

Searching for the Right to Truth: The Impact of International Human Rights Law on National Transitional Justice Policies

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ABSTRACT

This Article focuses on the right to truth and its interaction with the duty to bring perpetrators to justice following a period of gross violations of international human rights law and serious violations of international humanitarian law. It explores how truth-finding and criminal justice programs interact, and how States can most comprehensively satisfy their obligations with regard to the right to truth and the duty to bring perpetrators to justice, given the raft of practical limitations that a State may face in periods of political transition. The Article argues that even when a State is able to carry out prosecutions, it is likely obliged to look for additional strategies, including truth commissions, to more comprehensively fulfill its international human rights obligations. Additionally, where an exhaustive suite of prosecutions is not feasible in the short term, truth commissions and other transitional justice mechanisms can be employed to commence the fulfillment of the right to truth, though these should be implemented with a view to proceeding to thorough criminal justice processes as soon as the State's political context permits.

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INTRODUCTION

Following a period of gross and systematic violations of human rights and serious breaches of international humanitarian law, a government must not only respond to political pressures but also comply with international law. The field of transitional justice was developed by practitioners, policy makers, and

academics to guide government responses in order to achieve broad notions of justice while maintaining peace and stability.¹ Apart from the continuing obligation to protect individuals within its jurisdiction from human rights violations,² a State must provide reparations to victims of past human rights violations,³ and may be required to bring perpetrators to justice.⁴ A State must also ensure the fulfillment of the right to the truth, which obliges governments to investigate and reveal all available information regarding past human rights violations. The interaction of these obligations ensures that transitional justice policies are best suited to the maintenance of peace and the restoration of the dignity of victims, rather than merely forming policies that are politically expedient for the government. The impact of international human rights law on transitional justice policies is thus a ripe area for exploration. The norms and jurisprudence of international criminal and humanitarian law, both of which are relevant to periods immediately following conflict or grave human rights abuses, are also considered in this Article when determining the scope of the right to truth and the duty to bring perpetrators to justice.

This Article builds on jurisprudence and commentary from the last decade to conclude that the right to truth, often viewed as a soft (*lex ferenda*) obligation, has now crystallized into a legally binding (*lex lata*) norm. The Article considers the interaction of the right to truth with the duty to bring perpetrators to justice. Prosecutions are commonly regarded as the primary means of addressing both of

1. . See Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69 (2003) (defining transitional justice as “the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes”).

2. . See International Covenant on Civil and Political Rights art. 2(1), Dec. 16, 1966, S. TREATY DOC. 95-20, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR] (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.”).

3. . Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR]; ICCPR, *supra* note 2, art. 2(3); International Convention on the Elimination of All Forms of Racial Discrimination art. 6, Dec. 21, 1965, S. EXEC. DOC. C, 95-2 (1978), S. TREATY DOC. 95-18, 660 U.N.T.S. 195, 212 (all of which require States to provide “remedies” for violations of human rights); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, Dec. 10, 1984, S. TREATY DOC. No. 100-20 (1988), 1465 U.N.T.S. 85, 113 (requiring “redress” and “compensation”); Convention on the Rights of the Child art. 39, Nov. 20, 1989, 1577 U.N.T.S. 3 (1989) (requiring “measures to promote physical and psychological recovery and social reintegration of a child victim”); Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 3, Oct. 18, 1907; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 18 June 1977 art. 91, Jun. 8, 1977, 1125 U.N.T.S. 3 (requiring “compensation”); Rome Statute of the International Criminal Court art. 75, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (requiring “reparations . . . including restitution, compensation and rehabilitation”).

4. . See Part III: The Duty to Bring Perpetrators To Justice, *infra*.

these obligations.⁵ However, this Article argues that even when a State is able to carry out a comprehensive suite of prosecutions, it will usually be obliged to look for additional strategies to more comprehensively fulfill its international obligations. In this regard, the value of truth commissions in satisfying truth-finding obligations and the duty to bring perpetrators to justice is explored in detail.

The Article considers how the right to truth and the duty to bring perpetrators to justice can both be most fulsomely satisfied, given the raft of practical limitations that a State in transition may face. These factors include a government's institutional or financial capacities,⁶ the extent of the past violations,⁷ whether perpetrators remain embedded in State institutions,⁸ and the stability of the current political environment.⁹ Properly incorporating these factors into the design of a country's transitional justice program will assist States in determining the most productive division of labor between their obligations regarding truth and justice and in choosing among the various

5. . *Almonacid-Arellano v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 150 (Sep. 26, 2006) (holding that “the ‘historical truth’ included in the reports of the above mentioned Commissions is no substitute for the duty of the State to reach the truth through judicial proceedings”); *El-Masri v. The Former Yugoslav Republic of Maced.*, Judgment, App. No. 39630/09, Eur. Ct. H.R. ¶¶ 191–93 (Dec. 13, 2012); *Contreras v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 232, ¶ 170 (Aug. 31, 2011); Human Rights Council Res. 9/11, ¶ 4, Sept. 18, 2008, U.N. Doc. A/HRC/9/L.12; *see also* Juan Méndez and Francisco Bariffi, *Truth, Right to, International Protection*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT’L LAW, Jan. 2011, ¶ 13 (stating that “[a]s regards the duty of the State to prosecute grave human rights violations, the adequate fulfillment of this obligation by the State could be the most complete and satisfactory method of obtaining both truth and justice, by means of transparent criminal trials conducted with full guarantees of due process”).

6. . *See, e.g.*, Paul van Zyl, *Justice Without Punishment: Guaranteeing Human Rights in Transitional Societies*, in *LOOKING BACK, REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA* 55, 60–64 (Charles Villa-Vicencio & Wilhelm Verwoerd eds., 2000) (“a combination of the scale and nature of past crimes, the absence of evidence, and a dysfunctional criminal justice system may mean that a state is simply unable to punish”).

7. . *Id.*

8. . *Id.* 54, (arguing that where security forces are “under the control of, or loyal to, the previous regime” and are “so powerful that any attempt to prosecute them or their allies could lead to . . . a refusal to allow transition to democracy [or] a return to military rule” this may be a legitimate reason why a successor government may not be able to prosecute past abuses).

9. . *See, e.g.*, Omar Drammeh, *Rethinking Transitional Justice: The Simultaneous Existence of the Truth & Reconciliation Commission (TRC) and the Special Court for Sierra Leone*, Paper delivered to MAKING INSTITUTIONS WORK FOR THE POOR, ANNUAL CONFERENCE FOR THE NORWEGIAN ASSOCIATION FOR DEVELOPMENT RESEARCH, Bergen, Nov. 5-7, 2007, 7 (describing the factors affecting the Special Court of Sierra Leone’s approach to prosecutions, and observing that “[t]he extent and form of such prosecutions is generally viewed as being determined by local political context at the time of transition”).

mechanisms that can be employed to satisfy them. This should lead to a transitional justice program with various integrated, and possibly sequenced,¹⁰ mechanisms. The Article concludes that truth commissions should often be employed to play a fruitful, efficient, and complementary role in fulfilling the right to truth.¹¹ To do so, truth commissions must be implemented pursuant to a long-term strategy that clearly delineates how they interact with criminal prosecutions and other transitional justice processes.

This Article is divided into seven parts. It first considers how governments in times of transition must design policies that address the practical and political challenges they face while also complying with international human rights law. In Part II, the Article argues that the right to truth has crystallized into a hard norm, with which governments are bound to comply, and sets out the content of that right. State obligations to bring perpetrators to justice are considered under Part III, followed by a discussion on how the right to truth and the duty to bring perpetrators to justice interact in Part IV. Part V considers the capacity of prosecutions and of truth commissions to fulfill these obligations and addresses potential challenges. In Part VI, the Article navigates various practical factors that impact a State's ability to comply with its obligations. Part VII discusses the potential benefits of sequencing different transitional justice mechanisms. The Article concludes that while prosecutions will generally have a strong role to play, States will often be bound to implement some additional truth-finding processes to adequately fulfill the right to truth.

I.

DECISION-MAKING IN TIMES OF TRANSITION

Various pressures will influence government policies when transitioning from a period of gross and systematic human rights violations. Periods of prolonged armed conflict often significantly deplete a government's coffers, creating financial restrictions. Ruined infrastructure or a governmental apparatus staffed by bureaucrats loyal to the former regime may limit the new government's capacity to effectively implement new policies. The government may also find its citizens divided and traumatized, leading to popular reprisals or cycles of violence.¹² A State's police force or military may have been complicit

10. . See Part VII, *infra*.

11. . Lydiah K. Bosire, *Overpromised, Underdelivered: Transitional Justice in Sub-Saharan Africa*, 3 SUR – INT'L. J. HUM. RTS. 70, 79 (2006). Truth Commissions can also contribute to processes of reparations, recommend institutional reform, and provide a platform of dialogue between victims and perpetrators, which can contribute to societal healing and reconciliation. However, such functions are outside the scope of this Article.

12. . See, e.g., ERICA JAMES, DEMOCRATIC INSECURITIES: VIOLENCE, TRAUMA, AND

or actively involved in the past abuses and may pose a threat to the maintenance of a peaceful society. An effective government must be able to respond to and work within such constraints in determining its roadmap for the future.

Significant legal constraints also exist. In particular, international human rights law imposes duties on the State to bring perpetrators to justice (while according due process to all persons facing prosecution),¹³ to provide reparations to victims,¹⁴ and to uncover the truth.¹⁵ These obligations create a normative framework to guide governmental action, setting out “the right thing to do” in a way that cannot be ignored regardless of what a government’s political concerns may demand. They also apply important pressures on governments¹⁶ to ensure that responses to atrocity serve two important goals: the restoration of dignity for the victims of human rights violations¹⁷ and the non-recurrence of those violations.¹⁸

While international human rights law creates normative pressures on governmental responses to atrocity, this must not lead to responses that are unbalanced or that fulfill one particular obligation to the detriment of another.¹⁹ The question should not be whether to bring a perpetrator to justice or whether to uncover and record the truth, but how justice can be done and what process of truth-finding can be embarked upon given the countervailing pressures.²⁰ Thus,

INTERVENTION IN HAITI 12–13 (2010).

13. . See Part III, *infra*.

14. . The duty to provide reparations to victims is outside the scope of this Article, and will not be considered in detail.

15. . See Part II, *infra*.

16. . This Article focuses on obligations on national governments. Accordingly, efforts by international bodies at truth-finding or prosecutions will not be considered in detail.

17. . Navanethem Pillay, Address by Ms. Navanethem Pillay United Nations High Commissioner for Human Rights at the UN Approach to Transitional Justice (Dec. 2, 2009), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9663&LangID=e#sthash.BEFkcbxr.dpuf> (“[T]ransitional justice . . . seeks to restore and protect the dignity of individuals as bearers of fundamental human rights and freedoms.”).

18. . United Nations, *Guidance Note of the Secretary-General, United Nations Approach to Transitional Justice*, (Mar. 2010), 4, http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf (highlighting that transitional justice processes should “ensure the right of victims to reparations, the right of victims and societies to know the truth about violations, and *guarantees of non-recurrence of violations*, in accordance with international law” (emphasis added)).

19. . Eduardo González Cueva, *Seeking Options for the Right to Truth in Nepal*, ICTJ BRIEFING (Nov. 2012) at 2, <http://ictj.org/sites/default/files/ICTJ-Briefing-Paper-Nepal-Ordinance-Dec-2012-ENG.pdf>; Juan E. Méndez, *Accountability for Past Abuses*, 19 HUM. RTS. Q. 255, 256 (1997).

20. . Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 43 (2002) (stating that “prosecution and forgetting are not the only options available in the context of transitional justice”).

a State cannot rely on its inability to prosecute more than a handful of accused individuals as an excuse for not considering other complementary truth-finding mechanisms. This Article considers the interaction of truth-finding and justice processes in more detail in Part IV, before then exploring the various processes available to assist with truth-finding and bringing perpetrators to justice in Part V.

II.

THE RIGHT TO TRUTH

A. Content

The right to truth began as a general and somewhat flexible doctrine in the 1980s, but regional human rights courts have more precisely articulated and more strictly enforced the right in recent years.²¹ It was first enunciated not as an individual right, but by the corresponding State obligation to investigate.²² In *Velasquez-Rodriguez*, the Inter-American Court of Human Rights spoke of a State's obligation to "carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible,"²³ and to inform "the relatives of the fate of the victims and, if they have been killed, the location of their remains."²⁴

The right to truth has been held to belong not only to victims and their families,²⁵ but also to victims of similar crimes and to society as a whole.²⁶ In addition to holdings by the European Court of Human Rights Grand Chamber, the Inter-American Court of Human Rights, and the Inter-American Commission on Human Rights, references to the right of the general public to

21. . Paul van Zyl, *supra* note 6, at 53, 60–64.

22. . Méndez, *supra* note 19, at 261.

23. . Velásquez Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 174 (July 29, 1988).

24. . *Id.* ¶ 181.

25. . See, e.g., Comm'n on Human Rights Res. 2005/66, U.N. Doc. E/CN.4/RES/2005/66, at 2 (Apr. 20, 2005) ("[s]tressing the imperative for society as a whole to recognize the right of victims of gross violations of human rights and serious violations of international humanitarian law, and their families, within the framework of each State's domestic legal system, to know the truth regarding such violations").

26. . El-Masri v. The Former Yugoslav Republic of Maced., Judgment, App. No. 39630/09, Eur. Ct. H.R., ¶ 191 (Dec. 13, 2012); Lenahan (Gonzales) v. United States of America, Merits, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 193 (July 21, 2011); Moiwana Village v. Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 204 (June 15, 2005); Mack Chang v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 274 (Nov. 25, 2003).

truth have been made by the Human Rights Council²⁷ and the General Assembly,²⁸ as well as by expert studies and reports.²⁹

The types of “truth” that a State is now bound by international law³⁰ to genuinely attempt³¹ to reveal fall within two categories. First, a government must endeavor to uncover the truth about each particular incident, including the human rights violations suffered, the identity of the victim, the identity and responsibility of the perpetrator and, for disappearances, the victim’s whereabouts.³² This Article refers to such truths as “incident-specific truths.” Second, victims and the general public are also entitled to the “full and complete truth”³³ about the systemic or structural causes and circumstances of the events in question and any patterns of abuse.³⁴ This second category of truths is referred to herein as “structural truths.” The structural truths that a truth commission might articulate include the predominant societal factors that led to ethnic violence, such as when Kenya’s Truth, Justice and Reconciliation Commission found that “historical grievances over land constitute the single most important driver of conflicts and ethnic tension in Kenya.”³⁵ Truth commissions might also explain how government policies at the time of the

27. . Human Rights Council Dec. 2/105, at 1 (Nov. 27, 2006); H.R.C. Res. 9/11, *supra* note 5, at 2–3; Human Rights Council Res. 21/7, ¶ 3, U.N. Doc. A/HRC/RES/21/7 (Oct. 10, 2012).

28. . Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, ¶ 24, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

29. . Comm’n on Human Rights, Study on the Right to the Truth, ¶ 58, U.N. Doc. E/CN.4/2006/91 (Feb. 8, 2006) [hereinafter *Study on the Right to Truth*]; Comm’n on Human Rights, Report of the Independent Expert to Update the Set of Principles to Combat Impunity, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005), Principles 1, 2, 19 and 31.

30. . The right to truth has a diverse range of sources, which are discussed in Part II (C) (“Sources: Treaties and Interrelated Rights”) and Part. II(D). (“Sources: State Practice and Customary International Law”), *infra*.

31. . Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 174–81 (July 29, 1988) (holding that “[t]he duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result”); *see also* Méndez, *supra* note 19, at 264.

32. . Méndez & Bariffi, *supra* note 5, ¶ 6; González Cueva, *supra* note 19, at 2.

33. . *Study on the Right to the Truth*, *supra* note 29, ¶ 59; *see also* H.R.C. Res. 21/7, *supra* note 27, at 3 (acknowledging the right “to know the truth regarding such violations, to the fullest extent practicable, in particular the identity of the perpetrators, the causes and facts of such violations and the circumstances under which they occurred”).

34. . Valle Jaramillo v. Colombia, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 192, ¶ 102 (Nov. 27, 2008); *see also* Méndez and Bariffi, *supra* note 5, ¶ 5; *Study on the Right to the Truth*, *supra* note 29, ¶ 59; Report of the Independent Expert to Update the Set of Principles to Combat Impunity, *supra* note 29, Principle 2.

