# DOING JUSTICE TO HISTORY IN THE FACE OF GROSS HUMAN RIGHTS VIOLATIONS: EPISTEMIC JUSTICE OF TRUTH COMMISSIONS AND HUMAN RIGHTS REPORTS IN GUATEMALA, SERBIA AND SIERRA LEONE

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Mehmet Ratip

# ABSTRACT

DOING JUSTICE TO HISTORY IN THE FACE OF
GROSS HUMAN RIGHTS VIOLATIONS:
EPISTEMIC JUSTICE OF TRUTH COMMISSIONS
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IN GUATEMALA, SERBIA AND SIERRA LEONE

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This thesis examines the question of how societies deal with the legacy of gross human rights violations. More specifically, it examines the work of official human rights investigations called truth commissions which have been established in increasing numbers since the 1980s in post-conflict countries across the world as institutional responses to gross human rights violations. It involves a close study of reports written by three most prominent international human rights organizations (*Amnesty International*, *Human Rights Watch* and *International Center for Transitional Justice*) on the truth commissions in Guatemala, Serbia and Sierra Leone. A theory of *epistemic justice* is developed from a comparative analysis of human rights reports written to evaluate truth commissions. Epistemic justice is conceptualized as “doing justice to history” by producing impartial and consensual knowledge exhibiting the injustices of past violations. It is argued that the perspective of epistemic justice captures truth commissions’ special contribution to political transitions, a contribution distinct from “criminal justice” provided by the courts (doing justice to law) and “transitional justice”

provided by political processes (doing justice to politics). Accordingly, it is claimed that the success or failure of truth commissions should be evaluated in light of whether they realize a reliable documentation of gross violations. An ethical perspective in which truth commissions are seen as ends in themselves is proposed, in contrast to a prudential understanding of truth commissions as means to certain ends, such as criminal prosecutions and political regeneration, with which they may be overburdened to the point of failure.

Keywords: truth commissions, human rights, political theory, transitional justice, epistemic justice.

# ÖZ

AĞIR İNSAN HAKLARI İHLALLERİ KARŞISINDA
TARİHE HAKKINI VERMEK:
GUATEMALA, SIRBİSTAN VE SİERRA LEONE'DAKİ
HAKİKAT KOMİSYONLARINDA HAKİKATİN ADALETİ
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Bu tez, toplumların ağır insan hakları ihlalleriyle nasıl baş ettikleri sorusuyla ilgilenmektedir. Bu kapsamda, silahlı çatışma deneyimlerini geride bırakan ülkelerde 1980'lerden bu yana giderek artan sayıda kurulmakta olan ve ağır ihlallere yönelik resmî insan hakları soruşturmaları olarak işlev gören hakikat komisyonları araştırılmıştır. Tez, dünyanın önde gelen uluslararası insan hakları örgütlerinin (*Uluslararası Af Örgütü*, *İnsan Hakları İzleme Örgütü* ve *Uluslararası Geçiş Adaleti Merkezi*) Guatemala, Sırbistan ve Sierra Leone'daki hakikat komisyonlarını değerlendiren raporlarını incelemektedir. Komisyonları değerlendiren örgüt raporlarının karşılaştırmalı analizine başvurularak bir *hakikatin adaleti* kuramı geliştirilmektedir. Buna göre, hakikatin adaleti, geçmiş hak ihlallerinin yarattığı adaletsizliklere odaklanarak tarafsız ve mutabakata dayalı bilgi üretme yoluyla "tarihe hakkını vermek" şeklinde kavramsallaştırılmaktadır. Hakikatin adaleti kavramıyla, hakikat komisyonlarının siyasal geçiş süreçlerine yaptığı önemli katkı açıklanmakta ve bu katkının mahkemelerin sunduğu "ceza

adaleti" (hukuka hakkını vermek) ile siyasal süreçlerin sağladığı "geçiş adaleti"nden (siyasete hakkını vermek) farkı ortaya konmaktadır. Bu doğrultuda, hakikat komisyonlarının başarısının ya da başarısızlığının ağır ihlallerin güvenilir bir şekilde belgelenip belgelenmediği üzerinden değerlendirilmesi gerektiği ileri sürülmektedir. Hakikat komisyonlarının, denetleyemedikleri ve fakat başarısızlığa mahkûm olma pahasına ilişkilendirildikleri cezai kovuşturmalar ile siyasal reformlar gibi amaçlara ulaşmakta araç olarak kullanılmalarını içeren ihtiyadi anlayışa karşı, kendi içlerinde bir amaç olarak tasarlanmalarını savunan etik bir perspektif önerilmektedir.

Anahtar Kelimeler: hakikat komisyonları, insan hakları, siyaset kuramı, geçiş adaleti, hakikatin adaleti.

**Dedicated to Şeniz and Arman**

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In the course of my doctoral studies, five family members, or rather five old friends passed away. I had the matchless privilege of being the pet of Babi the Cat for nearly fifteen years back home in Cyprus. Her dry sense of humour is sorely missed. In my early days in Ankara, I was lucky to be the companion of great-aunt Akile for afternoon teas. She was a graceful voice of reason. Grandmother Jale... Words will not suffice to express my love for her. I can only hope that her miracle work on the piano will someday find expression in writing (hopefully mine). Behzat Ünel, the most interesting best friend I have had and probably will ever have, will forever remain the unsung king in a tale of two cities, Lefkoşa and London. Yet, the fear that my memories of his epic stories might eventually fade still grows on me. Great-aunt Letife was the kindest soul whose influence on my mother is a treasure beyond compare. May they all rest in peace.

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possible and it would be wise to look into a few more cases and human rights organizations; and Fatih Tayfur encouraged me to further explore what truth commissions might not be capable of achieving epistemically in light of knowledge-power relations. One of the most special privileges of my years as a doctoral student was to get to know and apprentice under Levent Gönenç. As a member of the examining committee, he encouraged me to further examine the relationship between epistemic justice and criminal justice. More importantly, he was always there whenever I was in dire straits. He is a mentor who helped me appreciate the virtues of law and joys of art.

Without the constant support and enlightening interventions of Cem Deveci, my supervisor, this thesis would have been more boring, less scientific and outright confusing. When I said to him back in 2008 that I wanted to write about political crimes, he made me understand that I actually meant gross human rights violations. Reading Hannah Arendt with him enabled me to think more seriously about political theory as a vocation. I greatly admire his virtuosity with concepts and consider myself very lucky to have had the opportunity to have long conversations with him. My fascination with ethics will hopefully be the enduring legacy of being a student of such a great teacher. I cannot thank him enough.

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If there is any humble sign of a serious, composed and refined thought process in the following pages, I owe this to her incomparable companionship and magnanimity. I am forever grateful for the way she helped me find serenity in mind so that I can finally say... *And sleep, history, sleep*.

# TABLE OF CONTENTS

**DECLARATION ON PLAGIARISM** .................................................... iii

**ABSTRACT**.............................................................................. iv

**ÖZ** ........................................................................................ vi

**ACKNOWLEDGEMENTS** ................................................................. ix

**LIST OF TABLES** .....................................................................xvii

**LIST OF FIGURES**...................................................................xviii

**NOTES ON STYLE** ..................................................................... xix

**INTRODUCTION** ..........................................................................1

**CHAPTERS**.................................................................................8

**1.** RESPONDING TO RADICAL EVIL: Remarks from Arendtian Political Thought ..........................................................................................8

1.1 Diagnosing inadequate responses: Rights, forgiveness and punishment ..........................................................................8

1.2 Observing one adequate response: The courtroom procedure...10

1.3 One question persists: Can we judge past events? ....................12

1.4 Exploring the possibility of a second response: Factual truth in history ...............................................................................16

1.5 Institutions of factual truth: Dealing with political responsibility outside the realm of politics................................................22

1.5.1 International nongovernmental human rights organizations..23

1.5.2 Truth commissions...............................................................25

1.5.3 Transitional justice ..............................................................28

1.6 Overview of the following chapters.............................................31

**2.** THEORETICAL PERSPECTIVE: Realizing Epistemic Justice through Truth Commissions ........ 36
2.1 Truth commissions as post-conflict instruments ........ 37
2.1.1 A general definition and its implications ........ 38
2.1.1.1 Ad hoc nature of commissions and their documentation of violations ........ 39
2.1.1.2 Organizational autonomy and historical impartiality ........ 40
2.1.1.3 Victim-centered commissions and their recommendations ........ 42
2.1.2 Amorphous wars that truth commissions deal with ........ 44
2.2 Assisting political transitions: Epistemic justice ........ 47
2.3 International peace and security: The wider environment in which truth commissions operate ........ 54
**3.** INSTITUTIONAL RESPONSES: Monitoring Gross Human Rights Violations through Human Rights Organizations ........ 59
3.1 Gross human rights violations: A matter of numbers and intensity ........ 60
3.1.1 Why gross violations are systematic/massive ........ 60
3.1.2 The issue of gravity: Serious violations of humanitarian law and gross violations of human rights law ........ 61
3.1.3 Are gross violations irreparable? ........ 64
3.1.4 Can gross violations be committed by actors other than the state? ........ 66
3.1.5 “Gross violations” as a term that presumes victims’ empowerment ........ 68
3.2 United Nations procedures for gross human rights violations ........ 69
3.2.1 Resolution 1235 ........ 69
3.2.2 Resolution 1503 ........ 72
3.3 Human rights organizations ........ 76
3.3.1 Amnesty International ........ 76
3.3.2 Human Rights Watch ........ 80

3.3.3 International Center for Transitional Justice..........................84

**4.** CASE SELECTION: Countries and Human Rights Reports.............92

4.1 Which countries and why? .........................................................92

4.1.1 Focus of thesis in light of transitional justice scholarship......95

4.2 Which reports and why?...........................................................100

**5.** GUATEMALA: Establishing a Truth Commission Under the Threat of Death...............................................................................................110

5.1 War in Guatemala, 1960-1996 .................................................110

5.2 Guatemala's Historical Clarification Commission, 1997-1999...124

5.3 Amnesty International on the Historical Clarification Commission ..........................................................................134

5.4 Human Rights Watch on the Historical Clarification Commission ..........................................................................142

5.5 International Center for Transitional Justice on the Historical Clarification Commission.................................................................146

**6.** SERBIA: Evading International Criminal Justice through a Truth Commission.........................................................................................152

6.1 Wars in the former Yugoslavia, 1991-1999 ...............................152

6.1.1 Wars in Slovenia and Croatia, 1991-1995 ..........................155

6.1.2 War in Bosnia and Herzegovina, 1992-1995 ......................157

6.1.3 War in Kosovo, 1998-1999 ................................................165

6.2 Yugoslav Truth and Reconciliation Commission, 2002-2003....168

6.3 Amnesty International on the Yugoslav Truth and Reconciliation Commission ..........................................................................173

6.4 Human Rights Watch on the Yugoslav Truth and Reconciliation Commission ..........................................................................175

6.5 International Center for Transitional Justice on the Yugoslav Truth and Reconciliation Commission .....................................................177

**7.** SIERRA LEONE: Seeking Truth in the Midst of International Prosecutions and a National Amnesty................................................184

7.1 War in Sierra Leone, 1991-2002 ...............................................184

7.2 Sierra Leone Truth and Reconciliation Commission, 2002-2004 ..... 199
7.3 Amnesty International on the Sierra Leone Truth and Reconciliation Commission ..... 207
7.4 Human Rights Watch on the Sierra Leone Truth and Reconciliation Commission ..... 217
7.5 International Center for Transitional Justice on the Sierra Leone Truth and Reconciliation Commission ..... 221
**8.** CHALLENGES, DILEMMAS AND DIFFICULTIES OF REALIZING EPISTEMIC JUSTICE: Comparing Truth Commissions' Relation to Courts, Victims and Causality ..... 230
8.1 Truth commissions in relation to courts ..... 205
8.1.1 Deterring future gross violations in Guatemala ..... 205
8.1.2 Dealing with the truth produced by an international court in Serbia ..... 209
8.1.3 Facing the difficult choice between prosecuting and reintegrating the small fry in Sierra Leone ..... 216
8.2 Truth commissions in relation to victims ..... 222
8.2.1 Contributing to the political empowerment of victims in Guatemala ..... 222
8.2.2 Confronting the sense of national victimization in Serbia ..... 225
8.2.3 Coping with the dilemmas posed by victim-perpetrators in Sierra Leone ..... 230
8.3 Truth commissions in relation to causality ..... 235
8.3.1 Seeking the origins of violence in Guatemala ..... 235
8.3.2 Grasping the responsibility for and effects of gross violations in Serbia ..... 241
**CONCLUSION:** Between Prudence and Ethics ..... 245
**APPENDICES** ..... 257
Appendix A ..... 257
Types of Violations Investigated by Truth Commissions ..... 257

Appendix B ........................................................................... 258
List of Human Rights Reports Analyzed ........................................... 258
Appendix C ........................................................................... 261
Number of Human Rights Reports Per Year ....................................... 261
Appendix D ........................................................................... 262
Critical Dates ........................................................................... 262
**REFERENCES** ........................................................................... 263
**TURKISH SUMMARY / TÜRKÇE ÖZET** ........................................... 290
**CURRICULUM VITAE** ........................................................... 315

# LIST OF TABLES

**TABLES**

**Table 1:** Possible responses to radical evil (following the questions posed by Hannah Arendt in twentieth-century political thought)............ 35

**Table 2:** Number of reports on truth commissions per international human rights organization ........................................................................ 101

**Table 3:** Number of reports on truth commissions per case................ 101

**Table 4:** Distribution of each organization’s reports across cases...... 103

**Table 5:** Distribution of organizations’ interest in the cases vis-à-vis the temporal dimension of the commissions’ operation........................ 105

**Table 6:** Challenges, dilemmas and difficulties revealed in human rights reports concerning truth commissions ........................................ 204

**Table 7:** Types of violations investigated by truth commissions ......... 257

**Table 8:** List of human rights reports analyzed.................................... 258

**Table 9:** Critical dates.............................................................................. 262

# LIST OF FIGURES

**FIGURES**

**Figure 1:** Number of unidentified bodies in La Verbena, a municipal cemetery in Guatemala, across years ....................................................118

**Figure 2:** Number of human rights reports per year by each organization ..........................................................................................261

**Figure 3:** Number of human rights reports per year on each country..................................................................................................261

# NOTES ON STYLE

**1.** Emphases in the quoted passages are in the original text unless otherwise stated.

**2.** Throughout the text, I avoided using abbreviations and, when abbreviations were used in original sources, I also added their unabridged versions. This choice will probably make the experience of reading more difficult (without acronyms, statements last longer), but also, hopefully, much easier (with no acronyms, one cannot forget what they stand for).

**3.** Throughout the text, I wrote the names of truth commissions and international nongovernmental human rights organizations in *italic* type (unless they were written otherwise in a quote or mentioned in references) due to their central importance for my thesis and in order to make them stand out for the reader.

# INTRODUCTION

In this work, I examined a subject matter which is generally defined in the vocabulary of international law and politics as “gross human rights violations”. This term was the starting point of my investigation. Frankly, it was a term that made my task difficult, given the fact that its referent was the challenging phenomenon of mass murder committed during violent political conflicts. However, in time, the term’s self-explanatory character revealed itself. “Gross human rights violations” identified not only a great problem faced by humankind, but also its solution or, at least, the first step towards conceiving its solution, namely, the perspective of “human rights”. This is the perspective upon which my analysis is built. Therefore, the more specific research question that I pursued here was *how the perspective of human rights leads us to respond to gross human rights violations*. Many polities across the world seemed to have agreed on certain institutional answers to this question, two of which form the primary content of my thesis: 1- national-official human rights investigations into gross violations called *truth commissions* and 2- international-nongovernmental monitoring bodies called *human rights organizations*. Throughout the dissertation, I will relate these two institutions by making the evaluative reports written by human rights organizations about truth commissions my principal object of research. Specifically, I

will look at reports written by *Amnesty International*, *Human Rights Watch* and *International Center for Transitional Justice* about the truth commissions established in the aftermath of armed conflicts in Guatemala, Serbia and Sierra Leone.

Despite the overwhelming, i.e., “gross”, nature of massacres and terror studied here, my aim is considerably modest. I hope to contribute to a discussion in the discipline of political theory concerning the variety of institutional responses to gross violations and the proper location of truth commissions amidst this variety. Therefore, I begin my inquiry with Hannah Arendt, a political theorist who has provided one of the most enabling entry points into this discussion. Let me try to explain why I primarily take my cue from Arendtian political thought and not anywhere else. Gross human rights violations is a post-Second World War notion that was first uttered in 1967. On the other hand, Arendt is the first contemporary political theorist who struggled with the same phenomenon before 1967, that is, before the term began to spread in international policy and advocacy circles. She did not name the phenomenon from the perspective of human rights, because, as will be noted below, she was largely critical of this perspective. Yet, by deriving her concept from Kantian philosophy and calling the Nazi policy of mass murder “radical evil”, she indicated that the phenomenon deserved, first and foremost, the attention of political theorists. The evil of gross violations was radical, in Arendt’s terms, because it uprooted the basic concepts of political thinkers, and among these concepts, “truth” occupies a special place. In *Eichmann in Jerusalem*, she emphasized that the Nazi regime was defined by an “aura of systematic mendacity”, an organized “criminal capacity for self-deception” (Arendt 1963: 52). The regime defined by totalitarian terror developed a disciplined effort to effectively deny its criminality. After all, Nazi propaganda tried to justify an extremely violent war by

claiming that the survival of the German people depended on it. In Arendt's words:

> During the war, the lie most effective with the whole of the German people was the slogan of "the battle of destiny for the German people" …, coined either by Hitler or by Goebbels, which made self-deception easier on three counts: it suggested, first, that the war was no war; second, that it was started by destiny and not by Germany; and, third, that it was a matter of life and death for the Germans, who must annihilate their enemies or be annihilated. (Arendt 1963: 52)

This was an instance of how totalitarianism (and the intensive violence it utilized) disrupted the relationship between truth and politics. The assumption that a political community could share undisputed facts was no longer taken for granted, because radical evil nurtured radical suspicion concerning the true meaning of major events. Arendt offered an original problematization of how such loss of truth and the accompanying fabrication of lies could have serious consequences for political life. Therefore, in Chapter 1, I will trace the evolution of her thought, showing how she consistently searched for adequate responses to what she called radical evil and later came to be known as gross violations. Her persistent examination of the question of whether we can judge past events of extreme violence provides a fruitful starting point for developing a theoretical discussion of truth commissions.

Consequently, my close reading of Arendt will lead me to develop my own theory concerning the proper connection between truth and politics in the face of gross human rights violations. In Chapters 1 and 2, I will introduce and elaborate on the concept of "epistemic justice". This concept, I will argue, captures the particular way in which truth commissions, as institutions given the task to

reinvigorate the possibility of attaining truth in a public realm contaminated by gross violations, realize justice as a fulfillment of the potential of human rights in an order characterized by peace and security. I will also introduce competing notions of justice which, when conceptually and institutionally linked with truth commissions, overburden the commissions with tasks beyond their reasonable capacity. I will present two such competing notions: 1- criminal justice provided by courts with the purpose of prosecuting and punishing persons responsible for gross violations, and 2- transitional justice realized through a variegated political process in which the ultimate aim is to rebuild the domain of politics by achieving reconciliation between victims and perpetrators of gross violations. Throughout the thesis, I will demonstrate how these notions correspond to three different modes of doing justice in the face of gross violations. Accordingly, *epistemic justice* will come to mean "doing justice to history", in other words, doing justice by producing an impartial body of knowledge regarding past violations through the report of the impartial investigative institution of truth commission. Similarly, in this conceptual framework, *criminal justice* will entail "doing justice to law", i.e., doing justice by way of assigning guilt to legal persons who should be held morally accountable for their acts amounting to gross violations. From this perspective, truth commissions are assessed by the extent to which they contribute to prosecutions. Finally, *transitional justice* will designate a mode of "doing justice to politics", reaffirming the faith in a political restructuring of social relations between hostile communities. Such transitional/political restructuring usually operates by way of relativizing (i.e., rendering secondary) the moral/legal goal of criminal punishment in light of the pragmatic consideration of granting amnesties to perpetrators. At the very least, from the perspective of transitional justice, criminal justice will come to be seen as one tool of

justice among many, with no legitimate claim to absolute necessity and indisputable moral authority. Truth commissions, on the other hand, will be regarded as, first and foremost, “truth and reconciliation commissions”, where truth will no longer be valued for its own sake, but will be assessed in terms of its therapeutic effects.

I will try to trace all this variation in the conception of justice in the monitoring activities of international human rights organizations. As its name suggests, the *International Center for Transitional Justice* will represent the perspective of transitional justice in their evaluations of truth commissions. *Amnesty International* and *Human Rights Watch*, however, will be closely associated with the position of criminal justice. Since my principal objects of research are the evaluative reports concerning truth commissions written by these organizations, I will try to demonstrate how these organizations, in their reports, make sense of truth commissions as instruments that should serve their respective visions of criminal and transitional justice. In contrast, I hope to show that the original political/ethical good provided by truth commissions is epistemic justice and argue that truth commissions should not be considered as mere means to the respective ends of criminal prosecutions and political regeneration.

At this point, another central theme of this thesis will emerge. This involves the tension between prudence and ethics and the way in which this tension shapes our inquiry into the past about the proper response to gross violations. In light of a Kantian conceptual framework, I will distinguish between 1- an ethical imperative which leads one to pursue an action for its own sake and regardless of practical calculations concerning the final outcome, and 2- a prudential imperative according to which an action is considered good as long as it serves as a means to a predetermined end. This distinction will assist me in two respects: First, it will allow me to see how *Amnesty*

*International* and *Human Rights Watch* generally adopt an ethically-driven understanding of criminal justice, whereas the *International Center for Transitional Justice* is more or less moved by prudential motivations. Secondly, it will help me to develop the main argument of my thesis, according to which a critique of human rights organizations' evaluations of truth commissions will be possible. Hence, I will claim that truth commissions should be seen as ends in themselves, i.e., ethical responses to gross violations and their specific mode of doing justice to history (epistemic justice) should be delinked, conceptually and institutionally, from post-conflict criminal prosecutions as well as political reconciliatory projects. The inability to achieve such autonomy between the conflicting goals of different conceptions of justice might force truth commissions to be seen as prudentially and pragmatically manipulable instruments that cannot claim to achieve an impartial look into the controversial history of violations. Under such circumstances, the absence of impartiality could allow manipulation of the past, which in turn blurs the preliminary vision of justice required for writing a history that recognizes human rights violations.

The reader should note that my interest in the cases of Guatemala, Serbia and Sierra Leone is not as direct and immediate as it would be in ordinary case studies. Put differently, for the purposes of this dissertation, these are not hard cases, i.e., they are not examined in order to achieve a thorough comprehension of the difficulties confronted in these countries during and after their armed conflicts. I was not in a position to personally witness the ongoing terrible dynamics of these wars and their effects. Therefore, they remain soft cases, letting me to analyze from a critical distance the efforts of human rights organizations in understanding the efforts of these countries' truth commissions. My own effort is built on this double institutional effort to respond to gross violations. I report on what

human rights organizations report on whether and how truth commissions report gross violations. Situating oneself at many removes from the empirical realm is probably advantageous for engaging in an exercise in political theory. Still, the facts on the ground are filtered through the reliable documentation of the world's best-known human rights organizations and, additionally, this documentation is corroborated by important accounts given by secondary academic literature, making it possible for me to make modest practical recommendations concerning how truth commissions can best realize their ethical potential. On the whole, this work is not immersed neither in detailed case studies of armed conflicts nor solely in human rights reports. I utilize both in order to construct a general comprehensive view of the role of truth commissions in the face of gross human rights violations. This role seems to be a major one to the extent that truth commissions can provide epistemic justice, which is a special contribution based on an ethical perspective centered on the importance of attaining impartial, hence *just* knowledge concerning gross violations.

# CHAPTER 1

# RESPONDING TO RADICAL EVIL: REMARKS FROM ARENDTIAN POLITICAL THOUGHT

## 1.1 DIAGNOSING INADEQUATE RESPONSES: RIGHTS, FORGIVENESS AND PUNISHMENT

As stated in Introduction, in this dissertation, I intend to extend a discussion in the discipline of political theory that began to be articulated after the Second World War, mainly by German political thinker Hannah Arendt (1906-1975). In her first preface to *The Origins of Totalitarianism* (1951), in light of the experience of world wars in the first half of the twentieth century, Arendt defined a new task for political thought: “examining and bearing consciously the burden which our century has placed on us” (Arendt 1951: viii). For instance, she said that, in light of such conscious examination,

> it must be possible to face and understand the outrageous fact that so small (and, in world politics, so unimportant) a phenomenon as the Jewish question and antisemitism could become the catalytic agent for first, the Nazi movement, then a world war, and finally the establishment of death factories. (Arendt 1951: viii)

Although the twentieth century was only halfway complete, Arendt seemed to have believed that the humankind had already seen enough to know that the death factories of the Nazi regime brought forth a "radical evil" (Arendt 1951: viii-ix). "Radical evil" was a term borrowed from German philosopher Immanuel Kant (1724-1804) to capture "offenses against human dignity so widespread, persistent, and organized that normal moral assessment seems inappropriate" (Nino 1996: vii). It was impossible for an eighteenth-century figure like Kant to foresee what radical evil might entail, but Arendt thought that the experience of totalitarian criminality gave an almost destined meaning to this notion. The development of antisemitism, imperialism and totalitarianism and their consummation in the radical evil of death factories, analyzed in *The Origins of Totalitarianism*, led her to express the following conviction: "human dignity needs a new guarantee which can be found only in a new political principle, in a new law on earth, whose validity this time must comprehend the whole of humanity" (Arendt 1951: ix). At first sight, the reader might think that the "new law" to which Arendt referred comprised the emerging international human rights norms. Indeed, a new guarantee of human dignity was inaugurated by the *Universal Declaration of Human Rights* adopted by the United Nations General Assembly in 1948, that is, just a couple of years before the publication of *The Origins of Totalitarianism*. In the same book, however, Arendt directly attacked the *Universal Declaration*:

> ... all attempts to arrive at a new bill of human rights were sponsored by marginal figures — by a few international jurists without political experience or professional philanthropists supported by the uncertain sentiments of professional idealists. The groups they formed, the declarations they issued, showed an uncanny similarity in language and composition to that of societies for the prevention of cruelty to animals. No statesman, no political figure of any importance could possibly take them

> seriously ... . Neither before nor after the second World War have the victims themselves ever invoked these fundamental rights, which were so evidently denied them. (Arendt 1951: 292)

Arendt's critique of the inadequacy of the *Universal Declaration* as a "new political principle" was actually part of a broader understanding of human powerlessness in the face of the terror of death factories. Seven years after the publication of *The Origins of Totalitarianism*, in *The Human Condition* (1958), where she discussed the potentialities of political action, she identified two more responses, next to the declaration of international legal norms of human rights, which she considered futile and even absurd in the face of radical evil. These were forgiveness and punishment:

> ... men are unable to forgive what they cannot punish and ... they are unable to punish what has turned out to be unforgivable. This is the true hallmark of those offenses which, since Kant, we call "radical evil" and about whose nature so little is known, even to us who have been exposed to one of their rare outbursts on the public scene. All we know is that we can neither punish nor forgive such offenses and that they therefore transcend the realm of human affairs and the potentialities of human power, both of which they radically destroy wherever they make their appearance. (Arendt 1958: 241)

## 1.2 Observing one adequate response: The courtroom procedure

Given that the offenses called radical evil mentioned in the above passage refer to Nazi crimes, it seems that Arendt was equally unimpressed by the legacy of the Nuremberg trials which punished the Nazi leadership for war crimes, crimes against peace and crimes against humanity. However, Arendt's dark view concerning human incapacity to adequately respond to the horrors exemplified by the Nazi

regime were to change, at least partially, five years later, in 1963, when she witnessed the trial of the German Nazi leader Adolf Eichmann in Jerusalem. One of the most remarkable conclusions of her *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963) was that the practice of law or, in her words, "the courtroom procedure" had the capacity to deal with a man who was personally responsible for causing great suffering to a great number of human beings. Punishment was now off the list of inadequate responses. Yet, although the law was seen to have a specific power to confront radical evil, Arendt warned that the limits of this power should be duly noted:

> The purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes —"the making of a record of the Hitler regime which would withstand the test of history," as Robert G. Storey, executive trial counsel at Nuremberg, formulated the supposed higher aims of the Nuremberg Trials—can only detract from the law's main business: to weigh the charges brought against the accused, to render judgment, and to mete out [distribute] due punishment. The judgment in the Eichmann case ... could not have been clearer in this respect and more to the point: ... the court could not "allow itself to be enticed into provinces which are outside its sphere. ..." Not only does it not have at its disposal "the tools required for the investigation of general questions," it speaks with an authority whose very weight depends upon its limitation. ... Hence, to the question most commonly asked about the Eichmann trial: What good does it do?, there is but one possible answer: It will do justice. (Arendt 1963: 253-254)

The evolution of Arendt's thought over a decade into the second half of the twentieth century brought her to a point where she had to distinguish between two modes of responding to radical evil. The lesson she drew from the Eichmann trial was that "the courtroom procedure", i.e., the law, can establish personal responsibility for "human wickedness" (Arendt 1963: 252, 253). This was the first possible response to radical evil, formulated as "doing justice" to the idea of legal

personality violated by the actions of a culpable person. Arendt was careful to underline that the effects of this response, which we might call "doing justice to law" or more obviously "criminal justice", cannot reach beyond the individual person or persons held responsible for massive injustice.[1] Any historical insight, on the other hand, into what pushed persons into such radically evil positions would have to remain beyond the scope of the legal procedure so that it could fulfill its task properly.

### 1.3 ONE QUESTION PERSISTS: CAN WE JUDGE PAST EVENTS?

Nonetheless, one year after the publication of *Eichmann in Jerusalem,* Arendt was forced to deal with determining the shape of the second possible response to radical evil, which proved more challenging. In her essay "Personal Responsibility Under Dictatorship" (1964), Arendt realized that the passing of a legal judgment in a court (i.e., criminal justice) seemed inadequate in one crucial respect. This was reflected in Eichmann's counterargument against the legal judgment that he was personally responsible for brutal crimes, precisely because he decided to revoke his autonomy, his human capacity to act otherwise. Indeed, both the judgment of criminal justice and Eichmann's objection to it were captured in Arendt's own hypothetical address to Eichmann towards the end of her book *Eichmann in Jerusalem*:

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[1] Arendt's notion of legal personhood, which, in contrast to mere humanity, makes us political beings, was already developed in *The Origins of Totalitarianism* as part of her critique of the idea of human rights: "The human being who has lost ... the legal personality which makes his actions and part of his destiny a consistent whole ... must remain unqualified, mere existence in all matters of public concern" (Arendt 1951: 301). "The paradox involved in the loss of human rights is that such loss coincides with the instant when a person becomes a human being in general —without a profession, without citizenship, without an opinion, without a deed by which to identify and specify himself— *and* different in general, representing nothing but his own absolutely unique individuality which, deprived of expression within and action upon a common world, loses all significance" (Arendt 1951: 302).

> You admitted that the crime committed against the Jewish people during the war was the greatest crime in recorded history, and you admitted your role in it. But you said you had never acted from base motives, that you had never had any inclination to kill anybody, that you had never hated Jews, and still that you could not have acted otherwise and that you did not feel guilty. ... You also said that your role in the Final Solution was an accident and that almost anybody could have taken your place, so that potentially almost all Germans are equally guilty. ... This is an indeed quite common conclusion, but one we are not willing to grant you. ... And no matter through what accidents of exterior or interior circumstances you were pushed onto the road of becoming a criminal, there is an abyss between the actuality of what you did and the potentiality of what others might have done. ... Let us assume, for the sake of argument, that it was nothing more than misfortune that made you a willing instrument in the organization of mass murder; there still remains the fact that you have carried out, and therefore actively supported, a policy of mass murder. (Arendt 1963: 277-279)

As noted in Arendt's essay "Personal Responsibility Under Dictatorship", Eichmann's obvious challenge to this judgment was simply that "no one can judge who had not been there":

> When told that there had been alternatives and that he [Eichmann] could have escaped his murderous duties, he insisted that these were postwar legends born of hindsight and supported by people who did not know or had forgotten how things had actually been. (Arendt 1964: 18)

Thus, Arendt was forced to ask the following question: "to what extent, if at all, can we judge past events or occurrences at which we were not present?" (Arendt 1964: 18-19). As explained above, in the case of the practice of criminal justice, the answer was: "we can judge past events to the extent that we can judge persons and establish personal responsibility". But there was another area that also had to be taken into account, specified in Eichmann's objection that "if I had not

done it, somebody else could and would have" (Arendt 1964: 29). Arendt called this argument raised by Eichmann "the cog-theory" (Arendt 1964: 29). This theory was based upon the viewpoint of a political system,

> how it [the political system] works, the relations between the various branches of government, how the huge bureaucratic machineries function of which the channels of command are part, and how the civilian and the military and the police forces are interconnected. (Arendt 1964: 29)

From this viewpoint, "we speak of all persons used by the [political] system in terms of cogs and wheels that keeps the administration running" and "each person must be expendable without changing the system, an assumption underlying all bureaucracies" (Arendt 1964: 29). Arendt distinguished this level of analysis from the criminal-legal approach which focused on "personal responsibility". The perspective of political system, however, was not simply devoid of any notion of responsibility. It was defined, in contrast to personal responsibility, by

> political responsibility which every government assumes for the deeds and misdeeds of its predecessor and every nation for the deeds and misdeeds of the past. When Napoleon, seizing power in France after the revolution, said: I shall assume the responsibility for everything France ever did from Louis the Saint to the Committee of Public Safety, he only stated a little emphatically one of the basic facts of all political life.[2] And as for the nation, it is obvious that every generation, by virtue of being born into a historical continuum, is burdened by the sins of the fathers as it is blessed with the deeds of the ancestors. (Arendt 1964: 27)

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[2] Napoleon Bonaparte (1769-1821) was the Emperor of the French from 1804 to 1815. Louis the Saint (1214-1270) was the King of France from 1226 until his death. The Committee of Public Safety was the *de facto* executive government in France during the "Reign of Terror" stage (1793-1794) of the French Revolution.

Arendt was once again careful to distinguish between the legal notion of criminal responsibility which assigned guilt to individuals alone and political responsibility assumed at the governmental and community level where the category of guilt stopped making sense: “There is no such thing as collective guilt or collective innocence; guilt and innocence make sense only if applied to individuals” (Arendt 1964: 29). She argued, however, that

> while courtroom procedure or the question of personal responsibility under dictatorship cannot permit the shifting of responsibility from man to [political] system, the system cannot be left out of account altogether. It appears in the form of circumstances. (Arendt 1964: 32)

In sum, Arendt’s inquiry into the burden of the twentieth century, that is, the question of possible responses to radical evil, progressed in the following stages: 1- She began by claiming that neither universal rights nor forgiveness and not even criminal punishment could be adequate responses. 2- She then changed her mind after she confronted Eichmann and decided that at least a criminal justice process which held persons responsible and punished them was necessary. 3- Finally, she arrived at a point where the “circumstances” and “general questions” beyond personal responsibility (“provinces which are outside the sphere of criminal justice”) had to be investigated. This latter point led Arendt to further inquire into the possibility of a second appropriate response to radical evil, next to criminal justice.

## 1.4 Exploring the possibility of a second response: Factual truth in history

Three years after the publication of "Personal Responsibility Under Dictatorship", Arendt published another essay called "Truth and Politics" (1967) which, I would argue, hinted at what this second possible response might involve.[3] In this essay, Arendt tried to establish the significance of what she called "factual truth" for the stability of a political realm beyond the actions of individual persons. She defined "factual truth" as follows:

> Factual truth ... is always related to other people: it concerns events and circumstances in which many are involved; it is established by witnesses and depends upon testimony; it exists only to the extent that it is spoken about, even if it occurs in the domain of privacy. It is political by nature. Facts and opinions, though they must be kept apart, are not antagonistic to each other; they belong to the same realm. Facts inform opinions, and opinions, inspired by different interests and passions, can differ widely and still be legitimate as long as they respect factual truth. Freedom of opinion is a farce unless factual information is guaranteed and the facts themselves are not in dispute. In other words, factual truth informs political thought (Arendt 1967: 238)

To Arendt, this notion of factual truth was closely related to both the ancient and modern concepts of history, discussed in another essay

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[3] Arendt concedes in both essays that they were written as reflections over the controversies caused by her book *Eichmann in Jerusalem*. This is why I think it is important to discuss both essays in connection with the problem of "radical evil" that became more pressing after Arendt's observations at the Eichmann trial.

called "The Concept of History: Ancient and Modern" (1961).[4] In its ancient variant, factual truth came out of the effort "to say what is", as exemplified by the ancient Greek historian Herodotus (c. 484-425 B.C.) (Arendt 1967: 229). Arendt argued that "[n]o permanence, no perseverance in existence, can even be conceived of without men willing to testify to what is and appears to them because it is" (Arendt 1967: 229). Moreover, factual truth from the viewpoint of ancient history was based on an understanding of impartiality, "as it is echoed by Herodotus, who set out to prevent "the great and wonderful actions of the Greeks *and* the barbarians from losing their due meed [reward] of glory" (Arendt 1968a: 51). This, for Arendt, remained in modern times "the highest type of objectivity we know", leaving behind "the common interest in one's own side and one's own people" and developing the capacity to relate to antagonistic standpoints. In terms of Arendt's confrontation with Eichmann, such historical impartiality necessitated understanding Eichmann's actions and circumstances, though, of course, not to save their glory, but to "examine and consciously bear the burden" of their factuality.

This examination is also reflected in the modern concept of history, informed by German philosopher Georg Wilhelm Friedrich Hegel (1770-1831), which, according to Arendt, helps human beings to firmly root themselves in reality. In her words:

> History —based on the manifest assumption that no matter how haphazard single actions may appear in the present and in their singularity, they inevitably lead to a sequence of events forming a story that can be rendered through intelligible narrative the moment the events are removed into the past— became the

[4] In "Truth and Politics", Arendt made the relation between the concept of factual truth and the concept of history clearly visible by stating that "all factual truth, of course, concerns the past" (Arendt 1967: 258).

> great dimension in which men could become “reconciled” with reality (Hegel), the reality of human affairs, i.e., of things which owe their existence exclusively to men. (Arendt 1968a: 85)

One particular difficulty, however, persists in this historical activity of forming meaningful stories from the subject matter of radical evil, one of the most disturbing things owing its existence to human beings. Arendt asks whether it is impossible to ascertain facts “without interpretation, since they [facts] must first be picked out of a chaos of sheer happenings ... and then be fitted into a story that can be told only in a certain perspective” (Arendt 1967: 238). She argues, by giving an example, that factual truth can actually escape from this difficulty:

> Even if we admit that every generation has the right to write its own history, we admit no more than that it has the right to rearrange the facts in accordance with its own perspective; we don’t admit the right to touch the factual matter itself. To illustrate this point: ... During the twenties [1920s], so a story goes, Clemenceau,[5] shortly before his death, found himself engaged in a friendly talk with a representative of the Weimar Republic on the question of guilt for the outbreak of the First World War. “What in your opinion,” Clemenceau was asked, “will future historians think of this troublesome and controversial issue?” He replied, “This I don’t know. But I know for certain that they will not say Belgium invaded Germany.” We are concerned here with brutally elementary data of this kind, whose indestructibility has been taken for granted even by the most extreme and most sophisticated believers in historicism. (Arendt 1967: 237-238)

Although Holocaust denial, for instance, continues to exist in today’s world as an extreme example of relativistic historicism, Arendt seems to have proposed that the activity of preserving “brutally elementary data” or “factual truths”, like the indisputable construction of death factories

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[5] George Benjamin Clemenceau (1841-1929) was the Prime Minister of France during the First World War.

and production of mass murder by the Nazi regime, would put us on another path of facing the radical evil, a response beyond the courtroom procedure that found Eichmann guilty. This response must escape from the fallacy of assigning guilt to collectivities like nations and governments. Therefore, it must attempt to understand how "historical continuum" burdens future generations of actors with political responsibility as opposed to personal responsibility.

Arendt draws the general outlines of this response with her concept of "factual truth" which she places "outside the political realm" in order to maintain its "indestructibility" and "unreasonable stubbornness" against actual and interpretive political conflicts (Arendt 1967: 238, 243). She argues from the assumption that political power can abuse factual truth by relativizing or even eliminating it. In other words, "facts are not secure in the hands of power" (Arendt 1967: 258). An equally significant point for Arendt, however, was that political power and its abusive strategies of "organized lying" and "mass manipulation" which engage in "rewriting contemporary history under the eyes of those who witnessed it" cannot completely invade the realm of factual truth (Arendt 1967: 252).

Arendt was probably the first contemporary political theorist who realized the deadly connection between destroying factual truths and committing serious political crimes, a connection utilized by those holding political power. She gives the following example in *Eichmann in Jerusalem*:

> During the last weeks of the war, the S.S. bureaucracy was occupied chiefly with forging identity papers and with destroying the paper mountains that testified to six years of systematic murder. Eichmann's department, more successful than others, had burned its files, which, of course, did not achieve much, since all its correspondence had been addressed to other State and Party offices, whose files fell into the hands of the Allies. (Arendt 1963: 220)

This attempted "systematic mendacity" of the Nazi regime was a critical element of the policy of systematic murder (Arendt 1963: 52). Political power destabilizes and threatens its own legitimacy and stability by committing massacres and then tries to restore, however deceitfully, that legimitacy and stability by engaging in organized lying and systematic denial. Still, Arendt says:

> power, by its very nature, can never produce a substitute for the secure stability of factual reality, which, because it is past, has grown into a dimension beyond our reach. ... In their stubbornness, facts are superior to power; they are less transitory than power formations, which arise when men get together for a purpose but disappear as soon as the purpose is either achieved or lost. (Arendt 1967: 258-259)

This relationship between factual truth and political power leads Arendt to provide another answer to the question of how to respond to radical evil beyond the criminal justice provided by a court of law. The question posed by her confrontation with Eichmann —"can we judge past events at which we were not present?"— is answered in the affirmative, from the perspective of political system and political responsibility, by the existence of factual truths "which men cannot change at will" (Arendt 1967: 264). Their stubbornness and undeniability entrenched in history guides the future governmental and nongovernmental actors in their endeavour to figure out how they can truthfully assume political responsibility for past deeds of radical evil. Factual truth limits the disagreements and conflicts of the political realm and gives them definite borders within which they can continue to unfold without recourse to organized lying. By respecting these borders, a political system burdened with the legacy of radical evil can give political life a new meaning beyond the "lust for dominion" (Arendt 1967: 263). Assuming political responsibility based on facts can eventually

give way to living a political life based on "acting together and appearing in public, ... inserting ourselves into the world by word and deed, thus acquiring and sustaining our personal identity and beginning something entirely new" (Arendt 1967: 263). This is basically a political life defined by "freedom" (Arendt 1968b).

So, this is the second response, besides the courtroom procedure, to radical evil: factual truth dealing with the political circumstances of radical evil, countering the danger of mass manipulation with objective remembrance of history, and thereby revealing the possibility of a new political beginning. For the sake of brevity, I would call this response "doing justice to history" or, even more succinctly, "epistemic justice", because it is constituted by knowledge (*episteme* in Ancient Greek) of factual truths produced by an impartial look into history. One does justice to history, hence to the accumulated knowledge of the past, via establishing factual truth concerning political responsibility in the past.

To my knowledge, there is only one scholarly work which deals specifically and comprehensively with the concept of "epistemic justice", though from a negative viewpoint, that is, by examining its reverse or absence, namely, "epistemic injustice". In her *Epistemic Injustice: Power and the Ethics of Knowing* (2007), Miranda Fricker provides a general definition of "epistemic practices" as "those human practices through which knowledge is gained, or indeed lost" (Fricker 2007: vii). She then proceeds to argue that there is "a certain ethical dimension to epistemic life — the dimension of justice and injustice" (Fricker 2007: vii). Her analysis focuses on "a distinctively epistemic kind of injustice", that is, "a wrong done to someone specifically in their capacity as a knower" (Fricker 2007: 1). Building on this conceptual framework, one can speak of institutions of epistemic justice aiming at the rightful empowerment of persons in their capacities as knowers. In the next

section, I will try to account for the possibility of such institutions of epistemic justice as a viable response to radical evil.

## 1.5 Institutions of Factual Truth: Dealing with Political Responsibility Outside the Realm of Politics

In order to better explicate the potentialities of factual truth in terms of dealing with past radical evil, Arendt noted several "existential modes of truthtelling" such as "the impartiality of the historian and the judge, and the independence of the fact-finder, the witness, and the reporter" (Arendt 1967: 259-260). She insisted that these represented a "standpoint outside the political realm — outside the community to which we belong and the company of our peers" (Arendt 1967: 259). In order for them to last, they had to have "no political commitment" (Arendt 1967: 259). This was the central tension of any notion of epistemic justice in response to radical evil: It dealt with political responsibility, but it had to remain politically impartial or, in Arendt's words, "non-political and, potentially, even anti-political" (Arendt 1967: 260). Arendt held that some constitutional polities, in contrast to those with totalitarian and dictatorial tendencies, understood this tension and tried to institutionalize it. In her words, "in constitutionally ruled countries, the political realm has recognized, even in the event of conflict, that it has a stake in the existence of men and institutions over which it has no power" (Arendt 1967: 261). Among the examples she gave were the institutions of judiciary and university, both of which demonstrated the capacity to produce "[v]ery unwelcome truths" (Arendt 1967: 261).

Arendt did not live long enough to witness the rise of two more institutions which she might have perceived as serving to preserve

factual truth and impartial history to account for political responsibility in the face of radical evil: These were 1- international nongovernmental human rights organizations and 2- truth commissions. She also did not witness the emergence of a specific field of knowledge called "transitional justice" which focused on the question of how to respond to past radical evil. I think each of these developments had direct implications for an "epistemic justice" response to radical evil explored in Arendt's political thought. This dissertation further pursues this exploration and deals with all three phenomena —human rights organizations, truth commissions and transitional justice— that appeared in response to radical evil in various forms and different parts of the world. Let me briefly introduce these three institutions.

### *1.5.1 International Nongovernmental Human Rights Organizations*

The rise of international nongovernmental human rights organizations, especially the increasing visibility of *Amnesty International* after it received the Nobel Peace Prize in 1977 and the foundation of another distinguished organization called *Human Rights Watch* in 1978, led to the consolidation of a new understanding of radical evil. In that particular historical moment of deeply embedded Cold War tensions, unlike Arendt's grim assessment in 1951, the discourse of international human rights became a considerably adequate response to terror and dictatorship all around the world. What Arendt would call definite instances of radical evil were now interpreted as "gross human rights violations".

As the second half of the twentieth century unfolded, the possibility of believing in political utopias failed one after another. The

Western capitalist model was confronted with a youth movement dissatisfied with consumerism and deemed responsible for supporting ruthless anticommunist regimes all around the world. The Soviet bloc promised nothing politically emancipatory and conducted ever more tyrannical methods to repress dissent within its system. The post-colonial states did not live up to the expectations of their citizens whose rights remained unenjoyable despite the hopes attached to the newly acquired right to self-determination of peoples. In other words, none of the geopolitical realms of the post-war world order (neither the First World of Western capitalism nor the Second World of communism and not even the Third World of post-colonialism) was capable of creating a political system cleansed of traces of radical evil.

As a result, as the world of politics overburdened with radical evil was incapable to enact programmes in response to rights violations at the community level, human rights organizations assertively called for the enforcement of suprapolitical principles at the personal level. With their impartial fact-finding and reporting of the violations of individuals' rights under different types of political regimes, these organizations worked to realize a function of "epistemic justice" in their own way. Furthermore, two of the most prominent of these organizations studied in this dissertation, *Amnesty International* and *Human Rights Watch*, were largely identified with furthering an "international criminal justice" agenda toward the close of the century and beyond. From their viewpoint of "doing justice to law and morality by establishing individual accountability", the burden of confronting radical evil identified by Arendt in 1951 could be best borne by the "courtroom procedure" identified by Arendt in 1963. For *Amnesty International* and *Human Rights Watch*, pursuing the path of criminal justice (punishment of gross human rights violators) was, in Kantian terminology, a moral imperative. It was an end to be pursued regardless of the political circumstances on

the ground and without any expectation of success or failure regarding its outcome (Kant 1964: 37). Epistemic justice (impartial documentation of facts with regard to past occurrences of gross violations) was expected to assist and reinforce this ethical pursuit of criminal justice.

### *1.5.2 Truth commissions*

In addition to international human rights organizations, the initial emergence of national truth commissions in the early 1980s was almost an exact manifestation of Arendt's insight into how polities recognized the need for institutions of factual truth beyond the reach of political power. However, in practice, truth commissions, as officially authorized investigations into past human rights violations, were enmeshed in political struggles of their polity and had to fight for their impartiality as institutions of factual truth outside the political realm.

The first truth commission in the world that successfully completed its task of producing an official report of gross violations was the *National Commission on Disappeared Persons* (CONADEP) in Argentina. This commission operated in 1983-1984, in response to crimes committed during the reign of military juntas between 1976 and 1983. The *National Commission on Disappeared Persons* collected more than 7,000 statements over a nine-month period and reached to facts about how 8,960 persons who were forcefully disappeared by the military regime in Argentina (Hayner 2011: 46). Moreover, this epistemic justice function of the Argentine commission was fed into a criminal justice process, a connection which then revealed the conflict between factual truth and political power as pointed out by Arendt. The Argentine experience demonstrated an example of how political power could not

tolerate inconvenient factual truth. In the words of Priscilla Hayner, an expert observer of the phenomenon of truth commissions:

> The information collected by the commission, and especially the great number of direct witnesses identified in its case files, was critical in the trial of senior members of the military juntas, succeeding in putting five generals in jail. Under threats from the military, however, further trials were prevented with the passage of quasi-amnesty laws, and even those convicted were soon pardoned by incoming president Carlos Menem in 1989. (Hayner 2011: 46)

The attempt to introduce epistemic justice in the service of criminal justice provoked a reaction from the powers that be. There was an uneasy relationship between combining factual truth and courtroom procedure in response to radical evil, on the one hand, and proceeding carefully to avoid fomenting divisive political conflicts and endangering political stability. Despite this tension, facts endured, as if to prove Arendt's insight into how facts are more stable and less transitory than power, and amnesties in effect were eventually repealed. "By late 2009, a remarkable 1,400 persons had been charged or were under formal investigation for crimes of the dirty war" waged by the Argentine military dictatorship between 1976 and 1983 (Hayner 2011: 47). The lesson drawn from the experience of the Argentine commission was that "criminal justice, which may at first appear impossible, may become possible over time" (Hayner 2011: 47). Evidently, what preserved this possibility despite the passage of time was the capacity of a commission which somewhat managed to stay outside the political realm to do justice to the history of gross violations and provide epistemic justice.

Toward the close of the twentieth century, we witnessed yet another important experiment in the practice of truth commissions, this time in South Africa. It was as if those responses to radical evil which

were found by Arendt in her lifetime to be inadequate were, one by one, demonstrating an effort to prove adequate. As discussed above, first of all, the highly effective fact-finding and reporting functions of the human rights organizations showed that the *Universal Declaration of Human Rights* mattered a lot as a standard-setting and monitoring tool, an international yardstick of moral political conduct beyond the influence of political power formations. Secondly, though this was also appreciated by Arendt after she confronted Eichmann, the idea that we cannot punish the unforgivable offenses characterized by radical evil was refuted more than once. The advocacy of *Amnesty International* and *Human Rights Watch* eventually contributed to the formation of international criminal tribunals in the former Yugoslavia and Rwanda in the 1990s and the establishment of the International Criminal Court in 2002. Additionally, the persistent demand by the victims of the military regime in Argentina, the site of the first truth commission, that knowing the facts should be a step towards punishing the perpetrators provided a perspective in which truth commissions were seen as preparing the ground for realizing criminal justice. By the end of the century, therefore, both international human rights and punishment of radical evil were considered adequate and also legitimate responses to radical evil.

The controversy surrounding the South African experience, however, was that forgiveness, too, was proposed as an adequate response to radical evil. The *South African Truth and Reconciliation Commission*, which operated in 1995-2002 and was given the task to deal with gross human rights violations committed during apartheid rule between 1960 and 1994, designed a procedure in which those who confessed their participation in past political crimes were granted amnesty. The full disclosure of all relevant facts was required on the part of perpetrators in order for them to be forgiven for their crimes (Hayner 2011: 30). The basic idea behind this procedure was that

factual truth combined with forgiveness can eventually help to leave the criminal past behind and lead to a better future understood as reconciliation between former enemies. Some victims' families challenged this idea and sought legal ways to annul the amnesty-granting power of the commission. It seemed that, in Arendt's terms, radical evil remained unforgivable yet perfectly punishable for some. Nevertheless, seeking new responses beyond courts persisted.

### *1.5.3 Transitional justice*

What the South African experience strikingly brought to fore was the question of whether "doing justice to history", in addition to facilitating "doing justice to law", could enable "doing justice to politics". The idea of reconciliation, informing the South African commission's work, presumed that a reinvigoration of the sense of political community is possible despite the burden of unforgivable offenses. In other words, assuming political responsibility and avoiding the determination of personal responsibility for gross violations was a sufficient response to radical evil. Facing the factual truth about the circumstances of apartheid could lead the political community to adapting to new circumstances cleansed of retributive feelings. This was a bold assumption insofar as epistemic justice was delinked from the prospects of criminal justice and utilized for strengthening a renewed faith in political processes. Indeed, what was suggested as a not only adequate, but also morally superior response to radical evil was "doing justice to politics", that is, doing justice to the inherent power of its dynamics to achieve a transition from past evil to a peaceful present and future. This understanding of "doing justice to politics and the idea

of a new political community" was the fertile ground on which the field of transitional justice emerged.

As will be discussed below in the section on the *International Center for Transitional Justice*, an advocacy organization bringing together the founders and representatives of this burgeoning field and the third human rights organization studied in this dissertation, "transitional justice" was directly inspired by the experience of the *South African Truth and Reconciliation Commission*. What the unprecedented amnesty-granting procedure of the commission represented for a community of scholars, lawyers and human rights advocates was the proliferation and diversification of modes of responding to radical evil (Hirsch 2007). Unlike Arendt who confined adequate responses to criminal justice (doing justice to law and morality via establishing personal responsibility) and epistemic justice (doing justice to history via establishing factual truth concerning political responsibility), the proponents of transitional justice saw an untapped potential of doing more justice at the level of political responsibility.

As discussed above, according to Arendt, political responsibility was assumed at the governmental (political rulers) and nongovernmental (nation) levels and it involved a consciousness of the continuity of political community despite possible changes in political system and social values (Arendt 1964: 27). The field of transitional justice was born in the broader context of variegated transitions from repressive regimes like communism and military dictatorships to at least nominally democratic polities after the Cold War. This field, therefore, understood political responsibility to be something more than reconciling with reality through history and knowing the truth about past radical evil. According to this viewpoint, the assumption of political responsibility by new rulers for the acts of their predecessors should entail not only knowledge and acknowledgement of the historical

continuum, but also active intervention in the further unfolding of the historical continuum. This was a shift of focus from knowing history for enabling new political thought and action (a function of epistemic justice) to making history for building new political systems and values. With the consolidation of the discourse of transitional justice, the activity of responding to radical evil was given new tasks that went beyond obtaining "factual truths" and administering "courtroom procedures" outside the political realm. In this new conception, political impartiality was considered either not necessary or outright impossible. Dealing with political responsibility necessitated grounding oneself firmly in the power circuits of politics and associating the activity of responding to radical evil with such comprehensive objectives as "regime change" and "nation building".

In Arendt's understanding of politics, political action was defined by its inherent unpredictability, which was also a reflection of the freedom of the actors engaged in words and deeds in the political realm (Arendt 1958: 243-247). Transitional justice offered a highly different view of politics, a view that almost saw "[t]he construction of the public space in the image of a fabricated object" (Arendt 1958: 227). Politics was not a realm of mere free action surrounded by unchangeable facts of the past, but also a craft requiring efficient techniques to bridge the gulf between the past of radical evil and the future of peace and reconciliation. This was a framework of transitional politics as manageable construction rather than creative spontaneity. It consisted, from Arendt's perspective, in "[t]he substitution of making for acting and the concomitant degradation of politics into a means to obtain an allegedly "higher" end" (Arendt 1958: 229). Accordingly, political transitions were seen as environments in which the "tools" of justice (criminal, epistemic and other unforeseen variants that can be produced in light of the specific needs of a political community) can be utilized by

skillful and prudential politicians in the service of the higher goal of a reconciled democratic community. This, of course, entailed an empowerment of political actors, mainly at the elite level. In Kantian terminology, the challenge posed by transitional justice to the alternative conceptions of doing justice to law (criminal justice) and doing justice to history (epistemic justice) was that it suggested blending moral/ethical imperatives with prudential ones (Kant 1964: 82-88). Both epistemic justice and criminal justice conceive knowing the truth about the circumstances of radical evil and punishing those persons responsible for radical evil, respectively, as ends in themselves. The perspective of transitional justice, however, relativizes these notions of justice as certain options among others and employs them as means to the higher end of steering a successful political transition and building a new political community.

## 1.6 Overview of the Following Chapters

So far, I have tried to show how Arendtian political thought sought responses to the phenomenon of radical evil and how new possible responses like human rights organizations, truth commissions and transitional justice emerged after her death (for a summary, see Table 1 at the end of this chapter). I also argued that these recent responses eventually revealed a tension between ethical and prudential approaches to radical evil. In this dissertation, I will try to account for the ways in which ethical and prudential imperatives are reflected in the reports prepared by three of the world's most prominent international human rights organizations. I will try to show how human rights organizations assessed in their reports the truth commissions in three different countries at the turn of the twentieth century. My analysis will

hopefully demonstrate that the burden that Arendt spoke of in the middle of the twentieth century is still with us, placed on the humankind's current efforts to face gross human rights violations. On the whole, I hope to make a case for the epistemic justice provided by truth commissions as an end in itself, as a political good which is morally good in itself, without the need to divert it into supposedly higher goals. The close examination of the positions taken by human rights organizations regarding truth commissions will bring to light the tendencies of connecting epistemic justice, first, to criminal justice, and secondly, to transitional justice. I will evaluate both tendencies in their various appearances across the country cases. Then, I will try to explain how truth commissions' way of "doing justice to history" can do justice *in and of itself* regardless of the outcome of court procedures and political transitions in a given country.

In the next chapter (Chapter 2), I will provide a definition of truth commissions as post-conflict instruments assisting political transitions toward an order of peace and security. After giving a brief presentation of a valid definition of truth commissions in the current literature, I will explain how my choice of cases justifies making a more specific definition. I will situate truth commissions into the context of what I call amorphous wars as well as in direct relation to the international system represented by the United Nations. I will also discuss and develop the concept of epistemic justice as the special way in which truth commissions assist transitions.

In Chapter 3, I will attempt a conceptualization of gross human rights violations. I will examine the meaning of gross human rights violations, an exact depiction of what Kant and Arendt called radical evil, in today's international human rights discourse. Then, I will briefly explicate how certain United Nations procedures used the concept of gross human rights violations. These sections might seem a

cumbersome digression from the main stream of my thesis, which attempts to develop a theory of realizing epistemic justice through truth commissions. However, this digression is necessary, as gross human rights violations is a new and very specific concept produced at the United Nations level of international politics from 1960s onwards. This international historical background informs the wider context in which first, international nongovernmental human rights organizations and then, truth commissions rose to prominence as alternative institutional efforts to deal with gross violations beyond the United Nations procedures. After this digression, the final section of Chapter 3 will also introduce the international nongovernmental human rights organizations whose reports I analyzed in this dissertation. I will provide short descriptions of each human rights organization by focusing on their specific features.

Chapter 4 will elaborate the scope of my research, discussing why I chose Guatemala, Serbia and Sierra Leone as cases and clarifying how and why I chose the human rights reports that I evaluated. Although these choices are somewhat bound to be arbitrary, I will try to show how comparing these cases is a logical and necessary endeavour and has inner consistency in terms of furthering the debate in this field of research.

In Chapters 5, 6 and 7, I will present my cases. For each country, the presentation will include, first, descriptive accounts of its armed conflict and truth commission, and then, detailed readings of the human rights reports written by each human rights organization.

In Chapter 8, I will develop a closer examination of human rights reports in terms of their broader implications for truth commissions and the dilemmas and difficulties faced by truth commissions in realizing epistemic justice. I will determine the specific challenges raised by human rights organizations and try to make sense of the specific

perspectives according to which they develop normative and legal expectations from truth commissions. On the whole, I will discuss the relationship of truth commissions to courts, victims and causality. This discussion will hopefully clarify the distinction between epistemic justice, on the one hand, and criminal justice and transitional justice, on the other hand.

Finally, in light of this distinction, I will conclude my thesis by returning to the discussion of the central ethics-prudence tension. This final discussion will enable me to make certain modest recommendations for the practice of prospective truth commissions, suggesting how the minimalist objective of achieving epistemic justice is most important in terms of treating truth commissions as ends in themselves.

I will now move on to presenting the theoretical perspective of epistemic justice and demonstrating how this perspective is embedded in the formal definition of a truth commission.

*Table 1: Possible responses to radical evil (following the questions posed by Hannah Arendt in twentieth-century political thought)*

| | |
|---|---|
| **Inadequate responses** | • Declaration of human rights<br>    ▪ (*The Origins of Totalitarianism*, 1951)<br>• Forgiveness<br>• Punishment<br>    ▪ (*The Human Condition*, 1958) |
| **One adequate response** | • “Courtroom procedure”<br>  o Personal responsibility for radical evil<br>  o CRIMINAL JUSTICE (DOING JUSTICE TO LAW)<br>    ▪ (*Eichmann in Jerusalem*, 1963) |
| **One persistent question** | • “Can we judge past events at which we were not present?”<br>  o Personal responsibility v. Political responsibility<br>  o Accounting for the role of political system and circumstances surrounding persons<br>    ▪ (“Personal Responsibility Under Dictatorship, 1964) |
| **A possible second response** | • “Factual truth”<br>  o Circumstances in which many are involved<br>  o Impartial history beyond the reach of political power<br>  o Political responsibility for radical evil<br>  o e.g. historian, judge, reporter, university<br>  o EPISTEMIC JUSTICE (DOING JUSTICE TO HISTORY)<br>    ▪ (“Truth and Politics”, 1967) |
| **After Arendt** | • Institutions of factual truth<br>  o International nongovernmental human rights organizations<br>    ▪ Perspective of criminal justice<br>      • *Amnesty International*<br>      • *Human Rights Watch*<br>    ▪ Perspective of TRANSITIONAL JUSTICE (DOING JUSTICE TO POLITICS)<br>      • *International Center for Transitional Justice*<br>  o Truth commissions<br>    ▪ A discussion in this dissertation from the perspective of epistemic justice |

# CHAPTER 2

# THEORETICAL PERSPECTIVE: REALIZING EPISTEMIC JUSTICE THROUGH TRUTH COMMISSIONS

This dissertation is particularly concerned with truth commissions in relation to the question of responding to gross human rights violations. I define truth commissions, within the scope of this dissertation, as post-conflict instruments assisting political transitions toward an order characterized by peace and security. This definition consists of three parts. The first part (characterizing truth commissions as *post-conflict* instruments) and the second part (relating the commissions to the broader aim of *peace and security*) concern the national and international conditions under which the truth commissions that I studied had to operate. Nationally, these commissions were designed to address the aftermath of highly amorphous wars. Internationally, they were informed by the United Nations framework of an international society of states sharing security strategies and human rights norms. These two parts, therefore, help me describe a complex environment of strategic-normative institutionalism, driven by the exigencies of wars, within which truth commissions operate.

