

SQUARE PEG, ROUND HOLE: TRANSITIONAL JUSTICE MECHANISMS AND STATE-BUILDING

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ABSTRACT

Transitional justice is an area oft-studied and yet ill-defined. This article analyzes the impacts of transitional justice—specifically, international courts and truth commissions—on state capacity. To do so, this article first defines and describes the different elements of transitional justice, and then focuses on the function of truth commissions and international criminal prosecutions in post-conflict states. It next conducts four case studies on the following institutions: South Africa’s Truth and Reconciliation Commission; El Salvador’s Truth Commission; the International Criminal Tribunal for Rwanda; and The Special Court for Sierra Leone. These case studies illustrate that transitional justice mechanisms can result in: (1) the removal of staff or political actors from the prior political regime; (2) the creation of a sense of justice, which can become a basis for legitimacy for the new legal institutions; and (3) training of personnel, in contexts of prolonged international involvement. However, transitional justice mechanisms tend to be ineffective tools for building state capacity because all of these three key results vary greatly in actual impact. Transitional justice frequently proves its worth in areas other than improving state capacity: international courts focus on providing accountability for gross violations of human rights, and truth commissions are frequently tied to other packages of reform and can be a key component of a lasting peace agreement. In fact, many of the most important impacts of transitional justice may not be capacity related at all; transitional justice is, after all, dedicated to the “transition” of a state from a period of conflict to one of democratic governance.

I. INTRODUCTION

Between 1945 and 2008, there were 217 non-international conflicts that hamstrung state capacity throughout the world.² Of these, 139 (64%) incorporated some form of transitional justice remedy after the end of the conflict.³ This trend has increased in recent years; in fact, the year the conflict ended is the single most influential predictor on the likelihood of a state employing transitional justice mechanisms.⁴ In every possible analysis, controlling for a wide variety of variables, the more recent conflicts are more likely to make use of transitional justice practices.⁵ The changing attitudes, as well as growing usefulness of transitional

² Christopher Mullins, *Conflict Victimization and Post-Conflict Justice 1945-2008*, in *THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE* 67, 79 (M. Cherif Bassiouni, ed., 2010) [hereinafter *Conflict Victimization*].

³ *Id.*

⁴ *Id.* at 84.

⁵ *Id.*

justice mechanisms due to more examples from which to learn, have likely caused much of this growth.⁶ This begs the question: how effective are these mechanisms?

Transitional justice mechanisms may broadly be split into prosecutorial and non-prosecutorial devices.⁷ Prosecutorial mechanisms include international courts, hybrid courts, domestic criminal mechanisms, military prosecutions, and civil legal remedies.⁸ Non-prosecutorial mechanisms include truth commissions (both domestic and international), non-governmental organization (NGO) inquiries, legislative responses (such as amnesty, lustration, and victim compensation), memorialization, and traditional/religious conflict resolution approaches.⁹ Of these mechanisms, the most salient under international law are international/hybrid courts and truth commissions, as these have been the most popular mechanisms for transitioning states.¹⁰

This article focuses on the differences between truth commissions and international courts by analyzing their impact on the state's post-conflict development. Specifically, the goal of this article is to assess whether truth commissions or international courts are more effective at bringing about substantial state reform and improving the capacity of post-conflict states. Part II of this article begins by giving an overview and background for the differences between truth commissions and international judicial prosecutions.¹¹ Part II defines transitional justice and identifies the broad goals for both truth commissions and international courts. It concludes by briefly surveying the differences between the mechanisms.

Part III of this article conducts an in-depth analysis via case studies of four transitional justice mechanisms: (1) the South African Truth and Reconciliation Commission; (2) the El Salvadoran Truth Commission; (3) the International Criminal Tribunal for Rwanda and the associated Gacaca courts; and (4) the Special Court for Sierra Leone.¹² Part III addresses the mandate of each mechanism, its successes as seen at the time, and its long-term impact. It concludes by comparing and contrasting the impacts of truth commissions and courts, and by identifying the fact that neither truth commissions nor international courts appear to be consistently effective in promoting reform and state capacity. Finally, Part III offers an overview of "lessons learned," and compares and contrasts the impacts of truth commissions and international courts.¹³

⁶ *Conflict Victimization*, *supra* note 2, at 84.

⁷ *See generally* U.N. Secretary-General, *United Nations Approach to Transitional Justice* (Mar. 2010), https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010_FINAL.pdf [hereinafter *U.N. Approach to Transitional Justice*] (discussing the U.N.'s approach to transitional justice processes and mechanisms).

⁸ *See Conflict Victimization*, *supra* note 2, at 78.

⁹ *See id.*

¹⁰ *See id.* at 80–82.

¹¹ *See infra*, Part II.

¹² *See infra*, Part III.

¹³ *See infra*, Part IV.

II. BACKGROUND: TRUTH OR JUSTICE FOR TRANSITIONING STATES?

The post-conflict goals of “truth” for victims and “justice” for perpetrators frequently come into opposition as states consider tradeoffs while implementing transitional justice programs.¹⁴ This part discusses the concept of transitional justice broadly, including definitions, history, and the role of truth commissions and criminal prosecutions within the transitional framework. Next, this part explores the functions of truth commissions and of international prosecutions in post-conflict states. Lastly, this part concludes by discussing the relationship of truth-telling and criminal justice approaches; it sets the stage for comparative case studies contrasting truth commissions and international courts.

A. The Concept of Transitional Justice

Transitional justice is a slippery concept, simultaneously incorporating the elements of law, history, and politics.¹⁵ Academics and practitioners have both put forward competing definitions of “transitional justice,” especially as the concept has gained salience in the international community following the end of the Cold War.¹⁶ These definitions tend to focus on three main topics: (1) the goals of the field; (2) the subject of the field; and (3) the timeframe of the field.¹⁷ For instance, the United Nations (UN) defines transitional justice as “the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice, and achieve reconciliation.”¹⁸ However, this definition—as with many others—fails to take into account the relationship of these mechanisms to the states in which they operate.¹⁹ This article therefore proposes a multi-faceted definition of transitional justice, gleaned from a variety of existing approaches. Transitional justice:

(a) takes place after a period of large-scale conflict, whether an international conflict, a civil war/non-international armed

¹⁴ E.g., Tom Syring, *Truth versus Justice: A Tale of Two Cities?*, 12 INT’L LEGAL THEORY 143, 144 (2006) (examining the broader philosophical and legal differences between the modalities chosen for transitional justice and looking at the scope of the academic debate).

¹⁵ See generally Thomas Obel Hansen, *Transitional Justice: Toward a Differentiated Theory*, 13 OR. REV. INT’L L. 1 (2011) (providing one attempted look at defining transitional justice taking into account culture and history).

¹⁶ See, e.g., Ruti Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS J. 69, 69–70 (2003).

¹⁷ See *id.* at 69.

¹⁸ U.N. *Approach to Transitional Justice*, *supra* note 7, at 2.

¹⁹ But see *id.*

conflict (“NIAC”),²⁰ or an internal conflict in opposition to a repressive regime;²¹

(b) consists of a set of legalistic processes and mechanisms;

(c) is designed to address gross human rights violations, breaches of international law, and/or war crimes; and

(d) exists external to or in addition to the existing justice system in a state and is ad-hoc in nature.²²

This definition is malleable enough to cover all of the different forms transitional justice may take, yet specific enough to identify key elements of a transitional justice regime. Some academics and practitioners prefer the term “post-conflict” justice because it more broadly captures notions of judicial mechanisms instituted without respect to their goals.²³ The term “post-conflict” justice arose before “transitional justice,” but the latter term has moved to capture many of the meanings of the first.²⁴ Additionally, the term “post-conflict” justice may also avoid some of the difficulty with defining what the “transitional” period of a state actually

²⁰ See INT’L COMM. OF THE RED CROSS, HOW IS THE TERM “ARMED CONFLICT” DEFINED IN INTERNATIONAL HUMANITARIAN LAW? 5 (2008), <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> (“Non-international armed conflicts are protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organization.”).

²¹ This article will use the term “internal conflict” to refer to any prolonged period of unrest and conflict which does not rise to the formal definition of a non-international armed conflict, such as continuous yet low-level resistance to an ineffective repressive regime. *Cf. id.*

²² See Teitel, *supra* note 16, at 69; see also U.N. Approach to Transitional Justice, *supra* note 7, at 2; see also *What is Transitional Justice?*, INT’L CTR. FOR TRANSITIONAL JUST., <https://www.ictj.org/about/transitional-justice> (last visited Oct. 12, 2018) [hereinafter *What is Transitional Justice?*]; Christina Binder, *Introduction to the Concept of Transitional Justice*, in TRANSITIONAL JUSTICE EXPERIENCES FROM AFRICA AND THE WESTERN BALKANS 9, 9 (Walter Feichtinger et al. eds., 2013), http://www.bundesheer.at/pdf_pool/publikationen/transitional_justice_sr_11_2013_03_c_binder.pdf.

²³ See generally M. CHERIF BASSIOUNI, THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE (2010) (utilizing the term “post-conflict” justice to capture a wide variety of conflicts, justice mechanisms, and goals to facilitate the most comprehensive set of examples possible).

²⁴ David E. Guinn, *Human Rights Education: The Third Leg of Post-Conflict/Transitional Justice 2* (DePaul Univ., Working Paper No. 42, 2007), <https://www.du.edu/korbel/hrhw/workingpapers/2007/42-guinn-2007.pdf> [hereinafter *Human Rights Education*].

is.²⁵ Still, despite the complications, this article uses the term “transitional justice,” as it is more widely used in modern literature on the subject. Further, the more specific forms of transitional justice—of which there are many, discussed below—each have their own, specific definitions. However, considering the broad stroke of the history of transitional justice, a wide-spectrum definition is an important starting place.

