

# Adequacy of Truth Commissions as Alternative to Criminal Prosecution: A Discourse

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**Abstract:**-Despite the existence of criminal prosecution in tackling international crimes, other means of resolving international crimes has not been a thing of concern. Whereby, you find every aggrieved individual or society still approaching the international criminal court and seeking redress of an international crime committed against an individual or society. This paper examined what truth commissions are, the cases handled by truth commissions over the years, and also discusses the advantages and disadvantages of truth commissions. It also discusses the achievements recorded by truth commissions and compares the gains of criminal prosecution. It further examined the roles played by the international criminal court in handling cases brought before it. The study established that, most transitional periods or governments where heinous international crimes have been committed have opted to the use of both truth commissions and criminal prosecution in fact-finding and determination of the truth.

**Keywords:** International Criminal Court; Criminal Prosecution; Truth Commissions, International law, Crimes

## I. INTRODUCTION

This paper is aimed at finding out whether or not truth commissions can stand as an alternative to criminal prosecution, most especially in the implementation of international criminal law. It tries to provide a general overview of the positive and negative features of both truth commissions and criminal prosecution. Furthermore, in a bid to achieve the aims of this study two cardinal principles are to be discussed which include; truth commissions and criminal prosecution.

This study examines past truth commissions and their findings or recommendations and how they have helped in the evolution of international criminal law. Consequently, it aims at finding out whether or not truth commissions can stand in place of or substitute criminal prosecution in international criminal law, or whether the two principles as have been adopted in some jurisdictions can be improved upon in establishing serious international crimes.

International criminal law lawyers and other commentators have shown that criminal prosecution is the most favourable or (the best practice) to deal with international crimes, while on the other hand international criminal law lawyers and commentators perceive that the use of other methods such as truth commissions stands a better chance. Criminal prosecution has taken the centre stage in tackling most

international crimes; this is because it deals decisively with most of the elements of an international crime. As a result of this, arguments have cropped up as to the use of other methods in tackling international crimes as against criminal prosecution. This is because most of these methods tend to address most of the methods used in criminal prosecution, even though each case has its own peculiarity and which is also dependent on its feasibility.<sup>1</sup> Though distinct and different methods exist in dealing with international crimes, none of these methods stands perfect; they all have limitations which could include funding, political possibility and the availability of infrastructure. Therefore, both national and international crimes, especially those that affect humanity, are sensitive and should be dealt with in a sensitive manner, especially in an instance where, whether or not to go with criminal prosecution, truth commission or both should be adopted, considering the capabilities and limitations of such methods.

Thus, this study will examine these factors and try to explain these methods of 'criminal prosecution and truth commission' in details with their limitations and try to strike a balance whether truth commissions can take the place of criminal prosecution which has been over the years a widely accepted method in dealing with international crimes.

## II. CRIMINAL PROSECUTION

In general terms, criminal prosecution can be said to be an act of carrying out legal action against an individual or group of persons who have committed a crime. In the case of international law, the Rome statute has set up a criminal justice system<sup>2</sup> under the international criminal court to try and prosecute individuals or group of persons who have violated international laws or have committed grievous crimes, which include crimes against humanity, war crimes and genocide. Therefore, the international criminal court applies international laws and which derives its powers and occupation from international law. Therefore, it is an international court whose powers are obtained from treaties of an international council or body. The international criminal court obtains its approvals from international communities,

<sup>1</sup> Laurel Fletcher, Harvey Weinstein with Jamie Rowen, 'context, timing and the dynamics of transitional justice: A historical perspective' (2009) 31 Human Rights Quarterly 163

<sup>2</sup> Julio BacioTerracino, 'National implementation of ICC crimes' (2007) journal of international criminal justice 5(2)421

and the court is constituted by a group of nations.<sup>3</sup> These constitute the features of the international criminal court.

The question that comes to mind most times is whether criminal prosecution is the only answer to the violation of human rights. After World War II, criminal prosecution became the normal method of trying international crimes; starting from the Nuremberg trials, ever since, a number of nations depend on criminal prosecution to investigate and try international crimes. An example is Sierra Leone which used the method after a bloody civil war.<sup>4</sup> The main aim of criminal prosecution is to punish the accused person if found guilty and obtain justice for the victim. This serves as a deterrent against future occurrence of such crimes. The emergence of the international criminal courts and criminal prosecution in Nuremberg and other nations such as Sierra Leone brought with it some kind of justice and security to the victims of atrocities committed to individuals during and after wars. However, it is pertinent to note that even with the emergence of an international criminal justice system some nations up till date have not ratified the Rome statute. The United States of America is one of those nations,<sup>5</sup> who have argued that the interest of the international criminal court is only about or is all about the security council. Furthermore, during the apartheid period in South Africa, truth commissions were used in place of criminal prosecution.