35. . TRUTH, JUSTICE, AND RECONCILIATION COMM’N, REPORT OF THE TRUTH, JUSTICE AND RECONCILIATION COMMISSION, VOL. IV, at 8 (May 2013).

violations ensured rights violations remained “unpunished and . . . impossible to redress,” as was found by Argentina’s National Commission on the Disappearance of Persons (CONADEP).³⁶ They may also identify demographic tendencies of victims, such as Peru’s Truth and Reconciliation Commission’s conclusion that those experiencing poverty and social exclusion, and those speaking indigenous languages, were considerably more likely to be victims.³⁷ Juan Méndez, former President of the Inter-American Commission on Human Rights and the current United Nations Special Rapporteur on Torture, notes that investigation and revealing the truth should also involve the hearing of the victims’ voices, which should include a “process whereby victims or their family members are invited to be heard by a State entity, or at least by a representative of the society in which they live.”³⁸ International courts and instruments have yet to expressly include this notion of hearing from victims or their family members within the right to truth, although by necessity truth-finding will often be reliant on the accounts of those who suffered the abuse.

The right to truth also has a temporal element. The United Nations Human Rights Committee has determined that there is a general obligation to investigate allegations of violations “*promptly*, thoroughly and effectively through independent and impartial bodies.”³⁹ For this reason, a truth commission may be an especially apposite mechanism to employ in circumstances where other means of obtaining the truth, such as prosecutions, may take considerable time to conduct. How the timing of different mechanisms affects a State’s ability to fulfill its international obligations is further considered in Part VII.

The focus of the obligation to fulfill the right to truth is the means employed by a State, rather than the extent of the truth actually found.⁴⁰ Regardless, the duty requires the State to carry out a serious and thorough investigation, rather than one which is “a mere formality preordained to be

36. . NATIONAL COMM’N ON THE DISAPPEARANCE OF PERSONS, NUNCA MÁS (NEVER AGAIN): REPORT OF CONADEP, at Part I. G (1984).

37. . TRUTH AND RECONCILIATION COMM’N OF PERU FINAL REPORT, VOL. VIII, “GENERAL CONCLUSIONS”, at 316–717 (YEAR).

38. . Juan Méndez, *The Right to Truth*, in REINING IN IMPUNITY FOR INTERNATIONAL CRIMES AND SERIOUS VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS: PROCEEDINGS OF THE SIRACUSA CONFERENCE 265 (Christopher C. Joyner and M. Cherif Bassiouni, Eds., 1998).

39. . Human Rights Comm., General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 15 (2004) (emphasis added).

40. . Velásquez Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 174–81, (July 29, 1988). (holding that “[t]he duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result”); *see also* Méndez, *supra* note 19, at 264.

ineffective.”⁴¹ The Human Rights Council and the General Assembly have also articulated the right to truth as requiring States to preserve archives and other evidence⁴² and to use, where practicable and appropriate, forensic technologies in their investigations.⁴³

B. *Status as Lex Lata*

The right to truth has emerged as a legally binding (*lex lata*) norm of international law.⁴⁴ It has been the subject of significant extra-judicial development by scholars and independent experts⁴⁵ and is regularly applied in many authoritative interpretations of binding norms and international instruments.⁴⁶ The Inter-American Court of Human Rights first articulated the right to truth in the context of enforced disappearance, holding that “[t]he State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”⁴⁷

More recently, the Grand Chamber of the European Court of Human Rights in *El Masri* considered the right to truth of a man who was detained and later

41. . Velásquez Rodríguez, *supra* note 23, ¶ 177.

42. . H.R.C. Res. 9/11, *supra* note 5; H.R.C. Res. 21/7, *supra* note 27, at 3. *See also* G.A. Res. 68/165, ¶ 10, U.N. Doc. A/RES/68/165 (Dec. 18, 2013) (encouraging states to “establish a national archival policy that ensures that all archives pertaining to human rights are preserved and protected”).

43. . Human Rights Council Res. 10/26 (Mar. 27, 2009) and Res. 15/5 (Sep. 29, 2010) (recognizing the importance of the utilization of forensic genetics to deal with the issue of impunity within the framework of investigations relating to gross human rights violations and serious violations of international humanitarian law).

44. . Juan E. Méndez, *The Human Right to Truth: Lessons Learned from Latin American Experiences with Truth Telling*, in TELLING THE TRUTHS: TRUTH TELLING AND PEACE BUILDING IN POST-CONFLICT SOCIETIES 116 (Tristan A. Borer ed., 2006) [hereinafter *Lessons Learned from Latin America*].

45. . *See* Y. Gloria Park, *Truth as Justice: Legal and Extralegal Development of the Right to Truth*, 31 HARV. INT’L REV. 24 (2010) (citing Méndez, *supra* note 19, at 255, who in turn cited *Eighth Annual Report and List of States which, Since 1 January 1985, Have Proclaimed, Extended or Terminated a State of Emergency*, presented by Mr. Leonardo Despouy, Special Rapporteur appointed pursuant to Economic and Social Council Resolution 1985/37, U.N. Doc. E/CN.4/Sub.2/1995/20/Corr.1 (1995)).

46. . *Lessons Learned from Latin America*, *supra* note 44, at 116.

47. . Velásquez Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 174 (July 29, 1988). *See e.g.*, Inter-Am. Comm’n H.R., ‘OEA/Ser.L/V/II.68, doc. 8 rev. 1, 193 (1986). Before that case, the Inter-American Commission on Human Rights had asserted the existence of an “inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts.”

transferred to the United States Central Intelligence Agency's extraordinary rendition and detention program. It held that an inadequate investigation by the Former Yugoslav Republic of Macedonia into the circumstances of the detention and transfer violated the prohibition on torture in Article 3 of the European Convention of Human Rights and the right to an effective remedy set out in Article 13, and had an "impact" on the right to the truth.⁴⁸ Four concurring judges more forcefully affirmed the existence of the right to truth as "widely recognised by international and European human rights law."⁴⁹ While all aspects of the right to truth are not comprehensively codified in a binding international treaty, the right to the truth for victims of enforced disappearance is articulated in Article 24(2) of the International Convention for the Protection of All Persons from Enforced Disappearance.⁵⁰ It also has strong conceptual links to the international humanitarian law norm that families have a right to know the fate of their relatives, as set out in Articles 32 and 33 of the 1977 Additional Protocol I to the Geneva Conventions of 1949.⁵¹

C. Sources: Treaties and Interrelated Rights

Different aspects of the right to truth are based on a wide array of jurisprudential sources and human rights, including the prohibition of torture, the right to life, the right to an effective remedy, and the State obligation to end impunity and prevent recurrence of mass atrocity. These sources vary depending on the setting and type of human rights violation, the category of truth concerned, and the particular right holder. This subsection considers how each related human right has been used to establish aspects of the right to truth. States

48. . *El-Masri v. The Former Yugoslav Republic of Maced.*, Judgment, App. No. 39630/09, Eur. Ct. H.R., ¶¶ 174–91, 255 (Dec. 13, 2012) (acknowledging the right to truth and holding that "[w]here an individual has an arguable claim that he has been ill-treated by agents of the State, the notion of an 'effective remedy' entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure"). *See also* *Süheyla Aydın v. Turkey*, App. No. 25660/94, Eur. Ct. H. R., ¶ 204, 266 (May 24, 2005) (considering the duty to provide reparations set out in art. 41 of the European Convention of Human Rights).

49. . *El-Masri*, (Tulkens, Spielmann, Sicilianos and Keller, J., concurring), *supra* note 5, at 83.

50. . International Convention for the Protection of All Persons from Enforced Disappearance art. 6, G.A. Res. 61/177, U.N. Doc. A/RES/61/177 (Dec. 20, 2006). The International Convention for the Protection of All Persons from Enforced Disappearance entered into force upon the 20th ratification of the convention in December 2010. As of 1 December 2013, the convention has 40 States parties.

51. . Yasmin Naqvi, *The Right to Truth in International Law: Fact or Fiction*, 88 INT'L REV. RED CROSS 245, 248 (2006).

also increasingly acknowledge the existence of the right to truth: this is considered in the following section on customary international law.

International human rights law prohibitions of torture and cruel, inhuman, and degrading treatment form a key basis for certain aspects of the right to truth, including the right of family members to know the specific circumstances of a human rights violation. In the context of disappearances, the right of family members of a disappeared person to know incident-specific truths has been articulated in the prohibition of torture and cruel, inhuman, and degrading treatment embedded in the International Covenant on Civil and Political Rights (ICCPR).⁵² Specifically, in *Del Carmen Almeida de Quinteros v. Uruguay*, the Human Rights Committee concluded that the author of a complaint to the Committee had a “right to know what has happened to her daughter” given the suffering that the continuing uncertainty of a family member’s fate can cause.⁵³ The European Court of Human Rights in *El Masri* linked the right to truth to prohibitions of torture in a slightly different way. The court referred to the procedural limb of the prohibition of torture and inhuman and degrading treatment, requiring the State to conduct an “effective official investigation” whenever an individual raises an arguable claim of being subject to such prohibited treatment.⁵⁴ It went on to hold that a failure to conduct such an investigation (which effectively denies the victim the right to truth) constituted a breach of the procedural limb of the prohibition against torture.⁵⁵

The failure to investigate the disappearance of missing persons in life-threatening circumstances has also been held by the European Court of Human Rights to be a continuing violation of the procedural obligation to protect the right to life.⁵⁶ Although the Human Rights Committee did not make specific mention of the right to truth in its General Comment 6 on the right to life, it did link the importance of investigation procedures to the right to life. Specifically, the Committee set out State obligations to “establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances, which may involve a violation of the right to life.”⁵⁷

52. . *Del Carmen Almeida de Quinteros v. Uruguay*, Communication No. 107/1981, ¶ 14, U.N. Doc. CCPR/C/OP/2 (1990); Méndez and Bariffi, *supra* note 5, ¶ 21; *see also* González Cueva, *supra* note 19, at 1.

53. . *Quinteros*, *supra* note 52, ¶ 14.

54. . *El-Masri v. The Former Yugoslav Republic of Maced.*, Judgment, App. No. 39630/09, Eur. Ct. H.R., ¶ 182 (Dec. 13, 2012).

55. . *Id.* ¶ 194.

56. . *Cyprus v. Turkey*, Judgment, App. No. 25781/94, Eur. Ct. H.R., ¶ 136 (May 10, 2001); *Study on the right to the truth*, *supra* note 29, at 9.

57. . Human Rights Comm., General Comment No. 6 on the Right to Life, U.N. Doc. HRI/GEN/1/Rev.1, ¶ 4 (1982).

The human right to an effective remedy is another basis for certain elements of the right to truth because of the reparative effect that revealing the truth can produce for victims or their families. The Human Rights Committee determined that the right to the truth applies to any serious human rights violation and emanates from the procedural guarantee in Article 2(3) of the ICCPR, requiring a State to provide an effective remedy.⁵⁸ A concurring opinion in *El Masri* also linked State obligations to investigate violations to the right to remedy, concluding that “the right to an effective remedy enshrined in Article 13 [. . .] includes a right of access to relevant information about alleged violations.”⁵⁹

In addition, the Inter-American Court,⁶⁰ the Inter-American Commission on Human Rights,⁶¹ the Human Rights Council,⁶² and the General Assembly⁶³ have all emphasized connections between the right to truth and the duty to provide reparation to victims of serious human rights violations. Of particular note is the General Assembly’s exhortation, in its resolution on *Basic Principles and Guidelines on the Right to a Remedy and Reparation*,⁶⁴ to States to develop means of informing the general public and victims in particular, regarding gross violations of international human rights law and serious violations of international humanitarian law.

58. . H.R.C. General Comment No. 31, *supra* note 39, ¶ 15.

59. . *El-Masri*, (Tulkens, Spielmann, Sicilianos, and Keller, J., concurring), *supra* note 5, at 82–83 (referring to “the right to an effective remedy enshrined in Article 13, which includes a right of access to relevant information about alleged violations”).

60. . *Moiwana Village v. Suriname*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 204 (June 15, 2005) (holding in the context of a military-perpetrated massacre that “all persons, including the family members of victims of serious human rights violations, have the right to the truth. In consequence, the family members of victims and society as a whole must be informed regarding the circumstances of such violations. This right to the truth, once recognized, constitutes an important means of reparation. Therefore, in the instant case, the right to the truth creates an expectation that the State must fulfill to the benefit of the victims.”).

61. . *Lenahan (Gonzales) v. United States of America*, Merits, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 193 (July 21, 2011) (holding in the context of the repeated violation of the right to life that “[a] critical component of the right to access information is the right of the victim, her family members and society as a whole to be informed of all happenings related to a serious human rights violation” (emphasis added) and that the right to truth “is not only a private right for relatives of the victims, affording them a form of reparation, but also a collective right that ensures that society has access to information essential for the workings of democratic systems”; and citing *Ignacio Ellacuria and Others (El Salvador)*, Inter-Am. Comm’n H.R., Report on the Merits No. 136/99, Case 10.488, ¶ 224 (Dec. 12, 1999)).

62. . H.R.C. Res. 9/11, *supra* note 5, at 2.

63. . G.A. Res. 68/165, *supra* note 42, at 1.

64. . *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, *supra* note 28.

Finally, it is the State obligations to end impunity⁶⁵ and to prevent recurrence of mass atrocity,⁶⁶ rather than the prohibition of torture or other specific human rights,⁶⁷ that are regarded as forming the basis for the general public's right to truth. Democratic guarantees also contribute to the right to truth of the general public. For instance, the Commission on Human Rights emphasized the right to truth's links with the entitlement of the public to freedom of information and to the public's "access to the fullest extent practicable information regarding the actions and decision-making process of their Government."⁶⁸

D. Sources: State Practice and Customary International Law

Though the right to truth has not been incorporated into a widely ratified treaty, customary international law provides reasonable evidence that the right to truth, in broad terms, has emerged as an international law norm. This includes references to the importance of respecting the right to truth and to setting up judicial mechanisms and truth commissions to investigate human rights violations.⁶⁹ To achieve customary international law status a norm must be evidenced by State practice (including diplomatic and other governmental actions or inaction) and *opinio juris* (a State's understanding of the current status of customary international law, as evidenced by that State's behavior).⁷⁰ Tullio Treves notes that the increase in international forums where States meet to consider international legal norms has created additional opportunities for States to contribute to customary international law,⁷¹ whether expressly or by implication. This is consistent with the International Court of Justice's holding in *Nicaragua* regarding the customary prohibition on the use of force. There the Court held that *opinio juris* was manifest in the States parties' consent to a United Nations General Assembly resolution. The Court noted that endorsing

65. . C.H.R. Res. 2005/66, *supra* note 25, at 2, ¶ 1; H.R.C. Res. 9/11, *supra* note 5, at 2; H.R.C. Res. 21/7, *supra* note 27, at 3 ¶ 1; G.A. Res. 68/165, *supra* note 42 ¶ 1.

66. . *Bámaca-Velásquez v. Guatemala, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 91, ¶ 77 (Feb. 22, 2002)*; *Romero y Galdámez v. El Salvador, Case 11.481, Inter-Am. Comm'n H.R., Report No. 37/100, OEA/Ser.L/V/II.106, doc. 3 rev. ¶ 148 (2000)*; Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, *supra* note 29, Principles 2-3; Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.68, doc. 8 rev. 1, 193 (1986); *Study on the Right to the Truth, supra* note 29, ¶ 58.

67. . Méndez & Bariffi, *supra* note 5, ¶ 28.

68. . C.H.R. Res. 2005/66, *supra* note 25, at 2; H.R.C. Res. 21/7, *supra* note 27, at 3.

69. . See, e.g., G.A. Res. 68/165, *supra* note 42, ¶¶ 1,4.

