

TRANSITIONAL JUSTICE UNDER INTERNATIONAL LAW: NEED FOR ADMIXTURE OF MECHANISMS

BY
DR. BABATUNDE ISAAC OLUWATOYIN
&
ABEGUNDE BABALOLA

FACULTY OF LAW
EKITI STATE UNIVERSITY
ADO-EKITI,

PHONE: +2348037446738
E-MAIL: babalolaabegunde@yahoo.com

TRANSITIONAL JUSTICE UNDER INTERNATIONAL LAW: NEED FOR ADMIXTURE OF MECHANISM**

1.0 Abstract

The past decades have witnessed a revival in the idea of international criminal prosecution due to the establishment of ad-hoc criminal tribunals for the Yugoslavia and Rwanda, as well as the formation of the International Criminal Court. The underlying idea is that the most serious human rights violation perpetrated during war or armed conflict situation should not go unpunished and that the international community should step in where domestic prosecution fails. Recent years have witness a proliferation in the forms of transitional justice ranging from criminal trials (prosecution) to Truth and Reconciliation formulas. The choice of accountability formula to be adopted would naturally depend on the peculiar circumstance of each case. The paper examines the various machineries of criminal justice among other mechanisms. It is the finding of those authors that transitional justice requires a plurality of complementary approaches.

2.0 Introduction

Although international criminal justice was not a novel idea, World War II would be the first organized attempt to prosecute war crimes in an international forum and under an international law.¹ Due to the magnitude of the crimes committed during the Nazi reign, in 1945, the United States, Great Britain, France and Soviet Union signed the London Agreement thereby establishing the Nuremberg Tribunal,² and later the Tokyo Tribunal (established under the Charter of the International Military Tribunal for the Far East).³ The outrage following World War II with regards to the atrocities committed by the defeated Nazis demanded International accountability and justice for those responsible. Although, the ad-hoc nature of the tribunals was controversial and criticized as “victor’s justice,” the concept of International accountability for the world’s most heinous crimes was praised and a new world’s order was born.⁴

After the trials at Nuremberg, the United States began working on the creation of a permanent International tribunal.⁵ However, due to the UN Security Council Veto power possessed by both the United States and the Soviet Union, as well as the influence of the ongoing cold war underlying every Security Council decision, all attempts to create and implement a functional court were halted.⁶ Not until the 1990s after the massacre in Yugoslavia and after the horrors in Rwanda were revealed to the global community was an outcry for international accountability and justice once again heard.

The UN again created ad-hoc tribunals in order to bring to justice those individuals responsible for human rights violation in the former Yugoslavia and Rwanda.⁷ This re-ignited the clamour for a permanent court that would prosecute individual for the commission of the world’s most serious crimes and that would deter future violations. In the wake of the bloodiest century in history, the creation of the International Criminal Court would send a message to the world that crime such as those committed in World War II, Yugoslavia and Rwanda would no longer go unpunished. Individuals would be held accountable under the International law for crimes against humanity, war crimes and genocide.⁸

**Babalola Abegunde, Lecturer, Faculty of Law, Ekiti State University, Ado Ekiti, Nigeria

¹ See Agreement Between the United States of America and The French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republic Respecting the Prosecution and Punishment of the major war Criminals of the European Axis August 8, 1945, 59 Stat. b1544, 82 U.N.T.S. 280; Justice Robert Jackson, America Chief Prosecutor of the Nuremberg Tribunal noted: “we must never forget that the record on which we judge these defendants today is a record on which history will judge us tomorrow” Benjamin B F (2003), *Misguided Fears about the International Criminal Court*, “15 PACE INTERNATIONAL LAW REVIEW 223, 225-226”

² *ibid*

³ See Charter of the International Military Tribunals for the Far East, January 19, 1946 T.L.A.S. No1589

⁴ See generally Bryan, F .M. (1998) “ Building an International Criminal Court for the 21st Century” *13 CONN. INTL. L* 1, 8.