The third part of this definition, though, concerns not only a description, but also my main research question: In what special way, can truth commissions *assist transitions*? My answer will be developed with reference to the notion of epistemic justice. I will argue that the objective of epistemic justice as the major task of a truth commission needs to be delinked from the imperative of criminal justice, on the one hand, and the imperative of transitional justice, on the other hand. Criminal justice aims at the punishment of the perpetrators of gross human rights violations, whereas the task of epistemic justice ceases at the reliable documentation of gross violations. The concept of transitional justice intimates the wholesale restructuring of state-society relations in accordance with a master strategic plan, whereas epistemic justice at most contributes to this plan by negotiating a political deal regarding the narrative of the recent past so as to prepare a historically plausible plot for the enactment of the transitional strategy. Thus, epistemic justice will be defined as the core that gives the institution of truth commission its aura of uniqueness, its raison d'être. I will argue that, without assigning priority to this core, truth commissions cannot be seen as ends in themselves and will always be employed as means to certain ends which are beyond their effective control and with which they may be overburdened to the point of failure.

## 2.1 TRUTH COMMISSIONS AS POST-CONFLICT INSTRUMENTS

These distinctions will become clear as I present my cases in more detail. Nevertheless, in this chapter, I will unpack and qualify all of the above by unravelling what I mean by the description of truth commissions as post-conflict instruments assisting political transitions toward an order characterized by peace and security. This description

consists of important qualifications, specifying the common aspects of and problems associated with the truth commissions that I chose to study in this dissertation.

The first of these qualifications is the depiction of truth commissions as *post-conflict* instruments. This is indeed a subset of the universe of truth commissions. Truth commissions are not necessarily established in the aftermath of armed conflicts, as part of post-war transitions. They can also be set up during post-authoritarian transitions, that is, transitions from authoritarian regimes to more democratic ones.[6] However, the truth commissions of Guatemala, Serbia and Sierra Leone that I will examine here were all given the task to deal with the human rights violations that occurred during armed conflicts. Therefore, one should note that the specific context of the phenomenon of war always provides an amorphous background for the issues discussed in this thesis.

### *2.1.1 A GENERAL DEFINITION AND ITS IMPLICATIONS*

Before I specifically discuss the wars under study, it would be useful to digress into the wider universe of truth commissions, of which post-conflict ones are a subset. One of the most comprehensive definitions of a truth commission is provided by Mark Freeman:

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[6] Such transitions are generally depicted as movements from one sort of discriminatory, authoritarian political system (communism, apartheid, military dictatorship) to liberal-democratic systems defined by the rule of law. To be sure, post-war transitions can accompany such post-authoritarian transitions in cases when an authoritarian political system wages war. Therefore, the distinction between post-conflict/post-war and post-authoritarian transitions is mainly for analytical purposes.

> A truth commission is an *ad hoc*, autonomous, and victim-centered commission of inquiry set up in and authorized by a state for the primary purposes of (1) investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence and repression that occurred in the state during determinate periods of abusive rule or conflict, and (2) making recommendations for their redress and future prevention. (Freeman 2006: 18)

Now let me analyze this general definition more closely so that its several aspects —namely, a truth commission's *ad hoc*, autonomous and victim-centered character and the primary purposes to which it is expected to serve— become clearer.

#### 2.1.1.1 Ad hoc nature of commissions and their documentation of violations

Freeman's definition, endorsed by other scholarly works on truth commissions as one of the most comprehensive and most useful,[7] contains three important elements: First of all, truth commissions, regardless of their post-conflict or post-authoritarian character, are *ad hoc* national human rights investigations. *Ad hoc* means they are specifically designed for a purpose and that purpose is the documentation of gross human rights violations (termed generically by

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[7] See, for instance, Brahm 2009, where Freeman's definition is contrasted with other, less exhaustive definitions and found to be "the best suited to advance research in the field" (Brahm 2009: 1). Freeman's definition refers to and builds upon another important contribution to the literature on truth commissions made by Hayner 2001. Compare Freeman's above-quoted, categorical definition with Hayner's following, more sketchy one: Truth commissions "focus on the *past*; ... investigate a pattern of abuses over a period of time, rather than a specific event; ... [are temporary bodies], typically in operation for six months to two years, and completing [their] work with the submission of a report; and ... are officially sanctioned, authorized, or empowered by the state (and sometimes also by the armed opposition, as in a peace accord)" (Hayner 2001: 14). Hayner has recognized certain limitations of her earlier definition in the second edition of her *Unspeakable Truths*. For Hayner's new definition, see Hayner 2011: 11. See also Rotberg and Thompson 2000.

Freeman as "patterns of severe violence and repression") in the recent past of a country. The three countries that I chose to study in this dissertation —Guatemala, Serbia and Sierra Leone— are countries that established truth commissions for that specific purpose of historical documentation (at least, nominally). This *ad hoc* nature of the commissions is also captured in Freeman's definition in relation to one of their primary purposes: "investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence and repression that occurred in the state during determinate periods of abusive rule or conflict". Such understanding of the purpose of truth commissions comes very close to my understanding of epistemic justice as the primary objective of a truth commission. I will argue, throughout this dissertation, that it is best to conceptualize and design truth commissions as having only one absolutely necessary function, that is, the function of investigating and reporting gross human rights violations, upon which I locate my conceptualization of epistemic justice.

#### 2.1.1.2 Organizational autonomy and historical impartiality

In addition to their *ad hoc* character, truth commissions are *autonomous* organizations. Freeman calls this aspect as a commission's "relative independence from the state", despite the fact that it is "created or authorized by the state" (Freeman 2006: 17).[8] This element is directly

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[8] According to Freeman, this is not a contradictory expectation: "While some may query how a truth commission created or authorized by the state can be independent of it, such logic is flawed. For example, the fact that a judge is appointed by the state to serve on a court is hardly an indication of an absence of judicial independence" (Freeman 2006: 17). Note that this aspect resembles Arendt's description of institutions of factual truth which deal with political responsibility *outside the political realm*. See Chapter 1, section 1.5 of this dissertation.

connected with the above-mentioned specific purpose for which a commission is established, that is, the documentation of gross human rights violations in contemporary history. The institutional autonomy of a commission (aside from other factors contributing to such autonomy like the commission's composition and its financial, legal and operational autonomy — Freeman 2006: 17) manifests itself as *impartiality* in the realization of its objective. A truth commission's historical documentation of past human rights violations is meaningful to the extent that it relieves the process of political transition from the burden of the past. To do this successfully, a truth commission has to narrate the history of wartime violence so *impartially* that it is truly history. Impartiality ensures that the facts of the past are not in dispute and can be safely left behind (i.e. outside political dissensus) in the eyes of the large segments of the society.

The link between the political/historical impartiality and organizational autonomy of a truth commission —implied by Freeman, but explicitly underlined in this dissertation— is important. Although truth commissions are established by state organs like the presidency or the parliament, their autonomy vis-à-vis the state must be guaranteed in legislation. More importantly, such autonomy should be realized in the process of establishing a truth commission which should be based on public consultation enabling various sectors of society to participate in the selection of commissioners and even in the discussion of the commission's mandate. Such a participative process is, most of the time, the only way to guarantee the political impartiality of a truth commission. Consequently, the political impartiality of a commission is the only way (but, still, not the absolute guarantee) of ensuring that the majority of the transitional society supports or, at least, does not outright oppose the activities and outcomes of this official human rights investigation. Epistemic justice presented by a truth commission in the

form of factual truth can be *just* only when it is perceived as *impartial* by a considerably large part of the citizenry.

### 2.1.1.3 Victim-centered commissions and their recommendations

The final element in Freeman's definition concerns the centrality of victims in the work of truth commissions. Truth commissions are generally promoted as institutional responses to a popular demand for addressing past human rights violations. Generally, this demand is voiced by the victims' communities who have directly suffered from the violent acts committed by the principal belligerents of an armed conflict or by the principal actors/institutions of an authoritarian regime. Victims usually occupy the central stage in the final recommendations of a truth commission. Therefore, the victim-centeredness of a commission relates to the other primary purpose of a commission defined by Freeman, namely, making recommendations for redressing and preventing gross human rights violations. The commission is expected to propose the way forward for the new post-conflict state to redress the violations suffered by the victims and prevent their repetition. In other words, the commission not only creates the political category of victimhood in its detailed documentation, but also tries to empower victimhood in its recommendations as a post-commission status to be utilized by the historically disadvantaged actors to press for further reform.

Freeman expands the understanding of victim-centred commissions as follows:

> Being victim-centered means that most of a truth commission's time and attention is focused on victims — their experiences, their views, their needs, and their preferences. It does not mean

> that a truth commission is always self-consciously victim-centered (because some are not), nor does it mean that a truth commission is concerned only with victims (because they are not). (Freeman 2006: 17)

Indeed, truth commissions deal with bystanders and perpetrators as well as victims. In any case, the inherent amorphousness of wartime human rights violations makes it harder to distinguish between such categories of agency. For instance, a child soldier in Sierra Leone was almost always both a victim (because he was forcefully conscripted and, in the process, also tortured) and a perpetrator (because he was forced to kill and torture others). Additionally, in the case of bystanders, truth commissions are sometimes asked to investigate the responsibilities of third parties who could have done something to prevent gross violations, but did not. Such investigation is aimed at revealing the obscured fact that some bystanders are not mere spectators of events, but active participants in them. The analysis of the Guatemalan commission of the role of the United States in the Guatemalan civil war is one example of bringing the gray of the bystanders into the black-and-white account of victims and perpetrators.

In spite of this complication, victims and the recommendations on how to redress the violation of their rights add further specificity to the *ad hoc* work of truth commissions. At times, however, this focus on "recommendations" might shadow the "documentation" function of a commission. In this case, the question of how to redress the abuses suffered by victims might push a commission away from the task of epistemic justice (the provision of an impartial account of the history of violations) and into the more ambitious field of transitional justice (the reconciliatory reorganization of victims and perpetrators in a new, more just political community). In the lexicon of the field of transitional justice, truth commissions are only one of the many possible ways to meet the victims' demands, the others usually being listed as 1- criminal

prosecutions, 2- purges (also known as vetting or lustration, i.e., removal of violators from public office), 3- reparations and 4- a variety of legal reforms to transform the armed forces, the judiciary and other key institutions. [9] All of the above measures are now internationally recognized as mechanisms of transitional justice.[10] As will be discussed below, the basic argument in this dissertation would be for an understanding of the truth commission as a stand-alone post-conflict instrument doing the modest job of providing an impartial historical account (i.e. truth commission as an epistemic justice institution). Such modesty is opposed to the categorization of truth commissions as an instrumental part of a bigger project with aspirations to engage in a major overhaul of political values and institutions and rebuild the whole political realm (i.e. truth commission as a transitional justice mechanism).

### *2.1.2 AMORPHOUS WARS THAT TRUTH COMMISSIONS DEAL WITH*

As stated at the outset, what makes the three cases studied in this dissertation —Guatemala, Serbia and Sierra Leone— initially comparable is the fact that all three countries went through wars or, in

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[9] To a large extent, Mark Freeman concurs with this classification. He states that "transitional justice focuses on four main mechanisms" and lists them as follows: 1- trials, 2- fact-finding bodies (including truth commissions), 3- reparations, 4- justice reforms (grouping vetting and legal reforms together) (Freeman 2006: 5-6). For a definition of transitional justice by one of its key advocacy organizations, namely, the *International Center for Transitional Justice*, also analyzed in this dissertation, see International Center for Transitional Justice 2013a.

[10] The 2004 report of the United Nations Secretary-General, titled "The rule of law and transitional justice in conflict and post-conflict societies", attests the increasing international recognition of transitional justice mechanisms (United Nations Security Council 2014).

the terminology of international law, armed conflicts. Their truth commissions were post-war institutions established in response to gross human rights violations perpetrated during their armed conflicts. In this section, I will show how these armed conflicts make the truth commissions created to address them comparable.

The armed conflict in Guatemala (1960-1996) was internal. It demonstrated all the usual traits of a civil war, namely, huge numbers of civilian casualties, rebel forces using guerrilla tactics, a state's armed forces with massive military power compared to the rebel forces, and numerous atrocities which repudiated the old notion of warfare between orderly state armies (Smeulers and Grünfeld 2011: 22). The wars of Serbia and Sierra Leone also represented, in certain respects, cases of civil wars, but they were also newer wars compared to the war in Guatemala.[11] The newer wars of Serbia (1991-1999) and Sierra Leone (1991-2002) complicated and disrupted the distinction between internal and international armed conflicts, easily observable in old wars and regulated by international humanitarian law. For instance, the International Criminal Tribunal for the former Yugoslavia understood the wars in Yugoslavia (1991-1999) through the concept of "internationalized" armed conflict so as to deal with this indistinction between civil (internal) and inter-state (international) wars. Therefore,

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[11] For a discussion of the distinction between new and old wars, see, generally, Kaldor 2012. Charles Hauss also distinguishes "today's conflicts" from those of the Cold War era which were more limited in their violence and spillover effects (Hauss 2010: 6-7). Pascal Teixeira makes a similar distinction between classic, inter-state conflicts and internal conflicts characterizing failed states. The latter is further divided into "disintegration of states, with clashes between national groups or secessionist movements" and "the collapse of states and/or civil wars between political and/or ethnic or tribal groups". The experience of the former Yugoslavia is given as an example of the former, whereas the wars in Guatemala and Sierra Leone are given as two examples of the latter. Teixeira argues that the common characteristics of these "new conflicts" are as follows: unlimited geographical extent; difficulty in identifying all the actors involved; indistinction between civilians and military personnel; connection with various forms of trafficking and criminal activities; and difficulty in implementing a sustainable resolution (Teixeira 2003: 5-8).

the Yugoslav wars “started with internal disturbances in which several groups fought for their independence” and claimed sovereignty for their own states. When “other states began to recognize these declarations of statehood ... , the internal armed conflict turned into an international dispute” (Smeulers and Grünfeld 2011: 22). The mixed nature of internal and international armed conflict was not as dramatically obvious in Sierra Leone as it was in Serbia, but it was there. The rebel group that started the conflict, the Revolutionary United Front, was directly supported by other states like Libya and Liberia. The neighbouring Liberia’s involvement was so extensive that, by the end of the conflict, the Special Court for Sierra Leone convicted the former leader of the National Patriotic Front of Liberia and the former president of Liberia, Charles Taylor, as an actor with the greatest responsibility for war crimes committed during the Sierra Leonean civil war.

Although the Sierra Leone conflict was by far the most multifarious among the three armed conflicts, the issue of combatants also made the wars in the former Yugoslavia and Sierra Leone newer and more amorphous compared to the more understandable character of the Guatemalan civil war. The former Yugoslavia and Sierra Leone witnessed the brutality of belligerents other than classic civil war combatants, that is, regular state armies and irregular insurgents. Although Guatemala, too, suffered from informally organized death squads, the plurality of combatants was more severe in the other two wars. In the former Yugoslavia, certain notorious paramilitary groups, “such as the Arkan Tigers led by the Belgrade underground figure Željko Ražnjatović, nicknamed Arkan”, were largely composed of common criminals, making the war more atrocious (Smeulers and Grünfeld 2011: 23). In the case of Sierra Leone, mercenaries, peacekeeping units, “sobels” (soldiers by day, rebels by night) and, more disturbingly, child soldiers complicated the picture even further,

turning the civil war into “a continuous stream of battles between different factions, which, for tactical reasons, may align themselves with groups they only recently declared as enemies” (Smeulers and Grünfeld 2011: 24). On the whole, in all three countries, truth commissions were expected to deal with the immense amorphousness of wars with high numbers of civilian casualties and atrocities and a strong presence of irregular and informal combatants.

## 2.2 Assisting political transitions: Epistemic justice

This brings us to a second qualification: the meaning of *assisting political transitions* which should be specified in light of the amorphous background of wars. Put simply, truth commissions, with their official organizational form, temporary mandate, and investigative and report-oriented activities, are not capable or powerful enough to capture the total amorphousness of wars. But this is not a weakness. It is just an acknowledgement of their operative boundaries. Within the bounds of their investigative activities, the main strength of truth commissions in post-war transitions is their capacity to capture a significant part of the inherent amorphousness of contemporary wars in *report form*.[12] This might seem insignificant at first sight, but is indeed a vital element of the effort to rid political life of the remnants of wartime violence.[13] The facts

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[12] For a discussion of the notion of *report form* with reference to the investigations into the Srebrenica massacre, see Fournel 2012.

[13] This line of thought is informed by Hannah Arendt, who depicted “violence” as “incapable of speech” and therefore a non-political or anti-political phenomenon. To the extent that truth commissions work against or beyond violence, they try to reinstitute the political capacity to speak, that is, to endow “what appears in the domain of human affairs” with “speech and articulation”. In a sense, truth commissions revive political thought. Although Arendt claimed that political theory “has little to say
*(cont’d overleaf)*

documented and textually presented by the commission help the transitional society drop an anchor in the fragile context of building peace. This anchor takes the form of historical meaning assigned to the key actors, institutions, major events and turning points of the war. In addition, a broader analytic framework is developed in order to explain the causes and effects at work in the process of war-making. Therefore, truth commissions assist transitions by fixing the meaning of war in history as indisputable knowledge so as to open a new space in the present for post-war actors and their peace and security-oriented future actions. This "semantic fix" for the problem of transition is also, in a nutshell, what I call *epistemic justice*.

Epistemic justice, the major task of a truth commission, means that the contemporary history written by a commission provides a launching ground for a possibly new politics. By authoring the historical meaning of wartime human rights violations, truth commissions do justice to newcomers who are the next actual and potential political actors. In Hannah Arendt's terms, this aspect of the work of truth commissions is concerned with *vita activa*, that is, how the citizens of a polity can publicly *act* (Arendt 1958). In this sense, epistemic justice provided by the truth commission is *emancipatory*. It somewhat *frees* transitional political actors from the legacy of war. Actors in a political transition are presented with a story, i.e., a commission's final report, that assigns them roles and responsibilities relieved from the burden of wartime chaos. The knowledge communicated by the report helps the ordering of what political freedom can mean and how it can be acted out in a new context of peace and security.

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about the phenomenon of violence and must leave its discussion to the technicians", her painstaking examination of radical evil, as presented in Chapter 1, demonstrates, to the contrary, that political theory has much to say about violence (Arendt 1965: 19). I follow the same conviction here and hope to make sense of violence as gross human rights violations from the perspective of political theory.

But how does a commission's report achieve this? I argue that this has something to do with the other part of the work of a truth commission, the part concerning, again in Arendt's terms, *vita contemplativa*, that is, how the citizens of a polity can *think* (Arendt 1958). The question of how we *think* in response to atrocious wars and their aftermaths is baffling insofar as there is no easy way to explain how ordinary human beings take part in mass atrocities. Gross human rights violations in armed conflicts, as the adjective "gross" suggests (a topic to be clarified in the next chapter), are simply too much to take in. Metaphorically speaking, war operates like a flood that drags every person and institution in its way and it leaves no time to think of one's involvement in the wider scheme of things. Experientially, this is an instance of being dumbstruck by what ordinary people would call the "madness" of a seemingly endless cycle of murder, torture, rape and other barbarities. Truth commissions institutionalize a partial reversal of this process which is based on *thoughtlessness* (Arendt 1971). The commissions' major objective of rearranging the facts of recent history works against the taken-for-granted tactics of immediate survival which impose their urgency in the life-and-death moments of armed conflicts and suspend ethical standards of behaviour. In other words, epistemic justice provided by truth commissions is *reflective*. It stimulates thinking and encourages the post-war actors and spectators of a transition to *stop and consider* the historical meaning reported by the commission (Arendt 1971: 105). In relation to the emancipatory effects on the possibilities of post-war political action, reflections over the reported knowledge of violations are, ideally speaking, expected to prevent action from turning violent again.

In sum, emancipatory epistemic justice is inspired by an Arendtian understanding of political action. Accordingly, truth commissions will report indisputable facts about wartime gross

violations and place them outside the political realm (beyond dispute). Thereafter, post-war political action will know that its freedom inside the political realm will be defined by the principle of international human rights, which counteract gross violations with norms that acknowledge their illegal and immoral character (Arendt 1968b: 152; Arendt 1965: 211-213). At the same time, reflective epistemic justice, based on Arendt's concept of "political thought", will operate through the facts and stories captured in a truth commission's report, "by making present to [one's] mind the standpoints of those who are absent", namely, the victims (Arendt 1967: 241). The readers of a truth commission's report, who will most probably be the willing political actors of a new era of peace and security, will form their political opinions by representing, through the report, the experiences of those who suffered from gross human rights violations. Thus, thinking inside the political realm will be defined by counterarguing against the thoughtlessness inherent in gross violations. Political action will begin from the principle of thinking in light of the undeniable truth of gross rights violations and thereby forming opinions inspired by human rights norms.

Although the three commissions that I studied here do not share the same set of emancipatory and reflective properties, they raise similar questions. My main argument, as stated at the outset of this chapter, is that truth commissions can effectively assist transitions only in a limited manner, a manner which I choose to conceptualize as epistemic justice. But truth commissions are almost always designed to serve other purposes. These purposes are usually considered higher than the mere opening of a new opportunity space for political actors (emancipatory epistemic justice) and the hopeful dissemination of facts that will trigger a train of thought immunized against the legitimation of unjust violence (reflective epistemic justice). Even these latter purposes which I propose under the banner of epistemic justice are ideal types

when it comes to the goals of a truth commission. The questions raised by the specific cases at hand, however, make it inevitable to seek and define the *indispensable* political good offered by these human rights investigations. How can, for instance, the goal of historical clarification of the Guatemalan *Historical Clarification Commission* coexist with the goal of “making specific recommendations to encourage peace and harmony” assigned to the same commission? Should one prioritize one or the other? My answer is yes: historical clarification should come first. And if one does not prioritize historical clarification (i.e., epistemic justice), it would not only be unfair, but also politically unhelpful to assess the outcome of a commission’s work in terms of its recommendations whose realization, by definition, would be beyond the commission’s limited and challenging mandate.

Still, the real problem of how truth commissions can best assist transitions is most clearly reflected in the names of the other two commissions in this study, that is, *truth and reconciliation* commissions. Reconciliation is a big word, carrying the assumption that former enemies could be made, via the appropriate rituals of truth-telling and accompanying institutions, friends in a new political community. While the concept of a “truth commission” seems to assume historical truth as an end in itself, the concept of “truth and reconciliation” implies that truth is a means to the nobler end of reconciliation. Therefore, the question is, for example, whether the *Sierra Leone Truth and Reconciliation Commission* will be loyal to its mandate and *both* create an impartial record of human rights violations *and* promote healing and reconciliation. The perspective of epistemic justice that I want to develop asserts that a commission can be expected to successfully

deliver only the first part, that is, an impartial historical record.[14] The case of the *Yugoslav Truth and Reconciliation Commission* is even more striking to the extent that it failed and did not produce any report. In other words, this Serbian commission did not do justice to the contemporary history of the Yugoslav wars, though it was questionable from the start how it could do so in the eyes of the non-Serb peoples of the former Yugoslavia. Still, despite being a Serbian-only commission, its mandate included the aim to "establish cooperation with similar commissions and bodies in neighbouring countries and abroad, in order to exchange working experiences". But before realizing such far-fetched aims, the following questions were on the minds of everyone who tried to understand the Yugoslav commission: How can the truth commission of one particular ethnic community do justice to the history of wars affecting many other ethnic communities? How can such a commission, in the words of its own mandate, expect "to organize researches and reveal evidences about social, interethnic and political conflicts which led to war and shed light on causal links between these events"? That the Serbian commission reveals the immense difficulty of achieving epistemic justice after amorphous wars should be seen as the affirmation of the fact that the very minimal goal of historical clarification of human rights violations is actually the most important "maximum" that a commission can accomplish.

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[14] Mark Freeman seems to agree with this argument: "In this author's view, truth commissions should generally focus on the objective of providing a measure of impartial, historical clarification to countervail false or revisionist accounts of the past. This is, arguably, what truth commissions do best. Indeed, if a commission fails in the mission of historical clarification, it is almost sure to have failed in parallel or subsidiary missions such as to bolster accountability, reform, or reconciliation" (Freeman 2006: 39). A similar, widely-quoted understanding of the objective of truth commissions is provided by Michael Ignatieff: "All that a truth commission can achieve is to reduce the number of lies that can be circulated unchallenged in public discourse" (Ignatieff 1996: 113).

One final reason for explaining the difficulty faced by all three commissions in making the provision of historical truth an end in itself should be noted. All three commissions operated after 1995, that is, in a period when the example of the *South African Truth and Reconciliation Commission* was firmly set and drew worldwide attention in the years to come. This commission is, as Mark Freeman duly notes, “the most well-known truth commission” in the world. Freeman, therefore, proposes to “divide the history of truth commissions into two periods: before South Africa, and after” (Freeman 2006: 26). His reason for postulating the importance of the South African commission rests on the fact that it conducted “victim-centered public hearings”, which, until South Africa, was unprecedented, but later came to be frequently replicated by other commissions. An equally significant characteristic bringing the South African commission worldwide reputation, however, was its controversial “amnesty for truth” procedure, as mentioned in Chapter 1 of this thesis. This procedure granted amnesty to perpetrators of gross human rights violations “in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past” on condition that “a full disclosure by the perpetrator of all the relevant facts relating to the criminal act” was provided at the commission’s hearings (Pizzutelli 2010: 2). Francesca Pizzutelli criticizes the high visibility of the *South African Truth and Reconciliation Commission* in “both legal/policy discussions about truth-seeking mechanisms and the public perception of truth commissions” (Pizzutelli 2010: 3). This critique is based on two observations: First, the “amnesty for truth” procedure has never been and is unlikely to be adopted by other commissions due to the highly specific context of the favourable South African conditions. Secondly and perhaps more importantly, this procedure is increasingly found by certain supranational bodies to be in contravention to the international legal

obligation to prosecute perpetrators responsible for gross human rights violations.[15]

On the whole, the significance of analyzing the three truth commissions in Guatemala, Serbia and Sierra Leone is related to the effort of answering the following research question: What can truth commissions be legitimately expected to achieve in light of the fact that the experience of the *South African Truth and Reconciliation Commission* publicized and promoted great expectations from truth commission from 1995 onwards? When seeking an answer to this question in this dissertation, the tension between epistemic justice (the definition of a minimal, but *sine qua non* task for truth commissions) and transitional justice (the design of truth commissions as part of a maximalist project of social-political change) will become more visible.

## 2.3 INTERNATIONAL PEACE AND SECURITY: THE WIDER ENVIRONMENT IN WHICH TRUTH COMMISSIONS OPERATE

Although truth commissions should aim at a feasible minimum, there is a wider world in which that minimum becomes meaningful. In other words, negating unfairly broad mandates attached to truth commissions should not stop one from reflecting on the wider environment in which the commissions operate. The international reputation of the *South African Truth and Reconciliation Commission* and the general perception of truth commissions that it generated and transmitted into the policy and advocacy circles around the globe are one aspect of that wider environment. In this section, I will introduce another aspect.

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[15] See Laplante 2009, presenting a detailed analysis of the rising trend of outlawing all amnesties, especially focusing on the legal interpretations concerning the matter provided by the Inter-American Court of Human Rights.

The third qualification, following the "post-conflict" and "transitional" contexts described above, that informs the selection of the three truth commissions and adds weight to their post-conflict character bears on the fact that these organizations are designed from the broader perspective of assisting the creation of viable conditions for *peace and security*. "Peace and security" is an international concept symbolizing the United Nations framework of international law and international relations in the post-Second World War society of states. It is spelled out in article 1(1) of the United Nations charter as the primary purpose of the organization as follows:

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment and settlement of international disputes or situations which might lead to a breach of the peace. (United Nations 2013: 3)

Additionally, this strategic-normative goal is directly linked with the perspective of human rights as demonstrated in the preamble of the United Nations Charter where the organization is depicted as "determined to save succeeding generations from the scourge of war ... and to reaffirm faith in fundamental human rights" (United Nations 2013: 2). Article 1(3) of the United Nations Charter also underlines one of the primary purposes of the organization as achieving "international co-operation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" (United Nations 2013: 3).

According to Smeulers and Grünfeld, the United Nations Charter is an expression of the awareness shared by the founding powers of the organization regarding a perception that "universal respect for human

rights ... [is] an important condition for international peace and security" (Smeulers and Grünfeld 2011: 5). This link between "universal respect for fundamental human rights" and "the establishment of international peace and security" constituted one of the most "radical and innovative" dimensions of the United Nations institutional framework.

Nevertheless, the true meaning of the connection between strategic security concerns and normative human rights standards was to be grasped, long after the adoption of the United Nations Charter, in the final decade of the twentieth century. In 1993, the United Nations Security Council acted to fulfill its "primary responsibility for the maintenance of international peace and security" defined in Chapter VII of the United Nations Charter and established the International Criminal Tribunal for the former Yugoslavia (Futamura 2008: 3). The "serious violations of international humanitarian law committed in the territory of the former Yugoslavia" were regarded as "threats to international peace and security" (Futamura 2008: 3). In response, the United Nations-sanctioned international criminal tribunal, the first of its kind, was established to prosecute "persons responsible" for these major threats that took the form of large-scale illegitimate violence. The Security Council Resolution 827, therefore, stated the tribunal's objective as "the restoration and maintenance of peace".[16]

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[16] The antithesis of the notion of "international peace and security" developed in the United Nations Charter after Second World War was understandably "the inter-state conflicts and wars of aggression that had ravaged Europe and the world between 1937 and 1945" (Teixeira 2003: 25-26). Nevertheless, after the Second World War (as in the Guatemalan conflict) and, more ostensibly, after the Cold War (as in the Yugoslav and Sierra Leonean wars), the phenomenon of war changed character, growing more amorphous and disrupting the distinction between inter-state and internal conflicts. The International Criminal Tribunal for the former Yugoslavia, therefore, reflected a corresponding change in the character of the "peace and security" perspective. It constituted a form of international-judicial instrument for addressing the amorphousness of the Yugoslav conflicts.

The mandate of the International Criminal Tribunal for the former Yugoslavia shed light on the link between human rights, on the one hand, and peace and security, on the other hand, which was only vaguely formulated in the United Nations Charter. Since, in the case of the former Yugoslavia, serious violations of humanitarian law actually amounted to gross human rights violations (to be clarified in the next chapter), the international tribunal effectively encapsulated the novel idea of practising criminal justice (i.e. prosecution of gross human rights violators) as an instrument of peace and security.

All three truth commissions under study were established against this backdrop of international criminal justice and its concomitant assumption that prosecuting those responsible for wartime gross human rights violations contributed to building peace. Consequently, like the relevance of the experience of the *South African Truth and Reconciliation Commission* problematizing the relationship between epistemic justice and transitional justice, the experience of the International Criminal Tribunal for the former Yugoslavia problematizes the relationship between epistemic justice and criminal justice. Both the South African commission and the Yugoslav tribunal inform and help the creation of —what I called at the beginning of this chapter— *a complex environment of strategic-normative institutionalism, driven by the exigencies of wars, within which truth commissions operate*. Furthermore, the experience of the International Criminal Tribunal for the former Yugoslavia leads us to pose the following research questions: What can truth commissions be legitimately expected to achieve as the experience of the International Criminal Tribunal for the former Yugoslavia connects prosecuting gross human rights violators with building international peace and security? Is such a prosecution-oriented approach an obstacle to epistemic justice which should be the primary concern in our attempts to do justice to history in the face of

gross human rights violations? When seeking answers to these questions in this dissertation, the tension between epistemic justice (the definition of a minimal, but *sine qua non* task for truth commissions) and criminal justice (the conception of truth commissions as contributory or complementary to the nobler effort of meting out criminal punishment to violators) will come to the fore.

Let me now digress into the meaning of gross human rights violations and provide a brief introduction of the international human rights organizations to be studied in this thesis.

# CHAPTER 3

# INSTITUTIONAL RESPONSES: MONITORING GROSS HUMAN RIGHTS VIOLATIONS THROUGH HUMAN RIGHTS ORGANIZATIONS

Throughout the second chapter, a pivotal term and its relevance for a general readership was taken for granted: gross human rights violations. For instance, I defined epistemic justice as the reliable documentation of gross human rights violations and criminal justice as the punishment of the perpetrators of gross human rights violations. Additionally, I suggested that transitional justice meant an overall transformation of the aftermath and aftereffects of gross human rights violations. At times, I underlined that my main interest lies in *wartime* gross human rights violations, that is, gross violations that occur in the context of armed conflicts. Finally, I have also postponed clarifying two issues: first, the question of how the adjective "gross" indicates that the violence of human rights violations is at an extreme level; secondly, the question of how serious violations of international humanitarian law also amount to gross human rights violations.

In this chapter, I will provide a conceptualization of gross human rights violations that will clarify all of the above. This clarification will hopefully demonstrate the ethical aspect inherent in the concept of

gross violations. Then, I will move on to introduce human rights organizations as organizations dealing with gross human rights violations from varying perspectives such as criminal justice in the case of *Amnesty International* and *Human Rights Watch*, and transitional justice in the case of the *International Center for Transitional Justice*. I will continue to build upon and unravel the main argument of this dissertation: that the basic task of a truth commission is and should be the provision of epistemic justice and this minimally expected good to be contributed by the work of a truth commission clashes with the comparably more maximalist perspectives of three of the most important human rights organizations.

## 3.1 Gross human rights violations: A matter of numbers and intensity

### *3.1.1 Why gross violations are systematic/massive*

In H. Victor Condé's *A Handbook of International Human Rights Terminology*, gross human rights violations are defined as follows:

> A term used but not well defined in human rights resolutions, declarations, and treaties but generally meaning systematic violations of certain human rights norms of a more serious nature, such as apartheid, racial discrimination, murder, slavery, genocide, religious persecution on a massive scale, committed as a matter of official practice. Gross violations result in irreparable harm to victims. The U.S. *Restatement of Law*, 3rd ed., says that "a violation is gross if it is particularly shocking because of the importance of the right or the gravity of the violations." There is an ongoing attempt in the United Nations to define "Gross Violations." The "1503 Procedure" of the United Nations deals with consistent patterns of "Gross Violations." (Condé 2004: 103)

This definition allows me to discuss several fundamental traits associated with the term “gross human rights violations”. One of the first notions to be clarified in this definition is “systematic”. Condé defines “systematic violations” as those “that occur in a definite organized pattern, with consistent frequency, indicating an intentional, concerted, planned action to commit such acts” (Condé 2004: 254). As Heidy Rombouts observes, the notion of “systematic” mainly designates a *quantitative* aspect of gross human rights violations, which “refers to both the number of people affected by these violations and the frequence of their occurrence” (Rombouts 2004: 11). Similarly, “massive” signifies quantity, drawing attention to the fact that situations of gross human rights violations involve “many people and many violations” (Rombouts 2004: 11).

### *3.1.2 The issue of gravity: Serious violations of humanitarian law and gross violations of human rights law*

On the other hand, the “serious nature” and “gravity” of violations are all terms reiterating the *quality* of grossness. As Condé’s above-cited examples show, there is a tendency to limit the grossness, gravity, and seriousness of human rights violations specifically to the violations of rights to life and physical integrity. Nevertheless, I agree with Rombouts’ claim that “[t]here is no reason to limit gross and systematic human rights violations to specific rights only” (Rombouts 2004: 10). In this sense, all human rights can be grossly violated. In line with Rombouts’ characterization, I also do not distinguish between violations

of “international human rights law and humanitarian law” (Rombouts 2004: 10).[17] Whereas international humanitarian law, which emerged “as a result of the influence of human rights doctrines on the law of armed conflict”, is applicable “only during armed conflict”, human rights law “applies during peacetime as well as wartime” (International Criminal Tribunal for the former Yugoslavia 1995: para.87; Sierra Leone Truth and Reconciliation Commission 2004a: 38-39). In other words, although gross human rights violations need not occur during wartime, serious violations of the laws of war always entail gross human rights violations.[18] For example, enforced disapperances involve cases in which both humanitarian and human rights laws can be seriously/grossly violated. An enforced disappearance violates both the human rights of the victim of disappearance (such as, the rights to life and liberty) protected under international human rights law *and* the rights of the family of the victim to know the fate of the latter (that is, a right to the truth about the circumstances in which violation took place) protected under international humanitarian law. Furthermore, even if an enforced disapperance occurs during an armed conflict, the violation of the rights of the victim’s family might continue well into peacetime,

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[17] “Humanitarian law refers to the body of principles governing armed conflicts. Key is the Geneva Conventions of 1949” (Rombouts 2004: 10). See also International Committee of the Red Cross 2013a; 2013b.

[18] Christian Tomuschat expresses this view as follows: “Since international humanitarian law aims to maintain a modicum of civilization amid the worst of all cataclysms human communities can experience, namely war, it may be classified as one of the branches of international human rights law. During an armed confrontation, human rights suffer by necessity. In particular, the killing of combatants cannot be avoided. Therefore, special rules had to be evolved in order to adapt the normal regime of human rights to the specificities of armed warfare, rescuing whatever is possible of its core substance. ... Whereas the traditional approach to the delimitation between human rights law and humanitarian law was based on a clear either-or alternative, the modern view ... holds that the protection afforded by human rights law does not completely cease in a time of armed conflict (Tomuschat 2008: 292). See also Quénivet 2008.

unless the truth about the details of the disappearance are revealed. Therefore, even a single case of gross human rights violation, such as an enforced disappearance, might initiate a chain of violations transcending both the temporal-contextual distinction between war and peace and the legal-technical distinction between human rights law and humanitarian law. This also shows that a gross human rights violation does not cease to exist with the disappearing, killing or, in general, bodily destruction of a human being. It goes on to affect the lives of others, such as the family of the victim, by forcing upon them the psychological burden of not knowing what happened to their loved one. Hence, my agreement with Rombouts' reservation at the beginning of this paragraph. Gross human rights violations cannot be limited to specific rights, because they have unexpected, intrusive effects, extending well beyond the physical integrity of victims and beyond the time and space of their occurrence.[19] This is an important detail to the extent that truth commissions are generally expected to deal with such extensive violations. One has to keep in mind that a commission's highly challenging attempt to do justice to history (realize epistemic justice) is ultimately an effort to deal with the potentially limitless character of gross violations.

Because the concept of "gross violations" is shown to be valid independent of the political distinction between wartime and peacetime

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[19] For a discussion of which rights might be violated in cases of enforced disappearances, see Scovazzi and Citroni 2007: 1. Priscilla Hayner also depicts the contagious and expansive nature of gross human rights violations as follows: "such widespread abuses ... leave behind a powerful legacy. The damage goes far beyond the immediate pain of loss. Where there was torture, there are walking, wounded victims. Where there were killings, or wholesale massacres, there are often witnesses to the carnage, and family members too terrified to grieve fully. Where there were persons disappeared, there are loved ones desperate for information. Where there were years of unspoken pain and enforced silence, there may be a pervasive, debilitating fear and, when the repression ends, a need to slowly learn to trust the government, the police, and armed forces, and to gain confidence in the freedom to speak freely and mourn openly" (Hayner 2011: 3).

as well as the legal distinction between humanitarian law and human rights law, when a truth commission deals with gross violations, its work inevitably gains an ethical character. This is because the conceptual autonomy of gross violations vis-à-vis the domains of politics and law necessitates a discussion of what is just and unjust irrespective of, for instance, a politician's decision about whether it is wartime or peacetime or a lawyer's argument regarding which body of international law should apply to a given case. In this sense, it should be noted that gross violations as an ethical notion provides both truth commissions and human rights organizations with the opportunity of a flexible interpretation of its own content.

### *3.1.3 ARE GROSS VIOLATIONS IRREPARABLE?*

Another important characteristic attributed to gross human rights violations in Condé's encompassing definition is their "irreparable" nature. Nevertheless, the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for the Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the United Nations General Assembly in 2005, is based on exactly the contrary assumption. This document clearly states the following:

> Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. (United Nations General Assembly 2005: para.15)

*Basic Principles and Guidelines* lists five forms of reparation — namely, restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition (United Nations General Assembly 2005: para.19-23). It is generally accepted that such internationally recognized reparations attest the possibility of realizing a kind of justice in the face of gross human rights violations. This runs contrary to the claim that gross human rights violations are irreparable, a claim which might nurture a cynical attitude not only towards the possibility of realizing justice but also to the attempt to address violations in political, legal and institutional terms.

Additionally, the title of the *Basic Principles and Guidelines* suggests that gross violations of human rights law and serious violations of humanitarian law share a similar character. But bringing both kinds of violations under the generic concept of gross human rights violations has a further consequence. It implies that whenever international humanitarian law or human rights law is violated and whenever we understand this violation as a gross human rights violation, *rights irrespective of laws* are subject to violation. This is another way of saying that human rights norms are primarily ethical. Although their legalization constitutes an important part of their political and institutional viability, they could still be claimed by every human being on earth, regardless of whether they are part of effective human rights legislation or not. In fact, human rights norms are most needed when there is no favourable legal environment ensuring their protection (Nino 1991: 2-3). As Rombouts notes, “[f]rom the victim’s point of view, it is important to stress that the (gross and systematic) violation of her/his human rights is not necessarily a crime under national or international law” (Rombouts 2004: 13). Thus, gross human rights violations are ethically/morally wrong, independent of their legal definition or legal recognition in a given polity.

### *3.1.4 Can gross violations be committed by actors other than the state?*

In addition to the reconsideration of gross violations as “reparable violations” in the previous section, the question of who perpetrates gross violations needs refinement. As suggested by the phrase “committed as a matter of official practice”, Condé’s definition points toward those violations for which accountability and responsibility can be specifically attached to government and state actors. However, the context of amorphous wars, where an inter-state conflict is replaced or at least accompanied by an internal conflict between a state and an insurgency, necessitates a wider conception of gross human rights violations which can also include violations perpetrated by several non-state actors. Here, it is sufficient to draw attention, once again, to *Basic Principles and Guidelines* and how it assigns the task of reparation, which is a good indicator of the locus of responsibility for gross human rights violations. This General Assembly resolution states that:

> In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim. (United Nations General Assembly 2005: para.15)

The experience of civil/internal war witnessed in all three countries to be studied in this dissertation reveals such situations in which entities other than those associated with the state (e.g., mercenaries, private armed

groups, insurgencies, terrorist organizations, international organizations, etc.) can be found liable for gross human rights violations and their reparation. Still, the wording of the resolution demonstrates that the state remains the principal mechanism through which responses to gross human rights violations are regulated and organized.

Usually, seeing states or governments as the principal sites of responsibility for gross human rights violations results from "a strict legal viewpoint" according to which only states have international obligations to respect human rights and, therefore, "[o]nly those committed to such obligations, namely states, can violate them" (Rombouts 2004: 13). Again, the experience of civil war problematizes such a delimitation. In the words of Heidy Rombouts:

> Conflicts and periods following transitions are often characterized by violent acts committed by both sides to the conflict, i.e. the incumbent government and (any) armed opposition groups. Actions of the latter, may, de facto, constitute gross and systematic abuses of human rights. From a victim's perspective, such human rights abuses (as opposed to violations) will have similar effects and put them in a similarly detrimental position. (Rombouts 2004: 13)

Understandably, the victim's perspective trumps other perspectives insofar as gross human rights violations create victims who are the "most in need" in terms of human rights protection. Therefore, following Rombouts' argument, I also avoid the distinction between "violations" (perpetrated by state actors) and "abuses" (perpetrated by non-state actors) and opt for the umbrella conception of gross human rights violations.

### *3.1.5 "Gross violations" as a term that presumes victims' empowerment*

Such a victim-oriented conception is embedded within the structure and scope of the concept of gross human rights violations to the extent that it helps the identification of the subjects of violations (that is, victims) as rights-holders. In this way, victims are not merely seen as subjects of victimization, that is, helpless and powerless figures who can be easily deprived of their universally recognized rights. It is true that, after the fact of gross violations, rights do seem like arbitrarily assigned privileges, since they can be so easily violated. However, as Johannes Morsink observes, rights can be violated, but "cannot be taken away" (Morsink 2009: 34). Once the violence suffered by victims is defined as gross human rights violations, this opens the way for perceiving victims as subjects of potential empowerment. The notion of gross human rights violations conceptually encourages a process involving the empowerment of victims, because, by definition, victim status becomes directly attached to rights entitlements and legitimate demands backed by an internationally upheld standpoint of ethics (i.e., justice). This is why, though they have been dubbed "irreparable", gross human rights violations still call for innovative and principled policies and institutions of reparations. Such policies and institutions arise from a perception of victims of gross human rights violations as agents to be politically empowered and socially reintegrated through a reclamation of their rights. On the whole, with reference to the normative order of universal human rights, the concept of gross human rights violations directs the victim to an understanding of why her/his suffering should be taken into account as an international issue of remedies and reparations. When what are basically "gross injustices" (or, in Arendt's terms, "radical evil") are called gross human rights violations, human rights are intimated as

the ground on which justice should be built. This shows the centrality of human rights for realizing justice especially under the circumstances of radical evil and especially under (and after) conditions where legal rights make no sense.

## 3.2 UNITED NATIONS PROCEDURES FOR GROSS HUMAN RIGHTS VIOLATIONS

### *3.2.1 RESOLUTION 1235*

In the previous section of this chapter, I tried to demonstrate the ethical perspective inherent in the concept of gross human rights violations. In this section, I will look into how the concept was used in international system headed by the United Nations. After showing how "gross violations" operated in the discourse of international politics, I will move on to the ways in which international nongovernmental human rights organizations tried to question and diversify the possible uses of the concept.

The United Nations Economic and Social Council[20] Resolution 1235 (XLII) of 1967 is the first document that refers to gross violations in an expression that is to become almost a catch phrase, if not a

[20] Article 62 of the United Nations Charter defines the functions and powers of the Economic and Social Council, one of the principal organs of the United Nations, which includes making "recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all" (United Nations 2013).

euphemism, in the years to come: “gross violations of human rights and fundamental freedoms”.[21] The resolution is titled,

> Questions of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories (United Nations Economic and Social Council 1967)

The passage which refers to gross violations is as follows:

> [The Economic and Social Council *a*]*uthorizes* the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities ... to examine information relevant to gross violations of human rights and fundamental freedoms, as exemplified by the policy of apartheid as practised in the Republic of South Africa and in the Territory of South West Africa under the direct responsibility of the United Nations and now illegally occupied by the Government of the Republic of South Africa, and to racial discrimination as practised notably in Southern Rhodesia. (United Nations Economic and Social Council 1967)

The procedure established under this resolution, namely the 1235 procedure, envisaged a “public international debate within the [United Nations] Commission on Human Rights” (Condé 2004: 1). It was aimed at “identifying country-specific situations” (Condé 2004: 1). Both governments and nongovernmental human rights organizations, providing information regarding the situations “to which they believe the commission [i.e. United Nations Commission on Human Rights] should give attention”, can participate in this debate concerning the country-

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[21] The expression “human rights and fundamental freedoms” was first put forward in the Charter of the United Nations. As Nihal Jayawickrama states, “the Universal Declaration is acknowledged today as the legitimate aid to the interpretation of the expression “human rights and fundamental freedoms” in the Charter of the United Nations” (Jayawickrama 2002: 30).

specific violations at the annual meeting of the Commission on Human Rights (Condé 2004: 1).

Although the 1235 procedure puts the spotlight on the South African apartheid, the language of the resolution kept the possibility of examining other country-specific violations open, as noted by Lyal S. Sunga:

> At the time that ECOSOC [United Nations Economic and Social Council] resolution 1235 was being drafted, the government of South Africa vehemently objected to being singled out by the international community. To avoid the charge of political selectivity without letting South Africa off the hook, ECOSOC [United Nations Economic and Social Council] added the word "exemplified" to indicate that the Commission [United Nations Commission on Human Rights] would examine the human rights situation in any country where human rights violations reached the gravity of those committed in apartheid South Africa and South West Africa. The word "exemplified" thus authorised the Commission [United Nations Commission on Human Rights] to refer publicly to human rights violations in any part of the world regardless of the State's treaty obligations. (Sunga 2009: 171)

The 1235 procedure not only involves a public debate, but also can choose other means to study and investigate gross violations, such as studies, reports and on-site investigations (Condé 2004: 1). Despite the openness and bureaucratically straightforward nature of this procedure, it was only after the coup d'état against President Salvador Allende in Chile in 1973 that the 1235 procedure was freed from its South African focus. According to Christian Tomuschat, an international lawyer and also the United Nations-appointed head of the Guatemalan truth commission, by 1974/1975, "[i]t was clear now that the resolution [1235] could also be used against the backdrop of other patterns of gross violations" (Tomuschat 2008: 141). Still, until early 2000s when Russia, a permanent member of the United Nations Security Council, was put under scrutiny,

> the choice of the countries to be examined under the procedure of ECOSOC [United Nations Economic and Social Council] Resolution 1235 regularly went through a preliminary phase of intense political haggling. ... Which country was eventually put under scrutiny depended more on its own might or the influence of its allies than its human rights record proper. (Tomuschat 2008: 142)

It was this fact of persistent realpolitik at the United Nations, among other things, weakening the 1235 procedure that helped human rights organizations like *Amnesty International* and *Human Rights Watch* eventually gain moral weight in the eyes of the international public opinion. Although the 1235 procedure was, in Michael Freeman's words, "an advance in the implementation of UN [United Nations] human-rights standards, … it worked unevenly and remained marginal to the world's human-rights problems" (Freeman 2011: 49). However, the reports of human rights organization like *Amnesty* and *Human Rights Watch*, free from the burden of implementation, were even-handed and critical, investigating both superpowers and small states, and reporting largely irrespective of powerful alliances and pragmatic calculations (Freeman 2011: 51, 175).

### *3.2.2 Resolution 1503*

The insufficiency of human rights monitoring concerning gross human rights violations at the United Nations level was more strikingly reflected in another procedure based on another United Nations Economic and Social Council resolution. The Resolution 1503 (XLVIII) of 27 May 1970 was titled, "Procedure for dealing with communications in relation to violations of human rights and fundamental freedoms" (United Nations Economic and Social Council 1970). It made possible the "investigation

by the UN [United Nations] Sub-Commission on the Promotion and Protection of Human Rights[22] of specific “situations” of gross and systematic human rights violations” (Condé 2004: 1). The Sub-Commission was authorized

> to consider written “communications” received from a nongovernmental source, such as a group/NGO [nongovernmental organization]/individual, claiming to be a victim of violations or having direct and reliable knowledge of violations. (Condé 2004: 1)

The 1503 procedure was a very cumbersome one, involving many difficulties. First of all, it dealt with the lists of confidential communications established by the [United Nations] Secretary-General. Then, the Sub-Commission on the Promotion and Protection of Human Rights would examine these communications with a view to determine whether they appeared to reveal “a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms”. The Sub-Commission worked on a “cleansed list” screened by a working group of the Sub-Commission. At one point, the Sub-Commission could refer the communications it deemed relevant to the United Nations Commission on Human Rights which would establish whether the “consistent pattern of gross violations” might exist in the country under scrutiny. Eventually, the Commission on Human Rights could decide to conduct a thorough study, leading to a report and recommendations addressed to the Economic and Social Council, or establish an *ad hoc* committee to carry out investigations (Tomuschat 2008: 139). The most problematic aspect was that all these steps were taken in private meetings. Based on his personal observations,

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[22] Formerly known as the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

Christian Tomuschat notes that the members of the working group of the Sub-Commission, which did the first screening of communications, frequently "acted on purely political grounds, seeking to fend off any attack against their country or any country of the "camp" to which they belonged" (Tomuschat 2008: 139-140).

Nine years after the establishment of the 1503 procedure and two years after it received the Nobel Peace Prize, *Amnesty International*, the world's best known international nongovernmental human rights organization, found the opportunity to assess this United Nations procedure dealing with gross human rights violations. According to Nigel Rodley, the organization's leading legal specialist, the Resolution 1503 "has not even yielded ... one thorough study or investigation" (Korey 1998: 249). Rodley argued that the United Nations human rights machinery of the time would be unable and unwilling to approach "in a systematic and unpartial program of monitoring even the most serious incidents of human rights violations in the world, at least within the next generation" (Korey 1998: 249). This assessment by *Amnesty International* was made at a time when the international human rights movement reached its zenith in terms of a moral transcendence of the polarizing Cold War politics. It defined, in reverse, what the international nongovernmental human rights organizations should aim to do: a systematic and impartial monitoring of the most serious human rights violations in the world. From 1970s onwards, as the United Nations procedures proved ineffective and politicized, international nongovernmental human rights organizations, starting with the early and inspiring example of *Amnesty International*, aspired to fulfill the need for dedicated monitoring of gross human rights violations.

In time, however, as the examination of one of the newest human rights organizations, *International Center for Transitional Justice*, will show, the task of monitoring gross human rights violations was

somewhat superseded or, rather, got more sophisticated. With the arrival of novel human rights institutions like international criminal tribunals and truth commissions on the world scene whose function was to deal with the expansive phenomenon of gross human rights violations, human rights organizations were forced to upgrade their monitoring to include the evaluation of these institutions. Previously, *Amnesty International* and *Human Rights Watch* would document gross human rights violations on a global scale. Now, as criminal prosecutions and official truth-seeking investigations began to document and assess gross human rights violations, too, they would need to monitor these efforts in light of their own standards. In other words, their monitoring task diversified. It began to involve the critical appraisal of, and more prominently in the case of *International Center for Transitional Justice*, the provision of technical consultancy for the institutional responses to gross violations like courts and truth commissions. Human rights organizations had to provide services on a spectrum that moved from monitoring gross human rights violations to evaluating how tribunals and truth commissions monitored and processed gross human rights violations. This latter form of institutional evaluation was less straightforward than documenting violations whose meaning, according to the international ethical perspective of human rights, became almost indisputable and universal. However, the meaning of new human rights institutions like truth commissions and human rights trials was less consensual and more controversial, as they had direct effects on national political struggles. Thus, as will be shown below, the approaches of human rights organizations to human rights investigations conducted by courts and truth commissions gradually grew more differentiated. Differentiation involved the eventual adoption of a criminal justice (doing justice to law) perspective by *Amnesty International* and *Human Rights Watch*, on the one hand, and a

transitional justice (doing justice to politics) perspective by the *International Center for Transitional Justice*. Let me restate my main argument, which is that this differentiation left out the possibility of developing an epistemic justice perspective specific to the work of truth commissions. I will now introduce the three most important human rights organizations that I will analyze in this dissertation, by providing a sketch of their specific features.

## 3.3 HUMAN RIGHTS ORGANIZATIONS

### *3.3.1 AMNESTY INTERNATIONAL*

*Amnesty International* was founded in London in 1961. The seed of what was to become the world's largest human rights organization was sown in an article titled "The Forgotten Prisoners", published in the *Observer* newspaper and written by the British lawyer Peter Benenson, the founder of *Amnesty*. There, Benenson protested the imprisonment of two Portugese students for raising a toast to freedom and launched a campaign called "Appeal for Amnesty, 1961" (Amnesty International 2013a). The appeal called for the release of six well-known political prisoners, "three held by communist dictatorships, three imprisoned by right-wing anticommunist regimes" (Neier 2012: 187). Such division of labour was a reflection of the campaign's aim "to work impartially to release those imprisoned for their views" (Neier 2012: 188). Other well-known newspapers responded positively to Benenson's appeal and reprinted his article. In this way, *Amnesty*, from the very beginning, became an international effort and thereafter attracted numerous volunteers and financial contributions from all over the world (Neier 2012: 188).

*Amnesty*'s global outreach is considered one of its kind. Among the international human rights organizations, it stands out as the best known and the largest in membership, income and the number of national units. The organization defines itself as "a global movement of more than 3 million supporters, members and activists in over 150 countries and territories who campaign to end grave abuses of human rights" (Amnesty International 2013b). Indeed, *Amnesty*'s internationalism directly stems from its principled effort to take the *Universal Declaration of Human Rights* very seriously. It takes upon itself the truly daunting objective of realizing the *Universal Declaration* in letter and spirit. In the organization's own words: "Our vision is for every person to enjoy all the rights enshrined in the *Universal Declaration of Human Rights* and other international human rights standards" (Amnesty International 2013b). More assertively, *Amnesty* claims the following in the "About Amnesty International" section of their website:

> Until every person can enjoy all of their rights, we will continue our efforts. We will not stop until everyone can live in dignity; until every person's voice can be heard; until no one is tortured or executed. (Amnesty International 2013c)

The lasting legacy and continuity of *Amnesty*'s work is built upon its worldwide membership, a unique feature. This aspect strengthens *Amnesty*'s legitimacy in the eyes of what some call a global civil society. Aryeh Neier, a founder of *Human Rights Watch*, describes this legitimacy as "the ability to speak on behalf of millions of dues paying members all over the world" (Neier 2012: 196). This legitimacy is further reinforced by the fact that *Amnesty* does not allow contributions from sources other than its members to "loom large in its finances" (Neier 2012: 196). Therefore, *Amnesty* does not depend on the financial support of foundations, wealthy philanthropists and governments. A constant flow of small donations by its ordinary members drive the

organization's authoritative claim to impartiality, which translates into *Amnesty*'s self-portrayal as being "independent of any government, political ideology, economic interest or religion" (Amnesty International 2013c).

*Amnesty*'s independence was also assisted by the simplicity of its mandate. Initially, it solely focused on the cases of "prisoners of conscience" which was defined in its first annual report as "those men and women who are imprisoned because their ideas are unacceptable to their governments" (Amnesty International 1962: 1; Korey 1998: 161). These persons suffered from the violations of their human rights identified in the articles 18 and 19 of the *Universal Declaration*, namely, the right to freedom of thought, conscience and religion, and the right to freedom of opinion and expression (Amnesty International 1962: 1). This highly specific mandate involved an allocation of the cases of prisoners of conscience to local campaign groups where each would, in the terminology of the organization, "adopt" three cases, "one each of prisoners held by communist, anticommunist, and nonaligned countries" (Neier 2012: 189; Korey 1998: 163). This impartial outlook was seen as key to achieving credibility and effectiveness in terms of *Amnesty*'s internationalist goals.

Although the prisoner-oriented mandate eventually broadened to include cases of torture and capital punishment in the 1970s, one particular issue related to the expansion of the *Amnesty* mandate determined the organization's primary focus in the years to come: "the issue of promoting compliance with international humanitarian law" (Neier 2012. 194). *Amnesty*'s focus was always centred on the United Nations framework of international human rights law. This meant that it principally dealt with and worked for individual victims of human rights violations perpetrated by governments. International humanitarian law, which developed outside the United Nations system, on the other hand,

necessitated developing an approach to combatant groups and, as the contemporary wars grew more amorphous, increasingly unconventional combatants including a wide variety of non-state actors. Whereas *Amnesty*'s work on prisoners of conscience, torture victims, victims of extrajudicial killings and disappearances, and persons sentenced to death was based on the familiar setting of government-individual relations, the contemporary wars that fell within the scope of humanitarian law disrupted this very setting. These wars were fought under the extremely adverse condition of failing, if not totally absent, governmental authority. The immediate consequence of such governmental failure, where the predictable provision of security was no more, was the problematization of the category of "individual victim" which *Amnesty* deemed central to guarantee its impartial approach. Nevertheless, as Aryeh Neier notes, the ecosystem of armed conflicts, which largely became the main arena of gross human rights violations in the Cold War era and its aftermath, produced such complicated situations where it was "rarely possible to single out individuals" (Neier 2012: 195). Therefore, for some time, the collective character of wartime gross violations, such as "indiscriminate bombardment, attacks on civilians en masse etc.", posed serious challenges to *Amnesty* in light of the question of how to expand the organization's mandate in response to armed conflicts.

While *Amnesty* slowly "adjusted its mandate and started monitoring guerrilla organizations, too", another international human rights organization embraced the reality of amorphous wars and decided to build its reputation through its comprehensive focus on international humanitarian law. *Human Rights Watch*, which quickly became only second to *Amnesty* in worldwide popularity, took up the effort to deal with gross human rights violations not only on *Amnesty*'s

terms of human rights standards, but also beyond the *Amnesty* framework of government-individual relations.

### 3.3.2 HUMAN RIGHTS WATCH

*Human Rights Watch* was founded in 1978 in New York. Its specific contribution to the international human rights movement in the late 1970s is best understood in comparison to *Amnesty International*. At first sight, both organizations share a similar overarching outlook, as *Amnesty* works to "end grave abuses of human rights" and *Human Rights Watch* works to "investigate and expose human rights violations and hold abusers accountable" (Human Rights Watch 2013b). To a great extent, this similarity is definitive. However, three significant differences stand out.

The first difference is simply related to the location of *Human Rights Watch*. A United States-based international human rights organization was considered necessary by the prominent human rights activists of the time, as *Amnesty*, though international in its operative scope, was based in London, United Kingdom. This perceived need to base an effective human rights organization in the United States of America was also driven by the strategic approach of some representatives of the human rights community who assigned great importance to "influencing the conduct of American foreign policy" (Neier 2012: 205). The Cold War made the United States one of the two superpowers in world politics and this meant that the attempt to win over the American policy-making circles in support of a human rights agenda was seen as a realistically assessed priority in terms of its worldwide repercussions. *Human Rights Watch* was designed to serve this United States-oriented perspective, in slight contrast to *Amnesty*'s

painstaking stance of impartiality and evenhandedness in relation to the power blocs of international affairs. The contrast was slight, mainly because *Human Rights Watch* was founded as *Helsinki Watch* in 1978, engaged in "denouncing Soviet abuses of rights" (Neier 2012: 205). However, the American-centred approach gained significance from 1980 onwards, as the election of Ronald Reagan to the United States presidency meant that the former president Jimmy Carter's human rights approach to foreign policy would soon be dismantled. Therefore, in spring 1981, "the leaders of Helsinki Watch decided to form an Americas Watch Committee under the same roof" (Neier 2012: 207). The two groups eventually came under the name *Human Rights Watch* in 1987.[23]

Still, the objective of influencing the United States foreign policy, as Reagan's disregard of human rights concerns became evident, persisted. Robert Bernstein, one of the founders of *Human Rights Watch* stated this objective openly, comparing his organization to *Amnesty*: "We're much more involved with the United States government. We're in all parts of it" (Korey 1998: 343). Aryeh Neier, the other founder, was also very explicit regarding the matter:

> ... as an American organization, we could focus significantly on U.S. policy, and U.S. [United States] policy was so significant on a worldwide basis, that our impact would derive from our relationship to U.S. policy. (Korey 1998: 344)

Interestingly, if not ironically, this special focus on the foreign policy of a single country helped *Human Rights Watch* gain a truly international reputation.