70. . RESTATEMENT (THIRD) OF THE LAW FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

71. . Tullio Treves, *Customary International Law*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW, ¶ 11 (2012).

the General Assembly resolution “cannot be understood as merely that of a ‘reiteration or elucidation’ of the treaty commitment undertaken in the Charter,” but rather may actually “be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.”⁷²

Repeated consensual consideration of the right to truth by multilateral bodies such as the General Assembly,⁷³ the Human Rights Council,⁷⁴ and the now defunct Commission on Human Rights⁷⁵ has become increasingly pivotal in the crystallization of the right to truth as a legally binding (*lex lata*) norm. Calls by the Human Rights Council and the General Assembly for special rapporteurs and other mechanisms to take into account the right to truth⁷⁶ and the subsequent establishment of the mandate of the Special Rapporteur on the Promotion of Truth, Justice, Reparations and Guarantees of Non-Recurrence⁷⁷ provide further evidence of *opinio juris* regarding the crystallization of the right to truth.⁷⁸

A duty to investigate past acts of violence was also confirmed by the African Commission on Human and People’s Rights in *Zimbabwe Human Rights NGO Forum v. Zimbabwe*.⁷⁹ In that case, Zimbabwe readily acknowledged the existence of a duty to investigate incident-specific truths,⁸⁰ though not expressly negating the duty to also investigate structural truths, and the Commission ordered the respondent State to establish a commission of inquiry into acts of violence that had not been investigated.⁸¹ This case complements the duty to investigate articulated by the European Court of Human Rights⁸² and the Human Rights Committee for circumstances where the

72. . Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. Rep. 14, ¶ 188 (June 27).

73. . G.A. Res. 68/165, *supra* note 42; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, *supra* note 28.

74. . H.R.C. Res. 9/11, *supra* note 5; Human Rights Council Res. 12/12, U.N. Doc. A/HRC/RES/12/12 (Oct. 12, 2009); H.R.C. Res. 21/7, *supra* note 27.

75. . C.H.R. Res. 2005/66, *supra* note 25.

76. . H.R.C. Res. 9/11, *supra* note 5; G.A. Res. 68/165, *supra* note 42, ¶ 12.

77. . Human Rights Council Res. 18/7: Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, U.N. Doc. A/HRC/RES/18/7 (Oct. 13, 2011).

78. . *See also* G.A. Res. 65/196, U.N. Doc. A/RES/65/196 (Dec. 21, 2010) (proclaiming 24 March as the ‘International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims’).

79. . African Comm’n on Human and People’s Rights, Communication 245/02: Zimbabwe Human Rights NGO Forum v. Zimbabwe (June 25, 2002).

80. . *Id.* ¶ 115.

81. . *Id.*

82. . Cyprus v. Turkey, Judgment, App. No. 25781/94, Eur. Ct. H.R., ¶ 136 (May 10, 2001).

right to life may have been violated, discussed in Subsection C of Part II, above.⁸³

In addition, the General Assembly and Human Rights Council have also both noted that the right to truth⁸⁴ may be alternatively characterized in domestic legal systems as “the right to know, the right to be informed, or freedom of information.”⁸⁵ In its first session, the General Assembly referred to freedom of information as a “fundamental human right.”⁸⁶ The prevalence of freedom of information clauses in constitutions and laws in many countries⁸⁷ could provide further proof of the crystallization of (at least one aspect of) the right to truth: such laws tend to enshrine the right of access to information already in the possession of public authorities.⁸⁸ Whether they provide further evidence of a governmental duty to investigate and disclose the truth related to gross violations of human rights or serious violations of international humanitarian law per se remains to be determined.

Domestic jurisdictions also continue to reaffirm the right to truth of the general public. Argentina, the Bolivarian Republic of Venezuela, Cuba, Peru, and Uruguay all made statements to the Office of the High Commissioner on Human Rights affirming that society is entitled to know the truth regarding serious violations of human rights.⁸⁹ Courts in Colombia, Bosnia and Herzegovina, Peru, and Argentina were some of the first national courts to uphold the right of society as a whole to the truth.⁹⁰ More recently, the Supreme Court of the Philippines invoked the public’s right to truth when releasing its rules on writs on *habeas data* (concerning access to information), a remedy that

(cited in *Study on the right to the truth*, *supra* note 29, at 9).

83. . H.R.C. General Comment No. 6 on the Right to Life, *supra* note 57.

84. . These statements acknowledge that the right to truth applies to incident-specific truths (given the statements’ repeated focus on identifying victims and setting up judicial processes in the preamble and para. 4). Arguably, their reference to “massive or systemic violations of human rights” (preamble) provides some evidence of endorsement of the right to truth also applying to structural truths.

85. . G.A. Res. 68/165, *supra* note 42; H.R.C. Res. 21/7, *supra* note 27.

86. . G.A. Res. 59 (I), U.N. GAOR, 1st Sess., U.N. Doc. A/RES/59(I) (Dec. 14, 1946).

87. . *See, e.g.*, Toby Mendel, *Freedom of Information as an Internationally Protected Human Right*, ARTICLE 19, <http://www.article19.org/data/files/pdfs/publications/foi-as-an-international-right.pdf> (referring to freedom of information laws in Fiji, India, Japan, South Africa, Trinidad and Tobago, the United Kingdom, Sweden, the United States, Finland, the Netherlands, Australia, Canada, and a number of other European States).

88. . *Id.*

89. . *Study on the Right to the Truth*, *supra* note 29, ¶ 37.

90. . *Id.* at ¶ 36 (referring to the following holdings: Supreme Court of the Nation (Argentina), Judgment 14/6/2005; Constitutional Tribunal (Peru), Judgment of 18 March 2004; Constitutional Court (Colombia), 2002, Judgment C-580; Human Rights Chamber for Bosnia and Herzegovina, Decision of 7 March 2003, Srebrenica cases, ¶ 212).

can be pursued by “any person [or if that person is dead, any member of that person’s immediate family] whose right to privacy in life, liberty or security is violated or threatened by an unlawful act or omission of a public official or employee.”⁹¹ The court specifically described the rules as “promulgated both as an independent remedy to enforce the right to informational privacy and the complementary ‘right to truth’ as well as an additional remedy to protect the right to life, liberty, or security of a person.”⁹² Writs of *amparo* (concerning protection) in the Philippines, also created by the rules of that country’s Supreme Court, protect an individual’s constitutional right to life, liberty, and security.⁹³ Victims of violations or threats thereof, their family members or “[a]ny concerned citizen, organization, association or institution, if there is no known member of the immediate family or relative of the aggrieved party”⁹⁴ are entitled to file writs of *amparo*. In 2011, South Africa’s Constitutional Court also affirmed the rights of victims, the media, and the general public to speak the truth about crimes committed during apartheid, including crimes for which amnesty had been granted.⁹⁵

E. Conflicts with Other Rights Holders

While the truth can be a source of healing for victims and a means of ensuring greater understanding and accountability for society, tensions can emerge between the right to truth and the privacy rights of different stakeholders.⁹⁶ Insisting on the general public’s right to truth might mean exposing the details of sexual or other degrading offences, which can violate the privacy rights of victims and their families.⁹⁷ Revealing the identity of child perpetrators (who may also be victims⁹⁸) is also problematic, given that they

91. . SUPREME COURT OF THE PHIL., THE RULE ON THE WRIT OF HABEAS DATA §§ 1,-2 (2008).

92. . SUPREME COURT OF THE PHIL., ANNUAL REPORT 63 (2008).

93. . SUPREME COURT OF THE PHIL., THE RULE ON THE WRIT OF AMPARO § 1 (2007).

94. . *Id.* at § 2(c).

95. . *The Citizen 1978 (Pty) Ltd v McBride*, CCT 23/10 [2011] ZACC 11; 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC) (8 Apr. 2011).

96. . Publicly “identifying” someone as a perpetrator of a crime prior to them being subject to a lawful crime also raises ethical and human rights concerns. *See* discussion “iii. Identifying Perpetrators” under Part IV(B), *infra*.

97. . ICCPR, *supra* note 2, art. 17(1) (“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”).

98. . *See* Ismene Zarifis, *Sierra Leone’s Search for Justice and Accountability of Child Soldiers*, 9 HUM. RTS. BRIEF 18 (2002) (referring to child soldiers as “both victims and victimizers”).

have a right to anonymity⁹⁹ and that the best interests of the child must be a primary consideration in all “actions” concerning children.¹⁰⁰ In addition, publically exposing a juvenile offender’s identity can undermine his or her ability to reintegrate into society,¹⁰¹ given the stigma that can attach to such actions.¹⁰² Resolving this tension requires the balancing of these different interests and can be facilitated by the use of pseudonyms, private hearings, and other methods of ensuring that individual accounts cannot be traced back to those who wish, and who have the right, to remain anonymous.

F. *Non-State Duty Bearers?*

With regard to duty bearers, the host State will be obliged to comply with the right to truth and its correlative duty to investigate and disclose publically held information. Other entities may also be bound by, or voluntarily take on, these obligations. If the violation was committed during an international armed conflict by a combatant belonging to another State, that State will also be bound by international humanitarian law obligations regarding the search for such persons, including transmitting any relevant information upon request.¹⁰³ Such a State would also be obliged to fulfill the right to truth for any violations it committed extraterritorially.¹⁰⁴

Claims that non-State actors such as armed opposition groups ought to be bound by international human rights standards, which would include the right to

99. . UNICEF, *Cape Town Principles and Best Practices on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa*, at 8 (Apr. 30, 1997) (“A code of conduct for journalists should be developed in order to prevent the media exploitation of child soldiers. This code should take account of, *inter alia*, the manner in which sensitive issues are raised, the child’s right to anonymity and the frequency of contact with the media.”).

100. . Convention on the Rights of the Child, *supra* note 3, art. 3(1) (“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”).

101. . *Id.* art. 39 (requiring states to take measures to promote societal reintegration of child victims).

102. . BETH VERHEY, *CHILD SOLDIERS: PREVENTING, DEMOBILIZING AND REINTEGRATING* 10 (2001).

103. . Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *supra* note 3, arts. 32–33.

104. . Arguments that the right to truth applies extra-territorially have been made in cases concerning the United States’ policy of extraordinary rendition. *See, e.g.*, Steven Macpherson Watt et al., *Petition Alleging Violations of the Human Rights of Binyam Mohamed, Abou Elkassim Britel, Mohamed Farag Ahmad Bashmilah, and Bisher Al-Rawi by the United States of America with a Request for an Investigation and Hearing on the Merits*, Nov. 14, 2011, <https://www.aclu.org/files/assets/111114-iachr-petition-final.pdf>.

truth, remain controversial. Philip Alston, whilst Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, suggested that it may be desirable for the actions of armed opposition groups to be addressed “within some part of the human rights equation,” especially where the group “exercises significant control over territory and population and has an identifiable political structure.”¹⁰⁵ While any such obligations for non-State actors would likely be politically (rather than legally) imposed, it would still open up space for encouraging such groups to effectively fulfill the right to truth. Actions of the Revolutionary Armed Forces of Colombia (FARC) opposition group also contribute to a growing expectation that armed opposition groups will honor the right to truth, regardless of whether or not they are strictly obliged to by international law. These include the FARC’s calls for a truth commission, and its signing of a declaration of principles for the continuation of peace talks in June 2014, which includes a statement that “[c]larifying what happened during the conflict, including its multiple causes, origins and effects, is a key part of the fulfillment of the rights of victims, and society in general.”¹⁰⁶

Finally, business enterprises have a responsibility to respect human rights,¹⁰⁷ meaning that they should avoid violating human rights. Where businesses do breach human rights—for instance, by assisting a previous rights-violating regime—they should remedy the problem.¹⁰⁸ Disclosure of all pertinent information would likely come within such remedy, using a similar logic to that of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, which, as discussed above, emphasizes the need to inform victims and the general public

105. . Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Civil and Political Rights, including the Questions of Disappearances and Summary Executions*, ¶ 76, Comm’n on Human Rights, U.N. Doc. E/CN.4/2005/7 (Dec. 22, 2004) (by Philip Alston); see also Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, , *Civil and Political Rights, including the Questions of Disappearances and Summary Executions, Addendum: Mission to Sri Lanka*, ¶ 71(c), Comm’n on Human Rights, U.N. Doc. E/CN.4/2006/53/Add.5 (Mar. 27, 2006) (by Philip Alston) (calling on the Liberation Tamil Tigers of Eelam to “take a range of concrete steps to demonstrate that it is serious about human rights”); Andrew Clapham, *Human Rights Obligations of Non-state Actors in Conflict Situations*, 88 INT’L REV. RED CROSS 863 (Sept. 2006).

106. . Joint Communique 37—Declaration of Principles for the Discussion of 5th Item of the Agenda: “Victims”, Colom.–FARC-EP, June 2014, <http://bit.ly/1rCL8ab>.

107. . Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, at 13, Human Rights Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) (“Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”).

108. . *Id.*

regarding gross violations of international human rights law and serious violations of international humanitarian law.¹⁰⁹

G. “The Truth”

Part of the challenge of defining the exact contours of the right to truth is the difficulty in defining what “the truth” actually is. Martti Koskenniemi conceived of major events impacting on international politics, which for this Article’s purposes would include widespread or systematic violations of international human rights law or international humanitarian law, as having many truths—among them, the legal truth (whether or not the accused committed the crime) and the historical truth (why they did it and how they were influenced by the behavior of others around them and the general context).¹¹⁰ This jars with the notion that a singular, definitive truth can be found by a court or other fact-finding institution.¹¹¹ The issue is further complicated by Koskenniemi’s observation that there will be various stakeholders to the truth in any particular case, including victims and members of the public who seek closure and healing, perpetrators who have the right to a fair trial, and members of general society who crave societal reconciliation.¹¹² The difficulty in arriving at a single incontestable truth was also acknowledged by the South African Truth and Reconciliation Commission. The Commission emphasized “the multilayered experiences of the South African story” that were illustrated by allowing both perpetrators and victims to recount their perspectives.¹¹³

The co-existence of criminal trials and a truth commission can also lead to inconsistent findings by different institutions, which can cause consternation and confusion. For instance, despite the fact that the 2014 report of Brazil’s National Truth Commission¹¹⁴ identified certain surviving perpetrators of human rights violations between 1946 and 1988, there is no guarantee that these perpetrators would be convicted in a criminal trial. Some or all may be acquitted, or the

109. . Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, *supra* note 28, ¶ 24.

110. . Martti Koskenniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B. OF U.N. LAW 1, 12 (2002) (cited in Georgina Duffin, *Past Truths and Present Justice: The Right to Truth in Transition* 13 (Sep. 8, 2010) (unpublished M.A. dissertation, School of Oriental and African Studies, University of London)).

111. . Naqvi, *supra* note 51, at 246.

112. . Koskenniemi, *supra* note 110, at 12–13.

113. . TRUTH AND RECONCILIATION COMM’N OF S. AFR., VOLUME ONE: TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 112 (Oct. 29, 1998).

114. . COMISSÃO NACIONAL DA VERDADE, RELATÓRIO: VOLUME I (Dec. 2014).

crimes alleged might be attributed to other individuals, which could frustrate or confuse victims and members of the public.

However, such inconsistencies are not fatal to the truth-finding project. Different processes and investigative methods will answer different questions. More victim-focused processes, such as truth commissions, may better represent the disputed nature of certain events by allowing the inclusion of conflicting interpretations in the final report. Indeed, prosecutions must present the possibility of coming to findings that are inconsistent with truth commission findings: were it otherwise, the integrity of the prosecution would be significantly undermined. At the very least, truth commissions offer what Michael Ignatieff has described as the ability to limit the amount of unchallenged lies that exist in public discourse: Argentina's CONADEP made it impossible to deny that the military threw victims into the sea from helicopters, and Chile's Commission refuted denials that the Pinochet regime dispatched thousands of innocent individuals.¹¹⁵ South Africa's Commission managed to rely on a diversity of accounts while still discrediting existing "disinformation":

[O]ne can say that the information in the hands of the Commission made it impossible to claim, for example, that: the practice of torture by state security forces was not systematic and widespread; that only a few 'rotten eggs' or 'bad apples' committed gross violations of human rights; that the state was not directly and indirectly involved in 'black-on-black violence' . . . Thus, disinformation about the past that had been accepted as truth by some members of society lost much of its credibility.¹¹⁶

While it may be an imperfect or unsatisfying result to leave open the possibility of different mechanisms coming to different conclusions about certain events, this conflict is necessary to ensure the integrity and independence of each process. Truth commissions will generally have a broader scope of inquiry, which combined with their ability to debunk existing "disinformation," illustrates their value in helping to reveal both incident-specific truths and structural truths.