⁵ Regina H (2003), “The Long Road to Hypocrisy: The United States and the International Criminal Court.” *24 WHITTIER. L. REV. 1041. 1045 - 46*

⁶ Kircher *op.cit.* p. 264; Macpherson pp. 11-22

⁷ Jean G (2002), “ The British Administration’s Response to the International Criminal Court.” *21 BERKERLY J. INTL. L* 683

⁸ Rome Statute of the International Criminal Court, Article 5, UN Doc. A/CONF, 183/9 (July 17, 1998)

3.0 Criminal Prosecution of Serious Human Rights Violations

There is usually the question of how past human rights violations should be remedied in post conflict situation. The right to an effective remedy has found its way into regional and international human rights instruments.⁹ In order to provide victims with such a remedy, a proper formula of justice must be chosen. The model chosen to deal with past human rights has implication for present and future protection.¹⁰ Confronting past human rights violations is necessary not only in furthering the interest of victims, but also in preventing future atrocities.¹¹ There is a need to look into the past in order to learn for the future. If serious human rights violations go unpunished there is a risk that they will recur in the future. The duty to “protect and ensure” human rights, which is part of all major human rights treaties, therefore entails the obligation to hold perpetrator of human rights violation somehow accountable¹²

Criminal justice thus may figure as an important element of prevention considering its deterrent potential. As indicated above, a number of human rights conventions such as Torture Convention,¹³ the Genocide Convention¹⁴ and the Apartheid Convention,¹⁵ provide for an explicit duty to prosecute. In post conflict situations, it is therefore important to build up a functioning, independent and impartial judiciary which is capable of guaranteeing the right to a fair trial and fair hearing.¹⁶ The most prominent decision on the duty to prosecute was made by the Inter-American Court of Human Rights in its judgement in the *Velasquez Rodriguez case of 1988* where the court explains that state parties must investigate and punish any violation of the rights recognized by the American Convention of Human Rights.¹⁷ In other words, criminal justice is more and more considered to be an important element of effective human rights protection.

The increased emphasis on the duty to prosecute serious abuses has evidently had an impact on the issue of post conflict justice, illustrated by the shift from a somewhat lenient approach towards an increasing limitation of amnesties.

4.0 Machineries of Criminal Justice

International criminal justice has been taken in Yugoslavia, Rwanda etc and is still currently taking place in many parts of the world in variety of forms e.g. Kosovo, Cambodia, Sierra-Leone, Iraq, ICC in Hague etc

⁹ International Covenant on Civil and Political Rights (ICCPR) which came into force on March 23, 1976, Article 25
European Convention For the Protection of Human Rights and Fundamental Freedom. Nov, 4, 1950. Article 13

¹⁰ Anja S F (2005), “Human Rights as Guiding Principle In the Context of Post Conflict Justice,” *Michigan State Journal of International Law*, Vol,13, Issue 12, p. 182:

¹¹ Ibid

¹² Juan, E.M (1997) “ Accountability for Past Abuses” *19 HUMAN RIGHTS QUARTERLY* 225

¹³ Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment opened for signature Feb. 4, 1985.

¹⁴ Convention on the Prevention and Punishment of the Crime Genocide, Dec. 9, 1948 Article 6

¹⁵ International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30,1973, Article 4.

¹⁶ Article 9, 10, 14 of ICCPR

¹⁷ Velasquez Rodriguez case Inter. Am Ct HR<Ser. C. Para 166 (1988)

The most popular accountability mechanism have included: domestic judicial systems, Permanent International tribunals, ad-hoc tribunal and hybrid courts.¹⁸ The prosecutorial mechanisms have traditionally received their mandate either through Chapter VII action by the United Nations Security Council,¹⁹ or from state parties to an international treaty.²⁰ Also, Stahn²¹ has observed four different models of institutional design thus: international tribunals, hybrid tribunals, internationalized domestic courts, and internationally assisted courts.²² These models shall now be examined one by one.

4.1 International Tribunals

The prime examples of this tradition are of course the ICTY and ICTR which were established by the UN Security Council in the 1990s. They were fully international justice. In 1999, the United Nations Security Council charged the UN Interim Administration Mission in Kosovo with administering powers of Kosovo²³ and by extension over the judiciary in Kosovo.²⁴

The main achievement of the ad-hoc tribunals in term of institutional design is that they have opened the door for the creation of new international model of criminal justice, both through their international trial practice and substantial development of international criminal law.²⁵

But the ad-hoc tribunals do not present conclusive answers to dilemmas of post conflict justice.²⁶ The experience of the ICTY and ICTR has shown that international tribunals are only able to try a very small fraction of the perpetrators. Moreover, they are often too detached from local communities to respond effectively to the

¹⁸ Rosama, L. (2006) "Restructuring the ICC Framework to Advance Transitional Justice," *Columbia Law Review* Vol. 106. 1

¹⁹ See e.g. Statute of International Tribunal for Rwanda (ICTR) Nov. 8, 1994. The Statute of International Tribunal for Former Yugoslavia (ICTY) May 25, 1993

²⁰ See e.g. Agreement between the United Nations and the Government of Sierra-Leone on the establishment of a Special Court for Sierra-Leone on January 16, 2002 (Hybrid Tribunal for Sierra-Leone)

²¹ Stahn, C. (2005) "The Geometry of transitional Justice: Choices of Institutional Design." *Leiden Journal of International Law*, Vol. 18, No. 3 p. 436.

