Power and Cooperation: Understanding the Road Towards a Truth Commission

Ming M Zhu
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UNDERSTANDING THE ROAD TOWARDS A TRUTH COMMISSION

Abstract

Truth commissions, usually described as a softer transitional justice alternative to trials, gained traction in academic circles following the establishment of South Africa’s Truth and Reconciliation Commission. Though they are praised for their value in societal reconciliation and widely recognized for their flexibility; little is understood of their causal factors or requirements. This Article turns to this hole in the research and examines the effects of one potential causal variable, the balance of power between the warring parties. Through an in-depth examination of four case studies, El Salvador, Guatemala, Peru, and East Timor, this Article finds that truth commissions are more likely to be implemented following conflicts that have ended without a clear and absolute winner. The analysis suggests two things: first, scholars should shift from the ends-based analysis of what works best to the means-based analysis of what will be possible; and second, a quest for truth may first require a need for compromise.

We cannot be facile and say bygones will be bygones, because they will not be bygones and will return to haunt us. True reconciliation is never cheap, for it is based on forgiveness which is costly. You cannot forgive what you do not know.

- Archbishop Tutu

Given the continuing violence in places like the Sudan, Iraq, and East Timor, discussions of post-conflict transitions and reconstructions have been appearing with increasing frequency in academic, political, and civil society circles. One of the most important aspects of a post-conflict transition is the pursuit of a transitional justice mechanism to address the atrocities committed during the course of the conflict. Transitional justice mechanisms can help restore the rule of law, strengthen democratic institutions, provide a form of retribution for victims, promote national peace and

1 Response by Archbishop Tutu on his appointment as Chairperson of the Truth and Reconciliation Commission, November 30 1995.
2 For further information on the causes, histories, and available responses in dealing with civil wars, see STEPHEN JOHN STEDMAN, DONALD ROTHCHILD, AND ELIZABETH M.COUSENS, EDS, ENDING CIVIL WARS. Boulder, CO: Lynne Rinner Publishers. 2002.
unity, \(^3\) and, perhaps most importantly, provide recuperating states with a sense of justice and legal order.\(^4\) As Gary Bass notes, “the treatment of humbled or defeated enemy leaders and war criminals can make the difference between war and peace.”\(^5\) Transitional justice options span from retributive justice, taking the form of trials and reparations, to restorative justice, advanced through informal or formal amnesty.\(^6\) Somewhere in between trials and amnesty lies a relatively unnoticed option: the truth commission.\(^7\)

As a midpoint between tribunals and amnesty, truth commissions are often criticized as purely symbolic mechanisms that fail to employ the sticks of trials or the carrots of amnesty agreements—“at best an empty gesture and at worst a fig leaf covering up continued abuses.”\(^8\) Yet, even a symbolic option is better than nothing, as complete inaction can result in deadly self-help, as witnessed by the retribution killings of World War II prior to the establishment of the Nuremberg trials and the Tutsi vigilante killings of unimprisoned Hutu genocidaires.\(^9\) It is true that many truth commissions have been forced to compromise justice for the sake of peace or stability,\(^10\) but even a compromised truth commissions has much to offer. In El Salvador, a sweeping amnesty passed close on the heels of the commission’s report release. In South Africa, the truth commission offered amnesty to cooperating individuals. Yet, these two commissions are arguably two of the most constructive truth commissions ever created.\(^11\)

\(^6\) For a discussion of all the transitional justice strategies available and their relative relations to one another, see Amstutz, supra note 3, at 18–40.
\(^9\) Bass, supra note 5, at 305.
\(^11\) El Salvador is celebrated for being one of the few truth commissions that saw steady implementation of the report’s pointed recommendations. See Hayner, supra note Error! Bookmark not defined., at 40. South Africa’s Truth and Reconciliation Commission eventually took testimonies from over 21,000 victims and witnesses and received over seven thousand applications for amnesty from perpetrators volunteering to testify before the TRC for their participation and appeasement in the apartheid. Domestically, South Africa’s TRC was credited for being the first large-scale, indigenous departure from formal punitive justice. Siva Maqungo, Legal Affairs Counselor at the Permanent Mission of South Africa to the United Nations, Personal Interview. 17 December 2004.
Even if approached as the least-common denominator or option of last resort, truth commissions are better than nothing.\textsuperscript{12}

Academic scholarship on truth commissions, though late in coming, has covered an impressive amount of ground. Much has been written about specific truth commissions, most often those of South Africa, the “model” truth commission, El Salvador, the success of Latin America, and East Timor and Sierra Leone, the attempts to combine truth commissions and tribunals.\textsuperscript{13} In terms of generalized or comparative scholarship, scholars have looked at how truth commissions have been helpful and how they have been limited; they have also studied how best to design a truth commission in order for it to be part of the former category.\textsuperscript{14}

However, one topic is noticeably absent: few scholars have analyzed the requirements for the initial establishment of a truth commission. In our eagerness to evaluate the track record of this abnormal player in the field transitional justice, we have overlooked the question of when it gets to come off of the bench.\textsuperscript{15} Though theories and evaluations of the effectiveness and impact of truth commissions are interesting, they are, practically speaking, completely useless if the truth commission cannot be implemented in the first place. This Article examines one factor – the

\textsuperscript{12} See Llewellyn, supra note 10, at 87 (“Truth commissions are. . . a second best option, but they are nevertheless better than nothing in situations where ‘full’ justice is not possible.”).