III.

THE DUTY TO BRING PERPETRATORS TO JUSTICE

Another State obligation that arises in transitional justice contexts and which often interacts with the right to truth is the duty to bring perpetrators of gross human rights violations to justice. Whether or not a State is under a duty to

115. . Michael Ignatieff, *Articles of faith*, 5 INDEX ON CENSORSHIP 110, 113 (1996). Cited in *Volume One: Truth and Reconciliation Commission of South Africa Report*, *supra* note 113, at 111.

116. . *Volume One: Truth and Reconciliation Commission of South Africa Report*, *supra* note 113, at 11112.

prosecute perpetrators of human rights abuses will depend on the circumstances of the violation. For State parties to the relevant treaties, there exists a duty to prosecute instances of genocide,¹¹⁷ torture and cruel, inhuman and degrading treatment,¹¹⁸ apartheid,¹¹⁹ and forced disappearances.¹²⁰ There also exists an obligation to prosecute grave breaches of international humanitarian law,¹²¹ provided the breaches occurred during an international armed conflict.¹²² The United Nations' *Basic Principles and Guidelines on the Right to a Remedy and Reparation* also set out that victims of gross human rights abuses or serious violations of international humanitarian law have a right to a remedy. This right entitles victims access to justice, adequate reparation, and information concerning violations and reparation mechanisms.¹²³

Whether States have a duty to prosecute all international crimes or serious violations of international human rights law is unsettled. The duty to prosecute and its corresponding right to justice are best characterized as soft (*lex ferenda*) norms. Many international courts and mechanisms have sought to articulate such a duty. The Human Rights Committee has built upon the obligation in the ICCPR's Article 2(1) to "respect and ensure" human rights, arguing that there exists an obligation to bring "to justice" violators of the right to life, the prohibition on torture, and the protection of liberty and security, among others.¹²⁴ This is based on the reasoning that impunity for perpetrators of human rights violations weakens respect for human rights.¹²⁵

117. . Convention for the Prevention and Punishment of the Crime of Genocide art. 4, Dec. 9, 1948, 78 U.N.T.S. 277.

118. . Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 3, arts. 4, 7.

119. . G.A. Res. 3068 (XXVIII), International Convention on the Suppression and Punishment of the Crime of Apartheid, U.N. Doc. A/9030, 1015 U.N.T.S. 243 art. IV (Nov. 3, 1973).

120. . International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note 50, arts. 4–11.

121. . Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) art. 49, Aug. 12, 1949, 6 U.S.T. 3114; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention) art. 50, Aug. 12, 1949, 6 U.S.T. 3217; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) art. 129, Aug. 12, 1949, 6 U.S.T. 3316; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) art. 146, Aug. 12, 1949, 6 U.S.T. 3516.

122. . Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶ 202, (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

123. . Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, *supra* note 28, ¶ 11.

124. . ANJA SEIBERT-FOHR, PROSECUTING SERIOUS HUMAN RIGHTS VIOLATIONS 13–16

The European Court of Human Rights has developed jurisprudence concerning a duty to prosecute as a means of ensuring general enjoyment of the right to life.¹²⁶ The Inter-American Court of Human Rights' articulation of the duty to "prevent, investigate and punish" in *Velasquez-Rodriguez* and subsequent cases was also based on the obligation to ensure human rights,¹²⁷ including the right to life. Although the court in that case refrained from calling for criminal prosecutions,¹²⁸ by 2006 it had characterized the duty to prosecute (and the victim's corresponding right to judicial protection) as a non-derogable (*jus cogens*) norm.¹²⁹ The obligation to bring perpetrators to justice has often been articulated as including investigation, the bringing of criminal charges, judgment and, if the individual is convicted, punishment.¹³⁰

One complicating factor regarding the duty to bring perpetrators to justice is the repeated use of amnesties in peace negotiations. An amnesty that guarantees that certain persons cannot be convicted for actions associated with past human rights violations undercuts a duty to bring a perpetrator to justice by potentially rendering that duty impossible to wholly fulfill.¹³¹ For this reason, it is becoming increasingly untenable for States to grant a blanket amnesty for serious human rights violations in an attempt to foster the disclosure of information by perpetrators. While such a process may ensure the comprehensive satisfaction of the right to truth, blanket amnesties have been repeatedly held to be invalid. For instance, the Inter-American Court of Human

(2009).

125. . Human Rights Comm., Comments on Argentina, ¶ 10, U.N. Doc. CCPR/C/79/Add.46 (1995) (cited in SEIBERT-FOHR, *supra* note 124, at 16).

126. . Öneriyildiz v. Turkey, Judgment, App. No. 48939/99, Eur. Ct. H.R. ¶ 91 (2004) and Mahmut Kaya v. Turkey, App. No. 22535/93, 2000-III Eur. Ct. H.R. ¶ 85 (2000) (both are cited in SEIBERT-FOHR, *supra* note 124, at 115).

127. . Velásquez Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 166 (July 29, 1988); SEIBERT-FOHR, *supra* note 124, at 58. Although, the Court in that case refrained from calling for criminal prosecutions, despite being asked to by the complainants.

128. . Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CALIF. L. REV. 451 (1990) (cited in van Zyl, *supra* note 21, at 61).

129. . Goiburú v. Paraguay, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 153, ¶¶ 84, 131 (Sept. 22, 2006); La Cantuta v. Peru, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 157 (Nov. 29, 2006) (cited in SEIBERT-FOHR, *supra* note 124, at 67).

130. . Vicente v. Colombia, H.R.C., Communication No. 612/1995, ¶ 8.8, U.N. Doc. CCPR/C/60/D/612/1995 (1997), ; Bautista de Arellana vs. Colombia, H.R.C., Communication No. 563/1993, ¶ 8.6, U.N. Doc. CCPR/C/55/D/563/1993 (1995), ; Las Palmeras Case, Inter-Am. Ct. H.R. (ser. C) No. 90, ¶ 65 (Dec. 6, 2001).

131. . William A. Schabas, *Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 11 U.C. DAVIS J. INT'L L. & POL'Y 145 (2004); William A. Schabas, *A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 15 CRIM. L. F. 3 (2004).

Rights in the 2001 *Barrios Altos* decision held that “all [self-]amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations.”¹³² In addition, the European Court of Human Rights held in the 2009 *Yeter v. Turkey* decision that amnesties or pardons that apply to criminal proceedings and sentencing “should not be permissible” for government agents who are accused of crimes that violate Article 3 of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment.¹³³

On the other hand, the fact that States often resort to the granting of amnesties casts doubt on whether the duty to bring perpetrators to justice is a legally binding (*lex lata*) obligation in customary international law.¹³⁴ In this regard, the refusal of the Sierra Leone Truth and Reconciliation Commission to characterize the amnesty set out in the Lomé Peace Accord as illegal is telling. The Commission’s holding that “amnesties should not be excluded entirely from the mechanisms available to those attempting to negotiate a cessation of hostilities after periods of brutal armed conflict” undermines arguments that the duty to bring perpetrators to justice is a binding one.¹³⁵ The Special Court for Sierra Leone took a different position, characterizing the Lomé Peace Accord amnesty as “contrary to the direction in which customary international law is developing.” This ruling was vigorously critiqued by William Schabas, a member of the Sierra Leone Truth and Reconciliation Commission.¹³⁶ Schabas criticized the ruling for vaguely referring to the “direction” of customary international law, rather than clearly holding that the amnesty strictly breached customary international law in its present form.¹³⁷ This disagreement between

132. . *Barrios Altos Case, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 83, ¶¶ 41–44 (2001)*; see also *Gelman v. Uruguay, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶¶ 195–229 (Feb. 24, 2011)* (considering authorities from the American, European, and African regional human rights bodies, as well as United Nations human rights bodies and national jurisdictions invalidating amnesties for serious human rights violations, and holding that “[t]he incompatibility with the Convention includes amnesties of serious human rights violations and is not limited to those which are denominated, ‘self-amnesties’”).

133. . *Yeter v. Turkey, App. No. 33750/03, Eur. Ct. H.R., ¶ 70 (Jan. 13, 2009)* (citing *Abdülşamet Yaman v. Turkey, App. No. 32446/96, Eur. Ct. H.R., ¶ 55 (Nov. 2, 2004)* and *Yeşil and Sevim v. Turkey, App. No. 34738/04, Eur. Ct. H.R., ¶ 38 (2007)*).

134. . See Part III, *infra*.

135. . SIERRA LEONE TRUTH AND RECONCILIATION COMM’N, WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION VOL. 3B 365 (2004).

136. . Schabas, *supra* note 131, at 161 (“Courts, of course, should apply the law, but should they also apply ‘the direction in which the law is developing’? This is an odd approach, to say the least.”).

137. . *Id.*

leading commentators and jurists is an example of the uncertainty and lack of consensus regarding whether the duty to bring perpetrators to justice is a legally binding (*lex lata*) obligation.

Interpreting the duty to bring perpetrators to justice as a hard norm also clashes conceptually with the discretion of prosecutors, predominantly in common law jurisdictions,¹³⁸ to decide which cases will be pursued. The duty to bring perpetrators to justice, as framed, is one of “means” and not “results”:¹³⁹ governments are bound to pursue prosecutions in good faith but will not breach their duty where prosecutions result in acquittals or where their justice system cannot prosecute every single accused person. Nonetheless, domestic prosecutors may decline to prosecute a case for many reasons other than an inability or a lack of resources, such as having good cause consistent with the public interest.¹⁴⁰ Where this discretion forms an uncontroversial part of State practice in many nations, a characterization of the duty to prosecute as a *lex lata* norm is harder to defend.

Similarly, looking at the duty to bring perpetrators to justice from its correlative right of victims to justice, shortcomings are readily apparent in the operation of the International Criminal Court, where prosecutors are bound only to consider the amorphous concepts of “gravity” and the “interests of justice” when selecting cases for prosecution.¹⁴¹ The court’s limited resources and the vastness of the situations it grapples with means the court can only ever prosecute a tiny sliver of the available cases.¹⁴² Given that the court’s jurisdiction is only enlivened where a nation is unwilling or unable to carry out domestic prosecutions,¹⁴³ the majority of victims affected by situations now before the court will inevitably not see their right to justice fulfilled. This

138. . Cécile Aptiel, *Prosecutorial Discretion at the ICC and Victims’ Right to Remedy: Narrowing the Impunity Gap*, 10 J. INT’L CRIM’L JUST. 1357, 1359 (2012).

139. . See Mendéz, *supra* note 19, at 264.

140. . See, e.g., ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, 3D ED. Standard 3-3.9(b) (AMERICAN BAR ASS’N 1993), http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blkold.html (“The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction.”).

141. . Aptiel, *supra* note 138, at 1361 (citing Rome Statute, *supra* note 3, arts. 14, 15: “[T]he ICC Prosecutor has broad discretionary powers, and is only requested to consider ‘gravity’ and the ‘interest of justice’ when selecting cases. The vagueness and ambiguity of these two concepts is such that they do not really restrict the prosecutor, as their understanding is inherently subjective.”).

142. . *Id.* at 1360 (noting that “sifting through the crimes and layers of criminal responsibility to handpick a few cases is a quintessential part of what international prosecutors have been tasked to do since Nuremberg”).

143. . Rome Statute, *supra* note 3, art. 17(1)(a)–(b).

practical impediment, acknowledged and incorporated into the Rome Statute, weakens the plausibility of each State bearing a legally binding (*lex lata*) duty to prosecute.¹⁴⁴ Despite these difficulties, the right of victims to justice and the corresponding State duty still play an important factor in shaping State responses to gross violations of international human rights law and international humanitarian law.

IV.

RELATIONSHIP BETWEEN TRUTH AND JUSTICE

Deciding whether to focus on either the obligation of truth-finding or of achieving justice has been aptly identified as a false dilemma.¹⁴⁵ It will not suffice for a State to satisfy its obligations concerning only one of the two; each obligation stands independently.¹⁴⁶ Therefore, the question is how to design a transitional justice policy that meets both. Indeed, the two obligations often lead to complementary, rather than conflicting, transitional justice mechanisms. Just as prosecutions include truth-finding, so too can facts found by truth commissions assist future prosecutions.¹⁴⁷

On the other hand, there are times when one process ought to prevail over the other. Méndez suggested that truth-finding might be favored over prosecution where the impugned actions were legal at the time they were committed and where moral culpability is shared by large sections of society.¹⁴⁸ Conversely, the Office of the High Commissioner for Human Rights' Working Group on Enforced or Involuntary Disappearances argued that justice may be privileged over truth-finding if proportionate and necessary to avoid jeopardizing an ongoing criminal investigation.¹⁴⁹ The above discussion of amnesties, which impact whether or not the duty to bring perpetrators to justice is a binding one, further demonstrates that navigating the interaction of that duty and the right to truth will often be complex and difficult to resolve.

144. . *Id.*

145. . *Lessons Learned from Latin America*, *supra* note 44, at 119; González Cueva, *supra* note 19, at 3; TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE, (Naomi Roht-Arriaza and Javier Mariezcurrena eds., 2006); Mark Drumbl, *Book Review: Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*, Naomi Roht-Arriaza and Javier Mariezcurrena, 1 INT'L J. TRANSITIONAL JUSTICE 311 (2007).

146. . Méndez, *supra* note 19, at 255.

147. . González Cueva, *supra* note 19, at 2. *See also* Méndez, *supra* note 19, at 256; Paul van Zyl, *Unfinished Business: the Truth and Reconciliation Commission's Contribution to Justice in Post-Apartheid South Africa*, in POST CONFLICT JUSTICE 751 (M. Cherif Bassiouni ed., 2002).

148. . Méndez, *supra* note 19, at 280.

149. . OHCHR, *Special Procedures Advisory, General Comment on the Right to Truth: Working Group on Enforced or Involuntary Disappearances* (July 22, 2010).

While the right to the truth and duty to bring perpetrators to justice impose obligations on States, in some situations there may be good reason to allow for some flexibility with regard to compliance. The duties to punish and to investigate are duties of means, not results.¹⁵⁰ The obligations attached to a State therefore vary depending on the State's capacity to act and are not intended to lead to unrealistic requirements. A State may be entitled to derogate from these obligations where to pursue them would pose a grave threat to the life of the nation or where the obligations would be impossible to perform.¹⁵¹ Between discussions of strict compliance and derogation lies the question of how best to holistically satisfy these obligations, given the particular circumstances facing a State in any given case. The next Part considers the transitional justice mechanisms available to States seeking to fulfill their obligations.

V.

MECHANISMS AVAILABLE TO FULFILL TRUTH AND JUSTICE OBLIGATIONS

States have various mechanisms to choose from when seeking to meet their obligations with regard to the right to truth. The options available to bring perpetrators to justice are fewer, but there remains some scope for differing approaches to the legitimate pursuit of justice, depending on the type and number of prosecutions or other processes leading to some form of sanction. Freedom of information procedures can help to satisfy the right to truth by making accessible information in the government's possession.¹⁵² Reparations provide a remedy to victims in the form of compensation and acknowledgement of past wrongs. Memorials provide very public acknowledgments of past events, which can impact a government's obligations with regard to truth, justice, and remedy. Searches for missing or disappeared persons, while often taking many years,¹⁵³ help fulfill the right to truth by identifying the remains of victims and providing key insights into the past, while also allowing families some sense of closure. Searches can also provide information to investigators that can be used in future prosecutions, thus assisting governments to bring perpetrators to justice. Where governments are completely lacking in capacity, the international

150. . See *supra* note 34.

151. . Paul van Zyl, *supra* note 6, at 64-66 (citing Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2596 (1990/1991) and *Lawless v. Ireland*, No. 3 E. H.R. Rep. (ser. A) 1/15, 31-32 (1961) (discussing the proposition that prohibitions of detention without trial could be derogated in a time of war or other public emergency threatening the life of a nation).

152. . González Cueva, *supra* note 19, at 2-3.

153. . *Id.* at 3.

community may be motivated to offer resources and technical assistance to truth commissions, such as international criminal trials or the United Nations' provision of three non-citizen commissioners to assist the four Sierra Leonean commissioners of Sierra Leone's Truth and Reconciliation Commission.¹⁵⁴ Community groups may also contribute to truth-finding through non-governmental truth projects.¹⁵⁵

This Article focuses on truth commissions, but that is not to deny the useful role that the other mechanisms have to play. Rather, truth commissions are considered because of their potential to supplement many aspects of the right to truth—particularly those that even the most exemplary set of prosecutions may not be able to satisfy. The following section considers the ability of prosecutions to fulfill the right to truth and the duty to bring perpetrators to justice. A discussion of the value of truth commissions with regard to truth and justice follows.