²² For a survey of Various accountability mechanism, see generally *Transitional Justice: How Emerging Democracies Reckon with former Regimes* (Neil j. KrtZ ed. 1995). Universal jurisdiction has also been invoke to try crimes of mass atrocity. This principle holds that certain crimes are of such magnitude that they are committed not against individual victims, but against all humankind. Belgium, Spain, Germany and Israel have initiated prosecutions on this basis. See Paul, R. (2005) "Human Rights Law meets Private Law Harmonization: The Coming Conflict," *30 Yale J. Inter' I.L.* 211, 281. Where criminal prosecutions are otherwise impracticable Truth Commissions have also been established as an alternative to traditional accountability mechanisms. Elizabeth, M. (2004) *Truth and Justice in Sierra-Leone: Coordination between Commission and Court* "104 *Columbia L. Rev.* 703,731." Yet these commissions along with the exercise of universal jurisdiction have been criticized as an inferior alternative to full scale criminal prosecution see Diane, F. (1996), *Setting Accounts: The Duty to prosecute Human Rights Violation of a Prior Regime* "100 *Yale L. J.* 2537"

²³ Security Council Resolution 1244 (1999) of 10th June,1999

²⁴ See UNMIK Regulation No 1/1999. UNMIK used its power to appoint international judges and prosecutors in the territory who acted as the only functioning judiciary institution in the immediate aftermath of hostilities due to a capacity gap in the local judiciary – See H. Strohmeye, 4. (2001) "Collapse and Reconstruction of a Judicial System: The United Nations Mission in Kosovo & East Timor", *95 AJIL* 46.

²⁵ Stahn. Op.cit p. 449

²⁶ See Report of the Secretary General, *The Rule of Law and Transitional Justice in Conflict Societies*, 3rd August 2004, UN Doc. 3/2004/616, para.21

needs and expectations of victims group and local societies. Trials before these tribunals are also protracted.²⁷

Nevertheless, the option of the establishment of ad-hoc tribunals cannot be completely discarded from the choices of institutional design in post conflict situations. Ad-hoc tribunal remains most effective choice in cases in which international criminal institution need robust cooperation regime to get hold of perpetrators who are beyond the reach of a national jurisdiction.

4.2 Hybrid Courts

The hybrid tribunal is one of the latest frameworks used to seek justice for mass atrocities. Hybrid tribunal is designed primarily in response to criticism of ad-hoc tribunals. Hybrid court combines aspects of domestic legal system with international oversight and resources.²⁸

First established in East Timor, hybrid tribunals are now used in varying forms in Cambodia, Kosovo and Sierra-Leone. The hybrid model can be seen as combining the strengths of the ad-hoc model with the benefits of local prosecutions. The majority of Senior Court Officials are “international jurists” are appointed by the United Nations,²⁹ while the rest are nationals of the country or region where the crimes took place. Hybrid courts apply domestic and international judges enforcing both domestic and international laws.

Hybrid court offers at least partial response to challenges of legitimacy and capacity in a post conflict environment.³⁰ The main advantages of hybrid court over ad-hoc tribunals or the ICC is that they are better equipped to address directly the needs of local people and society which suffered from the atrocities. The fact that foreign judges sit side by side with their domestic counterparts offers additional advantage, because it allows the sharing of experience and knowledge in both directions³¹

However, hybrid courts cannot replace domestic or international trials. Their capacity is mostly limited to the trial of a handful of perpetrators.³²

4.3 Internationalised Domestic Courts

This is also a mixed national and international court chambers. Mixed court chambers differ from hybrid courts in that they lack a separate international legal identity of their own distinct from the domestic legal system. They are internationalized domestic institutions, which have jurisdictions over special categories of offences by applying both domestic and international law. Mixed national- international chambers from part o f the structure of the domestic legal

²⁷ The PUNCH, Monday January 26th 2009, p. 69 where the international criminal tribunals (e.g. ICTR, ICTY) have long been criticized for the slow progress of its cases

²⁸ Lipscomb, op.cit p. 184; See also Suzame, K. (2003) “Hybrid Tribunals: Searching for Justice in East Timor”, 16 *Harvard Rights Journal* 245. 245-46”

²⁹ This term refers to jurist who are not citizens of the country in which the tribunal operates.