1. History of Transitional Justice

Although a theory of post-conflict justice dates back millennia,²⁶ the field of transitional justice is truly a modern conception.²⁷ The first usages of the term “transitional justice” in its modern incarnation originated in the 1980s as a response to post-Cold War democratization of states.²⁸ However, the field itself was born, as many modern-era institutions were, out of the end of World War II.²⁹ The international criminal trials at Nuremberg and Tokyo introduced the practice of culpability for crimes during warfare on behalf of a sovereign state, and created the link between justice and transitioning from conflict to post-conflict state.³⁰ As transitional justice evolved from these nascent institutions, it evolved through three primary phases: first, the post-World War II war crimes tribunals; second, post-Cold War incarnations involving conflicts resulting from democratization among previously authoritarian regimes; and third, modern hybrid approaches (post-2000) institutionalizing transitional justice for internal conflict.³¹

After World War II, the victorious allies created the Nuremberg international criminal tribunal to try and convict Nazi perpetrators of the Holocaust (and other war crimes).³² The involvement of international actors conferred a level of accountability to the mechanisms. In contrast, the domestic judicial systems lacked legitimacy, both in the eyes of the citizenry (which had suffered under significant periods of repression and lack of effective judicial remedies) and in the eyes of international actors (which saw the lingering influence from the wartime political establishment).³³ The Nuremberg era was a key jump-start in the search

²⁵ PIERRE HAZAN, *JUDGING WAR, JUDGING HISTORY: BEHIND TRUTH AND RECONCILIATION* 30–32 (2010).

²⁶ See Binder, *supra* note 22, at 11 (discussing the concept of amnesties and prosecutions used as post-conflict judicial measures by the ancient Greeks).

²⁷ *Id.*

²⁸ Paige Arthur, *How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 *HUM. RTS. Q.* 321, 324 (2009).

²⁹ See Teitel, *supra* note 16, at 70–72.

³⁰ HAZAN, *supra* note 25, at 14.

³¹ See Teitel, *supra* note 16, at 70–72.

³² HAZAN, *supra* note 25, at 14.

³³ See Teitel, *supra* note 16, at 73.

for a global version of judicial accountability, but the rapid slide into Cold War political impasse stifled any further developments for many decades.³⁴

The second and third phases of transitional justice came as the Cold War ended.³⁵ The second phase is characterized by the democratization of states and the proliferation of conflict.³⁶ While conflict during the Cold War was frequently driven by political motives of either the United States or the Soviet Union, many other internal conflicts (such as fault lines between ethnic groups, religious groups, or other identity groups) simmered beneath the surface.³⁷ After the lid on domestic political activism was lifted with the removal of Cold War-era pressure, many of these conflicts—such as those across Latin America and the Balkans—exploded into reality.³⁸ The third phase of transitional justice is the modern era; it is characterized by the normalization of transitional justice as a response to periods of conflict and instability, as well as novel approaches and the hybridization of judicial conflict resolution mechanisms.³⁹ This era has seen rapid expansion of transitional justice mechanisms in concert with new norms of legitimacy, domestic ownership, and peace processes. Many of these modern conflicts are still ongoing, and many of the transitional justice mechanisms are too young to provide accurate assessments for some time yet.

2. Goals of Transitional Justice

The goals of transitional justice are inseparable from its elements and mechanisms; indeed, the goals are central to the definition of transitional justice itself. The primary objective of transitional justice is to end impunity for war crimes and establish rule of law and a functioning democratic governance for a state.⁴⁰ Additionally, there are several complementary development-oriented goals for transitional justice.⁴¹ These include, but are not limited to, the following: (1) creating access to justice for victims following violence; (2) ensuring the political participation of marginalized groups; (3) promoting respect for the rule of law; (4) advocating for judicial conflict resolution procedures; and (5) fostering reconciliation among various groups in the state.⁴² Lastly, developing state capacity

³⁴ *See id.* at 70–71.

³⁵ *See* Teitel, *supra* note 16, at 70–71.

³⁶ *Id.*

³⁷ *See* Arthur A. Stein & Steven E. Lobell, *Geostructuralism and International Politics: The End of the Cold War and the Reorganization of International Security*, in REGIONAL ORDERS: BUILDING SECURITY IN A NEW WORLD 101 (David A. Lake & Patrick P. Morgan, eds., 1997); Richard H. Shultz, Jr., *State Disintegration and Ethnic Conflict: A Framework for Analysis*, 541 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 75, 76 (1995).

³⁸ *See* Teitel, *supra* note 16, at 71.

³⁹ *Id.*

⁴⁰ Binder, *supra* note 22, at 9.

⁴¹ *What is Transitional Justice?*, *supra* note 22.

⁴² *What is Transitional Justice?*, *supra* note 22.

is also a key goal of transitional justice tying directly into the concept of the rule of law.⁴³ Specifically, many transitional justice processes seek to establish accountable institutions and restore confidence in those institutions; in other words, they seek to create an effective government bureaucracy with legitimacy among the population.⁴⁴ The level of institutional reform sought by a transitional justice process varies significantly from state to state, and even between mechanisms in states which use multiple mechanisms.⁴⁵ This comes down to the individualized goals of each mechanism, set forth in the foundational document establishing the transitional process. Still, the broad discussion of transitional justice's impact on institutional capacity is ingrained in any discussion of successful mechanisms by virtue of a debate over long-term impacts.⁴⁶

3. Truth-telling and Criminal Prosecution as Elements of Transitional Justice

This article focuses on truth commissions and criminal prosecutions as the two main mechanisms of transitional justice, but they are just two of the many different elements and tactics that states have used.⁴⁷ Broadly, these mechanisms include truth-based initiatives, prosecutions, legislative actions, and traditional approaches.⁴⁸ Legislative actions can include lustration, victim compensation, and amnesty.⁴⁹ Traditional approaches can include religious reconciliation techniques as well as indigenous conflict resolution mechanisms, and are often included in addition to more formal international and/or legal techniques.⁵⁰ While truth-telling and prosecutions are the two most popular forms of transitional justice, they are frequently used along with these other types. For instance, of the 139 NIACs or internal conflicts that have used some form of transitional justice, fifty-three have used at least one type of prosecution (38%) and sixty-five have used at least some type of truth-telling initiative (49%).⁵¹ Holistic transitional justice institutions usually recognize the value of multiple mechanisms with different missions.⁵²

⁴³ *Institutional Reform*, INT'L CTR. FOR TRANSITIONAL JUST., <https://www.ictj.org/our-work/transitional-justice-issues/institutional-reform> (last visited Oct. 12, 2018) [hereinafter *Institutional Reform*].

⁴⁴ *Id.*

⁴⁵ *See id.*

⁴⁶ *See id.*

⁴⁷ *See Conflict Victimization*, *supra* note 2, at 77–78.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 79.

⁵¹ *Id.* at 80.

⁵² *See* Rebekka Friedman & Andrew Jillons, *The Pitfalls and Politics of Holistic Justice*, 6 GLOB. POL'Y 141, 141 (2015).

B. The Function of Truth Commissions in Post-Conflict States

Truth commissions are non-prosecutorial bodies created to investigate war crimes, human rights violations, and other systemic breaches of law which occurred during a prolonged period of conflict within a state.⁵³ They are the most popular transitional justice mechanism for post-conflict states, with 49% of all conflicts resulting in some form of truth-telling initiative.⁵⁴ Truth commissions can take three primary forms, depending on which entities control the process and facilitate the truth telling. These include: (a) a national commission, run by the state itself; (b) an international commission, run by outside actors; and (c) a non-governmental commission, run by civil society involved in the peace process.⁵⁵ Regardless of the form, truth commissions are frequently hailed as one of the most important ways to promote societal reconstruction after a conflict.⁵⁶ This part delves into the idea of a truth commission, looking first at goals and subsequently analyzing what elements make up a truth commission.

1. Goals of a Truth Commission

Truth commissions have non-prosecutorial goals.⁵⁷ These goals are typically outlined in the peace agreement, or foundational legislation, which creates the commission.⁵⁸ These goals are evidenced by the breadth of the commissions' mandate, as well as by the tools which the commission has at its disposal to pursue information.⁵⁹ Common goals of truth commissions include the following: (a) to clarify the causes of violence and state breakdown; (b) to promote national reconciliation, healing, and unity; (c) to promulgate recommendations for institutional reform; (d) to recommend violators for prosecution; and (e) to

⁵³ E.g., Jaya Ramji, *Reclaiming Cambodian History: The Case for a Truth Commission*, 24 FLETCHER F. WORLD AFF. 137, 142 (2000).

⁵⁴ *Conflict Victimization*, *supra* note 2, at 80.

⁵⁵ *Id.*

⁵⁶ See, e.g., Christopher K. Connolly, *Living on the Past: The Role of Truth Commissions in Post-Conflict Societies and the Case Study of Northern Ireland*, 39 CORNELL INT'L L. J. 401, 410 (2006) (analyzing attempts at truth-telling and proposing a formal truth commission for Northern Ireland).

⁵⁷ See generally Legal Memorandum from Pub. Int'l L. & Pol'y Grp., Truth and Reconciliation Commissions: Core Elements (May 2013), http://syriaaccountability.org/wp-content/uploads/PILPG-Truth-and-Reconciliation-Memo-2012_EN.pdf [hereinafter Truth and Reconciliation Commissions: Core Elements] (discussing the key components of successful truth commissions).

⁵⁸ *Id.* at 4–5.