A. Prosecutions

Prosecutions of human rights violations stand as an obvious choice for seeking to bring perpetrators to justice. The dominant mode of thought in regional human rights courts, other human rights bodies, and extra-curial writing is that State-operated prosecutions also remain the most appropriate means of satisfying the right to truth, provided they are supported by an effective police force, comply with fair trial standards, and target a sufficient amount of past perpetrators.¹⁵⁶ The rigorous evidentiary and due process standards afforded to the accused lead to detailed findings that are harder to contest.¹⁵⁷ However, prosecutions still require close scrutiny in this context, given that they tend to be selectively carried out, can pose threats to the fair trial rights of accused persons, reveal a fairly narrow scope of truth, and tend to focus more on the guilt or innocence of the accused, rather than on the perspective of those who suffered the human rights violations. This subsection scrutinizes different factors that impact on the ability of prosecutions to satisfy these two obligations. Subsection B then considers how truth commissions can be used by States to complement such efforts.

154. . Truth and Reconciliation Commission Act 2000 (Sierra Leone), art. 3(1).

155. . Louis Bickford, *Unofficial Truth Projects*, 29 HUM. RTS. Q. 994 (2007).

156. . *See supra* note 5.

157. . Méndez, *supra* note 19, at 278.

1. *Selective Prosecutions*

Prosecutions require an immense amount of resources, technical expertise, and other institutional capacities, including accountable police forces to make arrests and prisons to house the accused. Transitioning States are often unable to carry out a sustained campaign of criminal prosecutions in a manner that sufficiently fulfills the right to the truth. For instance, a government seeking to pursue a strategy that focuses on justice may find that it can only carry out a handful of prosecutions that satisfy these requirements. Such prosecutions will likely establish incident-specific truths for the crimes prosecuted, but many other violations will remain unacknowledged. Further, where the only truth-seeking process embarked upon by the State is prosecution, the experiences of victims of perpetrators who have fled the jurisdiction or who have died will not be made part of the historical record.

Carrying out prosecutions selectively is not inconsistent with the soft (*lex ferenda*) obligation to bring perpetrators to justice, provided that the selection of those prosecuted is made pursuant to a clear public rule that does not discriminate based on a proscribed category¹⁵⁸ and that reflects the full extent of the State's capacity to bring prosecutions. However, achieving only a limited number of prosecutions may fail to meet a government's obligations to uncover the truth.

Governments facing resource and capacity shortages may seek to carry out large numbers of prosecutions that do not comply with accepted fair trial standards. Rwanda's Gacaca courts (or *Inkiko Gacaca*) were the archetypal example of streamlined prosecutions, with over one million accused persons being tried, but the courts drew significant criticisms from international civil society organizations like Amnesty International for their lack of fair trial and due process protections.¹⁵⁹ Defendants were tried without legal counsel, which likely infringed on their right to "equality of arms" as set out in the ICCPR and African Charter on Human and Peoples' Rights.¹⁶⁰ Amnesty International also decried the swiftness and brevity of the training given to Gacaca judges and expressed concern regarding the impartiality of judges, given the vagueness of the organic law establishing the Gacaca courts and the "considerable political, social, economic and psychological pressures emanating from within polarized communities" with which the judges would have to contend.¹⁶¹ Others critiqued

158. . Méndez, *supra* note 19, at 274.

159. . Ariel Meyerstein, *Between Law and Culture: Rwanda's Gacaca and Postcolonial Legality*, 32 L. & SOC. INQUIRY 479 (SPRING, 2007).

160. . AMNESTY INTERNATIONAL, RWANDA: GACACA: A QUESTION OF JUSTICE 35 (Dec 17, 2002), <http://www.amnesty.org/en/library/info/AFR47/007/2002..>

161. . *Id.*, at 38.

Amnesty's response as being too focused on western or common law forms of justice, instead of assessing whether the Gacaca might satisfy international human rights standards through a singular and innovative process.¹⁶² Overall, prosecutions that fail to comply with fair trial standards will usually not satisfy the duty to bring perpetrators to justice, and any unreliable procedures employed may undermine the quality of any truth found.

2. *The Narrow Truth*

Prosecutions may also fail to adequately reveal structural truths. This is because a court is primarily concerned with determining the criminal responsibility of the accused, rather than with the broader system that allowed the abuse to occur.¹⁶³ The truth about an accused's guilt or innocence is often very narrow, focused on the elements of crime and drawn from a strictly regulated pool of evidence.¹⁶⁴ Rules of evidence, while strengthening the reliability of the truth found by a court, may exclude information that is not strictly relevant to the trial of the accused but which is nonetheless important to understanding the broader context in which human rights violations occurred.¹⁶⁵ Prosecutors may also be reasonably motivated reduce the number of charges against the accused to ensure a less complicated trial and a possible conviction, further limiting the scope of incident-specific truth that will be uncovered.¹⁶⁶ Evidence relating to incidents no longer the subject of prosecutions could also be regarded as irrelevant and inadmissible.¹⁶⁷

In addition, plea bargaining—regularly employed by prosecutors in common law and international criminal law jurisdictions¹⁶⁸—can lead to processes of justice that are swift but which obscure the truth in exchange for a

162. . See, e.g., William Schabas, *Genocide Trials and Gacaca Courts*, 3 J. INT'L CRIM. JUST. 886–87 (2005); Meyerstein, *supra* note 159, at 478.

163. . González Cueva, *supra* note 19, at 3.

164. . INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, ICTJ BRIEFING: CONFRONTING THE PAST: TRUTH TELLING AND RECONCILIATION IN UGANDA, 3 (Sept. 2012).

165. . Priscilla Hayner, UNSPEAKABLE TRUTHS 107 (2d ed., 2010).

166. . See, e.g., Gideon Boas, *Trying Tyrants for Mass Atrocity*, 34 ALTERNATIVE L. J. 108 (2009), (arguing that “[o]ne of the clear messages from the trial [of Slobodan Milošević at the International Criminal Tribunal for the former Yugoslavia] was that international prosecutors must resist the temptation to ‘throw the book’ at a senior accused who may be linked at differing levels of responsibility to a massive scope of criminality. Milošević was charged with over 7000 criminal allegations across three wars, spanning eight years. Commitment to represent all victims of the conflicts led to an understandable, but weak, refusal to take responsibility for that which a prosecution must: the scope, nature and viability of the case it will plead.”).

167. . INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, *supra* note 164, at 3.

168. . Naqvi, *supra* note 51, at 271 (referring to rule 62 of the ICTY Rules of Procedure and Evidence, adopted in 2001, which sets out a process for accepting a plea arrangement).

guilty plea for other crimes.¹⁶⁹ For instance, Biljana Plavšić, a senior official of the Serbian Democratic Party, was originally indicted by the Prosecutor for the International Criminal Tribunal for the Former Yugoslavia for a host of international crimes, including genocide, complicity in genocide, crimes against humanity of persecutions, extermination and killing, deportation, and inhumane acts.¹⁷⁰ Plavšić pleaded guilty to a single count of the crime against humanity of persecution, relating to the persecution of Bosnian Muslim, Bosnian Croat, and other non-Serb populations in Bosnia Herzegovina.¹⁷¹ Pursuant to a plea bargaining agreement, the Prosecution moved to dismiss the remaining counts of the indictment.¹⁷² Allegations that Plavšić was involved in the partial destruction, extermination, and killing of those populations, and the deportation and forced transfer of members of those populations, were never determined. While this is an instance of an international, rather than domestic, criminal prosecution, it nonetheless highlights that plea bargains can reduce the capacity of prosecutions to uncover both incident-specific truths (here, regarding the partial destruction, extermination, and killing of populations, as well as deportations and forced transfers) and structural truths (Plavšić's original indictment alleged a series of joint criminal enterprises with other high-ranking officials that would likely have revealed certain systemic causes for the atrocities in Bosnia Herzegovina).

This is not to suggest that prosecutions should not focus on such a limited range of information: this narrow focus is essential to their fair and efficient operation. If criminal trials were used for judgments of history about systemic causes of atrocity, there would be a risk of breaching a defendant's right to a fair trial and descending into show trials.¹⁷³ Nonetheless, such a narrow scope can ignore or inadvertently exonerate the systems or structures that led to the individual actions that are the subject of prosecutions.¹⁷⁴ This indicates that

169. . *Id.* at 271 (referring to the *Prosecutor v. Biljana Plavšić*, Case No. IT-00-39&40/1-S, where the defendant's charge bargain entailed admission to facts relevant to the charge of persecution in exchange for the withdrawal of previous charges related to genocide, thereby obscuring what involvement if any she had had in the planning of activities which constituted genocide). *See also* Méndez, *supra* note 19, at 268.

170. . *Prosecutor v. Krajišnik & Plavšić*, Case No. IT-00-39&40-PT, Decision on Prosecution's Motion for Leave to Amend the Consolidated Indictment, (Int'l Crim. Trib. for the Former Yugoslavia Mar. 7, 2002).

171. . *Prosecutor v. Plavšić*, Case No. IT-00-39&40/1-S, Sentencing Judgment, ¶ 5 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 27, 2003).

172. . *Id.*

173. . Méndez, *supra* note 19, at 279 (quoting IAN BURUMA, *THE WAGES OF GUILT: MEMORIES OF WAR IN GERMANY AND JAPAN* 142 (1994)).

174. . Koskeniemi, *supra* note 110, at 15.

prosecutions cannot usually be solely relied upon to fulfill the right to the truth and that governments may need to employ additional truth-finding mechanisms.

3. *Victims' Voices*

Prosecutions will also struggle to create an environment conducive to the restoration of victims' dignity through the hearing of victims' voices. This is particularly problematic when the past human rights violations occurred in a context where victims were silenced by state-sanctioned intimidation tactics.¹⁷⁵ Courts must treat victims neutrally, which requires some form of contestation of the victims' evidence by judges or defense counsel at trial.¹⁷⁶ Many victims will not desire to be cross-examined and have their credibility and the veracity of their accounts challenged. This in turn may limit the truth found in a particular trial.

The above discussion of the potential shortcomings of prosecutions with regard to the right to truth and, to a lesser extent, the duty to bring perpetrators to justice, indicates that transitional programs relying solely on prosecutions are likely to fall short of satisfying international human rights law. While ably conducted and properly resourced prosecutions offer the best available option for bringing a perpetrator to justice, the narrowness of the truth revealed by prosecutions and the potentially limited amount of prosecutions that can be so pursued means that they are unlikely to ever sufficiently reveal structural truths or an adequately wide scope of incident-specific truths. Therefore, prosecutions typically cannot be the only transitional justice mechanism employed by States. This Article now turns to consider the role truth commissions can play to more comprehensively fulfill the right to truth. The obligation to bring perpetrators to justice is less relevant to this discussion, although the role truth commissions can play in assisting prosecutions is considered.

B. Truth Commissions

While the composition and mandate of a truth commission will vary depending on the context in which it is created, most truth commissions share some common characteristics. Truth commissions generally take the form of government-sanctioned bodies of inquiry, set up on a temporary basis to investigate a set of abuses (rather than a single incident) that took place during a

175. . Méndez, *supra* note 19, at 278.

176. . See, e.g., Mary Fan, *Adversarial Justice's Casualties: Defending Victim-Witness Protections*, 55 B.C. L. REV 775 (2014) (discussing defendant rights of confrontation and cross-examination).

specific period in that nation's history.¹⁷⁷ Their intended duration is often no longer than two years,¹⁷⁸ and their findings are often compiled in a written report.¹⁷⁹

Truth commissions use the truth-finding process to achieve many goals.¹⁸⁰ Not all commissions have been explicitly set up to fulfill the right to truth,¹⁸¹ although even those that do not refer to the right to truth generally have the objective of investigating and revealing the truth regarding past events. Commissions that do have express references to the right to truth in their mandates include those of Guatemala ("a right to know the whole truth concerning these events"¹⁸²), Peru ("the right of society to the truth"¹⁸³), Brazil ("the right to memory and historical truth"¹⁸⁴), and Tunisia ("[u]nveiling the truth about violations" and "[p]reserving the national memory" are rights guaranteed by law¹⁸⁵). The right to truth does not necessarily mandate the establishment of a truth commission,¹⁸⁶ and the Inter-American Court of Human Rights has even held that the "historical truth" obtained by a truth commission

177. . Priscilla Hayner, UNSPEAKABLE TRUTHS 14 (1st ed., 2001).

178. . Cf. BRAZIL'S SPECIAL COMMISSION ON POLITICAL DEATHS AND DISAPPEARANCES (CEMDP), BRASIL: *DIREITO À MEMÓRIA E À VERDADE* (Brasília: Secretaria de Direitos Humanos, 2007) (cited in Juan Pablo Bohoslavsky and Marcelo D. Torelly, *Financial Complicity: The Brazilian Dictatorship Under the "Macroscopic" in JUSTICE AND ECONOMIC VIOLENCE IN TRANSITION* 245 (Dustin Scharp ed., 2014)) (established in 1995 pursuant to Law No. 9.410 and did not publish its final report until 2007).

179. . See, e.g., TRUTH, JUSTICE AND RECONCILIATION COMM'N, KENYA, REPORT OF THE TRUTH, JUSTICE AND RECONCILIATION COMMISSION (2013); REPUBLIC OF LIBERIA, TRUTH & RECONCILIATION COMM'N, CONSOLIDATED FINAL REPORT (2009); COMISSÃO DE ACOLHIMENTO, VERDADE E RECONCILIAÇÃO DE TIMOR-LESTE, CHEGA! (NOV. 2005); SIERRA LEONE TRUTH & RECONCILIATION COMM'N, WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH & RECONCILIATION COMMISSION (2004); TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA, TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT (Oct. 29, 1998).

180. . See *supra* note 7.

181. . The right to truth is not mentioned in, for instance, the founding documents or final reports of the South Africa Truth and Reconciliation Commission. See South Africa Promotion of National Unity and Reconciliation Act 34 § 3 1995; TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA, TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT (Oct. 29, 1998); Commission for Reception, Truth and Reconciliation in East Timor. See COMISSÃO DE ACOLHIMENTO, VERDADE E RECONCILIAÇÃO DE TIMOR-LESTE, CHEGA! [Commission for Reception, Truth and Reconciliation in East Timor], pt. Part 2, 2 (Nov. 2005).

182. . U.N. Mission for the Verification of Human Rights in Guatemala, Comm. for Historical Clarification: Charter, at 1 (Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer).

183. . Supreme Decree No. 065-2001-PCM, June 4, 2001 (Peru).

184. . Law N° 12.528 of 18 November 2011, art. 1 (Braz.).

185. . Draft Organic Law on the Foundations and Organization of Transitional Justice of Tunisia's Instance Verite et Dignite, arts. 2, 5.

186. . *Lessons Learned in Latin America*, *supra* note 44, at 119.

does not completely fulfill the right to truth in and of itself.¹⁸⁷ Commissions can nevertheless be effective tools for at least partially fulfilling this right. They will be most effective when established by a government seeking to comply in good faith with its international human rights law and international humanitarian law obligations,¹⁸⁸ and when provided with a clear and achievable mandate and the financial and other means needed to realize that mandate. Commissions should also be established as soon as is practicable: while the exact amount of time needed will vary depending on the circumstances facing the government, a commission would ideally be created within months, not years, of a political transition, where possible.