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[23] In addition to Helsinki Watch and Americas Watch, the organization also comprised Asia Watch (1985), Africa Watch (1988) and Middle East Watch (1989), the latter two having been established after the organization decided to adopt the name *Human Rights Watch* in 1987 (Neier 2012: 215).

Secondly, unlike *Amnesty*, *Human Rights Watch* does not command its own membership (Baehr 2009: 4-5) and this has implications for its funding philosophy. Mass membership guaranteed *Amnesty*'s financial independence insofar as it was able to choose, when necessary, its own non-controversial donors. Accordingly, in line with its principle of geopolitical impartiality, *Amnesty* was able to avoid seeking support from United States donors (Neier 2012: 204). *Human Rights Watch*, on the other hand, is an organization based on expertise without membership. This expertise —which involves professional research, meticulous reportage and sophisticated lobbying— is "supported by contributions from private individuals and foundations worldwide" (Human Rights Watch 2013a). Nevertheless, *Human Rights Watch* also tries to uphold one particular form of financial independence, that is, independence from governmental assistance: "It accepts no government funds, directly or indirectly" (Human Rights Watch 2013a). This was a lesson learnt from the experience of one of the first *Amnesty* missions, a mission to Rhodesia, which "was discredited when it leaked out that the money to fund the inquiry had come in secret from the UK Foreign and Commonwealth Office" (Robertson 2010: 7). Both organizations, therefore, adopted this rule of never taking money from governments.

Finally, and perhaps more importantly, as mentioned in the section on *Amnesty International*, *Human Rights Watch* made its entry into the world of international human rights promotion by focusing on the phenomenon of gross human rights violations from a broader international legal perspective, compared to *Amnesty.* While the latter (*Amnesty*), for a long time, specified its mandate with reference to international human rights law, dealing with individual victims of government policies, the former (*Human Rights Watch*), from the outset, decided to also "look at the violations of the laws of war" (Neier

2012: 204). Aryeh Neier stressed this aspect of the organization's work, in comparison to *Amnesty*'s "limitations with respect to the mandates that governed it" (Korey 1998: 344). Although Neier underlined that "*Amnesty* did a "superb job" with respect to people being detained or imprisoned or tortured or killed", it was not concerned with "transgressions in the context of armed conflict" (Korey 1988: 344). This neglect meant that *Amnesty*'s remit was "to investigate the conduct of the state rather than the conduct of those opposed to the state" (Robertson 2010: 8). *Human Rights Watch* consciously tried to fill this "vacuum in the human rights field created by *Amnesty*'s strict adherence to its mandate system" (Korey 1998: 344). The decision to look at the violations of international humanitarian law fed into the civil war reportage of *Human Rights Watch* which, from the early 1980s onwards, documented gross violations attributable "to guerrilla forces as well as to government forces in internal armed conflicts" (Neier 2012: 211). Reporting on the violations of international humanitarian law, and accomplishing this by reporting on violations committed by all parties to an armed conflict, constituted, in the words of one of its founders, "the organization's most significant innovation" (Neier 2012: 211).

Still, both *Amnesty* and *Human Rights Watch* seem to share certain important traits. First of all, both are generally seen as "purist" organizations (in contrast to, for instance, the *International Center for Transitional Justice* presented in the next section) as they strongly advocate criminal prosecutions of gross human rights violators as the *sine qua non* of an ethical human rights policy, regardless of political/prudential considerations (Grodsky 2010: 16). Barberet groups *Amnesty* and *Human Rights Watch* under the category of "international criminal justice-oriented nongovernmental organizations" as both "focus all of their efforts on preventing, denouncing and documenting human rights violations" (Barberet 2011: 381). Secondly, both organizations

share the strategy of "naming and shaming" in achieving their objectives. Publicity matters for both. *Amnesty International* "hopes that the leaders of repressive regimes will be shamed ... in the glare of world public opinion and, perhaps, the censure of other nations" (Orentlicher 1990: 84). Similarly, as succinctly put by the *Human Rights Watch* founder, Aryeh Neier, publicizing human rights violations is "not only the most powerful weapon [against abuses]; it is the only weapon" (Orentlicher 1990: 84).

As will be obvious throughout the thesis, both *Amnesty International* and *Human Rights Watch* will increasingly make sense of truth commissions in their reports from the perspective of criminal justice. They will, therefore, use their publicity strategies to evaluate whether truth commissions sufficiently contribute to the morally superior goal of prosecuting gross violators. Let me now introduce the third human rights organization to be analyzed here, the *International Center for Transitional Justice*, which does not share this perspective.

### *3.3.3 INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE*

The *International Center for Transitional Justice*, an organization with a considerably different nature compared to *Amnesty* and *Human Rights Watch*, was founded in 2001 in New York. Its origins lay in the new policy debate surrounding the dozens of truth commissions established all over the world in the 1980s and 1990s plus the innovative *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda in the early 1990s. Eventually, both truth commissions and criminal tribunals attracted worldwide attention as human rights institutions that responded to difficult and variegated political conflicts contaminated by gross human rights violations. However, the most publicized period of

and the critical turning point for this new wave of international institution-building was the early 1990s. The consecutive establishment of the International Criminal Tribunal for the former Yugoslavia in 1993, the International Criminal Tribunal for Rwanda in 1994 and the *South African Truth and Reconciliation Commission* in 1995 coincided with the increasing usage of the burgeoning term of "transitional justice" in advocacy, academic and policy circles.[24] As Paige Arthur, a participant in and a close observer of the human rights debate in this period, notes, the notion of transitional justice "was invented as a device to signal a new sort of human rights activity and as a response to concrete political dilemmas human rights activists faced in what they understood to be "transitional" contexts" (Arthur 2009: 326). After its establishment in 2001, the *International Center for Transitional Justice* was to conceive these transitional contexts as "societies emerging from repressive rule or armed conflict, as well as ... established democracies where historical injustices or systematic abuse remain unresolved" (Hayner 2009: 80).

What was the novelty of the human rights activity that could best respond to the dilemmas of political transitions? The *International Center for Transitional Justice*, through its practice, has developed a detailed answer to this question. Just as comparing *Human Rights Watch* with *Amnesty International* contributes to a better understanding of the former, an apprehension of the specific place of the *International Center for Transitional Justice* and its novel practice in the world of international human rights organizations is well served by keeping in

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[24] An instance of the increasing usage of the term is the following: One of the first comprehensive studies under the title of "transitional justice" was "Neil Kritz's four-volume compendium *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*" published in 1995, around the same time when international tribunals and the South African truth commission were to receive worldwide acknowledgement (Arthur 2009: 330).

mind its contrasting aspects with the pioneering role of *Amnesty* and *Human Rights Watch* in human rights advocacy. Unlike *Amnesty* and *Human Rights Watch*, the *International Center for Transitional Justice* does not base its operations on human rights fact-finding missions where the basic strategy is to name and shame gross human rights violators. Although the main subject matter of the *Center*'s activities — "massive human rights abuses" (International Center for Transitional Justice 2013a)— is similar to that of the other two organizations — "grave abuses of human rights" (*Amnesty*) and "human rights violations" (*Human Rights Watch*)—, their respective approaches to this subject matter which can be summed up as "gross human rights violations" largely differ.

The difference in approach is reflected in the particular historical circumstances surrounding the emergence of the human rights organizations. Both *Amnesty* and *Human Rights Watch* were largely formations of the Cold War era during which authoritarian and violence-ridden regimes abounded. Their main strategy was "to shame repressive governments into treating their citizens more justly" (Arthur 2009: 334). However, "the ending of repressive regimes in Latin America in the early to mid 1980s" and the following collapse of communism across Central and Eastern Europe in the beginning of the 1990s "forced a shift in strategy and thinking" (Arthur 2009: 334). Juan Mendez, the Washington director of *Human Rights Watch* in the early 1980s and the president of the *International Center for Transitional Justice* from 2004 to 2009, observed the difficulty in this shift. As the international human rights movement slowly lost an important number of its principal objects of critique, that is, grossly unjust regimes, Mendez notes that many human rights advocates thought that, after regime change, there was "no role for us", since the country had "turned a new leaf" (Mendez in Arthur 2009: 335). This difficulty is explained by

Samuel Moyn, a historian of human rights, as entailing a transition experienced by the idea of human rights from "an exceptionally powerful tool for the critique of a regime" to a tool for "constructing an alternative" (Moyn 2011: 136).

Nevertheless, in time, human rights advocates proved up to the task of moving the international human rights agenda from designing responses to gross human rights violations occuring in real time to designing responses for their challenging aftermath. The expanding mandates of "classic" human rights organizations like *Amnesty* and *Human Rights Watch* in the post-Cold War period was a consequence of this awareness of changing human rights strategies. The geopolitical circumstances where fabricating an image of impartiality in view of opposing power blocs which were equally involved in wrongful political acts amounting to gross human rights violations perpetrated by their members was no more. Therefore, the *International Center for Transitional Justice* represented a new period when an impartial human rights organization had to negotiate its neutrality in every single national context in which it operated. Adopting an equal number of cases from the Soviet and American blocs was no longer an option for *Amnesty*. Similarly, *Human Rights Watch*'s attempt to influence the United States foreign policy, when the accompanying critique of communist regimes would no longer be possible due to their collapse, became more challenging. Hence, the *International Center of Transitional Justice*, as a token of a new form of impartiality, initially took cases "only in countries where it received an explicit request, be it from the government, a local human rights or victims organization, or another entity" (Hayner 2009: 81).[25] This was a less moral than technical form of

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[25] "In time, the ICTJ [*International Center for Transitional Justice*] began to work in some contexts on its own initiative where it saw a clear need" (Hayner 2009: 81).

impartiality. This also explains why it was less problematic for the *International Center for Transitional Justice* to seek funding from governments, which it did. In this sense, the relationship between international human rights organizations and governments was given a new shape: Whereas *Amnesty* and *Human Rights Watch* chose to impose a moral relationship resembling that between a prosecutor and a defendant, the *Center*'s relation to governments was more similar to that between a service provider (or, a consultant) and a client. However, the *Center* also adopted "a policy that restricted it from seeking U.S. [United States] government funds, based on a stated need for independence and the central role that the U.S. plays in many contexts in which the Center works" (Hayner 2009: 82-83).

In any case, the *Center* was a new breed as it defined its objective as the provision of "technical assistance, research, and training in the core pillars of transitional justice" (Hayner 2009: 82). The core pillars of transitional justice, according to the *Center*'s website, refers to

> the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms. (International Center for Transitional Justice 2013a)

Since, concerning these measures/pillars of transitional justice, the *Center* positions itself as the provider of "technical expertise and knowledge of relevant comparative experiences ... from across the globe", its job seems less moral advocacy than technical consultancy, which makes its reception of governmental assistance more understandable (International Center for Transitional Justice 2013b). The activities of investigating and exposing violations and campaigning

to end violations (associated with *Amnesty* and *Human Rights Watch*) might only be seen as indirect outcomes of this "technical" objective. Still, the *Center* seems to uphold a moral vision, however, by working with "victims' groups and communities, human rights activists, women's organizations and others in civil society with a justice agenda" (International Center for Transitional Justice 2013b).

Bringing together *Amnesty, Human Rights Watch* and the *International Center for Transitional Justice* in a critical analysis of how they monitor truth commissions necessitates understanding how they perceive the work of truth commissions vis-à-vis gross human rights violations. As should be obvious from the above presentation of the human rights organizations, *Amnesty* and *Human Rights Watch* mainly concentrate on the condemnation of gross human rights violations and their perpetrators. As the analysis of their reports on truth commissions below will show in the following chapters, this position on moral condemnation will increasingly lead them to adopt an ethical "criminal justice" framework advocating the punishment of gross human rights violators. The *International Center for Transitional Justice*, on the other hand, adopts a prudential "transitional justice" framework, seeing criminal prosecutions as an alternative among a set of possible measures. This framework relativizes the normative priority attached by *Amnesty* and *Human Rights Watch* to the punishment of violators by subjecting the viability of criminal justice to a contextual evaluation, that is, the extent to which the facts on the ground in the country concerned allow an uncompromising stance on punitive measures. In this sense, the priority for the *Center* remains answering the question of how to "combine and sequence" transitional justice measures. This is a question of balance, based on the recognition of the fact that countries cannot put every alleged gross human rights violator on trial (Olsen et al 2010: xvi). The balance sought by a comprehensive transitional justice

strategy is “between legal imperatives, public safety, and pragmatic considerations” (Olsen et al 2010: xvi) and the major political good to come out of this balance is defined by the *Center* in terms of social transformation:

> Transitional justice is a response to systematic or widespread violations of human rights. It seeks recognition for the victims and to promote possibilities for peace, reconciliation, and democracy. Transitional justice is ... justice adapted to societies transforming themselves after a period of pervasive human rights abuse. (Olsen et al 2010: 11)

On the whole, *Amnesty* and *Human Rights Watch* will be seen as viewing truth commissions in relation to the ethical imperatives of criminal justice (doing justice to law), defining the relationship between truth commissions and courts as a crucial concern, whereas the *International Center for Transitional Justice* will be seen as evaluating truth commissions from the broader perspective of transitional justice, assigning the process of political transition transformative goals (doing justice to politics), especially with respect to the political empowerment of victims and peaceful reintegration of human rights violators into the new, post-conflict community. From this perspective, the relationship between truth commissions, on the one hand, and victims and perpetrators of gross human rights violations, will gain significance.

In light of this general picture, my main objective will be to evaluate the reports written by these human rights organizations regarding the truth commissions in Guatemala, Serbia and Sierra Leone and rescue the normative expectations from truth commissions from the imperatives of both criminal and transitional justice, proposing in their stead the priority of an epistemic justice (doing justice to history) perspective. Before engaging in this critical evaluation in Chapter 8, however, I will first summarize my outlook regarding case selection, that

is, the selection of the countries and human rights reports to be examined (Chapter 4) and then present in a detailed manner the conflicts and resultant event and violations and the post-conflict truth commissions in Guatemala, Serbia and Sierra Leone, together with the human rights reports written by each organization on each case (Chapters 5, 6 and 7).

# CHAPTER 4

# CASE SELECTION: COUNTRIES AND HUMAN RIGHTS REPORTS

## 4.1 WHICH COUNTRIES AND WHY?

In this dissertation, I dwell upon three countries —Guatemala, Serbia and Sierra Leone— which experienced gross human rights violations in brutal wars and ended up becoming three different sites for the development of justice institutions like truth commissions with varying features.

Guatemala, where impunity shamelessly reigned after a long civil war, became home to an apparently weak truth commission which was forced to operate amidst amnesty laws and under the condition that it will have no judicial effect in terms of assigning individual responsibility for gross human rights violations. The *Historical Clarification Commission* was, however, actually dedicated to a strong sense of justice in the way it put forward its results. Its report *Memory of Silence* was prepared in such a way that it could facilitate and give way to criminal prosecutions insofar as the judicial system was independent and robust enough to pursue the task. Its 1999 finding of genocide has

only become subject to a domestic criminal trial in 2013 whose result as of October 2013 is uncertain. Guatemala's is a disheartening success story demonstrating how the work of a truth commission, if conducted properly, could 1- inspire long-term justice efforts where individuals with fully visible faces who made conscious choices and carried concrete responsibilities are put to trial for gross violations and 2- encourage a deeper understanding of institutions, social structures and historical inequalities conducive to violence.[26] Nationalisation of the framework of international crimes, even through the genocide finding of a truth commission without finalized courtroom procedures, enable a progress, however slow and modest, in attempts to prosecute gross human rights violators shielded by impunity.

The case of Serbia offers a painstaking example of the paradigmatic failure of a pseudo-truth commission as well as a situation in which an international *ad hoc* criminal tribunal takes on the task of finding out the ugly truth of gross human rights violations in the wars of Yugoslavia in order to prosecute and punish the individuals bearing responsibility. Serbia provides a challenging example to the extent that it shows how ill-intentioned the non-prosecutorial and non-punitive mechanism of a truth commission could become. Designing a mock (pretended) epistemic justice institution[27] (namely, the *Yugoslav Truth*

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[26] The *Historical Clarification Commission* is considered one of the best examples of a truth commission in terms of the structural, institutional and historical analyses provided in its final report. For an assessment, see Grandin 2005. Such analyses are important in terms of accounting for political responsibility as opposed to personal responsibility, as discussed in Chapter 1, with reference to Hannah Arendt's thought. See Chapter 8, section 8.3.1 for further discussion of this matter.

[27] The generic term "justice institutions" is intended to cover criminal tribunals, both domestic and international, as well as truth commissions. Against the artificial academic distinction between truth (provided by a truth commission) and justice (provided by a court), often depicted as contradictory goals, I argue that there is a right to truth whose realization and protection brings justice (see, for instance, Naqvi 2006).

*(cont'd overleaf)*

*and Reconciliation Commission*) with the aim of suppressing the pursuit of international criminal justice seriously worsened the consequences of the legitimacy deficit of the International Criminal Tribunal for Yugoslavia in the eyes of the Serbian people. The bright side was to see that domestic and international courts could step in to realize some form of epistemic justice (without compromising the goal of criminal justice) through the production of truth in criminal cases, whenever truth commissions could not materialize.

The case of Sierra Leone almost lies midway between those of Guatemala and Serbia insofar as it brought together a truth commission with a considerably well-structured mandate and a special "internationalized" court creatively mixing domestic and international legal entities. For a time, the coexistence of such two justice institutions with divergent modalities of restorative and retributive concerns was expected to cause problems, but a form of cooperation between the two institutions that was not completely reluctant ensued. Determining the criminal accountability of those bearing the greatest responsibility for serious violations fell within the purview of the Special Court for Sierra Leone which had to face the challenges of low funding and limited jurisdiction. The *Sierra Leone Truth and Reconciliation Commission*, on the other hand, did fulfill a difficult objective by organizing public hearings and documenting the minutiae of a devastating war.

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In my conceptual framework, as explicated in Chapters 1 and 2, which does not deal with the big question of "What is justice?", but tries to make sense of justice through middle-range concepts, truth commissions are among the best instruments to provide *epistemic* justice, whereas courts are generally good at the provision of *criminal* justice.

#### *4.1.1 Focus of thesis in light of transitional justice scholarship*

My study of these three countries and their truth commissions largely falls within the genre of multicountry or cross-national case studies. There are important examples of such studies within the so-called "transitional justice scholarship".[28] Two such studies, for instance, have been recently reviewed by Christopher Lamont in the *International Journal of Transitional Justice*, namely, Brian Grodsky's *Costs of Justice: How New Leaders Respond to Previous Rights Abuses* (2010) and Roman David's *Lustration and Transitional Justice: Personnel Systems in the Czech Republic, Hungary, and Poland* (2011). Lamont characterizes the two works as inquiries into "transitional justice dilemmas confronted by transition elites" (Lamont 2013: 186). Grodsky takes into account a spectrum of transitional justice measures that includes "seven types of justice that range from cessation and codification of human rights violations to criminal prosecutions of commanders", covering options that range from "lenient" to "harsh" (Lamont 2013: 188, 189; Grodsky 2010: 35-57). This spectrum is "ranked incrementally according to the degree to which responsibility is personalized and the severity of repercussions for perpetrators of past violations" (Lamont 2013: 188). To sum up, Grodsky analyzes the strategies pursued by transition elites in implementing certain types and combinations of justice policies. He focuses on four postcommunist case studies — Poland, Serbia and Montenegro, Croatia and

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[28] For recent critiques of the "field" of transitional justice, see Leebaw 2008, Bell 2009, Subotić 2012 and Obradović-Wochnik 2013.

Uzbekistan. David's study on lustration[29] similarly deals with "the policy dilemmas facing new elites in relation to the inherited personnel" of the previous, authoritarian regimes (Lamont 2013: 190). His research question is as follows: "How can states undergoing the transition from authoritarianism to democracy deal with inherited state personnel complicit with abuses of prior regimes?" (Lamont 2013: 190; David 2011: 2). He also studies postcommunist case studies, but with a regional focus; namely, three countries —Czech Republic, Hungary, and Poland— from Central and Eastern Europe.

It is useful to discuss the scope of these exemplary works in order to clarify what I intend to do in this dissertation. Like these two works, I will also look into "transitional justice dilemmas confronted by transition elites", but with differing conceptual and practical concerns. First of all, I will deal with dilemmas confronted not only by elites, but also by the other main transition constituencies like victims and perpetrators. In any case, transition elites might have to square the circle in terms of being forced to respond to the demands of not only victims, with their rightful claims to remedies and reparations, but also perpetrators who found themselves on the losing side of a war or, at least, with decreasing bargaining power. The context of gross human rights violations ensures that both are crowded and effective constituencies, affecting the capacity of transition politicians. In the case of perpetrators, however, the problem of transition is more acute, as mass prosecution is hardly possible (i.e. too expensive and infrastructurally infeasible) and forms of accountability beyond criminal

[29] Lustration, also known as vetting, refers to "processes for assessing an individual's integrity as a means of determining his or her suitability for public employment ... processes [which] are aimed at screening public employees or candidates for public employment to determine if their prior conduct (including, most importantly from a transitional justice perspective, their respect for human rights standards) warrants their exclusion from public institutions" (Duthie 2007: 17).

liability might have to be pursued, which goes directly against the demand for punitive measures raised by many victims' communities.

Secondly, I will specifically look into dilemmas raised by the choice to establish truth commissions, conceptualized as dilemmas of epistemic justice, in a post-conflict context. This is a much narrower focus, compared to, for instance, Grodsky's research on seven types of justice comprising truth commissions, criminal prosecutions and other measures. Yet this narrow focus aims to develop a critique of the concept of "transitional justice", which is found too ambitious to deal with the amorphous character of wars and too broad to comprehend the special way in which truth commission do justice. Still, freed from its grandiose purpose of transforming a whole society, transitional justice can at best be conceptualized as a "new beginning" in Hannah Arendt's sense, where the old is still around the corner, if not in the midst of the new and fertile period of politics, and where unpredictability inherent in all political action is at a maximum.[30] In this sense, transitional justice involves a political process in which the meaning of human rights for a new polity is negotiated, after a past contamined by gross human rights violations. Accordingly, strategic decisions and symbolic actions on the part of political elites propose 1- a new vision of "political remembrance" to the citizenry, i.e., a new "historical truth" that will distribute largely symbolic political responsibility for past violations among the parties of the armed conflict, and 2- a new wave of institutionalization that will explicitly distance itself from the criminal traits of the previous regime and its organizations. This is how I view transitional justice as a useful concept. It is a view from the perspective of epistemic justice offered by truth commissions, as opposed to Grodsky's more general and overwhelming definition of "a new or nominally new regime's legal and

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[30] For Arendt's understanding of "new beginnings", see Arendt 1965: 204-214.

symbolic responses to past human rights violations" (Grodsky 2010: 4). In sum, I reverse Grodsky's methodological assumption that there can be a distinguishable set of policy options that are categorizable under the vague banner of transitional justice. Instead, I move from the concrete institution —truth commission— to explore how it affects the volatile ecosystem of political transition from war to peace and how it necessitates a critical evaluation of the notion of "transitional justice".

Finally, my limited focus on one type of justice institution, namely the truth commission, might sound more similar to David's focus on a specific justice measure like lustration. David analyzes his set of three postcommunist cases to come up with "policy-relevant advice as to how to deal with the legacy of inherited personnel" (Lamont 2013: 186). Although he relates the policy of lustration to the wider field of transitional justice, which I refrain from doing in my "epistemic justice" approach to truth commissions, I will also offer policy-relevant advice concerning the primarily political/prudential effort to moderate the popular expectations following the decision to establish a truth commission, without losing sight of the moral good provided by a commission.

On the whole, my choice of countries allows me to move beyond the scope of both Grodsky's and David's contributions. Unlike these two recent multicountry case studies, my area of interest is not confined to historically, geographically and ideologically specific transitional periods like "postcommunist encounters with transition" or post-authoritarian transitions (Lamont 2013: 186). At first sight, my area of interest may be considered as "post-conflict" transition to the extent that all three cases involve periods of armed conflict followed by justice mechanisms. Nevertheless, it remains highly variegated in geographical (Central America, Southeastern Europe and West Africa), historical (a long civil war in Guatemala covering much of the Cold War period and two wars

of the post-Cold War era), and ideological (Serbia's post-communist, Guatemala's post-authoritarian and Sierra Leone's post-colonial/patrimonialist transitions) terms. In this way, I will be able to offer certain modest lessons and recommendations regarding the practice of truth commissions at a fairly generalizable level that is independent from a regional or contextual understanding of truth commissions.[31] Although truth commissions are largely associated with Latin American and African contexts where they have been more numerous, I will assume that they are now internationally valid instruments, as attested by the United Nations involvement in their appraisal and even establishment.[32] My set of countries will also allow me to delink the practice of truth commissions from specific kinds of war and political system. Wars in Guatemala, the former Yugoslavia and Sierra Leone are the products of distinct historical circumstances. Moreover, the political systems that accompanied these wars are highly divergent (a series of military authoritarian regimes or dictatorships based on a highly unequal land distribution disadvantaging a largely indigenous, peasant population in the case of Guatemala; a postcommunist regime built upon an irredentist project of ethnic-nationalism in the case of Serbia; and a fledgling post-colonial

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[31] For the "Latin American" understanding of truth commissions, see, for example, Skaar, Garcia-Godos and Collin 2012.

[32] For the United Nations reports on transitional justice and truth commissions, see United Nations Security Council 2004 and United Nations 2006. For the special role played by two senior United Nations officials, the Special Representative of the Secretary-General for Sierra Leone and the High Commissioner for Human Rights, in the establishment of the *Sierra Leone Truth and Reconciliation Commission*, as noted by one of the commissioners, see Schabas 2006: 23. Similarly, for an assessment of the role of the United Nations in the establishment of the *Historical Clarification Commission* of Guatemala by the chairman of the commission, see Tomuschat 2001. Elizabeth Oglesby's study of the Guatemalan commission also positively notes that because "the Truth Commission report is out there with the imprimatur of the United Nations, it's impossible now to deny certain realities" (Oglesby quoted in Grandin 2005: 67).

constitutional democracy coming out of a deeply rooted patrimonial and one-party system in the case of Sierra Leone), making their post-conflict transitions equally divergent. This divergence in the design of my cross-national cases is hoped to generate policy-relevant recommendations on the practice of truth commissions understood as internationally valid post-conflict instruments. This "international" understanding will be also significant in furthering the political-theoretical debate concerning the ethics-prudence tension, which I will explore in my concluding chapter.

## 4.2 WHICH REPORTS AND WHY?

In this dissertation, I analyzed a total of 48 reports issued by international nongovernmental human rights organizations. They are reports written or commissioned by *Amnesty International* and *Human Rights Watch*, the two of the largest international human rights organizations, and the *International Center for Transitional Justice*, one of the most important new international human rights organizations known for offering consultancy for those countries that want to establish truth commissions. These reports were selected because they contained evaluations of truth commissions established in the countries under study. They cover the period from 1994, the year when *Human Rights Watch* evaluated the Global Human Rights Accord signed by the Guatemalan government and the guerrillas united as the Guatemalan National Revolutionary Unity, until 2012, when the *International Center for Transitional Justice* assessed the value of truth commissions in light of promoting indigenous rights, especially of the Mayas in Guatemala.

*Table 2: Number of reports on truth commissions per international human rights organization*

| Amnesty International | Human Rights Watch | International Center for Transitional Justice | Total |
|---|---|---|---|
| 24 | 14 | 10 | 48 |

Of the 48 reports analyzed here, 24 belong to *Amnesty International*, 14 to *Human Rights Watch* and 10 to the *International Center for Transitional Justice* (see Table 2). The difference in these numbers can be explained by the size of the organizations. Because *Amnesty International* is the largest organization, it is understandable that it has a greater capacity to produce more reports on any number of cases. Another reason behind the difference in the number of reports per organization seems to arise from the fact that nearly two decades separate each organization in terms of their years of establishment. Therefore, *International Center for Transitional Justice*, the organization that is most recently established in 2001, simply did not have the time to produce as many reports as the other two organizations.

*Table 3: Number of reports on truth commissions per case*

| Guatemala | Serbia | Sierra Leone | Total |
|---|---|---|---|
| 19 | 5 | 24 | 48 |

The discrepancy in the number of reports per case demands explanation, too. Table 3 shows that the three human rights organizations wrote the highest number of reports on the *Sierra Leone Truth and Reconciliation Commission*. This is understandable considering the novel institutional framework of post-conflict justice in the case of Sierra Leone. There, immediately after the end of the war, both a truth commission and a special international court were established. Thus, human rights organizations had to grapple with two topics of inquiry: a truth commission which was established under the difficult circumstances of a fragile peace agreement that included a blanket amnesty, and an international tribunal that was the first of its kind and also a subject of controversy insofar as there was no precedent regarding how such a tribunal could coexist with a truth commission. That the second highest number of reports concerns the Guatemalan *Historical Clarification Commission* is also understandable. First, there is the fact that it was established nearly five years before the other two commissions, putting it under scrutiny for a longer period of time. But, more importantly, it was the only and, at first sight, a very weak accountability institution in Guatemala that had to deal with the legacy of a thirty-six year long civil war marked by more than 200,000 deaths. This made the *Historical Clarification Commission* a challenging subject of great interest. The interest aroused by its highly detailed and voluminous report *Memory of Silence* also explains its broad coverage by human rights organizations. Serbia's *Yugoslav Truth and Reconciliation Commission*, on the other hand, was evaluated in only five reports, probably because it failed to operate effectively and disbanded without producing a report.

*Table 4: Distribution of each organization's reports across cases*

| | Amnesty International | Human Rights Watch | International Center for Transitional Justice |
|---|---|---|---|
| Guatemala | 5 | 11 | 3 |
| Serbia | 1 | 1 | 3 |
| Sierra Leone | 18 | 2 | 4 |
| Total | 24 | 14 | 10 |

Additionally, one should not expect these organizations to focus on each case in an equal manner. As Table 4 demonstrates, there is an uneven distribution of an organization's reports across cases. There is no doubt that the work of all three organizations is international in scope and that they review countries representing all sorts of geopolitical alignments on a recurrent basis. The reason why their focus seems uneven in the table above is most probably because we are doing the comparison across a mere set of three cases. It is likely that the overall balanced approach of organizations can be demonstrated by looking at their reports on all countries in the world. In any case, *Amnesty International* and *Human Rights Watch* issue annual world reports, and *International Center for Transitional Justice* works in more than thirty countries all around the world, also subject to annual reports. Their global outlook is definitive.[33]

[33] There are some studies which challenge this global outlook or at least its practical effects. For a critical analysis of how *Amnesty International* "produces more written work on some countries than others to maximize advocacy opportunities", see Ron, Ramos and Rodgers 2005. For a discussion of how the timing of the *Human Rights Watch* reports "relates to very different transitional moments within each of the countries" and therefore produces unexpected outcomes, see Mallinder 2010.

Nevertheless, the above numbers tell something. For instance, 18 reports out of a total of 24 *Amnesty International* reports deal with the *Truth and Reconciliation Commission* in Sierra Leone. Once again, this is due to the novel institutional framework provided by the "two-track accountability" approach of a truth commission and a special international court. The case of Sierra Leone offers a great opportunity for an organization like *Amnesty International* which puts individual criminal accountability for gross human rights violations very high on its agenda to diagnose and address the limitations of Sierra Leone's innovative internationalized court and truth commission. The other interesting figure is that 11 out of a total of 14 *Human Rights Watch* reports are about the Guatemalan *Historical Clarification Commission*. This has a more specific explanation to the extent that, in May 1999, three months after the publication of the *Historical Clarification Commission* report, *Human Rights Watch*, along with three other human rights organizations, released a document smuggled out of Guatemalan military files, a document which revealed the fate of more than 180 "disappeared" individuals between 1983 and 1985. Nine of the 11 *Human Rights Watch* reports on Guatemala, including the report about this file on disappearances, were written after this "smuggling" activity. In other words, with the release of this document and its direct association with the name of the organization and its activism, *Human Rights Watch* is likely to have got more engaged in the unfolding of the struggle for accountability in Guatemala. Finally, the focus of the *International Center for Transitional Justice* seems more even, though this could change as the organization grows older like its two other counterparts.

Let us not forget that, in terms of the analysis pursued in this thesis, the fact that one organization has produced more reports on one case compared to others does not decrease the value of the latter's

reports. The criterion that matters for my comparative analysis is the transparency of the positions taken and substance of the arguments uttered by the human rights organizations, regardless of whether they were articulated in a single report or a dozen.

*Table 5: Distribution of organizations' interest in the cases vis-à-vis the temporal dimension of the commissions' operation*

| | Guatemala | | Serbia | | Sierra Leone | |
|---|---|---|---|---|---|---|
| Before the commission's operation | AI* | 1 | - | | AI | 10 |
| | HRW* | 2 | | | HRW | 1 |
| | | | | | ICTJ* | 2 |
| During the commission's operation | AI | 3 | ICTJ | 1 | AI | 1 |
| | | | | | HRW | 1 |
| | | | | | ICTJ | 2 |
| After the commission's operation | AI | 1 | AI | 1 | AI | 7 |
| | HRW | 9 | HRW | 1 | | |
| | ICTJ** | 3 | ICTJ | 2 | | |
| Total | | 19 | | 5 | | 24 |

* Abbreviations: *Amnesty International*, AI; *Human Rights Watch*, HRW; *International Center for Transitional Justice*, ICTJ.

** The *International Center for Transitional Justice* was founded in 2001 and therefore not able to observe the conception and operation phases of the Guatemalan truth commission.

Finally, the distribution of the organizations' interest in the cases in relation to the temporal dimension of the commissions' operation, as indicated in Table 5, is also a helpful indicator of how different human rights organizations might choose to respond to similar cases. There are four instances of concurrent reportage by the three organizations: 1- before the operation of the *Sierra Leone Truth and Reconciliation Commission*; 2- during the operation of the *Sierra Leone Truth and Reconciliation Commission*; 3- after the operation of Guatemala's *Historical Clarification Commission*; and 4- after the operation of Serbia's *Yugoslav Truth and Reconciliation Commission*. One should note that probably there would have been concurrent reportage of the period before the operation of the Guatemalan commission if the *International Center for Transitional Justice* had been established earlier, that is, not in 2001. The absence of the *International Center for Transitional Justice* at this phase of commission activity is beyond its means. Similarly, it was not possible for the *International Center for Transitional Justice* to be active during the operation of the *Historical Clarification Commission* between 1997 and 1999. Hence, the only possible way for the *Center* to deal with the Guatemalan truth commission was after its operation. This objective limitation on its part is denoted by the double asterisk (**) in the "after" section of the Guatemalan column.

One possible reason why the only instances of concurrent "before" and "during" reportage occurred in the case of Sierra Leone is, to reiterate, the curiosity aroused by the innovative "two-track" accountability mechanism entailing the truth commission and the international court. International human rights organizations had to directly face the questions posed by this new setting of post-conflict justice without the luxury of waiting for its maturation at the end of the temporal mandate of the truth commission. On the other hand, the

highly politicized nature of the Serbian commission might have probably lowered expectations regarding its unfolding, explaining the absence of “before” and “during” reportage.

To be sure, 48 is not the sum total of all that the three human rights organizations produced with respect to the truth commissions in Guatemala, Serbia and Sierra Leone. The materials that I have reached and analyzed are limited to online sources accessible to everyone. Without the effective, professional and neat utilization of the Internet by these organizations, this dissertation would not be possible. Although using solely world wide web material is indeed a limitation, it provides a meaningful field for research. The virtual space created by computers or the so-called social media is, most of the time, the only and most effective means of access to the reports of human rights organizations for many people. It is particularly the primary source for both the ordinary people all around the world who want to know more about the truth of gross human rights violations and the expert audience who professionally interacts with the international human rights movement. This dimension of “connectivity” is important for not avoiding the question of who reads human rights reports or for whom human rights reports are produced.[34]

Obviously, if someone tries to search for either one of the truth commissions under study on the website of either one of the human rights organizations, they will inevitably find hundreds, if not thousands, of related reports. I reached the sum total of 48 reports by following a threefold procedure: First, I took the liberty of excluding those reports which included repetitive remarks, that is, remarks which I previously took note of through another report. For instance, the assessment by

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[34] For an analysis of human rights nongovernmental organizations’ websites in terms of the prospects for online advocacy, see Kingston and Stam 2013.

*Amnesty International* regarding how “truth commissions are not a substitute for justice” was made in several reports on Sierra Leone, but I included the one where it first appeared plus the ones where the same assessment was accompanied by other important qualifiers. Secondly, I took the liberty of excluding those reports which only contained informative reminders about a truth commission’s mandate, features or mere existence. Thirdly and finally, I reached these 48 reports not by seeking them from among every report written by the human rights organizations on Guatemala, Serbia and Sierra Leone, but by searching online for the relevant keyword which was always the official name of the truth commission. I did not, however, discriminate between long and detailed reports based on fact-finding missions and shorter press statements sending out a concise message. Here, both types of material are considered *human rights reports*. On the whole, this is a perfectly fallible, hence perfectible database, but I believe these 48 reports offer a good start for developing an approach to understand the work of international human rights organizations in relation to truth commissions within the broader normative context of what I call “doing justice to history” or “epistemic justice”.

In the next three chapters of the dissertation, I will first describe the armed conflicts and truth commissions in Guatemala, Serbia and Sierra Leone and then try to interpret how human rights organizations evaluated truth commissions in their reports from the perspectives of criminal justice and transitional justice. The three wars —war in Guatemala (1960-1996), wars in the former Yugoslavia (1991-1999) and war in Sierra Leone (1991-2002)— will be described as amorphous violence-ridden eras characterized by gross human rights violations. Each country will be dealt with in separate chapters and each chapter

will start with 1- a brief sketch of how the war unfolded,[35] followed by 2- an outline of how the truth commission in each country was designed and put on agenda, and ending with 3- an examination of how the three human rights organizations —*Amnesty International*, *Human Rights Watch* and *International Center for Transitional Justice*— evaluated the truth commission and its achievements or failures in each case. The first two sections of each country chapter will provide highly descriptive accounts. Therefore, the reader should not expect to find, for instance, an analysis of the historical roots of the war in the first section or a detailed assessment of the work of the truth commission in the second. However, a more interpretative approach will be taken in the third section where the particular evaluations made by the human rights organizations will be scrutinized in order to explicate their differing normative expectations from the work of truth commissions. This interpretative effort will lead us to refine the distinction between criminal and transitional perspectives of justice and discuss how each perspective makes sense of truth commissions. It will then be possible to move on to the argument for designing truth commissions as epistemic justice institutions independent of criminal and transitional justice agendas, as explicated in Chapter 8 and Conclusion.

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[35] The sections on the historical background of wars will be based on 1- mostly secondary academic literature in order to take note of major political developments surrounding the conflict and 2- documentation of exemplary gross human rights violations by the human rights organizations under scrutiny, specifically by *Amnesty International* and *Human Rights Watch*, since the *International Center for Transitional Justice* was founded only in 2001, that is, at a time when the wars under study were either concluded (Guatemala) or on the verge of conclusion (Sierra Leone and the former Yugoslavia).

# CHAPTER 5

# GUATEMALA: ESTABLISHING A TRUTH COMMISSION UNDER THE THREAT OF DEATH

## 5.1 WAR IN GUATEMALA, 1960-1996

The republic of Guatemala, located in Central America, is bordered by Mexico to the north and west, Belize to the northeast, the Carribean to the east, and Honduras and El Salvador to the southeast. It has a population of nearly 15 million, which, according to various sources, is mainly divided between a 50-60 percent Ladino/Mestizo group of Spanish or mixed Spanish-Amerindian descent and a 40-50 percent indigenous Mayan population covering multiple indigenous language groups (Lunsford 2007: 385; The World Factbook 2013a). Guatemala is home to Roman Catholic, Protestant and indigenous Mayan beliefs. According to the United Nations Development Programme's 2013 Human Development Index, Guatemala's Human Development Index value is positioned at 133 out of 187 countries, in the medium human development category, with 71.4 years of life expectancy, 10.7

expected years of schooling, $4,235 Gross National Income (GNI) per capita.[36]

The beginning of the Guatemalan civil war is usually traced back to 13 November 1960 when a group of junior army officers engaged in an attempted coup against the president General Miguel Ydígoras Fuentes (Baldwin 2009: 53). These officers claimed in their manifesto to aim at the "installation of a regime of social justice in which riches pertain to those who work and not to the exploiters, those who starve the people, and the gringo[37] imperialists" (Afflitto and Jesilow 2007: 22). Several of these officers went on to found, according to David Stoll, "the country's first Marxist guerrilla organizations" (Stoll 2005: 419). As the conflict unfolded into becoming a very long civil war, the longest-running in Latin America, these guerrilla organizations [38] ultimately came together in 1982 under the banner of the Guatemalan National Revolutionary Unity (URNG), the generic name of the insurgents who fought against the state forces operating under what generally

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[36] Human Development Index provides "a summary measure for assessing long-term progress in three basic dimensions of human development: a long and healthy life, access to knowledge and a decent standard of living". The standard of living is measured by "Gross National Income (GNI) per capita expressed in constant 2005 international dollars converted using purchasing power parity (PPP) rates" (United Nations Development Programme 2013a).

[37] A pejorative term used in Latin America to denote foreigners generally of United States origin.

[38] The mentioned guerrilla organizations are "four groups traditionally operating in different parts of the country", namely, the Guerrilla Army of the Poor (EGP), the Rebel Armed Forces (FAR), the Organization of the People in Arms (ORPA) and the Guatemalan Workers Party (PGT) (Lunsford 2007: 391).

appeared, according to the Polity IV Scale, as a violent military authoritarian regime.[39]

The attempted coup of 1960 was indeed a reaction against the consequences of a "successful" coup carried out in 1954. After what is known as the October Revolution of 1944, which brought together various social groups like teachers, lawyers and army officers in an uprising against the last liberal dictator General Jorge Ubico,[40] a "decade of reform" ensued as the elected governments of presidents Juan José Arévalo (1945-1950) and Colonel Jacobo Arbenz Guzmán (1951-1954) initiated a series of progressive policies (Stoll 2005: 418). During their ten-year rule, President Arévalo, who was "the first Guatemalan president in the twentieth century to be elected in office, serve the full constitutional term and step down voluntarily" and

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[39] The Polity IV Scale is a research project that codes the authority characteristics of states in the world. Originally developed by Ted Robert Gurr, its conceptual scheme "examines *concomitant qualities of democratic and autocratic authority* in governing institutions" and thereby depicts countries in the world on "a spectrum of governing authority that spans from *fully institutionalized autocracies* through *mixed, or incoherent, authority regimes* (termed "anocracies") to *fully institutionalized democracies*". The Polity IV Scale shows that Guatemala had been an anocracy for the most part of its civil war, with a significant fall back to autocratic characteristics in the early 1980s (Polity IV 2012a; Polity IV 2012b). Anocratic regimes, "characterized by institutions and political elites that are far less capable of performing fundamental tasks and ensuring their own continuity, … very often reflect inherent qualities of instability or ineffectiveness and are especially vulnerable to the onset of new political instability events, such as outbreaks of armed conflict, unexpected changes in leadership, or adverse regime changes (e.g., a seizure of power by a personalistic or military leader)" (Marshall and Cole 2011: 13).

[40] Liberal dictatorships were the outcome of the liberal reform period experienced in Central America roughly between the years 1870 and 1920. The liberal reform period in Central American countries like Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua was characterized by "reformist leaders who embraced "liberalism" as an ideology". They "exercised power over the state … [and] implemented reforms that led to a dramatic expansion of commercial agriculture and the incorporation of national economies into the international market". The liberal reform period in Central America was also often marked by "personalistic rule by an individual military officer or general", hence the conceptualization of "liberal dictatorship". President General Jorge Ubico (1931-1944) was the last representative of this Central American variant of "authoritarian liberalism" (Mahoney 2001: 12; 31-32; 46; 205-208).

President Arbenz, who, as “Arévalo’s Minister of Defense”, won a free and open election in 1950 (Baldwin 2009: 47) “abolished mandatory labour, encouraged workers to organize, and instituted land reform” (Stoll 2005: 419). In the polarizing international environment of the Cold War, such policies sufficed to stir the fears of the United States government that a communist takeover was being undertaken in its backyard.

The land reform of President Arbenz was particularly deemed offensive as it touched the central nervous system of vested elite interests formed around one of the most unfair agrarian capitalist economies. W. George Lovell duly notes that the “struggle for justice in Guatemala is inseparable from the struggle for land rights on the part of the impoverished majority” (Lovell 2010: 132).[41] What President Arbenz hoped to transform was a system in which, according to a 1950 census, “2.2 percent of the nation’s landowners managed 70 percent of Guatemala’s total arable land” (Lovell 2010: 132). This eventually led to the notorious hostility between Arbenz and the United Fruit Company, “the largest and most powerful U.S. [United States] corporation” which was so active in the Guatemalan agribusiness of the day that locals dubbed it “El Pulpo” (The Octopus) due to its apparent ubiquity (Lovell 2010: 133). Arbenz’s land reform, described in his first presidential speech in 1951 in the light of a vision to create a “modern capitalist state”, amounted to bringing into production through transfer to landless peasants “uncultivated land and properties where feudal customs are maintained” and welcoming foreign capital as long as it “remains always subordinate to the Guatemalan laws” (Lovell 2010: 133). The United

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[41] *Amnesty International* reported in 1976 that almost “75% of Guatemalans are *campesinos* (peasants)” (Amnesty International 1976: 1).

Fruit Company, on the other hand, did not welcome such intrusion on the part of a democratically elected government. As the Arbenz administration began to appropriate land "at a price related directly to its declared taxable worth", the United Fruit, which had for years "deliberately undervalued [its property] in order to reduce the company's tax liability", took advantage of its close connections in Washington,[42] convinced the incumbent Eisenhower administration of the communist threat posed by Arbenz, and incited the Central Intelligence Agency (CIA) to organize a coup against the Arbenz government (Lovell 2010: 134). The Central Intelligence Agency "organized, equipped and directed a small invasion force led by Colonel Carlos Castillo Armas in June 1954" who assumed the presidency after Arbenz's resignation (Baldwin 2009: 49).

This was the historical background to the formation of a peasantry-based insurgency. What followed throughout thirty six years of civil war fought between a series of military governments with paramilitary extensions and leftist guerrillas was a great turmoil complicated by the Cold War perception of threats by the agents of an increasingly militarized state apparatus. As will be seen in the next section, the *Historical Clarification Commission* estimated that the conflict cost the lives of more than 200,000 persons, making it one of the deadliest among contemporary civil wars. Afflitto and Jesilow provide a helpful periodization of an otherwise amorphous and eventful civil war by tracing the evolution of "state-sanctioned terrorism" in Guatemala in four waves (Afflitto and Jesilow 2007: 23). The first wave of state-sanctioned terrorism started with President Armas' rule which

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[42] The United Fruit Company "had previously received legal counsel from John Foster Dulles, then U.S. [United States] secretary of state, and his brother, Allen, then director of the Central Intelligence Agency" (Lovell 2010: 134). For a detailed account of how Arbenz was overthrown through United States involvement, see Schlesinger and Kinzer 2005.

witnessed the total banning of communist organizations and labour groups through legislation, the imprisonment of about 17,000 alleged leftists and the murder of nearly 300 popular activists (Afflitto and Jesilow 2007: 21). This first wave lasted until President Ydígoras Fuentes who survived the attempted coup of the army officers (those who then became the “first generation of leftist guerrillas”) was removed from power in 1963 by another coup led by Colonel Peralta Azurdia, then Minister of Defence (Baldwin 2009: 53; Afflitto and Jesilow 2007: 23-24).

The second wave of state terror took place from 1963 until 1970. This period saw the replacement of what was considered to be the “dismissive treatment of the insurgency” on the part of the former presidents Ydígoras Fuentes and Peralta Azurdia by “the propagation of counterinsurgency tactics by the military and police” (Baldwin 2009: 53-54; Afflitto and Jesilow 2007: 24). Gross human rights violations considerably increased in both numbers and intensity and involved “torture, public exhibition of mutilated corpses, and the phenomenon of enforced disapperance for which Guatemala is infamous” (Afflitto and Jesilow 2007: 24). The first case of forced mass disappearance in Guatemala’s history occured in this period and was documented in a declassified Central Intelligence Agency cable as the “secret execution of Guatemalan communists and terrorists by Guatemalan authorities on the night of 6 March 1966” (National Security Archive 2012).[43]

Between 1970 and 1978, the third wave of state-sanctioned terror hit the guerrilla movement really hard. According to Afflitto and

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[43] National Security Archive is a nongovernmental, non-profit research and archival institution located at the George Washington University in Washington, D.C. Founded in 1985, it publishes declassified United States government files on certain topics of United States foreign policy obtained via the Freedom of Information Act enacted in 1966. One area of research is the Guatemalan civil war. For more information, visit http://www.gwu.edu/~nsarchiv/index.html (access: 09.07.2012).

Jesilow, the insurgency suffered "near-annihiliation" in the face of the counterinsurgency campaign of President Carlos Arana Osorio (1970-1974) (Afflitto and Jesilow 2007: 24). Before rising to presidency, Arana was known as the "butcher of Zacapa", named after a city in eastern Guatemala where he commanded a military base and carried out a counterinsurgency campaign utilizing the notorious "death squads", the paramilitary pro-government groups supported by the United States. As a president, he continued his brutal campaigns against guerrillas, which "came at a high price because almost all Guatemalans' human rights were systematically violated to eliminate the leftist threat" (Baldwin 2009: 55). Arana is said to have said that "if it is necessary to turn the country into a cemetery in order to pacify it, I will not hesitate to do so", a statement whose grim proof was demonstrated by gross human rights violations which led even the Central Intelligence Agency to describe the Arana regime as "the most extreme and unyielding in the Hemisphere". Nevertheless, throughout Arana's tenure, United States aid to the Guatemalan government continued (Baldwin 2009: 57).

Many organizations, domestic and international, witnessed and documented the country's transformation into a cemetery. In a 1976 report, *Amnesty International* referred to Guatemalan sources which claimed that over 15,000 were disappeared or found dead during the first three years of Arana's presidency (Amnesty International 1976: 5). Some sources determined different figures for the period of 1970-1971 which were, however, never less than thousands. According to Guatemalan Christian Democrat Party, those who died or disappeared were around 2,500 in 1970-1971, and according to Guatemala City newspaper *El Gráfico*, those shot dead after detention or abduction were over 1,000 (Amnesty International 1976: 5). The practice of the burial of unidentified bodies in municipal cemeteries, reflecting one of the main disposal methods employed by the paramilitary groups, also

consistently increased between the years 1966 and 1972, reaching its peak during Arana's first year. The below survey conducted by the Guatemala City magazine *Domingo* using the official register of La Verbena, one of the principal cemeteries, "based on the numbers of burials in each year ... indicates peaks which coincide with reported times of intensification of governmental or government-sanctioned paramilitary violence" (Amnesty International 1976: 6). It is illustrative of the intensity of violations, given that bodies are unidentified and that there are hundreds of them in the span of seven years even in a single cemetery.[44]

[44] Another important truth-seeking organization, yet one with a different mandate compared to that of a truth commission, is the Guatemalan Forensic Anthropology Foundation (FAFG) whose objective involved the identification of bodies in mass graves, including the one in La Verbena. For more information on the foundation's work concerning forced disappearances, visit http://www.fafg.org/Ingles/paginas/ForcedDisappearances.html (access: 11.11.2013).

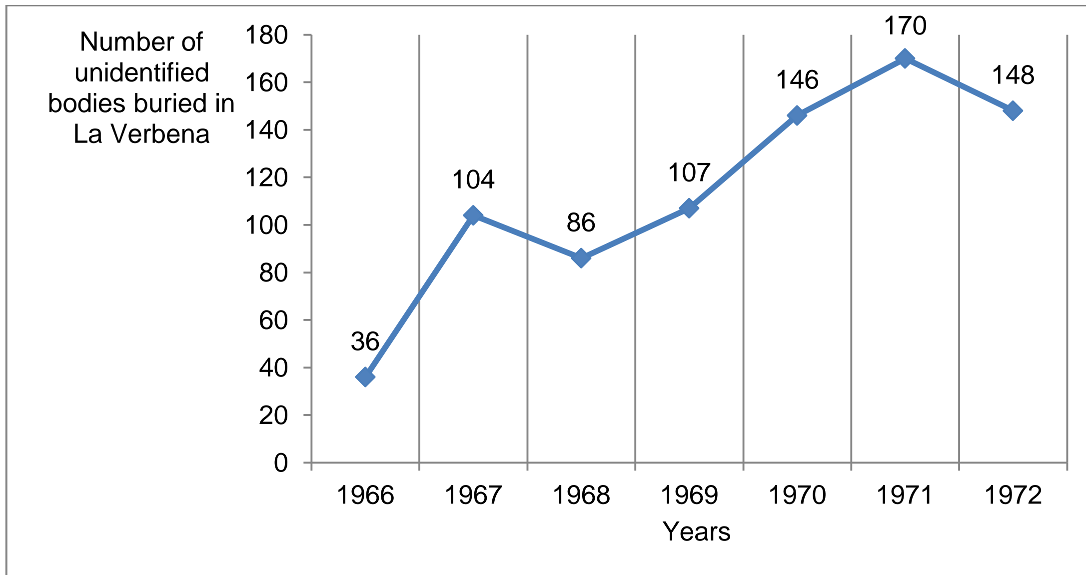


**Figure 1: Number of unidentified bodies in La Verbena, a municipal cemetery in Guatemala, across years (Amnesty International 1976: 6)**

The fourth and worst wave of terror began in 1978 with “the army-perpetrated massacre of approximately one hundred Kekchí Indians at the town of Panzós” (Afflitto and Jesilow 2007: 24). Sharon Lunsford characterizes the Panzós massacre as a potent sign of the “inflexibility” of the military authoritarian regime (Lunsford 2007: 387), which, according to Afflitto and Jesilow (2007: 24), by the late 1970s was a “terror machine” and “achieved unbridled visibility”. The Panzós massacre took place when

> local Indian peasants of the Kekchi language group had marched to the town hall to pick up titles to the lands they occupied, after the National Institute of Agrarian Transformation (INTA) had agreed to grant the titles. … Instead of titles, the Kekchi encountered soldiers’ gunfire, resulting in the deaths of more than 100 Kekchi peasants. (Lunsford 2007: 387)

A brief Associated Press story based on an announcement by the military depicted the massacre of peasants as “civilians stirred up by guerrillas who attacked a military post and were repelled” (Lunsford 2007: 387), demonstrating the extent to which the state was unwilling to distinguish between combatants and non-combatants and willing to cover up the truth. Embarrassed by this brutal logic of endless gross human rights violations, “the U.S. [United States] Congress under the President Jimmy Carter … had suspended military aid to Guatemala in 1978” (Reilly 2009: 23).

Still, the Panzós massacre was just the beginning. The fourth wave “produced the majority of dead and disappeared victims in modern Guatemalan history” (Afflitto and Jesilow 2007: 25). Another massacre took place on 31 January 1980 at the Spanish Embassy in Guatemala, which Baldwin relates as follows:

> Indigenous people, predominantly from Quiché communities, took hostages and occupied the embassy in protest of the Panzós massacre and others within El Quiché province hoping to draw international attention to the situation in Guatemala. [The military-appointed President General Romeo Lucas García] ordered the Army into the embassy despite two calls from the Spanish Foreign Minister demanding his security forces withdraw because a settlement had been reached with the occupiers. Instead Guatemalan police broke down the door and threw Molotov cocktails inside which set the entire building ablaze. Thirty-nine people were killed in the government’s raid including a former Guatemalan Vice-President, a former Guatemalan Foreign Minister who was visiting the Embassy, and the father of a future Nobel Peace Prize recipient Rigoberta Menchú. Only one peasant, Gregorio Yuja Xona, and the Ambassador survived … Yuja Xona did not live long enough to talk about the events of the day. His lifeless body would later be found mutilated; the government never explained how this was possible since he was placed in protective custody at the hospital. (Baldwin 2009: 60-61)

These exemplary outbursts of violence were yet to reach their climax. President García was also responsible for creating the Civil Self-Defense Patrols (PACs) in 1981, which drew hundreds of thousands of civilian indigenous males into the war and armed them to fight on the side of the army against the guerrillas (Afflitto and Jesilow 2007: 27; Baldwin 2009: 62). But García was succeeded by another military dictator, General Efraín Ríos Montt, who seized power in 1982 and initiated a "scorched-earth" policy, which meant the total eradication of hundreds of indigenous communities and "was widely recognized to have emulated U.S. [United States] counterinsurgency programs utilized in the Vietnam conflict" (Afflitto and Jesilow 2007: 25; Baldwin 2009: 66). When asked about his policy during a visit to Washington, Ríos Montt stated that "We have no scorched earth policy. We have a policy of scorched Communists" (Baldwin 2009: 66). He is also said to have privately acknowledged the massacres: "We are killing people, we are slaughtering women and children. The problem is, everyone is a guerrilla there" (Baldwin 2009: 66). The scorched-earth policy was indeed a response to the newly united insurgency, the Guatemalan National Revolutionary Unity (United States Institute of Peace 2012a). By 1983, United States economic aid to Guatemala was suspended, too, although President Reagan insisted that Montt was "a man of great personal integrity, totally committed to restoring democracy" and later managed to have military and economic aid resumed in 1984 (Reilly 2009: 23; Baldwin 2009: 68, 70).

The Montt period (1982-1983) witnessed the worst levels of human rights violations in both numbers and intensity. In a classic 1982 report titled "Human Rights in Guatemala: No Neutrals Allowed", *Human Rights Watch*, which was then organized in regional branches and reported the Guatemalan case as *Americas Watch*, shared its

findings after a visit to Guatemala in October 1982 based on the following general observation:

> We came away profoundly disturbed by the policies and attitudes of the Rios Montt government. That government, whose legitimacy and authority derive only from the military, is committed, and has been committed from the outset, to a military solution. Indeed, we believe that the government of President Rios Montt is committed to total war. It asserts that it offers the people of Guatemala "fusiles e frijoles"—guns and beans. In other words, those who are with the government are fed; those who are not with the government are shot. No one is permitted to remain neutral. (Human Rights Watch 1982: 2)

*Human Rights Watch* gave representative examples of rural massacres documented by other domestic and international human rights monitors and substantiated by witness statements. These massacres mostly affected the Mayan population in Guatemala. In one particular example,

> Mr. [Andres] Paiz Garcia, 45 years old, said he was in San Francisco [a rural estate] when some 500 soldiers "and six colonels" arrived around 11 AM on Saturday, July 17 [1982]. Shortly afterward, he recalled a helicopter landed and some men were ordered to help unload the boxes. The soliders then called all the villagers together, putting women and children in the hamlet's chapel and a nearby house and gathering the men in a wooden building known as the "juzgado"... Mr. Paiz Garcia was among those assigned to collect the cows and escape into the undergrowth surrounding the village... Mateo Ramos Paiz was among the men crowded inside the juzgado. "The war started first with the women in the house," he said in an interview. "With shooting, with pure lead, they killed the poor women. Afterward they burned the house. They then turned on the chapel. No firing, just machetes and knives. We heard the noise of crying women and children and they said our turn was next." ... He said the men were taken out of the juzgado in groups of eight and shot... Mr. Ramos sad he was pushed into a corner of the juzgado by the other men, who were panicking. "I knelt down, then suddenly I felt how they threw bombs... I felt a stream of blood. Why doesn't it hit me? I asked. I was under about 10 bodies..." He said that in the evening, at about 8 PM, when the soldiers were listening to

> music on stolen tape recorders he escaped through the window of the juzgado... Mr. Ramos lost his entire family in the massacre. (Human Rights Watch, 1982: 20-21)

Some statements shed further light on the problem of Civil Self-Defense Patrols formed by civilians who were forced to become both perpetrators and victim of gross human rights violations, illustrating the amorphousness of the Guatemalan war.

> Statement of a 44-year-old man from village (name withheld) in Huehuetango: "On or about July 23, 1982, government soldiers arrived in his village. The same soldiers had been there on two previous occasions to organize a civil patrol, an organization whose sole purpose, he says, was to keep watch on the town. The first time, in early July, they said all the villagers were now soldiers and guns would be put in their hands. The second time, on July 20, they recruited many boys. This time, they called everyone in the village enemies of the government. They drove off the cattle, killed many peasants, and burned the village. Those who had joined the civil patrol participated in the killing, then were themselves killed by soldiers... He and other residents fled as their village burned... (Human Rights Watch 1982: 20)

These instances of massacres reported by *Human Rights Watch* exemplified the pattern of violence characterizing the Montt period. The same period was to be graphically scrutinized by the *Historical Clarification Commission* of Guatemala, which would find in its 1999 report that the agents of the Guatemalan state committed acts of genocide against groups of Mayan people. Indeed, 48 percent of all violations reported by the truth commission occurred in 1982 under Montt's rule. Twelve months of his 17-month rule witnessed the killings of 3,180 Maya in 85 massacres in the El Quiche department (Sanford 2003: 158).

The rule of civilian governments in Guatemala began in 1986, only after President General Mejía Victores, who removed Montt by a coup in 1983 yet continued many of his policies, allowed for the drafting

of a new constitution and the resumption of democratic elections (Baldwin 2009: 70; Stoll 2005: 419). A civilian, Cerezo Arévalo, replaced Mejía Victores who, before leaving the office, signed a highly convenient decree granting amnesty to "all people implicated in political crimes and related common crimes during the period from 23 March 1982 [when General Montt came to power] to 14 January 1986 [when President Cerezo took office]" (Baldwin 2009: 71). The fact that President Cerezo Arévalo himself believed that "investigating past human rights abuse would just encourage revenge" was seen as a sign not only of how misplaced the hope of seeing this civilian president end the war was, but also that "the military remained in charge" (Baldwin 2009: 71; Afflitto and Jesilow 2007: 26).