⁵⁹ Truth and Reconciliation Commissions: Core Elements, *supra* note 57.

determine and provide amnesty guarantees.⁶⁰ Some of these goals are common across all truth commissions, such as the goal of promoting national reconciliation and clarifying causes of the violence.⁶¹ Others are more controversial—the inclusion of amnesty provisions, and their efficacy, has provoked great debate among academics and practitioners in the transitional justice field.⁶²

2. Elements of a Truth Commission

The elements of a successful truth commission are tied intimately to the goals of the commission. For many commissions, what makes a truth commission a truth commission is the focus of its work. A truth commission tends to focus on past crimes, as opposed to crimes committed during the operational period of the commission. Relatedly, they investigate patterns of abuse over a period of time, rather than specific and individualized crimes.⁶³ Naturally, the truth commission still gathers data about individual crimes, but it does so to assess larger trends and systemic violations rather than to bring single perpetrators to justice.⁶⁴ Additionally, a truth commission is a temporary body, which concludes its work by issuing a final report.⁶⁵ The report lays out findings, concerns, and recommendations for the future, though it usually does not have a binding nature.⁶⁶ Lastly, a truth commission is officially sanctioned and empowered by the state, though it frequently does have international assistance.⁶⁷ In contrast to purely international efforts, a successful truth commission works with the cooperation of the post-conflict state to ensure legitimacy among the domestic population.⁶⁸

Other, more specific elements of a truth commission explain how the commissions tend to achieve their goals.⁶⁹ Truth commissions frequently have both domestic and international commissioners, which aids in institutional capacity

⁶⁰ See *id.* at 5–6.

⁶¹ Truth and Reconciliation Commissions: Core Elements, *supra* note 57, at 5–6.

⁶² See Anastasia Kushleyko, *Accountability v. “Smart Amnesty” in the Transitional Post-conflict Quest for Peace. A South African Case Study*, in CURRENT ISSUES IN TRANSITIONAL JUSTICE 31, 33–35 (N. Szablewska & S.-D. Bachmann, eds., 2015).

⁶³ Oskar N.T. Thoms et al., *State-Level Effects of Transitional Justice: What Do We Know?*, 4 INT’L J. TRANSITIONAL JUST. 329, 334 (2010).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Onur Bakiner, *Truth Commission Impact: An Assessment of how Commissions Influence Politics and Society*, 8 INT’L J. TRANSITIONAL JUST. 6, 30 (2013) (concluding that a TC’s “*ad hoc* and nonbinding character limits [its] potential for impact”).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See, e.g., Truth and Reconciliation Commissions: Core Elements, *supra* note 57, at 11–12.

building while taking advantage of knowledge of international best practices.⁷⁰ Truth commissions also usually have divisions devoted to data collection, hearings, research, and analysis.⁷¹ Each division contributes to methods by which the commissioners ascertain the history of the conflict and methods which can help a state recover during the post-conflict period.⁷² Lastly, the final report of the truth commission always includes recommendations for institutional reform, highlighting the importance of state capacity building to the functioning of the commission.⁷³ While truth commissions may vary in implementation, these common elements are essential markers to separate a truth commission from other mechanisms of transitional justice.

C. The Function of International Criminal Prosecutions in Post-Conflict States

While truth commissions may be more common in modern instances of transitional justice, international courts are far older and have a more established record of action in post-conflict states.⁷⁴ The first international courts can be plausibly traced back to 15th century France, and the prosecution of Peter von Hagenbach for “tramp[ing] underfoot the laws of God and men.”⁷⁵ This is essentially a combination of war crimes and crimes against humanity,⁷⁶ and the tribunal itself was international because all of the jurisdictions involved in the trial nominated judges to serve on the bench for a combined trial of von Hagenbach.⁷⁷ This trial was even cited at the genesis of modern international criminal law as precedent for the Nuremberg Tribunal, and to combat the assertion that the tribunals constituted *ex post facto* law applied through victors’ justice.⁷⁸ Thus, the von Hagenbach trial, and other historical examples, such as the slave trade tribunals set up by European states in the 18th and 19th centuries,⁷⁹ set the stage for international

⁷⁰ *Id.* at 13.

⁷¹ *Id.* at 15–18.

⁷² Truth and Reconciliation Commissions: Core Elements, *supra* note 57, at 15–18.

⁷³ *Id.* at 18–19.

⁷⁴ See, e.g., Gregory S. Gordon, *The Trial of Peter von Hagenbach: Reconciling History, Historiography, and International Criminal Law*, in THE HIDDEN HISTORIES OF WAR CRIMES TRIALS 13, 15–18 (Kevin Jon Heller & Gerry Simpson, eds., 2013).

⁷⁵ *Id.* at 17.

⁷⁶ *Id.* (quoting L.C. GREEN, SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW 263 (1976)).

⁷⁷ See *id.* at 16.

⁷⁸ Gordon, *supra* note 74, at 16 (quoting American chief prosecutor Telford Taylor, in TRIALS OF WAR CRIMINALS: BEFORE THE NÜERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (MINISTRIES CASE) 96–97 (Vol. 13 1952)).

⁷⁹ See, e.g., Frank Dame, *The Effect of International Criminal Tribunals on Local Judicial Culture: The Superiority of the Hybrid Tribunal*, 24 MICH. ST. INT’L L. REV. 213, 214–16 (2015).

acceptance of prosecution as a means of transitional justice following World War II.⁸⁰

International courts generally differ substantially from their domestic counterparts. They have their own sets of procedures, follow international law, and usually operate independently—or at least separate from the domestic systems in their subject states.⁸¹ Further, international courts are established specifically by statute or treaty and have a governing “constitution” of sorts which controls their procedures, jurisdiction, governing law, and lifespan.⁸² Thus, except for the International Criminal Court,⁸³ these are ad hoc tribunals created to serve a specific purpose and then dissolved at the conclusion of that purpose.⁸⁴ As they are established by negotiated treaty or peace agreements, international courts constitute a unique intersection of law and international politics to function within the post-conflict reconstruction system.⁸⁵

1. Goals of an International Court

International courts, while focused on the truth in individual cases, are committed to prosecuting distinct persons accused of gross violations of human rights and international law.⁸⁶ This sharply contrasts with the operation of truth commissions, where the goal is to identify trends and clarify the broad historical record.⁸⁷ Within this broad task, there are a variety of specific goals that influence the creation of international courts.⁸⁸ International courts share the same four broad

⁸⁰ *Id.* at 216.

⁸¹ Dame, *supra* note 79, at 213–14.

⁸² *See id.*

⁸³ The International Criminal Court is a permanent body established by the Rome Statute in 1998. It operates outside the bounds of normal transitional justice, as it seeks to bring individual perpetrators of heinous crimes to justice regardless of the status of a state as transitioning or post-conflict. This article will not consider the operation of the International Criminal Court, though it has dramatically shifted the conversation about international criminal law away from being solely focused on transitional justice. *See generally* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 .

⁸⁴ *See Internationalized Criminal Tribunals*, INT’L JUST. RES. CTR., <https://ijrcenter.org/international-criminal-law/internationalized-criminal-tribunals/> (last visited Oct. 12, 2018) (listing ad hoc tribunals and identifying that they serve a specific prosecutorial purpose for a given conflict).

⁸⁵ *See* JESSICA LINCOLN, TRANSITIONAL JUSTICE, PEACE, AND ACCOUNTABILITY: OUTREACH AND THE ROLE OF INTERNATIONAL COURTS AFTER CONFLICT 17–20 (2011).

⁸⁶ Off. of the U.N. High Comm’r for Hum. Rts., *Rule of Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts*, 7–8, U.N. Pub. No. HR/Pub/08/2 (2008) [hereinafter *Rule of Law Tools for Post-Conflict States*].

⁸⁷ Thoms et al., *supra* note 63.

⁸⁸ Anna Petrig, *Negotiated Justice and the Goals of International Criminal Tribunals*, 8 CHI.-KENT J. INT’L & COMP. L. 1, 11 (2008).

goals of domestic criminal justice systems: retribution, deterrence, rehabilitation, and restorative justice.⁸⁹ That is, international courts seek to punish those convicted, deter future convictions, teach the convicted how to reenter society, and compensate victims.⁹⁰ Additionally, international courts have some more specific goals, including the following: promoting international accountability; conducting capacity building for local judicial institutions, developing international criminal law jurisprudence; and clarifying the historical record.⁹¹

2. Types of International Courts

This article considers the two primary types of international courts. First, so-called “pure” international courts are those which are established independent of the post-conflict state itself.⁹² Second, “hybrid” international tribunals are those which are interwoven with the domestic judiciary in a post-conflict state.⁹³

a. Pure International Courts

There are only two “pure” international courts which have been created to dispense transitional justice (excluding the International Criminal Court):⁹⁴ The International Criminal Tribunal for the former Yugoslavia⁹⁵ (ICTY) and the International Criminal Tribunal for Rwanda⁹⁶ (ICTR). These tribunals have some distinct advantages and disadvantages as compared to more localized variations on justice.⁹⁷ International tribunals are set up via a UN Security Council Resolution, are located in The Hague, and apply pure international law.⁹⁸ Typically, they operate this way where local courts lack capacity to try lengthy and complex crimes,

⁸⁹ Christopher Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventative Justice and Hybrid Inquisitorialism*, 57 WM. & MARY L. REV. 1505, 1509 (2016); Janine Geske, *Achieving the Roles of Criminal Justice: A Role for Restorative Justice*, 30 QUINNIPIAC L. REV. 527 (2012) (explaining a former judge’s experience with restorative justice).

⁹⁰ Petrig, *supra* note 88, at 11.

⁹¹ See LINCOLN, *supra* note 85, at 19–20.

⁹² See *infra* Part II, Section C, Subsection 2(a).

⁹³ See *infra* Part II, Section C, Subsection 2(b).

⁹⁴ See Dame, *supra* note 79, at 225.

⁹⁵ See generally U.N. S.C., *Statute of the International Criminal Tribunal for the Former Yugoslavia*, (May 25, 1993), <http://www.refworld.org/docid/3dda28414.html> [hereinafter *Statute of the International Criminal Tribunal for the Former Yugoslavia*].