The scope of inquiry for different truth commissions varies, as does their fulfillment of the right to truth's two categories of truth. Truth commissions seeking to establish incident-specific truths can seek to hear from victims, witnesses, and alleged perpetrators.¹⁸⁹ Most commissions also seek to reveal the broader causes and patterns in a series of violations, thus fulfilling the right to truth with regard to structural truths. Generally, the scope of truth commission mandates is broad. Kenya's recent Truth, Justice and Reconciliation Commission had one of the most expansive mandates to date,¹⁹⁰ including the creation of a complete historical record of individual violations (including breaches of economic rights)¹⁹¹ and a more systemic-focused inquiry into the causes, nature, and extent of the violations,¹⁹² among a raft of other broad-reaching, truth-seeking, and recommendation-making functions.¹⁹³

187. . *Almonacid-Arellano v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 150 (Sep. 26, 2006) (holding that "the 'historical truth' included in the reports of the above mentioned Commissions is no substitute for the duty of the State to reach the truth through judicial proceedings. In this sense, Articles 1(1), 8 and 25 of the Convention protect truth as a whole, and hence, the Chilean State must carry out a judicial investigation of the facts related to Mr. Almonacid-Arellano's death, attribute responsibilities, and punish all those who turn out to be participants"). See also *Unfinished Business: the Truth and Reconciliation Commission's Contribution to Justice in Post-Apartheid South Africa*, *supra* note 147, at 745–60.

188. . Méndez, *supra* note 19, at 278.

189. . See, e.g., Mark Freeman and Priscilla B. Hayner, *The Truth Commissions of South Africa and Guatemala*, RECONCILIATION AFTER VIOLENT CONFLICT (David Bloomfield and Lucien Huyse, eds, 2003) 140–141 (describing how South Africa's Truth and Reconciliation Commission sought to reveal both incident-specific and structural truths by hearing testimony from 23,000 victims and witnesses, as well as granting amnesty to perpetrators "who fully confessed to their involvement in past crimes and showed them to be politically motivated").

190. . INT'L CTR FOR TRANSITIONAL JUSTICE, *ICTJ Forum Series on Truth Commissions and Peace Mediation: Betty Murungi*, (Mar. 12, 2013), <http://ictj.org/es/node/18020>.

191. . Truth, Justice, and Reconciliation Commission Bill, (2008), arts. 5(a),6(a) (Kenya).

192. . *Id.* arts. 5(b), 6(b).

193. . See *id.* arts. 5, 6.

Some of the aspects that distinguish truth commissions from prosecutions—less formal evidentiary and procedural rules, a usually broader scope of investigation—have also been a source of criticism. While truth commissions benefit from a wider scope, they are less suited to determining a comprehensive and incontestable account of the truth.¹⁹⁴ One commentator has wryly suggested that truth commissions should be called “some-of-the-truth commissions.”¹⁹⁵ Truth commissions also face various legal and practical pitfalls that sit in tension with uncovering the full and complete truth. These include legal difficulties associated with naming perpetrators and referring individuals for prosecution, as well as the shortage of resources that truth commissions usually face. Truth commissions that do not allow for public participation and oversight also risk undermining the right to truth and opportunities for public healing. This section considers these issues by exploring in turn: (i) the importance of truth-finding processes being open to the public, (ii) challenges concerning the practice of identifying perpetrators by name, (iii) how truth commissions can contribute information to criminal prosecutions, and (iv) the ways in which time and resource limitations can impact on truth-finding efforts and be affected by the scope of a truth commission’s mandate.

1. Public Processes

Because the right to truth is held by both victims and society as a whole, a process of truth-finding must be substantially open to the public. This was the case for Argentina’s “truth trials,” Morocco’s Equity and Reconciliation Commission, and the Truth and Reconciliation Commissions of South Africa, Peru, and Sierra Leone, all of which conducted at least some proceedings that were open for the public to attend.¹⁹⁶ Broadcasting proceedings via radio or television, as was done by South Africa’s Commission,¹⁹⁷ is another effective way to increase the general public’s access, especially those in remote locations.¹⁹⁸

A commission’s final report must be promptly made available to the public to ensure that the public can access the commission’s findings and more

194. . Hayner, *supra* note 177, at 22.

195. . *Id.* (quoting an anonymous commentator).

196. . *Lessons Learned from Latin America*, *supra* note 44, at 129. The holding of some proceedings *in camera* may also be appropriate in certain circumstances.

197. . Gunnar Theissen, *Common Past Divided Truth*, in LEGAL INSTITUTIONS AND COLLECTIVE MEMORIES 101, 105 (Susanne Karstedt ed., 2009).

198. . Ari S. Bassin and Paul van Zyl, *The Story of Samuel Hinga Norman in Sierra Leone: Can Truth Commissions and Criminal Prosecutions Coexist After Conflict?*, in HUMAN RIGHTS ADVOCACY STORIES 260 (Deena Hurwitz and Margaret Satterthwaite eds., 2009).

effectively hold the government accountable regarding any recommendations made by a truth commission.¹⁹⁹ Haiti's National Commission on Truth and Justice fell drastically short of this standard. President Aristide failed to release the report for six months after receiving it from the Commission, and when it was released, only a small number of copies were ever printed and distributed.²⁰⁰ This obstructed the access of many to the truth that had been found.²⁰¹ The government generally ignored the recommendations set out in the report,²⁰² although some efforts have been made to arrest and prosecute those included on the report's list of accused perpetrators,²⁰³ illustrating how truth commissions can assist governments to fulfill their duty to bring perpetrators to justice.

2. *Identifying Perpetrators*

A truth commission that refuses to identify perpetrators by name will limit the "full truth" that the right to truth requires.²⁰⁴ Yet, seeking to publish the names of perpetrators must be done in compliance with those individuals' due process protections.²⁰⁵ Such protections include the right to the presumption of innocence²⁰⁶ and to "a fair and public hearing by a competent, independent and impartial tribunal established by law."²⁰⁷ Those accused also must be afforded the right to challenge the authenticity of evidence relied upon and to cross-examine witnesses testifying against the alleged perpetrator.²⁰⁸ These protections would create strong pressures on a commission to follow stricter, more court-like procedures, which in turn would reduce the commission's agility and ability to efficiently reveal the truth.

The South African Truth and Reconciliation Commission was determined to name thousands of individuals for whom there existed strong evidence of involvement in past abuses but ultimately named less than ten percent of that

199. . *Id.* at 80.

200. . *Lessons Learned in Latin America*, *supra* note 44, at 129.

201. . Similar delays occurred in Ghana and Sierra Leone. Bosire, *supra* note 11, at 80.

202. . Hayner, *supra* note 177, at 55.

203. . Brian Concannon, *Beyond Complementarity: The International Criminal Court and National Prosecutions, A View From Haiti*, 32 COLUM. HUM. RTS. L. REV. 201 (2000).

204. . Méndez, *supra* note 19, at 265.

205. . Eduardo González Cueva, *The Peruvian Truth and Reconciliation Commission and the Challenge of Impunity*, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE 88 (Naomi Roht-Arriaza and Javier Mariezcurrena eds., 2006).

206. . ICCPR, *supra* note 2, art. 14(2).

207. . ICCPR, *supra* note 2, art. 14(1).

208. . *See e.g.*, *Mulosmani v. Albania*, Judgment, App. No. 29864/03, Eur. Ct. H.R., ¶ 125-126 (2013) (discussed *infra*).

figure.²⁰⁹ The Commission determined that due process standards required that the accused individuals were entitled to an opportunity to examine the evidence, upon which the Commission planned to base an allegation, and to respond to the allegations.²¹⁰ This process took considerable time, as lawyers for the individuals accused sought a sufficient opportunity to properly analyze the documentary and in person evidence on which the tribunal sought to base its conclusions.²¹¹ This resulted in significant delays for the Commission, which, compounded by the fact that the decision to name perpetrators was taken towards the end of its mandate, restricted the number of individuals the Commission could name after the individuals were accorded due process.²¹² This example reveals how truth commissions, as usually *ad hoc* institutions with modest funding sources and limited control over the duration of their mandates, can struggle to manage more cumbersome, court-like processes. Other commissions have allowed perpetrators to cross-examine victims.²¹³ Such disputation of a victim's account, while in furtherance of reaching an objective truth and in compliance with the alleged perpetrator's right to a fair trial, may further strip, rather than restore, the victim's dignity and can lead to further traumatization.²¹⁴ While restoring a victim's inherent dignity might not be the central focus of the truth or justice obligations considered in depth by this Article, it is an important factor underpinning the field of transitional justice generally,²¹⁵ as well as forming one of the key bases for international human rights law.²¹⁶

More fundamentally, there may be circumstances in which naming a perpetrator will breach that individual's right to a fair trial. European Court of

209. *Unfinished Business: the Truth and Reconciliation Commission's Contribution to Justice in Post-Apartheid South Africa*, *supra* note 147, at 751.

210. *Id.* at 750–51.

211. *Id.* at 751.

212. *Id.* at 751.

213. *See, e.g.*, Bosire, *supra* note 11, at 80 (discussing Ghana's National Reconciliation Commission and the Oputa Panel of Nigeria).

214. *Id.* Bosire goes on to note, however, that other victims felt empowered by the Commission's court-like process and felt gratified by the 'victory' of summoning the perpetrators to the commission to defend themselves.

215. Elizabeth A. Cole, *Transitional Justice and the Reform of History Education*, 1 INT'L J. TRANS. JUST. 115 (2007) ("Transitional justice goals now extend to truth telling, restoring the dignity and preserving the memory of victims, building peace, creating respect for human rights and democracy, and to reconciliation.").

216. *See, e.g.*, UDHR, *supra* note 3, preamble ("Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world") and art. 1 ("All human beings are born free and equal in dignity and rights.").

Human Rights jurisprudence sets out that any statement by a public official reflecting a belief that an individual charged with a crime is guilty violates the presumption of innocence.²¹⁷ There may be doubts regarding whether truth commission members, especially those appointed by international processes rather than by the State, are considered public officials. Many truth commissions will also seek to name perpetrators before they are formally indicted with an offence. Nonetheless, a truth commission's ability to identify perpetrators could be significantly challenged or limited if a court were to interpret or expand this fair trial protection in a way that included members of truth commissions as public officials.

Peru's Truth and Reconciliation Commission resolved this dilemma by naming individuals and providing all relevant information of their acts while avoiding language that sounded like an indictment for a particular crime,²¹⁸ as that was a task for the prosecutors to whom it would refer potentially prosecutable cases. A senior staff member of the Commission viewed the distinction between naming an individual as a "doer" rather than as a "perpetrator" moot: it did not result in the protection of the individual's reputation in the "court of public opinion,"²¹⁹ where such due process rights do not exist. Nonetheless, using language that avoids accusing individuals of breaches of domestic law or of international human rights or international humanitarian law may well comply with the human right to a fair trial. The appropriateness of such an approach will depend on the circumstances in which a commission operates, including time and resource constraints, as well as the specific language used.

A central consideration for future commissions seeking to follow the Peruvian Commission's approach will be to ensure compliance with the human rights of the alleged perpetrators, including their rights to due process. A failure to ensure this would risk undermining the normative system of human rights protections that transitional justice seeks to restore. Méndez resolves this dilemma by stating that a commission should name names where prosecutions are unlikely to follow (after informing the accused of the allegation and allowing them the opportunity to adequately prepare to defend the allegation) but should refrain from identifying individuals if a trial is due to take place.²²⁰ Where a

217. . *Mulosmani v. Albania*, Judgment, App. No. 29864/03, Eur. Ct. H.R., ¶ 137 (2013) (holding that "the presumption of innocence . . . will be violated if a statement of a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved so according to law") (citing *Shuvalov v. Estonia*, App. No. 14942/09, Eur. Ct. H.R., ¶ 75 (2002); *Allenet de Ribemont v. France*, App. No. 15175/89, Eur. Ct. H.R., ¶ 35 (1995)).

218. . *González Cueva*, *supra* note 205, at 88.

219. . *Id.* at 88–89.

220. . Méndez, *supra* note 19, at 265; Méndez and Bariffi, *supra* note 5, ¶ 13.

commission does plan to name individuals as perpetrators, the manner in which it does so must be carefully considered and, preferably, be the subject of an independent legal opinion to ensure it is done through a process that complies with each alleged perpetrator's human rights.

3. *Contributing to Prosecutions*

Truth commissions can also contribute to prosecutions, thereby supplementing the process that has been most consistently endorsed as the key to satisfying the State's obligation to investigate and to punish. Various commissions have referred cases to prosecutors, whether according to an official mandate or of their own initiative. Argentina's CONADEP is regarded as a vital precursor to prosecutions.²²¹ Peru's Truth and Reconciliation Commission referred some forty-seven individuals for prosecution, although institutional tensions between the Commission and the Office of the Prosecutor General failed to lead to the timely indictment of those individuals.²²² It was only after the establishment of a National Criminal Court to hear human rights cases that many of these individuals were indicted, albeit with most trials leading to acquittals.²²³

Other commissions have been explicitly prohibited from naming names or referring persons for prosecution.²²⁴ Indeed, a commission that plans to refer cases to prosecutors is likely to encounter greater reluctance from accused persons to give evidence, thus losing a vital source of information.²²⁵ This means efforts to strengthen justice may come into tension with a commission's ability to uncover the truth. Whether a commission ought to have a cooperative relationship with prosecutors will thus depend on the particular circumstances of each case and the priorities of the government's transitional justice program, which will vary from government to government, depending on, amongst other factors: the country's political stability, the extent of funding and institutional

221. . Hayner, *supra* note 177, at 94 (quoting Luis Moreno-Ocampo, the then deputy prosecutor of Argentina, as stating that would have been "impossible" without the information gathered by CONADEP).

222. . González Cueva, *supra* note 205, at 88–89.

223. . Hayner, *supra* note 177, at 96.

224. . *Id.* at 93. Such commissions include those of Morocco and the Solomon Islands, as well as Chile's second commission.

225. . Basin and van Zyl, *supra* note 198, at 258 (stating that "the TRC [truth and reconciliation commission] will not want to provide prosecutors with free access to all information it gathers, as this will dissuade perpetrators from cooperating with the TRC. It might cause the TRC to be perceived as an investigative branch of the court, and thus create powerful disincentives for people to testify before the TRC. Valuable information would be lost, and the TRC may not be able to function effectively as a venue for truth-seeking or reconciliation.").

capacity available, and the perspectives and articulated priorities of victims and other stakeholders. In that regard, a government seeking societal reconciliation and a period of nation-wide reflection through truth-finding may be less inclined to encourage truth commissions to refer cases for prosecution than a government seeking to differentiate itself from the former regime through a policy of robust and sustained prosecutions of human rights violators. Both approaches can be pursued while still fulfilling a State's truth and justice obligations, provided due care is taken in the design of mechanisms employed and in how those mechanisms interact.

4. *Time and Resource Limitations*

Finally, time and resource limitations can make it difficult for truth commissions to adequately satisfy the right to truth with regard to incident-specific truths and structural truths. This is further complicated by the growing tendency of truth commission mandates to include the making of recommendations on systemic reforms to prevent recurrence. For instance, Argentina's 1983 commission produced recommendations to ensure non-recurrence which spanned less than a page,²²⁶ in comparison to the seventeen or so pages of recommendations included in the 2013 findings of Kenya's Truth, Justice and Reconciliation Commission.²²⁷ Pablo de Greiff, the United Nations Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, has argued that a truth commission's ability to comprehensively carry out truth-finding can be eroded by more global or recommendatory mandates, which pull a commission's efforts and resources in a different direction.²²⁸ In other words, there is a risk that empowering a truth commission to make recommendations for reform can deprive the commission of valuable time, resources, and energy needed for comprehensive truth-finding. On the other hand, determining appropriate structural reforms is vital to a nation's attempts to prevent recurrence of violence, and a commission intimately familiar with the nature of abuses on an individual and systemic level will often be well placed to efficiently make recommendations for reform. While the right to truth would pull in the direction of restricting truth commission mandates to truth-finding, prudent governance (and State obligations under international human rights law to prevent recurrence of human rights violations and to end

226. .NATIONAL COMM'N ON THE DISAPPEARANCE OF PERSONS, *supra* note 36, pt. VI.

227. . TRUTH, JUSTICE, AND RECONCILIATION COMM'N, *supra* note 35, at 1–62.

228. . Pablo de Greiff, *Truth Without Facts: On the Erosion of the Fact-Finding Function of Truth Commissions*, in THE FUTURE OF HUMAN RIGHTS FACT-FINDING (Philip Alston and Sarah Knuckey eds.) (forthcoming 2015).

impunity²²⁹) also requires consideration of reforms to ensure non-recurrence of human rights violations and the maintenance of peace. How this tension is resolved in each case will depend on the circumstances, and the likely competencies and resources of the truth commission.