³⁰ See generally Dickinson, L. A. (2003) “The Promise of Hybrid Courts” 97 *A.J.I.L* 295 at 306

³¹ Stahn, op.cit p. 450

³² Ibid

system.³³ This helps in potential jurisdictional conflict among the different legal institutions.

4.4 Internationally – Assisted Courts

This is yet another model in the internationalization of criminal justice. This was first practicalized in Iraq (the Iraq Special Tribunal). Both the influence of the US-British Coalition Provisional Authority (CPA) on the design of post conflict justice in Iraq and concomitant pressure for local ownership in the post-Saddam era led to the creation of internationally-assisted special tribunals.³⁴ The status of this tribunal/court is unique. It derives its authority from the Coalition Provisional Authority to the Iraq Governing Council.³⁵ Domestic judges are formally in charge of the trials, but, non-Iraq nationals may act as observers to the Trials Chambers as well as the Appeal Chambers.

4.5 International Criminal Court (ICC)

On July 17th 1998, representatives from approximately 160 nations met in Rome at the UN Diplomatic Conferences of Plenipotentiaries to finalize and adopt the Rome Statute, the document establishing the International Criminal Court (ICC). On April 11th 2002 the Rome Statute entered into force. To date, over 139 countries have signed the statute and over 97 have ratified it, evidencing remarkable global support for the ICC.³⁶ On 31st December, 2000 President Clinton of USA signed the Rome Statute³⁷ of the ICC.

With respect to subject matter jurisdiction, the ICC has jurisdiction over four types of crimes (1) genocide (2) crimes against humanity (3) war crimes, and (4) crimes of aggression.

Additionally, the court's jurisdiction is limited to crimes committed after ratification of the treaty.³⁸ ICC has personal jurisdiction over individuals suspected of

³³ E.g. Special War Crimes Chambers in the State Court of Bosnia and Herzegovina, October, 8th 2003.

³⁴ Stahn, op.cit p. 144

³⁵ See. Section 1 Coalition Provisional Authority (CPA) Order No. 48 of 9th December 2003. The Governing Council is hereby authorized to establish an Iraq Tribunals to try nationals or residents of Iraq accused of genocide, crimes against humanity, war crimes or violation of certain Iraq laws by promulgating a statute.

³⁶ Kircher, op.cit p. 265; Status of Multilateral Treaties Deposited with the Secretary-General, Ch. CVIII 10 available <http://untreaty.un.org/ENGLISH/bible/enlightenment/part/chapterXVIII/treaty10.asp>

³⁷ See generally Clinton's words: "The Right Action" N.Y. Times, January 1, 2001 at A6. However on May 6, 2002, the George Bush Administration "unsigned" the Rome Statute, see generally Edward, T. (2003), "Unsigned", 55 *STAN L. REV.* 2061

³⁸ ICC Statute Article II (1). The treaty is not to be applied retroactively. The current crisis in the Western Sudanese Province of Dafur provides another instance in which the international community has been called up to chose among existing accountability mechanism. On September 9, 2004, the United States Secretary of States Collin Powell proclaimed that genocide had been taking place in Sudan. Given the alleged involvement of the Sudanese Government in the mass atrocities, and the apparent control of the judiciary by the military government, the ICC seem perfectly situated to handle the crimes arising under its jurisdiction. Prompted in part by the US Declaration of Genocide, the Security Council adopted Resolution 1564 calling for an international investigation into the genocide and crimes against humanity. The subsequently created commission issued a report that resulted in an Article 13 (b) Security Council referral of the case to the ICC – making it the very first such referral to ICC in history.

committing any of the crimes contained in the Rome Statute under three circumstances.

First, ICC jurisdiction extends to people who have committed crimes in the territory of a state that is party to the Rome Statute. Secondly, the ICC has jurisdiction over individuals who are citizens of a state party. The ICC jurisdiction may be exercised over crimes committed in the territory of a non-party state, or by a citizen of a non-party state if the state accepts the ICC's jurisdiction through declaration.³⁹

5.0 The Rational For Criminal Justice Under International Law

International criminal justice is not an end in itself. It is rather a means to ensure peace, security and the protection of human rights. Where the international community has opted for criminal prosecution, it has done so in the interest of peace and security as for example in the case of Yugoslavia and Rwanda.