Negotiations with the guerrillas united under the Guatemalan National Revolutionary Unity started with the next civilian president, Jorge Serrano Elías (1991-1993). However, real progress was achieved only when the country's Human Rights Commissioner Ramiro de Leon Carpio who, during his tenure, documented human rights violations perpetrated by both insurgents and state actors, became the president in 1993. In 1994, with the direct support of the United Nations and a group called the "Friends of the Peace Process" which included Colombia, Mexico, Norway, Spain, United States and Venezuela, "the Guatemalan government and guerrilla leadership began official negotiations" (Reilly 2009: 23). Between the years 1994 and 1996, several agreements on human rights, the timetable for negotiations, the resettlement of displaced persons, the investigation of human rights violations, the identity and rights of indigenous peoples, socioeconomic and agrarian matters, the strengthening of civilian power, cease-fire, constitutional reforms, the integration of the Guatemalan National Revolutionary Unity as a political party and the implementation of peace accords were reached (Reilly 2009: 23-24; Lunsford 2007: 399). The

third agreement to be reached between the government and the insurgency was on “the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence that have caused the Guatemalan Population to Suffer”, signed in Oslo on 23 June 1994. With this agreement’s incorporation into the final peace document, “Agreement on a Firm and Lasting Peace”, signed in Guatemala City, on 29 December 1996, Guatemala’s truth commission, the *Historical Clarification Commission* (CEH), was established (Reilly 2009: 127-131). I will now provide a brief description of this truth commission.

## 5.2 GUATEMALA’S HISTORICAL CLARIFICATION COMMISSION, 1997-1999

The peace agreements that led to the establishment of the *Historical Clarification Commission* (*Comisión para el Esclarecimiento Histórico* - CEH) in Guatemala were the result of tough negotiations made under the shadow of the Guatemalan armed forces. Whereas the victims’ groups, particularly the Mayan communities, were very much interested in seeing a truth commission come to life, the army was concerned about the consequences of such an endeavour. The example of the truth commission in the neighbouring El Salvador which released its report titled *From Madness to Hope* in early 1993, a year before the conclusion of Guatemala’s peace negotiations, was the main source of tension. In the Salvadoran example, the truth commission was given the task of naming the perpetrators responsible for human rights violations. The *Commission on the Truth for El Salvador* named “over forty senior members of the military, judiciary and armed opposition for their role in the atrocities” (Hayner 2001: 39-40). This “naming” activity of the truth commission then provided “critical support for the removal of human

rights violators from armed forces" (Hayner 2001: 39-40). This was the prospect feared by the Guatemalan military elites. Therefore, "the Guatemalan armed forces insisted that the Salvadoran model of naming perpetrators would not be repeated in Guatemala" (Hayner 2001: 45).

The Guatemalan army, still considerably powerful despite the transition to civilian rule, eventually got what it wanted. The mandate of the *Historical Clarification Commission*, produced within the framework of the peace talks, included the following clause regarding the operation of the commission: "The Commission shall not attribute responsibility to any individual in its work, recommendations and report nor shall these have any judicial aim or effect" (United States Institute of Peace 2012b: 2). In this way, the former agents of the military governments that ruled Guatemala during its atrocious civil war minimized the "threat" they perceived from the accountability mechanism of the truth commission. This restriction on the "judicialization" and "individualization" of the commission's findings helped them avoid being held accountable for criminal acts, dimmed the prospect of being subject to formal procedures like dishonourable discharge or criminal prosecution, and even made symbolic stigmatization in the eyes of their victims impossible.

This was not the sole restriction on the mandate of the *Historical Clarification Commission*. Temporal restriction was discouraging, too. The "Installation and Duration" section of the mandate stated that the "Commission shall work for a period of six months starting from the date of its installation; this period may be extended for a further six months if the Commission so decides" (United States Institute of Peace 2012b: 2-3). In other words, the Commission was expected to deal with the legacy of the longest-running civil war in Latin America within the span of a mere year.

Both restrictions, judicial and temporal, stirred controversy and triggered harsh criticism. Priscilla Hayner reports that "the strong reaction to the truth commission agreement [in 1994] came close to derailing the peace talks altogether" (Hayner 2001: 46). In his *New York Times* piece titled "In Guatemala, All Is Forgotten", Francisco Goldman reached the conclusion that, compared to the truth commissions in Argentina (which fed the information it gathered into the criminal prosecutions of those responsible for enforced disappearances), South Africa (which granted amnesty to the violators only in exchange for the confession of the truth of perpetrating gross human rights violations) and El Salvador (which individualized responsibility for violations as described above), "Guatemala has opted for ignorance" by deciding to overlook individual responsibility for gross human rights violations (Goldman in Hayner 2001: 275).

Nevertheless, the *Historical Clarification Commission* was very creative in its interpretation of both restrictions and managed to operate effectively. First of all, the Commission found a way of accounting for individual responsibility without naming those responsible for human rights violations. It decided to name "the military unit, and the position of the commanding officer who was responsible", which, combined with the time and place of violations, provided sufficient information to figure out the identity of the violator (Hayner 2001: 275). Moreover, this limitation encouraged the *Historical Clarification Commission* to go beyond the details of individual cases and "examine the roles of institutions and the social structure that produced the violence" (Chapman and Ball 2001: 13). Secondly, the 12-month deadline, too, was subjected to the commission's flexible interpretation. The commission acted on the assumption that the 12-month limit covered only the "investigative phase" of its work, which made it possible to continue its operations for eighteen months (Tomuschat 2001: 241). On

the whole, the 1994 agreement that established the *Historical Clarification Commission* which came into effect with the signing of the final 1996 peace accord received mixed reactions as to its restrictive mandate. However, the mandate, despite its limitations, proved to be open to an enabling reading as long as the commissioners were intent on forming an effective commission, which they were.

The *Historical Clarification Commission* had three members. The chair was to be a non-Guatemalan to be appointed by the United Nations Secretary-General. Accordingly, Kofi Annan appointed Christian Tomuschat, “a German law professor who had served as an independent expert on Guatemala for the UN [United Nations] several years earlier” (Hayner 2001: 46). The non-Guatemalan chair was seen as an “element of independence and impartiality” in the context of the “deeply divided” character of the Guatemalan society (Tomuschat 2001: 238). The two other members, to be appointed by the chair, were to be “a Guatemalan of irreproachable conduct” and an academic to be selected “from a list proposed by the University presidents” (United States Institute of Peace 2012b: 2). Tomuschat, the chair, himself notes that such a “personnel configuration was a novelty in the short history of truth commissions” (Tomuschat 2001: 237). By mixing two nationals with a foreigner heading the commission, the *Historical Clarification Commission* stroke a balance between the model in which all members of a truth commission are nationals because “[t]here can hardly be any matter as “domestic” as an inquiry into the failures of the operation of a system of governance” and the model implemented in El Salvador where all members were foreigners because “everyone was counted as a person either of the right or the left” (Tomuschat 2001: 238).[45]

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[45] At one point, the Guatemalan government responded to the charges of defective cooperation made by the *Historical Clarification Commission* by threatening “to expel

*(cont’d overleaf)*

The final mandate of the *Historical Clarification Commission* described the purposes of the commission as follows:

> I. To clarify with all objectivity, equity and impartiality the human rights violations and acts of violence that have caused the Guatemalan population to suffer, connected with the armed conflict.
> II. To prepare a report that will contain the findings of the investigations carried out and provide objective information regarding events during this period covering all factors, internal as well as external.
> III. Formulate specific recommendations to encourage peace and national harmony in Guatemala. The Commission shall recommend, in particular, measures to preserve the memory of the victims, to foster a culture of mutual respect and observance of human rights and to strengthen the democratic process. (United States Institute of Peace 2012b: 1-2)

This was an "extremely broad" mandate (Tomuschat 2001: 239). Specifically, as Tomuschat underlines, the task to clarify "the" human rights violations textually meant ""all" human rights violations" between the years 1962 when the first armed rebel forces were established and 1996 when the final peace agreement was signed. Overburdened by "such far-reaching objectives", the *Historical Clarification Commission* eventually decided that "attacks on life and personal integrity, in particular extrajudicial executions, forced disappearances and sexual violations" should be given priority (Tomuschat 2001: 239-240). Regarding the span of history subject to scrutiny, although the 1962-1996 periodization "led to the understanding that the guerrilla insurgents began the war", this did not stop the *Historical Clarification Commission* from moving outside its mandate and explicitly recognizing "the 1954

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the coordinator [Tomuschat] on the strength of the Guatemalan Aliens' Law" (Tomuschat 2001: 239). Therefore, in the world of truth commissions, there seems to be no guarantee that everyone can agree on the objectivity of a foreign chairman in a polarized national setting.

coup as the crucial turning point toward more exclusive social policies" (Chapman and Ball 2001: 13).

Unlike the world-famous example of the *South African Truth and Reconciliation Commission*, the *Historical Clarification Commission* had "no search-and-seizure power, no ability to subpoena [i.e. to issue a writ for the summoning of witnesses and submission of evidence], no right to hold public hearings" (Tepperman 2002: 136). Let me briefly consider what the lack of each power meant in the case of the *Historical Clarification Commission*. First, the fact that the *Historical Clarification Commission* was prevented from searching the "premises where relevant archives were kept" and "ordering the seizure of evidence in the possession of governmental or other institutions" was indeed a weakening aspect. Still, the commission sought other ways of reaching vital information: "The commission asked the U.S. [United States] government to declassify and provide its own documents relating to the civil war and succeeded in getting much of what it wanted" (Tepperman 2002: 137-138). Secondly, although Christian Tomuschat, the head of the commission, agrees that "it might have been helpful for the Commission to enjoy subpoena powers", he also thinks that

> [a]ccording to the logic of the rule of law, any enforceable subpoena should have been made subject to a legal remedy. Necessarily, such remedy would have rested with the courts of Guatemala. Eventually, therefore, the Guatemalan judiciary would have acquired a power of review over the CEH [Historical Clarification Commission]. Thus, the autonomy and impartiality of the CEH [Historical Clarification Commission] could have suffered serious damage. (Tomuschat 2001: 246)

Furthermore, the fact that the "post-war Guatemalan government was fragile ... and ... right-wing elements remained extremely powerful in the country, especially within the military" accounts for the discouraging political environment that would not have put up with an "overly

aggressive" truth commission (Tepperman 2002: 136). Tomuschat sums up the delicate situation well: "Even if we'd had subpoena power, people just wouldn't have shown up" (Tepperman 2002: 137). Finally and on a related note, the fear that "the former power wielders, in particular, members of the Armed Fores and the *Patrullas de Autodefensa Civil* [Civil Self-Defense Patrols – PACs], would take revenge measures against any witnesses daring to talk about the injustices they had suffered" determined the lack of public hearings in the *Historical Clarification* process (Tomuschat 2001: 247). Although Mark Freeman is right to assert that "whether or not a commission conducts public hearings ... has an unparalled impact on the level of public awareness and engagement in a truth commission process" (Freeman 2006: 26), it is obvious that the lack of public hearings was not the result of a choice made by the *Historical Clarification Commission*, but a repercussion of the difficult political conjuncture in Guatemala.

Despite the above-mentioned limitations, the *Historical Clarification* process had the advantage of receiving the support of a significant civil society effort in truth-seeking. A project called the "Recovery of Historical Memory" (REMHI) carried out by the Catholic Church's Human Rights Office under the coordination of Archbishop Juan Gerardi produced the four-volume report *Guatemala: Never Again!* (*Nunca Más*) which,

> on the basis of 6,500 testimonies gathered by six hundred trained researchers, furnishes horrific details of fifty-five thousand human rights violations, of which over twenty-five thousand resulted in death. Sixty percent of the testimonies—a figure, some would contend that accurately reflects the native population majority—were given in one of fifteen Maya languages, the most represented being Q'eqchi', Ixil, and K'iche'. Almost fifty thousand of the incidents recorded are attributed to state security forces: the army, the police, civil defense patrols,

> military commissioners, and paramilitary death squads. Guerrilla insurgents are held accountable for the remainder, less than 10 percent of total atrocities. Volume Four of *Nunca Más*, aptly titled *Victims of the Conflict*, is a thick dossier that lists the names, dates, and places of execution of fifty-two thousand assassinated individuals. It runs to 544 pages, the longest of all four volumes. While the names of the victims are recorded, left unnamed are those responsible for their murders ... (Lovell 2010: 154-155)

Archbishop Gerardi, who presented this comprehensive report to the Guatemalan public on 24 April 1998, was "beaten to death in the garage of his house" on 26 April 1998. "When he entered and parked his car, assailants who lay in wait pulled him from it, knocked him unconscious, and then pounded his head with a heavy concrete block" (Lovell 2010: 156).

It is important to understand that the *Historical Clarification Commission* report *Memory of Silence* was made public on February 25, 1999 under the shadow of Gerardi's murder. It shows how the Guatemalan commission was established and operated under the threat of death. The "Recovery of Historical Memory" project not only shared its huge database with the commission, but also released a report that became, in Lovell's words, "a moral benchmark" for the commission (Isaacs 2010: 260; Lovell 2010: 158). Lovell's brief comparison of the two human rights projects is a fair one:

> [W]hereas REMHI [Recovery of Historical Memory] was a voluntary initiative on the part of the Catholic Church, the CEH [Historical Clarification Commission] was an undertaking mandated by the international community and agreed to by the Guatemalan government and the guerrilla forces ... as an institutional component of the peace process. While REMHI [Recovery of Historical Memory] chose not to "name the names" of those responsible for the violence, the CEH [Historical Clarification Commission] had to respect terms of reference that prevented it from "individualizing responsibility." (Lovell 2010: 158-159)

The organizational and behavioural differences of the two truth-seeking activities are all the more important to the extent that both "have reached largely similar conclusions" through different processes (Tomuschat 2001: 256).

> The commission registered a total of over 42,000 victims, including over 23,000 killed and 6,000 disappeared, and documented 626 massacres. Ninety-three percent of the violations documented were attributed to the military or state-backed paramilitary forces; 3 percent were attributed to the guerrilla forces. (Hayner 2001: 48)

In the light of the data from other studies, the *Historical Clarification Commission* estimated that the number of persons killed or disappeared during the civil war "reached a total of over 200,000" (Historical Clarification Commission 2012a: par.2).

On the whole, the *Historical Clarification Commission* is mostly deemed a success, its report more "frank and incriminating" than anyone could have expected (Lovell 2010: 159). Being, according to its chair, "the only example worldwide of a truth commission brought into being without any kind of budgetary resources", it sometimes faced certain financial difficulties, but the international community —"a selected group of friends of Guatemala"— eventually provided the sufficient funding (Tomuschat 2001: 248-249). Tomuschat further claims that, with the handing over of the *Historical Clarification Commission* report titled *Memory of Silence*, it felt like "something great had been achieved, namely a truly objective assessment of a period of history which until then had lain buried under mountains of lies and prejudice" (Tomuschat 2001: 253). Perhaps the strongest conclusion that the *Historical Clarification Commission* reached was regarding the indigenous Mayan community of Guatemala: The "Conclusions" of *Memory of Silence* begins with the finding that "[e]ighty-three percent of

fully identified victims were Mayan and seventeen percent were Ladino [of Spanish or mixed Spanish-Amerindian descent]" (Historical Clarification Commission 2012a: par.1). But, more importantly,

> the CEH [*Historical Clarification Commission*] concludes that agents of the State of Guatemala, within the framework of counterinsurgency operations carried out between 1981 and 1983, committed acts of genocide against groups of Mayan people which lived [in four selected geographical regions]. (Historical Clarification Commission 2012b: par.122)

When discussing the question of whether the truth-seeking process, in general, and the truth of genocide, in particular, helped "lay the foundations for national reconciliation", Tomuschat says that this is a "bold assumption" to make in a country that has been divided since "the days of the Spanish conquest" (Tomuschat 2001: 256-257). He adds that the true challenge that remains is for the "Ladino group of the population ... to acknowledge that the racist ideology that has pervaded Guatemala for centuries has been one of the main reasons for the ruthless treatment of the Mayan communities" (Tomuschat 2001: 257). But regardless of the consequences following the truth reported by the *Historical Clarification Commission*, Tomuschat is certain that "Guatemalan society ... cannot escape questions about the phenomenon of dehumanization which held their country in its grip for decades" (Tomuschat 2001: 256). In his own words:

> The facts cannot be hidden any more. No one may contend that the accounts of untold death and suffering in the highlands are just figments of imagination. The armed forces have lost all credibility for their mythical claim to have saved the country from left-wing dictatorship, and the guerrilla forces also have had to acknowledge a reality that did not show them solely as knights in shining armor. Thus, the history of the armed confrontation has become transparent. The ground has been cleared for deep-going reforms. (Tomuschat, 2001: 256)

As will be seen in the following sections, the international human rights organizations reporting on the *Historical Clarification Commission* differ in their answers to the questions of whether "deep-going reforms" are or what kind of reforms should be on the table in Guatemala. I now turn to the evaluations made by *Amnesty International*, *Human Rights Watch* and *International Center for Transitional Justice* and see what they have to say regarding the *Historical Clarification Commission*.

## 5.3 Amnesty International on the Historical Clarification Commission

A few months before the signing of the "Agreement on a Firm and Lasting Peace" that ended the civil war, *Amnesty International* presented the government of Guatemala a memorandum on the *Historical Clarification Commission*. Published in an *Amnesty International* report dated October 1996, a few months before the commission began to operate, this memorandum warned against the "ambiguity of the Commission's mandate" which could result in impunity for gross human rights violations (Amnesty International 1996: 2). *Amnesty International*'s primary concern was with regard to the restriction of the commission's work in terms of judicialization and individualization of responsibility. The clause in the commission's mandate which stated that "[t]he Commission shall not attribute responsibility to any individual in its work, recommendations and report nor shall these have any judicial aim or effect" demonstrated, according to *Amnesty International*, "a clear lack of interest ... as regards the bringing to justice of the individuals responsible for thousands of human rights violations" (Amnesty International 1996: 11).

This critique was one of the first manifestations of *Amnesty International*'s insistence that the *Historical Clarification Commission* should facilitate a judicial response to gross human rights violations, if not act like a judicial institution. *Amnesty International*'s second concern was related to the interpretation of the third purpose of the *Historical Clarification Commission* specified in the 1994 Oslo agreement delineating the commission's mandate. Accordingly, the commission was expected to formulate "specific recommendations to encourage peace and national harmony in Guatemala". *Amnesty International* was concerned that this could be read as a justification of the "continuance of impunity" (Amnesty International 1996: 12). In this regard, *Amnesty International* agreed with the conclusion of the United Nations Working Group on Enforced or Involuntary Disappearances, according to which "[p]erpetrators of human rights violations, whether civilian or military, will become all the more brazen when they are not held to account before a court of law". Therefore, *Amnesty International* recommended that the *Historical Clarification Commission* should "encourage the results of the Commission's investigations being taken up by the relevant courts" (Amnesty International 1996: 12). In a sense, *Amnesty International* presumed that the value of the commission's work would be most meaningful only if it was *judicialized*, that is, only if it led to criminal justice initiatives in the form of the prosecutions of gross human rights violators.

In an April 1998 report titled "All the Truth and Justice for All" and published as the *Historical Clarification Commission* was still in operation, *Amnesty International* reminded the Guatemalan state that it will be judged "according to ... how it responds to the Commission's findings" (Amnesty International 1998a: 1, 2). Here, once again, *Amnesty International* raised concern regarding the ambiguity of commission's mandate which "may lead to a partial or fragmented

presentation of the state's involvement in past human rights violations" (Amnesty International 1998a: 2). Much like the warning in the 1996 memorandum issued before the commission began its work, *Amnesty International* emphasized that "it still remains unclear how the Commission's findings and recommendations will feed into ongoing judicial investigations" (Amnesty International 1998a: 2). Feeding the commission's findings "into ongoing and new judicial investigations" was crucial, according to *Amnesty International*, so that the Guatemalan authorities could "facilitate the process of clarifying the full facts about past human rights crimes, identifying the perpetrators and bringing them to justice" (Amnesty International 1998a: 3). Again, the underlying assumption held by *Amnesty International* seemed to be that judicial investigations needed to follow the revelation of the commission's findings about past violations. The full facts would then be attained by a proper judicial process.

Another important aspect of this *Amnesty International* report was the way the human rights organization chose to define the events in Guatemala that was to be analyzed by the *Historical Clarification Commission*. *Amnesty International* stated that, between 1960 and 1996, the period to be studied by the commission,

> tens of thousands of Guatemalans from all sectors of society "disappeared" or were extrajudicially executed or tortured by members of the Guatemalan security forces, their auxiliary forces or agents operating with the state's consent. Although the extent of violations fluctuated during the period under review, violations were massive, widespread and systematic. They constituted a pattern of gross human rights violations (Amnesty International 1998a: 4).

Throughout the report, *Amnesty International* documented cases of gross human rights violations that "illustrate the broad patterns of past state atrocities" and argued that

> they indicate the sort of evidence already available that could serve as the basis for a thorough examination by the Commission to discover exactly who was responsible for ordering, carrying out and covering up tens of thousands of similar cases recorded by AI [*Amnesty International*]. (Amnesty International 1998a: 5)

In other words, *Amnesty International* somewhat expected the *Historical Clarification Commission* to reach one step further than what *Amnesty International* already achieved: The human rights organization's illustrative documentation should feed into the truth commission's "thorough examination" whose thoroughness would be measured by the extent to which it helped "discover exactly" the criminally responsible. The ultimate purpose of the whole endeavour of official truth-seeking remained, in the eyes of *Amnesty International*, as that of "[making] those responsible accountable before the courts" (Amnesty International 1998a: 9).

*Amnesty International* saw "impunity" to be the most pressing problem facing Guatemala. It defined impunity as "a denial of the right to seek truth and justice" and, in the case of Guatemala, as "the single thread linking all past human rights violations" (Amnesty International 1998a: 9). Accordingly, the question of whether a truth commission in Guatemala would engage in a worthwhile effort to realize justice depended on the possibility of that commission helping the judicialization and prosecution of the cases in which gross human rights violators were implicated. In order to depict the resistance against judicial investigations in Guatemala, *Amnesty International* cited the then incoming President Vinicio Cerezo who stated in November 1985 that:

> We are not going to be able to investigate the past. We would have to put the entire army in jail... Everyone was involved in

> violence. But this has to be left behind. If I start investigations and trials, I am only encouraging revenge. (Amnesty International 1998a: 9)

*Amnesty International* was very sensitive to the fact that the case of Guatemala was contaminated by "systematically destroyed evidence", that is,

> consistent covering up of cases of human rights violations, including interference in the judicial criminal investigations, [which] required the acquiescence or complicity of numerous state organs and an ever-greater number of state officials. (Amnesty International 1998a: 10)

The organization seemed to believe that this official battle against the emergence of truth could only be confronted with a retributive criminal justice framework that would once and for all cleanse the state apparatus from those involved in gross human rights violations. Hence, *Amnesty International*'s demand that the *Historical Clarification Commission* direct its work towards the assigning of criminal responsibility, that is, utilizing the truth in the service of punitive/criminal justice. In this sense, two particular recommendations made by *Amnesty International* to the commission were striking insofar as they showed the organization's insistence on the judicialization of the official truth-seeking activity:

> ... 5. The Commission should identify not only the direct perpetrators of torture, extrajudicial executions and "disappearances", but also those who planned or ordered them, establishing chain-of-command responsibility.
> 6. The Commission should ensure that all information it gathers that might help clarify the facts about past human rights violations and those responsible, and that might facilitate proper judicial investigations, is taken up by the appropriate courts of law in accordance with domestic and international law. Confidentiality should only be maintained in the interest of due

> process and international fair trial standards, and should not be applied at the expense of the individual's right to know the full facts. ... (Amnesty International 1998a: 40)

Even among *Amnesty International*'s general recommendations to the Guatemalan authorities, the emphasis on "judicial" measures was highly visible:

> The Guatemalan authorities should ensure that allegations of human rights violations committed during the period of the internal armed conflict, in particular cases of extrajudicial execution, torture and "disappearance", are judicially investigated without delay, impartially and effectively. Investigations must apply to cases opened prior to the commencement of the work of the Historical Clarification Commission, to cases taken up by the judicial authorities as a result of the Commission's work, and to cases that come to light after the Commission ceases to operate. (Amnesty International 1998a: 42)

*Amnesty International* seemed to hold that, though the *Historical Clarification Commission*'s effect was temporally limited (so much to do and so little time), judicial investigations could and should aim at a longer-term vision of how to realize justice, reaching before and after the commission's work. The importance assigned to legality was also exemplified in another recommendation which called forth the Guatemalan authorities to establish "legal measures making the Commission's recommendations binding" (Amnesty International 1998a: 45). It seems that, for *Amnesty*, realizing justice in the face of gross violations in Guatemala was only possible, in terms of the conceptual framework I introduced in Chapter 1, by way of "doing justice to law".

In a May 1998 report, almost a year before the *Historical Clarification Commission* published its final report, *Amnesty International* observed that

> the Guatemalan authorities, particularly the military, have not cooperated fully with the Historical Clarification Commission. They have for example withheld vital information requested by the Commission and restricted access to certain military installations. (Amnesty International 1998b: 1)

*Amnesty International* was concerned that such a lack of cooperation could “undermine the effectiveness of the Commission’s work and lead to a partial or fragmented version of the state’s involvement in past violations” (Amnesty International 1998b: 1). This was only one instance of *Amnesty International*’s pessimistic assessment of what the commission could produce in the face of many political setbacks. In a December 1998 report, a few months before the release of the commission’s report, even “[t]he fact that the President of Guatemala, Álvaro Arzú, and the Minister of Defence, Héctor Barrios, have acknowledged the participation of state bodies in human rights violations” was received with suspicion by *Amnesty International* (Amnesty International 1998c: 1). The organization suspected that

> accepting responsibility for committing abuses could be a ploy by government and military sectors to undermine the efforts of the Historical Clarification Commission, the results of which are due to be published on 31 January next year. (Amnesty International 1998c: 2)

In the conceptual framework proposed by Hannah Arendt (see Chapter 1), *Amnesty* was insistent that responsibility for gross violations should be assigned personally, not politically.

All this concern regarding the possibility that the *Historical Clarification Commission*’s efforts and effectiveness could be undermined by political circumstances reflected *Amnesty International*’s perception of the Guatemalan commission as a weak truth commission. When the commission’s report *Memory of Silence* was presented on 25

February 1999, however, it seemed to have achieved more than what *Amnesty International* expected. In its 2009 assessment of the consequences of the *Historical Clarification* process, a decade after *Memory of Silence*, *Amnesty International* considered the commission's final product a "landmark inquiry into the gross human rights violations of the conflict years" (Amnesty International 2009a: 2). The human rights organization interpreted the fact that the commission's recommendations had not been followed as follows:

> In total, the CEH [*Historical Clarification Commission*] documented 669 massacres, 626 of which were attributable to state security forces. To date, less than five such cases of serious human rights violations have resulted in convictions in a Guatemalan court, and even then only of low-ranking officers. No high-ranking officer or official has ever been brought to justice for their role in ordering, planning or carrying out the widespread and systematic human rights violations over which they presided. (Amnesty International 2009a: 2)

The critical tone of this passage can be read as saying that the *Historical Clarification Commission* successfully completed its task, that is, the clarification of the history of gross human rights violations, whereas the rest of the system, especially the judicial system, has been slow to follow in terms of the goal of prosecuting gross human rights violators. In other words, the truth was out there, but no judicial process was in sight to do it justice. A similar outlook defined the evaluation of the *Historical Clarification Commission* by *Human Rights Watch*. Let me now examine that evaluation.

## 5.4 Human Rights Watch on the Historical Clarification Commission

At a time when the mandate of the *Historical Clarification Commission* was about to be negotiated in Oslo by the Guatemalan government and the guerrilla forces represented by the Guatemalan National Revolutionary Unity, *Human Rights Watch* published its comprehensive June 1994 report titled "Human Rights in Guatemala During President De Leon Carpio's First Year". In this report, the human rights organization welcomed the signing of a Global Human Rights Accord in March 1994 by the Guatemalan government and the Guatemalan National Revolutionary Unity as "the greatest promise of any of the government's achievements in human rights" (Human Rights Watch 1994a: 1). However, *Human Rights Watch* also expressed its concern regarding the absence of "any reference to the establishment of a "Truth Commission" to examine human rights violations" (Human Rights Watch 1994a: 1). Although the organization noted that "the government and guerrillas will discuss the establishment of some form of truth commission during negotiations scheduled for late May 1994", it also stressed the fact that the "army has resisted the establishment of a truth commission, which it argues will be more harsh on the military than on the guerrillas" (Human Rights Watch 1994a: 2). The discussion of a prospective truth commission was concluded in the June 1994 report of *Human Rights Watch* with the assertion that "a true healing of the wounds of the past will not be possible without a profound process of truth seeking and justice for past abuses" (Human Rights Watch 1994a: 2). Then, a March 1995 report welcomed the establishment of the *Historical Clarification Commission* which was seen as the acknowledgement by both the government and the guerrillas of the

Guatemalan people's right to know the whole truth about gross human rights violations (Human Rights Watch 1995a).

Right after the release of the *Historical Clarification Commission* report in February 1999, *Human Rights Watch* "released a document that was smuggled out of Guatemalan military files", revealing "the fate of more than 180 individuals "disappeared" by Guatemalan security forces between August 1983 and March 1985" (Human Rights Watch 1999). This document was deemed highly significant, because it was "the first specific evidence of individual crimes to come out from the military's own files" (Human Rights Watch 1999). Critical of the United States' approach to acts of state terror in Guatemala, *Human Rights Watch* argued that a truth commission "should establish, at a minimum, who was responsible for the misrepresentations contained in [United States] State Department Country Reports on Guatemala in the 1980s and why these distortions were advanced" (Human Rights Watch 1999).

While, in 2001, *Human Rights Watch* "welcomed the decision of a Guatemalan court to convict two army officers for their participation in the 1998 killing of Bishop Juan Gerardi", the man behind the "Recovery of Historical Memory" project (Human Rights Watch 2001), in 2002, the organization observed that "only a small number of ... cases [that had been investigated by the *Historical Clarification Commission*] have been addressed by the Guatemalan justice system" (Human Rights Watch 2002a). *Human Rights Watch* also reflected on the "deep skepticism that cases could advance against powerful figures such as Efraín Ríos Montt, a former head of state and the current President of Congress" responsible for the genocidal acts of the early 1980s (Human Rights Watch 2002a). *Human Rights Watch*'s basic assumption was that

> [i]f the Guatemalan justice system cannot investigate the most serious atrocities committed in the country's recent history, there

> is little reason to expect that it will be able to deter political violence in the future. (Human Rights Watch 2002a)

*Human Rights Watch*'s close monitoring of the Guatemalan justice system continued. In October 2002, *Human Rights Watch* welcomed the

> decision to convict a senior military officer for the 1990 killing of Myrna Mack, ... an anthropologist, ... studying the army's mistreatment of displaced rural communities when she was attacked in front of her Guatemala City office on September 11, 1990. Stabbed 27 times, she bled to death in the street. (Human Rights Watch 2002b)

*Human Rights Watch* noted that this was "the first time that a senior officer has been found responsible for planning human rights violations committed during Guatemala's 36-year civil war" (Human Rights Watch 2002b). "A three-judge tribunal sentenced Col. Juan Valencia Osorio to 30 years for his role in planning the killing", whereas previously in 1993, "[a]rmy sergeant Noel Beteta was convicted of the murder and sentenced to 25 years" (Human Rights Watch 2002b). The organization reminded the contribution made by the *Historical Clarification Commission* in terms of the recognition of the institutional context of this murder as follows:

> At the time of Mack's murder, Beteta served in the presidential security unit (Estado Mayor Presidencial), under the command of the three officers convicted today. The unit was responsible for numerous human rights violations during the war, according to a U.N. [United Nations]-sponsored truth commission report issued in 1999. Last year, three veterans of the unit were convicted in the 1998 assassination of Bishop Juan Gerardi ... (Human Rights Watch 2002b)

This demonstrated that *Human Rights Watch* valued the *Historical Clarification Commission*'s work especially in terms of the verification by

the Guatemalan judiciary of the truth reported in *Memory of Silence*. Similar to *Amnesty International*'s interest in seeing the truth enshrined in a legally binding court decision, *Human Rights Watch* was keen on emphasizing how the findings of the commission's report were confirmed by the criminal justice system in both Gerardi and Mack cases.

By 2004, *Human Rights Watch* remained critical of the judicial progress in following up the cases investigated by the Guatemalan truth commission. The organization stressed that

> [i]n the seven years since the war ended, only two major human rights cases have resulted in the conviction of senior army officers. These rulings came only after witnesses were assassinated, and investigators, judges and prosecutors fled the country. Both convictions were subsequently overturned on dubious grounds and remain under review in the courts. (Human Rights Watch, 2004)

Similarly, both the 2005 ad 2006 *Human Rights Watch* World Reports stated that "[o]f the 626 massacres documented by the truth commission, only one case has been successfully prosecuted in the Guatemalan courts" (Human Rights Watch 2005; 2006a). By the time of the 2009 *Human Rights Watch* World Report, the number of cases successfully prosecuted rose to three (Human Rights Watch 2009: 1). The 2012 *Human Rights Watch* World Report, however, was more appreciative. The human rights organization informed that

> 2011 saw the first arrest of a top-ranking official for human rights violations. In June Gen. Héctor Mario López Fuentes, former defense minister in the de facto government of Gen. Oscar Humberto Mejía Victores, was detained for his alleged role in massacres committed in 1982 to 1983. A judge also issued a warrant for the arrest of Mejía Victores, who seized power in a coup in 1983, but as of October 2011 he was in the hospital after having suffered a stroke, according to his lawyer. In August 2011

> a court sentenced four other former army officers to a total of 6,050 years in prison for participating in a brutal massacre in 1982 in Dos Erres, in which more than 250 people, including children, were murdered. Of 626 documented massacres, the Dos Erres case was only the fourth to have led to a conviction. (Human Rights Watch 2012: 2)

This brief overview shows that *Amnesty International* and *Human Rights Watch* shares a perspective regarding the legacy of the *Historical Clarification* process. Both organizations seem to hold that the *Historical Clarification Commission* successfully completed its primary task involving what I call "epistemic justice", that is, the clarification of the history of gross human rights violations. Yet, although the commission did justice to history, the judicial system has been slow to follow in terms of the goal of prosecuting gross human rights violators. Still, even slow progress is appreciated and assessed as a promising sign of the burdensome process of the legalization of human rights via the pursuit of criminal justice. On the whole, both *Amnesty* and *Human Rights Watch* approached the Guatemalan case by assigning normative priority to the "courtroom procedure" mode of responding to radical evil, as discussed by Arendt. The value of the "epistemic justice" function of the commission was directly linked to the prospect of "doing justice to law" through criminal prosecutions. I will now look at the evaluation of the Guatemalan commission by the *International Center for Transitional Justice*.

## 5.5 International Center for Transitional Justice on the Historical Clarification Commission

In a June 2009 research brief titled "Truth-Telling, Identities and Power in South Africa and Guatemala", *International Center for Transitional*

*Justice* researchers Madeleine Fullard and Nicky Rousseau examined truth-telling initiatives as “vehicles through which “acts of citizenship” may be performed, especially by those historically marginalized” (International Center for Transitional Justice 2009a: 1). Their definition of the Guatemalan civil war as “the culmination of centuries of conflict over indigenous people’s racialized inequality and dispossession, dating from Spanish colonial rule in 1524” also reflects a reading from the perspective of the “historically marginalized” (International Center for Transitional Justice 2009a: 3). Fullard and Rousseau seemed to agree with the generally accepted observation that the broad mandate of the *Historical Clarification Commission*, that is, the task of investigating all human rights violations and acts of violence during the conflict, “ultimately enabled the CEH [*Historical Clarification Commission*] to deal directly with the ethnicized character of violence. Indigenous groups in particular lobbied the CEH, pushing its investigations in this direction” (International Center for Transitional Justice 2009a: 3).

As this research brief shows, *International Center for Transitional Justice* was particularly interested —and more visibly so than *Amnesty International* and *Human Rights Watch*— in the consequences of the *Historical Clarification* process regarding the situation of the oppressed indigenous peoples of Guatemala. This was underlined by Fullard and Rousseau’s following statement:

> The CEH’s [*Historical Clarification Commission*’s] most dramatic and shocking finding was that “agents of the State of Guatemala, within the framework of counterinsurgency operations carried out, between 1981 and 1983, acts of genocide againt groups of Mayan people” in four regions. The CEH [*Historical Clarification Commission*] was the first and indeed only truth commission to make a genocide finding. (International Center for Transitional Justice 2009a: 3)

According to the *International Center for Transitional Justice* researchers, the commission findings helped "constitute and consolidate Mayan identity at both national and international levels" because *Memory of Silence* was indeed "one of the first national documents in which indigenous peoples form an integral part of an account of Guatemalan history" (International Center for Transitional Justice 2009a: 3-4). Furthermore, the *Historical Clarification Commission*'s genocide finding proved that the commission, despite the widespread perception regarding its compromised structure, had a sense of duty that went beyond the concern to "legitimate new governments or engage in nation building — as has often been said of truth-telling initiatives in general" (International Center for Transitional Justice 2009a: 4). Instead of legitimating the post-war Guatemalan governments, the commission seemed to legitimate the indigenous victims' communities and their identities, a result that was seen in positive light by the *International Center for Transitional Justice*.

Another important point emphasized by the *International Center for Transitional Justice* was the role of nongovernmental organizations (NGOs) in helping truth commissions document truth. In the 2009 report titled "Documenting Truth", the *International Center for Transitional Justice* researchers Louis Bickford, Patricia Karam, Hassan Mneimneh and Patrick Pierce argued that "documents collected by NGOs [nongovernmental organizations] can constitute an essential component of prosecutions or truth-seeking efforts", mentioning the civil society truth-telling initiatives in Guatemala as an example (International Center for Transitional Justice 2009b: 4). As previously discussed, the "Recovery of Historical Memory" project of the Catholic Church was one such initiative. Here, however, the authors focused on another example. They stated that the way in which the Forensic Anthropology Foundation of Guatemala (FAFG) "uses physical evidence and

documents from its investigations into clandestine graves to identify the disappeared" helped the *Historical Clarification Commission* "strengthen its case for genocide suffered by large segments of the Guatemalan population" (International Center for Transitional Justice 2009b: 14). The Forensic Anthropology Foundation of Guatemala's contribution to the Guatemalan truth commission in providing scientifically solid, forensic evidence was not noted in the reports of *Amnesty International* and *Human Rights Watch*. This attests the difference in the focus of monitoring (discussed in Chapter 1) between *Amnesty* and *Human Rights Watch*, on the one hand, and the *Center*, on the other hand. While the former (*Amnesty* and *Human Rights Watch*) mainly focus on monitoring violations, the latter (the *Center*) generally deals with monitoring human rights institutions working on violations like the Forensic Anthropology Foundation.

Finally, in one of its latest reports on truth commissions titled "Strengthening Indigenous Rights through Truth Commissions: A Practitioner's Resource", the *International Center for Transitional Justice* examined the *Historical Clarification Commission*, alongside the commissions in Peru and Paraguay, as a truth commission that "have addressed cases of violence against indigenous peoples" (International Center for Transitional Justice 2012: 1). In this regard, the *Center* spoke highly of an unintended achievement of the Guatemalan commission, namely, its contribution to the mobilization of local leaders "to form new coalitions between indigenous organizations" (International Center for Transitional Justice 2012: 5):

> Perhaps Guatemala's Commission of Historical Clarification (CEH) is the only one that has made a demonstrable contribution to the participation of indigenous people in public life. The commission's finding that the state had committed acts of genocide against indigenous peoples helped to reframe political debate in Guatemala, and the struggle for truth and reparations

> galvanized a range of indigenous groups to become more active politically. (International Center for Transitional Justice 2012: 37)

These remarks regarding the *Historical Clarification Commission* are an example of the *Center*'s special focus on indigenous rights as part of an interest in finding out "how individual violations impact a group or community" (International Center for Transitional Justice 2012: 4), ostensibly differing from *Amnesty International*'s and *Human Rights Watch*'s focus on individual violations from the perspective of criminal justice. This difference was also visible in the way the *International Center for Transitional Justice* conceived the truth commissions as

> an important contemporary mechanism to reveal and highlight where violations have targeted ... individuals because they belong to a group. This is particularly the case since truth commissions are often better than courts at identifying patterns of abuse, especially where there are limited official mechanisms to prosecute human rights abuses. (International Center for Transitional Justice 2012: 11)

As seen in the sections on *Amnesty International* and *Human Rights Watch*, while these two human rights organizations largely perceive the function of a truth-seeking process as complementing the criminal prosecution of gross human rights violations to pursue individual accountability for these crimes, the *International Center for Transitional Justice* shifts the emphasis towards collective actors, collective victims and their identity, and points to the way in which truth commissions can explore the processes of group victimization and facilitate empowerment through their analysis of "patterns of abuse". This shift in emphasis also understands truth commissions to be something more than an institutional auxiliary to courts. From this perspective, the *International Center for Transitional Justice* claims that

> truth commissions can provide an arena to analyze the structural causes of past violence. In Guatemala, for example, the truth commission not only gathered testimony but also analysis of why the violence occurred in the first place. (International Center for Transitional Justice 2012: 11)

Accordingly, the *International Center for Transitional Justice* holds that the truth commission provides a long-term approach to understanding the causes of gross human rights violations (International Center for Transitional Justice 2012: 3). The contrast between *Amnesty* and *Human Rights Watch*, on the one hand, and the *International Center for Transitional Justice*, on the other hand, is obvious. The former choose to focus on the knowledge imparted by the Guatemalan commission from the perspective of utilizing this knowledge in doing criminal justice by establishing personal responsibility. The *Center*, however, sees the most significant epistemic contributions of the commission in the following areas: 1- making sense of community-level dynamics like the mobilization of victims' communities, and 2- revealing deep historical causes of gross violations to clarify the present conditions under which assuming political responsibility can lead to a social rejuvenation immune to violence. I will now move on to my second case, Serbia, to see whether these differences between the human rights organizations' evaluations of truth commissions persist in a very different context compared to that of Guatemala.

# CHAPTER 6

# SERBIA: EVADING INTERNATIONAL CRIMINAL JUSTICE THROUGH A TRUTH COMMISSION

## 6.1 WARS IN THE FORMER YUGOSLAVIA, 1991-1999

Serbia is a landlocked country located in Southeastern Europe, bordering Hungary to the north, Romania and Bulgaria to the east, Macedonia and the partially recognized Kosovo to the south, and Croatia, Bosnia and Montenegro to the west. It has a population of nearly 7 million, around 80 percent of which are ethnic Serbs. The main religious denomination, representing approximately 85 percent of the population, is Serbian Orthodox (The World Factbook 2013b). In the Human Development Index developed by the United Nations Development Programme (indicating "progress in three basic dimensions of human development: a long and healthy life, access to knowledge and a decent standard of living"), Serbia is ranked 64th out of 187 countries, exemplifying those countries with "high human development". Its main human development indicators are 74.7 years of life expectancy at birth, 10.2 mean years of schooling for adults and $9,533 Gross National Income per capita (United Nations Development Programme 2013b).

Serbia is an independent state since 2006 and "the political heir to the Socialist Federal Republic of Yugoslavia, the Federal Republic of Yugoslavia, and the Union of Serbia and Montenegro" (Polity IV 2013a). The Serbian administration, which aspired to be the sole legal successor of the Socialist Federal Republic of Yugoslavia (1943-1992), constituted itself as the Federal Republic of Yugoslavia (1992-2003) during the Yugoslav wars, but was eventually forced to face the emergence of six independent states (Slovenia, Croatia, Bosnia and Herzegovina, Macedonia, Montenegro, and Serbia) and the still disputed statehood of the partially recognized Kosovo. The Polity IV Scale, which shows the authority trends of states in the world, depicts the Serbian Federal Republic of Yugoslavia as an autocracy during the wars in Yugoslavia, an autocracy being generally characterized by "the authoritarian rule of personalistic rulers" or "one-party structures" (Marshall and Cole 2011: 9).

The wars in the former Yugoslavia during the 1990s occurred almost a decade after the death of Josip Broz Tito (1892-1980) who ruled the Socialist Federal Republic of Yugoslavia during most of the Cold War. Tito's Yugoslavia was "a multi-ethnic/national polity" in which "the interests of its constituent peoples —Serbs, Croats, Slovenians, Muslims, Montenegrins and Albanians— were roughly balanced" (Bloxham and Moses 2011: 126). Balancing these interests almost always meant devolving political and economic power to "the six republics and two autonomous provinces of Kosovo and Vojvodina" comprising the federal Yugoslavia (Thompson 2005: 1170). With the demise of the Soviet Union and the collapse of one-party communist systems in Europe around 1990, the Yugoslav scene became increasingly marked by a weak central government (Thompson 2005: 1170). Since the Yugoslav state "was basically organized along ethnonational lines", the conditions were set for "the lure of national

populism" and "irredentism" to do their work on the popular imagination as communism was no longer a legitimate unifier (Bloxham and Moses 2011: 126).

The most aggressive nationalism to arise from the slow and painful dissolution of the Yugoslav federation was that of Serbia. Moreover, the armed forces of the former regime, namely the Yugoslav People's Army (Jugoslovenska Narodna Armija – JNA), also embraced Serbian nationalism (Thompson 2005: 1170). In this context, Slobodan Milošević who "rose in the 1980s to head the Serbian League of Communists" played a critical role by becoming the "first senior politician to acknowledge Serbian anger over Kosovo as valid" (Thompson 2005: 1170). This was an important emphasis. The granting of federal status to Kosovo in the 1974 constitution of the Yugoslav federation was considered a great loss for the Serbian people. Kosovo was the "site of the mythologized 1389 battle against the Ottoman empire, and traditionally celebrated as the cradle of Serbian culture" (Thompson 2005: 1170). Therefore, when Milošević limited the constitutional autonomy of Kosovo in 1989, this was one of the first powerful signs of a new "national" politics in which the federation was to be redesigned and rebalanced in favour of the Serbian people, a third of which "lived as minorities in other provinces" (Thompson 2005: 1171; Bloxham and Moses 2011: 127). Because "matching political borders precisely with ethnic homogeneity was impossible", the Serbian nationalism led by Milošević which was based on "the simple message that Serbia and the Serbs—some 36 percent of Yugoslavia's population—must be "united" at any cost" triggered other nationalist reactions and thereby inaugurated a decade of war contaminated by gross human rights violations (Thompson 2005: 1171).

### *6.1.1 Wars in Slovenia and Croatia, 1991-1995*

The first reactions against Serbian nationalism came from Slovenia and Croatia who "complained about having to financially subsidize the poorer south and began to regard the federation as a vehicle of Serbian domination" (Bloxham and Moses 2011: 127). A confrontation between Slovenia's defence forces and the Serb-dominated Yugoslav People's Army cost the lives of 13 on the Slovenian side and 39 on the side of the Yugoslav People's Army (Thompson 2005: 1172). The consequences of Slovenia's declaration of sovereignty and independence in June 1991, however, were relatively less destructive compared to that of Croatia. Croatia's proclamation of independence on the same day immediately caused alarm among the Serbs of Croatia "who comprised some 12 per cent of its population — about 600,000" (Bloxham and Moses 2011: 127). This Croatian move for independence was built upon the 1990 election of Franjo Tudjman. Tudjman not only made clear in his election campaign his irredentist interest in the neighbouring Bosnia and Herzegovina, but also openly defended a revisionist history of the Second World War. According to this revised history, the fascist Croatian nationalist "Ustasha" regime, a puppet regime under the occupation of Mussolini's Italy and whose "leaders were obsessed with eliminating the Serb Orthodox population", expressed in Tudjman's eyes "the historic aspirations of the Croatian people" (Thompson 2005: 1169, 1171). Considering the fact that "[a]t least 20,000 Serbs were killed in pogroms during summer 1941", a Milošević-led, media-driven campaign after Tudjman's election targeted Croatia's Serbs and started "exploiting fears of an Ustasha revival" (Thompson 2005: 1171).

The Serb-Croat confrontation grew more complicated when Croatia's Serb rebels supported by the Serb-dominated Yugoslav

People's Army proclaimed their own state in Croatian territory, namely, the Republic of Serb Krajina (Republika Srpska Krajina - RSK) (Bloxham and Moses 2011: 127). With the secession of Croatia, these Serb rebels,

> along with JNA [Yugoslav People's Army] regulars and Serbian paramilitaries, began to target large numbers of civilian Croats in and around the territory claimed by the self-styled RSK [Republic of Serb Krajina], killing many and driving away survivors. (Thompson 2005: 1172)

In November 1991, in Vukovar, a city in eastern Croatia, the Serbian forces captured the city and removed 260 Croatian men from the hospital and slaughtered them (Thompson 2005: 1172; Bloxham and Moses 2011: 127). Known as the Vukovar massacre, this event was "the first indisputable war crime" of the Yugoslav wars and "largest single massacre since WWII [the Second World War] and until Srebrenica" (Thompson 2005: 1172; Nice 2012: 4). By December 1991, "half a million people had been displaced in Croatia or fled as refugees" and the grave pattern of "atrocities and refugee crises" that were to characterize the Yugoslav wars had begun (Thompson 2005: 1172; Bloxham and Moses 2011: 127).

The war in Croatia came to a standstill in January 1992 when a United Nations-brokered ceasefire —to be exact, the thirteenth ceasefire after the previous twelve collapsed— took effect. This was followed by the deployment of 14,000 United Nations troops, namely, the United Nations Protection Force (UNPROFOR), who were, however, very ineffective in terms of preventing further conflict (Thompson 2005: 1172; Bloxham and Moses 2011: 128). An uneasy truce continued "until 1995 when Croatian forces, with the approval and support of the United States, attacked and drove out the Serbs, replete with atrocities" (Bloxham and Moses 2011: 128). This resulted in

"hundreds of thousands of refugees who headed east into Serb-controlled northern Bosnia", adding fuel to the conflict in Bosnia and Herzegovina (Bloxham and Moses 2011: 128). The war in Croatia ended with the signing of the 1995 Dayton Peace Accords by the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia.

### *6.1.2 War in Bosnia and Herzegovina, 1992-1995*

Bosnia and Herzegovina, "the only Yugoslav republic without a titular nation,[46] hence the only one that could not become a nation-state", was the scene of the most brutal and amorphous Yugoslav war (Thompson 2005: 1173). The amorphousness of its war was reflective of its demographic makeup: "44% Muslim, 31% Serb, 17% Croat, the remaining 5% 'Yugoslav', Jews and Roma" (Bloxham and Moses 2011: 128).

The early manifestation of the conflict in Bosnia and Herzegovina was during the October 1991 vote on sovereignty at the Bosnia and Herzegovina parliament, boycotted by the Serb delegates. A few months before the vote on sovereignty, Serb-majority regions in the north and east of Bosnia and Herzegovina were declared "autonomous" (Thompson 2005: 1173). These regions were later to form the basis of the Republika Srpska, one of the two political entities constituting the post-conflict Bosnia and Herzegovina. But the main event that triggered further polarization was the vote on sovereignty which led the Serbs of Bosnia and Herzegovina to establish their own assembly under the

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[46] Meaning that the title of the republic does not specifically refer to a national identity as in Serbia, Croatia, Slovenia or Albania.

guidance of Radovan Karadžić, the political leader of Bosnian Serbs. This Bosnian Serb assembly "at once appealed to the JNA [Yugoslav People's Army] for protection" (Thompson 2005: 1173). Before leaving the Bosnia and Herzegovina parliament, Karadžić warned the Bosnian Muslims:

> Do not think that you will not lead Bosnia into hell, and do not think that you will not perhaps lead the Muslim people into annihilation, because the Muslims cannot defend themselves if there is war. (Tindemans et al 1996: 34)

Alija Izetbegovic, the leader of the main Bosnian Muslim party, replied:

> His [Karadžić's] words and manner illustrate why others refuse to stay in Yugoslavia. Nobody else wants the kind of Yugoslavia that Mr. Karadžić wants anymore. Nobody except perhaps the Serbs. (Tindemans et al 1996: 34)

This exemplary exchange between the political leaders in October 1991 was followed by the proclamation of a "Serb Republic of Bosnia and Herzegovina" in January 1992 and the international recognition of Bosnia and Herzegovina, the state endorsed by Bosnian Muslims and Croats, in April 1992 (Thompson 2005: 1173). By the time Bosnia and Herzegovina was recognized, Serbia and Montenegro had formed the "Federal Republic of Yugoslavia" led by Milošević (Sriram et al 2009: 81), an entity which directly supported the 75,000 Bosnian Serb forces representing the "Army of the Serb Republic" (Thompson 2005: 1173). Bosnia and Herzegovina, on the other hand, "had only a fractured police force, a nascent, Muslim-led Patriotic League, and a Croat militia" which was also "hampered by a UN [United Nations] arms embargo that starved them of weaponry" (Thompson 2005: 1173; Bloxham and Moses 2011: 128). By the late summer of 1992, "more than a million people had been displaced" (Thompson 2005: 1173).

Moreover, the Serbian armed factions had already established a pattern of shooting or abducting Muslim and Croat community leaders and intellectuals and moving thousands of Muslims and Croats "into unused industrial facilities, where they were starved, tortured, and even killed" (Thompson 2005: 1173). The Serbian forces eventually gained control of "70 per cent of Bosnian territory" (Bloxham and Moses 2011: 128).

Another factor making the conflict in Bosnia and Herzegovina more complicated was Tudjman's intention to partition the territory between Serbs and Croats. Known for his anti-Muslim sentiment, Tudjman led the Croatian Army in 1993 to attack "their nominal ally, the Army of Bosnia and Herzegovina, with its predominantly Muslim troops" (Thompson 2005: 1174). Eventually, both sides took part in crimes committed against civilians. Therefore, "Bosnian forces and Croatian forces fought not only the Serb forces in their territories, but occasionally also each other, creating a three-way, albeit asymmetrical, conflict" (Sriram et al 2009: 70).

Among the most prominent gross human rights violations of the early stage of the war in Bosnia and Herzegovina were large-scale "ethnic cleansings", a term which "passed from Serbo-Croat [*etničko čiščenje*] into English to encapsulate the brutality of a conflict in which the principal aim was to erase all traces of a culture" (Bennett 2005: 125). The first massive wave of ethnic cleansings was triggered by a "premeditated massacre of Muslims" by General Zeljko Ražnjatović Arkan in April 1992 in northeastern Bosnia and Herzegovina in Bijeljina. The objective was the formation of Greater Serbia (Bennett 2005: 128). In the post-war documentation of human rights crimes by the International Criminal Tribunal for the former Yugoslavia (ICTY), it was determined that

> [a]t least 48 civilians, most of whom were non-Serbs, had been killed by Serb paramilitaries during the Serb take-over of Bijeljina.

> ... A total of 48 bodies, including those of women and children, were collected from the town's streets and houses, 45 of these victims were non-Serbs and none wore uniforms. Most of the dead had been shot in the chest, mouth, temple, or back of the head, some at close range. (International Criminal Tribunal for the former Yugoslavia 2006: 114)

As this massacre in Bijeljina showed, the ethnic cleansing program never stopped at the systematic expulsion and displacement of non-Serbs, attesting the contagious and expansive nature of gross human rights violations (as noted in Chapter 3). "Cleansing" a territory had not simply entailed a violation of the human right to property and home, but almost always meant a series of violations of the rights to life, bodily integrity, freedom of movement and freedom of conscience, among others.

This lack of understanding of the expansive nature of gross human rights violations also disabled the capacity of the international actors to accurately assess the situation in Bosnia and Herzegovina. As Bennett notes, "[i]nternational efforts amounted to little more than persuading the Bosnian Serbs to make some territorial concessions and forcing the Bosnian Muslims to accept the resulting deal" (Bennett 2005: 128). However, as the ethnic cleansing campaign for a Greater Serbia continued throughout 1994, *Human Rights Watch* warned that

> the most savage and institutionalized "ethnic cleansing" is taking place in areas where there is no fighting, where the Bosnian Serbs have political and military control and would most likely maintain it under any territorial settlement. ... To achieve a peace that actually ends violence against civilians in northern Bosnia—and other areas not directly affected by fighting—it will not be enough to agree on boundaries. Any meaningful peace agreement must contain guarantees of the rights of those who have remained behind in areas being "cleansed" and of those who wish to return. (Human Rights Watch 1994b: 2)

In other words, there was no guarantee that gross human rights violations would not continue in a post-conflict settlement, unless these violations were adequately held accountable by serious investigations and effective institutions. From this perspective, an internationally supported peace plan should have also involved an agenda for establishing accountability mechanisms. It was due to such rights-oriented perspective that, as soon as the pattern of human rights violations clearly emerged from the early days of the Bosnian and Croatian conflicts in 1992, *Human Rights Watch* "issued a public call for the establishment of an international criminal tribunal to punish war crimes committed in Bosnia and Croatia" (Neier 2012: 265). The International Criminal Tribunal for the former Yugoslavia was established in 1993.

As the war raged on in the face of failed peace initiatives, *Human Rights Watch* provided in 1994 a detailed documentation of gross human rights violations in Bosnian Serb-controlled territories, including murders and beatings, torture, rape, forced labour, disappearances, evictions and extortion. The following documented act of rape committed after an eviction shows the continuing and contagious character of violations. In this grim account, L.D., a sixty-seven-year-old Muslim man and his Serbian wife were evicted from their home in February 1994. They then lived in the house of L.D.'s sister-in-law who lived in Germany. The couple was then forced to move into the basement of the sister-in-law's house because it was occupied by a Serbian military police officer. According to L.D.:

> About three months ago, at about 10:00 P.M., three men came into our basement; one was an adult who was nineteen years old and the other two were minors. The military police officer must have let them into the house because only he controls the entrance. They knocked on the basement door, called for me, came in and said, "We're Serbo-Četniks and we've come to rape

> your wife." They were not armed. I couldn't say anything because they must have been working in conjunction with the military police officer who lived upstairs. They didn't let me leave and made me sit on one couch while my wife remained on the other couch. They tried to rape her and beat her. One of them raped her, one of them forced her to perform fellatio and the other one stood by. She tried to defend herself, but they beat her. This went on for about thirty minutes. Then the military police officer came to the door after they had raped my wife and told them to cut it out. The three youths then went upstairs and spent about an hour drinking with the military police officer. (Human Rights Watch 1994b: 16)

The developments that brought the war in Bosnia and Herzegovina to an end were largely prompted by another massacre, this time more massive and actually "the single greatest atrocity" of the Yugoslav wars (Bennett 2005: 128). This was

> the shocking massacre of some 8,000 Muslim men and boys by Bosnian Serb forces in July 1995 in Srebrenica, a supposed UN [United Nations] safe area guarded by only 600 lightly armed Dutch troops, who surrendered the civilians to their fate. (Bloxham and Moses 2011: 129)

*Human Rights Watch*, exemplary of its focus on the laws of armed conflict, recorded what it termed the "gross violations of humanitarian law, as has been typical of Bosnian Serb military conduct to date" in Srebrenica based on an investigation conducted in August 1995. They examined the mishandling of the crisis by the United Nations peacekeeping force and reported on the Dutch Defence Ministry's "destruction of a video tape showing Bosnian Serb soldiers engaged in extrajudicial executions as Dutch U.N. [United Nations] troops looked on" (Human Rights Watch 1995b: 1-2).

The Srebrenica massacre became one of the clearest examples of the phenomenon of gross human rights violations in contemporary history. The International Criminal Tribunal for the former Yugoslavia

gathered “a multitude of evidence publicly available that proves that Bosnian Serb and other forces executed 7,000 to 8,000 Bosnian Muslim prisoners from Srebrenica in one week in July 1995” (International Criminal Tribunal for the former Yugoslavia 2013: 1). It defined the event as “the single worst atrocity committed in the former Yugoslavia during the wars of the 1990s and the worst massacre that occurred in Europe since the months after World War II” (International Criminal Tribunal for the former Yugoslavia 2013: 1). What made the disturbing wave of violations perpetrated in the mere span of a week particularly gross was, in the words of the tribunal, the fact that Srebrenica was “a planned killing operation” (International Criminal Tribunal for the former Yugoslavia 2013: 6). The tribunal made this assertion against what it considered “the most perfidious claim that one hears in Republika Srpska and Serbia” (International Criminal Tribunal for the former Yugoslavia 2013: 6). This was the claim that “Bosnian Serb forces killed the Bosnian Muslim prisoners from Srebrenica in revenge”, that is, in response to “the crimes Bosnian Muslim forces committed against Serbs in the villages around Srebrenica” (International Criminal Tribunal for the former Yugoslavia 2013: 6). The grossness of the violations in Srebrenica was captured by the tribunal’s following definite assessment:

> It is impossible to kill 7,000 to 8,000 people in the space of one week without methodical planning and substantial resources. Soldiers have to be mobilized to guard the prisoners, to move them from holding locations to execution sites, and to shoot them. Multiple locations to hold the prisoners and to execute them need to be identified and secured. Thousands of rounds of ammunition to shoot the prisoners need to be supplied. Numerous vehicles and hundreds of litres of fuel need to be commandeered to move the prisoners. A number of bulldozers and excavators need to be commissioned to dig their graves. During a state of war mobilizing such resources cannot be done at the whim of a few crazy soldiers. It needs to be ordered and

> authorized by commanders at high-levels. (International Criminal Tribunal for the former Yugoslavia 2013: 6)

The contagious and expansive aftereffects of the gross violations of the basic right to life in Srebrenica were reflected in the gruesome attempt to get rid of and even hide the bodies. As Sarah Wagner notes:

> The majority of the victims were summarily executed and their remains dumped into mass graves. In the months that followed, Bosnian Serb forces returned to the site of those graves and, attempting to hide traces of the war crimes, dug up, transported, and reburied the bodies in secondary mass graves. (Wagner 2010: 28)

These secondary gravesites, "most of them filled with disarticulated and partial skeletal remains", constituted gross violations of the rights of the victims' surviving families to know the truth about the fate of the victims of the Srebrenica massacre and to have the remains of the victims identified and returned to them (Wagner 2010: 27, 28).