This discussion reveals that prosecutions alone cannot entirely protect the right to the truth. Truth commissions will often play a complementary role, albeit one that must be carefully navigated. Truth commissions can help bring perpetrators to justice, provided that pitfalls of including justice considerations, such as referring accused perpetrators to prosecutors, are closely monitored within truth commissions' mandates. The next Part considers contextual variables that impact the ability of different transitional justice mechanisms to protect the right to truth and satisfy the duty to bring perpetrators to justice. The following Part looks at the various ways to combine different procedures to form an integrated response that best meets these obligations, depending on the specific facts in any case.

VI.

VARIABLES TO THE FULFILLMENT OF THE RIGHT TO TRUTH AND DUTY TO BRING PERPETRATORS TO JUSTICE

It is trite to say that transitional justice does not have a 'one size fits all' solution to every scenario. Each country in transition may require a different combination of transitional justice mechanisms depending on the circumstances that country faces. This Article seeks to explain the value and shortcomings of truth commissions in transitional settings, especially with regard to a government's international legal obligations to ensure the right to truth and to bring perpetrators to justice. However, the evaluation of truth commissions cannot be done in a vacuum: various practical considerations must be factored into decision-making regarding transitional justice policies. This Part considers five contextual variables that determine the most effective transitional justice measures to fulfill a State's international human rights law obligations.

A. Institutional Capacity

Implementing transitional justice mechanisms requires functioning State institutions.²³⁰ For example, criminal trials require an effective police or security service to investigate and detain accused individuals, an able and sufficiently resourced prosecutor, competent and accessible defense counsel, and

229. . See discussion in Part II(C): "Sources: Treaties and Interrelated Rights," *supra*.

230. . Bosire, *supra* note 11, at 76.

an independent and well-trained judiciary. States will have greatly reduced capacity to carry out criminal trials where its judges and prosecutors lack independence,²³¹ were decimated²³² or left the country following the withdrawal of an occupying power.²³³ In such circumstances, a truth commission might provide a more realistic means of fulfilling the right to the truth due to its *ad hoc* nature and its less technical procedures; carrying out a very limited number of prosecutions or seeking international funding and assistance to build domestic prosecution capability may then be the only plausible means of satisfying the duty to bring perpetrators to justice. As a party to the Rome Statute, if a State cannot fulfill its duty to prosecute, it may be obliged to submit a self-referral to the International Criminal Court.²³⁴ Even where a relatively substantial number of prosecutions do take place, the scale of such efforts will likely be dwarfed by a properly financed, victim-focused truth commission. For example, Argentina succeeded in convicting over 250 offenders since 2003,²³⁵ which is a substantial number compared to many other transitional attempts at prosecution. This number was nonetheless eclipsed by the list of 8,960 disappeared persons compiled by Argentina's CONADEP.²³⁶ In other cases, truth commissions might also seek to complement and facilitate future prosecutions. For instance, CONADEP referred around 700 individual cases for prosecution.²³⁷ Alternatively, a truth commission might help clear the

231. . See *id.* at 77 (noting that “[i]n the DRC, the history of the judiciary in the entire post-colonial phase has been marked by a lack of independence, integrity, and infrastructure.”).

232. . See, e.g., William Schabas, *Justice, Democracy, and Impunity in Post-genocide Rwanda: Searching for Solutions to Impossible Problems*, 7 CRIM L. F. 533 (1996) (cited in van Zyl, *supra* note 21, at 55 (referring to reliable estimates that only 20% of Rwanda's judiciary survived the events of 1994)).

233. . Justice Shane Marshall, *The East Timorese Judiciary: At the Threshold of Self-sufficiency?*, Conference of Supreme and Federal Court Judges, Darwin, Australia, (Dec. 20, 2004) (discussing East Timor's appointment of its first eight judges and two prosecutors in 2000); Justice Shane Marshall, *The East Timorese Judiciary: At the Threshold of Self-sufficiency? Update*, Co-operating with Timor-Leste Conference, Victoria University, Melbourne, Australia, (Jun. 17, 2005) (noting that in 2005 all 22 of East Timor's judges, as well as all prosecutors and public defenders that were assessed, failed their examinations and evaluations and were suspended from duty).

234. . Rome Statute, *supra* note 3, art. 14(1). This will be limited to crimes committed after that state became a party to the Rome Statute, art. 11(2).

235. . HUMAN RIGHTS WATCH, WORLD REPORT 2013, ARGENTINA, <http://www.hrw.org/world-report/2013/country-chapters/argentina>.

236. . NATIONAL COMMISSION ON THE DISAPPEARANCE OF PERSONS, *supra* note 36, at pt. II. An additional 1,300 had been seen in secret detention centers but were still missing.

237. . Leonardo Filippini, ICTJ BRIEFING: CRIMINAL PROSECUTIONS FOR HUMAN RIGHTS VIOLATIONS IN ARGENTINA 2 (Nov. 2009). Prosecutors tried three military juntas before the “Full Stop Law,” *Ley de Punto Final*, was passed by the National Congress of Argentina in 1986, halting prosecutions until the law was held to be unconstitutional in 2005. Rebecca Lichtenfield, ICTJ CASE STUDY SERIES: ACCOUNTABILITY IN ARGENTINA: 20 YEARS LATER, TRANSITIONAL JUSTICE

docket itself in countries with low institutional capacity. The UNTAET Commission for Reception, Truth and Reconciliation in East Timor used plea bargaining to swiftly mete out Community Reconciliation Agreements, in which individuals who confessed to crimes could accept some form of community service as punishment.²³⁸ Additionally, truth commissions may fill a potential gap in the current prosecution process by identifying perpetrators.²³⁹ As discussed in Part V.B.2, identifying perpetrators is a resource-intensive process because of due process rights afforded to each named individual. However, the process of identification by a truth commission may cost less than prosecuting each named individual and, in a country lacking institutional capacity, should be easier to achieve.²⁴⁰

B. *Financial Resources*

Transitional governments often lack the financial resources required to carry out prosecutions that promote fair trial standards for defendants.²⁴¹ Additionally, limited State funding reduces the number of possible prosecutions. When a government faces such financial constraints, truth commissions, which are generally less expensive,²⁴² can complement a State's endeavors to comply with its international obligations. However, limited funding will also affect a truth commission's ability to pursue incident-specific truths and to identify perpetrators while affording them due process.

Rather than simply establishing a truth commission, financial limitations demand nuanced transitional justice policies. A State may be unable to allocate the funds needed to sustain a specialized prosecutorial office (or a court) that serves to prosecute grave human rights violations, and this type of office usually produces a very low yield of convictions to money spent.²⁴³ Thus, setting up

MAINTAINS MOMENTUM (Aug. 2005).

238. . U.N. Transitional Administration in East Timor (UNTAET), Regulation No. 2001/10 On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, U.N. Doc. UNTAET/REG/2001/10, pt. IV (July 13, 2001). The Office of the General Prosecutor maintained the power to nullify such Community Reconciliation Plans and have the case reheard: *ibid.*, § 24.6.

239. . As was done by, e.g., the South African Truth Commission: see van Zyl, *supra* note 147, at 751.

240. . *See, e.g.*, Marshall, *supra* note 233 (discussing the suspension from duty of all judges in East Timor). In such circumstances, the absence of a functioning judiciary renders an *ad hoc* truth commission more likely than the courts to efficiently and appropriately reveal the identity of perpetrators of violations of international human rights and international humanitarian law.

241. . van Zyl, *supra* note 6, at 57.

242. . CHARLES VILLA-VICENCIO & ERIK DOXTADER, PIECES OF THE PUZZLE: KEYWORDS ON RECONCILIATION AND TRANSITIONAL JUSTICE, 89–90 (2004).

243. . One key example, albeit at the international level, as opposed to the domestic level, is the

courts specifically to try human rights violations, such as Peru's National Criminal Court, will likely not be possible. However, such prosecutorial efforts can be blended with other, potentially pre-existing, investments in the legal infrastructure. It may be cost effective to assign human rights violations to the corruption, criminal syndicate, or other complex crime prosecution units. These units will be more accustomed to carrying out prosecutions that, like crimes associated with grave human rights violations, involve individuals who plan the offense and 'foot soldiers' who carry it out and that pose the challenge of disproving plausible deniability. This approach, while not necessarily being cheaper than implementing a truth commission,²⁴⁴ offers the opportunity to reduce operational costs compared with those that would be required to establish a new human rights and international humanitarian law focused prosecutorial office. This approach could also leave sufficient funds for a truth commission to exist alongside such efforts to prosecute violations of human rights, thus expanding the State's ability to fulfill its duties with regards to both truth-finding and bringing perpetrators to justice.

C. *Extent of the Atrocity*

When human rights violations occur on a massive scale, it may be impossible to investigate and prosecute every perpetrator.²⁴⁵ However, this impossibility does not render the prosecution attempts that do take place to be futile: the duty to prosecute obliges states to use all available means to bring perpetrators to justice, rather than demanding that states succeed in bringing every perpetrator to justice.²⁴⁶ In such circumstances, criminal prosecutions may also be positioned to make findings regarding historical or structural truths. In its early cases, the International Criminal Tribunal for the former Yugoslavia used historians as expert witnesses to explain the background of certain conflicts.²⁴⁷ Historians also explained the circumstances in which the charged

International Criminal Court, which has secured only two convictions in its first twelve years of operation. While international courts operate in different contexts to national courts, the International Criminal Court also possesses a significant depth of expertise in determining questions of international human rights and international humanitarian law; this renders its relatively meager output of convictions per year particularly illustrative of the low yields of convictions to be expected by an institution for breaches of international human rights or international humanitarian law.

244. . VILLA-VICENCIO & DOXTADER, *supra* note 242 (noting that truth commissions "demand fewer resources than courts").

245. . van Zyl, *supra* note 6, at 59.

246. . *See supra* note 139.

247. . Robert J. Donia, *Encountering the Past: History at the Yugoslav War Crimes Tribunal* 11 J. INT'L INST. (2004), <http://hdl.handle.net/2027/spo.4750978.0011.201> ("I was called as the prosecution's historical expert in June 1997 in the case against Croatian General Tihomir Blaškić. False My presentation was more an extended lecture on regional history than court testimony as it

crimes were allegedly committed.²⁴⁸ Such a role will not always be possible. Systemic crimes remain very costly to prosecute and can be difficult to prove beyond a reasonable doubt in circumstances where government officials may be “trained in the art of concealing their crimes and destroying evidence”.²⁴⁹ These characteristics limit the ability of criminal prosecutions to make expansive historical findings. On the other hand, due to their broader scope of investigations and less rigorous evidence standards, truth commissions utilize a greater pool of potential information sources.²⁵⁰ These will often make truth commissions better placed to make findings regarding structural truths.²⁵¹

D. *Whether Perpetrators Still Inhabit State Institutions*

When those who organized, assisted, or directly perpetrated human rights violations continue to occupy influential positions in State machinery, this could impede State efforts to carry out effective prosecutions, at least in the short term. If judges were implicated in past abuses or exhibit continuing prejudice against a previously victimized group, it will be difficult to obtain fair prosecutions.²⁵²

might take place in an American court, where a judge would neither need nor welcome such an extensive background portrayal.”).

248. . *Id.* (referring to Dr. Audrey Budding’s account in *Prosecutor v. Milošević*, Case No. IT-02-54-T, of Slobodan Milošević as a pragmatist who evoked latent nationalist sentiment for his own political gain).

249. . Paul van Zyl, *Dilemmas of Transitional Justice: The Case of South Africa’s Truth and Reconciliation Commission*, J. INT’L AFF. (Spring 1999), 652-653 (explaining that the South African government could not afford the costs associated with prosecuting all of the accused, many of whom were former state employees with the right to state-funded legal defense and describing the “hidden costs to the state” such as large teams of state lawyers and large costs associated with witness support and protection) and 652 (stating that “political crimes committed by highly skilled operatives trained in the art of concealing their crimes and destroying evidence are difficult to prosecute”).

250. . Eduardo González and Howard Varney, *Truth Seeking: Elements of Creating an Effective Truth Commission* (2013), <https://www.ictj.org/sites/default/files/ICTJ-Book-Truth-Seeking-2013-English.pdf>, 11 (stating that “[b]ecause of their broad focus, both in terms of violations and time period, commissions may gather massive information from direct witnesses, archives, and other sources. . . . Such large amounts of data allow commissions to incorporate different methodological approaches, like statistical analysis, in their work.”).

251. . *Id.*, 11 (stating that “[u]nlike parliamentary commissions of inquiry, common in many countries, which tend to focus on single issues or the circumstances of a specific event, truth commissions typically cover longer periods of abuse, sometimes decades. This allows truth commissions an opportunity to identify historical patterns of violence and systemic violations.”).

252. . Paloma Aguilar *Judiciary Involvement in Authoritarian Repression and Transitional Justice: The Spanish Case in Comparative Perspective*, 7 INT’L J. TRANS. JUST., 246 (arguing that “[w]hen liability for repression not only falls on military and police forces but also implicates the judicial system, judges and prosecutors tend to be reluctant to approve punitive measures against repressors”); see also Paola Cesarini, *Transitional Justice*, THE SAGE HANDBOOK OF COMPARATIVE POLITICS 507 (Todd Landman & Neil Robinson, eds., 2009) (stating that “local

One alternative for a new government which seeks to achieve justice and carry out truth-finding, but whose courts are staffed by such judges, is to set up new judicial institutions, such as Peru's National Criminal Court. This may not be an easy task, but if those loyal to the former regime are only concentrated in the judicial arm of government, the State's legislature or executive may be in a position to proceed to establish such an additional court. As previously discussed, ensuring fair criminal trials is a resource-intensive endeavor; setting up an alternative court would also require considerable financial investment and time to become operational.²⁵³ Additionally, there must be judges available who possess the training and expertise, and who exhibit a requisite degree of integrity and lack of bias. Deferring prosecution until the judiciary has been re-trained or gradually vetted and re-staffed, may be another option, provided the absence of immediate efforts to prosecute is replaced with other truth-finding mechanisms.²⁵⁴ Truth commissions, freedom of information processes, and missions dedicated to locating disappeared persons can be used for this purpose. To guarantee the right to truth, staff members of such mechanisms must be appointed using public processes that apply strict criteria regarding independence and ability.²⁵⁵ In many circumstances, staffing a truth commission may be easier than finding judges for a new judicial institution, as truth commissions can recruit from a broader field of potential candidates than courts. This will be especially relevant in contexts where a State finds itself with very few candidates possessing the sufficient training to become judges.

Another challenge exists where current members of the police force or military are implicated in past human rights violations²⁵⁶ and pose the risk of leading the nation back into conflict by mobilizing their armed forces against a government that seeks to prosecute them. If the threat is sufficiently serious, a government may be able to derogate from its duty to bring perpetrators to

employees from the previous undemocratic regime will be – at best – less than enthusiastic supporters of democratic reform and – at worse – active saboteurs of the new regime”).

253. . Christina T. Prusak, *The Trial of Alberto Fujimori: Navigating the Show Trial Dilemma in Pursuit of Transitional Justice*, 873 NYU L. Rev. (2010), (arguing that “given the financial expenditures associated with fair trials, societies with scarce resources are wise to invest in more viable transitional justice mechanisms, such as truth commissions or victim reparations schemes”).

254. . Bosire, *supra* note 11, at 77 (citing *Rep. of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, xiv ¶50 U.N. Doc. S/2004/616 (2004)).

255. . *Id.* at 79 (citing Alex Boraine, *A COUNTRY UNMASKED: INSIDE SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION*, 71–72 (2000)).

256. . Such was the case in South Africa and, initially, in Argentina and Chile. Christian Tomuschat, *Clarification Commission in Guatemala*, 23 HUM. RTS. Q. 233, 235 (2001); Jose Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations* 43 HASTINGS L. J. 1425, 1432 (1992).

justice.²⁵⁷ However, governments should still endeavor to find alternative means to comply with international human rights law, rather than seeking to avoid their international law obligations. By focusing on incremental or sequenced responses,²⁵⁸ a government may be able to fulfill its obligations through a multi-pronged response that seeks to prosecute after utilizing other truth-finding and vetting processes.²⁵⁹ This approach allows the truth commission to gather evidence and information immediately, instead of waiting for an appropriate time to prosecute,²⁶⁰ by which time material evidence or witnesses may have disappeared.²⁶¹ Even a truth commission would not, however, guard against witnesses' memories fading.