⁹⁶ See generally U.N. S.C., *Statute of the International Criminal Tribunal for Rwanda*, (Nov. 8, 1994), <http://www.refworld.org/docid/3ae6b3952c.html> [hereinafter *Statute of the International Criminal Tribunal for Rwanda*].

⁹⁷ See Dame, *supra* note 79, at 225.

⁹⁸ *Id.* at 225, 227.

and where the conflicts had an extremely high profile internationally.⁹⁹ There has to be a lot of motivation and political will among international actors in order for these courts to be established, funded, and sustained.¹⁰⁰

While international courts tend to have a high degree of expertise and can effectively apply principles of international criminal law, there are also a number of drawbacks to their use.¹⁰¹ The most salient struggle for international courts is related to legitimacy; because international courts are so far removed (both ideologically and physically) from the subject state, there may be a backlash against the institution of international justice that can result in the local judiciary rejecting international precedents.¹⁰² This dramatically hampers the impact on capacity building in the post-conflict state. Additionally, while the courts themselves may get a large degree of support from international actors, little of that support is subsequently funneled into the post-conflict state attempting to rebuild.¹⁰³ Thus, international courts may provide a win for the amorphous concept of “international justice,” but they are so far removed that such gains may result in only tangential impact for the state itself.¹⁰⁴

b. Hybrid Tribunals

In contrast to pure international tribunals, hybrid international tribunals are integrated into the local post-conflict context.¹⁰⁵ Specifically, for hybrid tribunals “both the institutional apparatus and the applicable law consist of a blend of the international and the domestic.”¹⁰⁶ These courts, such as the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Court for Sierra Leone (SCSL), vary dramatically in their implementation, but all consist of some combination of international involvement with domestic systems.¹⁰⁷ They are frequently integrated with the local judiciary, such as incorporating both domestic and international judges, and they have mixed jurisdiction over crimes under domestic and international law.¹⁰⁸ Hybrid courts can build upon some of the positive aspects of pure international tribunals, as they also function where a purely

⁹⁹ Dame, *supra* note 79, at 225.

¹⁰⁰ *See id.*

¹⁰¹ *Id.* at 243–46.

¹⁰² Dame, *supra* note 79, at 244.

¹⁰³ *Id.* at 246.

¹⁰⁴ *Id.* at 245.

¹⁰⁵ *See generally* Alberto Costi, *Hybrid Tribunals as a Viable Transitional Justice Mechanism to Combat Impunity in Post-Conflict Situations*, 22 N.Z. U. L. REV. 213 (2006) (exploring the concept of hybrid tribunals and assessing their use in post-conflict states).

¹⁰⁶ *Id.* at 214.

¹⁰⁷ Dame, *supra* note 79, at 247–49.

¹⁰⁸ *Id.*

domestic prosecution does not have the capacity for such complex criminal trials.¹⁰⁹ Additionally, because of their proximity to and coordination with local institutions, they frequently have a much stronger emphasis on building the capacity of the domestic state's judicial infrastructure.¹¹⁰

Despite these positive aspects, hybrid tribunals still suffer from some drawbacks that plague the many variants of internationally supported transitional justice.¹¹¹ Like pure international tribunals, local resentment can lead to an uncooperative and toxic environment that reduces any positive local capacity building efforts.¹¹² Additionally, there is the added step of required state cooperation for hybrid tribunals.¹¹³ A domestic government that doesn't want the court to properly function—whether out of fear of investigation or lack of domestic buy-in—can hamstring it beyond the ability to have a positive impact. These drawbacks are common to most forms of international involvement in a rebuilding state—hybrid tribunals may still create some form of unique benefit as compared to their pure international counterparts.¹¹⁴ Generally, truth commissions and international tribunals all have positives and negatives, which is why they are so frequently used in concert with each other and with other overlapping mechanisms of transitional justice.¹¹⁵

III. ANALYSIS: TRUTH COMMISSIONS AND INTERNATIONAL COURTS BOTH FALL SHORT OF IMPROVING STATE CAPACITY

Truth and justice intersect when working to improve state capacity in post-conflict states. Transitional justice and state capacity building have a rocky relationship, and it is usually not a straightforward path for states seeking to emerge stronger from post-conflict periods.¹¹⁶ This section analyzes the intersection of truth and justice, specifically as it relates to developing state capacity in target states. As analysis of the case studies included below proves, transitional justice mechanisms have three key ways of impacting state capacity in post-conflict states. First, transitional justice mechanisms can lead to the removal of staff, personnel, and societal actors associated with the prior regime responsible for violations of human rights. This can result in societal stability through addressing large-scale grievances, but it can also result in governmental instability by removing individuals with significant institutional capacity. Second, transitional justice mechanisms can create a sense of “justice,” which forms a basis for legitimacy for

¹⁰⁹ *See id.* at 249.

¹¹⁰ *Id.*

¹¹¹ *See* David Cohen, “Hybrid” Justice in East Timor, Sierra Leone, and Cambodia: “Lessons Learned” and Prospects for the Future, 43 *STAN. J. INT’LL.* 1, 23–26 (2007).

¹¹² Dame, *supra* note 79, at 248.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *See Conflict Victimization*, *supra* note 2, at 77–78.

¹¹⁶ *See generally* Thoms et al., *supra* note 63.

new legal institutions and the new state. This is most frequently manifested in the idea of increasing the rule of law in a state to increase that state's capacity. Third, transitional justice mechanisms train local personnel to staff future legal institutions and the state bureaucracy. This is most effective at directly increasing state capacity, yet it requires a long-term commitment from the transitional justice community and high levels of integration with domestic personnel.

This part analyzes instances of state practice to explain the key impacts transitional justice mechanisms have on state institutions. First, the case studies concentrate on truth commissions, including those in South Africa and El Salvador. Next, the case studies move to international courts, with one example of a pure international tribunal (the International Criminal Tribunal for Rwanda) and one example of a hybrid court (the Special Court for Sierra Leone). This part concludes by comparing and contrasting all of the case studies and extracting key lessons learned.

A. Truth Commissions: Case Studies

The two truth commissions chosen for this article illustrate vastly different origins and implementations, which makes them useful comparisons. First, the South African Truth and Reconciliation Commission (TRC), lauded by many as a success story, was a purely domestic commission assessing a state exiting years of simmering internal conflict to a repressive regime.¹¹⁷ In contrast, the El Salvador Truth Commission (TC) was created by the signing of a peace accord to end a brutal civil war, and was implemented entirely by international actors working within the state.¹¹⁸ This section discusses the history and background, the mission, the implementation, and the long-term efficacy of each truth commission to assess long-term institutional impact.

1. South Africa: The Truth and Reconciliation Commission

Nelson Mandela, upon receiving the interim TRC report in October 1998, stated that the report “represents a toil of nurturing the tender fields of peace and reconciliation and the plodding labor of opening the bowels of the earth to reveal its raw elements that can build and destroy.”¹¹⁹ His statement indicates the promise and the dangers of a truth commission—that exposing the divisions of society which have generated conflict creates an opportunity to both reopen that conflict, but also

¹¹⁷ See *infra* Part III, Section A, Subsection 1.

¹¹⁸ See *infra* Part III, Section A, Subsection 2.

¹¹⁹ Nelson Mandela, President, S. Afr., Statement on Receiving Truth and Reconciliation Commission Report (Oct. 29, 1998) (transcript available at http://www.mandela.gov.za/mandela_speeches/1998/981029_trcreport.htm).

to bring people together and build a stronger state on top of the ruins which conflict has left behind.

a. History and Background

Apartheid ended in South Africa with the first all-race elections in 1994.¹²⁰ Before this, constant violence simmered between the dominant white party, the National Party, and the dominant black party, the African National Congress (ANC).¹²¹ Violence between competing black parties, such as the Inkatha Freedom Party and the ANC, also erupted from time to time in regional disputes.¹²² This period in South Africa's history is largely characterized by apartheid, and by the large-scale violence, segregation, and public discontent, which were hallmarks of the power structure.¹²³ After the ANC took power in the 1994 all-race elections, South Africa's parliament established a truth commission to resolve lingering conflicts, strengthen rule of law, and clarify a murky history.¹²⁴ The Promotion of National Unity and Reconciliation Act laid the groundwork for the TRC, including by defining its mandate, structure, and jurisdiction.¹²⁵

b. Mission of the TRC

The TRC was specifically empowered to investigate human rights abuses perpetrated from 1960 to 1994, including abductions, extrajudicial killings, and torture.¹²⁶ This mandate included actions by both the state and armed groups protesting the state.¹²⁷ Powers of the commission included hearing and drafting reports, investigating specific sectors of the government, and granting amnesty to perpetrators who confessed their crimes completely.¹²⁸ This amnesty power proved controversial—amnesty provisions remain one of the most controversial

¹²⁰ *Truth Commission: South Africa*, U.S. Inst. of Peace (Dec. 1, 1995), <https://www.usip.org/publications/1995/12/truth-commission-south-africa> [hereinafter *Truth Commission: South Africa*].

¹²¹ *Id.*

¹²² ERIC WIEBELHAUS-BRAHM, *TRUTH COMMISSIONS AND TRANSITIONAL SOCIETIES: THE IMPACT ON HUMAN RIGHTS AND DEMOCRACY* 36 (2010).

¹²³ *See generally* Winston P. Nagan, *Law and Post-Apartheid South Africa*, 12 *FORDHAM INT'L L. J.* 399 (1988) (describing the use of legal and political power structures as tools of oppression in apartheid).

¹²⁴ Promotion of National Unity and Reconciliation Act 34 of 1995 §§ 2–11 (S. Afr.) [hereinafter *Promotion of National Unity and Reconciliation Act*].