The major aim of criminal prosecution and the international criminal court is to safeguard and protect human rights. This is done with respect to the rule of law in which nation states who have ratified the Rome statute seeks to achieve that aim.<sup>6</sup> To achieve this aim of criminal prosecution, the following bares to mind which can be perceived as the advantages of criminal prosecution.

### III. ADVANTAGES AND DISADVANTAGES OF CRIMINAL PROSECUTION

Firstly, international crimes could arouse different reactions against an accused person. Many at times, when the rights of individuals have been violated. This attracts different forms of reaction. Therefore, for a nation to defend victims of such crimes and deter future occurrences, criminal prosecution is meted out. The international criminal court does this by first finding out the individual responsible for the act or violation

<sup>3</sup> Astrid kjeIdgaard-Pedersen 'what defines international criminal court? A critical assessment of the involvement of the international community as a deciding factor, Hague international tribunal' (2015) *Leiden journal of international law* 28, pp113-131

<sup>4</sup> W.A Schabas, 'The relationship between truth commissions and international courts: the case of Sierra leone' (2003) *human rights quarterly* 25 p1049

<sup>5</sup> William A. Schabas, 'united states hostility to the international criminal court: it's all about the security council' (2004) 15 *European Journal of International Law (EJIL)* 701

<sup>6</sup> Christopher J.M. Safferling, 'can criminal prosecution be the answer to massive human rights violation?' (2004) paper presented at the second international German law journal workshop: "the political economy of jurisdictional competence for human rights" held at Duke University of law, Durham

of the law; the true and real history of a crime or an event can be made known if the person who has committed such a crime is found.<sup>7</sup> Where an individual who has committed an atrocity is found, it gives the citizens of such a nation a sense of belief in their legal system, and that the nation's legal system can protect individuals from such atrocities.

After an accused person is found, tried and found guilty, the next necessary step is to prevent future occurrence. This is very important because it is a reaction to the violation of international law, which has been codified as one of the aims of the universal declaration on human rights and also the preamble to the genocide convention which states that, it is aimed at liberating mankind from genocide as such an odious scourge.<sup>8</sup> The reason to react to such atrocities is to seek redress for the victim. This suggests that the victim seeks to obtain justice against the accused; sometimes the victim gets paid some form of compensation. In essence, finding the accused and preventing future occurrence are not enough, but criminal prosecution seeks justice for the victim.

Secondly, after understanding and analysing the necessary reactions where an international crime has been committed which include; finding the person(s) responsible, preventing the re-occurrence of such heinous crimes and seeking redress for the victim, the next step is to look at possible means,<sup>9</sup> in redressing these atrocities, and amongst many is criminal prosecution of accused person(s). The main aim or goal criminal prosecution seeks to achieve is to actually know who is responsible for an act in order to punish such individual(s). Most times, the punishment meted out to the accused person does not really justify the crime committed, but such punishment could serve as a deterrent from future re-occurrence. Criminal prosecution is most at times done in public, which ultimately leads to the finding of the truth. The standard of proof required by the international criminal court in proving the guilt of an accused person is proof beyond all reasonable doubt. Because of the open trial of the international criminal court, criminal prosecution allows the calling of witnesses who can be coerced to testify, institutions on the other hand can be subpoenaed to either testify or produce document that will show evidence which would naturally have been in secret.

Criminal prosecution affords a victim the opportunity to narrate his or her story. Though criminal prosecution has its lapses, its major setback about criminal prosecution is that it depends on the victim's co-operation, which comes to test where the victims is cross-examined by the accused person, thereby subjecting him/her to narrating his/her story again. This has a psychological effect on the victim which creates an internal conflict for the victim, thus the possibility of a fair trial is weighed on the mind of the victim as well as privacy of

<sup>7</sup> Ibid at 6

<sup>8</sup> Convention on the prevention and punishment on the crime of genocide, (11 December, 1948) 78 UNTS (1951) pp. 277-323

<sup>9</sup> Ibid at 6

witnesses and interest of justice.<sup>10</sup> As a result of this, a lot of victims and witnesses find it difficult to testify against an accused person during criminal prosecution. Criminal prosecution has a stigmatization that comes with it when an individual is found guilty; as such, the society sees such an accused person as one who has failed morally, thereby giving the society hope on the legal system of criminal prosecution that the system can assure the member of society of their security against such atrocities. Most importantly, justice is attained for the victims of such act.