E. Precariousness of Peace

Some civil wars end in negotiated peace agreements rather than the defeat of one side of the conflict. In these circumstances, peace and security can be fragile. Either party could be in a position to revive conflict if they are dissatisfied with, or threatened by, transitional justice mechanisms.²⁶² Parties may view truth commissions as less of a challenge, potentially indicating that truth commissions may be less likely to reignite conflict.²⁶³ In El Salvador and

257. . van Zyl, *supra* note 6, at 65–66.

258. . The notion of sequencing transitional justice mechanisms is discussed in Part VII, Sequencing, *infra*.

259. . U. N. PEACEBUILDING SUPPORT OFFICE, WHAT IS TRANSITIONAL JUSTICE? A BACKGROUND 4 (Feb. 20 2008), http://www.un.org/en/peacebuilding/pdf/doc_wgll/justice_times_transition/26_02_2008_background_note.pdf.

260. . Elin Skaar, Camila Gianella Malca, & Trine Eide, AFTER VIOLENCE: TRANSITIONAL JUSTICE, PEACE, AND DEMOCRACY, 49 (2015) (noting that transitional justice mechanisms, such as truth commissions, “typically” occur “immediately after the transition”).

261. . *See, e.g.*, HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH, BRIEFING PAPER: SEDUCTIONS OF ‘SEQUENCING’: THE RISKS OF PUTTING JUSTICE ASIDE FOR PEACE, (Dec. 2010), http://www.hrw.org/sites/default/files/related_material/Sequencing%20Paper%2012.7.10.pdf, at 3–4 (stating that in transitional justice contexts: “[i]f delays [in pursuing justice] persist, other practical problems may arise that could render justice even more difficult to achieve. Memories fade over time, witnesses move or pass away, documentary or physical evidence can be lost, and suspects may no longer be available for prosecution.”).

262. . *See, e.g.*, Rachel Kerr & Eirin Mobekk PEACE AND JUSTICE 8 (2007) (noting that “[s]et against all the purported benefits of transitional justice are a number of risks and dangers that also need to be taken into account. Foremost is the potential for destabilization of a fragile peace process and the risk that pursuing justice might heighten tensions and reignite conflict between warring factions.”).

263. . *See, e.g.*, Pierre Hazan, *The Nature of Sanctions: the Case of Morocco's Equity and Reconciliation Commission*, 90 INT'L. REV. OF THE RED CROSS 405 (describing the King of Morocco's need in 2004 to “cope with countervailing pressure from, on the one hand, human rights activists [some of whom demanded complete accountability for past wrongs, others of whom demanded at least some form of transitional justice mechanism] and, on the other, the armed forces,

Guatemala, truth commissions were required by peace agreements between each government and its opposing guerilla movement.²⁶⁴ Christian Tomuschat, former coordinator of Guatemala's Commission for Historical Clarification, views prosecutions as unlikely to be an effective means of sanctioning past atrocities in these circumstances.²⁶⁵ However, the perceived precariousness of peace should not be used to justify inaction or a disproportionately cautious (or stubborn) approach. Doing so risks squandering the opportunities for systemic change and investigation that democratic restoration can create.²⁶⁶ It may also cause extensive public outcry and opposition, such as when the Uruguayan government chose to grant amnesty to military and government personnel²⁶⁷ and to not pursue prosecutions *or* truth-finding after over a decade of civic military dictatorship.²⁶⁸

All potential transitional justice options should be considered. The possibility of future prosecutions should not be definitively ruled out merely because their immediate pursuit might endanger peace.²⁶⁹ Indeed, efforts by civil society in numerous countries have been effective in ensuring that initial commitments to limited transitional justice mechanisms eventually lead to more comprehensive responses to past violations of international human rights and international humanitarian law. Argentina progressed from truth-finding in 1984 and two laws which impeded prosecutions²⁷⁰ to recommencing prosecutions in

the police and the security services that helped him keep his grip on power [and who insisted on the absence of any form of prosecution of past perpetrators].”

264. . Tomuschat, *supra* note 256, at 235.

265. . *Id.* at 235.

266. . Rolando Ames Cobián & Félix Reátegui, *Toward Systemic Social Transformation: Truth Commissions and Development*, in TRANSITIONAL JUSTICE AND DEVELOPMENT: MAKING CONNECTIONS 154 (Pablo de Greiff & Roger Duthis eds., 2009) (stating that in transitional periods “acute awareness of the crisis to be overcome and the enthusiasm of the democratic restoration generate a climate in which certain executive or legislative decisions become possible, along with certain agreements among various sectors of society that would not be possible in routine situations”).

267. . L 15.848, Ley de Caducidad de la Pretensión Punitiva del Estado [Law on the Expiration of the Punitive Claims of the State] (Uruguay) (Dec. 22, 1986).

268. . Zalaquett, *supra* note 256, at 1432; *Lessons Learned from Latin America*, *supra* note 44, at 138.

269. . Graeme Simpson, *Transitional Justice and Peace Negotiations*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, 18. See, e.g., Sarah Khatib, *Transitional Justice in the Shadow of the Arab Spring*, MUFTAH (Aug. 3 2012), <http://muftah.org/transitional-justice-in-the-shadow-of-the-arab-spring> (considering the prosecution of former President Hosni Mubarak in the immediate aftermath of his fall from power as contributing to the destabilization of Egyptian society, and noting that “success of criminal prosecutions may be dependent on timing”).

270. . Law No. 23492, Dec. 24, 1986, [1986-B] A.L.J.A. 1100 (Arg.), <http://www.nuncamas.org/document/nacional/ley23492.htm> (known as “Punto Final” or the “Full Stop Law”) and Law No. 23521, June 8, 1987, [1987-A] A.L.J.A. 260 (Arg.), <http://>

2005, after the Supreme Court overturned those laws.²⁷¹ Morocco gradually advanced from its initial reparations recommendations to more substantial, if not geographically comprehensive, truth-finding.²⁷² These examples illustrate how a country can incrementally adopt various transitional justice mechanisms as power dynamics shift within the country.

This Part has considered various practical challenges to implementing transitional justice programs that are consistent with a nation's international human law obligations. To adopt a realistic, effective transitional program the government must consider factors, including the country's institutional capacity and whether perpetrators remain in control of certain State institutions. Additionally, the State should closely consider its available financial resources and the extent of the atrocity in designing mechanisms to satisfy the right to truth and the duty to bring perpetrators to justice to the fullest extent possible. The precariousness of peace will also be a key factor in designing a policy that does not lead to further human rights violations. Most importantly, these variables should function as countervailing pressures, rather than inflexible roadblocks to the fulfillment of truth or justice. As discussed in the following Part, the incremental or sequential implementation of different mechanisms in response to changing political environments can assist a government to ensure these obligations are achieved holistically despite various practical challenges.

VII. SEQUENCING

The above contextual variables indicate that there is no hard and fast formula to satisfy a government's human rights obligations during transitional periods. However, these factors are directly applicable to a government's short-term goals, which can change along with the political context. Therefore, they should not rule out the possibility of future prosecutions, which may become possible as political dynamics shift. Rather than justifying non-compliance with international human rights law obligations, a government should aspire towards an integrated, long-term transitional justice strategy. This may involve

www.derechos.org/ddhh/arg/ley/ley23521.txt (known as "*Obedencia Debida*" or the "Due Obedience Law").

271. . See, e.g., Margarita K. O'Donnell, *New Dirty War Judgments in Argentina: National Courts and Domestic Prosecutions of International Human Rights Violations*, 84 NYU L. REV. 333 (2009).

272. . See, e.g., Veerle Opgenhaffen and Mark Freeman, *Transitional Justice in Morocco: Lifting the Veil on a Hidden Face*, in RECONCILIATION(S): TRANSITIONAL JUSTICE IN POST CONFLICT SOCIETIES (Joanna Quinn ed., 2009).

sequencing different mechanisms to start at various times, depending on the political context.

The examples of Sierra Leone,²⁷³ where a court and a truth commission took conflicting positions on the legality of amnesty clauses (discussed in Part III, above), and Peru,²⁷⁴ where institutional tensions undermined a truth commission's prosecution referrals (discussed in Part V.B.3, above), illustrate the difficulties that can result from the concurrent operation of prosecutions and truth commissions without sufficiently clear modes of operation and communication. Similar complications can result where multiple truth-finding commissions are established with overlapping mandates, as was proposed in Nepal.²⁷⁵ Even if a government has the resources and opportunity to immediately employ various judicial mechanisms at once, sequencing different mechanisms may be more effective in certain cases. Whether trials and truth-finding occur in parallel or consecutively, the government must also articulate clear rules and criteria to prioritize resources between these processes and govern their interactions, while also defining long-term strategies and goals. A transitional judicial program that promises too much to victims, such as "completely restor[ing] their dignity,"²⁷⁶ can further alienate victims when those commitments are not delivered. Similarly, a program that pledges too little, by, for instance, ruling out the possibility of any prosecutions of human rights violations,²⁷⁷ will also undermine the key transitional justice objectives of acknowledging and upholding the dignity of each victim and preventing atrocities from recurring.²⁷⁸ Furthermore, transitional justice programs must be designed and implemented in close consultation with victims groups and other relevant stakeholders. A program that is designed without such consultation

273. . Bassin and van Zyl *supra* note 198, at 229–65.

274. . González Cueva, *supra* note 205.

275. . *See, e.g.*, González Cueva, *supra* note 19 (discussing the overlapping mandates of the proposed Truth and Reconciliation Commission and a Commission of Inquiry on the Disappearance of Persons, which were merged pursuant to a Nepali Cabinet ordinance in August 2012).

276. . The Democratic Republic of Congo's Truth and Reconciliation Commission was mandated to, amongst other things, decide the "fate of the victims of the said crimes . . . and completely restore their dignity." Inter-Congolese Dialogue Resolution, DIC/CPR/04 (quoted in Bosire, *supra* note 11, at 80).

277. . For instance, Sri Lanka's government ruled out the possibility of future prosecutions for crimes committed during and following its civil war. Niran Anketell, *Hijacked Justice? Truth and Reconciliation in Sri Lanka*, OPEN SECURITY (December 3, 2013), <https://www.opendemocracy.net/opensecurity/niran-anketell/hijacked-justice-truth-and-reconciliation-in-sri-lanka>.

278. . *See also* HUMAN RIGHTS WATCH, *supra* note 261, 19 (arguing that "failing to signal the intent to implement accountability measures in a serious way and failure to follow through sends a dangerous message").

risks being ill-adapted to the circumstances on the ground²⁷⁹ and also may fail to sufficiently acknowledge and protect the inherent dignity of those who have suffered human rights violations.

Commentators note that sequencing processes of peace building (and impliedly truth-finding) before prosecutions can undermine future prosecutions, as vital evidence may be lost, perpetrators may no longer be available for prosecution and witnesses' memories may fade.²⁸⁰ However, the practical necessity of avoiding the realistic risk of descending back into conflict, where present, can outweigh these dangers. Additionally, the effective information collection and organization carried out by truth commissions can be used for future prosecutions. Nonetheless, sequencing should not be used as a means to completely avoid justice. The delay of prosecutions for several decades, as occurred in Argentina,²⁸¹ Chile,²⁸² and Cambodia,²⁸³ should also be avoided where possible. Delays in prosecutions increase the chances of witnesses' recollections diminishing and documentary evidence being misplaced or destroyed, which can impede the government's ability to bring perpetrators to justice.²⁸⁴ For instance, in the case of Cambodia, one report noted that "[m]uch mass grave evidence from the Khmer Rouge era has been lost or destroyed as crime scenes have been altered and witnesses' memories may have faded."²⁸⁵ Given these risks, sequencing different transitional justice mechanisms must aim to maximize the complementarity of those mechanisms.²⁸⁶

279. . Such allegations were recently leveled against Mali's recent suite of transitional justice mechanisms. INT'L CTR FOR TRANSITIONAL JUSTICE, BRIEFING PAPER: POSSIBILITIES AND CHALLENGES FOR TRANSITIONAL JUSTICE IN MALI (Sept. 2014), <http://www.ictj.org/publication/possibilities-and-challenges-transitional-justice-mali>, at 8–9.

280. . See, e.g., HUMAN RIGHTS WATCH, *supra* note 261, at 3–4; see also Mark Kersten, *The Fallacy of Sequencing Peace and Justice*, OPINIO JURIS (Sep. 29, 2011), <http://opiniojuris.org/2011/09/29/the-fallacy-of-sequencing-peace-and-justice/> (discussing the practical difficulties of using amnesties to secure peace and then later invalidating them to enable prosecution of past perpetrators).

281. . See O'Donnell, *supra* note 271.

282. . Marny A. Requa, *A Human Rights Triumph? Dictatorship-era Crimes and the Chilean Supreme Court*, 12 HUM. RTS. L. REV. 79 (2012).

283. . See, e.g., Suzannah Linton, *New Approaches to International Justice in Cambodia and East Timor*, 84 INT'L REV. RED CROSS 93 (2002).

284. . HUMAN RIGHTS WATCH, *supra* note 261, 3–4.

285. . Melanie Klinkner, *Forensic Science for Cambodian Justice*, 2 INT'L J. TRANSITIONAL JUST. 239 (2008).

286. . U. N. PEACEBUILDING SUPPORT OFFICE, *supra* note 259.

CONCLUSION

International human rights law is gaining influence over governmental responses to gross and systematic human rights violations. Regional and international human rights institutions and experts regularly apply the rights to truth and reparations and the duty to bring perpetrators to justice when considering State transitional justice policies, and States and international organizations are also increasingly acknowledging the existence of such norms. This ensures that governments adopt policies that are best suited to maintaining peace and restoring the inherent dignity of victims rather than merely adopting measures that suit the government's political program. As a general rule, prosecutions stand as the principal means of complying with a State's truth and justice obligations. However, even the most well resourced prosecution campaigns may fail to uncover the systemic causes of violence and the incident-specific truth for each victim and perpetrator. Governments may also more effectively fulfill the duty to bring perpetrators to justice by supplementing prosecutions with additional transitional justice mechanisms, such as truth commissions. States should therefore consider implementing a range of transitional justice mechanisms to comprehensively fulfill their international obligations. When practical limitations restrict a State's ability to carry out comprehensive prosecutions, additional transitional justice mechanisms become even more important.

This Article has set out the advantages and shortcomings of using truth commissions to complement prosecutorial efforts. Truth commissions are governed by less technical rules of procedure, enabling them to determine incident-specific and structural truths on a broader scale than prosecutions. Problems can arise, however, where commissions seek to identify perpetrators by name: due process rights for the accused are enlivened, which can stymie a commission's efficiency as it requires more formal, court-like processes. Similarly, while truth commissions might be able to contribute to prosecutions and supplement government efforts to fulfill the duty to bring perpetrators to justice, such an approach requires the careful navigation of practical and legal challenges that can arise when a truth commission and a court have overlapping mandates.

This Article has also considered contextual variables that, if taken into account early enough, can promote integrated policies to maximize the number of perpetrators brought to justice and the amount of truth uncovered. To determine realistic goals, one must consider a State's institutional capacities and whether perpetrators or those loyal to the former regime still inhabit State institutions. Additionally, the State's available financial resources and the extent of past human rights violations are factors that may affect how a government

should set out to meet its truth and justice obligations. Governments must also comply with fair trial rights and ensure public access to truth-finding procedures. The precariousness of peace is another important consideration given the need of governments to prevent future human rights violations.

Most importantly, these variables should only be used to fine tune policies; they should not be regarded as inflexible barriers to the fulfillment of State obligations regarding truth or justice. Truth commissions, for instance, must not be used to justify impunity by avoiding prosecutions. In this regard, mechanisms can be sequenced—only when absolutely necessary—so that a State is fulfilling both its truth and justice obligations to the greatest extent practically possible under the circumstances. While sequencing may often lead to truth commissions commencing before prosecutions, there is no hard and fast rule. The strategic implementation of necessary transitional justice mechanisms to fulfill the right to the truth and the duty to bring perpetrators to justice will depend on each State's specific context. States who devise strategies to meet both short- and long-term obligations will maximize their compliance with international human rights norms, which are designed to prevent future gross, systematic human rights violations, and to restore the inherent dignity of those whose human rights were violated.