The Srebrenica massacre, together with the cumulative effects of the Croatian offensives in May and August 1995 which pushed the Serbs eastwards and the taking of United Nations hostages by Bosnian Serbs in May 1995, caused the North Atlantic Treaty Organization (NATO) to launch the first air campaign of its history in August 1995 (Bloxham and Moses 2011: 129; Bennett 2005: 128). The two-week-long North Atlantic Treaty Organization air campaign

> succeeded in shattering Bosnian Serb communications, helped the Croats and Muslims reverse some of the Serb gains from the beginning of the war and, most importantly, paved the way for the peace negotiations in Dayton, Ohio, that eventually brought the Bosnian War to an end. (Bennett 2005: 128)

### *6.1.3 WAR IN KOSOVO, 1998-1999*

As noted above, Kosovo had great symbolic weight for modern Serbian nationalism. Present in the region since the seventh century, Serbs ruled over Kosovo in the thirteenth century until their defeat in a battle with the Ottomans in 1389 which caused a massive influx of Turks and Albanians, making the latter the dominant ethnic group (Sriram et al 2010: 72). This ancient battle was reinvoked by Milošević in his claims for a Greater Serbia. The latter objective also informed his constitutional move that limited Kosovo's autonomy in 1989. One justification behind this move was the rise of Albanian nationalism which, despite the near-republic status granted to Kosovo in the 1974 constitution, demanded independence and caused the mistreatment of local Serbs (Sriram et al 2010: 72). After Milošević's constitutional putsch, Kosovar Albanians' initial reaction was to use nonviolent strategies, "ignoring Serbian political structures and developing a "parallel system" of basic education and healthcare" (Thompson 2005: 1176). Following the Croatian and Slovenian examples in 1991, Kosovar Albanians even "held a referendum in which Kosovo declared itself independent" (Sriram et al 2010: 72).

As the Yugoslav wars outside Kosovo intensified and the Dayton peace accords reinforced the belief that nonviolence would not help increase the international pressure on Serbia, a radicalized Albanian resistance movement called Kosovo Liberation Army (KLA) decided to take up arms in 1996 (Bloxham and Moses 2011: 129; Thompson 2005: 1176). Viewed as a terrorist organization by both the United States and the Yugoslav/Serbian governments, the Kosovo Liberation Army engaged in direct confrontation with the Serbian forces, also targeting civilians in its guerrilla fight. Serbia's response was "a counterinsurgency campaign that entailed massacres and massive

expulsions of ethnic Albanians" (Sriram et al 2010: 72). The escalation of violence in 1998 which, by August, caused nearly 200,000 Kosovars to flee into the hills and another 100,000 to leave the province attested the existence of a new, full-fledged Yugoslav war (Thompson 2005: 1176).

Once again, as in the examples of the Vukovar massacre during the war in Croatia and the Srebrenica massacre during the war in Bosnia and Herzegovina, the international response to the war in Kosovo was "atrocity-driven", that is, the phenomenon of mass killing triggered more involvement in the conflict on the part of outside actors (Thompson 2005: 1176). The murder of 45 Albanians at Račak in January 1999 led the international community to give the following ultimatum to Milošević: "accept an international settlement granting Kosovo the widest measure of autonomy, or face punishment by NATO [North Atlantic Treaty Organization] missiles" (Thompson 2005: 1176). The latter option took effect in March 1996 when "NATO [North Atlantic Treaty Organization] began an aerial bombing campaign to force Milošević to withdraw its forces" (Bloxham and Moses 2011: 129). However, Milošević was not deterred. On the contrary, the North Atlantic Treaty Organization's intervention inadvertently encouraged Milošević's forces to use the chaos to kill an estimated 11,000 Albanians and drive almost a million out of Kosovo (Bloxham and Moses 2011: 129; Thompson 2005: 1176). The Serbian offensive eventually yielded in June 1999 after a three-month North Atlantic Treaty Organization bombing campaign against military targets and civilian infrastructure (Sriram et al 2010: 72; Bloxham and Moses 2011: 130; Thompson 2005: 1176). However, the withdrawal of Serbia's military and police forces from Kosovo was followed by a "reverse ethnic cleansing" caused by "the reflux of Albanian refugees and expulsion of Serbs and Roma, as the KLA [Kosovo Liberation Army]

moved from partly terroristic resistance to co-author of de facto ethnic cleansing" (Thompson 2005: 1176; Bloxham and Moses 2011: 130).

As *Amnesty International* documented in October 1999, the Roma population, in addition to Albanians and Serbs who were also among the victimized groups of the conflict, was targeted by ethnic Albanians affiliated with the Kosovo Liberation Army who claimed that the Roma participated in gross human rights violations perpetrated by the Serbian forces. The witness account provided by the son of A.B. was typical of the gross violations caused by an enforced disappearance. According to the *Amnesty International* report on the disappeared and abducted in Kosovo province, one afternoon in the middle of June, "a group of men who represented themselves as KLA [Kosovo Liberation Army] members" came to A.B.'s home and took him away by car. His son tried to seek information about A.B. at a KLA base where he was told, "If he comes home tonight, then he's alive; if not, then he will go into a ditch, dead". A few days after he tried to seek more information at another KLA [Kosovo Liberation Army] base, "a handwritten note was fixed to the door of the family house: 'You have 24 hours to get out, otherwise you are dead – KLA'" (Amnesty International 1999a: 7). The human rights of the family of A.B. were not only violated by the inhumane treatment arising from not knowing the fate of the disappeared, but also exposed to the continuing and expansive nature of gross violations as they were also forced to leave their home and live under a death threat.

This exemplary account of gross violations, which occurred around the same time when North Atlantic Treaty Organization's intervention stopped the war in Kosovo, demonstrates how the end of a war does not necessarily mean the end of gross human rights violations. The forced conclusion of the conflict by the North Atlantic Treaty Organization intervention was not equal to a peaceful settlement

of the fight "for power over people and territory" (Thompson 2005: 1176). Still, the end of the war in Kosovo marked the end of the wars in the former Yugoslavia.

## 6.2 Yugoslav Truth and Reconciliation Commission, 2002-2003

The *Yugoslav Truth and Reconciliation Commission* (*Komisija za istinu i pomirenje*) was one of the first attempts by the post-Milošević Serbian leadership to address the legacy of gross human rights violations during the Yugoslav wars of the 1990s "that amounted to the bloodiest conflict in post-1945 Europe" (Grodsky 2010: 123). Almost a year after the North Atlantic Treaty Organization's intervention in Kosovo forced Milošević to stop the war, in October 2000,

> a democratic alliance dominated by two Serbian opposition parties, Vojislav Koštunica's Democratic Party of Serbia (DSS) and Zoran Đinđić's Democratic Party (DS), helped to lead what was billed as a peaceful revolution against Milošević. (Grodsky 2010: 124)

Koštunica became the president and Đinđić the prime minister of the new Serbia.

The major issue concerning justice in post-Milošević Serbia, which still possessed the title of Federal Republic of Yugoslavia until it transformed into the State Union of Serbia and Montenegro in 2003, was the issue of cooperation with the International Criminal Tribunal for the former Yugoslavia. Already indicted by the court in May 1999 during the North Atlantic Treaty Organization's Kosovo intervention, Milošević was still not transferred to the court as of March 2001 when President Koštunica issued a decree forming the *Yugoslav Truth and*

*Reconciliation Commission* (Ilic 2004: 8; Kerr and Mobekk 2007: 49; Grodsky 2010: 131). Although President Koštunica began to market the idea of a truth commission by "publicly arguing that the commission would prepare society for criminal trials", he was also known to have "deplored the ICTY [International Criminal Tribunal for the former Yugoslavia] as a "monstrous institution" whose indictments were "despicable and counterproductive"" (Grodsky 2009: 696; Grodsky 2010: 131). Koštunica's position vis-à-vis the international tribunal is best understood, however, when considered in light of the division within the new Serbian government regarding the effectiveness and strength of a prospective truth commission. As Brian Grodsky notes:

> Justice Minister Momčilo Grubač and Foreign Minister Goran Svilanović projected a strong commission with the power to grant amnesties, subpoena witnesses, and demand evidence. The commission would include international experts and lead to criminal trials after only eighteen months. (Grodsky 2010: 131)

This design was nullified when Koštunica suddenly decided, without his cabinet's knowledge, to establish a much weaker commission. As Justice Minister Grubač recalled: "One morning I read in the paper that Koštunica had started a commission", a commission that was "more moral than legal, and more public than state" (Grodksy 2010: 131).

Koštunica was under immense international pressure to cooperate with the International Criminal Tribunal for the former Yugoslavia. The quickest way to demonstrate his willingness to pursue a justice policy was to "create only a weak "consultative body" tasked with compiling information and evidence from various —mostly open— sources" and lacking constitutional or legal status (Grodsky 2010: 132). The presidential decree establishing the *Yugoslav Truth and Reconciliation Commission* defined the commission's task as follows:

> The task of the Commission is:
> - to organize researches and reveal evidences about social, interethnic and political conflicts which led to war and shed light on causal links between these events;
> - to inform domestic and international audience about its work and results;
> - to establish cooperation with similar commissions and bodies in neighboring countries and abroad, in order to exchange working experiences. (Ilic 2004: 8)

Koštunica and other Yugoslav officials actively sought support for the commission, but was ultimately unable to convince skeptical Western diplomats who "dismissed the [Yugoslav truth] commission as a mechanism explicitly designed to avoid ICTY [International Criminal Tribunal for the former Yugoslavia] cooperation" (Grodsky 2009: 696). Carla Del Ponte, the chief prosecutor of the International Criminal Tribunal for the former Yugoslavia at the time, perceived the commission to be an initiative of "local justice" aimed at counteracting international justice efforts and warned that such a commission must not "encroach on the prerogatives of the law" (Grodsky 2009: 696). Koštunica's own remarks did not help to change, but, on the contrary, reinforced this negative perception of the *Yugoslav Truth and Reconciliation Commission*, when he advocated his commission as a tool "to counter the "biased" "pseudo-history" and "hypocrisy" of the Hague [that is, the International Criminal Tribunal for the Former Yugoslavia]" (Grodsky 2010: 132). He thought that the international court was engaged in implementing a victor's justice and writing a victor's history and thereby stated that "We have to do everything to influence the writing of history" (Grodsky 2010: 132).

The appointment of the commission members was also made overnight within the scope of Koštunica's decree. The decree named 19 commissioners, three of whom resigned soon after hearing the establishment of the commission. Vojin Dimitrijević, one of those who

resigned, explained his decision in April 2001 in the following terms: First, he considered the commission's mandate to be "very narrowly defined" (Ilic 2004: 8). Besides this technical objection, Dimitrijević voiced serious concerns regarding the political and legal implications of the temporal and territorial reach of the commission's proposed work. He stated that the commission's historical focus on the period before the dissolution of the socialist federal Yugoslavia would be politically misconceived insofar as there are "people who lived and worked in that Yugoslavia and do not live and work in this [current] Yugoslavia". Therefore, because this commission contained only the citizens of today's Yugoslavia, it "will not be viewed as an impartial one when judging about events [that] occurred on territories that are outside its borders" (Ilic 2004: 8-9). Dimitrijević's final objection against the commission's proposed focus on the causes of war reflected a legal concern. He argued that "there are many reasons and causes of wars, but there is only one international humanitarian law that ought to be respected by both aggressors and defenders, being a lawyer" (Ilic 2004: 9). Dimitrijević explicitly warned against the misguided character of the effort of understanding the causes of gross human rights violations through "big truths and explanations" instead of accounting for gross human rights violations and violators themselves:

> I am mostly interested, as it is to be expected in brutalities of our wars. I am afraid of big truths and explanations: in the name of these truths severe violence was done. The reconciliation might start with more modest aims and goals. It is not the matter of who was right and who was wrong, but who behaved as a human being and who did not. (Ilic 2004: 9)

Basically, Dimitrijević was concerned about the attempt for legitimizing those Serbian acts which amounted to human rights violations through an historical account of how Serbs were repressed and violated. Such

an attempt was exemplified in the above-mentioned mythology surrounding Kosovo's meaning for a Greater Serbia. Dimitrijević criticized such utilization of history as an excuse for the perpetration of gross human rights violations.

In line with Dimitrijević's criticisms, the commission was seen as an institution designed to "reduce the image of Serbian guilt" (Grodsky 2009: 697). Therefore, neither the fact that "Koštunica handpicked the commission's 19 members, who were almost all ethnic Serbs", nor "a second round of appointments designed to increase the commission's representativeness and legitimacy" in 2002 helped change this widespread perception among domestic and international human rights circles (Grodsky 2009: 697). The second most important negatively perceived objective of the commission, that is, the objective of delaying transfers to the international tribunal, was further underlined when Koštunica granted the commission "a full three years to do its work, during which time Koštunica demanded the international court postpone prosecutions" (Grodsky 2009: 697).

The weakness of the *Yugoslav Truth and Reconciliation Commission* was also confirmed by its very restricted budget. It received "its annual budget of $20,000—less than 15% of the sum requested—only 10 months after inception". Moreover, "commission members were unpaid professionals, working only in their spare time" (Grodsky 2009: 697). Indeed, the fact that the commission was "starved of funding" also reinforced the "widespread perception among Serbian elites that Koštunica's truth commission was an attempt to side-step international pressures for ICTY cooperation" (Grodsky 2009: 697).

The commission's financially and politically challenged status deterioriated even more sharply when Prime Minister Đinđić decided, though reluctantly, to arrange a series of handovers to the International Criminal Tribunal for the former Yugoslavia, including the June 2001

transfer of Milošević to the Hague (Grodsky 2009: 697). Although the official work of the *Yugoslav Truth and Reconciliation Commission* started in February 2002, it was disbanded in February 2003, two years short of its three-year mandate, without producing a report (United States Institute of Peace 2013a). It only left behind a few internal documents and a single round table meeting in May 2002 where “the commission’s members faced criticism for their inactivity and avoidance to explore the massive violations of human rights perpetrated by Serbian forces” (Ilic 2004: 10). The bureaucratic reorganization of the Federal Republic of Yugoslavia into the State Union of Serbia and Montenegro in December 2003 caused all official institutional traces of the existence of a truth commission to disappear (Dimitrijević 2008: 18). Its website, “launched only in November 2002, had within two years been turned into a pornography site” (Grodsky 2009: 697). Serbia’s was the truth commission that never was.

## 6.3 Amnesty International on the Yugoslav Truth and Reconciliation Commission

*Amnesty International* made the *Yugoslav Truth and Reconciliation Commission* the subject of its reportage only once. In its April 2010 report titled “Commissioning Justice: Truth Commissions and Criminal Justice”, *Amnesty International* analyzed 40 truth commissions with respect to their relationship with criminal prosecutions and amnesties. The *Yugoslav Truth and Reconciliation Commission* was briefly mentioned and, similar to the general observations regarding the commission, Koštunica’s intention to delay cooperation with the International Criminal Tribunal for the former Yugoslavia was noted: “According to some observers”, said *Amnesty International*, “the

Yugoslav authorities had proposed the commission in an effort to justify their refusal to send former president Slobodan Milošević to The Hague for trial" (Amnesty International 2010a: 18). However, *Amnesty* also reminded its readers of, if not tacitly backed, the position taken by the Parliamentary Assembly of the Council of Europe which noted that the *Yugoslav Truth and Reconciliation Commission* "may in no circumstances substitute itself" for the International Criminal Tribunal for the former Yugoslavia (Amnesty International 2010a: 18). This position was in line with the below-mentioned repeated claim by *Amnesty International* vis-à-vis the *Sierra Leone Truth and Reconciliation Commission* that truth commissions can never be a substitute for criminal prosecutions.

*Amnesty International* also emphasized the fact that the Serbian truth commission "was initially intended to grant amnesty to those accused of "crimes against the state" in exchange for their testimony" (Amnesty International 2010a: 18). Indeed, as Dejan Ilic notes, the *South African Truth and Reconciliation Commission* was at first considered "a relevant model for the Yugoslav one" and, in 2001, Alex Boraine, one of the masterminds behind the South African commission, even became a "special consultant for the matters of truth and reconciliation of both Vojislav Koštunica, at that time the President of Federal Yugoslavia, and the commission, formed by Koštunica's decree" (Ilic 2004: 7). *Amnesty* noted that, unlike the *South African Truth and Reconciliation Commission*, the Yugoslav commission "did not have any power to grant amnesty". The human rights organization believed that this lack of amnesty-granting power was reflective of the general trend represented by the 40 truth commissions analyzed in its report. According to this trend, the "practice of truth commissions rejects the granting of amnesty for crimes under international law in connection with truth-seeking processes" (Amnesty International 2010a: 5).

*Amnesty International* showed agreement with this trend by voicing the following opinion regarding justice in the face of gross human rights violations:

> Although an effective truth commission can go a long way to satisfying a state's obligation to respect, protect and promote the victims' right to truth, there is no alternative to investigation and prosecution of crimes under international law. (Amnesty International 2010a: 6)

As in its evaluation of the truth commission in Guatemala, *Amnesty International* consistently supported the idea of the primacy of criminal justice, that is, the perspective of doing justice to law by realizing individual criminal accountability for gross human rights violations which are always considered international crimes in light of international law.

## 6.4 Human Rights Watch on the Yugoslav Truth and Reconciliation Commission

Like *Amnesty International*, *Human Rights Watch* took note of the issue of the Yugoslav truth commission, without even mentioning it by its name, in a single report. Actually, the issue was simply noted in a passing remark within a report about the legacy of the Milošević trial at the International Criminal Tribunal for the former Yugoslavia. It was as if *Human Rights Watch* paid the *Yugoslav Truth and Reconciliation Commission* the attention it deserved. The total failure of the commission, as depicted in its politicized mandate, its deliberate design aimed at sidestepping the international court, and its inability to produce a final report, was likely to have made it unworthy of any lengthy and serious consideration by the human rights organization. Therefore, it would not be too far-fetched to claim that *Human Rights Watch*, like

many other observers of the early justice policy in post-Milošević Serbia, seemed to concur with the comment made by one Western diplomat in Belgrade regarding the *Yugoslav Truth and Reconciliation Commission*: “The commission was set up as a sop to the international community... It is not being done by serious people for serious reasons” (Grodsky 2009: 697).

In any case, the short paragraph in the December 2006 *Human Rights Watch* report titled “Weighing the Evidence: Lessons from the Slobodan Milošević Trial” made the following important point, not so much about the disbanded and ineffective *Yugoslav Truth and Reconciliation*, but regarding the absence of any working truth commission in the region of former Yugoslavia:

> *Human Rights Watch* has examined a portion of the evidence presented to the court [International Criminal Tribunal for the former Yugoslavia] during the Milošević trial. We believe this evidence should have an effect on how future generations understand the region’s history and how the conflicts came to pass: *because no truth commission has been established to look into the events in the region, the Milošević trial may be one of the few venues in which a great deal of evidence was consolidated about the conflicts.* The fact that Milošević had the opportunity to test the prosecutor’s evidence in cross-examination enhances its value as a historical record. (Human Rights Watch 2006b: 1; emphasis mine)

This concise argument contained an important idea regarding the importance of an international criminal trial and the judicial truth produced through the evidence raised in a criminal prosecution in the absence of a truth commission or, rather, in the presence of a very politicized truth commission like the one established by Koštunica’s decree. Similar to the spirit of the *Amnesty International* statement on truth commissions being no substitute for criminal prosecutions, *Human Rights Watch* stressed the encouraging possibility of criminal

prosecutions acting as surrogate truth commissions. In other words, according to *Human Rights Watch*, one can do justice to history by doing justice to law, and the facts gathered by a criminal justice process can have important epistemic justice functions, making the possibility of an original contribution by a truth commission less significant.

## 6.5 International Center for Transitional Justice on the Yugoslav Truth and Reconciliation Commission

The *International Center for Transitional Justice* produced three reports on the Serbian truth commission. Unlike *Amnesty International* and *Human Rights Watch*, the *Center*, founded in 2001, produced one of its first reports at a time when the *Yugoslav Truth and Reconciliation Commission* was still existent. The April 2002 "Summary Report regarding Local, Regional and International Documentation of War Crimes and Human Rights Violations in the former Yugoslavia" prepared by Djordje Djordjević and commissioned by the *International Center for Transitional Justice* identified "a broad range of agencies in and outside the region of the former Yugoslavia that collect documentation on war crimes and other human rights violations committed in the 1991-1999 wars" (International Center for Transitional Justice 2002a: 4). The *Yugoslav Truth and Reconciliation Commission* was one of the agencies described in the report and grouped under the category of national agencies and the sub-category of governmental commissions (International Center for Transitional Justice 2002a: 6). The following, very uncritical consideration of the commission is striking:

> The Yugoslav Truth and Reconciliation Commission (FRY TRC) was established in March 2001 by president Koštunica to investigate all the conflicts in the territory of the former

> Yugoslavia. The Commission—an independent body—is made up of 15 members. Its task is to construct a comprehensive account of the 1990-1999 wars, publicize its findings, and "influence the writing of history." The work is set to start by collecting testimonies and conducting public hearings of all those involved in some of the most tragic episodes of the war, such as those that took place in Vukovar, Srebrenica, Strpci and during the "Storm" operation in Croatia. The Commission does not have its own documentation database and will therefore have to make use of documents collected by other agencies. Most of the allocated funds will go towards the processing of this massive documentation on the events in the region in the last fifteen years. Following its completion, the entire document will be made available to the public. (International Center for Transitional Justice 2002a: 8-9)

It is interesting to note that, though published in April 2002, the report did not mention the already publicized objections and criticisms raised against the *Yugoslav Truth and Reconciliation Commission* during and after its inception in March 2001. For instance, the report did not problematize the commission's mandate which covers "all the conflicts in the territory of the former Yugoslavia" and depicted the commission as an "independent body ... made up of 15 members" (International Center for Transitional Justice 2002a: 8). However, as early as April 2001, Vojin Dimitrijević —the commission member who resigned, along with two other members, soon after he found out that he was a member— questioned the legitimacy of a "national" endeavour formed by the citizens of a Serbian Yugoslavia to judge the criminal events of the former, multi-ethnic Yugoslavia.

The contrast between the report's claim that the commission is independent and Dimitrijević's criticism that "this commission will not be viewed as an impartial one" is important to the extent that the *International Center for Transitional Justice* avoided making a normative evaluation of the controversial Yugoslav truth commission (Ilic 2004: 9). Similarly, the report did not question how a Serbian commission will be

able to collect testimonies and conduct public hearings "of all those involved", that is, Bosnian Muslims, Kosovar Albanians, Croatians and the Romani among others. Finally, although the methodology of the commission, that is, the processing of documents collected by other agencies without having its own documentation database, demanded critical assessment, the report simply did not make one. In any case, that the *International Center for Transitional Justice* chose to employ neutral description rather than critical evaluation in one of its first reports is noteworthy. This might be viewed as the cautious behaviour of a new organization trying to make a name for itself in the expanding sphere of international human rights organizations.

In its October 2004 report titled "Serbia and Montenegro: Selected Developments in Transitional Justice" written by Mark Freeman, the *International Center for Transitional Justice* changed its descriptive stance to a more critical appraisal of the *Yugoslav Truth and Reconciliation Commission*. The report started with the observation that

> [a]lthough the ICTY [International Criminal Tribunal for the former Yugoslavia] has made a significant contribution to clarifying the historical record of war crimes committed in the former Yugoslavia, the ongoing perception that it is an anti-Serb body has severely limited its impact in Serbia and Montenegro [the name of the state that is the Federal Republic of Yugoslavia prior to 2003 and Serbia from 2006 onwards]. (International Center for Transitional Justice 2004a: 7)

Therefore, the demand for a truth commission that satisfied the sentiments of every ethnic group involved in the Yugoslav wars was seen as a legitimate one. However, as the report stated, "the only state in the region to actually establish a truth commission is Serbia and Montenegro" and "[u]nfortunately, its experience is a case study in how *not* to establish or run an effective commission" (International Center for Transitional Justice 2004a: 7).

The points raised in the report to characterize the ineffectiveness of the *Yugoslav Truth and Reconciliation Commission* were as follows: First of all, the "brief text" of Koštunica's decree provided too narrow a mandate (International Center for Transitional Justice 2004a: 7). Secondly, a diverse commission membership was lacking insofar as "there were only two ethnic minority representatives and no members of religious communities other than the Serbian Orthodox Church", making the commission "Serbian, rather than Yugoslav" (International Center for Transitional Justice 2004a: 7). Thirdly, "there was no public consultation or debate in advance" regarding the commission's structure (International Center for Transitional Justice 2004a: 7). Fourthly, its lack of wide civil society support reinforced the opinion that the commission was "a weak attempt to placate" the international community which pressured Koštunica to deal with the legacy of the Milošević era (International Center for Transitional Justice 2004a: 7). Fifthly and finally, that the commission's mandate focused on "the causes of the wars and related atrocities, rather than their effects" was very problematic because a commission established in Serbia without the representation of various ethnic communities of the former Yugoslavia was not to be deemed appropriate "to objectively assess the truth about the causes of the war" (International Center for Transitional Justice 2004a: 8). As the report stressed, because the commission's mandate did not focus on "Serbia's responsibility for wartime violations and their effects on victims", it was bound to be perceived as "a mechanism to help justify Serbian wartime atrocities" (International Center for Transitional Justice 2004a: 8).

Among the lessons drawn from the failed Serbian experience in the report, it is important to emphasize that one of the most improper features of the *Yugoslav Truth and Reconciliation Commission* was that it was a "national" commission that took upon the task of examining the

“causes and consequences” of a “region-wide”, multi-ethnic and even multi-national conflict (International Center for Transitional Justice 2004a: 8). This is an important reservation on the part of the *International Center for Transitional Justice*. As the *International Center for Transitional Justice* reportage on the Guatemalan truth commission showed, the Center assigned importance to the fact that the *Historical Clarification Commission* was able to not only “gather testimony” to look into the effects of human rights violations, but also “analyze the structural causes of why the violence occurred in the first place” (International Center for Transitional Justice 2012: 11). Therefore, the *International Center for Transitional Justice* seems to hold the opinion that analyzing the causes of gross human rights violations is a good idea for a truth commission when and if the commissioners are selected through public consultation; a large, competent staff is available; there is a strong civil society support for the effort and detailed local non-governmental organizations’ documentation of the violations as in the case of Guatemala (Quinn and Freeman 2003: 1123); and, more importantly, when such a causal analysis reveals the historical roots of the long marginalization of an indigenous community like the Maya of Guatemala. On other hand, analyzing the causes of gross human rights violations is a bad idea for a truth commission when and if the commissioners are arbitrarily selected; there is a limited staff; civil society involvement is low (International Center for Transitional Justice 2004a: 7-9); and, more importantly, when such a causal analysis is made by the representatives of a single community in a conflict involving many. This duality reflected in the *International Center for Transitional Justice* reporting on Guatemalan and Yugoslav commissions is a significant indicator of the attention paid by the human rights organization to details and nuances which matter a lot when one is dealing with complex institutions like truth commissions.

The final *International Center for Transitional Justice* report on the *Yugoslav Truth and Reconciliation Commission* is dated January 2007, titled "Against the Current: War Crimes Prosecutions in Serbia" and written by Bogdan Ivanišević. Here, within the space of a single paragraph, the fact that Serbia's transition was marked by the absence of successful "formal truth-seeking efforts" was duly noted (International Center for Transitional Justice 2007: 3). Then, it was argued that this absence showed "the political strength in Serbia of those who resist coming to terms with the past" and "the predominance of a widely accepted popular view of recent history in which Serbia is the greater victim of external forces" (International Center for Transitional Justice 2007: 3). Among the reasons why the Yugoslav commission failed, that the makeup of the commission and the personality of Koštunica "aroused distrust among the victims and in civil society" was emphasized. Similar to the 2004 *International Center for Transitional Justice* report on the *Yugoslav Truth and Reconciliation Commission*, the commission's stated objective "to investigate the causes of the wars and related atrocities rather than focusing only on establishing the facts about the crimes" was highlighted. But this was done so without reiterating the critical tone of the 2004 report which found a national commission's focus on the causes of an internationalized conflict highly problematic. On the whole, the most important aspect of the *Center*'s reporting on the Yugoslav case remained the consideration of the question of when it is a good idea for a truth commission to engage in an analysis of the causes and origins of gross human rights violations. The *International Center for Transitional Justice*, in its reporting across the cases of Guatemala and Serbia, attested the difficulty of providing a "one-size-fits-all" answer to this question. I will return to this topic in Chapter 8, section 8.3. Note, however, that the *Center*'s criticism of the Yugoslav commission differed from that of *Amnesty* and *Human Rights*

*Watch*. While the latter two organizations were more interested in how a truth commission relates to courts and courtroom procedures designed to punish persons responsible for gross violations, the former was concerned with how a truth commission can reflect the variety of political communities involved in a multifaceted conflict. This difference is caused by the distinction between the perspectives of criminal justice and transitional justice. As the *Center*'s reportage in the Serbian case showed, transitional justice is ultimately interested in the construction of political communities in general and, in the particular case of Serbia, the question of how a truth commission can find a balanced way to relate to diverse ethno-national political allegiances. As I argued in Chapter 1 and will further discuss in Chapter 8 and Conclusion, such interest accounts for the prudential focus of a transitional justice approach, as opposed to the ethical focus of a criminal justice approach. What remains unconsidered in both approaches is the possibility of an ethical perspective specific to the institution of truth commission.

# CHAPTER 7

# SIERRA LEONE: SEEKING TRUTH IN THE MIDST OF INTERNATIONAL PROSECUTIONS AND A NATIONAL AMNESTY

## 7.1 WAR IN SIERRA LEONE, 1991-2002

Sierra Leone is a small West African country with a population of 5.6 million bordering Guinea to the northeast, Liberia to the southeast and the Atlantic Ocean to the southwest (United Nations 2013). Its capital Freetown had a colonial past that dated back to the late 18th and early 19th century, when freed African slaves from places as diverse as America, the West Indies, Jamaica and Britain arrived and "transformed the city from an international transit center for slavery to a refuge for transatlantic slave victims" (Mboka 2010: 118-119). Freetown became a British Crown colony in 1808, whereas the rest of what constitutes the contemporary Sierra Leone was declared the Sierra Leone British Protectorate in 1896. "Under the indirect rule policy, the British colonial empire governed the Crown colony through its governor who in turn administered the protectorate through the district officers" (Mboka 2010: 120). Local traditional leaders called the "paramount chiefs" reported to

the district officers, but also effectively established themselves within this system of governance as “direct representatives of their subjects” (Mboka 2010: 121). As Abu Karimu Mboka notes, the chiefdoms occupied a strategic position in the overall administrative structure, “because the success of the Crown colony depended on the cooperation of the chiefs”, especially in terms of tax collection, and “local residents looked up to the same chiefs for protection against harsh government policies” (Mboka 2010: 121). Hence, a corrupt political system based on “regional and patrimonial politics” emerged (Mboka 2010: 121). The governmental mechanisms based on chiefdoms which were linked to the central colonial administration encouraged favouritism along ethnic and tribal lines at the local level, contributing to a long history of social and economic antagonisms that influenced the background of the contemporary civil war.

Today an ethnically diverse republic, Sierra Leone consists of two large ethnic groups, the 31% Mende found in the south and the 35% Temne in the north. The Krio, who are the descendants of freed Jamaican slaves who settled in the area of Freetown in the late 18th century, represent only 2% of the population, though their language, English-based Creole, is a lingua franca understood by 95% of the people. The country is predominantly Muslim (60%), with 10% practising Christianity and 30% subscribing to other indigenous religions (The World Factbook 2013c). According to the 2013 Human Development Report prepared by the United Nations Development Programme, Sierra Leone is the 177th country out of 187 in the Human Development Index (HDI). It is a country with “low human development”, that is, 48.1 years of life expectancy, 3.3 mean years of schooling of adults, $881 Gross National Income per capita (United Nations Development Programme 2013c). The Polity IV Scale characterizes the country as an autocracy for most part of its civil war,

an autocracy being generally defined by "the authoritarian rule of personalistic rulers, military juntas, or one-party structures ... [which] may allow some space for political participation or impose some effective limits on executive authority" (Marshall and Cole 2011: 9; Polity IV 2013b).

The toll in the Sierra Leone civil war was horrific. In eleven years,

> an estimated 150,000 people died, more than half the country was rendered homeless, 600,000 refugees (12% of the population) fled to neighbouring countries, more than 200,000 women were raped, and about 1,000 civilians suffered the amputation of one or more limbs. (Richards 2005: 946)

The conflict begins with the entry of around a hundred guerrilla fighters into eastern Sierra Leone from Liberia in March 1991 (Peters 2011: 62). This first group of insurgents included Sierra Leoneans as well as fighters from the National Patriotic Front of Liberia (NPFL), an armed group led by Charles Taylor fighting a civil war in the neighbouring Liberia against the Samuel Doe government that came to power in a military coup in 1980. Calling themselves the Revolutionary United Front (RUF), this first group of guerrilla forces who were supported by Taylor also included Sierra Leonean fighters who received training in Muammar Gaddafi's Libya in 1987-1988. The proclaimed aim of the Revolutionary United Front was "to overthrow the president, Major General Joseph Saidu Momoh of the All People's Congress, whose previous leader, President Siaka Stevens, had declared Sierra Leone a one-party state in 1978" (Peters 2011: 63).

As the Revolutionary United Front gained greater control in the far eastern part of Sierra Leone in the months following the incursion in March 1991 (Peters 2011: 64), a considerably weak Sierra Leone Army with insufficient manpower was even forced to borrow "men from the United Liberation Movement of Liberia, a group countering Taylor's

NPFL [National Patriotic Front of Liberia" (Denov 2010: 66). In the first year of the conflict, the Revolutionary United Front recruited, sometimes coercively, from among school pupils in the Sierra Leone-Liberia border region and school drop-outs working in alluvial diamond mining (Peters 2011: 63). Some of the initial recruits perceived the war in ethnic terms and "joined the RUF [Revolutionary United Front] because they saw it as a Mende uprising against the Temne-dominated APC [All People's Congress] party" (Peters 2011: 63). But the motivations behind the insurgency were more amorphous. According to Krijn Peters, they reflected "a rural crisis expressed in terms of unresolved tensions between landowners and marginalised rural youth". This was "an unaddressed crisis of youth that currently manifests itself in many African countries — which was further reinforced and triggered by a collapsing patrimonial state" (Peters 2011: ii). This definition accounts for the persistence of diverse local antagonisms caused by the unjust system of traditional chiefdoms in the post-colonial era. But still a certain amorphousness and impenetrable aspect of the war in Sierra Leone remains. Compared to the armed conflicts in Guatemala and the former Yugoslavia, the Sierra Leone civil war is, admittedly, more confusing, and this not simply because "it fits no prevailing stereotype" (Richards 2005: 950). It also seems to lack a strategic background informing how and why it was carried out. Unlike the anti-communist and racist "national security" agenda of the Guatemalan state or the "Greater Serbia" project fuelling the Yugoslav wars, the brutality of the war in Sierra Leone appears (reminiscent of the lesson drawn by Hannah Arendt in *Eichmann in Jerusalem*) less rational than banal and its evilness reveals a massive thoughtlessness. Although the conditions of extreme poverty might help to understand the specificity of this case, I will refrain from pretending to have a full grasp of how this war emerged or rather exploded. I have to recommend caution on the part

of the reader, too, as what follows below is a mere sketch of this many-sided and chaotic civil war.

In an April 1992 report, *Amnesty International* gave examples of human rights violations documented by its representatives which reflected the violent beginnings of the conflict. Towards the end of 1991, according to *Amnesty*, the Sierra Leone government began to detain and torture suspected rebels. For instance, one detainee, who "had reportedly been forced under duress to go with the rebels" when they attacked his village, was "captured in the bush in September 1991" and detained in army headquarters as a suspected rebel. He "was reportedly tied with his arms behind his back, then hung up by his arms and bayoneted by soldiers. He was only released and given hospital treatment" when his friends intervened (Amnesty International 1992: 4). Other captured rebels were also reportedly ill-treated, "sometimes imprisoned inside a wire cage", and in the case of women "alleged to have been rebels' girlfriends, ... publicly whipped by soldiers" (Amnesty International 1992: 5). Torture was not the only type of human rights violation documented by *Amnesty International*. The year 1991 also witnessed acts of extrajudicial executions. In one case in July 1991, "a suspected rebel was paraded before crowds, ... encouraged to try to escape and, when he ran away, was shot dead" (Amnesty International 1992: 6). Some suspects were reportedly killed after they were "made to dig their own graves" or "drowned in the river" (Amnesty International 1992: 6). The problem of distinguishing between civilians and rebels in the chaos of the war was evident as early as 1991 as in the example of a man "reportedly killed by soldiers ... because he was mistaken for a man of the same name who was believed to have joined the rebels" (Amnesty International 1992: 7). In addition to government crimes against suspected rebels, *Amnesty International* reported the killings committed by the National Patriotic Front of Liberia and the

Revolutionary United Front of Sierra Leone. These killings included 16 traders "publicly beheaded" in May 1991 and mass executions in the countryside which was "said to be full of the corpses of young men, women and children" (Amnesty International 1992: 11). The children of those "who fled from the rebels, to hide in the bush for weeks or months ... have reportedly died from malnutrition and disease" (Amnesty International 1992: 11). The violence continued until mid-March 1992 when "rebels reportedly killed at least 20 and possibly as many as 50 people as they fled their houses" (Amnesty International 1992: 11). In one case, they were allegedly responsible for "setting fire to a house and burning alive a woman and her two children" (Amnesty International 1992: 11).

A military coup in April 1992 by "a faction of young army officers" carried the conflict into its next stage (Richards 2005: 947). "President Momoh fled at the first sight of protesting soldiers, and the protestors were more or less given the president's seat" (Peters 2011: 64). Captain Valentine Strasser, the new head of state aged 27, established the National Provisional Ruling Council (NPRC) replacing the All People's Congress rule of Momoh. This marked the first of two military coups during Sierra Leone's war (Denov 2010: 67). As the war continued, its infamous "blood diamond" aspect also became more visible.[47] "In 1993, Strasser's government reportedly exported US$435

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[47] Sierra Leone is a country "whose economy depends essentially on revenues from its mineral resources", particularly diamonds. The *Sierra Leone Truth and Reconciliation Commission* examined in its report *Witness to Truth* the role of the diamonds in the Sierra Leone war and reached the following conclusions: "The exploitation of minerals and in particular diamonds did not cause the conflict but rather fuelled it. Diamonds were used by most of the armed factions to finance their war efforts. The sale of diamonds has contributed in large measure to the procurement and proliferation of small arms within the sub-region [i.e. West Africa]. Successive post-colonial governments in Sierra Leone have mismanaged the diamond industry and placed its effective control in the hands of non-Sierra Leoneans in a way that has not benefited the majority of the people. The state never had effective control of the

*(cont'd overleaf)*

million in illicit diamonds to Sweden" (Denov 2010: 67). Another significant aspect of the National Provisional Ruling Council rule was the intensive recruitment "in the capital and provincial towns among unemployed youth" (Peters 2011: 65). This enabled the National Provisional Ruling Council to "expand the army from a pre-war figure of 3,000-4,000 to a 1993-1994 total of around 15,000-20,000" comprising new recruits characterised by lack of military training and discipline (Peters 2011: 65). Civilians were later to call this type of reckless soldiers " 'sobels'—soldiers by day, rebels by night" (Peters 2011: 65).

No real opportunity for engaging in peace negotiations arose during the National Provisional Ruling Council [NPRC] rule, "largely because the NPRC continued to maintain that the RUF [Revolutionary United Front] was a front for Charles Taylor and not an indigenous Sierra Leonean movement" (Richards 2005: 947). However, the Revolutionary United Front proved resilient and changed tactics by starting an effective guerrilla war, "no longer limiting itself to the eastern part of the country" (Peters 2011: 66). This change in the character of the rebel organization led the war to a "brutal phase ... that spread the conflict all over the country" (Bevernage 2012: 68). By the end of 1994, the Revolutionary United Front was running "six permanent bush camps ... from which it was able to carry out raids" (Denov 2010: 68).

The 1994 "revitalization" of the RUF was also linked to the so-called "sobel" (soldier-rebel) phenomenon to the extent that Strasser himself announced that "at least 20 per cent of his forces were disloyal" (Denov 2010: 68). Army soldiers leaving behind weapons for and rotating control of diamond mines with the Revolutionary United Front was enough to prove, in the eyes of the civilians, that "the line between

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diamond industry prior to or during the conflict period" (Sierra Leone Truth and Reconciliation Commission 2004b: 53).

the army and its opponents became increasingly blurred" (Denov 2010: 68; Peters 2011: 67). As factions apparently at war began to take equally damaging part in committing atrocities, the people returned to civil defense forces which first emerged for the sole purpose of protecting local communities, but later "developed into the well-armed and organised Civil Defense Force" or CDF also known as the *kamajors* (Bevernage 2012: 68-69; Denov 2010: 69). In time, the Civil Defense Force were to be implicated in gross human rights violations, too, "which sometimes were ethnically inspired" (Bevernage 2012: 68-69).

Another factor making the war more amorphous was the recruitment of mercenaries by the National Provisional Ruling Council starting from 1995 which were also used to train the Civil Defense Force in order to make the government forces "more effective in combating the RUF [Revolutionary United Front" (Peters 2011: 69). One of the mercenary forces, the South African private security firm Executive Outcomes (EO) was even given "a mining concession reportedly valued at US$30 million" because "the bankrupted NPRC [National Provisional Ruling Council] government was unable to pay" for the mercenaries' "services" (Peters 2011: 69). The Executive Outcomes, "which was led by retired white officers from the notorious apartheid-era 32$^{nd}$ battalion of the South African Special Forces", ended up becoming an actor accused of committing gross human rights violations (Denov 2010: 70). This was an example of how mineral resources contributed to the war effort of mercenaries who were stained by their involvement in South African apartheid and made the conflict more amorphous than it already was.

Domestic and international demands for democratic reform forced the National Provisional Ruling Council government to agree to hold elections in early 1996 (Richards 2005: 947; Bevernage 2012: 69). The news sparked a new wave of violence as rebels and sobels, largely

under the banner of the Revolutionary United Front, “tried to disrupt the polls” and “symbolically amputated the hands of thousands of civilians” as “a clear message to prospective voters” (Peters 2011: 73; Denov 2010: 71). Still, despite an ineffective January 1996 provisional ceasefire, the two rounds of elections in February and March resulted in the victory of the Sierra Leone People’s Party (SLPP), “even though it had been banned under a one-party constitution in 1978” (Richards 2005: 947). The new government under the presidency of Ahmed Tejan Kabbah, a retired United Nations bureaucrat, was formed (Richards 2005: 947; Bevernage 2012: 69), whereas the peace negotiations which began towards the end of the previous National Provisional Ruling Council rule went ahead despite the continuing attacks against the Revolutionary United Front by the Civil Defense Force and mercenaries (Peters 2011: 74). The Kabbah government claimed that it had no control over the attacks (Peters 2011: 74). The outcome of these peace talks was the Abidjan Agreement signed in November 1996. The Abidjan Agreement entailed “a cessation of hostilities, conversion of RUF [Revolutionary United Front] into a political party, a general amnesty, DDR [disarmament, demobilization and reintegration] for the combatants, downsizing of the army and withdrawal of EO [Executive Outcomes]” (Peters 2011: 253). However, this agreement failed to come to life and all sides to the conflict continued to engage in violence. Despite instituting a general amnesty, the Abidjan Agreement included no mechanisms —neither a criminal legal process, nor a non-punitive official investigation like a truth commission— to account for the human rights violations suffered during the conflict (Sierra Leone Truth and Reconciliation Commission 2004a: 23).

In February 1997, the Revolutionary United Front leader Foday Sankoh was arrested in Nigeria for “illegal smuggling of ammunition” (Denov 2010: 71), a development which caused an escalation of

Revolutionary United Front attacks in reaction to the capture of their leader (Peters 2011: 253). The support given by the Kabbah government to the Civil Defense Force further alienated the army, leading to a major clash between the Civil Defense Force and the army in May 1997 which left more than 100 dead (Peters 2011: 253). The first civilian government did not last long amidst this chaos and, on 25 May 1997, a military coup brought an Armed Forces Revolutionary Council (AFRC) to power. The Armed Forces Revolutionary Council, led by Major Johnny Paul Koroma, offered the Revolutionary United Front through its imprisoned leader to share power which Sankoh accepted (Peters 2011: 253). "The RUF [Revolutionary United Front] power-sharing trigerred an exodus of 400,000 Sierra Leoneans to neighbouring Guinea, Liberia and the Gambia in the 3 months following the coup" (Denov 2010: 73).

From October 1997 onwards, the Nigerian and Guinean foreign ministers, as part of their role in the Economic Community of West African States (ECOWAS), negotiated a peace plan that involved the restoration of constitutional government. However, the clashes between the Economic Community of West African States' Cease-Fire Monitoring Group (ECOMOG) and the AFRC/RUF [Armed Forces Revolutionary Council and Revolutionary United Front] forces led to the reinforcement of Nigerian troops in Sierra Leone which became by January 1998 around 10,000. Together with the Civil Defense Force, these Nigerian forces of Economic Community of West African States' Cease-Fire Monitoring Group (ECOMOG) forced the AFRC/RUF [Armed Forces Revolutionary Council and Revolutionary United Front] alliance out of Freetown to the north and east of the country in February 1998, enabling the Kabbah government to return to power in March 1998. In the meantime, Sankoh returned to the capital city of Freetown in custody (Peters 2011: 254).

In July 1998, the United Nations Security Council decided to send a military observer group to Sierra Leone (United Nations Observer Mission in Sierra Leone – UNOMSIL) “who documented the human rights abuses over a 6-month period” (Denov 2010: 74). When soldiers involved in the May 1997 coup were executed by the government and Sankoh was sentenced to death in October 1998, the Revolutionary United Front and ex-Armed Forces Revolutionary Council combatants countered with more attacks (Peters 2011: 254). In a July 1998 report titled “Sowing Terror: Atrocities Against Civilians in Sierra Leone” covering the period from February through June 1998, *Human Rights Watch* provided extensive documentation of gross human rights violations. *Human Rights Watch* argued that “the scale and grotesque nature of the AFRC/RUF [Armed Forces Revolutionary Council and Revolutionary United Front] attacks have set this round of violence against civilians apart from others” in Sierra Leone’s seven-year war. The *Human Rights Watch* report gave a detailed account of human rights violations committed by all sides of the war (Human Rights Watch 1998).

Based on the “testimony from dozens of survivors and witnesses”, *Human Rights Watch* reported that gross human rights violations “involving the physical mutilation, torture and murder of Sierra Leone civilians” committed by the AFRC/RUF [Armed Forces Revolutionary Council and Revolutionary United Front] included

> amputations by machete of one or both hands, arms, feet, legs, ears and buttocks and one or more fingers; lacerations to the head, neck, arms, legs, feet and torso; the gouging out of one or both eyes; rape; gunshot wounds to the head, torso and limbs; burns from explosives and other devices; injections with acid; and beatings. (Human Rights Watch 1998)

The story of Ruth B., a thirty-six year old farmer, is an exemplary account of a victim-survivor of sexual violence who "fled her village when attacked by the AFRC/RUF [Armed Forces Revolutionary Council and Revolutionary United Front], but was captured, beaten, raped, and forced to work" (Human Rights Watch 1998). It shows how rape, abduction, murder, torture, forced labour, mutilation and enslavement are not merely separately inflicted categories of crime, but all add up to form a total, amorphous and indiscriminate violation of humanity in the experience of a single individual:

> They took three of my children and killed my husband. The rest of us ran away. But we were captured by the junta [AFRC – Armed Forces Revolutionary Council], and they took the women away to carry their loads. I was with them one month. They held us in a house. One day while we were there and they were away, another group came ... and asked us what our mission was. We told them we were from Gandorhun, and they beat us. They beat us severely. They stomped on my stomach, and the next day, I was bleeding from my vagina as if I had had an operation. Now, I have serious backache. Later the two groups came together, and the second group told the first group that we were family members of the Kamajors [CDF – Civil Defense Force]. They used me for sex, and they cut my heels with their bayonets so I wouldn't run or walk off. But I escaped into the bush even though I was wounded. ... I didn't know who captured me. They were older and younger—adults and children. Some had uniforms and machetes, and some wore ordinary clothes, like jeans, and had guns. There were lots of nicknames; one of them was called "Blood." They said they didn't like Kabbah and said, "If he's there, we will continue to fight." They were both Liberian and Sierra Leonean. I could tell from their language. (Human Rights Watch 1998)

The Civil Defense Force was also reported to have committed gross human rights violations. According to the same *Human Rights Watch* report, some combatants of the Civil Defense Force followed a "take no prisoners" policy and, if they "caught [AFRC/RUF – Armed Forces Revolutionary Council and Revolutionary United Front] soldiers,

they burned them alive with tires and petrol" (Human Rights Watch 1998). Moreover, as noted in the report, throughout the said cycle of violence, all sides engaged in extensive recruitment of child soldiers.

In December 1998, the AFRC/RUF [Armed Forces Revolutionary Council and Revolutionary United Front] managed to kill hundreds of Nigerian soldiers and, in the meantime, "captured significant amounts of weapons and ammunition", gaining enough force to come within 50 kilometres of Freetown (Peters 2011: 254). This led to a further reinforcement of the Economic Community of West African States' Cease-Fire Monitoring Group (ECOMOG) forces which now comprised 15,000 troops. The Revolutionary United Front demanded the "immediate and unconditional release" of Sankoh and peace through dialogue. However, their failed attempt to take control of Freetown in January 1999, causing "5,000 deaths and numerous atrocities" in one week, further delegitimized their demand and, in the end, Sankoh remained a prisoner. The "reign of terror" in Freetown was named by the Revolutionary United Front as "Operation No Living Thing" (Denov 2010: 74). Sam Bockarie, Sankoh's loyal second man, even "announced on the BBC [British Broadcasting Corporation] newswire that it [Revolutionary United Front] planned to kill everyone, '[down] to the last chicken'" (Denov 2010: 74). The battle of Freetown saw the Economic Community of West African States' Cease-Fire Monitoring Group (ECOMOG) forces commit atrocities, too (Bevernage 2012: 69). By the end of January 1999, "West African leaders [began to] push for a negotiated settlement" (Peters 2011: 254). The deadly escalation of violence from February 1998 to January 1999 seemed to have forced outside actors to do something, however limited, in order to end this situation which was completely out of control and disturbingly resembled the Hobbesian state of nature.

In May 1999, a new round of peace talks commenced “after the promise of the release of Sankoh and a cease-fire” (Peters 2011: 255). This time, the outcome was the Lomé Peace Agreement, signed in July 1999 and entailing power sharing arrangements, a blanket amnesty for all combatants of the conflict, and the establishment of a *Truth and Reconciliation Commission*. “The Lomé Peace Agreement offered the RUF [Revolutionary United Front] a better deal than it had been offered in Abidjan”, as “[t]he death sentence on Sankoh was lifted, and the movement was offered three senior government posts” (Richards 2005: 949). The controversial blanket amnesty, on the other hand, was to affect the unfolding of the struggle for justice in Sierra Leone, with those negotiating the Lomé peace apparently interested in non-punitive measures. The United Nations representative, however, managed to attach “a disclaimer saying that the amnesty does not apply to international crimes” (Peters 2011: 255). This made it possible to later establish a prosecutorial institution like the Special Court for Sierra Leone that would try those considered to have the greatest responsibility for gross human rights violations and violations of humanitarian law. The implementation of the Lomé Agreement was “painfully slow, with limited access to RUF-controlled [Revolutionary United Front] areas and non-implementation of DDR [disarmament, demobilization and reintegration]” (Peters 2011: 255).

One year after the signing of the peace agreement and despite the parliamentary approval of the act establishing the *Sierra Leone Truth and Reconciliation Commission* in the February 2000, the situation worsened with “the capture of about 500 peacekeepers” in May 2000 “in a dispute over the return of disarmed fighters”. As a result, the United Nations Secretary-General recommended “immediate reinforcement of the peace keepers from 9,250 to 13,000” (Denov 2010: 75; Peters 2011: 255). The failure to demobilize the Revolutionary

United Front and the continuing acts of violence led President Kabbah to write in June 2000 "to the UN [United Nations] Secretary-General to request assistance in creating a Special Court". This culminated in the 14 August 2000 agreement between the United Nations and the Sierra Leone government "pursuant to Security Council Resolution 1315" establishing the Special Court to prosecute international crimes including war crimes and crimes against humanity (Peters 2011: 256).

The war still continued in different venues and forms, complicating the Lomé framework. In September 2000, a British military intervention took place against the so-called West Side Boys, a splinter rebel faction of the Armed Forces Revolutionary Council, freeing their hostages which included British soldiers and killing 26 of the rebels. After the intervention, the British stayed to "retrain and reorganize" the Sierra Leone army, contributing to the enforcement of peace (Denov 2010: 76; Richards 2005: 950). By the end of 2000, the United Nations Mission in Sierra Leone (UNAMSIL) deployed 17,500 troops, making it at the time the biggest peacekeeping force in the world, further demonstrating the determination to keep and enforce the peace (Denov 2010: 76; Peters 2011: 256). The "international attention and pressure to crack down on 'conflict diamonds'" and the sanctions imposed on Charles Taylor by the United Nations Security Council, "which included a ban on Liberian diamond exports, the strengthening of the existing arms embargo and the grounding of Liberian aircraft" helped to implement Lomé, too (Denov 2010: 76). Moreover, the demobilization of the combatants became more effective between May 2001 and January 2002 when "a total of 42,551 fighters" disbanded (Peters 2011: 256; Richards 2005: 950). Eventually, the end of the Sierra Leone war was officially declared on 18 January 2002 (Peters 2011: 256).

## 7.2 SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION, 2002-2004

The 1999 Lomé Peace Agreement promised the establishment of a truth and reconciliation commission that will deal with "the question of human rights violations since the beginning of the Sierra Leonean conflict in 1991" (Lomé, Article XXVI in United States Institute of Peace 2013b). In January 2000, after "national consultative processes" in which domestic civil society actors also played an important role (International Center for Transitional Justice 2004b: 2), a parliamentary act establishing this commission was adopted, specifying the mandate as follows:

> The object for which the Commission is established is to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the conflict in 1991 to the signing of the Lomé Peace Agreement; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of violations and abuses suffered. (United States Institute of Peace 2013c)

Although it was founded by the Parliament of Sierra Leone, this national commission also "had an international dimension because of the participation of the Special Representative of the Secretary-General for Sierra Leone and the High Commissioner for Human Rights in its establishment" (Schabas 2006: 23).

The *Truth and Reconciliation Commission* had seven members appointed by the President of Sierra Leone, including four Sierra Leone nationals and three internationals. The national members were selected through a consultative process involving the government, the Revolutionary United Front and several non-governmental actors,

whereas the international members were selected by the Office of the United Nations High Commissioner for Human Rights (International Center for Transitional Justice 2003: 10).[48] The staff, many of them Sierra Leoneans, was "mostly employed by the Commission", although there were several international heads of department recruited by the Office of the United Nations High Commissioner for Human Rights in Geneva (International Center for Transitional Justice 2003: 11; International Center for Transitional Justice 2004b: 3).

The commission was almost completely funded by international donors. However, compared to the Special Court for Sierra Leone, the other accountability mechanism established in the same period, the *Sierra Leone Truth and Reconciliation Commission* received "poor donor response" (Schabas 2006: 23). This lack of sufficient funding was, according to William A. Schabas, one of the international commissioners, was "a disappointing result that seems to indicate an indifference to [the] mission" of the Sierra Leone truth commission (Schabas 2006: 23).

The *Sierra Leone Truth and Reconciliation Commission* operated from July 2002 until October 2004 and "'generally approached its work in phases, each one focused on a primary task", namely, statement taking, public hearings and report writing (International Center for Transitional Justice 2004b: 3). The span of history that its work had to cover, though limited in the mandate to the armed conflict between 1991 and 1999, was indeed much broader. Because the Truth and Reconciliation Commission Act defined the commission's task as investigating and reporting on the "causes, nature and extent" of human

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[48] The selection process of the commissioners of the Sierra Leone truth commission was indeed a benchmark, against which the failure of the Yugoslav truth commission, in terms of the objective of designing transparent processes and an impartial structure, becomes clearer.

rights violations “including their antecedents”, this meant “it could look well back from 1991” (Schabas 2006: 23). Indeed, “its analysis of the background of the conflict, and its attempt to identify causes” was “[o]ne of the most significant, but also potentially controversial, contributions” of the commission (Schabas 2006: 27). Moreover, as Schabas noted, certain aspects of the mandate such as “addressing impunity, responding to the needs of the victims, promoting healing and reconciliation and preventing a repetition of the violations and abuses suffered ... had no precise temporal framework” (Schabas 2006: 23). Therefore, the commission saw in these aspects its “authority to look at post-Lomé events” and was able to report on the aftermath of the signing of the Lomé Peace Agreement in 1999 (Schabas 2006: 23).

The subject matter under investigation was formulated as “violations and abuses of human rights and international humanitarian law”, which, as Schabas admits, was “a very broad concept” (Schabas 2006: 24). This formulation significantly differed from the mandate of the *South African Truth and Reconciliation Commission*, “a model familiar to the Parliament of Sierra Leone” (Schabas 2006: 24). In the case of South Africa, the violations to be examined were specifically defined as “gross human rights violations”, a notion which comprised “killing, abduction, torture, and severe ill-treatment” (Hayner 2001: 73), but whose scope was considerably narrower than the one conceptualized in this dissertation. According to Hayner, this narrow scope was criticized for presenting a “compromised truth” which excluded other types of violations (Hayner 2001: 74). Schabas, on the other hand, argues that the broad terminology of “violations and abuses” in the case of Sierra Leone helped fend off such criticism. In this way, the *Sierra Leone Truth and Reconciliation Commission* moved beyond “the classic violations of bodily integrity, such as killings, rapes and other violent crimes, and ... crimes of destruction of property or pillage” and chose to stress “the

indivisibility of human rights" (Schabas 2006: 25). According to Schabas, the value of an emphasis on indivisible human rights "became abundantly clear when victims reported to the Commission":

> Although they would describe their initial victimization in terms of physical violence or destruction of property, by and large they told the Commission that they were not seeking compensation or restitution tied to these specific harms, but rather "schooling my children", "medical care" and "decent housing." For the victims of terrible brutality, the future lay in the vindication of their economic and social rights. (Schabas 2006: 25)

Therefore, the broadness and vagueness of the notion of "violations and abuses of human rights and international humanitarian law" proved useful for the commission to open-endedly deal with and include within its report the detailed victim accounts of what human rights violations might entail. Actually the commission's report explicitly stated that the commission's mandate "is a very broad one ... not limited by use of adjectives such as 'gross' or 'serious'" (Sierra Leone Truth and Reconciliation Commission 2004a: 36). In this way, the question of how certain human rights violations might become "gross" (even though they might not appear so at first sight) due to their expansive, contagious and continuous nature was also implicitly addressed. Accordingly, the understanding that "gross" violations need not stop at violations of a limited set of civil and political rights, but might move on to causing economic and social deprivations was indirectly recognized. As noted in Chapter 3, this is in line with the meaning of the concept of gross human rights violations defined in this dissertation. The adjective "gross" does not specifically limit the definition of human rights violations, but, on the contrary, provides a key to understanding the limitless ways in which the intrusive and extensive nature of violations cause damage.

Victims' accounts provided an invaluable input into the statement taking phase of the commission in which nearly "seventy "statement takers" were recruited throughout the country", mostly drawn from civil society, non-governmental organizations and religious institutions and also ensuring that "a significant percentage" were women. "Approximately 7,000 statements, mainly from victims but with a not unsubstantial number of perpetrators, were compiled" (Schabas 2006: 25). As an appropriate methodology to deal with such an immense load of data, "representative statements that served to illustrate important aspects of the conflict" called "window cases" were identified. All statements were additionally subjected to statistical analysis (Schabas 2006: 26).

Several domestic nongovernmental organizations assisted the commission in its work. Campaing for Good Governance "undertook a "mapping" of the conflict based on more than 1000 statements gathered from victims and witnesses throughout the country, the first attempt since the start of the war to gather statements on such a wide scale" (International Center for Transitional Justice 2004b: 2). Additionally, National Forum for Human Rights and Manifesto 99 undertook "studies on the role of traditional authorities and practices in Sierra Leone, and how the TRC [*Truth and Reconciliation Commission*] might creatively engage them" (International Center for Transitional Justice 2004b: 2). All these works were submitted to the commission at the beginning of its operation.[49]

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[49] Similar to the Guatemalan case, the Sierra Leone official truth-seeking process was assisted by the efforts of nongovernmental organizations that were active before the establishment of the truth commission. The Serbian commission, on the other hand, did not manage to enter into a fruitful cooperation with such nongovernmental organizations, mainly due to the immature conclusion of its work. The silent dissolution of the Serbian commission, however, was largely caused by the apparent lack of transparency, impartiality and ingenousness in the process of its establishment.

When preparing its conclusions, the commission tried to overcome the "tendency by some to overlook crimes committed by the anti-RUF [Revolutionary United Front] forces, who, it is said, were fighting a just cause" (Schabas 2006: 28). Because its mandate clearly specified the task of addressing violations and abuses, whatever the identity of the perpetrator, the final report of the commission included findings that attributed responsibility to all sides of the conflict (Schabas 2006: 28).

Perhaps the most important aspect of the *Sierra Leone Truth and Reconciliation Commission* was the broader context of international accountability within which it operated. The novelty of the two-track accountability mechanism which involved the operation of the truth commission alongside an internationalized Special Court for Sierra Leone founded by a treaty signed between the United Nations and the government of Sierra Leone was a subject of great interest for everyone concerned. What made things more complicated was the existence of a blanket amnesty granted as part of the Lomé Peace Agreement that ended the war. The commission recognized in its findings that "it is generally desirable to prosecute perpetrators of serious human rights abuses" (Schabas 2006: 29). However, "amnesties should not be excluded entirely from the mechanisms available to those attempting to negotiate a cessation of hostilities" (Schabas 2006: 29).

That the amnesty provision of the peace agreement could not prevent the establishment of a process of international criminal prosecution institutionalized in the Special Court was made possible by the above-mentioned escalation of the conflict in May 2000. This escalation stalled the truth commission process and put the United Nations and the Sierra Leone government on a criminal justice track. In 2000, the United Nations Security Council supported the creation of a court "to try "persons who bear the greatest responsibility" for serious

violations of international humanitarian law and the laws of Sierra Leone" (Schabas 2006: 33). The agreement between the United Nations and the government was formalized in 2002.

Although some were concerned that the *Truth and Reconciliation Commission* would be misrepresented as the investigative arm of the Special Court and perpetrators would be disinclined to provide testimony to the commission, the confusion about the two institutions did not result in such unwanted consequences. As Schabas puts, "there was never any formal agreement between the two bodies, or was there any information sharing. Neither institution showed any interest in cooperation. Both seemed to value polite, neighbourly relations, and nothing more" (Schabas 2006: 36). Indeed, David Crane, the prosecutor of the Special Court, was kind enough to announce early on that "he was not interested in seeking information from the TRC [*Truth and Reconciliation Commission*]" (Schabas 2006: 36).