\textsuperscript{14} See e.g., HAYNER, supra note \textbf{Error! Bookmark not defined.}, discussing the roles of past truth commissions in a country’s political transition and the importance of addressing the past in order to create a stable future; Martha Minow, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998) (noting in particular the ability of truth commissions to enable a society, and each individual victim, to mourn and move on); TEIFEL, supra note 4 (employing an inductive method to argue that the amount of justice pursued is highly influenced by the nature of the transition); Georgina Mensah-Data, “Elements of Design: What Makes Truth and Reconciliation Commissions Fail?,” Harvard Law School LLM Paper, Spring 2005 (proposing a checklist of factors for success, namely, political will, civil society participation, consensus building, truth-telling, and sufficient resources).

\textsuperscript{15} Scholars have suggested a few requirements, though none have been authoritatively surveyed or analyzed. Chief among the requirements suggested include international attention, timeliness or a “window of opportunity,” a balance of atrocities, and regional trends.
balance of power between the warring parties – in the broader hope of shifting the current scholarship towards a more means-based, as opposed to ends-based, analysis.

The core argument of this Article thus rests on the balance of power following a conflict’s conclusion and the consequential effect on the establishment of a truth commission.16 Relying on personal interviews with individuals involved with each of the truth commission establishments and declassified governmental documents,17 this Article examines four examples of successful18 truth commission establishments,19 thereby providing insight into the relationship between the decision to establish a truth commission and the balance of power in the conflict country. I argue that these case studies share one trait in common: the parties involved retained a relatively even balance of power. In other words, the analysis suggests that truth commissions are only considered when all warring parties20 have some form of leverage, thus creating a need for compromise.21 Part One

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16 This concept is drawn from the leading political science theory of realism, which assumes that the dynamics of geo-political power are integral to all decisions within a nation’s political existence. For further reading on realism, see the readings of John Mearsheimer, Kenneth Waltz, and Stephen Krasner.

17 Interviewees include academic scholars, foreign governmental officials, US governmental officials, civil society experts, and human rights activists, providing a mixture of personal and official accounts and testimonies.

18 For the purpose of this Article, a “successful” establishment of a truth commission must be: 1) sanctioned by the government, 2) pursued within five years of the conflict’s resolution, and 3) followed by a public distribution of their findings. Truth commissions conducted by non-governmental organizations or third-party interest groups are disqualified because they involve cases where the government proved uninterested or unable to authorize an official commission; these are precisely the cases where the campaign for a truth commission failed. Examples of such “unsuccessful” truth commissions include Brazil, Sri Lanka, South Korea, and The Philippines. Truth commissions established prior to a conflict’s conclusion bear obvious doubts of impartiality; no government wishing to stay in power and in international favor would impartially research its own atrocities in the ongoing civil war. Five years stands as the cutoff date because a truth commission established more than five years after a conflict’s resolution implies that another mechanism was employed in the meantime; the truth commission was officially, or unofficially, passed over as the justice instrument of first resort. Finally, commissions that fail to release some form of their findings are excluded; for without public access, even the most extensive investigations would be effectively worthless to the victims, perpetrators, and the international community at large.

19 I would like to emphasize the difference between my focus on a successful establishment of a truth commission and the successfulness of the truth commission itself. The success of a truth commission itself will likely depend on the degree of detail and dissemination; some would argue that any truth commission is a success while others would insist that no inquiry is a true success unless specific perpetrators are mentioned and brought to justice. This Article does not enter this debate; for our purposes, the ensuing “success” of the truth commission itself is irrelevant – it is the successful creation of the truth commission that matters.

20 The “parties” involved are usually governmental military forces and rebel groups, but the conflicting sides could also be majority and minority political parties, right-wing and left-wing proponents, peasants and bourgeoisie, etc.

21 Ruti Teitel hints at this idea in TRANSITIONAL JUSTICE, p. 80, writing that “in countries where military rule ended without clear political transition, as in Brazil, or following difficult negotiations, as in Uruguay, governmental investigation was out of the question.”
examines the traditional type of truth commissions, those examining the atrocities of previous military regimes or dictatorships, specifically through the case studies of El Salvador, Guatemala, and Peru. Starting from a historical summary, each country’s narrative then proceeds to the formation of the truth commission and concludes with insights on the need for a balance of power. Part Two follows a similar process leading to the most recent truth commissions, those created following fights for state independence, here exemplified by the story of East Timor. The Article concludes with a look at the relevancy of this discussion within the broader questions of transitional justice and the policy implications therein.