A similar approach was taken by the drafter of the Rome Statute for the International Criminal Court. The Preamble Declares that the crimes for which the court has jurisdiction include threat to the peace, security and the well being of the world. This is the reason why the international community asks for criminal justice.

But there is no absolute rule of criminal prosecution. In sum, not every international crime must be addressed by prosecution if there had been a thorough investigation and a good faith effort to come to terms with past and there is good reason to abstain from international criminal prosecution. After all, criminal justice is not prosecution at all cost.⁴⁰

Is there an absolute duty to prosecute or can it be compromised in the interest of reconciliation? There is a need for reconciliation in order to provide for lasting peace and protection of human rights. In a number of post-conflict situations, states have claimed that the need for reconciliation requires that the demand for criminal justice be compromised. There appears to be a seeming contradiction between justice on the one hand and the need for reconciliation on the other hand. Note however that justice is not necessarily defined as criminal justice.⁴¹

The current understanding is that there is not necessarily a dichotomy between justice and reconciliation. While originally the focus was on the contradiction between criminal justice and reconciliation, there is a growing conviction in the international settings that reconciliation is to be achieved by prosecuting perpetrators of serious human rights violations.

The concept of internationalization of criminal justice might be considered as a possible mechanism to deal with categories of crime other than war crimes, crimes against humanity, such as drug related crimes or terrorist offence. Domestic judges operate under strong and severe domestic pressure when trying such offences.

³⁹ Kircher, op. cit p. 267

⁴⁰ Michael, S. (1991), "The Amnest Exception to the Jurisdiction of the International Criminal Court", 32 *CORNELL INT'L L. J.* 507

⁴¹ Justice could be discussed or defined in the context of Amnesty, Truth and Reconciliation etc.

6.0 Emergence of Truth and Reconciliation Commission

Truth commissions were established as alternative measures, at times with the aid of the United Nations. The idea was to shed light into past atrocities in order to serve the interest of the victim and to prevent recurrence. The interest of criminal punishment was compromised in order to facilitate peace agreement and to foster reconciliation. While the models adopted in South and Central America. Such as the blanket amnesty of El-Salvador, do not serve as good examples for the return to peace and rule of law, the South African Truth and Reconciliation Commission process can indeed be characterized as a good-faith effort in this regard.⁴² Truth commissions are traditionally temporary bodies set up by an official authority to investigate a pattern of gross human rights violations committed over a period of time in the past, the record of which is identified in a public report and or recommendations for justice and reconciliation.

These truth commissions vary in forms, some are composed of a mixture of domestic and international membership,⁴³ and others composed purely domestic personnel,⁴⁴ or purely international members.⁴⁵ Also, while some commissions have a broad mandate to carry out a general inquiry,⁴⁶ others have specific mandates limited to specific events.⁴⁷ The South Africa Model is famous for its novel approach by exercising the power to grant amnesty for politically motivated offences upon full disclosure of crimes.⁴⁸

Some Truth and Reconciliation Commissions have had to take on the additional role of re-integrating individuals into their local environment in order to prevent underlying social grievances from being passed on from one generation to another. This happens where the atrocities have a religious, racial or ethnic component, where different layers of a society have been involved in an armed conflict, and where the conflict has triggered displacements and distance perpetrators from their local community.⁴⁹ Such a re-integration function was assigned to Gacaca Panels in the context of Rwanda.⁵⁰

⁴² See generally, Promotion of Nationality and Reconciliation Act. No. 34 (July 26, 1995), available at <http://www.doj.gov.za/trc/legal/act9534.htm> (calling for the establishment of the South African Truth and Reconciliation Commission); Lyn, G (2001), "To Punish or Pardon: A Comparison of the International Criminal Tribunal for Rwanda and the South African Truth and Reconciliation Commission," *HUMAN RIGHTS REVIEW* at 3; Gerhard, W. (1996) "Without Truth, No Reconciliation: The South African Rechtsstaat and the Apartheid Past" 29 *VERFASSUNGUND RECHT IN UBERSEE* 58; Kader, A. "Truth Reconciliation and Justice: The South Africa Experience in THE FUTURE OF THE INTERNATIONAL HUMAN RIGHTS 399 (Burns H. Weston & Stephen P. Marks ed 1999)

⁴³ Sierra-Leone Truth Commission

⁴⁴ Domestic Commissions-Sabato Commission in Argentina; Rettig Commission in Chile; and Tutu Commission in South Africa

⁴⁵ The El-Salvador Truth Commission, The Guatemala Commission

⁴⁶ The El-Salvador and Guatemala Commission

⁴⁷ Chilean Truth Commission; Argentineans Commission on Forced Disappearance of Persons.