Another major effect of criminal prosecution in international criminal law is to deter other individuals or persons from committing such crimes. The question that comes to mind is whether criminal prosecution has been able to deter other individuals from committing international crimes. Most at times, the answer to this question is in the negative;<sup>11</sup> the reason being that international criminal laws are not really and actually enforced. These laws are therefore being enforced in a sporadic manner; as such, accused persons are not worried about being tried and prosecuted. This lacuna in enforcing international criminal laws can be improved upon where member states to the Rome statute co-operate with each other to develop and enforce the laws of the institution known as the international criminal court. The perpetrators of heinous international criminal court crimes would then be concerned with criminal prosecution. Scholars have argued that criminal law at the national level is more enforced than at the international level. Legal writers have also argued that though the international criminal court puts in efforts to enforce international criminal laws, it may not deter individuals or persons from committing international crimes; this is because there is no empirical proof to show that criminal prosecution stands as a deterrent.<sup>12</sup>

Authors and criminologists have tied deterrence to criminal prosecutions though there is no evidence or data to prove such assertion. Under the national laws of a country, criminal prosecution can deter others from committing crimes, especially when criminal laws at the national level are being enforced. These crimes include; property crime and crimes of serious physical body injuries. At the national level threat of sanction on an accused person can deter such an individual from committing such crimes. It can also deter other members of the society from engaging in such crimes.<sup>13</sup> It can be argued further that the reason criminal prosecution cannot serve as a deterring factor is that most accused persons are not usually cautioned as to the repercussion of such a crime, if so committed. It can be further argued that ignorance of the law cannot serve as an excuse when a crime has been committed. The major challenge is how these factors can be transferred into the international arena (Rome statute and the international

criminal court) to be able to curb and prevent international crimes. Therefore, the need to be able to enforce international laws arises; if not so, the deterring effect needed by criminal prosecution will not be achieved, even though there is an enforcing working legal framework in place. Most international criminal law violators are crowded with the sense of an ideology, fanaticism and religious fundamentalism.<sup>14</sup> As a result of these factors, these actors see themselves as being above the law and feel they cannot be caught, as such cannot be deterred from carrying out a large scale atrocity.

Therefore, criminal prosecution still stands a chance in deterring individuals from committing international crimes, if the international criminal court sets up and institutionalise a work force or body that will enforce international criminal laws. Notwithstanding the lapses the international criminal court has, if enforcement of international criminal law is very effective, it will stand to deter criminally inclined minds from committing international crimes.

#### IV. TRUTH COMMISSIONS

A lot of scholars have viewed criminal prosecution as the most viable method of dealing with international crimes. Thus, some individuals or nations perceive otherwise, bearing in mind that truth commissions can serve the same purpose and even do more.<sup>15</sup> Truth commissions are referred to as a body which is focused on the past rather than present unfolding events. Also, a truth commission investigates a pattern of events that has taken place over a specific period of time. Truth commission gets involved directly with the affected individuals or population, and in doing so collate information of their experiences. They are also temporary bodies whose aim is to investigate crimes and draw conclusions with a final report which is usually authorised by a state.<sup>16</sup> The growth of truth commissions over the years has increased rapidly. They are established primarily to conduct official investigations and provide accurate data analysis and records of large scale crimes committed during repression and civil war. Over the years, there have been more than thirty truth commissions in different countries amongst which include; Argentina, Chile, Timor-Leste, El Salvador, Guatemala, Sierra Leon, Democratic Republic of Congo (DRC) and South Africa.<sup>17</sup> Truth commissions are used to find the truth of crimes that have been committed and in doing that the victims of such crimes get justice. This is also an aim which truth commissions seek to achieve. They also seek to promote peace and reconciliation.