¹²⁵ *Id.*

¹²⁶ *Truth Commission: South Africa*, *supra* note 120.

¹²⁷ *Id.*

¹²⁸ *Id.*

mechanisms of transitional justice.¹²⁹ Lastly, the TRC was tasked with drafting recommendations to reform the justice system and the South African state.¹³⁰ These recommendations formed the backbone of the TRC's 1998 interim report.¹³¹ Some examples of recommendations include continuing reparations to victims and bringing together sectors of government (such as the judiciary, the prisons, and the police) with civil society (such as faith-based organizations, businesses, and the media) in an inclusive dialogue to make government more responsive, accountable, and legitimate.¹³²

c. Implementation of the TRC

The TRC was largely implemented according to the plan laid out in the Promotion of National Unity and Reconciliation Act.¹³³ The TRC split itself into three committees: the Human Rights Violation Committee, the Reparation and Rehabilitation Committee, and the Amnesty Committee.¹³⁴ Each of the three had distinct, yet interdependent, duties. The Human Rights Violation Committee conducted investigations and heard testimony from victims and their families.¹³⁵ Overall, it collected testimony from approximately 21,000 individuals.¹³⁶ Of these, it selected 2,000 individuals whom the Human Rights Violation Committee believed were representative of overall trends after a qualitative analysis of the experiences.¹³⁷ These individuals gave testimony at public, televised hearings.¹³⁸ The Reparation and Rehabilitation Committee's work built off of the Human Rights Violation Committee.¹³⁹ It heard petitions for reparations from victims, and it was charged with awarding fixed amount to victims and their families.¹⁴⁰ Additionally, it produced the recommendations report which suggested structural changes to the South African government and strategies for continuing the reconciliation goals of the TRC after the Commission itself dissolved.¹⁴¹

The Amnesty Committee, as the name implies, heard amnesty petitions from perpetrators and decided whether or not to grant amnesty in exchange for

¹²⁹ See, e.g., Kushleyko, *supra* note 62, at 33–35.

¹³⁰ WIEBELHAUS-BRAHM, *supra* note 122, at 39.

¹³¹ See generally TRUTH AND RECONCILIATION COMM'N., TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT (1998), <http://www.justice.gov.za/trc/report/>.

¹³² See *Truth Commission: South Africa*, *supra* note 120.

¹³³ Promotion of National Unity and Reconciliation Act §§ 2–11.

¹³⁴ *Truth Commission: South Africa*, *supra* note 120.

¹³⁵ WIEBELHAUS-BRAHM, *supra* note 122, at 39–40.

¹³⁶ *Truth Commission: South Africa*, *supra* note 120.

¹³⁷ *Id.*

¹³⁸ WIEBELHAUS-BRAHM, *supra* note 122, at 39–40.

¹³⁹ *Id.* at 40.

¹⁴⁰ *Id.*

¹⁴¹ See TRUTH AND RECONCILIATION COMM'N., *supra* note 131, at 24.

testimony.¹⁴² The incentives behind the amnesty provisions were designed to defeat the so-called “conspiracy of silence” among perpetrators, which would have resulted in few perpetrators testifying and choosing to instead remain silent.¹⁴³ By offering an incentive—in this case, immunity against prosecution—the Amnesty Committee encouraged truth-telling.¹⁴⁴ However, the contemporaneous domestic prosecutions were poorly implemented and largely unsuccessful, which limited the efficacy of the amnesty incentive.¹⁴⁵

d. Impacts and Efficacy

The TRC was not a consensus success, yet neither was it an utter failure. According to expert Eric Wiebelhaus-Brahm, “South Africa’s Truth and Reconciliation Commission provided something less substantial than its vaunted international reputation would suggest, [but] . . . at minimum, it did little harm.”¹⁴⁶ It failed to make an impact on many systemic issues that still plague South Africa, such as continued human rights abuses by the security sector and high rates of crime and violence more broadly.¹⁴⁷ Additionally, legal reform in response to the TRC report was limited, and mostly consisted of a handover of the state apparatus from the National Party to the ANC.¹⁴⁸ Still, there were some substantial markers of progress as a result of the TRC; these included an increase in grassroots human rights education, signing of several major international human rights treaties, multi-racial support for most political parties, and turnover among the leadership of the security sector agencies.¹⁴⁹ Despite a relatively strong judicial sector existing prior to the transitional justice process, the TRC did not succeed in creating meaningful changes to judicial capacity through either trials of perpetrators or increased structural support from the government.¹⁵⁰ In fact, some social scientists argue that apartheid-era South Africa was the better functioning bureaucracy, although implementing evil laws, while post-apartheid South Africa has shifted to just, but

¹⁴² WIEBELHAUS-BRAHM, *supra* note 122, at 40.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 39.

¹⁴⁵ *Id.* at 40.

¹⁴⁶ WIEBELHAUS-BRAHM, *supra* note 122, at 50.

¹⁴⁷ See generally U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS., & LAB., SOUTH AFRICA 2016 HUMAN RIGHTS REPORT (2017), <https://www.state.gov/documents/organization/265514.pdf>.

¹⁴⁸ WIEBELHAUS-BRAHM, *supra* note 122, at 47–49.

¹⁴⁹ *Id.* at 46–48.

¹⁵⁰ Jonathan Hyslop, *Political Corruption: Before and After Apartheid*, 31 J. S AFR. STUD. 773, 773–74 (2005).

poorly implemented, laws.¹⁵¹ Regardless of the ultimate cause, society remains fairly fragile and prone to conflict, though that conflict has yet to ignite.¹⁵²

2. El Salvador: Truth Commission

El Salvador's truth commission differs from South Africa's in many meaningful ways: it came at the end of a lengthy civil war; its founding document was a negotiated peace agreement; and it was an exclusively international commission sponsored by the UN, with none of the commissioners hailing from El Salvador itself.¹⁵³ Additionally, the environment in which El Salvador implemented its TC likely impacted its ultimate lack of impact: El Salvador had no history of a strong judicial culture, had little in the way of an effective state during the conflict, and remained mired in ideological conflict after the conclusion of the civil war.¹⁵⁴ Still, even negative examples can be illuminating on the links between transitional justice and state capacity.

a. History and Background

Following the first democratic elections in the state in 1931, El Salvador never had a strong government—it suffered a series of military coups and endemic social unrest due to extreme inequality.¹⁵⁵ In 1980, the unrest exploded into a full-scale civil war between the government and the Farabundo Marti National Liberation Front (FMLN), which lasted until 1992.¹⁵⁶ The civil war happened for a variety of complex and intersecting reasons, such as class and economic inequality, political exclusion, the response to fraudulent elections, and international involvement.¹⁵⁷ It was one of the last Cold War proxy wars, with the United States supporting the Salvadoran government and the Soviet Union supporting the FMLN.¹⁵⁸ Following UN mediation and a stalemate in the fighting,

¹⁵¹ *Id.*

¹⁵² Laurel Fletcher et al., *Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective*, 31 HUM. RTS. Q. 163, 185–86 (2009).

¹⁵³ See PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 38–39 (2001).

¹⁵⁴ *Id.* at 39–40.

¹⁵⁵ WIEBELHAUS-BRAHM, *supra* note 122, at 80.

¹⁵⁶ Margaret Popkin, *The Salvadoran Truth Commission and the Search for Justice*, in TRUTH COMMISSIONS AND COURTS: THE TENSION BETWEEN CRIMINAL JUSTICE AND THE SEARCH FOR TRUTH 105, 106 (William A. Schabas & Shane Darcy eds., 2004).

¹⁵⁷ See generally Diana Villiers Negroponte, *Ancient Conflicts, Modern Violence: The Causes and Context for Civil War in El Salvador*, in SEEKING PEACE IN EL SALVADOR: THE STRUGGLE TO RECONSTRUCT A NATION AT THE END OF THE COLD WAR 15 (Diana Villiers Negroponte ed. 2012).

¹⁵⁸ Popkin, *supra* note 156, at 106.

the FMLN and the government signed a peace agreement in 1992.¹⁵⁹ Incorporated into the peace agreement was the institution of an international truth commission, which formed a component of the UN monitoring mission in El Salvador.¹⁶⁰

b. Mission of the TC

The Mexico Agreement of April 27, 1991, a predecessor to the comprehensive Chapultepec Peace Agreement, empowered the TC with investigating human rights violations and crimes against humanity on all sides during the conflict.¹⁶¹ Additionally, the TC was specifically charged with identifying individuals responsible for crimes, ending impunity for government officials, and laying the groundwork for future prosecution of named individuals.¹⁶² Lastly, as with the South African TRC, the Salvadoran TC investigated government institutions and recommended structural reforms to strengthen the post-conflict state and reduce the likelihood of a slide backwards into violence.¹⁶³ However, the parties to the Agreement specifically drew a distinction between the work of the commission and any judicial prosecution; meaning that the commission could not provide amnesties, it could not judge the criminal culpability of individual actors, and it could not institute reparations.¹⁶⁴

c. Implementation of the TC

The TC was implemented entirely independent of domestic Salvadoran concerns.¹⁶⁵ Specifically, it was entirely funded by the UN, and its three commissioners were from the United States, Venezuela, and Colombia.¹⁶⁶ Additionally, of the twenty permanent staff and twenty-five temporary staff supporting the work of the commission, none were Salvadoran.¹⁶⁷ The agreement implemented the TC in this manner out of concerns for objectivity on the commission, yet it contributed to a feeling of disconnect between the government, the populace, and the truth commission.¹⁶⁸ Still, the TC completed a lot of

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 107–09.

¹⁶¹ U.N. Gen. Assembly S.C., Annex: Mexico Agreement, at 5, U.N. Doc. A/46/553-S/23130 (Apr. 27, 1991), https://peacemaker.un.org/sites/peacemaker.un.org/files/SV_910427_MexicoAgreement.pdf [hereinafter Mexico Agreement].