⁴⁸ Section 2 of South African Nationality Unity and Reconciliation Act 1995

⁴⁹ Stahn, op. Cit p. 434

⁵⁰ Ibid. Both the case of Sierra-Leone and the East Timorese Truth Commission indicate that truth commissions may take an active role in peace building through the involvement based structures.

7.0 Admixture of Accountability Regimes

Under this sub-head, we shall be examining complementarities of criminal trials and alternative mechanisms of justice. Recent developments have shown that one single approach alone does not suffice to solve the problems of transitional justice. While prosecution and truth have traditionally been thought of as mutually exclusive models, there is much to be said for a parallel system.⁵¹ There is an increasing trend not to view prosecution and truth commission mechanism as alternative measures, but as complementary means in post-conflict justice.⁵² While this may be due to the new understanding that reconciliation and justice are not necessarily in contradiction, it also stems from the insight that there is a need for practical solution.⁵³

Especially in the situation where there is no functioning independent judiciary, the call for prosecution (criminal justice) could lead to injustice which are incompatible with international human rights standards.⁵⁴ Furthermore, after extended periods of civil war, a comprehensive prosecution would probably affect wide parts of the population which may cause new tension and prevent a return to normal life for a long period of time.⁵⁵

International practice has shown that the restoration of justice in post-conflict societies required “integrated and complementary approaches”, encompassing a variety of fora, including trials, truth commission, return mechanism for displaced person and reparation programmes.⁵⁶ It has, in particular, become clear that justice forums and truth commissions are not alternative formulas but complementary models.⁵⁷ It was acknowledged by the UN Truth Commission for El-Salvador that an absolute call for prosecution may be counter-productive.⁵⁸ The commission was faced with problems that El-Salvador had no system for the administration of justice which met the minimum requirement of objectivity and impartiality necessary to achieve justice.⁵⁹

The example of South Africa has shown that even modern and relatively successful truth and reconciliation are only partial solutions to transitional justice.⁶⁰ At the same time, criminal trials are incomplete response to mass atrocities. It is a bare fact that a large number of perpetrators cannot be tried in post-conflict societies either domestically or internationally.⁶¹ Nor are criminal trials well suited to establish the truth in a multiplicity of cases.

⁵¹ Williams A. (2003), “The Relationship between Commission and International Court: The Case of Sierra-Leone,” 25 *HUM/RTS. Q 1035, 1066*

⁵² Instead of considering truth commission to be substitute for the prosecution of human rights offenders, the Inter-American Institutions have instead sought to use them in addition to investigation and prosecutions by the judiciary in recent years. See e.g. Case 10488, Inter-American C>H>R. OEA/Ser.L/V/II106.doc3 rev. para. 229-32 (1999)

⁵³ *Ibid*

⁵⁴ *Ibid* 5

⁵⁵ *Ibid*

⁵⁶ See Report of the Secretary General *Supra* note 27 Paras 23-6

⁵⁷ See principle 12 of the General Principles for Combating Immunity for International Crimes in Bassiouni Post-Conflict Justice (2002) at 269 (“the investigation commissions should be employed as precursors or adjuncts to criminal prosecutions, not as substitutes for them”). See also Stahn *op.cit* p. 453

⁵⁸ The Commission on the Truth for El-Salvador was established in 1992 pursuant to the Salvadorian Peace Accord.

⁵⁹ Report of the Commission on the Truth for El-Salvador from Madness to Hope, UN SCQR at 178 UN.Doc.s/25500 (1993)

⁶⁰ The South African Truth Commission played a comparatively successful role in the peace process by offering individuals amnesty in exchange for truth-telling and by supporting the process of institutional reform in South-Africa

⁶¹ See the Report of the Secretary General, *supra* note 2 at para 46

The foregoing insight are rational pluralist and integrated solution combining judicial and non-judicial frameworks of justice.

How accountability and reconciliation can co-exist was illustrated by the Cambodia Model. The United Nations and Cambodia in their Agreement of 2003 opted for a system of selective prosecutions.⁶² In order not to jeopardize the process of reconciliation, it envisages only the prosecution of senior leaders and those most responsible for genocide, crimes against humanity and grave breaches of humanitarian law.⁶³ A comprehensive prosecution of all crimes, including those bearing less responsibility was considered hampering of peace and reconciliation process.