<sup>14</sup> Jose E. Alvares, 'crimes of states/crimes of hate: lessons from Rwanda' (1999) 24 Yale journal of international law 365

<sup>15</sup> Lias Bantekas and Susan Nash, *International Criminal Law* (3<sup>rd</sup> edition, Routledge Cavendish 2007) 580-584

<sup>16</sup> Robert Cryer, Hakan Friman, Daryl Robinson, Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3<sup>rd</sup> edn, Cambridge University press, 2014) pg. 576-580

<sup>17</sup> Villa- Vicencio and Wilhelm Verwoerd, "Looking Back, Reaching Forward: Reflection on the Truth and Reconciliation Commission of South Africa" (UCT Press, 2000) pg 34

<sup>10</sup> Christopher Safferling, 'towards an international criminal procedure' (2003) 226-239, 283-288

<sup>11</sup> Ibid at 6

<sup>12</sup> Franz Streng, *strafrechtlichesanktionen* (2<sup>nd</sup> ed. 2002) MN53-60

<sup>13</sup> Lisa Stolzenberg and Steward J.D Alessio, 'capital punishment, execution publicly and murder' Texas (2004) 94 J. crim. Law and criminology 351-379

There has been a growing interest in truth commissions as a result of limited success achieved in criminal prosecution. Also, there is a growing urge to take cognisance of past wrongs and confront, and punish or reform those persons and institutions that have committed grievous crimes. Criminal prosecutions have but only recorded a few successful cases of the commission of massive atrocities. This can be likened to lack of resources and/or a compromised judicial system which is usually politically driven. Therefore, many governments have turned to methods outside criminal prosecution to find out the truth of past events, confront them and learn from such horrific crimes. Truth commissions stand a better chance in achieving the aims of the commission where criminal prosecutions fail. The idea behind truth commissions is to afford people the opportunity to be willing to share their activities if they are not to be prosecuted for them.<sup>18</sup>

A major setback for truth commissions is that they are particularly set up to investigate and confront a particular crime over a period of time and thereby make a report. This limits the powers of the truth commission preventing it from investigating and confronting other crimes that are not within the powers conferred on a particular truth commission. A good example is the South African report; the commission only had the powers to investigate and deal with political violence, but could not as a matter of fact investigate and deal with issues such as forceful taking of lands and other aspects of apartheid. As such, the true story of the apartheid period in South Africa remains incomplete.<sup>19</sup> It has been argued by legal authors and commentators whether or not truth telling can lead to reconciliation or if truth telling accords the opportunity of moving beyond the past, most of which answers are in the negative. This has cast doubt in the minds of many as to whether truth commissions stand a greater chance than criminal prosecution; reason being that such commissions ignore some major roles played by individuals in the investigation of a crime and in producing a concise report on same. For example, the role of bystanders and the role of those who have in one way or another benefitted from a crime.<sup>20</sup> In such instances, reconciliation is not achieved, which is a major aim or goal of truth commissions. Furthermore, scholars have argued that truth commissions are better off in providing healing for the victims, but not in reconciliation or as an avenue to move from the past.

According to Abie Sachs, in the truth commission of South Africa;

*“Instead of coming forward and speaking from the heart and crying and being open, most of the perpetrators come in neatly pressed suits, expressing tight body language, with their lawyers next to them, and read prepared statements as though they were in a court of law. Their admissions were important but tended to be limited to a factual*

*acknowledgment of unlawful conduct coupled with a rehearsed apology, rather than encompassing an emotional convincing acknowledgment of wrong doing.”<sup>21</sup>*

Based on the above, it is evident that truth commissions, though, can stand as a method of extracting truth from criminal perpetrators which also aid in the reconciliation process, but still may not be able to stand in place of criminal prosecution because it is merely regarded as a healing process or mechanism. Furthermore, some commentators argue that truth commissions are political platforms, sometimes established to give victims some form of acknowledgment for their suffering or a means to prevent the re-occurrence of such crimes.

Adversely, truth commissions add a lot to criminal prosecution, where there are loop holes in criminal prosecution. Truth commissions play a vital role in complementing criminal prosecution, such as retribution or justice for victims. This serves as a deterrent or punishment to individuals who have committed crimes, which is usually a major and important aspect of transitional justice systems, in order to punish people who have committed such grievous crimes and to avoid ‘jungle justice.’ A lot of commentators have argued that the act of speaking the truth in itself serves as a form of justice to crime victims and stands as a kind of retribution to perpetrators of such crimes. The idea is that, when an individual confesses in public to his crimes and the blame is meted out on that individual, such stands as punishment through shame, which is quite different from retribution meted out through criminal prosecution which could include fine, imprisonment and sometimes execution. According to Rotberg as regards the truth and reconciliation commission in South Africa;

*“The public shaming that came through the open nature of the truth and reconciliation commission procedure substituted reasonably well for penal justice. Exposure is punishment. It is a powerful component of accountability.”<sup>22</sup>*

It is important for truth commissions to find the perpetrators of such crimes and know them by their names, which is a major requirement for the truth commissions, though most truth commissions over the years have not heeded to this requirements. If this form of retribution is adopted, another dilemma may arise; that is, where information is released about an alleged accused person and where such alleged accused person has the right to remain silent and may not participate in testifying in the truth commission. The alleged accused person’s right of presumption of innocence may be infringed upon, most especially when it is discovered upon criminal prosecution or trial that it was a false accusation.