Nevertheless, the neighbourly relations were disrupted at one point. In August 2003, "some detainees of the Special Court asked to give public testimony to the TRC [*Truth and Reconciliation Commission*]" (Schabas 2006: 36). Geoffrey Robertson, the president of the Court, allowed defendants to appear before the commission in private, without authorizing a public hearing. Robertson seemed to think that the idea of a public testimony to be given by someone accused of and prosecuted for gross human rights violations made a mockery of the judicial process at the Special Court. The reason given by Robertson for his decision, which was seen too harsh by the supporters of the truth commission, deserves to be quoted at length:

> A man in custody awaiting trial on very serious charges is to be paraded, in the very court where that trial will shortly be held, before a Bishop [Joseph Christian Humper, Chairman of the *Sierra Leone Truth and Reconciliation Commission*] rather than a presiding judge and permitted to broadcast live to the nation for a

> day or so uninterrupted. Thereafter for the following day or days, he will be examined by a barrister and then questioned from the bench by the Bishop and some five or six fellow Commissioners. In the immediate vicinity will be press, prosecutors and "victims." His counsel will be present and permitted to interject but there are no fixed procedures and no Rules of Evidence. The event will have the appearance of a trial, at least the appearance of a sort of trial familiar from centuries past, although the first day of uninterrupted testimony may resemble more a very long party political broadcast. ... I cannot believe that the Nuremberg Tribunal would have allowed its prisoners to participate in such a spectacle, had there been a TRC [*Truth and Reconciliation Commission*] in Germany after the war, or that the International Criminal Tribunals for the Former Yugoslavia or Rwanda would readily permit indictees awaiting trial to broadcast in this way to the people of Serbia or Rwanda. If it is the case that local TRCs [Truth and Reconciliation Commissions] and international courts are to work together in efforts to produce post-conflict justice in other theatres of war in the future, I do not believe that granting this application for public testimony would be a helpful precedent. (Schabas 2006: 36-37)

Schabas argues that behind Robertson's strongly worded opinion lies a disagreement about a "division of labour" between the court and the commission. The general assumption was that the court will try the so-called "big fish", that is, those bearing the greatest responsibility for violations, whereas the commission will work with the so-called "small fish" or "small fry", that is, low-level perpetrators. But the commission's application to the court for a public hearing of detainees showed that the commission also considered the "big fish" as an indispensable part of the impartial historical record of the violations and abuses it was tasked to write (Schabas 2006: 37). The detainees "ultimately refused to cooperate with the TRC [*Truth and Reconciliation Commission*]" (Schabas 2006: 36).

The whole point of this story of disagreement is perhaps simpler than it might at first seem. First of all, the immediate lesson to be drawn from this example for the future instances of court-commission

interaction is that it is not easy for a nonjudicial body like a truth commission to make use of the persons and materials already involved in a judicial process. It would be wise to keep a safe distance from the world of criminal justice so that the commission does not appear weak next to the legal authority of the courts. Secondly and perhaps more importantly, the distinct and potentially conflicting roles played by the commission and the Special Court in Sierra Leone did not lead them to failure, but produced a relationship that Schabas characterized as "more synergistic than many might have thought" (Schabas 2006: 39). In the end, the commission was able to successfully finalize its operation, leaving behind a detailed report, a concrete set of recommendations and a legacy open to the scrutiny and monitoring of international human rights organizations. I will now return to these organizations' evaluations concerning the *Sierra Leone Truth and Reconciliation Commission*.

## 7.3 Amnesty International on the Sierra Leone Truth and Reconciliation Commission

Before the establishment of the *Sierra Leone Truth and Reconciliation Commission*, in its evaluation of the Lomé Peace Agreement, *Amnesty International* was skeptic about the future possible benefit of a truth commission. The July 1999 report, just two days after the signing of the Lomé Agreement, stated that "it is not clear that this commission will fully meet the rights of victims and their families to truth, justice and reparation". *Amnesty International* further argued that a "lasting peace" is made possible not only by establishing "the truth about gross human rights abuses", but also by holding "those responsible ... accountable" (Amnesty International 1999b). In its August 1999 report, *Amnesty*

*International* qualified its skepticism regarding the prospective truth commission by emphasizing the fact that “an amnesty for human rights abuses has already been granted” which will negatively affect the outcome of any truth-seeking effort (Amnesty International 1999c).

In November 1999, *Amnesty International* protested once again “the blanket amnesty provided by the peace agreement [which] grants complete immunity to the perpetrators”, but, on the other hand, welcomed the fact that

> [t]he UN [United Nations], as a signatory to the peace agreement, added a disclaimer that it does not recognize the amnesty as applying to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. (Amnesty International 1999d)

*Amnesty International* also hoped that “an international commission of inquiry [the future Special Court for Sierra Leone] as recommended by the UN [United Nations] High Commissioner for Human Rights” is established as soon as possible in order to address the issue of impunity (Amnesty International 1999d). In this report, we also saw a clear articulation of what a truth commission can achieve in the eyes of *Amnesty International*:

> While the Truth and Reconciliation Commission provided by the peace agreement cannot alone establish full accountability for ... human rights abuses, it can play a role in revealing the truth and may contribute towards the wider international investigation requested by the UN [United Nations] High Commissioner for Human Rights. (Amnesty International 1999d)

This was similar to the position that *Amnesty International* took with respect to Guatemala according to which the value of a truth commission is largely connected to its making a contribution towards the criminal investigation of human rights violators.

In its July 2000 report, reflecting on the continuing violence despite the peace agreement, *Amnesty International* questioned the "viability" of the *Truth and Reconciliation Commission* "in the current climate" and added that "more is needed to bring true justice and reconciliation and an end to impunity" (Amnesty International 2000a). The "more" that was needed according to *Amnesty* was criminal prosecution. This was revealed in two additional reports. In its November 2000 "Recommendations on the draft Statute of the Special Court", *Amnesty International* posited the following view regarding "[t]he choice between prosecution and non-judicial mechanisms":

> Amnesty International does not take a position on the use of non-judicial mechanisms such as truth commissions provided that they are not a substitute for justice. However, any truth commission should respect due process, establish the truth, facilitate reparations to victims and make recommendations to prevent a repetition of these crimes. (Amnesty International 2000b)

In December 2000, *Amnesty International* underlined its "view on impunity" by asserting that "investigations and prosecution are vital" to combat impunity. *Amnesty* explained that, regardless of the existence of a truth commission, the task of providing "a full account of the truth to the victim, their relatives and society" lied with criminal investigations: "Alleged perpetrators should be brought to trial and such trials should conclude with a clear verdict of guilt or innocence". *Amnesty International* was consistent throughout its reports that "the emergence of the truth" should lead to "accountability before the law". In other words, the question of whether a truth commission succeeds or fails was less significant in comparison to the design of truth-seeking as part of "the judicial process". As *Amnesty International* put forward in more than one occasion, "truth commissions are not a substitute for bringing

perpetrators of serious crimes and human rights violations to justice" (Amnesty International 2000c).

This view was reiterated by *Amnesty International* in its September 2001 report. The human rights organization considered the *Sierra Leone Truth and Reconciliation Commission* in terms of "its contribution to ending impunity [which] is likely to be extremely weak or non-existent" (Amnesty International 2001). According to *Amnesty*, the *Sierra Leone Truth and Reconciliation Commission* was legally impotent:

> The Truth and Reconciliation Commission cannot itself prosecute individuals and the amnesty conferred by the peace agreement effectively means that the Truth and Reconciliation Commission cannot recommend further investigations or prosecutions at the level of the national courts. (Amnesty International 2001)

One possible way in which the *Sierra Leone Truth and Reconciliation Commission* could be helpful in the field of criminal prosecution was through its relationship with the Special Court for Sierra Leone which did not begin its operations at the time. As *Amnesty International* noted, "it is undetermined whether the Truth and Reconciliation Commission can recommend that an individual be investigated or prosecuted by the Special Court" (Amnesty International 2001). Once again, a major concern for *Amnesty International* was to recommend a connection between the truth commission and the Special Court so that the truth established by the commission could feed into the criminal prosecution of the perpetrators of gross human rights violations. This is why *Amnesty* asserted in every opportunity, as in the September 2001 report, that "[t]ruth commissions are not substitutes for bringing perpetrators of serious violations of human rights to justice". Still, according to this view, truth commissions were expected to contribute to prosecutorial efforts. Therefore, *Amnesty* argued that, when the

relationship between the Special Court and the commission was to be clarified, it “should include provisions for the Truth and Reconciliation Commission to recommend that the Special Court carry out investigations into specific incidents or allegations against specific individuals”. In this way, the *Sierra Leone Truth and Reconciliation Commission* would be able to contribute “towards efforts to address impunity, one of [its] stated objectives” (Amnesty International 2001).

Despite the importance assigned by *Amnesty International* to the possible prosecutorial cooperation between the truth commission and the Special Court, it remained critical of the mandates of both institutions: “[They] will only address certain human rights abuses committed during the conflict” (Amnesty International 2002a). *Amnesty International* did not explicitly express which human rights abuses it considered to be excluded from the compass of the Sierra Leone justice institutions.

This critique of the partial coverage of human rights violations by both the *Sierra Leone Truth and Reconciliation Commission* and the Special Court for Sierra Leone was given more emphasis in a May 2002 report: Here *Amnesty International* set the bar very high by calling for “all those alleged to have committed human rights abuses to be brought to justice” (Amnesty International 2002b). It was said that “the Special Court will only prosecute a limited number of those who have committed war crimes and crimes against humanity” and *Amnesty* considered this a weakness. The report also reiterated the basic weakness of the *Sierra Leone Truth and Reconciliation Commission* according to *Amnesty International*, that is, the fact that “it is not a judicial mechanism”. Nevertheless, the most interesting aspect of the report was that Amnesty International clearly formulates a maximalist expectation regarding the combat against impunity. It claimed that “[n]either the Special Court nor the Truth and Reconciliation Commission can be a

substitute for bringing to justice all alleged perpetrators of human rights abuses within the national judicial system" (Amnesty International 2002b). Compared to its earlier reports, this was indeed a more specific and also a more demanding assertion. Here *Amnesty International* seemed to argue that true justice can only be achieved when *all* alleged perpetrators —which would amount to at least thousands of people if we take into account the number of ex-combatants involved in the disarmament, demobilization and reintegration (DDR) programme— are brought to trial in the extremely weak and highly dysfunctional, if not politicised and corrupt, judicial structures of one of the poorest countries in the world. The question of why one of the best known international human rights organizations in the world would make such a demanding claim despite the apparent discouraging realities on the ground can be explained by the moral/ethical imperatives informing *Amnesty*'s work. As stated at the outset in Chapter 1, because an ethical imperative calls for an action that is good in itself irrespective of its outcome, *Amnesty*'s position is defined by defending the ethical imperative of criminal punishment regardless of the empirical obstacles to its fulfillment.

Despite its highly idealistic argument, however, *Amnesty International* underlined one important aspect of achieving long lasting justice in Sierra Leone. This is the argument for addressing gross human rights violations "within the national judicial system" (Amnesty International 2002b). It refered to this point in another report also dated May 2002 as follows:

> The Special Court and the Truth and Reconciliation Commission are both extremely important institutions which deserve the full support of the international community. However, equally important is the rebuilding of the national justice system. (Amnesty International 2002c)

This was indeed extremely important, especially because nationalization of international criminal justice standards largely determines the extent to which the truth outlined by truth commissions could be subject to criminal prosecutions. This was the case for the prospect of realizing justice in the face of gross human rights violations in all three situations under scrutiny in this dissertation, regardless of the existence or absence of international tribunals.

The main reason put forward by *Amnesty International* for underlining the importance of national justice stemmed from the fact that “[t]he Special Court for Sierra Leone will try only a relatively small number of people: those considered to “bear the greatest responsibility” for crimes committed after 30 November 1996”. Moreover, *Amnesty International* was concerned about the possible impunity of many alleged perpetrators with less than greatest responsibility for gross human rights violations who will be under the protection of “the general amnesty provided by the 1999 Lomé peace agreement” (Amnesty International 2003). Until this amnesty was repealed, it would not be possible for the national courts of Sierra Leone “to address impunity for those cases which will not be tried before the Special Court” (Amnesty International 2003). Therefore, *Amnesty International* consistently argued for the empowerment of the national judicial system due to the insufficiencies noted in the post-conflict justice institutions of Sierra Leone: The temporal mandate of the Special Court meant that it would prosecute “only a handful of the very large number of people suspected of committing ... crimes”, whereas the *Truth and Reconciliation Commission*, by default, “cannot be a substitute for a court of law” (Amnesty International 2005).

Actually, *Amnesty International* never idealized what national courts could realistically achieve. The organization was particularly disquieted by “the discrepancy between the Special Court and the

national courts" insofar as the latter "continue[d] to impose death sentences" (Amnesty International 2005). This showed the lingering moral and legal deficit suffered in the national justice system. In a 2009 call to the Sierra Leone President Koroma to commute all death row prisoners, *Amnesty International* referred to the *Truth and Reconciliation Commission* report which "found the continued existence of the death penalty on the country's statute books to be "an affront to civilised society based on the right to life"" (Amnesty International 2009b). Much of *Amnesty International*'s post-*Truth and Reconciliation Commission* evaluations contained such reminders as to the legal obligation of the Sierra Leone government "to implement all the recommendations of the TRC [Truth and Reconciliation Commission] report" (Amnesty International 2009b).

In a 2007 report on "getting reparations right for survivors of sexual violence", *Amnesty International* made a dispiriting assessment of the outcome of the *Truth and Reconciliation* process by saying that "more than three years after receiving the [*Truth and Reconciliation Commission's*] report, the government has shown little sign of commitment to its legal obligations" which involved the implementation of the commission's recommendations in a "faithful" and "timely" manner (Amnesty International 2007a). It also underlined the importance of "criminal prosecutions" especially in the case of "survivors of sexual violence who are stigmatized rather than the perpetrators of the crimes that have been committed against them". According to *Amnesty International*, "[c]riminal prosecutions challenge the social assumptions that underlie that stigmatization" (Amnesty International 2007a). The human rights organization insisted that

> [a] properly functioning justice system should enable survivors to describe what has happened to them in an environment that

> protects their dignity and helps to end impunity for the horrific crimes they have suffered. (Amnesty International 2007b)

This was the consistent *Amnesty* position on the irreplaceable importance of judicial remedies. Although it applauded the conviction of three senior members of the Armed Forces Revolutionary Council (AFRC) by the Special Court for war crimes and crimes against humanity, including rape and sexual slavery as "the first instance of anyone in Sierra Leone being held to account for war-related crimes", it also argued that justice will remain partial until the amnesty clause of the Lomé Agreement which bars national prosecutions was revoked so that "all crimes committed during the conflict" were effectively investigated (Amnesty International 2007b).

*Amnesty International*'s solid stance against selective justice persisted in 2010, when it objected to the "inquiry into the 1992 extra-judicial execution of 26 people", not because they did not deserve to be investigated, but because this "signalled an isolated process that focuses only on past crimes alleged to have been committed by political opponents of the administration" (Amnesty International 2010b). *Amnesty International*'s claim was as follows:

> For the authorities to focus only on certain crimes and to ignore the thousands of other serious human rights violations identified in the Truth and Reconciliation Commission report risks further undermining the weak rule of law in Sierra Leone. (Amnesty International 2010b)

Indeed, as *Amnesty* noted, the *Sierra Leone Truth and Reconciliation Commission* "already considered the crimes in question and found that the National Provisional Ruling Council (NPRC) executed 26 individuals accused of plotting a coup" (Amnesty International 2010b). This execution was, in the words of the commission, "without due process of law and in flagrant violation of international standards" (Amnesty

International 2010b). Nevertheless, a selective utilization of the *Truth and Reconciliation Commission* report meant, according to *Amnesty*, abusing the authoritative and impartial historical record of gross violations provided by the commission for partial, political purposes. Such utilization ran against the principle that "justice must be fair, impartial and independent" (Amnesty International 2010b). Therefore, this example showed how the epistemic justice provided by a truth commission in report form can be used and abused in a disingenuous and politicized criminal justice process, long after the commission completed its task. *Amnesty* took note of this bad example to reaffirm its position based on supporting the total prosecution of all crimes identified by a truth commission. Accordingly, in its 2010 submission to the United Nations Universal Period Review, *Amnesty International* argued for "a comprehensive plan of action to investigate and prosecute all crimes committed in Sierra Leone for which impunity continues to exist" (Amnesty International 2010c). According to *Amnesty*, two further qualifications should also ensue: First, those suspected of having committed gross human rights violations must be brought to justice "in accordance with international standards of fairness" and secondly, "legislation to make war crimes and crimes against humanity crimes under national law" must be enacted so as to reinforce the prospects for the national prosecution of international crimes (Amnesty International 2010c).

In the most recent Annual Reports of *Amnesty International*, the Lomé amnesty continued to be portrayed as the main obstacle before the prosecution of those responsible for gross human rights violations under national law. Non-implementation of other important *Truth and Reconciliation Commission* recommendations remained a problem, too. However, in terms of combating impunity, *Amnesty* conceded that the small number of trials before the Special Court contributed to a "partial

disclosure of the truth about ... serious crimes" (Amnesty International 2011). This was another way of saying that, from *Amnesty International*'s perspective, the full disclosure of the truth about gross human rights violations required nothing less than subjecting all perpetrators to the imperatives of national criminal law. I will now take a look at the position of *Human Rights Watch* on the *Sierra Leone Truth and Reconciliation Commission* to see whether this organization also puts forward a similar argument for the primacy of the perspective of criminal justice in understanding truth commissions.

## 7.4 HUMAN RIGHTS WATCH ON THE SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION

In April 2002, *Human Rights Watch* published a report on "The Interrelationship between the Sierra Leone Special Court and Truth and Reconciliation Commission" before any of these justice institutions became operational. The main concern of the report was the issue of "information sharing" and how it would come to life in a prospective "written agreement that permits [both institutions] to interact cooperatively" (Human Rights Watch 2002c).

*Human Rights Watch* based its evaluation on three observations. First, because the 2002 Special Court Agreement Act obliged every institution under Sierra Leone law to comply with the orders of the Special Court, [50] the *Truth and Reconciliation Commission* as an institution under Sierra Leone law was left in a difficult position. As an

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[50] The Special Court Agreement 2002 (Ratification) Act 2002 states the following: "Notwithstanding any other law, every natural person, corporation, or other body created by or under Sierra Leone law shall comply with any direction specified in an order of the Special Court" (Human Rights Watch 2002c).

institution legally permitted “to receive information on a confidential basis”, the *Truth and Reconciliation Commission* could potentially be forced by the Special Court “to produce even “confidential” materials”, which in turn “could potentially undermine the willingness of persons to come before the TRC [Truth and Reconciliation Commission] to provide testimony” (Human Rights Watch 2002c). *Human Rights Watch* argued that this aspect of the interrelationship between the court and the commission should be clarified so that “people who are providing information to the institutions will know how that information can be used” (Human Rights Watch 2002c). If not, persons otherwise ready to cooperate with the commission will not be able to easily trust the claim that the confidential information received by the commission will remain confidential.

Secondly, considering the budgetary and time constraints of each institution, *Human Rights Watch* argued that they “should not be compelled to perform duplicative work where there is no issue of witness confidentiality or similary compelling reasons” (Human Rights Watch 2002c). Therefore,

> where there is no issue of “confidentiality” or where sharing of information would not compromise an ongoing Special Court investigation or reveal privileged information, the institutions should be able to freely share information, including sharing information from the Special Court to the TRC [Truth and Reconciliation Commission]”. (Human Rights Watch 2002c)

Thirdly, because the 2002 Special Court Agreement Act provided that “the Special Court will be able to subpoena[51] the TRC [Truth and Reconciliation Commission]”, *Human Rights Watch* warned that this

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[51] Subpoena power involves issuing a writ for the summoning of witnesses or the submission of evidence, as records or documents, before a court.

could “waste precious resources in drafting document requests and responding to them, and most likely create an unduly litigious and hostile relationship” between the two institutions (Human Rights Watch 2002c). Alternatively, *Human Rights Watch* recommended that subpoenas should be used “as a last resort” and “information sharing could be handled by liaison persons who would be appointed by the institutions” (Human Rights Watch 2002c). In this way, the risk of “diminish[ing] the institutions in the eyes of the public” due to “unnecessary disputes” could be averted (Human Rights Watch 2002c).

In January 2003, after “[b]oth bodies became operational in the third quarter of 2002”, *Human Rights Watch* made a broader assessment, but on a more specific topic. Its report titled ““We Will Kill You If You Cry”: Sexual Violence in the Sierra Leone Conflict” made concrete recommendations to both the Special Court and the *Truth and Reconciliation Commission* (Human Rights Watch 2003: 61). First of all, *Human Rights Watch* argued that

> the work of the TRC [Truth and Reconciliation Commission] would be greatly enhanced were the staff of the TRC to be gender-balanced with women represented at all levels and to include persons with expertise in sexual and gender-based violence. (Human Rights Watch 2003: 62)

Regarding the wider judicial system, *Human Rights Watch* stated that the final report of the *Sierra Leone Truth and Reconciliation Commission* should include legal recommendations “toward eliminating the discriminatory nature of customary and general law, and on legal reform and human rights training for government authorities, including members of the criminal justice system” (Human Rights Watch 2003: 62).

In its evaluation of the Special Court, *Human Rights Watch* primarily took note of the specific crimes of sexual violence which the

court has the power to prosecute under the general category of crimes against humanity, that is, “rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence” (Human Rights Watch 2003: 63). Because the mandate of the court allowed it to prosecute only those “persons who bear the greatest responsibility” for these gross violations, in other words, only “the so-called “big fish” and not the “small fry” or those persons who in many instances actually committed the violations”, *Human Rights Watch* acknowledged the fact that “the SCSL [Special Court for Sierra Leone] will only try a limited number of alleged perpetrators” (Human Rights Watch 2003: 64-65). In this regard, *Human Rights Watch* called for the use of the principle of universal jurisdiction under which “all countries are under the obligation” to investigate gross human rights violations (Human Rights Watch 2003: 65). It referred to the report of the “special rapporteur for violence against women” who stressed the same point as follows: “crimes of gender-based violence must be investigated and documented for possible criminal prosecution in the domestic courts of other States which may have jurisdiction” (Human Rights Watch 2003: 66).

On the whole, *Human Rights Watch* attached importance to the effective coexistence of both the Special Court for Sierra Leone and the *Truth and Reconciliation Commission* as exemplified by its recommendations regarding the issue of information sharing. Nevertheless, the organization also made specific assessments regarding the ways in which the truth commission could recommend judicial reforms and the limited mandate of the Special Court could be improved. The inability to prosecute the low-level perpetrators of gross human rights violations was noted as a big problem. Therefore, *Human Rights Watch* proposed foreign prosecution of international crimes committed during the Sierra Leonean war through the exercise of universal jurisdiction as the means to overcome the enduring impunity

of violators. Both *Amnesty International* and *Human Rights Watch* seemed to share the concern that limited prosecutions put many guilty parties beyond the reach of criminal law. In other words, they shared a perspective, as they did in the Guatemalan and Serbian cases, that assigned primacy to the ethical obligation to prosecute and punish gross violators. Let us look at the *International Center for Transitional Justice* reports on the *Sierra Leone Truth and Reconciliation Commission* and see whether this organization also consistently adopts the position that it did in previous cases, namely, the prudential perspective of transitional justice.

## 7.5 International Center for Transitional Justice on the Sierra Leone Truth and Reconciliation Commission

Like the first report of *Human Rights Watch* on the *Sierra Leone Truth and Reconciliation Commission* dated April 2002, the first *International Center for Transitional Justice* report dated June 2002 focused on "the relationship between the Special Court and the Truth and Reconciliaton Commission of Sierra Leone" (International Center for Transitional Justice 2002b: 1). Authored by Marieke Wierda, Priscilla Hayner and Paul van Zyl and written at a time when both institutions became officially operational, the report argued that the court and the commission present "a unique opportunity to advance complementary processes of accountability" and made recommendations to help "minimize potential for rivalry" between the two (International Center for Transitional Justice 2002b: 2).

According to the *International Center for Transitional Justice*, there were at least two important aspects in which both institutions would fulfill "different but compatible roles in ensuring accountability"

(International Center for Transitional Justice 2002b: 2). First, the approach of the Special Court to patterns of violence, that is, patterns of gross human rights violations in the conceptual framework of this dissertation, “will be limited to the facts relevant to specific cases before it”, whereas the *Truth and Reconciliation Commission* “will compile a wider analysis of the patterns of violence and a more complete record of the conflict” (International Center for Transitional Justice 2002b: 2). Secondly, “a limited number of victims will take part in Special Court proceedings”, whereas the truth commission will provide “the main forum for victims and others to describe their experiences” (International Center for Transitional Justice 2002b: 2).

These two points of emphasis implied that the *International Center for Transitional Justice* did not consider the Special Court to be more important than the commission in terms of addressing the demand for justice, as opposed to the position put forward explicitly by *Amnesty* and implicitly by *Human Rights Watch* regarding the primacy of criminal justice vis-à-vis the truth commission. Indeed, the report referred to the Yugoslav experience where, according to the authors, the “limited number of criminal prosecutions [at the International Criminal Tribunal for the former Yugoslavia], no matter how successful, does not completely satisfy public or victim expectations for justice and acknowledgement” (International Center for Transitional Justice 2002b: 3). In this sense, the *International Center for Transitional Justice* assumed that the truth commission plays a vital role in eliminating truth and justice deficits caused by limited criminal prosecutions. Moreover, the organization held that the

> Special Court may benefit from, and even take judicial notice of portions of the TRC’s [Truth and Reconciliation Commission’s] final report which will describe the general factual background to certain crimes. (International Center for Transitional Justice 2002b: 4)

Overall, the report recommended that “the relationship between the institutions remain cordial but distant to allow each to function autonomously and fulfill its potential” (International Center for Transitional Justice 2002b: 19). As an instance of such a relationship, the *Center* suggested that “[i]n the case of persons indicted by the Special Court, the commission should decline to interview them altogether until the proceedings against them are concluded” (International Center for Transitional Justice 2002b: 18). This issue, as shown above, was the most important point of disagreement that arose between the court and the commission. The *International Center for Transitional Justice* seemed to have foreseen such a scenario and thereby prudently issued a warning.

The second *International Center for Transitional Justice* report on the *Sierra Leone Truth and Reconciliation Commission* focused on “Ex-Combatant Views of the Truth and Reconciliation Commission and the Special Court in Sierra Leone” (International Center for Transitional Justice 2002c: 2). In this study prepared in September 2002, in partnership with the Post-Conflict Reintegration Initiative for Development and Empowerment (PRIDE), an indigenous Sierra Leone nongovernmental organization, ex-combatants were considered “essential witnesses to what happened in this war and the greatest challenge to reconciliation” (International Center for Transitional Justice 2002c: 2). Therefore, a research was conducted through questionnaires

> designed to capture ex-combatants’ knowledge of and views about the TRC [Truth and Reconciliation Commission] and Special Court and determine how these were affected by (1) sensitization about the two institutions and (2) whether ex-combatants believe the TRC [Truth and Reconciliation Commission] will share confidential information with the Special Court. (International Center for Transitional Justice 2002c: 2)

The most crucial findings of this research were as follows: First of all, "ex-combatants are willing and eager to participate in the TRC [Truth and Reconciliation Commission] because they believe the TRC will facilitate reintegration into their former communities" (International Center for Transitional Justice 2002c: 5). Secondly, "[a]n overwhelming majority, 88% ultimately said that the TRC [Truth and Reconciliation Commission] would bring reconciliation to the country" (International Center for Transitional Justice 2002c: 6). Perhaps, most importantly, the report sent out a powerful reminder that

> the Sierra Leone civil war differs from those dealt with by past TRCs [Truth and Reconciliation Commissions] in that 70% of the ex-combatants feel that they were forcefully conscripted and themselves victimized. ... In this conflict, the line between victim and perpetrator is vague, if not non-existent. (International Center for Transitional Justice 2002c: 15)

Still, the report argued that some ex-combatants "expressed a great need to ask for forgiveness", which, facilitated by the truth commission, is the indispensable "element of reconciliation" bringing about ex-combatants' "reintegration" into their communities (International Center for Transitional Justice 2002c: 15). The Post-Conflict Reintegration Initiative for Development and Empowerment (PRIDE), the Sierra Leonean partner organization that contributed to this *International Center for Transitional Justice* report, made the following claim concerning this matter: "a failure by the TRC [*Truth and Reconciliation Commission*] to reach out adequately to ex-combatants would hinder reintegration and reconciliation efforts by creating disappointment and neglecting an opportunity for ex-combatants to ask for forgiveness" (International Center for Transitional Justice 2002c: 6).

Another significant conclusion drawn from the research was that "support for the institutions [i.e. both the court and the commission]

depends greatly on ex-combatants hearing about and properly understanding them; hence, the need for effective sensitization" (International Center for Transitional Justice 2002c: 29). As part of the importance given to the issue of correcting common misconceptions like the one that perceived the truth commission as the investigative arm of the Special Court, *International Center for Transitional Justice* seemed to agree with the view of the Post-Conflict Reintegration Initiative for Development and Empowerment (PRIDE) that saw their job primarily as "[giving] the ex-combatants accurate information and allow[ing] them to reach their own conclusions about the institutions" (International Center for Transitional Justice 2002c: 29).

In accordance with this understanding, the third report of the *International Center for Transitional Justice* (written by Paul James-Allen, Sheku B. S. Lahai and Jamie O'Connell and commissioned by the *Center* in cooperation with the Sierra Leonean organization National Forum for Human Rights) was a March 2003 work called "Sierra Leone's Truth and Reconciliation Commission and Special Court: A Citizen's Handbook" (International Center for Transitional Justice 2003). Prepared for "a non-specialist audience" with the objective of helping Sierra Leoneans "to understand the accountability institutions and to engage with them as responsible, empowered citizens", the citizen's handbook reflected an important example of the work of *International Center for Transitional Justice*. The organization believed that it was imperative that the newly active court and commission would be accurately perceived by their beneficiaries. After all, "the TRC [Truth and Reconciliation Commission] needs statements from victims and perpetrators and the Special Court needs information for its investigations" (International Center for Transitional Justice 2003: iii). According to the *Center*, both institutions needed informed citizens in order to successfully complete their mandates.

Finally, as part of its Case Study Series, the *International Center for Transitional Justice* published a briefing paper written by Priscilla Hayner in January 2004, titled “The Sierra Leone Truth and Reconciliation Commission: Reviewing the First Year” (International Center for Transitional Justice 2004b). As its title openly suggested, this was an evaluation of the work of the commission during its operation by an important expert of truth commissions who was also the Director of the Outreach and Analysis Unit at the *Center* (International Center for Transitional Justice 2004b: 1). The *Center* noted the following developments regarding the commission’s work:

> By August 2003, the Commission had taken more than 8000 statements from victims, witnesses, and perpetrators. Hinting at the remarkable findings that were likely to follow, in January 2003 it released an early analysis of the first 1300 statements, which included reports of 200 cases of rape or sexual violence and more than 1000 killings. Approximately 10 percent of the reported cases involved child perpetrators. The statements identified 3000 victims who had suffered approximately 4000 violations, including abductions, amputations, killing, torture, rape and other sexual abuse, and looting. (International Center for Transitional Justice 2004b: 3)

Appreciative of the commission’s activity, the report referred back to the 2002 study conducted with the Post-Conflict Reintegration Initiative for Development and Empowerment which “showed that ex-combatants from all sides generally support the TRC’s [Truth and Reconciliation Commission’s] work” (International Center for Transitional Justice 2004b: 4). Assuming that many ex-combatants were also perpetrators of human rights violations in the conflict, the report noted the fact that “an unprecedented number of perpetrators have come forward to the TRC [Truth and Reconciliation Commission]” (“more than 13 percent of the 8000 individual statements are directly from perpetrators and approximately a third of those who appeared in hearings admitted to

their own wrongs, often in great detail") and saw this as a consequence of the ex-combatants' trust in the commission (International Center for Transitional Justice 2004b: 4). This trust was also reinforced after the perpetrators saw that "there was no reaction from the Special Court for those that did testify" (International Center for Transitional Justice 2004b: 4). This was a result of the Special Court strictly staying within the confines of its mandate that specifically dealt with "those having the greatest responsibility" for gross human rights violations.

Indeed, precisely because of the limited mandate of the Special Court which can prosecute "no more than two dozen perpetrators" and faciliate the participation of "only a small number of victims" in its cases, this final *International Center of Transitional Justice* report on the Sierra Leonean truth commission emphasized the importance of "the mix of accountability and reconciliation measures" (International Center for Transitional Justice 2004b: 7). Accordingly, reconciliation did not only mean the reintegration of ex-combatants into their communities which the commission supported by cooperating with traditional authorities practising reconciliation ceremonies. It also meant, in line with the task of the commission, "addressing the hard lessons that must be learned about the causes of the war, as well as the systemic and institutional weaknesses that still exist" (International Center for Transitional Justice 2004b: 7). Therefore, the *Center* perceived the task of "identifying those critical reforms that might improve the country and prevent further conflict" to be the key task of reconciliation through institution-building alongside that of accountability for past violations. This view was clearly put forward in the following concluding remarks of the report: "While the Commission may identify individual perpetrators, and will certainly address the facts around ... violations [the task of accountability], the most important contribution may well be in setting out ... recommended reforms" addressing institutional problems (International Center for

Transitional Justice 2004b: 7). This is consistent with the *International Center for Transitional Justice* positions taken in the cases of Guatemala and Serbia in which the *Center* proposed moving beyond individual-level justice involving criminal prosecutions towards community-level justice involving social harmony and institutional regeneration. Therefore, the *Center* upheld the perspective of transitional justice dealing with the responsibility for gross violations at the political/prudential level of rebuilding a sense of political community, rather than the personal level where the morality of human action is taken into account through the criminal justice perspective exemplified by *Amnesty* and *Human Rights Watch*.

On the whole, the difference between the approaches of *Amnesty International* and *Human Rights Watch*, on the one hand, and the *International Center for Transitional Justice*, on the other hand, persisted in all three cases, i.e., Guatemala, Serbia and Sierra Leone. Having completed the detailed presentation of cases and close reading of human rights reports, I will now move on to a reassessment of my main argument. Recall that I put forward a perspective of "epistemic justice" (i.e., truth commissions' minimal, absolutely necessary task of doing justice to history by solely providing an impartial historical account of gross violations), as opposed to "criminal justice" (doing justice to law by linking truth-seeking to criminal prosecutions, favoured by *Amnesty* and *Human Rights Watch*) and "transitional justice" (doing justice to politics by linking truth-seeking to political reconciliation, upheld by the *International Center for Transitional Justice*). In the next chapter, I will focus on and seek cross-cutting themes regarding the challenges, dilemmas and difficulties confronted by the work of commissions, as they were addressed in the human rights reports. Finally, in the concluding chapter, I will return to the overarching ethics-prudence tension defining the way we perceive truth commissions and derive

from the discussion of dilemmatic and problematic issues presented in Chapter 8 some lessons and recommendations for the effective practice of future truth commissions in light of the ethics of epistemic justice.

# CHAPTER 8

# CHALLENGES, DILEMMAS AND DIFFICULTIES OF REALIZING EPISTEMIC JUSTICE: COMPARING TRUTH COMMISSIONS' RELATION TO COURTS, VICTIMS AND CAUSALITY

This chapter aims at a classification and evaluation of the recurrent dilemmas and difficulties faced by truth commissions as dealt with in the human rights reports presented above. I have detected eight discernible issues grouped under three broader themes, revealing the problematic and challenging aspects in the work of truth commissions. The human rights organizations approach and discuss these issues in nine different years of reportage and eleven different reports. The table below[52] (Table 6) lists the dilemmatic issues, their corresponding themes, the names of the countries in relation to which the issues are discused, the names of the discussant human rights organizations and the arguments to which they relate the issues.

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[52] Abbreviations used in the table, namely, AI, HRW, ICTJ and ICTY, refer respectively to *Amnesty International*, *Human Rights Watch, International Center for Transitional Justice* and International Criminal Tribunal for the former Yugoslavia. The term "Commission" as used in the table refers to the truth commission of the country concerned.

The themes that represent the recurrent concerns and critical debates voiced by the human rights organizations are 1- courts, 2- victims and 3- causality. “Deterrence”, “truth” and “small fry” are the three issues that correspond to the theme of “truth commissions’ relation to courts”. Under this broader theme, each issue reveals a particular difficulty faced by a specific truth commission and is discussed across the reports of three human rights organizations (for instance, the challenge of contributing to deterrence is confined to the case of Guatemala, but discussed by *Amnesty* and *Human Rights Watch*). I will separately evaluate the organizations’ perspectives on these matters and try to construct a critique of the framework of critical justice espoused by *Amnesty International* and *Human Rights Watch*.

The other two themes, namely, “truth commissions’ relation to victims” (covering the issues of “political empowerment”, “national victimization” and “victim-perpetrators”) and “truth commissions’ relation to causality” (covering the issues of “origins of violence” and “responsibility and effects”), will lead me to evaluate and criticize the transitional justice framework adopted in the *International Center for Transitional Justice* reports. The basic concern that pervades the whole discussion will be the question of how an effective truth commission can be designed from the minimal ethical perspective of epistemic justice. This will be more directly addressed in Conclusion, where the discussion of dilemmas and difficulties concerning truth commissions’ relation to courts, victims and causality pursued in this chapter will be used to derive basic principles in the form of modest recommendations regarding the proper role of a truth commission in responding to gross violations.

*Table 6: Challenges, dilemmas and difficulties revealed in human rights reports concerning truth commissions*

| **Challenging issue** | **Theme** | **Country concerned** | **Discussant organization** | **Arguments to which the discussant relates the issue** |
|---|---|---|---|---|
| Deterrence | Courts | Guatemala | AI | Perpetrators become brazen if not held to account before courts (AI 1996). |
| Deterrence | Courts | Guatemala | HRW | If courts cannot investigate atrocities in recent history, they cannot deter violence in the future (HRW 2002a). |
| Truth | Courts | Serbia | AI | Commission cannot be a substitute of ICTY, i.e., criminal prosecution under international law (AI 2010). |
| Truth | Courts | Serbia | HRW | Evidence presented to ICTY has value as a historical record (HRW 2006b). |
| Truth | Courts | Serbia | ICTJ | ICTY clarified historical record of war crimes, but the perception that it is anti-Serb limited its impact (ICTJ 2004a). |
| Small fry | Courts | Sierra Leone | AI | Neither Special Court nor Commission can be a substitute for bringing violators to national justice (AI 2002b). |
| Small fry | Courts | Sierra Leone | HRW | All countries are obliged to investigate gross violations and prosecute those who committed them (HRW 2003). |
| Small fry | Courts | Sierra Leone | ICTJ | Ex-combatants believed that Commission will facilitate reintegration into their communities (ICTJ 2002c). |
| Political empowerment | Victims | Guatemala | ICTJ | Commission contributed to the participation of indigenous people in public life (ICTJ 2009a; 2012). |
| National victimization | Victims | Serbia | ICTJ | Absence of successful truth-seeking attests the prevalent view that Serbia is the greater victim (ICTJ 2007). |
| Victim-perpetrators | Victims | Sierra Leone | ICTJ | 70% of ex-combatants feel victimized. The line between victims and perpetrators is vague (ICTJ 2002c). |
| Origins of violence | Causes | Guatemala | ICTJ | Commission analyzed structural causes of past violence (why violence occurred in the first place) (ICTJ 2012). |
| Responsibility and effects | Causes | Serbia | ICTJ | Commission cannot objectively assess causes of war without focusing on Serbia's responsibility (ICTJ 2004a). |

## 8.1 TRUTH COMMISSIONS IN RELATION TO COURTS

### *8.1.1 DETERRING FUTURE GROSS VIOLATIONS IN GUATEMALA*

The issue of deterrence is not directly related to the work of truth commissions and their expected outcomes. Although the mandate of the *Sierra Leone Truth and Reconciliation Commission* includes the task of “prevent[ing] a repetition of violations and abuses suffered”, the historical truth of gross human rights violations in report form is not usually, by itself, up to this task. Deterrence, that is, discouraging, restraining and preventing the perpetrators of human rights violations from committing further violations, is generally an expected outcome of the judicial process institutionalized in courts. This was also apparent in the establishment of the International Criminal Tribunal for the former Yugoslavia in 1993, that is, in the midst of the Yugoslav wars. Accordingly, it was hoped that the court would contribute “to the deterrence of further violence on the ground” (Futamura 2008: 4). The debate on the real effects of the International Criminal Tribunal for the former Yugoslavia on the Yugoslav conflict still continues. However, certain facts on the ground pointing to the escalation of violence after the court’s establishment seem solid in the eyes of many critics who saw the court’s indictments and prosecutions to be “counterproductive for restoring peace in the region” (Futamura 2008: 4).

Indeed, this debate is the famous “justice v. peace” debate, based on the questioning of the role of human rights trials vis-à-vis peace processes that usually involve those political and military leaders who are wanted to be put on those trials. Therefore, the question posed by Anthony D’Amato in 1994 regarding the possible detrimental effects of the International Criminal Tribunal for the former Yugoslavia on the

Yugoslav peace process is still relevant: “Is it realistic to expect them [political and military leaders with supreme responsibility for the conduct of war] to agree to a peace settlement in Bosnia, if, directly following the agreement, they may find themselves in the dock?” (D’Amato 1994: 500). The critical question is whether one can risk the escalation of violence in the name of a moral/legal argument for deterrence through criminal punishment.

Two of the human rights organizations, *Amnesty International* and *Human Rights Watch*, identified their positions regarding this question in the context of their reportage on the *Historical Clarification Commission* of Guatemala. First of all, in 1996 when the Guatemalan truth commission was about to be established, *Amnesty International* agreed with the following argument of the United Nations Working Group on Enforced or Involuntary Disappearances: “Perpetrators of human rights violations, whether civilian or military, will become all the more brazen when they are not held to account before a court of law” (Amnesty International 1996: 12). In light of this argument, *Amnesty* recommended that the *Historical Clarification Commission* should “encourage the results of the Commission’s investigations being taken up by the relevant courts” (Amnesty International 1996: 12). In other words, *Amnesty* suggested that the commission should link the worth of its findings to their being utilized in a criminal justice process that would deter perpetrators and further violations.

A similar approach regarding Guatemala was taken by *Human Rights Watch* in 2002, reflecting on the genocide finding of the *Historical Clarification Commission*. The human rights organization expressed its “deep skepticism that cases could advance against powerful figures such as Efrain Rios Montt, a former head of state and the current President of Congress” responsible for the genocidal acts of the early 1980s (Human Righs Watch 2002a). The historical truth of

genocide had not been subjected to a criminal justice process as of 2002. *Human Rights Watch*, therefore, made the following assertion: "If the Guatemalan justice system cannot investigate the most serious atrocities committed in the country's recent history, there is little reason to expect that it will be able to deter political violence in the future" (Human Rights Watch 2002a). The organization saw the weakness of the Guatemalan courts in their incapacity to pursue judicial inquiries into the atrocities uncovered by the truth commission. Such incapacity, if continued, would mean that criminal justice would not be able to fulfill one of its basic functions, that of deterrence, and Guatemala will be doomed to the repetition of the gross violations in its recent past. Unlike *Amnesty*, *Human Rights Watch* did not define the encouragement of a criminal justice process based on the epistemic justice provided by the truth commission as one of the tasks of the *Historical Clarification Commission*. However, it presumed that if the historical truth of the atrocities officially reported by the commission was not fed into criminal investigations by the Guatemalan courts, that truth would be useless in terms of deterring future gross violations.

Generally, it is hoped that courts can deter by meting out punishment. Truth commissions, on the other hand, are nonpunitive instruments. The basic political good that they can offer is epistemic justice, that is, the provision of a history of gross human rights violations that is legitimate and plausible in the eyes of the wider society and its diverse segments. The contribution of such historical record to deterrence can only be accidental. Considering the fact that truth commissions need to gain access to the testimonies of not only victims, but also perpetrators, and preferrably in large numbers, an initial design that would connect the work of a truth commission to a criminal justice process could defeat the purpose of gathering firsthand accounts. This is simply because incorporating the aspiration to deter perpetrators from

committing future violations into the mandate of a truth commission could discourage perpetrators from giving statements to the truth commission. What both *Amnesty* and *Human Rights Watch* seem to suggest is that the truth of a truth commission should serve the higher purpose of criminal investigations in order to deter potential future violators from engaging in violations similar to those of the recent past. Otherwise, the history provided by the truth commission could not by itself demarcate a future state of security, distinct from the past filled with gross violations.

On the contrary, I argue that embedding the goal of deterrence in the original design of a truth commission would be a strategic mistake. It would derail the provision of epistemic justice, which truth commissions do best, by alienating the constituency of alleged perpetrators from the official truth-seeking process. The commission would be perceived as the investigative arm of courts which, as in the case of Guatemala, would most probably not even be able to pursue proper investigations in the first place due to being subject to political pressure or, even worse, repression that represent wartime vested interests persisting in peacetime.

Mark Freeman claims that “the importance of criminal trials remains unrivaled” in terms of their deterrent effects: “No other mechanism is perceived to have a greater impact on specific and general deterrence” (Freeman 2006: 10). But facts on the ground can be stubborn. The courts of Guatemala, where those trying to pursue criminal justice, such as prosecutors, judges, lawyers, and victims, are often the target of deadly attacks, should be assessed accordingly, that is, in light of what they can realistically achieve in their present condition. The crucial findings of the *Historical Clarification Commission* documenting numerous atrocities are still there, waiting their due process in effective tribunals. However, as Snyder and Vinjamuri notes,

“[w]here legal institutions are weak, domestic trials typically lack independence from political authorities, fail to dispense justice, and sometimes even fail to protect the security of trial participants” (Snyder and Vinjamuri 2003: 25). In Guatemala, domestic trials also considerably lack independence from the past patterns of continuing and expansive human rights violations. Operating in a period when the death squads were still active and the military possessed considerable power to keep oppressing its opponents, the *Historical Clarification Commission* survived, ironically and tragically, due to its lack of judicial powers and its disconnection from any criminal justice process. Its survival meant that it successfully completed what it could minimally accomplish, that is, the objective of epistemic justice. Its report did justice to the recent history of gross human rights violations which, after its publication, became a history of undeniable facts. These undeniable facts did not immediately deter future violations, but one day they might. For this to happen, a robust reform of the judicial branch, accompanied by a security sector totally cleansed from the illegal elements of the era of armed conflict, is a must. Fortunately, this daunting task did not fall within the remit of the *Historical Clarification Commission*. Otherwise, it would not be the success story it is today.

### *8.1.2 DEALING WITH THE TRUTH PRODUCED BY AN INTERNATIONAL COURT IN SERBIA*

*Amnesty* and *Human Rights Watch* raised the issue of deterrence in their reports on Guatemala — understandably so, because of the deeply embedded culture of impunity, that is, non-deterrence, that ruled the country. Similarly, the issue of truth is raised by all three human rights organizations in their reports on a particular country, this time

Serbia. This is also understandable insofar as the case of Serbia offers the great contradiction between the undeniable documentation of war crimes by an international court and an ethnic community's very powerful and popularly upheld denial of the "truth" produced by that very same court. Let us have a look at how each human rights organization approached this issue and its implications.

In a 2010 report containing its only mention of the *Yugoslav Truth and Reconciliation Commission*, *Amnesty* argued that the Serbian truth commission "may in no circumstances substitute itself" for the International Criminal Tribunal for the former Yugoslavia (Amnesty International 2010a: 18). Behind this warning lied the awareness that the Yugoslav commission was established to counteract the efforts of the international tribunal. President Koštunica, who established the commission, openly stated that history was being written in the Hague, where the court was located, and "the Serbs must intervene [with their truth commission] to make sure it is written right" (Ash 2002). As Timothy Garton Ash, a British historian who interviewed Koštunica at the time of the commission's establishment, observed, writing history *right* according to Koštunica meant writing a history "with a fair attribution of blame to others, whether Croats, Bosnians, Americans or British, for their part in the tragedy" (Ash 2002). As a result, the case of the Serbian truth commission was, by definition, a difficult case of contesting truth claims of the respective processes of international criminal prosecution and national truth-seeking, or worse, i.e., national truth manufacturing.

Behind *Amnesty*'s attachment of normative priority to the international court lied an argument regarding the realization of the right to truth:

> Although an effective truth commission can go a long way to satisfying a state's obligation to respect, protect and promote the

> victims' right to truth, there is no alternative to investigation and prosecution of crimes under international law. (Amnesty International 2010a: 6)

Read in a different light, this statement meant that *Amnesty* saw the truth commission as an instrument that only partially fulfilled the right to truth, whereas an international criminal prosecution offered the full realization of this human right. While *Amnesty* speaks of the "victims' right to truth", the literature on this relatively new human right agrees that the right also has a component that makes it a right not only of victims, but also of the whole society. Accordingly, Mark Freeman distinguishes between an individual's right to truth[53] and a "societal right to know the full truth concerning serious violations, both for its own sake and to avoid the future recurrence of such violations" (Freeman 2006: 7-8). Therefore, an evaluation by *Amnesty* of the contributions that can be made by truth commissions and criminal prosecutions on the society's, instead of victims', right to truth is absent in the above argument.

The literature on truth commissions, on the other hand, seems to suggest that the commissions are one of the best venues to realize the societal right to know the truth about gross human rights violations. For one, Priscilla Hayner makes the following claim regarding the potential of a truth commission:

> ... it can reveal a global truth of the broad patterns of events, and demonstrate without question the atrocities that took place and what forces were responsible. If it is careful and creative, it can also go far beyond simply outlining the facts of abuse, and make a major contribution in understanding how people and the

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[53] An individual's right to truth contains a right to have rights violations effectively investigated, to know the fate of disappeared relatives, to be informed of the state of official investigations into violations, to be provided with the remains of loved ones once they have been located, and to know the identity of those responsible for the violations (Freeman 2006: 7).

> country as a whole were affected, and what factors contributed to the violence. (Hayner 2001: 85)

Interestingly, such an appreciation of the role that a truth commission can play in "broad" or "global" historical clarification of the truth of violations is also extended to the International Criminal Tribunal for the former Yugoslavia by *Human Rights Watch*. As a result of its examination of the evidence presented to the international court during the Milošević trial, *Human Rights Watch* reaches the conclusion that "this evidence should have an effect on how future generations understand the region's history and how the conflicts came to pass" (Human Rights Watch 2006b: 1). According to the human rights organization, the inability so far to establish a truth commission that could "look into the events in the region" (an acknowledgement of the failure of the Serbian commission) vindicated the significance of the Milošević trial as "one of the few venues in which a great deal of evidence was consolidated about the conflicts" (Human Rights Watch 2006b: 1). *Human Rights Watch* also underlined the fact that because "Milošević had the opportunity to test the prosecutor's evidence in cross-examination", the trial's "value as a historical record" was solid (Human Rights Watch 2006b: 1). Here, *Human Rights Watch* seems to carry the argument in favour of the truth produced by the criminal tribunal (a type of truth, which I will call, for the sake of convenience, "criminal truth") from where *Amnesty* left off and into more assertive territory.

Indeed, there is a logic behind *Amnesty*'s insistence that individual victims' (as opposed to the whole society's) right to truth could be fulfilled in judicial investigations rather than truth commissions. As discussed in the wider literature on justice institutions, victim testimonies are provided to both truth commissions and courts in an attempt "to document the details of the events in which they participated

and to identify those responsible for the abuses and violence in which they were involved" (Chapman and Ball 2001: 7). This "detail-centered" testimonial truth, however, as Chapman and Ball recognize, "approximates what judicial investigators might do, and it is truth at an intensely micro-level" (Chapman and Ball 2001: 7). The much broader and valuable contribution of a truth commission, which also helps define its outcome as epistemic justice, distinct from criminal and other transitional variants, comes about in its processing of findings and testimonies gathered "at the micro-level (on particular incidents and in respect to specific people)" with the ultimate purpose of producing a truth "at the macro-level (to identify the broader patterns underlying gross violations of human rights)" (Chapman and Ball 2001: 7). *Human Rights Watch*, however, poses the question of whether an international criminal tribunal, not a truth commission, can achieve this transition from micro- to macro-truth and replies in the affirmative. The organization regards the International Criminal Tribunal for the former Yugoslavia as capable of producing a valuable historical record that can influence "how future generations understand the region's history and how the conflicts came to pass". This is macro-truth *par excellence*, contributing to the realization of the societal right to truth.

The approach of the *International Center for Transitional Justice* to the matter at hand, on the other hand, is not as convinced as that of *Human Rights Watch*. In its October 2004 report titled "Serbia and Montenegro: Selected Developments in Transitional Justice" written by Mark Freeman, the *Center* makes the observation that

> [a]lthough the ICTY [International Criminal Tribunal for the former Yugoslavia] has made a significant contribution to clarifying the historical record of war crimes committed in the former

> Yugoslavia, the ongoing perception that it is an anti-Serb body has severely limited its impact in Serbia and Montenegro. (International Center for Transitional Justice 2004a: 7)[54]

Roy F. Baumeister speaks of a magnitude gap, that is, “the discrepancy between the importance of the act to the perpetrator and to the victim” (Baumeister 1999: 18). Such a gap, in a more challenging form, exists at the collective level in the case of Serbia, where a large section of the Serbian national group is perceived as perpetrator by other equally homogenous groups like, for instance, Kosovar Albanians, and, moreover, perceives itself as a collective victim.

On the whole, the value of the historical record of the tribunal is still relative and the Serbian resistance to the court’s production of truth still persistent. Only the *International Center for Transitional Justice* seems to have recognized this difficulty. But what remains certain is that none of the three human rights organizations is very confident in their reports regarding the lessons to be drawn from the failed Serbian truth commission and the potential of a future one in terms of creating a historically meaningful truth. Ash’s point regarding what a truth commission can best do, that is, how a commission can do justice to the history of a people, is relevant for the Serbian case, too:

> ... the basic moral starting point of countries confronting difficult pasts should be that you concentrate on what your own people did, not what others did to you. Admittedly, this is complicated by the fact that former Yugoslavia is now many different countries. But the principle remains: Serbs should face up to what Serbs did to others (and to fellow Serbs), Croats to what Croats did, Bosnians to what Bosnians did and, yes, the British to what we did —or failed to do— in the Balkans’ terrible last decade. (Ash 2002)

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[54] Serbia and Montenegro is the name of the state that is the Federal Republic of Yugoslavia prior to 2003 and Serbia from 2006 onwards.

The bitter fact is that the “lack of confidence in the impartiality of the ICTY [International Criminal Tribunal for the former Yugoslavia]” remained constant in 2003, 2004 and 2005 as “69 percent of interviewees believed that the Tribunal is biased against Serbs” and is unlikely to have changed since then (Dimitrijević 2008: 7). The “refusal to reflect on the past” accompanied by the “refusal to accept the criminal responsibility of those [Serbs] who stand accused before the ICTY [International Criminal Tribunal for the former Yugoslavia]” forces one to question the value of the criminal truth captured by the court (Dimitrijević 2008: 14). Though its value can arguably be realized in the long run, justifying *Human Rights Watch*’s emphasis on “future generations”, the difficult question of how a future truth commission (for Serbia or for the whole region) in search of a just historical truth can positively interact with the court’s inventory of detailed criminal truth remains. Given the negative perception of the tribunal, the prospective commission might aim at the limited goal of providing epistemic justice without necessarily building on the legacy of the truth produced in the Hague. But such an option is unfortunately open to political manipulation in the form of denigrating the undeniable facts found by the Court. Therefore, the specific problems attached to the Serbian experience do not allow an easy answer to the question of whether a truth commission can easily deal with the truth produced by an international court.

### *8.1.3 Facing the difficult choice between prosecuting and reintegrating the small fry in Sierra Leone*

The third issue concerning the relationship between truth commissions and courts raised by the human rights organizations is the so-called "small fry" problem. "Small fry" literally means "small fish". This is in contrast to the "big fish", a term used by international prosecutors to depict persons with the greatest responsibility for gross human rights violations such as Slobodan Milošević in the case of the Yugoslav wars and Charles Taylor in the Sierra Leone civil war (Osiel 2009: 8). It simply describes low-level perpetrators. Gross human rights violations are, by definition, large-scale crimes involving a great number of deaths. But great numbers also characterize those involved in the production of mass death. Mark Osiel describes this phenomenon as follows:

> Mass atrocity could not transpire without the organized cooperation of many, often numbering in the several thousands. There may have been more than two-hundred thousand immediate participants in the Rwandan genocide, for instance. Regular and irregular military forces, which did most of the killing, numbered about ten thousand. In the Third Reich, more than one-hundred thousand Germans participated in mass slaughters. In the former Yugoslavia, killers and rapists numbered at least ten thousand. These numbers include both soldiers of various rank and sympathetic civilians in government and private life. (Osiel 2009: 7)

The real problem, however, arises in the aftermath of a brutal armed conflict: How to respond to this mass complicity in human rights crimes? Prosecuting each and every alleged perpetrator seems out of the question because of the numbers involved. In the case of Sierra Leone, where a criminal justice process aimed at prosecuting the "big

fish" was implemented alongside a blanket amnesty barring any other prosecutorial policy, the truth commission was perceived as the main venue for dealing with the accountability of small fry.[55] This is in line with a general perception of the work of truth commissions which sees them as providing "something of a middle ground between trials and amnesties" (Olsen et al 2010: 23). That is, in cases where mass prosecutions are logistically impractical or considered to have politically destabilizing consequences, truth commissions are thought to "establish accountability through the public exposure and condemnation of perpetrators for their past violence" (Olsen et al 2010: 23). This is largely the view expounded by the perspective of transitional justice in which accountability can take varying forms. It is, however, merely an aftereffect of providing epistemic justice through an official truth-seeking instrument. The truth commission, in its historical account of the unjust and violent acts perpetrated by low-level officials or ordinary civilians, does justice to the suffering caused by the past wrongs inflicted by these small fry through the undeniable reportage of facts. Beyond the need to punish or condemn them (criminal justice) or recast them in a new polity as new political actors (transitional justice), the commission basically acknowledges their history as gross human rights violators and leaves the rest to processes, legal and political, beyond its control.

[55] Just like the previous two issues (deterrence in Guatemala, truth in Serbia), the issue of small fry is discussed by human rights organizations in relation to a specific country, this time Sierra Leone. This is most probably due to two particular conditions of the post-conflict transition in Sierra Leone. First of all, the limited mandate of the Special Court for Sierra Leone —looking only into the cases of "persons who bear the greatest responsibility", that is, those situated higher in the chain of command and behind the decisions and orders leading to gross violations— meant that low-level perpetrators, most of whom directly participated in violence, fell outside the scope of the tribunal's work. Secondly, a blanket amnesty barred national prosecutions of wartime violations, meaning that the criminal justice process became solely confined to the "big fish", that is, the international tribunal's work. Hence, the general state of immunity and impunity characterizing the situation of small fry.

Still, those human rights organizations aligned more closely with a criminal justice agenda, however, think otherwise.

Take the example of *Amnesty International*. First of all, its May 2002 report notes that the *Sierra Leone Truth and Reconciliation Commission* "is not a judicial mechanism". The reason why *Amnesty* underlines this basic property of the commission seems to be its desire to stress that any form of accountability other than judicial accountability is, at best, less than accountability or, at worst, no accountability at all. In any case, it is deemed a compromised stance vis-à-vis what needs to be done, which, according to *Amnesty*, should always be a maximalist combat against impunity. The human rights organization's assertion is as follows: "Neither the Special Court nor the Truth and Reconciliation Commission can be a substitute for bringing to justice all alleged perpetrators of human rights abuses within the national judicial system" (Amnesty International 2002b). The argument favoured by the organization is that true accountability can only be achieved when *all* alleged perpetrators, small fry as well as big fish, are brought to trial. That the responsibility of small fry for gross violations would be dealt with by the truth commission, given the cumulative effect of the national amnesty and the international criminal process, is, according to *Amnesty*, almost an act of perverting the course of justice. But how does *Amnesty* expect that each and every alleged perpetrator can be tried within the extremely weak and highly dysfunctional judicial structures of Sierra Leone, one of the poorest countries in the world? Moreover, what does the organization propose as a viable solution to deal with the problem of logistical improbabilities in trying tens of thousands of alleged perpetrators?[56] These questions are implausible, if

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[56] This estimated figure of "tens of thousands of alleged perpetrators" is based on the fact that "more than 70,000 combatants disarmed and received reintegration support"
*(cont'd overleaf)*

not unreasonable, from the perspective of *Amnesty International*. This perspective, an almost Kantian perspective based on a moral imperative to pursue an ideal “whether or not we can expect to secure results” (Kant 1964: 37), sees as its duty to assert what should be done, independent of an understanding of the means to do so. *Amnesty* would certainly agree with Immanuel Kant’s following argument as an appreciation of its principled stance to state the morally right action despite the empirical obstacles on the ground: “it is absurd to ask why we should do our duty ... and to expect as an answer that we should do so because of *something else*” (Kant 1964: 52). That *something else* means, in the case of Sierra Leone, securing an effective judicial system that could process a great number of prosecutions without producing unfair results for the prospective defendants or without tearing apart the fragile social fabric that somewhat maintains nonviolent relations between former enemies after a difficult peace process. But, still, speaking from the higher ground of morality, *Amnesty* disregards even reasonable political judgments behind the two justice institutions —Special Court and the truth commission— and argues in a categorical manner for national prosecutions of all perpetrators. It strains the meaning of the distinction between politics and ethics, deliberately making the latter irreconcilable with the former so that universal justice remains in sight as the ultimate objective.

The position taken by the other criminal justice-oriented human rights organization, *Human Rights Watch*, regarding the issue of small fry is not very dissimilar, but represents a slight move from the uncompromising idealism of the moral realm to the relatively more policy-oriented realm of making a technical/pragmatic recommendation.

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under the National Commission for Disarmament, Demobilisation and Reintegration (Peters 2011: 16).

For instance, in a January 2003 report, this human rights organization recognized that "the SCSL [Special Court for Sierra Leone] will only try a limited number of alleged perpetrators" (Human Rights Watch 2003: 64-65). Then, in response to the fact that criminal prosecutions targeted "the so-called "big fish" and not the "small fry" or those persons who in many instances actually committed the violations", *Human Rights Watch* called for the use of the principle of universal jurisdiction, under which "all countries are under the obligation" to investigate gross human rights violations (Human Rights Watch 2003: 65). Citing the example of "crimes of gender-based violence", the organization argued that these crimes "must be investigated and documented for possible criminal prosecution in the domestic courts of other States which may have jurisdiction" (Human Rights Watch 2003: 66). Although more practical than *Amnesty*'s categorical demand, realizing *Human Rights Watch*'s recommendation is still very challenging. Practising universal jurisdiction necessitates nothing less than constructing a legally viable network of cooperation and coordination between states. The so-called small fry, on the other hand, is a crowded constituency, whose attempted prosecution by another state can be easily seen as an open act of hostility, disrupting peaceful inter-state relations. But, irrespective of these difficulties, *Human Rights Watch* is silent about the potential role that the *Sierra Leone Truth and Reconciliation Commission* can play in dealing with the accountability problem posed by low-level perpetrators. It is as if the "epistemic justice" option offered by the truth commission does not make an impression on the monitoring activities of either *Amnesty* or *Human Rights Watch*. For both, the only morally desirable way to deal with the problem is through a criminal justice framework.