A mixed system also emerged in the context of Sierra-Leone. The Lome Agreement provides for a dualist approach to post-conflict justice in Sierra-Leone encompassing both a prosecution and a truth and reconciliation component. The Special Court for Sierra-Leone operated side by side with an Internationalized Truth and Reconciliation Commission,⁶⁴ which was established to investigate the causes, nature and extent of human rights violations committed from the beginning of the conflict in 1991 to the Lome Peace Agreement. Originally, the Lome Peace Agreement had provided for a general amnesty.⁶⁵ The UN Secretary General, however, appended to his signature of the Peace Agreement a Proviso that amnesty should not apply to, the international crime of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.⁶⁶ The statute of the Special Court explicitly provides that an amnesty granted a person falling within the court's jurisdiction shall not be a bar to prosecution by the court.⁶⁷

In Rwanda, an unconventional model of transitional justice was adopted. Domestic initiatives to complement the work of the ICTR and to deal with the mass of perpetrators held in Rwandan prison led to the creation of a Three-Tier System.⁶⁸ The multidimensional

⁶² See – Draft Agreement between the United Nations and the Royal Government of Cambodia, concerning the prosecution under Cambodia Law of Crimes committed during the period of Democratic Kampuchea (March 17, 2003), also available @ G. A. Res. 57/228, U.N. Doc. A/RES/57/338.B. Annex Instruction of Ratification of Agreement between the U.N. and government of Cambodia, Oct. 19, 2004, also see available at <http://www.cambodia.gov.kh/English/draft20agreement.htm>

⁶³ Such a selective approach was also advocated by Orientlicher, D. F. (1991) "Setting Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," *100 Yale L. J.* 2537

⁶⁴ Like the Special Court itself, the Truth Commission is a mixed body composed of four domestic commissioners and three foreign members appointed by the UN High Commissioner for Human Rights.

⁶⁵ Peace Agreement between government of Sierra-Leone and the Revolutionary United Front of Sierra-Leone Article 9 (June 3, 1999), available at <http://www.sierra-leone.org/lomeaccord.html>

⁶⁶ See S. C. Res 1312 UN SCOR, UN Doc. S/RES/1315/(2000)

⁶⁷ Statute of Special Court for Sierra-Leone, Article 10, available at <http://www.SCSL.org/SCSCL-statute.html> The Special Court in a 2004 decision confirmed that amnesty shall not be a bar to prosecution of genocide, war crimes, crimes against humanity etc in Prosecutor v. Kallon & Kamara case No. SCSL-2004 – 15AR 72 (E). Today, Charles Taylor had faced criminal prosecution and has been convicted and sentenced to 50 years jail term.

⁶⁸ Those persons allegedly most responsible for the Rwandan genocide were tried before the ICTR. Remaining leaders, including those who decide and led the genocide and those who committed act of sexual torture or violence (category I perpetrators) were tried by Conventional Courts. Finally, the great majority of cases are dealt with by less formal community panels (called Gacaca judgment on the grass panels) under which perpetrators, conspirators and accomplices of homicide (Category II Perpetrators) or serious bodily harm (Category III Perpetrators) as well as persons who committed property crimes (Category IV Perpetrators) may be tried by a community elected judges and receive reduced penalties, including Community Service upon confession and guilty plea. See Rwanda Organic Law on Gacaca, Organic Law No.40/2000 (2010; see also Daly E. (2002) "Between Punitive and Restrictive Justice: The Gacaca Courts in Rwanda *34 N.Y.U Journal of International Law*)

model of international domestic and local adjudication was necessitated by the incredible large number of alleged genocidaire in Rwanda. About 115.000 detainees accused of genocide and crimes against humanity were held in Rwanda Prisons. The government estimated that it would take at least 200 years to complete the trial of genocide-related detainees if the country relied on its conventional courts system.⁶⁹

In Bosnia and Herzegovina, a multi-dimensional transitional justice approach was also adopted. Infact, Claude Jordan, former President of ICTY, recognized in an open forum at Sarajevo in May 2001 that a truth commission and the international tribunals could perform “complementary and distinct roles”.⁷⁰ President Jordan noted that a truth commission could positively supplement the peace keeping activities of the ICTY, by allowing lower ranking perpetrators and executioners to participate voluntarily in the truth and reconciliation by admitting their crime, without being granted amnesties.