¹⁶² *Id.* at 16.

¹⁶³ *Id.* at 17.

¹⁶⁴ Mexico Agreement, *supra* note 161, at 16–17.

¹⁶⁵ See HAYNER, *supra* note 153, at 38–39.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

substantive work during its eight-month existence: it heard over 22,000 complaints on issues such as extrajudicial killings, disappearances, and torture; it worked with senior members of the security forces to learn inside information; and it exhumed and examined the remains of a prominent massacre, El Mozote.¹⁶⁹ The work of the TC culminated in the publication of the commission report, *From Madness to Hope*,¹⁷⁰ which was very well received among the international community and by human rights activists in El Salvador.¹⁷¹ The report contained multiple proposals for reform, as well as identifications of major human rights abuses committed during the conflict.¹⁷² Suggestions for reform were split into two primary areas: security sector reform and legal reform.¹⁷³ However well received and drafted the report was, much still depended upon the report's ultimate impact and implementation among policymakers after the conclusion of the TC.

d. Impacts and Efficacy

A mere five days after the release of the TC's report, the Salvadoran legislature passed an amnesty law which ended the possibility of prosecution or other legal action against perpetrators named in the report.¹⁷⁴ Additionally, the leadership of the military attacked the report as "unfair, incomplete, illegal, unethical, biased, and insolent."¹⁷⁵ Unsurprisingly, given the official reactions, the report largely failed in its attempt to reform either the security sector or the judicial sector.¹⁷⁶ Further, there were no prosecutions of named personnel due to the amnesty provision, no reparations to victims who testified, and no impact on continued opposition to the Salvadoran government.¹⁷⁷ There were some minor positive impacts in terms of human rights law; namely, perpetrators quietly left office, the military changed its training protocols, and the government established an ombudsman's office to oversee implementation of human rights provisions.¹⁷⁸ However, none of these changes led to increased state capacity to rein in violence.¹⁷⁹ The report did contain several proposals for building the rule of law and addressing

¹⁶⁹ Truth and Reconciliation Commissions: Core Elements, *supra* note 57, at 23; HAYNER, *supra* note 153, at 39.

¹⁷⁰ See generally *From Madness to Hope: The 12-Year War in El Salvador*, U.S. INST. OF PEACE, <https://www.usip.org/sites/default/files/file/ElSalvador-Report.pdf> (last visited Oct. 12, 2018) [hereinafter *From Madness to Hope*].

¹⁷¹ HAYNER, *supra* note 153, at 39.

¹⁷² WIEBELHAUS-BRAHM, *supra* note 122, at 89.

¹⁷³ *Id.* at 89–90.

¹⁷⁴ HAYNER, *supra* note 153, at 40.

¹⁷⁵ *Id.*

¹⁷⁶ WIEBELHAUS-BRAHM, *supra* note 122, at 100.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

the root causes of the violence, but the government refused to fully implement these provisions.¹⁸⁰ As such, violence continued, although in a different form—throughout the latter half of the 1990s, many people reported feeling less safe than they did during the civil war itself.¹⁸¹ Any impacts the TC had were short-lived, and did not contribute to overall state capacity following the civil war.¹⁸²

3. Lessons Learned: Truth Commissions

Truth commissions vary widely based on the context in which they are implemented. In this way, the results in South Africa and El Salvador do not deviate from the norm. South Africa was a reasonably strong state before the creation of the TRC, whereas El Salvador was weak before the creation of the TC. International pressure focused much more heavily on South Africa, where apartheid had been a salient issue among key allies for decades. In contrast, El Salvador had limited international pressure despite UN involvement. Even the UN involvement was for a limited duration and was not largely in response to international pressure. Thus, the key indicators for a successful truth commission are generally external to the imposition of the truth commission itself; while it helps to have a long period of implementation, strong domestic buy-in, and extensive budgeting (as in South Africa), without an existing culture of rule of law or the pressure and investment from the international community to create one, the results of a truth commission are easily sidelined.¹⁸³

B. International Courts: Case Studies

The two case studies of international courts selected for this article represent two wildly different states with different conflicts, international involvement, and lasting legacies. They also represent the two different styles of international involvement in criminal prosecution for transitional justice: the International Criminal Tribunal for Rwanda (ICTR) is one of two purely international ad hoc criminal tribunals created at the behest of the UN Security Council,¹⁸⁴ and the Special Court for Sierra Leone (SCSL) was one of the first “hybrid” courts created to combine elements of international law with domestic

¹⁸⁰ *Truth Commission: El Salvador*, U.S. INST. OF PEACE (July 1, 1992), <https://www.usip.org/publications/1992/07/truth-commission-el-salvador> [hereinafter *Truth Commission: El Salvador*].

¹⁸¹ WIEBELHAUS-BRAHM, *supra* note 122, at 92 (citing MARGARET POPKIN, PEACE WITHOUT JUSTICE: OBSTACLES TO BUILDING THE RULE OF LAW IN EL SALVADOR (2000)).

¹⁸² *Id.*

¹⁸³ See generally Fletcher et al., *supra* note 152 (discussing the relationship between preexisting indicators of state strength and “successful” transitional justice processes).

¹⁸⁴ See *infra* Part III, Section B, Subsection 1.

prosecutions.¹⁸⁵ This section discusses the background, establishment and mandate, relationship with the local system, and impacts of first the ICTR and next the SCSL.

I. Rwanda: International Criminal Tribunal for Rwanda

The ICTR was created by the UN Security Council after the conclusion of the Rwandan genocide.¹⁸⁶ It prosecuted crimes under various international authorities, including customary international law, the Geneva Conventions, and the Genocide convention.¹⁸⁷ The ICTR operated using concurrent jurisdiction and a relationship with local, traditional dispute resolution courts, the Gacaca system.¹⁸⁸ The Gacaca courts contributed to the tribunal's legitimacy, as they provided a unique connection between high-level international justice and localized systems.¹⁸⁹ This section concludes that the ICTR generally succeeded in its mission of improving both the judicial culture and judicial capacity of the Rwandan government.

a. History and Background

The Rwandan civil war and genocide, a conflict between ethnic Hutus and Tutsis in the East African state, was rooted in Belgian colonialism.¹⁹⁰ Before colonialism, scholars debate whether the Hutus and Tutsis were even separate ethnic groups at all.¹⁹¹ After acquiring Rwanda from the Germans at the end of World War I, the Belgian colonial government elevated the Tutsis to a ruling class based off of existing socioeconomic stratifications.¹⁹² The Tutsis controlled power under the Belgians until 1959.¹⁹³ After Rwanda declared its independence from Belgium in the post-colonial era, the "Hutu revolution" violently ejected Tutsis not

¹⁸⁵ See *infra* Part III, Section B, Subsection 2.

¹⁸⁶ S.C. Res. 935, ¶ 1 (July 1, 1994).

¹⁸⁷ Dame, *supra* note 79, at 237–38.

¹⁸⁸ U.N. S.C., Statute of the International Criminal Tribunal for Rwanda, art. 8 (Nov. 8, 1994), <http://www.refworld.org/docid/3ae6b3952c.html>.

¹⁸⁹ Dame, *supra* note 79, at 241.

¹⁹⁰ Megan Westberg, *Rwanda's Use of Transitional Justice after Genocide: The Gacaca Courts and the ICTR*, 59 KAN. L. REV. 331, 334 (2011).

¹⁹¹ *Id.*

¹⁹² Westberg, *supra* note 190.

¹⁹³ *Id.* at 335.

just from government, but also from their communities and homes.¹⁹⁴ A civil war ensued, lasting from 1962 to 1964, but the Tutsis were ultimately defeated and scattered throughout the interior of the state and into neighboring states.¹⁹⁵ In 1990, the Tutsi-backed Rwandan Patriotic Front (RPF) attacked Rwanda again, spiraling the state into civil war; Tutsis living in Rwanda were attacked for their ethnic affiliation with the RPF, and many feared for their lives.¹⁹⁶ In April 1994, the Hutu president's plane was shot down, and although there was no conclusive evidence, the Hutu-controlled government blamed the RPF.¹⁹⁷ This sparked the genocide: over the next 100 days, state forces and local Hutu citizens killed approximately 800,000 Tutsis.¹⁹⁸ During the chaos and confusion, the RPF secured control of the countryside while fighting back—they took control of the government and were in power throughout the transitional justice period.¹⁹⁹

b. Establishment and Mandate

In response to the ongoing civil war in 1994, the UN Security Council requested the Secretary General of the UN to investigate and identify whether or not there had been a genocide, as well as recommend future action.²⁰⁰ In November 1994, the Secretary General responded that there had indeed been a genocide, and requested that the Security Council create an international tribunal with Chapter VII authority to prosecute crimes against humanity, war crimes, and genocide.²⁰¹ The Security Council did so, establishing the ICTR with jurisdiction in Rwanda and in surrounding countries.²⁰² As a pure international criminal tribunal, the ICTR did not prosecute individuals under domestic Rwandan law—crimes against humanity, war crimes, and genocide are all crimes with universal jurisdiction under customary international law, the Geneva Conventions, and the Genocide Convention.²⁰³ The ICTR had three primary goals: (1) to prosecute top military and civilian leaders responsible for the genocide; (2) to deter future crimes against humanity and genocide in Rwanda and around the world; and (3) to facilitate the growth of the Rwandan judiciary and increase prosecutorial capacity.²⁰⁴ These three goals drove

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Westberg, *supra* note 190, at 335.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 336.

²⁰⁰ S.C. Res. 935.

²⁰¹ S.C. Res. 955, ¶ 1 (Nov. 8, 1994).

²⁰² S.C. Res. 955, ¶ 3 (citing to the Annex portion of the Resolution).