This changes, once again, with the reportage of the *International Center for Transitional Justice*. In September 2002, the *Center* reports

the finding, based on a survey, that “ex-combatants are willing and eager to participate in the TRC [Truth and Reconciliation Commission] because they believe the TRC will facilitate reintegration into their former communities” (International Center for Transitional Justice 2002c: 5). Also, it is noted that “[a]n overwhelming majority, 88% ultimately said that the TRC [Truth and Reconciliation Commission] would bring reconciliation to the country” (International Center for Transitional Justice 2002c: 6). On a related note, the report argues that some ex-combatants “expressed a great need to ask for forgiveness”, which, facilitated by the truth commission, is the indispensable “element of reconciliation” bringing about ex-combatants’ “reintegration” into their communities (International Center for Transitional Justice 2002c: 15). As is obvious from the above, the criminal justice framework is absent from the points emphasized by the *International Center for Transitional Justice* reportage. The imperative of justice through punishment is replaced by that of reconciliation through reintegration. The idea that this might be too much to expect from a truth commission is not readily available in the *Center*’s assessment. The difficulty in achieving forgiveness and reintegration at the individual and interpersonal levels followed by reconciliation at the societal level is well documented in the literature. For instance, as Martha Minow notes, “survivors differ remarkably in their desires for revenge, for granting forgiveness, for remembering and for moving on” (Minow 1998: 135). More importantly, however, for the purposes of this dissertation, the mandate of a truth commission need not include any task beyond that of reporting gross violations in a historically authoritative manner. It might include the task of recommending general ways to realize perpetrators’ reintegration into their communities in a reconciliatory fashion. But the prospects of such a process are beyond the monitoring capacities of a truth commission. Therefore, just as it would be wrong to demand from a commission to

facilitate the criminal prosecution of all alleged perpetrators, it would be misleading to expect them to contribute, with concrete results, to the perpetrators' peaceful reintegration. I think all three human rights organizations push the commission away from what it can realistically achieve, which is the establishment of a solid historical record of gross human rights violations, into policy territories ruled by the imperatives of criminal and transitional justice frameworks which are effectively beyond the commission's control and lifetime. Realizing epistemic justice through truth commissions, however, need not involve assisting neither the ethical goal of punishment nor the prudential goal of reconciliation. Epistemic justice (a commission's documentation of violations) is an ethical response, independent of these other efforts.

## 8.2 TRUTH COMMISSIONS IN RELATION TO VICTIMS

### *8.2.1 CONTRIBUTING TO THE POLITICAL EMPOWERMENT OF VICTIMS IN GUATEMALA*

The issue of political empowerment is raised by the *International Center for Transitional Justice* in two of its reports on the Guatemalan truth commission. First of all, the *Center*'s 2009 assessment of the *Historical Clarification Commission* observed that its broad mandate based on the task of investigating all human rights violations and acts of violence during the conflict "ultimately enabled the CEH [*Historical Clarification Commission*] to deal directly with the ethnicized character of violence". But, in addition to the enabling mandate, the *Center* notes that "[i]ndigenous groups in particular lobbied the CEH [*Historical Clarification Commission*], pushing its investigations in this direction" (International Center for Transitional Justice 2009a: 3). Here, we see

the political motivations of a victimized community affecting the unfolding of a commission's work. However, the *International Center for Transitional Justice* seems to be more interested in the further outcomes of this process. According to the *Center*, the Guatemalan commission's findings helped "constitute and consolidate Mayan identity at both national and international levels", because *Memory of Silence*, the commission's report, was indeed "one of the first national documents in which indigenous peoples form an integral part of an account of Guatemalan history" (International Center for Transitional Justice 2009a: 3-4). Therefore, even though a politically motivated victimized group might influence the work of a commission, a more significant aspect of a commission's work involves that work trigerring or encouraging the further political empowerment of a victimized group.

A similarly expressed evaluation is also evident in another *International Center for Transitional Justice* report, titled "Strengthening Indigenous Rights through Truth Commissions: A Practitioner's Resource", dated 2012. Here, the *Center* speaks highly of the Guatemalan commission's contribution to the mobilization of local leaders "to form new coalitions between indigenous organizations" (International Center for Transitional Justice 2012: 5) and makes the following claim:

> ... Guatemala's Commission of Historical Clarification (CEH) ... has made a demonstrable contribution to the participation of indigenous people in public life. The commission's finding that the state had committed acts of genocide against indigenous peoples helped to reframe political debate in Guatemala, and the struggle for truth and reparations galvanized a range of indigenous groups to become more active politically. (International Center for Transitional Justice 2012: 37)

The emphasis is again on the commission's capacity to politically empower the victimized group and its struggles. The recognition in the

2009 *Center* report of the capacity of the politically dedicated victims' groups to empower the commission to write a historically just account of the past is overshadowed by the reverse process in which the commission's account empowers victims. The concept of "epistemic justice" that I develop in this dissertation accounts for the dynamics of political empowerment as a possible function of the impartial historical record of the armed conflict provided by the truth commission. Epistemic justice means relegating wartime violations to the past in an official and indisputable manner so that the post-conflict period can be regarded as a period that has effectively dealt with and accounted for the past and is thereby ready to offer a new political environment in the present. According to this conceptual perspective, epistemic justice can politically empower all kinds of actors —including not only victimized groups, but also perpetrators— who is willing and capable to offer a new comprehension of politics distanced from the repudiated and despised discourses and actions contamined by past human rights violations. But such empowerment is not an inevitable consequence of a truth commission's work. It simply might not occur and when it does not, this does not mean that the commission failed in one of its basic tasks.

The above portrayal of the political empowerment of victims as a desirable outcome of truth commissions by the *International Center for Transitional Justice* does not necessarily overburden the commissions with overly ambitious expectations. Still, one needs to be wary of equating and confusing the favourable factors that accompany a truth commission's operation (a politically dedicated and motivated victims' community being one such factor) with the desirable outcomes demanded from truth commissions (e.g. political empowerment as a result of a commission's documentation and recommendations). While the former (political empowerment as a favourable accompanying

factor) helps the commission to achieve its core objective, i.e. impartial historical documentation, more efficiently, the latter (political empowerment as an expected outcome) can only be welcomed as a fortunate byproduct instead of a core objective.

### *8.2.2 Confronting the Sense of National Victimization in Serbia*

The second issue that relates truth commissions to victims, captured in a 2007 report by the *International Center for Transitional Justice*, concerns the sense of "national victimization" experienced in the Serbian society (an issue which should be read together with the difficulties discussed in section 8.1.2). This has both pre-war and post-war roots. Before the outbreak of the Yugoslav wars, the Serbian victimization in the hands of the Ustasha, "a Croat nationalist and fascist terrorist movement ... cultivated by the Fascist regime in Italy during the 1930s", shaped the memories of a generation of Serbs after the Second World War (Gow 2003: 36). James Gow notes the concrete effects of the Ustasha terror as follows:

> Many of the most senior serving generals of the Yugoslav state in the early 1990s were Serbs from the areas in which Ustasha terror had been most severe and who had joined the Partisans [a communist movement conducting guerrilla warfare and led by Josip Broz, known as Tito, who later became the leader of post-war Yugoslavia] as teenagers. (Gow 2003: 36)

This argument of national victimization reached its peak in 1986, shortly before the Yugoslav wars of the 1990s, when a memorandum prepared by the Serbian Academy of Arts and Sciences claimed that the Serbs were the victims of the Yugoslav federation, "especially in relation to the

more prosperous republics of Croatia and Slovenia” (Gow 2004: 40). The memorandum “called for the Serbian people to regain their pride” and eventually became “the ideological underpinning of the Serbian nationalist program” (Gow 2003: 40). This call eventually found its most assertive form in Milošević’s campaign supported by large numbers “receptive to the idea of Serbian victimhood” (Gow 2003: 10).

Nationalism nurtured by a sense of national victimization is defined by resentment, which, according to the Swiss historian Philippe Burrin, can be described as

> a sense of injustice, of being in the right and yet mocked, accompanied by an awareness of impotence as a result of which one becomes obsessed with the memory of all the unfairness suffered. (Burrin in Semelin 2007: 24)

This kind of resentment fuels the persistence of an identity of collective victimhood which is still widely popular within the Serbian society. Understandably, this persistence also affects the interpretation in post-war Serbia of the wartime gross human rights violations committed by Serbian actors. For example, Nenad Dimitrijević explains that, although many people in Serbia stopped denying that mass killings took place in Srebrenica in August 1995, “there still remains room for interpretive denial”, according to which many Serbs argue that “what happened was not a mass crime but rather a legitimate defense of national interests” (Dimitrijević 2008: 6). Hence, resentment-driven victimhood is continuously reproduced as a righteous identity that can be utilized in not only justifying the perpetration of gross human rights violations, without recognizing them as such, but also rewriting the history of how they took place in nationalistic terms. As a result, the sense of national victimization leads to the argument that “Serbia did nothing wrong” (Dimitrijević 2008: 6). As Dimitrijević notes in light of the example of the denial of the Srebrenica massacre, the question of whether there was a

wrongful act is very simple — “either there was or there was not a wrong committed” (Dimitrijević 2008: 6). But the answer makes all the difference in the world, because it “informs the way Serbia is seen by others, and the way Serbs see themselves. What is at stake is the nation’s identity” (Dimitrijević 2008: 6).

The difficulty caused by the sense of Serbian national victimization in the country’s post-conflict transition is noted in the 2007 *International Center for Transitional Justice* report, titled “Against the Current: War Crimes Prosecutions in Serbia”. Bogdan Ivanišević, the author of the report, firstly observes the absence of successful “formal truth-seeking efforts” in Serbia’s transition (International Center for Transitional Justice 2007: 3). Then, he argues that

> [t]his fact shows the political strength in Serbia of those who resist coming to terms with the past, as well as the predominance of a widely accepted popular view of recent history in which Serbia is the greater victim of external forces. (International Center for Transitional Justice 2007: 3)

Therefore, the sense of national victimization is seen as a barrier to the successful implementation of an official human rights investigation through the process of a truth commission.

The question that needs to be answered from the perspective of “epistemic justice” which delimits the task of a truth commission to the production of an impartial and authoritative truth about wartime human rights violations is whether a commission can do justice to this sense of national victimization despite a historical record of what would be perceived as “national” responsibility for gross violations. This question can be given an affirmative answer if the Serbian beneficiaries of a prospective truth commission begin to accept the following “simple analytical insight” proposed by Nenad Dimitrijević: “Injustices done in the name of the group to which we belong have created consequences

that cannot be erased by an act of political will, either from our history, or from our present" (Dimitrijević 2008: 14). However, this is a necessary yet insufficient basis for a truth commission to effectively complete its task, because, as Dimitrijević acknowledges, "neither the crimes nor their consequences are mere objective facts — they are subject to interpretation" (Dimitrijević 2008: 14). The question then becomes the following: How can the "interpretation" of the responsibility for gross violations by a truth commission become acceptable to a sufficient majority of the society?

As an answer, Dimitrijević proposes a truth commission "that should make it clear that its task would not be to attribute collective guilt; crimes would be treated as acts of the regime and not of the nation" (Dimitrijević 2008: 18). In this way, the notion of national victimization could gain a new meaning in the sense of a victimization inflicted by an abusive regime violating the nation's "sense of justice" and destroying "basic moral standards of right, good and just" (Dimitrijević 2008: 17). The more challenging aspect of such a commission's operation, however, lies elsewhere. How to feed the accounts of the victims who are not members of the Serbian polity into the history written by the truth commission? Dimitrijević's proposed commission would invite

> as witnesses the people who survived concentration camps, those who were wounded by firing squads, mothers whose innocent children were deliberately killed, women who were raped, those forcefully evicted from their homes. (Dimitrijević 2008: 21)

In other words, the commission would hold "public hearings" where ordinary Serbs would listen to mostly non-Serb victims' "attitudes toward the perpetrators and the Serbian nation as a whole" and "[p]erpetrators and supporters would also be invited to share their

versions of the events described by the victims” (Dimitrijević 2008: 21). Is Dimitrijevic’s proposal to stop seeing the sense of national victimization as a barrier to an effective truth-seeking effort in Serbia, as opposed to the assessment of the *International Center for Transitional Justice*, viable? Is it possible to start seeing a truth commission as an instrument to overcome the unjust consequences of a discourse of national victimization?

The critical choice is whether to adopt a model of truth commission based on “public hearings”, like the ones in South Africa and Sierra Leone, or to design a commission that takes statements and gathers evidence without recourse to public hearings, like the *Historical Clarification Commission* of Guatemala. The most obvious difficulty of the former design concerns the political and geographical difference between the former Yugoslavia and today’s Serbia. This is the basis on which Vojin Dimitrijević, for instance, disagrees with Nenad Dimitrijević’s proposal. In Vojin Dimitrijević’s words:

> [S]uch a body must not deal with the events that occurred in what are now foreign countries, nor should it even investigate the responsibility of the Serbs and their leaders for such events, because the state would once again usurp the right to represent Serbs beyond the borders of the current state. (Dimitrijević 2008: 19)

Indeed, this is a very delicate case. Therefore, in lieu of a concluding argument, let me make the cautious proposal that the Guatemalan design is better suited to the Serbian case to the extent that it is relieved of the burden of “transitional justice” objectives like reconciliation through public hearings or transformation of national sense of guilt or victimhood. The *Historical Clarification Commission* in Guatemala, under very difficult conditions, collected testimonies and documented cases of violations, without facilitating the symbolic and

ritualistic exchange of accounts given by victims and perpetrators in public as in South Africa and Sierra Leone. If a prospective Serbian commission intends to collect statements from victims beyond the borders of today's Serbia, then the Guatemalan design without public hearings would be less inclined to trigger the sense of Serbian victimization in a wrong, destabilizing and unhelpful manner. Giving a place to the account given by perpetrators and their supporters in the final report would also help to situate the Serbian victimization in an analytic framework where it is understood for drawing historical lessons rather than legitimating political emnity. Nevertheless, a South African or Sierra Leonean model could be tried only if Vojin Dimitrijević's warning is taken seriously and the process is confined to public participation within the borders of the Serbian polity. Otherwise, the task of epistemic justice would be overburdened by transitional justice imperatives that are too complicated for a truth commission to resolve.

### *8.2.3 Coping with the dilemmas posed by victim-perpetrators in Sierra Leone*

The difficulty of bringing together victims and perpetrators of gross human rights violations under the roof of a truth commission is well known, as can also be seen from the case of Serbia in the previous section. However, as a 2002 *International Center for Transitional Justice* report notes, the case of Sierra Leone has forced truth commission practitioners and theoreticians to also consider the puzzling conditions of the so-called "victim-perpetrators". The report, using the figures from a survey on ex-combatants, states that

> the Sierra Leone civil war differs from those dealt with by past TRCs [Truth and Reconciliation Commissions] in that 70% of the

> ex-combatants feel that they were forcefully conscripted and themselves victimized. ... In this conflict, the line between victim and perpetrator is vague, if not non-existent. (International Center for Transitional Justice 2002c: 15)

The phenomenon of "victim-perpetrators" complicates the dichotomic understanding of an armed conflict according to which "there are perpetrators of evil and their victims" (International Center for Transitional Justice 2011: 13). Erin Baines suggests that those occupying "ambiguous victim-perpetrator statuses" are "neither high-level organizers [of violence] nor passive victims" (Baines 2010: 412).[57] One of the most striking examples of victim-perpetrators are the so-called child soldiers who were forced to participate in armed groups and even commit gruesome acts like torture and murder, as witnessed in a number of conflicts including the war in Sierra Leone.[58]

The *International Center for Transitional Justice* report poses the general question of how truth commissions should relate and respond to the cases of victim-perpetrators (International Center for Transitional Justice 2002c: 13). Nevertheless, the specific recommendation of the *Center* with respect to the question of how the *Sierra Leone Truth and Reconciliation Commission* should deal with victim-perpetrators is rather equivocal. The *Center* states that "[t]o focus accurately on the victims of the Sierra Leone conflict, the TRC [Truth and Reconciliation Commission] must consider that some of the perpetrators were also victims" (International Center for Transitional Justice 2002c: 15).

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[57] In order to demonstrate its ambiguity, Baines argues that the category of "victim-perpetrators" might include "bystanders, collaborators, informants, forced perpetrators, forced combatants, victims-turned-perpetrators, and perpetrators-turned-victims" (Baines 2010: 412).

[58] For a consideration of the immense difficulties of rehabilitation and reconciliation processes involving child soldiers, see, for instance, Harris 2010.

How can a truth commission do justice to those who found themselves to be victim-perpetrators? From the perspective of transitional justice, a lot can be done. Insofar as a truth commission is considered one transitional justice mechanism among many and designed in view of such an assumption, it will be conceptually and institutionally connected with other post-conflict instruments like prosecutions and reparations. Then, it is relatively easier to answer the question of how a truth commission can approach victim-perpetrators, so long as the answer refers to processes beyond the truth commission. For instance, when the victimization suffered by a perpetrator is revealed and assessed to be true according to valid evidentiary standards during a commission's hearing, this could decrease the risk of being subject to a criminal investigation and prosecution. In an alternative scenario, the revelation before the truth commission, again tested in light of explicit evidentiary norms, that a victim was involved in the perpetration of gross violations could lead to the rejection of the victim's application to a reparations programme. These are, of course, hypothetical circumstances based on the assumption that a truth commission follows a rigorous (even court-like) protocol for assessing evidence. As Erin Baines notes, victim-perpetrators' situations are rarely addressed "in formal justice mechanisms", including truth commissions:

> With exceptions, few low-level "victim-perpetrators" will ever face trial; their numbers are great and overwhelming, and rarely reach a threshold of responsibility considered worthy of trial. Even within a truth commission, it is unlikely that the truth will be revealed. (Baines 2010: 412)

If Baines' claim is true and a truth commission most likely fails to capture the truth of a victim-perpetrator's experience, one exemplary moment of such a failure was lived during a hearing at the *Sierra Leone*

*Truth and Reconciliation Commission*. Below is the exchange or, rather, lack of exchange between Bishop Humper, chairman of the commission, and a former member of the Civil Defense Forces:

> HUMPER: You and your people became victims. And you endured and endured and it became non-endurable any longer! So you committed yourself to what ultimately came to be called CDF [Civil Defense Forces]. So you became a member of CDF [Civil Defense Forces]. Is that right? And CDF [Civil Defense Forces] are perpetrators, so you are a perpetrator as well. You are a victim-perpetrator!
>
> WITNESS: [unclear] No.
>
> HUMPER: It is simple here; you've said it here... At every point when you are a victim and in fact it was just that that is what was a militating factor that aggravated your anger and suddenly you said, "You have to change!" (Humper quoted in Kelsall 2005: 375)

In this example, there are several reasons why the truth of the victim-perpetrator is not captured. First of all, the commission's chairman seems to have a predetermined understanding of what the victim-perpetrator went through, observable in his insistent way of conveying the experience of the witness to the witness herself/himself. Therefore, the truth, if there is any, is a preconceived one, reflecting the personal comprehension of the chairman. Secondly, the atmosphere of a "public hearing", where the witness sits before the chairman, has an important effect on the character of the truth produced by the commission. This is largely due to the South African example which was the first to conduct public hearings and thereafter was regarded as the model commission worth emulating. In this model, "the sanctification of witness experience played an important public role" in reconciling enemies and bringing about "the renaissance of the nation" (Kelsall 2005: 375). Such public sentimentalization of narratives about war fulfill the imperatives of the

transitional justice perspective in which truth should always serve the higher purpose of a renewed sense of community.

Being a victim-perpetrator means being burdened by complicated emotions that defy comprehensible expression. A truth commission can give an expression to the victim-perpetrator's challenging experience only by way of a relatively distanced analysis of the circumstances making possible simultaneous victimization by and perpetration of human rights violations. Such an analysis would do justice to both the victim-perpetrator's difficult and almost always traumatic position and choices as well as the amorphousness of the war producing experiential modes beyond the clear categories of victim, perpetrator and bystander. Thus, the epistemic justice perspective directs the commission's energies into areas where it cannot easily fail. Resolving the psychological conflicts within someone who is both a victim and a perpetrator and translating this resolution into societal reconciliation is the magic role that a truth commission is hoped to play by a maximalist transitional justice agenda. Carrying out a much less ambitious task, that is, providing a historical account of how some persons can become victim-perpetrators would do justice to the wider society's right to know the truth about the amorphous nature of the war that have befallen them. Whether that knowledge transforms into rehabilitated or reconciled relationships is beyond a truth commission's reach. When it does, it is an achievement not of epistemic justice, but of its contingent consequences.

## 8.3 Truth commissions in relation to causality

### *8.3.1 Seeking the origins of violence in Guatemala*

As Mark Freeman notes in his comprehensive definition of truth commissions, a primary purpose of these institutions is

> investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence and repression that occurred in the state during determinate periods of abusive rule or conflict. (Freeman 2006: 18)

In a shorter formulation, this is the function of investigating and reporting the causes and consequences of gross human rights violations and, as I argued at the outset of this thesis, this is the *sine qua non* of a truth commission which eventually leads it to provide epistemic justice.

The consequences of gross human rights violations are usually highly visible. Put simply, there is no easy way of relativizing or denying thousands of dead bodies, the most grotesque consequential pattern of gross violations.[59] In legal terms, they are purely *after the fact*, that is, after the commission of a crime. Therefore, their documentation is less of an uncharted territory. After all, investigative procedures (e.g., how to collect testimony in the aftermath of gross violations) are continually refined in light of the lessons drawn from each truth commission

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[59] One example of an ambitious endeavour to fabricate such a "denial of consequences" can be attributed to the Milošević administration, though: "The cover-up concerned digging up bodies, which had been placed in mass graves in Kosovo, and removing them for re-burial where it was thought that the evidence would never be found" (Gow 2003: 7). Yet, this attempt failed.

experiment. The causes of gross human rights violations, however, are harder to grasp. First of all, by definition, causes run their course and happen *before the fact*, that is, prior to the commission of a crime. However, as causes play out their dynamics and happen, they are not known as causes, but experienced as a haphazard sequence of events. Their knowledge as "causes before the fact" is generally produced after the fact. The basic difficulty of the discourse of causality and causation, therefore, is that it is embedded in the contentious politics of post-conflict transitions. In the heat of the transitional moment, a discourse regarding the causes of gross human rights violations, as produced by a truth commission, will be put to the use and consumption of all sorts of political groups, thereby trigerring all sorts of reactions ranging from consensus to repudiation. To sum up, causes are already ambiguous and they consequently make a truth commission process controversial, and a truth commission report that comprises causal analyses of the history of violations is even more controversial.

This controversial aspect of the work of truth commissions is seen by the *International Center for Transitional Justice* as one of the strongest sides of these institutions. The issue comes up in the *Center*'s 2012 report titled "Strengthening Indigenous Rights through Truth Commissions" in relation to the Guatemalan case. There, the *Center* argues that

> truth commissions can provide an arena to analyze the structural causes of past violence. In Guatemala, for example, the truth commission not only gathered testimony but also analysis of why the violence occurred in the first place. (International Center for Transitional Justice 2012: 11)

The critical questions then become 1- what kind of causal analysis will be made under the rubric of official truth-seeking and 2- where that causal analysis will lead the recipients of a truth commission's report to

seek the origins of violence. The grand "transitional justice" assumption of causality is characteristically expressed by the *South African Truth and Reconciliation Commission* as "a "historic bridge" between "a deeply divided past of untold suffering" and a "future founded on the recognition of human rights" (Grandin 2005: 46). In other words, a truth commission informed by the transitional justice framework of reconciliation embeds itself as a causal link in the gap between the unjust past and a better future. In this rather unproblematic picture, an inquiry into the origins of violence are more likely to present "an interpretation of history as parable rather than as politics" (Grandin 2005: 48). As Greg Grandin stresses, the expectation that a truth commission should provide a historical morality tale that would make sense for the immediate future leads a commission away from what one might call serious, that is, politically meaningful "historical inquiry". Such an inquiry, according to Grandin, would include an examination "of economic interests and collective movements, or the unequal distribution of power in society" (Grandin 2005: 48). However, "[i]n most truth commissions, history was not presented as a network of causal social and cultural relations but rather as a dark backdrop on which to contrast the light of tolerance and self-restraint" (Grandin 2005: 48). Grandin seems to argue that such rhetorical devices, though necessary to some extent for the general readership, should not replace what he considers the scientific method of making "historical judgment" (Grandin 2005: 49). On the whole, Grandin speaks of a "burden of reconciliation" and claims that this burden "demands a conception of history that takes national cohesion as its starting premise and posits violence as resulting from the dissolution of that unity" (Grandin 2005: 49). According to Grandin, such a conception of history can only produce bad causality.

Grandin appears to agree with the *International Center for Transitional Justice* that a better model to adopt would be the Guatemalan truth commission's approach to history. The "constricted political terrain" in which the *Historical Clarification Commission* operated is ultimately seen as conducive to a better appreciation of the importance of historical causal analysis:

> Deep social divisions destroyed the conceit that either the past could be healed or future abuses prevented by appeals to national reconciliation. The commission [*Historical Clarification Commission*] also found the procedures used by previous truth commissions insufficient to account for the intensity of the violence that took place during a more than three-decade long civil war, which included an acute two-year phase of violence against the Mayans that the commission ruled to be genocidal. The commission turned more fully to causal history to break out of this impasse. (Grandin 2005: 49)

Greg Grandin worked as a historian with the *Historical Clarification Commission* in 1997-1998. He expresses what he sees as an achievement in terms of a correct usage of causal analysis, with reference to around 600 "massacres committed by the military or its allies ... between late 1981 and 1983", as follows:

> *Memoria del silencio* [*Memory of Silence*, the title of the *Historical Clarification Commission*'s report] depicted this campaign, which it ruled to be genocidal, not as state decomposition but state formation, a carefully calibrated stage in the military's plan to establish national stability through an incorporation of Mayan peasants into government institutions and a return to constitutional rule. A willingness to employ historical methodology and make historical judgments allowed the commission to examine the racist fury that underwrote this killing not as an unchanging value but as one element of a dominant, elastic ideology radicalized by the circumstances of war. (Grandin 2005: 61)

In sum, Grandin believes that the *Historical Clarification Commission* adopted the right analytic strategy to inquire into the causes and origins of violence embodied in concrete institutional milieus, that is, the Guatemalan security sector, without falling into the trap of finding the roots of past violations in misled nationalistic sentiments leading evil perpetrators to disrupt what would otherwise be a peaceful community. In this analytic framework, institutions and their places in history mattered.

In this sense, a truth commission's capacity to do justice to history seems to be determined by whether it takes seriously the historical-institutionalist insight that "the policy choices made when an institution is being formed, or when a policy is initiated, will have a continuing and largely determinate influence over the policy far into the future" (Peters 1999: 63). In the lexicon of the institutionalist approach, institutional formations and policy formulations generate a "path dependency", that is a tendency for historical choices to persist beyond their initial conditions of emergence (Peters 1999: 63-64). This makes the capacity of a truth commission to provide an impartial causal inquiry into history even more important, as its recommendations might inform the institutional reform policies of new post-conflict political actors.

Grandin warns that the "[d]iscussion about the efficacy of truth commissions often confuses the task of commissions to document and interpret acts of political violence with their function in promoting nationalism and consolidating state legitimacy" (Grandin 2005: 63). The former corresponds to the task of epistemic justice, whereas the latter effectively means transitional justice. Documenting and interpreting the causes of gross violations requires a detailed examination of institutions and their strategic roles in the armed conflict plus an "interpretive certainty" regarding the "historical conclusions" of that examination (Grandin 2005: 63). This might run counter to the imperatives of

transitional justice and its focus on reconciliation, which stipulates that some institutions, like the powerful Guatemalan armed forces, should not be critically evaluated in ways that would provoke them to thwart a fragile environment of peace and security. The safer approach would be to collect individual testimonies and provide illustrative cases of how victims and perpetrators can reestablish social harmony. But a commission, without hinting at the desirability of the criminal prosecution of individual perpetrators, needs to at least point to the role of an institutional ecosystem in causally enabling perpetrators. This requirement of the objective of epistemic justice might not lead to reconciliation, but definitely guarantees the clarification of a critical and concrete cross section of the origins of violence. Still, the historian Marc Bloch's point concerning the "idol of origins" must be kept in mind. As summarized by Samuel Moyn, a historian of human rights:

> It is tempting to assume that the trickle of melted snow in the mountains is the source of all the water in a great downstream flood, when, in fact, the flood depends on new sources where the river swells. They may be unseen and underground; and they come from somewhere else. History, Bloch concluded, is not about tracing antecedents. Even what continuity there is depends on novelty, and persistence of old things is due to new causes as time passes. (Moyn 2010: 41-42)

As a result, seeking origins can turn out to be a very misleading enterprise. After all, finding the origins of violence does not tell anything about what to do with the unchangeable gruesome consequences which are gross human rights violations. Similarly, the documentation of violations along with an interpretation regarding the role of critical institutions in them does not put a truth commission in a position from which it can magically change those institutions and do justice to the gross violations themselves. It can only do justice to the history of violations by impartially capturing their factuality and the causal traces

in that factuality of the effects of existing, concrete and malleable institutions of a polity.

### *8.3.2 Grasping the Responsibility for and Effects of Gross Violations in Serbia*

The final issue concerning the relationship between truth commissions and causation is the issue of "responsibility and effects", mentioned in a 2004 *International Center for Transitional Justice* report on the developments of transitional justice in Serbia. There, Mark Freeman, the author of the report, critically underlines the fact that the *Yugoslav Truth and Reconciliation Commission*'s mandate focused on "the causes of the wars and related atrocities, rather than their effects" (International Center for Transitional Justice 2004a: 8). The report argued that a commission established in Serbia without the representation of various ethnic communities of the former Yugoslavia was not appropriate "to objectively assess the truth about the causes of the war" (International Center for Transitional Justice 2004a: 8). As the report stressed, because the commission's mandate did not focus on "Serbia's responsibility for wartime violations and their effects on victims", it was bound to be perceived as "a mechanism to help justify Serbian wartime atrocities" (International Center for Transitional Justice 2004a: 8).

As mentioned in the section describing the *International Center for Transitional Justice* reportage on the *Yugoslav Truth and Reconciliation Commission* in Chapter 6, the Serbian truth commission is depicted as the exact opposite of the Guatemalan benchmark in causal analysis. It provides an almost textbook example of when and how not to engage in an examination of the causes of wartime human

rights violations. But is the alternative, that is, a focus on “responsibility and effects” the viable option for a truth commission in terms of fulfilling its goal of providing epistemic justice? Given the fact that the criminal justice process instituted at the International Criminal Tribunal for the former Yugoslavia continues, the Serbian case posits a serious challenge when it comes to figuring out how a Serbian truth commission can deal with the Serbian responsibility for violations and their effects on victims (see also sections 8.1.2 and 8.2.2 in this chapter). A prospective truth commission that would not repeat the mistakes of the failed *Yugoslav Truth and Reconciliation Commission* would need to assume the task of determining historical/political, not criminal/legal, responsibility. If informed by the perspective of epistemic justice, this would necessitate the type of causal inquiry into national institutions, specifically security sector institutions, that was carried out by the Guatemalan commission, as described in the previous section. But, in order to be effective, this strategy should not assign responsibility either beyond the institutional level or beyond the national borders. If the focus on institutional responsibility is not maintained, the controversy surrounding causes could further trigger the sense of national victimization that is widespread in Serbia. Even if the focus is maintained, however, the real challenge remains the collection of testimonies and statements from victims, occupying a very difficult political geography defined by the successor states of the former Yugoslavia. In light of this challenge, it is important to remember Vojin Dimitrijević’s argument concerning the prospects for establishing the mandate of a future Serbian truth commission:

> [S]uch a body must not deal with the events that occurred in what are now foreign countries, nor should it even investigate the responsibility of the Serbs and their leaders for such events, because the state would once again usurp the right to represent

Serbs beyond the borders of the current state. (Dimitrijević 2008: 19)

In agreement with Dimitrijević's position, I will argue that the lesson to be drawn from the Serbian case is that a truth commission should not seek either epistemic or transitional justice beyond its borders, especially when those borders were the result of a series of brutal interethnic wars. If and when a Serbian commission is established, it should do justice to the history of violations bequeathed to those persons inhabiting today's Serbia. It should impartially document how they suffered and how the members of their own society caused suffering, without any attempt to achieve more than it can, that is, social harmony between and beyond Serbia's current political divisions. The historical outlook should solely be set on the current geographical borders of the Serbian state. This would be a good start, much less ambitious than trying to form a regional truth commission to reconcile some of the most divergent histories known to the contemporary world.[60]

Still, designing an effective truth commission in a society largely defined by a sense of national victimization might also necessitate considering a move away from the common suggestions of "transitional justice", such as, "public engagement, discussion and acknowledgement as the most visible 'evidence' of the society's

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[60] For a critical assessment of the proposal to establish a regional truth commission for the former Yugoslavia, see Obradović-Wochnik 2013: 2: "The absence of 'ordinary' voices in transitional justice debates in Serbia and the disconnection between the public and practitioners are evident at some transitional justice events. For instance, in May 2011, I attended a discussion in Belgrade organized by NGOs campaigning for a regional truth commission. Although the talks were clearly aimed at a general audience, the audience was composed primarily of activists from Belgrade and Sarajevo, the media and intellectuals. The only audience members not already affiliated with regional activist circles were a handful of students. It was thus a discussion at which experts spoke to other experts about issues on which they broadly agree".

‘coming to terms with the past’” (Obradović-Wochnik 2013: 3). Under the circumstances of the Serbian society where the Milošević regime “threatened the lives of journalists and activists who sought to expose the truth about the wars”, “debate about the past” is understandably not a popular topic. The memory of silence as a survival tactic is still very fresh. It is therefore understandable that a future Serbian commission would prefer to conduct an inconspicuous statement-taking strategy. Such a strategy would emulate the way in which Guatemala’s *Historical Clarification Commission* remained low profile and, because it did not hold public hearings, “received limited media coverage until the release of its final report” (Quinn and Freeman 2003: 1123). This is not anathema to epistemic justice. On the contrary, because the minimal achievement expected of a truth commission is the documentation of gross human rights violations in an authoritative and impartial manner, through a myriad of possible methods and approaches, such “silent” mode of official truth-seeking could serve the purpose of doing justice to the history of gross violations in Serbia. Thus, the responsibility for and effects of violations can be understood and captured in an official report without the risk of polarizing the public with the exaggerated calls from the discourse of “transitional justice”, such as, “healing”, “turning a new leaf”, “forgiving” or “transforming”.

# CONCLUSION: BETWEEN PRUDENCE AND ETHICS

This dissertation was written against the background of a discussion in the discipline of political theory. In Chapter 1, I argued that the main research question around which this discussion evolved was "How to respond to radical evil?". I also demonstrated that the principal political thinker who not only started the discussion by formulating this question, but also tried to come up with different answers in her lifetime was Hannah Arendt. Her direct observations of the horrors of the two world wars, the unique mass murder policy of the totalitarian Nazi regime and the repressive developments in the other comprehensive totalitarian regime of the twentieth century Soviet Union led her to pursue an inquiry into the meaning of politics and morality in modern times. Hannah Arendt did not live long enough to see that an international discourse which equalized what she called "radical evil" with "gross human rights violations" was to become widespread towards the end of the Cold War and in its aftermath. The prominence of international nongovernmental human rights organizations, like the ones examined here, ensured that this discourse was kept in circulation and utilized by academic, policy and advocacy circles around the world well into the twenty-first century. I tried to locate Arendt's question in the context of this increasing relevance of the concept of gross human rights violations, which also implicitly expressed the idea that human rights

provided the ethically superior perspective for developing an appropriate response or responses to radical evil.

As I studied the possible ways in which the idea of human rights can develop responses to the phenomenon of gross human rights violations, I was also led, during the course of my research, to admit that I was writing this dissertation against a second influential background, next to that of political theory. This was the inevitable background of international politics. As stated in Chapters 2 and 3, the United Nations played an important role in terms of giving a definite shape to a politically comprehensible perspective of human rights. It initiated and nurtured the construction of novel institutions of justice specifically designed to address the problem of intense violence witnessed in inreasingly amorphous armed conflicts in the post-Second World War international system. In the United Nations framework, this problem of intense violence needed to be addressed both strategically and normatively: 1- strategically, i.e., in order to manage armed conflicts and *prudentially* regulate the threats they posed to the delicate balance of international power relations; and 2- normatively, i.e., in order to live up to the ideals encapsulated by international human rights norms and maintain a certain level of *ethical* relations in global affairs. Among these novel justice institutions were, first of all, international criminal tribunals whose operation eventually culminated in the establishment of the permanent International Criminal Court. Two cases that I decided to study in this dissertation, Serbia and Sierra Leone, were directly affected by the jurisdiction of such tribunals (International Criminal Tribunal for the former Yugoslavia and Special Court for Sierra Leone), built in an *ad hoc* manner in response to the amorphous armed conflicts experienced in these countries.

But what actually stirred my interest in these broadly perceived backgrounds of political theory and international politics was the other

kind of innovative human rights institutions, namely, the truth commissions. These initially emerged outside the United Nations-led process of strategic-normative institution-building, but then began to interact and was at times adopted by this international process. Two of my case studies, Guatemala and Sierra Leone, represented critical stages in the evolution of these institutions from largely experimental national investigations conducted in the heat of unpredictable political struggles, into internationally valid post-conflict instruments with definite ethical objectives immunized, at least conceptually, against local political exigencies. Of course, as shown in the detailed presentation of cases in Chapters 5, 6 and 7, the example of the Serbian process served to remind the actors and spectators of this worldwide phenomenon of truth commissions that this evolution was far from complete. As the Serbian truth commission was less a human rights institution than a public relations tactic, this example clearly demonstrated the uneradicable tension between the prudential concerns of political life and the ethical imperatives of human rights norms.

This fundamental distinction, (i.e., between prudence and ethics), derived from the philosophy of Immanuel Kant, pervades the whole problematic of responding to gross violations. Prudentially, gross violations are dealt with in light of empirical experiences which help to determine the set of possible actions to achieve the end of reviving the sense of political community disrupted by radical evil. Ethically, gross violations concern the whole humanity and posit the question of what one ought to do regardless of political circumstances and in view of discovering the absolutely necessary action beyond one's political community. Prudential response to gross violations is, by definition, good for something else, usually a political objective independent of and beyond the *sui generis* problem of gross violations. It is a response that

can be adapted to particular contexts. Ethical response to gross violations, on the other hand, is the good in itself. It is a response given not for something else, but for the sake of responding to gross violations, with the indubitable knowledge that gross violations demand a universal response, i.e., justice.

However, not only truth commissions as attested by the outlier case of Serbia, but also international nongovernmental human rights organizations are shaped by this central tension between prudence and ethics, and this was one of the essential points made in my dissertation. My close reading of the human rights reports prepared by *Amnesty International*, *Human Rights Watch* and *International Center for Transitional Justice* revealed that all three organizations have reached a consensus in identifying radical evil with gross human rights violations and presenting human rights as the overarching conceptual response to radical evil. Nevertheless, they are significantly divided over the issue of prioritization which necessitates answering the following questions: 1- Which human rights institutions are best suited to the task of responding to radical evil? and 2- which imperatives, prudential or ethical, should inform the answer to the first question? As should be obvious from Chapters 5 to 8, there is no doubt that *Amnesty International* and *Human Rights Watch* assign normative priority and primacy to international criminal justice. Therefore, both organizations define the role of truth commissions in terms of their contribution to the criminal prosecution of each and every violator. This approach is certainly moved by an ethical imperative, according to which, regardless of the empirical difficulties of trying thousands of perpetrators and the political calculations that might tempt one to avoid the course to mass punishment, the right, i.e., universal response to radical evil ought to be found in courtroom procedures. This is the imperative of "doing justice to law", i.e., to the law's moral universe of rights and duties and its

exacting presumption of personal responsibility for human beings' actions.

The challenge to this perspective of criminal justice comes from the *International Center for Transitional Justice*. The *Center*'s answer to the question of "Which human rights institutions?" appears to be "It depends on political circumstances". The perspective of transitional justice which gives this organization its name redefines the problem of responding to radical evil in terms of a problem of creating favourable conditions for a peaceful political transition. As favourable conditions differ with the different contexts imposed by the specificities of countries and their experiences of war or repression, the prioritization of human rights institutions must also differ in light of changing circumstances. In this sense, criminal prosecutions and truth commissions are merely two of the main "tools" in a broadly conceived set of transitional justice mechanisms which also include purges (lustrations), symbolic and material reparations, and institutional reforms aimed at rebuilding, for instance, the judiciary and the military. Therefore, the primary imperative at work here is prudential. It involves "doing justice to politics", i.e., to the opportunities and constraints presented by the political process (or, giving priority to the future political community).

This prudence-ethics divide is also reflected in the changing mandates of the three human rights organizations. Whereas *Amnesty* and *Human Rights Watch* are largely known for monitoring gross human rights violations as they occur in real time, the *International Center for Transitional Justice* focuses on the question of how to enforce human rights standards and build human rights institutions in the aftermath of gross violations. This represents a shift from monitoring violations to monitoring institutional responses to violations, to which *Amnesty* and *Human Rights Watch* have partially adapted, too. More clearly, whereas the latter define their mission in terms of realizing the

enjoyment of human rights by everyone on the planet and holding every gross human rights abuser accountable, the *Center* chooses to portray itself as the provider of technical expertise in matters of dealing with past human rights violations. In this scheme, ethical response exemplified by *Amnesty* and *Human Rights Watch* involves an intervention into the present irrespective of the great burdens of the past that show ethical intervention to be impractical and imprudent. Prudential response advocated by the *Center*, however, prefers to take steps informed by the lessons of the past. Thus, this overall picture substantially reveals the divergence in the outlook of the human rights organizations: *Amnesty* and *Human Rights Watch* move from the *ethical* assumption that gross human rights violations can be actually prevented and even eradicated from the face of the earth through criminal punishment and, therefore, informs an international public opinion that courts and truth commissions should live up to that universal aspiration. The *International Center for Transitional Justice* starts from the reality of already incurred massive injustice and provides "counsels of *prudence*" (Kant 1964: 84) to national political actors regarding the best means to achieve those conditions under which the evil past cannot recur.

My main argument in this dissertation was that this divergence forced human rights organizations to evaluate truth commissions from either the ethical perspective of criminal justice or the prudential perspective of transitional justice. My aim was to show that the basic misconception of a perspective of criminal justice was to assume that punishment is the only ethical way of responding to gross human rights violations. However, as Arendt's own investigation into the matter (presented in Chapter 1) showed, one cannot be solely satisfied with courtroom procedures, because ethical imperatives need not only concern issues of personal responsibility. More importantly, the

phenomenon of gross human rights violations has certain inherent aspects that transcend the domain of personal responsibility. Similarly, I objected to the assumption of the perspective of transitional justice according to which issues that go beyond personal responsibility and pertain to the domain of political responsibility can only be resolved by prudential insight. The issue of political responsibility need not be approached solely with prudential imperatives. There can be an ethical understanding of political responsibility and, moreover, such an understanding is necessitated by the specific character of gross human rights violations whose very grossness pushes us to review our ethical standards.

Instead of evaluating truth commissions from preconceived ethical and prudential priorities like, respectively, universal application of punishment and successful management of transitions, as the three human rights organizations do, I tried to grasp how the phenomenon of truth commissions helps us to evaluate ethically the political responsibility for gross violations. *Epistemic justice* was the concept that I proposed in order to conceive how the institution of truth commission can be good in itself, without necessarily contributing to criminal prosecutions or facilitating smooth political transitions. From this perspective, the need to have an impartial knowledge of the facts surrounding the radical evil unleashed in gross violations in wars (epistemic justice) is separate from and even beyond both the need to see gross violators held personally accountable (criminal justice) and the need to see one's political community progress into a better, more secure future (transitional justice). In other words, the experience of truth commissions deploys the subject of human rights on center stage as an ethical subject defined by her capacity to know the factual truth about the history of gross violations. This ethical subject is one endowed with political responsibility, because the factual truth produced

by a truth commission constrains the way she acts and thinks as a political being. Such an ethically informed political being acts and thinks without causing or legitimizing gross violations. Achieving this kind of ethical assumption of political responsibility through the official production of an impartial and consensual historical truth by a truth commission is an end in itself. It entails “doing justice to history”, i.e., to the factual truth of gross violations. Therefore, it seems that truth commissions should be built on an ethical obligation that surpasses their being utilized as a producer of information regarding the circumstances around the singular cases of gross violations for which persons can be held legally and morally responsible. Their prudential benefits, if any, should also be considered contingent insofar as an impartial historical knowledge of political responsibility for gross violations is morally good, even if it has the potential to destabilize a peaceful transition. Fear of destabilization creates a serious obstacle to realizing epistemic justice.

In lieu of a conclusion, this exercise in political thought enables me to draw certain practical lessons that could hopefully inspire 1- both fairer monitoring of truth commissions on the part of human rights organizations and 2- more carefully reasoned expectations regarding what these institutions can achieve on the part of those political actors who are intent on establishing truth commissions. The following recommendations come to the fore.

First of all, the human rights reports written by *Amnesty International* and *Human Rights Watch* definitely lead me to develop a critique of criminal justice insofar as criminal justice is presumed as the single absolutely necessary ethical response to gross human rights violations. On the contrary, truth commissions are genuine ethical responses, too — only at a different level of responsibility. In light of this argument, my first recommendation is as follows: *Truth commissions*

*should not bear the burden of the specific limits of criminal justice.* I exemplify these burdens in the course of a discussion in Chapter 8 about the issues of deterrence, truth and small fry. Courtroom procedures face considerable difficulties in dealing with the grossness of gross human rights violations, as shown in Chapter 8, section 8.1. Most of the time, courts cannot 1- deter gross violators, 2- convey a truth beyond the cases of specific individuals, and 3- try all the small fry. Still, this inherent burden of gross violations arising from the inherent limits of criminal prosecutions does not become less burdensome when it is transferred to or shared by truth commissions. Therefore, truth commissions should not be expected to fill in the blanks left by the practice of courts. They are different formations (or collective attempts) and their contribution to courtroom procedures can only be secondary to their primary objective of achieving epistemic justice.[61]

Secondly, the human rights reports written by the *International Center for Transitional Justice* also necessitates criticizing the discourse of transitional justice. As the perspective of epistemic justice delinks the practice of truth commissions from the imperatives of criminal law, a similar disconnection should come into effect in terms of the imperatives of political process. I want to argue that *truth commissions should not bear the burden of the wider and sometimes ubiquitous goals of transitional justice.* From this, two more specific recommendations follow. First of all, *truth commissions should produce a truth that makes*

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[61] Still, I have to admit that the relationship between epistemic justice provided by truth commissions and criminal justice provided by courts poses important questions which are beyond the scope of this thesis. For instance, the question of what will happen if a truth commission and a criminal court come to divergent factual conclusions about the same events is fascinating and in need of further exploration. Such an exploration will need to account for the ways in which criminal courts and truth commissions might have varying legal powers and utilize different procedural tools, such as different interrogation techniques (for a good starting point to think these issues through, see Freeman 2006). I would like to thank to Assoc. Prof. Dr. Levent Gönenç for making me more aware of this problem.

*sense to both victims and perpetrators.* As discussed in Chapter 8, although truth commissions generally empower victims, they also need to account for the different degrees of political responsibility incurred by the diverse community of perpetrators. This focus on perpetrators should be disconnected from both the prudential calculations that consider extending forgiveness and amnesty to perpetrators and the ethical considerations of how perpetrators' involvement might be fed into criminal legal processes. Truth commissions should deal with perpetrators in view of the interest of obtaining a more impartial factual truth about the circumstances of past radical evil. As the examples of national victimization in Serbia and victim-perpetrators in Sierra Leone discussed in Chapter 8, section 8.2 shows, the task of distinguishing between victims and perpetrators is sometimes complicated by the amorphous nature of the wars investigated. The effort to produce a truth that makes sense to both victims and perpetrators can somewhat limit the negative effects of this confusion on the truth commission report. The more clearly a commission reports the illustrative instances of indistinction between victims and perpetrators, the less prone it is to the allegation that its report has not adequatly accounted for the amorphous character of the armed conflict and the closer it is to the provision of epistemic justice.

The second recommendation aimed at practically distinguishing the objective of epistemic justice and the wider goals of transitional justice is as follows: *Truth commissions should analyze the causes of gross human rights violations to shed light on the ways in which causes are embodied in the institutions of justice and security sectors.* Arendt's conceptualization of political responsibility, as presented in Chapter 1, requires dealing with the role of political institutions in influencing the circumstances in which gross violations take place. In this sense, an inquiry led by a truth commission into the causes of gross violations

should not merely attach causes to personally responsible individuals. This option would amount to prudentially facilitating or ethically prioritizing criminal prosecutions. Additionally, a causal analysis should not produce mystifications about the supposed degradation of political relations in order to argue for reconciling old enemies in a new community of friendship. This option is beyond the reach of what factual truth can, by definition, achieve. Unlike the assumption behind the South African truth commission, there is no ethically necessary link between truth, which should be attained irrespective of political concerns, and reconciliation, which is a political concern *par excellence*. The effort of seeking causes in concrete institutions like the judiciary, the police and the armed forces, however, is true to the meaning of Arendt's definition of political responsibility in Chapter 1. The truth of a truth commission fulfills its ethical task more completely insofar as its explanation of the causes of radical evil can lead its readers to question the institutional arrangements which are supposed to provide justice and security for a peaceful order, but utterly fail in this most fundamental expectation from a just political order. An impartial judiciary and a legitimate coercive authority endorsed by security forces that can protect individuals' rights from being violated are the *sine qua non* of a morally desirable polity. In their absence, there remains no ethical obligation to assume political responsibility for one's political community and its institutions. If a truth commission detects these elementary institutions' failures in preventing gross violations and traces the causes of violations to these undeniable failures, then its truth is *epistemically just*. The rest, i.e., the weighty decision to reform these institutions, depends on the political process which falls within the prudential purview of transitional justice.

The idea of epistemic justice presumes that knowing can be an ethical activity and that the knowledge of inviolable rights and gross

injustices can be grasped in an ethical object like the report of a truth commission. The demand to know history and do justice to it instills in a person the political responsibility to give testimony to a truth commission. But this is simultaneously the demand to reclaim one's human dignity as a knower of right and wrong, of just and unjust, by seeing the political responsibility for radical evil printed on a piece of paper as if set in stone. Hannah Arendt said that making a truth "manifest in the guise of an example ... is the only chance for an ethical principle to be verified as well as validated" (Arendt 1967: 248). Thus, I will finish with a remarkable example of how justice inheres in knowing — knowing not by oneself, but through an official record. Such an experience of knowing elucidates the political responsibilities of both moral bearers and gross violators of human rights, as in the case of this witness who gave testimony to Guatemala's *Historical Clarification Commission*. He was driven by the urge to prove his statement and thereby demanded justice in the form of an authoritative record. Carrying with himself the exhumed remains of a loved one, he "took some bones out of his bag and part of a set of teeth" belonging to the victim and said:

> It's very painful for me to carry these... It is like carrying death... I am not going to bury them yet... Yes, I want him to rest. I also want to rest, but I cannot yet... They are the proof of my statement... I am not going to bury them yet. I want a document that tells me, "The patrols killed him because of the Army and he committed no crime. He was innocent." ... Then, we will rest. (Historical Clarification Commission 1982)

# APPENDICES

## APPENDIX A

### TYPES OF VIOLATIONS INVESTIGATED BY TRUTH COMMISSIONS

*Table 7: Types of violations investigated by truth commissions*

| Guatemala's *Historical Clarification Commission* | Serbia's *Yugoslav Truth and Reconciliation Commission* | Sierra Leone's *Truth and Reconciliation Commission* |
|---|---|---|
| *Mandate*:<br>"human rights violations and acts of violence connected with armed conflict" (1994)<br><br>*Scope*:<br>all human rights violations from 1962 to 1996<br><br>*Priority*:<br>attacks on life and personal integrity, in particular, extrajudicial executions, forced disappearances and sexual violations (Tomuschat) | *Mandate*:<br>"conflicts which led to war and causal links between them" (2001)<br><br>*Scope*:<br>undetermined<br><br>*Priority*:<br>undetermined<br><br>*Note*:<br>a mandate designed to counteract that of the International Criminal Tribunal for the former Yugoslavia (ICTY) which covers "serious violations of international humanitarian law in the territory of former Yugoslavia since 1991" (that is, grave breaches, violations of laws and customs of war, crimes against humanity, genocide) | *Mandate*:<br>"violations and abuses of human rights and international humanitarian law related to armed conflict" (2000)<br><br>*Scope*:<br>all human rights violations from 1991 to 1999<br><br>*Priority*:<br>favouring the "indivisibility of human rights" argument, that is, violations of both civil and political rights and social and economic rights (Schabas) |

# APPENDIX B

## LIST OF HUMAN RIGHTS REPORTS ANALYZED

**Abbreviations:**
**HROs,** Human rights organizations; **AI,** Amnesty International; **HRW,** Human Rights Watch; **ICTJ,** International Center for Transitional Justice; **GT,** Guatemala; **RS,** Serbia; **SL,** Sierra Leone.

*Table 8: List of human rights reports analyzed*

| | HROs | CASE | YEAR | TITLE |
|---|---|---|---|---|
| 1 | **AI** | **GT** | 1996 | The right to truth and justice |
| 2 | **AI** | **GT** | 1998 | All the truth, justice for all |
| 3 | **AI** | **GT** | 1998 | Is Guatemala falling back to its tragic past? |
| 4 | **AI** | **GT** | 1998 | Those who forget the past are condemned to relive it |
| 5 | **AI** | **GT** | 2009 | Justice and impunity: Guatemala's Historical Clarification Commission - 10 years on |
| 6 | **HRW** | **GT** | 1994 | Human rights in Guatemala during President de Leon Carpio's first year |
| 7 | **HRW** | **GT** | 1995 | Disappeared in Guatemala: The case of Efrain Bamaca Velasquez |
| 8 | **HRW** | **GT** | 1999 | New document reveals executions by Guatemalan army |
| 9 | **HRW** | **GT** | 2001 | Guatemala verdict hailed |
| 10 | **HRW** | **GT** | 2002 | Guatemala: Poltical violence unchecked |
| 11 | **HRW** | **GT** | 2002 | Guatemala's verdict a victory of military accountability |
| 12 | **HRW** | **GT** | 2004 | Guatemala: Establish investigative commission |
| 13 | **HRW** | **GT** | 2005 | 2005 World Report - Guatemala: Events of 2004 |

*Table 8 (continued)*

| | HROs | CASE | YEAR | TITLE |
|---|---|---|---|---|
| 14 | **HRW** | **GT** | 2006 | 2006 World Report - Guatemala: Events of 2005 |
| 15 | **HRW** | **GT** | 2009 | 2009 World Report - Guatemala: Events of 2008 |
| 16 | **HRW** | **GT** | 2012 | 2012 World Report - Guatemala: Events of 2011 |
| 17 | **ICTJ** | **GT** | 2009 | Documenting truth |
| 18 | **ICTJ** | **GT** | 2009 | Truth-telling, identities and power in South Africa and Guatemala |
| 19 | **ICTJ** | **GT** | 2012 | Strengthening indigenous rights through truth commissions: A practitioner's resource |
| 20 | **AI** | **RS** | 2010 | Commissioning justice: Truth commissions and criminal justice |
| 21 | **HRW** | **RS** | 2006 | Weighing the evidence: Lessons from the Slobodan Milosevic trial |
| 22 | **ICTJ** | **RS** | 2002 | Summary report regarding local, regional and international documentation of war crimes and rights violations in the former Yugoslavia |
| 23 | **ICTJ** | **RS** | 2004 | Serbia and Montenegro: Selected developments in transitional justice |
| 24 | **ICTJ** | **RS** | 2007 | Against the current: War crimes prosecutions in Serbia |
| 25 | **AI** | **SL** | 1999 | Sierra Leone: a peace agreement but no justice |
| 26 | **AI** | **SL** | 1999 | Sierra Leone: the Security Council should clarify the United Nations’ position on impunity |
| 27 | **AI** | **SL** | 1999 | Sierra Leone: Amnesty International's recommendations to the Commonwealth Heads of Government Meeting, Durban, South Africa, 12-15 November 1999 |
| 28 | **AI** | **SL** | 2000 | Sierra Leone: Ending impunity - an opportunity not to be missed |
| 29 | **AI** | **SL** | 2000 | Sierra Leone: Recommendations on the draft Statute of the Special Court |
| 30 | **AI** | **SL** | 2000 | Child soldiers: Criminals or victims? |
| 31 | **AI** | **SL** | 2001 | Sierra Leone: Renewed commitment needed to end impunity |
| 32 | **AI** | **SL** | 2002 | Sierra Leone holds elections in May |

*Table 8 (continued)*

| | HROs | CASE | YEAR | TITLE |
|---|---|---|---|---|
| 33 | **AI** | **SL** | 2002 | Sierra Leone: International community must stay involved after elections |
| 34 | **AI** | **SL** | 2002 | Guinea, Liberia and Sierra Leone: UN Security Council meeting on the countries of the Mano River Union - Observations by AI |
| 35 | **AI** | **SL** | 2003 | Sierra Leone: First indictments before the Special Court for Sierra Leone |
| 36 | **AI** | **SL** | 2005 | Special Court for Sierra Leone: Statement to the National Victims Commemoration Conference, Freetown, 1 and 2 March 2005 |
| 37 | **AI** | **SL** | 2007 | Sierra Leone: Getting reparations right for survivors of sexual violence |
| 38 | **AI** | **SL** | 2007 | Sierra Leone: Mass rally in support of survivors of conflict's sexual violence |
| 39 | **AI** | **SL** | 2009 | Sierra Leone: President Koroma must commute all death row prisoners |
| 40 | **AI** | **SL** | 2010 | Sierra Leone: Inquest or commission of inquiry into 1992 extrajudicial executions must form part of a comprehensive plan to end impunity |
| 41 | **AI** | **SL** | 2010 | Sierra Leone: Continuing human rights violations in the post conflict period |
| 42 | **AI** | **SL** | 2011 | Sierra Leone: Annual Report 2011 |
| 43 | **HRW** | **SL** | 2002 | The interrelationship between the Sierra Leone Special Court and Truth and Reconciliation Commission |
| 44 | **HRW** | **SL** | 2003 | "We'll kill you if you cry": Sexual violence in the Sierra Leone conflict |
| 45 | **ICTJ** | **SL** | 2002 | Exploring the relationship between the Special Court and the Truth and Reconciliation Commission of Sierra Leone |
| 46 | **ICTJ** | **SL** | 2002 | Ex-combatant views of the Truth and Reconciliation Commission and the Special Court in Sierra Leone |
| 47 | **ICTJ** | **SL** | 2003 | Sierra Leone's Truth and Reconciliation Commission and Special Court: A citizen's handbook |
| 48 | **ICTJ** | **SL** | 2004 | The Sierra Leone Truth and Reconciliation Commission: Reviewing the first year |

# Appendix C

## Number of Human Rights Reports Per Year

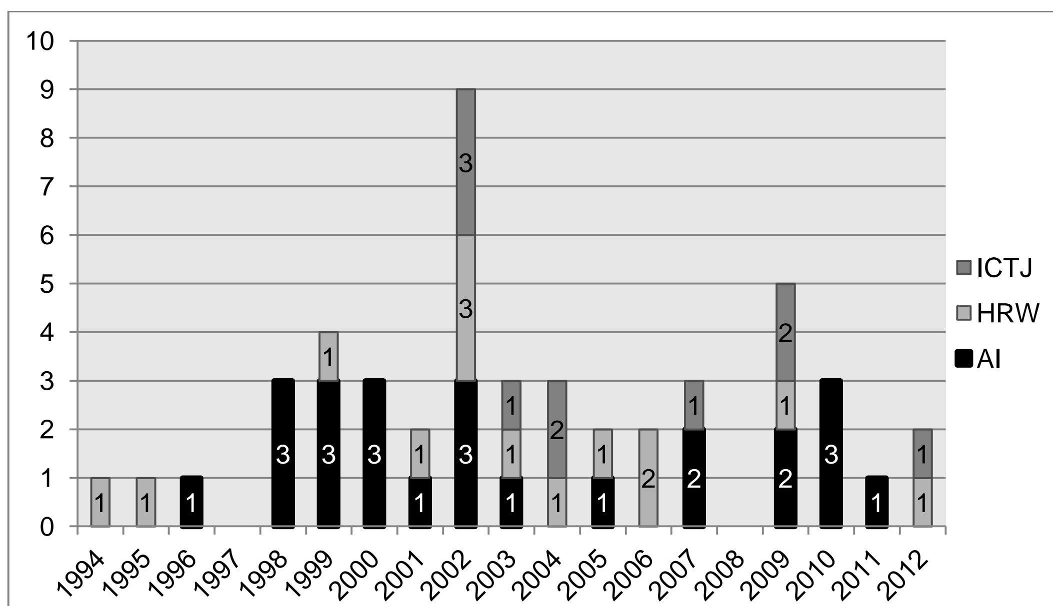


**Figure 2: Number of human rights report per year by each organization**

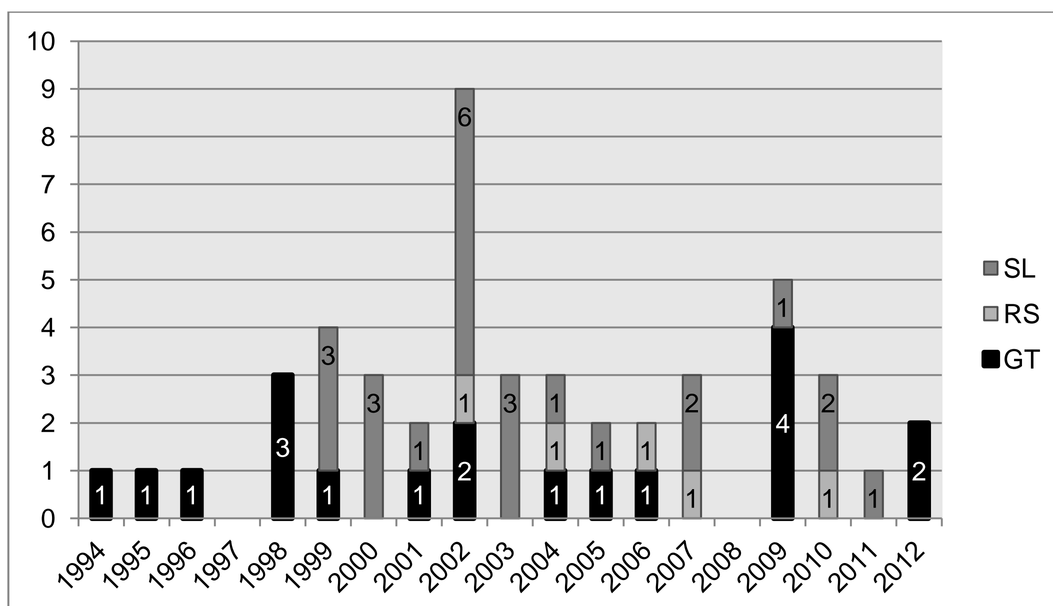


**Figure 3: Number of human rights reports per year on each country**

**Abbreviations: AI,** Amnesty International; **HRW,** Human Rights Watch; **ICTJ,** International Center for Transitional Justice; **GT,** Guatemala; **RS,** Serbia; **SL,** Sierra Leone

# APPENDIX D

## CRITICAL DATES

*Table 9: Critical dates*

| ***YEAR*** | ***MONTH*** | ***EVENT*** |
|---|---|---|
| 1960 | *November* | War in Guatemala begins. |
| 1961 | *May* | **Amnesty International** begins. |
| 1978 | | **Human Rights Watch** is founded. |
| 1991 | *March* | War in Sierra Leone begins. |
| 1991 | *June* | War in the former Yugoslavia begins. |
| 1993 | *May* | International Criminal Tribunal for the former Yugoslavia is established. |
| 1994 | *March* | Guatemala's **Historical Clarification Commission** is established. |
| 1994 | *November* | International Criminal Tribunal for the former Yugoslavia begins its work. |
| 1996 | *December* | War in Guatemala ends. |
| 1997 | *February* | Guatemala's **Historical Clarification Commission** begins its work. |
| 1999 | *February* | Guatemala's **Historical Clarification Commission** publishes its final report. |
| 1999 | *June* | War in the former Yugoslavia ends. |
| 2000 | *February* | **Sierra Leone Truth and Reconciliation Commission** is established. |
| 2001 | | **International Center for Transitional Justice** is founded. |
| 2001 | *March* | **Yugoslav Truth and Reconciliation Commission** is established. |
| 2002 | *January* | War in Sierra Leone ends. |
| 2002 | *January* | Special Court for Sierra Leone is established. |
| 2002 | *January* | **Yugoslav Truth and Reconciliation Commission** begins its work. |
| 2002 | *February* | Milošević trial at the International Criminal Tribunal for the former Yugoslavia begins. |
| 2002 | *July* | Special Court for Sierra Leone begins its work. |
| 2002 | *November* | **Sierra Leone Truth and Reconciliation Commission** begins its work. |
| 2003 | *February* | **Yugoslav Truth and Reconciliation** disbands. |
| 2004 | *October* | **Sierra Leone Truth and Reconciliation Commission** publishes its final report. |
| 2006 | *March* | Milošević trial at the International Criminal Tribunal for the former Yugoslavia ends. |

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# TURKISH SUMMARY / TÜRKÇE ÖZET

Tezdeki argümanların özeti niteliğindeki bu bölümde, ilk olarak, tezde tartıştığım temel kavramlardan biri olan *ağır insan hakları ihlallerinin* anlamına değineceğim. Ardından, tezde yürüttüğüm siyaset kuramı tartışmasına önemli bir katkı vermiş olan çağdaş siyaset düşünürü *Hannah Arendt*'in ağır insan hakları ihlalleri fenomeniyle ilgili görüşlerine yer vereceğim. Tezin temel katkısı olmasını umduğum *hakikatin adaleti* kavramını kısaca açıkladıktan sonra, argümanlarımı netleştirmek adına, *uluslararası insan hakları örgütlerinin*, hazırladıkları *insan hakları raporlarında*, ulusal resmî insan hakları soruşturmaları niteliğindeki *hakikat komisyonlarını* nasıl değerlendirildiklerini anlatacağım. Son olarak, hakikatin adaleti kavramının hakikat komisyonları bakımından önemini tekrar vurgulayarak, araştırdığım üç hakikat komisyonu olan *Guatemala, Sırbistan* ve *Sierra Leone* hakikat komisyonları hakkındaki izlenimlerimi kısaca paylaşacağım ve bu özeti hakikat komisyonlarının işleyişine dair birkaç mütevazı öneriyle sonlandıracağım.