The combined justice and reconciliation formulas embodied in UNTAET Regulations 2000/15 and 2001/10 presents overall a promising mechanism for the restoration of peace and justice in a post war society.⁷¹ The instruction of a division of labour between the truth commissions and international panels eased the burden on the judiciary, by relieving the courts of numerous low level criminal trials. Moreover, the reconciliation mechanism encouraged perpetrators to return to their original communities and assume responsibility for criminal acts that might otherwise go unpunished.

In the Democratic Republic of Congo (DRC) there was a three tier approach involving the ICC, a hybrid tribunal and a truth commission. The DRC has made a referral to the ICC which triggers the jurisdiction of the court.⁷²

Note that it is increasingly accepted that core crimes like genocide, crimes against humanity and serious war crimes are generally outside the realm of immunity in post-conflict scenarios. Hence, its is strongly recommended that peace agreements and Security Council Resolutions and mandates should reject any endorsement of amnesty for genocide, war crimes and crimes against humanity, including those relating to ethnic, gender and sexually based international crimes an ensure that no such amnesty granted shall constitute a bar to prosecution before any United Nations-created or United-Nations assisted court.⁷³

Under the International Criminal Court (ICC) which by its very nature is complementary in design to domestic jurisdiction, there is no guarantee that proceedings before truth commission will permanently relieve a perpetrator from criminal accountability

⁶⁹ See official website of the Rwanda Government genocide at <http://www.rwanda.com/gov>. Note however that Rwandan model suffered some frictions. There is a disparity of sentencing, while the most responsible accused tried before the ICTR faces the life imprisonment as the maximum penalty. Persons who are tried before domestic courts and who are allegedly “less responsible” are on the contrary subject to death penalty under domestic law. In addition, there are double standards in the treatment of detainees. Those tried in the ICTR have access to medical care and anti-retroviral drugs, while perpetrators tried under national law victim of sexual crimes often lack access to adequate medical facilities. See Strain J. and Keyes E. (2003). “Accountability in the Aftermath of Rwanda Genocide” in E. Stromseth (ed) *Accountability for Atrocities: National and International Responses* 273 at 127

⁷⁰ See ICTY Press Release, the ICTY and the Truth and Reconciliation Commission in Bosnia and Herzegovina, 17 May, 2001 at <http://www.un.org/icty/pressreal/p591-htm>

⁷¹ See Transitional Justice in East Timor-Section 1.3 of UNTEAT Regulation No. 15/2000 of 6 June

⁷² See ICC Press Release, Prosecutor receives referral of the situation in the Domestic Republic of Congo The Hague, 19 April. 2004 at <http://www.icepi.int.press/pressrealese19.html>. See generally William W. Burkwhite, (2005)

“Complementary in Practice: The International Criminal Court as part of a System of Multi-Level Global Governance in the Democratic Republic of Congo” (2005) *18 L.J.I.L.* 557.

⁷³ See Report of Secretary General, *supra* note 2, para. 64

before the ICC.⁷⁴ With respect to internationalized domestic courts, they come conveniently within the scope of application of the classical complementarity regime under Article 17 paragraph (1 and (2) which establishes a vertical relationship of cooperation with the ICC. Complementarity means that ICC will in principle, only act when domestic jurisdictions are unwilling or unable to bring perpetrators to justice.

With respect to ICC and hybrid and ad-hoc tribunals, complementarity rule does not apply. Article 17 of ICC which is in respect of domestic sovereignty, does not apply in the same fashion to international tribunals and hybrid courts which do not form part of a national judiciary. Hybrid and international courts are in principle independent of the ICC in structural terms. Hence, investigations or prosecutions may be carried out simultaneously and can only bar ICC proceeding in accordance with the principle of *nebis in idem* Articles 17 (1) (c) and 20 (3) of ICC statute.

8.0 Conclusion

This paper has examined the various dimension of post-conflict situations across the globe. While it can be said that no one model is superior to other, the various models are rather complementary and not contradictory or alternative. There are so much precedents of post-conflicts mechanisms that future generations would not have problem other than that of choice. However, it is opined that prosecution may target only the most serious perpetrators while the alternative forms of justice, such as truth telling, reconciliation and individualized amnesty procedures, can target the lower level perpetrators. What is important is that justice is done ultimately and that no criminal escape justice or goes unpunished.

⁷⁴ Robinson D. (2003) "Serving the interest of Justice: Amnesties, Truth Commissions and the International Criminal Court" 14 *E.J.I.L.* Article 17 (1) (2) ICC allow for flexibility.