone with the construction of its TRC.¹²² International influence was compounded by use of international commissioners and OHCHR's role in fundraising. Sierra Leonean civil society played a role in choosing its own national commissioners, but it was limited by the political factors discussed above. Civil society's role was further circumscribed in Sierra Leone's TRC when its advice that its truth-telling structure to be more heavily influenced by local inducement rituals was ignored.¹²³ Once the structure was premised as independent from pre-existing Sierra Leonean organizations already working on private reconciliation and reintegration of ex-combatants, the TRC further buttressed itself against involvement of local NGOs by preventing them from participating as statement takers and not using them for outreach or sensitization.

¹²¹ MENDEZ, *supra* note 53 at 270.

¹²² O'Flaherty, *supra* note 31.

¹²³ Manifesto '99 (2002) [hereinafter Manifesto '99] (discusses traditional methods of conflict management/resolution of possible complementary value to the proposed SL TRC) (Manifesto '99, Freetown) (on file with author).

The lack of societal catharsis in Sierra Leone is linked to the institutional limitation presented by the TRC being beholden to a larger entity that controls its freedom of action. Wilson warns that bureaucracies that are not given their own ability to fundraise or change course midstream have their hands tied, and are therefore likely to become ineffective. The model of TJMs which are either governed by the UN Security Council or the Office of the High Commissioner of Human Rights or a government which loses interest in it are often left without the political will to follow through on hearings or policy recommendations once the mandates are written. Furthermore, the suspicion of involving local NGOs based on an insistence on being independently objective shows that the bureaucratic imperative of objectivity was in direct conflict with utilizing resources that could have helped the TRC reach a greater amount of people, which plausibly could have helped the TRC achieve its goal of engaging more Sierra Leoneans in social catharsis.

The notion that the Sierra Leonean TRC was not built enough as a grassroots endeavor has two possible implications. One is that the truth commission model has drifted too far from one of its initial guidelines – that it be first and foremost homegrown to be decided on by democratic method in the country where atrocities occurred. Sierra Leone’s experience therefore can provide a wake-up call to actors in the field of transitional justice to remember its roots of shaping a model for particular cultural, political, and economic circumstances of the post-conflict nation.

A more dangerous implication of the same observation is questioning the usefulness of a model of a TJM altogether. This line of reasoning would regard the

presence of a model as part and parcel of hampering a truly grassroots experience whereby the survivors in a post conflict nation envision and enact the particular means by which they see fit to transition from mass atrocities. It also raises the concerns of postcolonial theorists – that a Western, international model that is imposing a certain legal order, even though claiming neutrality and universalism, is not capable to break from a civilizing imperative.¹²⁴ Perhaps if the UN or international NGOs truly provided resources for a grassroots endeavor instead of sponsoring their human rights models of TRCs and international tribunals, more effective reconciliation could occur.

Western Truth Not Being Told

That the truth be told in order to get to an established version of the truth, as a precondition to individual healing and reconciliation, are not causal steps occurring in Sierra Leone's TRC. This raises questions about the paradigmatic objective of truth commissions, like whether a truth telling principle that is so well defined in Western culture is the best means to post-conflict reconciliation in particularly African nations that do not have strong traditions of Western-style truth telling.

The goal of individualized truth telling is a goal that should be adjusted to the particularities of the conflict at hand and the specific cultural influences in the post-conflict society. The definition of truth should be widened to include locally accepted narratives, such as those based in a community-accepted outcome. As Rosalind Shaw's work points out, in Sierra Leone blessings and narratives which were based in marking

¹²⁴ Darian-Smith, *supra* note 7 at 296.

ex-combatants as moral subjects ready to put the past behind them are more characteristic of local means of getting past previous violence.¹²⁵ Reconciliation based in truth telling had only tangential relevance, and accountability through truth had no role in bringing ex-combatants back into communities.¹²⁶

As above, a greater body which controls the mandate of the local institution and an attitudinal bias among the workers combined to make the TJM less able to achieve its goal of reconciliation. The institutional imperative set at the top through a mandate which assumes the inherent value of truth-telling plus the workers' faith in truth-telling hampered the TRC from embracing more culturally relevant forms of reconciliation that were present in Sierra Leone.

But questioning the usefulness of a TJM altogether is only the most skeptical route by which to understand this evaluation. Instead, it is possible to see the Sierra Leonean TRC experience as a lesson to return to the roots of taking seriously the need for a TJM to be of the people it is meant to serve. For example, a report was written by Sierra Leonean NGOs before the final TRC structure was decided upon, which suggested that ritual be tightly intertwined with inducing truth telling.¹²⁷ It foresaw a much greater role for ritual throughout the testimony stage, as opposed to the isolated larger ceremony at the end of each week. This ritual component was only integrated on a much smaller scale by the UNHCR resulting in the TRC's final form. Involving the local

¹²⁵ Rosalind Shaw, *Transitional Subjectivities: Reconciling Ex-Combatants in Northern Sierra Leone* (preliminary draft, not to be cited without author's permission) (on file with author).

¹²⁶ *Id.* at 23.

¹²⁷ Manifesto '99, *supra* note 123.

constituencies' methods of healing must be considered the paramount means of getting to a goal of reconciliation.