* * *

Bu tezde yürüttüğüm araştırma, toplumların *ağır insan hakları ihlalleri* (*gross human rights violations*) karşısında neler yapabildikleri, bu ihlallerle nasıl baş ettikleri sorusuna dayanıyor. Dolayısıyla, araştırma

sürecinin başlangıç noktasını *ağır insan hakları ihlalleri* kavramının kapsam ve sınırlarına ilişkin bir inceleme oluşturdu. Araştırmamın son evresine geldiğimde ise, ağır ihlaller fenomenine verilen özel bir kurumsal yanıt niteliğindeki *hakikat komisyonlarına* (*truth commissions*) odaklanmak gereğini hissettim. Bu doğrultuda, tezimin odak noktasını silahlı çatışma deneyimlerini geride bırakan ülkelerde 1980'lerden bu yana giderek artan sayıda kurulmakta olan ve ağır ihlallere yönelik resmî insan hakları soruşturmaları olarak işlev gören *hakikat komisyonları* oluşturdu. Hakikat komisyonlarına dair siyaset kuramı disiplini içerisinde bir tartışma yürütme niyetim, beni, nihai olarak, bugün ağır insan hakları ihlallerinin birincil tarihsel örneklerinden biri olarak görülen Nazi rejiminin işlediği suçları araştırmış ve bu suçlar karşısında hakikat ile siyaset arasındaki ilişkiyi sorunsallaştırmış bir siyaset düşünürüne, Hannah Arendt'e ulaştırdı.

Araştırmamın başlangıç ve son evrelerindeki bu unsurların birlikteliğine, yani ağır insan hakları ihlalleri ile hakikat komisyonları hakkında siyaset kuramı disiplini içerisinde Hannah Arendt'in çalışmalarına gönderme yaparak yürütmek istediğim tartışmanın çerçevesine gelince, bu çerçevenin sınırını *uluslararası hükümet-dışı insan hakları örgütleri* (*international nongovernmental human rights organizations*) belirledi. Buna göre, tezimin temel araştırma alanını, dünyanın önde gelen *uluslararası insan hakları örgütleri* konumundaki *Uluslararası Af Örgütü* (*Amnesty International*), *İnsan Hakları İzleme Örgütü* (*Human Rights Watch*) ve *Uluslararası Geçiş Adaleti Merkezi*'nin (*International Center for Transitional Justice*) hazırladıkları, Guatemala, Sırbistan ve Sierra Leone'daki hakikat komisyonlarını değerlendiren *insan hakları raporları* (*human rights reports*) meydana getirdi. Böylece, ağır insan hakları ihlalleri karşısında hakikat komisyonlarının yapabileceklerine yönelik kavramsal tartışmayı, birbirinden oldukça farklı savaş ve savaş sonrası deneyimlere tekabül

eden üç somut vakanın *insan hakları raporları* kapsamında nasıl değerlendirildikleri sorusundan yola çıkarak yürütme imkânına sahip oldum.

## AĞIR İNSAN HAKLARI İHLALLERİ VE RADİKAL KÖTÜLÜK

Burada sunulan özete, sunuş tarzı bakımından tezin üçüncü bölümünde incelenmesine karşın tezdeki araştırmanın başlangıç noktasını oluşturan ağır insan hakları ihlalleri kavramından başlamak, tezde ulaştığım sonuçları genel hatlarıyla açımlayabilmem bakımından uygun olacaktır. Ağır insan hakları ihlalleri, netleştirilmeye muhtaç bir kavramdır, çünkü bazı insan hakları ihlallerini ağır kılanın ne olduğunu tespit etmek gerekir. Tezde incelediğim vakalar olan Guatemala, eski Yugoslavya ve Sierra Leone savaşları bağlamında, insan hakları ihlallerinin ağırlığı, neredeyse her durumda niceliksel bir aşırılığı ifade eder. Örneğin, Guatemala'da ağır ihlaller 36 yıllık bir iç savaşın sebep olduğu 200.000 ölüme denk gelir. Eski Yugoslavya savaşlarında, ağırlığın en önemli örneğini Srebrenitsa'da bir hafta içerisinde 8.000 yetişkin ve çocuk yaşta erkeğin öldürülmesi oluşturur. Sierra Leone'da ise, ağır, 11 yıllık silahlı çatışmaların sebep olduğu 150.000 ölümü anlatır. Bu örnekler ışığında, ağır insan hakları ihlallerinin temelde *katliamlardan* ibaret olduğu söylenebilir.

Ağır insan hakları ihlalleri kavramı, ilk kez 1967 yılında, bir Birleşmiş Milletler kararında kullanıldı. 1967'den bu yana, birçok uluslararası kurum tarafından ve birçok insan hakları soruşturmasında, örneğin, son olarak Suriye savaşına dair çeşitli raporlarda, yaygın bir biçimde yer aldı. Dolayısıyla, bu kavramın uluslararası siyaset jargonunun sıkça kullanılan terimlerinden birine dönüştüğü rahatlıkla söylenebilir. Tezimde, kavramın bu yönünü açığa çıkaran karmaşıklığını tespit etmeme ve tartışmama rağmen, siyaset kuramı üzerinden bir

tartışma yürütmek istediğim için, ağır insan hakları ihlallerinin bir uluslararası siyaset kavramının ötesinde bir şeye işaret ettiğini savundum. Kavramın siyaset kuramına konu olan yönünün, kavramın işaret ettiği fenomenin, yani katliamların insanlara temel bir etik sorusu sordurtmasıyla ortaya çıktığını ileri sürdüm. Bu temel etik sorusu, *İnsanlar katliam gibi büyük bir problem karşısında ne yapmalıdır?* şeklinde ifade edilebilir.

Tezimin temel argümanlarından biri, Hannah Arendt'in bu soruya sistematik bir biçimde yanıt arayan ilk çağdaş siyaset kuramcısı olduğudur. İlginç olan, Arendt'in ağır ihlaller fenomenine bu kavrama başvurmadan eğilmesidir. Onun yerine, Alman filozof Immanuel Kant'tan ödünç aldığı *radikal kötülük* (*radical evil*) kavramıyla ağır ihlalleri meydana getiren olayları incelemiştir. Arendt'e göre, Nazi toplama kampları radikal kötülüğün çağdaş örneklerindendi. Bu anlamda, *radikal kötülük*, akla hayale kolayca sığmayan büyüklükleri ve örgütlülükleriyle öne çıkan katliamlar sonucunda insanlığın temel etik, hukuki ve siyasi mefhumlarının parçalanmasına, geçersizleşmesine sebep olmaktaydı. Tez boyunca, Hannah Arendt'in çalışmaları üzerinden ağır insan hakları ihlalleri ile radikal kötülük arasında kurulan kavramsal denkliği korumaya özen gösterdim. Bu kavramsal denklik, uluslararası siyasetin en büyük sorunlarından biri olan ağır ihlaller fenomenini siyaset kuramı disiplininde sorulan etik soruları üzerinden çözümlememe olanak tanıdı.

## ARENDT'İN SORULARI: CEZA ADALETİNDEN HAKİKATİN ADALETİNE

Arendt'in en uç örneklerinden birini Nazi toplama kamplarında bulan ağır ihlallere yönelik araştırması, onun tercih ettiği tabirle söylenecek olursa, radikal kötülüğe karşı ne yapılabileceği sorusunu

temel aldı. Arendt'in bu genel soruya verdiği ilk cevap, *mahkeme prosedürleriydi*. Arendt, bu cevaba, Yahudilerin kitlesel olarak toplama kamplarına gönderilmelerinden sorumlu tutulan Nazi lideri Adolf Eichmann'ın İsrail tarafından yakalanmasının ardından yargılanmak üzere getirildiği Kudüs'teki duruşmalarına katıldıktan sonra kaleme aldığı *Eichmann Kudüs'te: Kötülüğün Sıradanlığı Üzerine Bir Rapor* (*Eichmann in Jerusalem: A Report on the Banality of Evil*) adlı yapıtında ulaştı. Arendt, yapıtında da vurguladığı üzere, duruşmalar süresince, kişileri bir hukuk mahkemesinde eylemlerinden dolayı ahlaken sorumlu tutmanın, katliamlar (dolayısıyla, ağır ihlaller) karşısında adaleti tesis etmek anlamına geldiğini gözlemledi.

Tezimde, Arendt'in dikkat çektiği bu adalet kavramını, *ceza adaleti* (*criminal justice*) olarak sundum ve tartıştım. Bununla birlikte, *ceza adaletinin*, *hukuka hakkını vermeye* (*doing justice to law*) dayalı bir süreçten meydana geldiğini ileri sürdüm. *Hukuka hakkını vermek* ise, basitçe, mahkemelerin ağır ihlallerden *şahsen sorumlu* (*personally responsible*) kişileri cezalandırarak ağır ihlallerle baş etmeleri anlamına geliyor.

Gelgelelim, Arendt, *Eichmann Kudüs'te* adlı yapıtından sonra sürdürdüğü çalışmalarında, ağır ihlallere karşı neler yapılabileceği sorusuna cevap olarak bulduğu *mahkeme prosedürleri / ceza adaleti* yaklaşımının bu büyük soruya tam anlamıyla tatmin edici bir cevap veremediğini ortaya koydu. Eichmann duruşmalarından birkaç yıl sonra kaleme aldığı bir makalesinde, bir başka büyük soru daha sormak zorunda kaldı: *Doğrudan deneyimlemediğimiz bir zaman diliminde, yani geçmişte gerçekleşmiş olan radikal kötülüğü, yani ağır hak ihlallerini yargılayabilir miyiz?*

Arendt'in sorduğu bu önemli soruyu Eichmann'ın mahkemede dile getirdiği, Nazi rejiminin suçlarından şahsen sorumlu olduğu yönündeki karara karşı yaptığı itiraz tetiklemişti. Eichmann, bu temel

itirazında, *onun konumunda olan herkesin aynı şeyi yapabileceğini ve hatta yapacağını* iddia ediyordu. Arendt, bu rahatsız edici iddia karşısında, ağır insan hakları ihlalleri için *kişisel sorumluluk* (*personal responsibility*) dışında bir başka sorumluluk biçiminden söz edip edemeyeceğimizi sorgulamaya başladı. Özetle, Eichmann'ın itirazına karşı geliştirdiği argüman şöyleydi:

Bir *katliam politikası* (*a policy of mass murder*), yani bir ağır ihlal politikası güden bir siyasal sistem, temsilcilerini bürokratik bir makinanın değiştirilebilir parçaları haline getirir. Böyle bir siyasal sistem temsilcilerinin özerk eylemde bulunma kapasitelerini ciddi ölçüde ve fakat onların kişisel sorumluluklarını tamamen ortadan kaldırmadan sakatlar. Dolayısıyla, Eichmann'ın itirazı, onun kişisel sorumluluğuna dair herhangi bir şüphe doğurmasa da, ağır ihlallerin önemli bir özelliğini dikkate almamızı gerektirir. Ağır ihlallerin kişisel yüklenmelerin ötesinde bir kolektif çabayı gerektirdiğini göz önünde bulundurmamız zorunludur. Radikal kötülüğün bu kolektif yönü ise, şu soruyu gündeme getirir: *Özerk kişilerin oluşturduğu bir dünyanın ötesini ilgilendiren bir sorumluluk biçimi var mıdır?*

Arendt, yürüttüğü sorgulamada, bu tür bir sorumluluk biçimi bulunduğunu ileri sürer ve bunu *ağır ihlallerden siyaseten sorumlu* (*politically responsible*) olma şeklinde açıklar. Buna göre, *siyasal sorumluluk* (*political responsibility*), siyasal aktörlerin ve siyasal toplulukların paylaştığı türden, kolektif bir sorumluluktur. Dahası, bu sorumluluğun ne anlama geldiğini çözümleyebilmek için, Arendt'in sorduğu ikinci önemli soru olan, *geçmişteki ağır ihlalleri yargılayabilir miyiz?* sorusuna cevap vermek gerekir. Arendt'in bu soruya kendi çalışmalarında verdiği cevap, olumludur. Ona göre, geçmiş ihlalleri yargılayabilmemiz için, bu ihlallerin *olgusal hakikatini* (*factual truth*) nesnel ve tarafsız bir biçimde tespit etmemiz gerekmektedir.

Arendt, siyasal sistem düzeyindeki ağır ihlallere ilişkin siyasal sorumluluğu tespit etmenin tek yolunun ağır ihlallerin *olgusal hakikatini* tespit etmekten geçtiğini ileri sürdü. Buna ilaveten, olgusal hakikatin tarafsız bir kurum tarafından üretilmesi halinde, bir siyasal topluluğun ağır ihlallere ilişkin siyasal sorumluluğu büyük anlaşmazlıklara düşmeden ve çatışma konusu etmeden anlayabileceğini savundu.

Arendt'in bu düşünceleri ışığında, tezde, ağır ihlallere ilişkin siyasal sorumluluğun olgusal hakikatini tespit etme çabasını kavrama sürecinde, ben kendi *hakikatin adaleti* (*epistemic justice*) kavramımı önerdim. Buna göre, *hakikatin adaleti*, geçmişteki ağır insan hakları ihlalleri hakkında tarafsız bilgi sahibi olmakla kazanılan bir adalet duygusunu temsil eder. Bu kavramsallaştırmam doğrultusunda, iki argüman ileri sürdüm: 1- 1980'lerden bu yana, ağır insan hakları ihlallerini ulusal düzeyde soruşturmak amacıyla kurulan hakikat komisyonları, ağır ihlaller hakkında, Arendt'in düşündüğü anlamda, tarafsız bilgi üretebilirler. 2- Ağır ihlaller hakkında bu tarz bir tarafsız bilgiyi üretmek, hakikat komisyonlarının olmazsa olmaz, birincil etik görevi olmalıdır. Böylece, tezin ağır insan hakları ihlallerine dair araştırma ve tartışmalara sunduğu temel katkı olabileceğini umduğum, literatürde daha önce kullanılmayan ve hakikat komisyonlarının birincil etik görevi olarak tanımladığım hakikatin adaleti kavramı, tezin temelini oluşturdu.

Hakikatin adaleti, *tarihe hakkını vermek* (*doing justice to history*) üzerine kuruludur. *Tarihe hakkını vermek* ise, hakikat komisyonlarının tarihi tarafsız bir biçimde belgeleyebileceği ve *ağır ihlallere ilişkin siyasal sorumluluğu* açıklayabileceği varsayımına dayanır. Hakikatin adaleti kavramının ceza adaleti kavramından farkı önemlidir: Ceza adaleti *ağır ihlallerden sorumlu kişileri hukuken cezalandırarak* ağır ihlallere yanıt verirken, hakikatin adaleti ağır ihlalleri olanaklı kılan ve meşrulaştıran *siyasal koşullara dair tarafsız tarihsel bilgi* edinerek ağır

ihlallere yanıt verir. İki adalet kavramı arasındaki bu farka bu özetin ileriki bölümlerinde değineceğim. Öncesinde ise, hakikatin adaleti kuramını, uluslararası insan hakları örgütlerinin hakikat komisyonlarıyla ilgili yazdıkları insan hakları raporlarını inceleyerek nasıl inşa ettiğimi açıklayacağım.

## İNSAN HAKLARI ÖRGÜTLERİ VE HAKİKAT KOMİSYONLARI

Tezde, ağır ihlallere karşı ne yapılabileceğine ilişkin tartışmayı Arendt'in bıraktığı yerden sürdürmeyi denedim. Ana araştırma sahamı, Arendt'in ölümünden sonra ortaya çıkan ve, Arendt'in tartıştığı anlamda, ağır ihlallere ilişkin siyasal sorumluluk hakkında olgusal hakikat üreten *iki tür kurumla* sınırlandırdım.

Birinci tür kurum, *uluslararası hükümet-dışı insan hakları örgütleridir*. Bu örgütler, dünya genelinde işlenen ağır insan hakları ihlallerini izleyen ve kayda geçen örgütlerdir. Raporlarını dengeli ve tarafsız bir biçimde sunma konusunda ciddi çaba harcarlar. Aynı zamanda, toplumların ağır ihlaller karşısında geliştirdikleri hakikat komisyonları gibi kurumsal çabaları da değerlendirirler.

İkinci tür kurum, ulusal resmî insan hakları soruşturmaları olan *hakikat komisyonlarıdır*. Hakikat komisyonları, 1980'lerin başlarından bu yana giderek artan sayıda kurulmakta olan özel amaçlı (*ad hoc*), geçici, özerk kurumlardır. Genellikle silahlı çatışma veya otoriter bir dönem sonrasında, ağır ihlallerin yakın tarihini soruşturmakla görevlendirilirler. Ortalama iki-üç yıllık bir görev süreleri vardır. Bu süre içerisinde, ülkenin yakın geçmişindeki ağır ihlallerin nedenleri ve sonuçları üzerine rapor hazırlayıp sunarlar ve ağır ihlallerin kurbanlarının ve kurban yakınlarının insan haklarının yeniden hayata geçmesi yönünde tavsiyelerde bulunurlar. Mahkemeler gibi yargısal nitelikli olmayan, fakat mahkemeler gibi bağımsız olmaları beklenen resmî soruşturmalardır.

Genellikle parlamento ya da cumhurbaşkanı tarafından görevlendirilirler.

Tez, Arendt'in başlattığı tartışmaya, ağır ihlallerle ilgili *olgusal hakikat arayışına* dayalı bu iki kurum arasındaki belli bir ilişki üzerinden katkı verme hedefiyle tasarlandı. Bahsi geçen ilişki, şu araştırma sorusu üzerinden formüle edildi: *İnsan hakları örgütleri, hakikat komisyonlarını nasıl değerlendiriyorlar?* Daha spesifik olarak, insan hakları örgütleri *hangi adalet kavramları üzerinden* hakikat komisyonlarını değerlendiriyorlar? Bu soruya yanıt bulma çabasının Arendt'in *geçmişteki ağır ihlalleri yargılayabilir miyiz?* sorusuna da yeni yanıtlar bulmaya imkân tanıyabileceği düşünüldü.

Tez kapsamında, toplamda, en önde gelen uluslararası insan hakları örgütlerinden üçünün, yani *Uluslararası Af Örgütü* (*Amnesty International*), *İnsan Hakları İzleme Örgütü* (*Human Rights Watch*) ve *Uluslararası Geçiş Adaleti Merkezi*'nin (*International Center for Transitional Justice*) hazırladığı 48 insan hakları raporu incelendi.

*Neden bu üç örgüt?* sorusuna şöyle yanıt verilebilir: *Uluslararası Af Örgütü*, bir uluslararası hükümet-dışı insan hakları örgütü olarak türünün ilk örneğidir. Soğuk Savaş süresince hâkim olan siyasal dengeler ve duyarlılıklar dolayısıyla hükümetler ve Birleşmiş Milletler örgütü ihlalleri etkili bir biçimde belgeleyemezken, *Af Örgütü*, kurulduğu 1961 yılından itibaren, ağır insan hakları ihlallerinin izlenmesi alanında öncü oldu. Örgüt, ihlaller hakkında tarafsız olgusal hakikat sağlaması bakımından dünya çapında saygınlık kazandı. *Uluslararası Af Örgütü*, bugün hâlâ dünyanın en büyük insan hakları örgütü konumundadır. Araştırma kapsamındaki ikinci örgüt, *İnsan Hakları İzleme Örgütü*, *Af Örgütü*'nün ardından dünyanın en büyük ikinci insan hakları örgütüdür. 1978 yılında New York'ta kurulan *İzleme Örgütü*, 1980'li yıllar boyunca dünya genelinde temsilcilikler açtı. 1980'li ve 1990'lu yılların gelişmekte olan insan hakları izleme etkinlikleri bakımından örgütü özgün ve önemli

kılan, *Af Örgütü*'nün izleme sistemindeki eksiklikleri gidermeye yönelik bir ihlal izleme sistemi geliştirmesiydi. *İnsan Hakları İzleme Örgütü*, örneğin, *Af Örgütü* henüz yalnızca hükümetler tarafından işlenen insan hakları hukuku ihlallerini değerlendirmeye alırken, gerek hükümetlerin gerekse hükümet-dışı aktörlerin işlediği savaş ve insancıl hukuk ihlallerini de izleme faaliyeti kapsamına alarak ağır ihlallerin olgusal hakikatini uluslararası kamuoyuna sunma konusunda ciddi ilerleme sağladı. Tezde incelenen üçüncü uluslararası insan hakları örgütü ise, 2001'de kurulması bakımından diğer iki örgüte göre daha yeni bir insan hakları örgütü olan *Uluslararası Geçiş Adaleti Merkezi*'dir. *Geçiş Adaleti Merkezi*'nin kuruluş amacının doğrudan hakikat komisyonlarıyla bağlantılı olması, bu örgütün insan hakları örgütleri evrenindeki konumuna ayrı bir önem kazandırır. *Merkez*, hakikat komisyonları kurmak isteyen ülkelere danışmanlık hizmetleri sunacak olan uzman bir insan hakları örgütü olarak kuruldu. *Af Örgütü* ve *İzleme Örgütü*'ne kıyasla yeni bir insan hakları izleme faaliyetini temsil eden *Geçiş Adaleti Merkezi*, yalnızca ağır ihlalleri değil, aynı zamanda hakikat komisyonları gibi ağır ihlallere karşı girişilen kurumsal çabaları izler ve değerlendirir.

Kısaca tanıtılan bu üç insan hakları örgütünün yanı sıra, araştırma *Guatemala*, *Sırbistan* ve *Sierra Leone*'daki silahlı çatışmalar sonrasında kurulmuş olan üç spesifik hakikat komisyonu hakkında yazılmış insan hakları raporlarıyla sınırlandırıldı.

*Neden bu üç ülkedeki hakikat komisyonları?* sorusuna da kısa bir yanıt vermek gerekirse: Bu üç hakikat komisyonunu çalışmak istememin ana sebeplerinden biri, iki özel kurumun ardından kurulmuş olmalarıdır. İlk olarak, her üç ülkedeki hakikat komisyonu da 1995 yılında kurulan *Güney Afrika Hakikat ve Uzlaşma Komisyonu* (*South African Truth and Reconciliation Commission*) deneyiminin ardından çalışmalarına başladı. Bu ayrıntının önemi, Güney Afrika Hakikat ve Uzlaşma Komisyonu'nun, işledikleri suçlara dair hakikati itiraf eden

failler hakkında af kararı verme yetkisine sahip olmasının, bu komisyondan sonra kurulan hakikat komisyonlarına yönelik normatif beklentileri belirlemiş olmasıdır. Bir başka deyişle, Güney Afrika deneyiminin ardından, hakikat komisyonlarının ağır ihlaller sonrası kurbanlar ve kurban yakınları ile failler arasındaki ilişkileri normalleştirecekleri ve hatta iyileştirecekleri; silahlı çatışma veya otoriter rejim sonrası toplumda büyük bir siyasal uzlaşmayı gerçekleştirecekleri yönündeki beklenti yüksektir. Güney Afrika deneyimi sonrası kurulan hakikat komisyonlarını incelemek, insan hakları örgütlerinin hakikat komisyonlarına yönelik değerlendirmelerinde (ileride geçiş adaleti kavramıyla ilişkilendirilecek olan) bu yüksek beklentinin ne ölçüde ve nasıl etkili olduğunu görmek bakımından öğreticidir. İkinci olarak, her üç ülkedeki hakikat komisyonu da 1993 yılında kurulan *Eski Yugoslavya Uluslararası Ceza Mahkemesi* (*International Criminal Tribunal for the former Yugoslavia*) deneyiminin ardından çalışmalarına başladı. Söz konusu mahkeme, ilk özel amaçlı (*ad hoc*) uluslararası ceza mahkemesidir. Önemi, kuruluşuyla birlikte, uluslararası ceza adaletinin ulus-devletlerin sınırlarının ötesinde, evrensel düzeyde tesis edilebileceği yönünde normatif beklentileri artırmış, bunun da hakikat komisyonlarının adalet tesis etme kapasitelerine yönelik normatif beklentileri belirlemiş olmasıdır. Eski Yugoslavya Uluslararası Ceza Mahkemesi deneyimi sonrası kurulan hakikat komisyonlarını incelemek, insan hakları örgütlerinin hakikat komisyonlarına yönelik değerlendirmelerinde bu kurumun ceza adaletinin tesisi yönünde teşvik ettiği yüksek beklentinin ne ölçüde ve nasıl etkili olduğunu görmek bakımından öğreticidir.

*Neden bu üç ülke?* sorusuna verilebilecek bir başka yanıt ise, Guatemala, Sırbistan ve Sierra Leone'un birbirinden olabildiğince farklı vakalar olmasıdır. Her üç ülke de yakın geçmişte silahli çatışmalara sahne olsa da, aralarındaki benzerlik bunun ötesine pek geçmez. İlk

olarak, bu üç ülke, coğrafi bakımdan büyük çeşitlilik arz eder. Guatemala Orta Amerika'da, Sırbistan Güneydoğu Avrupa'da, Sierra Leone ise Batı Afrika'dadır. Bir ölçüde coğrafi farklılıklarının bir yansıması olarak, üç ülke önemli tarihsel farklılıkları da temsil eder. Guatemala'nın geride bıraktığı uzun iç savaşın büyük bir kısmı Soğuk Savaş döneminde gerçekleşmişken, diğer iki ülkedeki savaşlar Soğuk Savaş sonrası döneme aittir. Ülkeler arasındaki üçüncü belirgin farklılık, geçirdikleri savaşlar sonrasında tecrübe ettikleri siyasal geçiş süreçlerinin ideolojik bakımdan birbirinden oldukça farklı olmasıdır. Özetle, Guatemala'nın geçişi askerî otoriter rejim sonrası, Sırbistan'ın geçişi komünizm sonrası, Sierra Leone'unki ise sömürgecilik ve patrimonyalizm sonrası geçiş olarak nitelenebilir. Son olarak, her üç ülkenin siyasal sistemi de birbirinden son derece uzak sistemlerdir. Buna göre, Guatemala'nın siyasal görünümü, yerli ve kırsal nüfusun büyük bir kısmını dezavantajlı konuma iten, derin bir eşitsizliğe dayalı toprak sahipliği dağılımı üzerine kurulmuş bir dizi askerî diktatörlükle tanımlanabilir. Sırbistan'da gözlemlenen ise, etnik milliyetçiliği temel alarak irredantist bir proje yürüten komünizm-sonrası bir rejimdir. Bu iki vakadan farklı olarak, Sierra Leone kabile ilişkilerinin fazlasıyla geçerli olmaya devam ettiği ve patrimonyal bir tek parti sistemini geride bırakmaya çalışırken çeşitli otoriter rejimlere sahne olan sömürgecilik-sonrası bir anayasal demokrasidir.

## ULUSLARARASI AF ÖRGÜTÜ VE İNSAN HAKLARI İZLEME ÖRGÜTÜ'NÜN CEZA ADALETİ (HUKUKA HAKKINI VERME) YAKLAŞIMI

Tezin temel argümanları, bu denli keskin farklılıkları barındıran üç ülkede kurulmuş hakikat komisyonlarını değerlendiren insan hakları raporlarının yakın bir okumaya tabi tutulmasıyla şekillendi. Nihayetinde,

bu raporların yakından incelenmesinin ardından, insan hakları örgütlerinin hakikat komisyonlarına yaklaşımları arasında belirgin bir ayrım ortaya çıktı.

*Uluslararası Af Örgütü* ve *İnsan Hakları İzleme Örgütü*, hakikat komisyonları konusunda oldukça benzer bir yaklaşım sergiler. Her iki örgüt de, Arendt'in sorusuna cevap verircesine, geçmişteki ağır hak ihlallerinin elbette yargılanabileceğini savunur, fakat aynı zamanda geçmiş ihlalleri yargılamanın en iyi yolunun ağır ihlallerden sorumlu kişilerin kovuşturulması ve cezalandırılması olduğunu açıkça belirtir. Bu anlayış, Arendt'in Eichmann duruşmalarının ardından önemini vurguladığı ve mahkeme prosedürleri olarak adlandırdığı anlayışla aynı çizgidedir. Kişisel suçu tespit eden bir *ceza adaleti* sürecine etik öncelik atfeden bir pozisyondur. Dolayısıyla, *Af Örgütü* ve *İzleme Örgütü*, *hukuka hakkını verme* yaklaşımıyla özdeşleşir. Kişileri eylemlerinden dolayı ahlaken sorumlu tutmaya dair hukuki fikri savunurlar.

Bu tür bir ceza adaleti yaklaşımında, hakikat komisyonlarının rolü ikincildir. Hem *Af Örgütü* hem de *İzleme Örgütü* hakikat komisyonlarının soruşturmalarını ceza adaletini gerçekleştirmeye katkı verecek şekilde yürütmeleri gerektiğine inanır. Bir başka deyişle, hakikat komisyonları *ağır ihlallerden sorumlu kişileri cezalandırmaya yönelik yüksek etik amaç* doğrultusunda kullanılacak bir *araç* olarak değerlendirilir. Bu anlayış, *Af Örgütü* ile *İzleme Örgütü*'nün üç ülkeye yönelik değerlendirmelerinde sabittir.

## ULUSLARARASI GEÇİŞ ADALETİ MERKEZİ'NİN GEÇİŞ ADALETİ (SİYASETE HAKKINI VERME) YAKLAŞIMI

Tezde incelenen üçüncü insan hakları örgütü olan *Uluslararası Geçiş Adaleti Merkezi*'nin hakikat komisyonlarına ilişkin değerlendirmeleri *Uluslararası Af Örgütü* ile *İnsan Hakları İzleme Örgütü*'nün

değerlendirmelerinden oldukça farklıdır. Örgütün adından da anlaşılacağı üzere, *Merkez* ihlalleri *geçiş adaleti* perspektifinden yorumlar. Geçiş adaleti, toplumların silahlı çatışmalar veya otoriter rejimler sonrasında dikkatle gözetilen dengelere dayalı bir adalet politikası aracılığıyla kapsamlı bir dönüşüm geçirebilecekleri varsayımına dayanır. Dolayısıyla, geçiş adaleti kavramı, *Af Örgütü* ve *İzleme Örgütü*'nün savunduğu *etik* (*ethical*) ceza adaleti kavramından farklı olarak *ihtiyatlı* (*prudential*) bir adalet kavramına denk gelir. Bu çerçevede, *ihtiyat*, ağır ihlaller sonrası siyasal geçişin görece barışçıl ve istikrarlı bir ortamda, yani siyasal süreçlere yönelik toplumsal güveni yeniden tesis eden bir ortamda gerçekleşmesi anlamına gelir. Bu yüzden, *Merkez*'in temel iddiası, geçmiş ihlallere karşı eşit derecede değerli alternatif çabalara girişilebileceği yönündedir. Ceza adaletine etik öncelik tanımanın zorunluluğu yoktur. Ne de olsa, her tikel siyasal bağlam, her bir ihlalcinin cezalandırılması türünden evrensel bir çare idealini yaşama geçirme lüksüne sahip olmayabilir. Her ülkenin farklı çarelere ihtiyacı vardır. Bu kapsamda, *Geçiş Adaleti Merkezi*, 1- ceza kovuşturmalarını, 2- hakikat komisyonlarını, 3- kamu görevlilerine yönelik güvenlik incelemelerini (*vetting*) ve 4- kurumsal reformları içeren bir geçiş adaleti araçları seti geliştirmiştir. Geçiş adaleti yaklaşımı açısından, hakikat komisyonları *siyasal uzlaşmayı sağlamaya yönelik yüksek ihtiyatlı amaç* doğrultusunda kullanılacak araçlar olarak işlev görür.

İhtiyat, ağır ihlallere sebep olan silahlı çatışmalar sonrasındaki politika seçeneklerini değerlendirirken dikkatlice hesap yapmayı, siyasal dengeleri gözetmeyi gerektirir. Bu yüzden, öncelik, *siyasete hakkını vermek* (*doing justice to politics*) olmalıdır. *Siyasete hakkını vermek*, her bir ülkenin içinde bulunduğu tikel zorlukları göz önünde bulundurarak ve bu zorlukları gidermeye yönelik ülkeye özgü önlemler alarak yeni bir siyasal topluluk oluşturulabileceği fikrine dayanır. Söz konusu ülkeye

özgü önlemler arasında hakikat komisyonlarının bulunması zorunlu değildir. Önemli ve öncelikli olan, silahlı çatışmanın sebep olduğu veya otoriter dönemin ürettiği eski düşmanlıkları ortadan kaldıracak ve yeni bir siyasal dostluk kuracak olan siyasal sürecin, yani geçişin kendisidir.

## ETİK ÇABALAR VE İHTİYATLI ÇABALAR

İnsan hakları örgütlerinin hakikat komisyonları değerlendirmelerindeki keskin ayrımdan da anlaşılacağı üzere, ağır ihlaller karşısında adaleti sağlama çabalarının tamamını kuşatan merkezî tansiyon, etik çabalar ile ihtiyatlı çabalar arasındaki tansiyondur. Tezin ana sonuçlarına ulaşmada yol gösteren, etik olan ile ihtiyatlı olan arasındaki bu temel ayrım, Immanuel Kant'ın felsefesine dayanır. Ağır insan hakları ihlalleri sorununa ilişkin bu merkezî tansiyon şöyle işler:

Ağır ihlaller karşısında ihtiyatlı çaba, *siyasal koşulları* gözetir. Siyasal koşullar, ağır ihlallerin parçaladığı siyasal topluluk hissini yeniden canlandırmaya yönelik, sınırları belli, olası ve makul bir eylemler seti geliştirmeye yardımcı olur. Öte yandan, ağır ihlaller karşısında etik çaba, *bütün insanlığı* gözetir. Bu insancıl perspektif, siyasal koşulları gözetmeksizin, ağır ihlaller karşısında adaleti tesis etmek için ne yapılması gerektiği sorusunu sorar. Dolayısıyla, ihtiyatlı çaba, *başka bir şey için iyidir*. Bu *başka şey*, genelde ağır hak ihlalleri fenomeninin temsil ettiği evrensel sorundan bağımsız olan siyasal bir amaçtır. İhtiyatlı çaba, tikel bağlamlara uyarlanabilen, siyasal olanaklara göre girişilen bir adalet sağlama çabasıdır. Etik çaba ise, *kendi içinde iyidir*. Başka bir amaç uğruna girişilmiş bir adalet sağlama çabası değil, sırf ağır insan hakları ihlallerine karşı adaleti sağlamak adına girişilmiş çabadır. Ağır ihlallerin evrensel bir sorun olduğu ve dolayısıyla evrensel bir çare gerektirdiğine dair kesin bilgiye dayanır.

Tezde, insan hakları örgütlerinin hakikat komisyonlarını ya ceza adaletinin etik perspektifinden, ya da geçiş adaletinin ihtiyatlı perspektifinden değerlendirdikleri savunuldu. *Af Örgütü* ve *İzleme Örgütü*'nün temsil ettiği ceza adaleti perspektifinin, cezalandırmanın ağır ihlallere karşı verilebilecek tek etik yanıt olduğu yönündeki bir yanlış varsayıma dayandığı ileri sürüldü. Ceza adaletinin etik bir yanıt olduğu doğrudur, fakat bu, yalnızca kişisel sorumluluk alanına nüfuz edebilen bir yanıttır. Halbuki ağır hak ihlallerinin çok sayıda ölüm ve çok sayıda suçluyla nitelenen ağırlığı, kişisel sorumluluğun etik alanını inkâr etmese de, aşmaktadır. Bu sebeple, tezde, siyasal sistem düzeyinde sorumlulukla iştigal edecek bir etik yaklaşıma ihtiyaç olduğu vurgulanmıştır. Benzer bir şekilde, *Geçiş Adaleti Merkezi*'nin savunduğu geçiş adaleti perspektifi de tezde eleştiriye tabi tutulmuştur, çünkü bu perspektif siyasal sorumluluğun yalnızca ihtiyatlı çabalarla dikkate alınabileceğine yönelik yanlış bir varsayıma dayanmaktadır. Bilakis, ağır ihlaller evrensel fenomenler olduklarından, siyasal sorumluluğu işleyen etik bir anlayışın kaçınılmaz olduğu savunulmuştur.

## HAKİKAT KOMİSYONLARINDA HAKİKATİN ADALETİ: TARİHE HAKKINI VERMEK

Sonuç olarak, tezde, hakikat komisyonlarını, üç insan hakları örgütünün yaptığı gibi, cezanın evrensel uygulanışı ve geçişlerin başarıyla yönetilişi gibi önceden tasarlanmış etik ve ihtiyatlı öncelikler ışığında değerlendirmek yerine, hakikat komisyonları fenomeninin kendisinden yola çıkarak bir adalet kavramı geliştirmek önerilmiştir. Bu doğrultuda, hakikat komisyonlarının siyasal sorumluluğu anlamaya yönelik etik bir yaklaşım sunma bakımından olanakları sorgulanmıştır. Bu sorgulamanın sonucunda, *hakikatin adaleti* (*epistemic justice*) kavramına ulaşılmıştır.

Hakikatin adaleti, hakikat komisyonlarının kendi içlerinde amaç olabilecekleri varsayımına dayanır. Bir başka deyişle, hakikat komisyonları, etkili ve başarılı olabilmeleri için, ceza mahkemeleri veya siyasal süreçler tarafından araçsallaştırılmak zorunda değildir. Hakikat komisyonları, *Af Örgütü* ve *İzleme Örgütü*'nün talep ettiğinin aksine, ceza kovuşturmalarına destek olmadan veya *Geçiş Adaleti Merkezi*'nin talep ettiğinin aksine siyasal geçişleri kolaylaştırmadan adalet sağlayabilirler. Bu perspektiften bakıldığında, yakın geçmişteki ağır ihlallere dair olgular hakkında tarafsız tarihsel bilgi sahibi olma ihtiyacı, bağımsız bir *tarihe hakkını verme* (*doing justice to history*) ihtiyacını yansıtır. Bu ihtiyaç, ağır ihlalleri işleyen kişilerin suçlarından dolayı cezalandırıldıklarını görme ihtiyacından, yani *hukuka hakkını verme* ihtiyacından bağımsızdır. Bu ihtiyaç, aynı zamanda, kendi siyasal topluluğunun ağır ihlaller sonrasında daha iyi bir geleceğe doğru ilerlediğini görme ihtiyacından, yani *siyasete hakkını verme* ihtiyacından da bağımsızdır.

*Hakikatin adaleti* (*epistemic justice*), kavramdan da anlaşılacağı üzere, *episteme*'ye, yani *doğru bilgiye* hakkını vermeyi içerir, ki bu da geçmişteki ağır ihlallerin *olgusal hakikatine dair bilgidir*. Hakikatin adaleti perspektifi, *bilmeyi* etik bir faaliyet olarak tanımlar. Bu faaliyet, kurumları ve temsilcileriyle bir siyasal sistemin nasıl ağır ihlallere imkân verdiğini bilmeyi içerir. Bunu bilmek, çok özel bir adalet duygusunu tatmin eder. Hakikat komisyonlarının sunduğu bilme imkânı, vatandaşları doğru ve yanlışın, adalet ve adaletsizliğin kesin bilgisine sahip olabilen insanlar olarak yeniden konumlandırır.

Hakikatin adaleti perspektifi, ağır ihlallerle ilgili kişisel sorumluluğa daha az vurgu yapıyor olabilir. Ne de olsa, bu perspektif, siyasal ilişkilerin ağır ihlalleri üretecek şekilde nasıl evrildiğinin hikâyesini sunar. Hakikatin adaletinin, benzer bir şekilde, barışçıl bir siyasal geçişi istikrarsızlaştırması da olasıdır, çünkü ağır ihlallere ilişkin

olgusal hakikatin anlattığı hikâye, geçiş toplumunda iktidarı elinde bulunduranların hoşuna gitmeyebilir ya da ihtiyatlı siyaset anlayışlarına ters düşebilir. Yine de, hakikatin adaletinin bir adalet kavramı olarak özelliği, suçluların *cezalandırılmasını* içeren *etik* faaliyet ile geçişlerin *yönetilmesini* içeren *ihtiyatlı* faaliyetten ayrılarak *etik* bir *bilme* faaliyeti tanımlamasıdır.

## GUATEMALA, SIRBİSTAN VE SİERRA LEONE'DAKİ HAKİKAT KOMİSYONLARIYLA İLGİLİ GENEL İZLENİMLER

Bu noktada, yukarıda değinilen kavramsal ayrımlar ışığında, Guatemala, Sırbistan ve Sierra Leone'daki hakikat komisyonları hakkında, tezde daha ayrıntılı ifade ettiğim genel izlenimleri paylaşmak faydalı olacaktır. Bu izlenimler, bahsi geçen her bir hakikat komisyonunun hakikatin adaletini sağlamaya yönelik temel etik görevlerini ne ölçüde yerine getirebildiklerine dairdir.

Hakikatin adaleti kavramının sunduğu etik perspektif bakımından, *Guatemala hakikat komisyonu* en başarılı komisyondur. İronik bir biçimde, sonuçlarının hukuki sonuç doğurması kuruluş aşamasında yasaklandığından, yetkileri son derece kısıtlı, etkisiz bir komisyon olması beklenerek tasarlanan bu hakikat komisyonunun ceza adaleti süreçlerinden yalıtılması başarılı olmasının teminatı oldu. Adı *Tarihi Aydınlatma Komisyonu* idi ve bu, tarihe hakkını verme konusuna öncelik vermesine işaret etmesi bakımından önemliydi. Kurbanlar ve kurban yakınları ile failleri uzlaştırmaya yönelik, Güney Afrika deneyiminden ilham alan herhangi bir geçiş adaleti etkinliği düzenleme çabasına girişmedi. Dolayısıyla, Guatemala hakikat komisyonu, bir hakikat komisyonunun vatandaşlara tarafsız tarihsel bilgi sağlamaya dayalı etik fikre hakkını verebileceğinin iyi bir örneği oldu.

Yelpazenin diğer ucunda, Guatemala komisyonunun başarısına tam anlamıyla zıt bir örnek teşkil eden ve resmî adı *Yugoslavya Hakikat ve Uzlaşma Komisyonu* olan, son derece başarısız *Sırbistan hakikat komisyonu* vardır. Bu komisyon, açık bir şekilde, Sırp savaş suçlularını da içerecek şekilde eski Yugoslavya'nın savaşlarında ağır insan hakları ihlallerini işleyen kişileri kovuşturma amacıyla kurulan ve Eski Yugoslavya Uluslararası Ceza Mahkemesi'nde kurumsallaşan uluslararası ceza adaleti sürecine karşı koymak, bu süreci engellemek veya en azından yavaşlatmak amacıyla kuruldu. Dolayısıyla, yalnızca ihtiyatlı kaygılarla kurulan bir hakikat komisyonunun tarafsız tarihsel bilgi sağlamaya yönelik etik yükümlülükten nasıl mahrum kaldığının en belirgin örneği oldu.

Son olarak, *Sierra Leone Hakikat ve Uzlaşma Komisyonu* ise, Guatemala ve Sırbistan örnekleri arasında, fakat hakikatin adaletini sağlama konusundaki başarısı bakımından Guatemala örneğine daha yakın bir konumda yer alır. Sierra Leone hakikat komisyonu da, Sırbistan komisyonu gibi, Sierra Leone Özel Mahkemesi'nde kurumsallaşmış uluslararası bir ceza adaleti sürecine paralel olarak kurulmuş, fakat ağır ihlallere ilişkin siyasal sorumluluğun tarihsel çözümlemesini sunmayı içeren etik yükümlülüğü yerine getirebilmiştir. Bununla beraber, Güney Afrika deneyiminden ilham alan, kurbanlar ve kurban yakınları ile failleri uzlaştırmaya yönelik bir geçiş adaleti sürecini de hayata geçirmeye çalışmıştır. Nitekim, bir siyasal topluluk kurmaya yönelik bu ihtiyatlı görevi dolayısıyla, siyasal sorumluluğu tarafsız bir biçimde soruşturmaya yönelik etik görevinden kısmen de olsa alıkonulmuştur.

## HAKİKAT KOMİSYONLARININ İŞLEYİŞİNE DAİR BAZI MÜTEVAZI ÖNERİLER

Tezi, gerek hakikatin adaleti kavramı üzerine inşa edilen kuramsal çerçeveden gerekse birbirlerinden son derece farklı olan Guatemala, Sırbistan ve Sierra Leone'daki hakikat komisyonları deneyimlerinden yola çıkarak geliştirdiğim, hakikat komisyonlarının işleyişine yönelik birtakım pratik, olabildiğince mütevazı önerilerle sonlandırdım. Bu özeti de, hem insan hakları örgütlerinin hakikat komisyonlarını izleme etkinliklerinde hem de çeşitli ülkelerdeki siyasal aktörlerin hakikat komisyonları kurmaya yönelik planlarında edinmeleri kuvvetle muhtemel olan, ceza adaleti veya geçiş adaleti çıkışlı yüksek normatif beklentilerini dengeleyebileceğini umduğum, hakikatin adaletini sağlamaya yönelik asgari etik beklentiyi temel alan söz konusu önerilerle bitireceğim.

Bu doğrultuda, *Uluslararası Af Örgütü* ile *İnsan Hakları İzleme Örgütü*'nün temsil ettiği ceza adaleti perspektifinin eleştirisi ışığında, hakikat komisyonlarının asgari bir etik ödevi yerine getirme hedefiyle işlemelerine dayalı ilk önerim şudur: *Hakikat komisyonlarına ceza adaletine özgü ödevler yüklenmemelidir*. Yukarıda da bahsedildiği gibi, ceza mahkemelerinde hayat bulan hukuk prosedürleri, ağır insan hakları ihlallerinin ağırlığıyla baş etmeye çalışırken birtakım güçlüklerle karşılaşırlar. Örneğin, ceza mahkemelerine yönelik en büyük beklenti, ihlallerden sorumlu kişilerin cezalandırılması sonucunda ileride ağır ihlaller işlemeyi düşünenler üzerinde mahkemelerin caydırıcı bir etkiye sahip olacağı yönündedir. Gelgelelim, ihlallerin ağırlığını temsil eden çok sayıda failin mahkeme önüne getirilmesinin önündeki pratik engeller hukukun caydırma etkisinin de sınırlarını belirlemiş olur. Dahası, yargılanabilen görece az sayıda failin mahkeme sürecinde sorumlu tutuldukları ağır ihlallere ilişkin ortaya çıkan olgusal hakikat kaçınılmaz

olarak ağır ihlalleri ağır kılan kolektif çabayı kısmen görünür kılabilir. Ağır ihlaller karşısında ceza adaleti sağlama çabasının karşılaştığı tüm bu sınırlılıkların hakikat komisyonlarınca aşılmasını beklemek ise, komisyonların kapasitesine ve özgül etik işlevine haksızlık etmeye varacaktır. Bu yüzden, hakikat komisyonlarına ceza adaletine özgü ödevler yüklenmemesi, komisyonlardan herhangi bir caydırıcı etkiye sahip olmalarının veya ağır ihlallere ilişkin kişisel sorumluluğu bütünüyle tespit etmelerinin beklenmemesi anlamına gelmektedir. Hakikat komisyonları, mahkeme pratiklerinin, ağır ihlallerin ağırlığını kuşatamama yüzünden geride bırakmak zorunda kaldıkları boşlukları doldurmak zorunda olmamalıdır, çünkü komisyonlar mahkemelerden oldukça farklı kurumsal formasyonlar ve kolektif çabalardır. Mahkemelere sunabilecekleri katkılar, hakikatin adaletini sağlamaya yönelik etik çabanın yanında ancak ikincil öneme sahip olabilir.

Buna ilaveten, *Uluslararası Geçiş Adaleti Merkezi*'nin kaleme aldığı insan hakları raporları göstermektedir ki, hakikat komisyonlarına ilişkin yüksek beklentilerin eleştirisi, geçiş adaleti perspektifinin eleştirisini de gerektirmektedir. Hakikatin adaleti perspektifi, hakikat komisyonlarının işleyişini ceza hukukunun buyruklarından olduğu kadar, siyasal süreçlerin gereksinimlerinden de bağımsız kılmalıdır. Bu doğrultuda, ikinci önerim şudur: *Hakikat komisyonlarına geçiş adaletinin geniş ve zaman zaman sınırsız görünen ödevleri yüklenmemelidir*. Bu ikinci öneri altında, daha spesifik iki alt öneri formüle edilebilir. İlk olarak, *hakikat komisyonları hem kurbanlar ve kurban yakınları hem de failler açısından anlaşılır olan bir hakikat üretmelidir.* Tezde de değindiğim gibi, hakikat komisyonları genelde kurbanları ve kurban yakınlarını siyaseten güçlendirmektedirler. Buna karşın, bir hakikat komisyonu, kendi içinde büyük çeşitlilik barındıran failler topluluğunun ağır ihlallere ilişkin farklı düzeylerdeki siyasal sorumluluklarını da tespit edebilmelidir. Hakikat komisyonlarının faillere yönelik çalışmaları, hem yeni bir siyasal

birliktelik adına faillerin affedilmesini içeren ihtiyatlı hesaplardan hem de faillerin hakikat komisyonlarına sağladığı bilgilerin ceza hukuku süreçleriyle bağlantılandırılmasını içeren etik yaklaşımdan bağımsız kılınmalıdır. Hakikat komisyonlarının faillere yönelik ilgisi, geçmişteki radikal kötülüğü mümkün kılan siyasal koşullar hakkında daha tarafsız olgusal hakikat elde etme ilgisiyle örtüşmelidir. Diğer bir taraftan, Sırbistan'da hüküm süren kurban bir ulus olma hissi veya Sierra Leone'da sıkça karşılaşılan, örneğin çocuk askerlerde olduğu gibi hem kurban hem fail olmayı içeren kurban-fail fenomeni, hakikat komisyonlarına konu olan amorf savaşlarda kurbanlar ile failler arasındaki ayrımın bulanıklaşabildiğini göstermektedir. Bu tür amorf durumların bir hakikat komisyonu raporunun sunacağı bilgiyi gölgelememesi için, üretilen hakikatin hem kurban ve kurban yakınları hem de faillere anlamlı gelen bir hakikat olması gerekir. Böylece, bir komisyon kurbanlar ile failler arasındaki ayrımın bulanıklaştığı örnek vakaları ne kadar açık ve net raporlarsa, bu raporun soruşturulan silahlı çatışma döneminin amorf karakterini yeterince yansıtmadığı iddiası o kadar geçersiz ve komisyonun hakikatin adaletini sağlaması o denli mümkün olacaktır.

Hakikatin adaletini sağlamaya yönelik asgari çaba ile geçiş adaletinin azami hedeflerini ayırmaya yönelik ikinci alt öneri ise şöyledir: *Hakikat komisyonları ağır insan hakları ihlallerinin nedenlerini, bu nedenlerin adalet ve güvenlik sektörlerinde işleyen kurumlarda nasıl vücut bulduğuna açıklık getirerek çözümlemelidir.* Bu, en başta açıklamaya çalıştığım, Arendt'in siyasal sorumluluk kavramsallaştırmasına uygun bir öneridir, çünkü hakikat komisyonlarını siyasal kurumların ağır ihlallere meydan veren koşullar üzerindeki etkilerini ortaya koyma uğraşına sevk etmektedir. Bu tür bir siyasal sorumluluk anlayışına göre, hakikat komisyonları, ağır ihlallerin nedenlerine ilişkin soruşturmasını, ihlallerin nedenleri ile ihlallerden

şahsen sorumlu bireyler arasındaki ilişkiyle sınırlandırmadan yürütmelidir. Aksi takdirde, ağır ihlallerin nedenlerini kişisel sorumluluk kapsamında ele almak, ceza kovuşturmalarının hakikat komisyonları eliyle ihtiyatlı bir biçimde kolaylaştırılması veya etik bir biçimde önceliklendirilmesi anlamına gelecektir. Bu bakımdan, komisyonların yürüteceği nedensel çözümlemenin, ihlaller yüzünden bozulduğu söylenen siyasal ilişkilerin kusursuz olduğu bir geçmiş varmışçasına yürütülmemesi, yeniden canlandırılması gereken saf bir topluluk halini varsayan çarpıtmalar üretmemesi de önemlidir. Böylesi çarpıtmalar, komisyonların nedenlere yaklaşımının, eski düşmanların dostluğa dayalı yeni bir toplulukta uzlaşması varsayımından hareket eden geçiş adaleti kavramı uyarınca şekillendirilmesine yol açar. Halbuki bir hakikat komisyonunun sınırlı görev süresi ve kapsamı içerisinde gerçekleştirebileceği tek makul hedef, ihlallere dair olgusal hakikatin belgelenmesi olduğundan, olgusal hakikatin resmî komisyon raporuna konu edilmesinin böylesine kapsamlı bir siyasal uzlaşmaya katkı verebileceğini düşünmek, komisyona kapasitesinin ötesinde bir işlev yüklemek olur. Güney Afrika deneyiminin ve bu deneyim ışığında tasarlanan komisyon türlerinin adlarının (*Hakikat ve Uzlaşma Komisyonları*) varsaydığının aksine, siyasal kaygılar gözetilmeksizin elde edilmesi gereken hakikat ile katıksız bir siyasal kaygı olan uzlaşma arasında etik açıdan zorunlu bir bağlantı yoktur. İhlallerin nedenlerini yargı, polis ve ordu gibi somut kurumlarda arama çabası ise, Arendt'in geliştirdiği siyasal sorumluluk kavramıyla örtüşmektedir. Bir hakikat komisyonunun üreteceği hakikat, barışçıl bir düzen için adalet ve güvenlik sağlamaları beklenirken, adil bir siyasal düzene dair bu en temel beklentiye ihanet eden kurumsal düzenlemelerin radikal kötülüğün nedenleri arasında yer aldığını gösterebiliyorsa, etik bir ödevi yerine getiriyor demektir. Ne de olsa, bireylerin haklarının ihlal edilmesini önleyen tarafsız bir yargı ve meşru yollarla zor kullanan

güvenlik güçleri, etik bakımdan arzulanan bir siyasal düzenin olmazsa olmazlarıdır. Bir başka deyişle, eğer bir hakikat komisyonu ihlallerin önlenmesinde bu tür temel kurumların başarısızlığa uğradığını tespit eder ve dahası ihlallerin nedenlerini bu kurumsal başarısızlığa dayandırabilirse, ulaştığı hakikatin adil olduğu söylenebilecektir. Bu hakikatin ötesindeki, kurumların reformuna ilişkin zor kararlar ise, geçiş adaletinin ihtiyatlı yaklaşımını ilgilendiren siyasal süreçlere bağlı olacaktır.

Son kez özetlemek gerekirse, hakikatin adaleti fikri, bilmenin etik bir faaliyet olabileceğini ve ihlal edilemez haklar ile ağır adaletsizliklere ilişkin bilginin bir hakikat komisyonu raporu gibi etik bir nesnede kaydedilebileceğini varsayar. Yakın tarihi bilme ve tarihe hakkını verme talebi, kişiye bir hakikat komisyonunda tanıklık etme siyasal sorumluluğunu da yükler. Bu talep, bir bakıma, doğruyu ve yanlışı, adaleti ve adaletsizliği bilen kişinin bu etik bilgisi üzerinden insanlık onurunu yeniden kazanma talebidir. Talebin gerçekleşmesi, radikal kötülüğe ilişkin siyasal sorumluluğun değiştirilemeyecek ve inkâr edilemeyecek bir biçimde yazılmasına, kayda geçirilmesine bağlıdır. Hannah Arendt, etik bir ilkeyi doğrulamanın ve tasdiklemenin tek yolunun bir hakikati bir örnek üzerinden görünür kılmaktan geçtiğini söyler. Bu yüzden, bu özeti, adaletin bilmeye —ama bireyin kendi başına bilmesine değil, resmî bir kayıt üzerinden bilmesine— içkin olduğunu gösteren çarpıcı bir örnekle bitirmek uygun olacaktır. Bu örnek, Guatemala’nın *Tarihi Aydınlatma Komisyonu*’na ifade veren bir tanığın deneyimidir ve bilmenin nasıl da insan haklarının etik taşıyıcılarının ve ağır ihlalcilerinin siyasal sorumluluklarını aydınlatabildiğini gözler önüne serer. Tanık, ifade verme ihtiyacıyla komisyona gelmiş ve adaleti güvenilir bir belge biçiminde talep etmiştir. Yakınının kazıyla çıkarılmış kalıntılarını yanında, bir çantada taşımaktadır. Çantasından kurbana ait “birkaç kemik ve bir sıra diş”

çıkarır ve şöyle der: “Bunları taşımak bana çok acı veriyor... Ölümü taşımak gibi... Henüz onları gömmeyeceğim... Evet, huzura kavuşmasını istiyorum. Ben de huzura kavuşmak istiyorum, ama bu henüz mümkün değil... Onlar ifademin kanıtları... Henüz onları gömmeyeceğim. Ta ki bir belge bana “Ordu yüzünden, devriyeler onu öldürdü ve o hiçbir suç işlemedi. Masumdu” diyene kadar... Ancak sonra huzura kavuşacağız.”

# CURRICULUM VITAE

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Political thought, international political theory, human rights, ethics

## SELECTED PUBLICATIONS

"Turkey and the International Criminal Court: How Terrorism Keeps Them Apart" (with Seda Kırdar), working paper, 2013.

"On the Need to Belong to a Non-Cypriot History" in ***Cyprus and the Politics of Memory: History, Community and Conflict***, London, I. B. Tauris, 2012.

"African Lessons for the International Criminal Court" in ***Studies in Ethnicity and Nationalism***, Vol. 11, No. 1, Wiley-Blackwell, UK, 2011.

"Katechon over Acheron: Carl Schmitt's Ambivalence and the Sovereignty of Exception," in ***Çankaya Journal of Humanities and Social Sciences***, 7/1, 2010.

"The Geopolitics of Imperialism: V. I. Lenin," in ***Western Geopolitical Thought***, Mustafa Serdar Palabıyık (ed.), Orion Press, Ankara, 2009 (in Turkish).

## WORK EXPERIENCE

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**TEZİN ADI (İngilizce):** Doing Justice to History in the Face of Gross Human Rights Violations: Epistemic Justice of Truth Commissions and Human Rights Reports in Guatemala, Serbia and Sierra Leone

**TEZİN TÜRÜ:** Yüksek Lisans ☐ Doktora [X]

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**TEZİN KÜTÜPHANEYE TESLİM TARİHİ:**