²⁰³ *See* Dame, *supra* note 79, at 238.

²⁰⁴ *See* Dame, *supra* note 79, at 239.

the actions of the Tribunal throughout its active period over the following two decades.²⁰⁵

c. Relationship between the ICTR and Gacaca Courts

The mandate of the ICTR was unique in that it did not confer exclusive jurisdiction on the international tribunal, but rather required it to work with domestic courts as well.²⁰⁶ Specifically, the Statute stated that both the international tribunal and local courts maintained “concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law in the territory of Rwanda.”²⁰⁷ In response to this mandate, Rwanda reinvigorated its system of Gacaca courts.²⁰⁸ In Rwandan society, Gacaca courts have historically been traditional adjudicative bodies that try local crimes, focusing on truth and reconciliation.²⁰⁹ Separate from the ICTR, the Gacaca courts had five goals: (1) establish the truth of what happened during the period of conflict; (2) expedite legal proceedings; (3) eradicate a culture of impunity for human rights crimes; (4) promote unity and reconciliation for post-conflict Rwandans; and (5) build the capacity of the Rwandan people to resolve outstanding issues in Rwandan society.²¹⁰ The Gacaca system helped implement the ICTR’s goals in many ways; for instance, the system aided the legitimacy of the international prosecutions, affected local systems of deterrence, contributed to judicial reform, trained local personnel, and impacted political reform through unity and reconciliation efforts.²¹¹

d. Impacts and Efficacy

The ICTR has had substantial impacts on both the judicial culture and capacity of the Rwandan state.²¹² As with many systems of transitional justice, the ICTR was implemented as an international body out of a fear that the local systems did not have the capacity for long-term, complex investigations and prosecutions.²¹³ However, unlike in many other states, this “snub” of the local judicial system

²⁰⁵ *See id.* at 241–43.

²⁰⁶ *See Statute of the International Criminal Tribunal for Rwanda*, art. 8.

²⁰⁷ *Statute of the International Criminal Tribunal for Rwanda*, art. 8.

²⁰⁸ Westberg, *supra* note 190, at 337.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Dame, *supra* note 79, at 240–41.

²¹² Dame, *supra* note 79, at 241.

²¹³ *Id.*

directly incentivized Rwanda to improve its court system.²¹⁴ Instead of galvanizing Rwandans against the ICTR, the government enacted significant judicial reforms, such as abolishing the death penalty, establishing a reliable witness protection program, and instituting extensive judicial training programs.²¹⁵ Additionally, thousands of Rwandan legal professionals were employed directly by the ICTR which resulted in substantial technical training that they were able to employ upon returning home.²¹⁶

Beyond simple capacity building, the ICTR also impacted the judicial culture and attitude towards rule of law in Rwanda.²¹⁷ The Gacaca courts vigorously pursued the prosecution of war criminals and demonstrated that impunity cannot survive in the post-conflict state.²¹⁸ This gave Rwandans significant faith in their own judiciary and increased the prominence of government-run dispute resolution mechanisms.²¹⁹ Further, by providing continuing deterrence to future war crimes in a divided society, the ICTR gave Rwandans a chance to heal and establish the state as something other than a purveyor of ethnic conflict.²²⁰

2. Sierra Leone: The Special Court for Sierra Leone

Established in 2002, at the conclusion of the civil war in Sierra Leone, the Special Court for Sierra Leone (SCSL) was one of the earliest examples of a “hybrid” international criminal tribunal.²²¹ After seeing pushback on the purely external international transitional justice efforts of the 1990s, the UN elected to sponsor a joint international–domestic tribunal when the president of Sierra Leone requested international involvement in a special tribunal.²²² The court posted mixed success—while the state remains deeply divided on whether the court was positive or negative, it also notched some notable wins in terms of prosecution and judicial capacity building.²²³ This section concludes that while the SCSL was deeply flawed

²¹⁴ *Id.* at 241–42.

²¹⁵ *Id.* at 242.

²¹⁶ *Id.*

²¹⁷ Dame, *supra* note 79, at 243.

²¹⁸ *Id.* at 242–43.

²¹⁹ *Id.* at 242.

²²⁰ *See id.* at 243.

²²¹ The first international hybrid mechanism was known as the UN Special Panels within the District Court of Dili, in East Timor. However, implementation was severely flawed, hampering the international impact of the precedent. *See generally* CAITLIN REIGER & MARIEKE WIERDA, *THE SERIOUS CRIMES PROCESS IN TIMOR-LESTE: IN RETROSPECT* (2006).

²²² Permanent Rep. of Sierra Leone to the U.N., Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2000/786 (Aug. 9, 2000) (annexing a letter from President Kabbah of Sierra Leone requesting the creation of an international court).

²²³ LINCOLN, *supra* note 85, at 138–39.

in implementation, the principles of success exist and could have positively impacted state capacity in Sierra Leone.

a. History and Background

As with Rwanda, the roots of Sierra Leone's conflict lie in colonialism.²²⁴ After the English withdrew from governing the region, Sierra Leone had essentially two state structures.²²⁵ The first was an imposed, westernized model of government with municipal courts and English legal traditions, and the second was a traditional, indigenous community-based model of justice for those unable to access the resources of the recognized state.²²⁶ This created a remarkably unstable situation with weak rule of law, a poor economy, and a tendency towards military coups.²²⁷ By 1991, large scale resentment of endemic corruption, fragile institutions, weak rule of law, and discontent with the central government had reached a tipping point.²²⁸ The Revolutionary United Front (RUF), with assistance from Charles Taylor's National Patriotic Front for Liberia, declared war on the government of Joseph Moma; and the conflict continued until 2002.²²⁹ The war itself was funded largely by diamond mining and control of natural resource extraction, which allowed for its long-lasting nature without significant international involvement.²³⁰

b. Establishment and Mandate

By the end of the Sierra Leone Civil War, multiple agreements had been negotiated in an attempt to end the violence, and the UN created the concept of the Court even before the civil war had fully concluded.²³¹ In 2000, the President of Sierra Leone requested UN assistance in prosecuting those responsible for atrocities during the conflict.²³² In response, the UN Security Council requested the Secretary General to "negotiate an agreement with the government of Sierra Leone to create an independent special court" and instructed that the "subject matter jurisdiction should consist of crimes against humanity, war crimes, and other serious violations of international humanitarian law, as well as crimes under Sierra Leonean Law,

²²⁴ Fletcher et al., *supra* note 152, at 181.

²²⁵ *Id.*

²²⁶ Fletcher et al., *supra* note 152, at 181.

²²⁷ *Id.*

²²⁸ LINCOLN, *supra* note 85, at 36.

²²⁹ *Id.* at 36–37.

²³⁰ *Id.* at 37.

²³¹ Charles Chernor Jalloh, *Special Court of Sierra Leone: Achieving Justice?*, 32 MICH. J. INT'L L. 392, 398–401 (2011).

²³² Permanent Rep. of Sierra Leone to the U.N., *supra* note 222, at 2 (annexing a letter from President Kabbah of Sierra Leone requesting the creation of an international court).

committed within the territory of Sierra Leone.”²³³ Key for its establishment, the court had a limited mandate—only crimes committed within the territory of Sierra Leone itself, and only certain specific crimes would be considered.²³⁴ Furthermore, the court’s statute specifically limited the prosecutorial discretion to avoid expense and meandering delays already experienced at the ICTY and ICTR.²³⁵ The Court was targeted to only prosecute those “who bear the greatest responsibility” for crimes, rather than any perpetrators of human rights violations.²³⁶ The SCSL had three goals, on top of traditional criminal law justifications: (1) improve the capacity of local judicial personnel; (2) prove the effectiveness of international criminal justice; and (3) promote national reconciliation and healing.²³⁷

c. Status as a “Hybrid” Tribunal

The SCSL was one of the first hybrid courts established under international law, combining elements of both international and domestic judicial processes.²³⁸ The court’s statute articulates how this plays out in practice. Judges were split between international judges and Sierra Leonean judges, with three-judge panels consisting of two internationals and one Sierra Leonean.²³⁹ In the appeals chamber, three judges were international and two were domestic.²⁴⁰ The prosecutor was international, and appointed by the UN, while the deputy prosecutor was Sierra Leonean, and appointed by the domestic government.²⁴¹ This mixed design was intended for a combination of reasons. First and foremost, the goal was to build the capacity of domestic judicial and legal personnel.²⁴² By interacting directly with more highly trained international lawyers and judges, it could act as an in-practice capacity building training for the Sierra Leonean members of the court.²⁴³ Additionally, learning from examples in other states where purely international tribunals lacked domestic buy-in, the SCSL hoped that by incorporating local staff it could increase the legitimacy of the court in Sierra Leone itself.²⁴⁴

²³³ S.C. Res. 1315, ¶ 1 (Aug. 14, 2000).

²³⁴ *Id.* ¶ 3.

²³⁵ RACHEL KERR & JESSICA LINCOLN, *THE SPECIAL COURT FOR SIERRA LEONE: OUTREACH, LEGACY, AND IMPACT* 5–6 (2008), <http://www.rscsl.org/Documents/slfinalreport.pdf>.

²³⁶ *Id.* at 4.

²³⁷ KERR & LINCOLN, *supra* note 235, at 5–6.

²³⁸ LINCOLN, *supra* note 85, at 56–57.

²³⁹ U.N. S.C., *Statute of the Special Court for Sierra Leone*, art. 12, (Aug. 14, 2000), <http://www.rscsl.org/Documents/scsl-statute.pdf>.

²⁴⁰ *Id.*

²⁴¹ *Id.* art. 15.

²⁴² LINCOLN, *supra* note 85, at 56–58.