Objective Yet Incomplete Account of the Conflict

Anticipation of whether the TRC report would actually break with the past by providing an objective historical account of the conflict was linked to the emphasis in hearings on individualized guilt being the focus of hearings – the goal of societal accounting. There was certainly a fear that the structure of hearings focused on specific patterns of abuses was going to mean that the historical account would ignore the broader causes of the war. This questions the structure of a testimony-based model for a war that is deeply embedded in years of repression and socio-economic degradation.

Yet the goal of writing an historical account of the conflict in order to disseminate it among the population seems a fairly operational one in institutional theory terms. It creates a clear goal – producing a report – that is less prone to vagueness as other reconciliatory goals such as telling the truth leaving the term “truth” without a defined discourse of reference. The outcome of a written document, since it is a clear, operational goal also provides the TJM's workers with a task rather than an undefined means of how to get to reconciliation. It is just necessary for the endeavor of history-writing to be inclusive of local narratives and open for full societal participation. For example, rather than too much of an emphasis on individuals' acts, which do not resonate with reconciliatory notions in Sierra Leone, actual causes of the atrocities must be addressed.

CHAPTER 6 - CONCLUSION

These conclusions and policy recommendations in Chapter 5, of how to improve the TRC reconciliation model, link the Sierra Leonean experience to the goals of reconciliation theory. Along the way of evaluating the TRC model, I have also hinted at the inadequacies that the reconciliation literature makes about bringing reconciliation to post-conflict postcolonial nations. In this conclusion I would like to explore some of the theoretical shortcomings of reconciliation theory, linking them to where thinking about where the theory of post-conflict reconciliation should head in the future.

“Societal accounting”, “societal catharsis”, “truth telling”, “objective accounting” and even the overarching label of “reconciliation” itself are all Judeo-Christian and Western legal vocabulary. As words that comprise the language of post-conflict reconciliation and the goals of models of transitional justice that (mostly) Western actors bring to post-conflict postcolonial nations, it is difficult to see why they would resonate with non-Western local modalities.

Yet Zalaquett, Mendez, Kritz, Minow, and others debate only about which of these goals should apply in which post-conflict situation and whether they can realistically be achieved through a tribunal, or in the more informal trappings of a truth commission. I believe this occurs on account of the assumption that human rights norms are universally applicable. Of course this assumption of universality has been questioned for decades – at least since postmodern theorists entered the field of international legal

theory discourse as the “New Stream.”¹²⁸ Since then, Third World Approaches to International Law scholars¹²⁹ as well as postcolonial theorists¹³⁰ have diversified the field. In fact, reconciliation theory and postmodern international legal theory both developed simultaneously in the 1980 and 1990s.

But the liberal reconciliation theorists and the postmodernists fundamentally disagree about universality of norms, which is why they talk past each other. And liberals have filled the field of human rights lawyers, international organization field workers, humanitarians, NGO staff, and diplomats – the policy makers and street-level bureaucrats who have created and implemented transitional justice mechanisms. To be fair, as discussed in Chapter 2, transitional justice theory began as a response to the transfer of Eastern European authoritarian regimes to democracies. Thus, Western motifs applied in that milieu. It is in postcolonial South American, African, and Asian transitions, though, that most of Hayner’s “failed” TJMs occurred. My research and analysis concludes that this is not coincidental or a product merely of particular circumstances, but that on the one hand certain assumptions built into reconciliation theory just do not work on the ground in non-Western cultures, and on the other hand

¹²⁸ See Kennedy, *supra* note 3.

¹²⁹ See BALAKRASHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE* (2003); R.P. Anand, *Attitude of the Asian-African States Toward Certain Problems of International Law*, 15 INT’L & COMP L.Q. 55 (1966); James Thuo Gathii, *Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy*, 98 MICH. L. REV 1996 (2000).

¹³⁰ See Antony Anghi, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 SOC & LEGAL STUDIES 321 (1996); Dianne Otto, *Subalternity and International Law: The Problem of Global Community and the Incommensurability of Difference*, 5 SOC & LEGAL STUDIES 337 (1996); Darian-Smith, *supra* note 7.

certain problems endemic to particular conflicts find no solution in Western reconciliation theory.

In the first category of assumed universal principles fall truth telling, individualized culpability, and catharsis; in the second category of particularities of (some) postcolonial reality is systemic violence and poverty. Without feigning to draw grand philosophical conclusions about whether universal truths exist, there does seem to be a disconnect between the ideals TJMs come to a postcolonial nation with and the local understandings of the endeavor. That some Sierra Leoneans and Rwandans I know see these international projects as neo-colonial is important in and of itself; perhaps more important, though, is that on-the-ground practice of what are Western notions of reconciliation do not translate directly to local understandings. Either the international must be informed by the local, or what I fear will be a truly postcolonial mistake – international notions of justice and reconciliation will become the totalizing narrative which overtake, dissipate, and eventually extinguish the alternative, local means of reconciliation.

Liberals may not be disturbed by this outcome if they see local, African justice as having been the source of conflict to begin with. If this is the case, my analysis of how to improve TJMs, or how post-conflict reconstruction efforts should be approached differently, is not useful to them. They will take up the mantle of neo-colonists and gladly impose their new “civilizing imperative” in the form of universal human rights norms. Others, I hope, will find it informative that transitional justice theory must look to the local particularities of what caused the conflict at hand as well as local reconciliation

traditions in order for them to be meaningful. Without fear of losing objectivity, international actors must partner more fully and variously with local civil society who will inform them of how to proceed successfully in transitioning out of their particular conflict. Unlearning the term “model” is a first step.