Truth commissions seek to rehabilitate the criminal or accused person. This arose sometime in the early 20<sup>th</sup>

<sup>18</sup> Ibid at 16

<sup>19</sup> Ibid at 16

<sup>20</sup> Ibid at 16

<sup>21</sup> Ibid at 16

<sup>22</sup> A. Fleschenberg, et al, ‘statement of the “reflection group” (paper produced as a result of the dealing with a burdened past-transitional justice democratic conference, Berlin Germany, 20-21 April 2006)

century. The question that comes to mind is, can truth commissions play a role in the reformation and rehabilitation of a criminal and the reintegration of such a criminal into a peaceful society where such an individual can still fit in? The answer to the above question most of the time is in the affirmative. The first and most important step towards reformation and rehabilitation is for the accused person to accept responsibility for his or her actions, where an accused person comes before a truth commission to acknowledge his crimes, the first step towards re-integration into the society is achieved, likewise rehabilitation. This is not really the case when it comes to criminal prosecution where accused persons are presumed innocent until proven guilty and where accused persons seek to defend or maintain their innocence. In criminal prosecution, where an individual has been found guilty of a crime, the punishment which most of the time is imprisonment seeks to isolate such an individual from the society, rather than re-integrate the individual into the society.

Truth commissions help in building a good and accurate historical record, in the sense that the findings and report of a truth commission play an important role in the future, where accurate and true data are needed. This tends to resolve dispute about occurrence and extent of human right abuses. On the other hand, criminal prosecution has achieved this feat because of the frontloading system and historical record keeping. It has been argued that the hearing, report and testimony of witnesses in a truth commission may sometimes not be true and accurate, in the sense that such testimonies have not met the requirement of the burden of proof in criminal trial, and that they may not have been subjected to cross-examination.

Truth commissions also aid in the promotion of democracy; it is worthy of note that democratic nations rarely fall into civil wars compared to undemocratic nations, though democracy does not stand as the sole political road-map to a peaceful nation.<sup>23</sup> Reasons for this assertion is because democracy is widely accepted by most international communities and guarantees individual human rights.

A country which has used truth commission in settling its differences will find that democracy comes to play where both warring groups decide to reconcile and agree to be governed by a single system of government. Therefore, a public and exposed truth commission can go a long way in promoting other democratic elements such as an independent and partial judiciary and more active and reformed legislative and executive arms of government, thereby having a much more enlightened society.

Most importantly, truth commissions also promote democratic values, such as the separation of powers and the rule of law. Furthermore, a well-established and successful truth commission builds up a nation's image; in essence, it

promotes the way and manner other nations of the world relate with nations that have just achieved democracy.

The achievements of truth commissions from their investigation and report, which include reconciliation of warring factions, promotion of democratic principles and institutional reforms make a nation more attractive, thereby attracting foreign investors which in turn boosts the economy of such nations with different investments. In essence, truth commission is a method that boosts business, trade and tourism in a society. On the other hand, the use of restorative justice in place of retributive mechanism may bring about foreign criticism by international nations, especially from nations with strong human rights norms and traditions.

## V. CONCLUSION

This paper explains the concept or principle of criminal prosecution and truth commissions, thereby analysing their features, advantages and disadvantages. The study is aimed at finding out if truth commissions are adequate enough to be substituted for criminal prosecution.

Most transitional periods used both truth commissions and criminal prosecution to investigate and establish grave criminal crimes during war; but then, critically looking at these periods, one will find that these nations used both mechanisms in order to achieve the long-lasting peace. More so, some principles such as amnesties were added to truth commissions to also achieve peace. The international criminal court has achieved a mile-stone in curbing international criminal atrocities. However, it still has its shortcoming, such as jurisdictional shortcoming on what the international criminal court can prosecute.

Truth commissions stand to fill the gap. Therefore, there is a craving need to improve on both mechanisms to achieve the desired result; as such, criminal prosecution still stands a better chance than truth commissions, but can be improved upon to complement each other. Thus, Nelson Mandela:

*"we have not taken the final step of our journey, but the first step on a longer and even more difficult road--- I have discovered the secret that after climbing a great hill, one only finds that there are many more hills to climb"*<sup>24</sup>

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