²⁴³ *Id.*

²⁴⁴ LINCOLN, *supra* note 85, at 56–58.

d. Impacts and Efficacy

While the SCSL was one of the first instances of an international mechanism of transitional justice making an effort to build the local capacity as a prime goal of the tribunal, the ultimate impacts of the court were limited.²⁴⁵ The mixed personnel didn't function as intended, as tensions between the styles and goals of the international judges and staff and domestic judges and staff overshadowed the operation of the court.²⁴⁶ Further, confusion as to the direct beneficiaries of public outreach campaigns and trainings held by the SCSL limited the impact of those programs.²⁴⁷ Lastly, any action of the court was overshadowed by looming economic and social problems in Sierra Leone—quite simply, the domestic citizens had other concerns on their minds besides the administration of justice.²⁴⁸ All of these issues combined for a weak system, which was itself hamstrung by limited international funding.²⁴⁹

Despite these issues, the SCSL did have some positive impacts. Surveys after the conclusion of the court indicated that it did contribute to the symbolic value of justice in the country,²⁵⁰ which was a definite improvement, given the weak rule of law culture that preceded the civil war. Additionally, some practical reforms instituted by the court contributed to rule of law capacity building in Sierra Leone.²⁵¹ One of these is the Witness Evaluation and Legacy Project, which helps build the capacity of local lawyers and police in how to protect, interrogate, and evaluate witnesses during and before trials.²⁵² Still, the legacy of the court remains a divisive issue in Sierra Leone. The fact that it is a divisive issue itself reduces the capacity for further outreach to have a continuing positive impact on the state's capacity.²⁵³

3. Lessons Learned: International Courts

Both Sierra Leone and Rwanda provide important case studies for assessing the effectiveness of international courts. Both cases illustrate the necessity of strong local buy-in: where Sierra Leone failed in creating the domestic support for its hybrid concept, it also failed in its capacity building outreach because

²⁴⁵ *See id.* at 138.

²⁴⁶ *See id.* at 242.

²⁴⁷ LINCOLN, *supra* note 85, at 140.

²⁴⁸ *Id.* at 141.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 138.

²⁵¹ *Id.*

²⁵² LINCOLN, *supra* note 85, at 137.

²⁵³ *Id.* at 138.

the local institutions did not see a benefit in cooperation.²⁵⁴ In contrast, Rwanda succeeded in creating local legitimacy through the ICTR's cooperation with the Gacaca courts, and so was far more successful in creating a culture of judicial accountability and doing work on justice system capacity building.²⁵⁵ Additionally, the Rwandan example shows the benefits of extremely long-term planning. The court lasted for over twenty years, and during that time it was able to train thousands of Rwandan lawyers by cycling them through the court processes.²⁵⁶ Still, neither example fully realized the mission of state capacity building. This illustrates the limitations of relying solely on the court model, which is focused strongly on criminal accountability and deterrence rather than on more broad institution building and state capacity.

C. Comparing and Contrasting the Case Studies

While the two primary mechanisms of transitional justice have different impacts in their target states, neither is particularly effective at long-lasting reform. This section compares the missions and impacts of truth commissions and international courts. It then concludes by finding no evidence of lasting general impact on state capacity by either truth commissions or international courts.

1. Comparing Missions and Impacts

Both truth commissions and international courts have missions related to rebuilding society after a prolonged period of conflict; indeed, as mechanisms of transitional justice, that is part of their definition.²⁵⁷ However, the specific missions identified in the founding documents of truth commissions differ substantively from those goals outlined by the statutes of international courts.²⁵⁸ Truth commissions tend to focus on broad-spectrum crimes, with an emphasis on reconciliation.²⁵⁹ Instead of providing detailed analyses of specific crimes, they instead attempt to identify the broad track of the conflict, with overarching themes of human rights violations and impunity. In contrast, courts analyze specific crimes in great detail. As they prosecute individuals, they necessarily concern themselves with individual crimes committed by those persons, rather than overarching themes of human rights violations and war crimes. Thus, while courts require truth-telling (without the truth, there can be no conviction), the truth-telling is a means to an end rather than the end in itself.

²⁵⁴ KERR & LINCOLN, *supra* note 235, at 28–30.

²⁵⁵ See Dame, *supra* note 79, at 240–41.

²⁵⁶ *Id.* at 242–43.

²⁵⁷ See Teitel, *supra* note 16, at 69.

²⁵⁸ Truth and Reconciliation Commissions: Core Elements, *supra* note 57.

²⁵⁹ *Id.*

Additionally, truth commissions always end with a final report which explicitly calls for recommendations and reforms,²⁶⁰ while international courts don't usually make overhauling the domestic judicial system part of their mission. The final reports of truth commissions, such as those in South Africa and El Salvador, usually call for deep structural reforms to the security sector, the judiciary, and the military.²⁶¹ This can include changes in training to build capacity, changes in qualifications to increase the professional nature of the agency, and increases (or decreases) in budget and powers to better balance other aspects of government.²⁶² While the implementation of these recommendations has a spotty record at best, the intent to reform the state is there. In contrast, international courts typically have a limited view of the state—when capacity building is specifically included in the mandate, such as for both the ICTR and SCSL, that capacity building is usually limited to the judiciary and concepts of rule of law.²⁶³

Still, courts tend to have more success at capacity building—in part because their mandate is limited, providing focus on individual tasks, and in part because their mandated lifespan tends to be significantly longer than truth commissions.²⁶⁴ The ICTR, which had success in increasing judicial capacity in conjunction with the Gacaca courts, existed from 1994 to 2015;²⁶⁵ the SCSL, which was not as successful in capacity building, was still in operation from 2002 to 2013.²⁶⁶ The lifespan of truth commissions pale in comparison: the South African TRC, one of the longer and more successful institutions, existed from 1996 to 2000,²⁶⁷ and the El Salvador TC lasted a mere eight months from 1992 to 1993.²⁶⁸ The nature of the mandate directly impacts the level of capacity building in which these transitional justice mechanisms engage.

2. No Evidence of Lasting General Impact

Of the four case studies included in this article, none are indisputably improved after the use of transitional justice mechanisms. South Africa, while inarguably more democratic than it was before the transition away from the

²⁶⁰ Thoms et al., *supra* note 63, at 334.

²⁶¹ See TRUTH AND RECONCILIATION COMM'N., *supra* note 131, at 61 (Vol. 5); *From Madness to Hope*, *supra* note 170.

²⁶² *From Madness to Hope*, *supra* note 170.

²⁶³ E.g., Adama Dieng, *Capacity-Building Efforts of the ICTR: A Different Kind of Legacy*, 9 NW. J. INT'L HUM. RTS. 403, 406 (2011).

²⁶⁴ See Dame, *supra* note 79, at 243.

²⁶⁵ *The ICTR in Brief*, U.N. INT'L RESIDUAL MECHANISM FOR CRIM. TRIBUNALS, <http://unictr.unmict.org/en/tribunal> (last visited Oct. 13, 2018).

²⁶⁶ *The Special Court for Sierra Leone: Its History and Jurisprudence*, RESIDUAL SPECIAL CT. FOR SIERRA LEONE, www.rscsl.org (last visited Oct. 13, 2018).

²⁶⁷ *Truth Commission: South Africa*, *supra* note 120.

²⁶⁸ *Truth Commission: El Salvador*, *supra* note 180.

apartheid regime, has neither improved its judicial capacity or rule of law in meaningful ways as a result of the TRC.²⁶⁹ For instance, police brutality has remained constant from before and after the transitional period, indicating that the same sort of abuses violating the rule of law from before the TRC have continued.²⁷⁰ In El Salvador, violent crime continues to hamstring the government.²⁷¹ Citizens have less faith in the state than they did during the civil war, and many believe they are less safe now than during the conflict, which indicates that the state is not successfully extending its police power to protect the population.²⁷² Sierra Leone's experience with the hybrid court has also been marked by failure.²⁷³ The judicial capacity building programs only generated tension and resentment between international workers and domestic judicial personnel, and the court only tried thirteen people over its eleven-year period of operation.²⁷⁴ It is the ICTR that has come the closest to making a lasting impact on its state.²⁷⁵ The combination of a twenty-one-year existence and extensive local presence through the Gacaca courts established a series of judicial reforms and a culture of accountability, yet the system itself remains inefficient, poorly funded, and in need of further capacity building.²⁷⁶

IV. CONCLUSION

Transitional justice will remain a widely sought-after option for states entering into post-conflict periods of development, although general impacts of transitional justice mechanisms provide at most limited improvements for the state. Transitional justice mechanisms frequently prove their worth in areas other than improving state capacity. International courts focus on providing accountability for gross violations of human rights, and while they tend to be slow and expensive, they succeed in that mission more often than not. Truth commissions are frequently tied to other packages of reform and can be a key component of a lasting peace agreement where otherwise the peace agreement may not be signed in the first place. In fact, many of the most important impacts of transitional justice may not be capacity related at all; transitional justice is, after all, dedicated to the "transition" of a state from a period of conflict to one of democratic governance. A greater influence of discussions about state capacity would be welcome in the literature of transitional justice. True success of a post-conflict state is not measured by how closely the state conforms to democratic principles and values on paper, but by how

²⁶⁹ WIEBELHAUS-BRAHM, *supra* note 122, at 50.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 92 (citing MARGARET POPKIN, PEACE WITHOUT JUSTICE: OBSTACLES TO BUILDING THE RULE OF LAW IN EL SALVADOR (2000)).

²⁷² *Id.*

²⁷³ See LINCOLN, *supra* note 85, at 62–63.

²⁷⁴ LINCOLN, *supra* note 85, at 62–63.

²⁷⁵ Westberg, *supra* note 190, at 359–61.

²⁷⁶ See *id.*

well the state functionally provides for its people. To be more than donor-driven impositions of international law, international courts and truth commissions must actually serve the people on whose behalf they claim legitimacy.