The current literature on truth commissions and transitional justice touches on power dynamics, but to a very limited degree and always from a political science perspective. For example, Eric Bahm notes the importance of a “balance of forces,” suggesting that truth commission are more likely to be established when a new government is forced to deal with a still-influential past regime. However, Bahm never develops or analyzes this claim–his research focuses instead on the factors used in evaluating truth commissions. Other scholars have explored specific facets of power such as the type of regime transition, balance of civilian and military power, or the level of civil society participation; but a comprehensive discussion of domestic power dynamics remains missing. The most pertinent study conducted to date was published in 1999 by Elin Skaar. Skaar hypothesized that “policy choice will tend towards trials as the outgoing regime becomes weaker and away from trials as the outgoing regime becomes stronger,” thus resulting in truth commissions when “the relative strength of the conflicting demands is roughly equal.” Skaar conducted an empirical analysis of all truth commission attempts before 1999, coding each attempt as successful and unsuccessful, each outgoing regime as “strong,” “defeated,” or “weak,” and the impact of public demand as “strong” or “weak”. Skaar’s analysis is limited, however, as it only compares the outgoing government to “public demand,” which is defined as


civilians and civil society, thereby ignoring the impact of the current government, the international community, and the outgoing military.

This Article brings all of these missing factors into the analysis and, through narrative anecdotes and personal interviews, offers a qualitative perspective that is missing from the current scholarship.

I. MILITARY TRANSITIONS

A. EL SALVADOR: WAR OF IDEOLOGY

The civil war in El Salvador originated in clashes of class and ideology, rather than from religion or ethnicity. Anti-governmental insurgency forces drawn mostly from poor, rural areas had been gathering for decades since the beginning of military rule in 1931, but the momentum found its peak in 1970s and the 1980s, as the military stepped up its death-squad killings and massacres. On October 10th, 1980, five of the main insurgency groups decided to merge their forces and created an operational, political, and military alliance, the Farabundo Marti National Liberation Front (FMLN). The groups were quite varied in nature, drawing from Marxism, Marxism-Leninism, Anti-Marxism, reformism, communism, militarism, and social democratic theories, and operated through various acts of civil disobedience. Once banded together, these left-wing forces collectively launched a two-prong strategy of economic sabotage and guerilla warfare, moving to more drastic means such as political kidnappings, assassinations, and bombings.

The first FMLN offensives occurred during the presidency of Jose Napoleon Duarte, who assumed power in 1980 through a military coup following a string of largely fraudulent elections. To counter the actions of the FMLN, his government built up their paramilitary forces and launched a campaign of death squads and intimidation. Between the military assassinations and the paramilitary massacres, tens of thousands of guerrilla fighters and civilians were murdered. Within the first four years of the war alone, over forty thousand individuals, mostly civilians, died at the hands of the death squads. There was a cyclical effect: governmental repression focused primarily on groups associated with reform efforts, such as Catholics, rural peasants, or labor unions, as a result, more of their mem-

25 Skaar, supra note 24, at 1116.
bers joined the FMLN, which then caused the government to increase their repression efforts.

By 1983, the FMLN stood at the brink of victory, strengthened by shipments of military equipment and ammunition from Cuba, Nicaragua, and Vietnam. Fortunately for the El Salvadoran government, the United States stepped in, sending in hundreds of millions of dollars worth of military and economic aid.\footnote{Call, supra note 28, at 545–50.} Faced with the government’s newly fortified military force, the FMLN proved unable to defeat the El Salvadorian military and the conflict converged into a strategic stalemate.

Peace talks were first proposed and discussed in 1983, but it wasn’t until October of 1984 that the various governmental and rebel representatives were able to come together in the little town of La Palma. Progress was slow, however, as FMLN kidnappings and violent paramilitary sweeps continued to occur. In 1985, the talks stonewalled with the kidnapping of President Duarte’s daughter and the subsequent release of hundreds of FMLN prisoners in exchange for her safety. In October of 1987, President Duarte signed the Central American Peace Agreement with the Presidents of Guatemala, Nicaragua, Honduras, and Costa Rica, promising to cease hostilities, implement democratic elections, and begin the repatriation and resettlement of displaced persons.\footnote{Guatemalan Agreement for Peace in Central America, US Department of State Bulletin, Aug. 7, 1987. http://www.findarticles.com/p/articles/mi_m1079/is_n2127_v87/ai_6101621 (February 2, 2005)} Once again, however, peace negotiations were cut short by insurgency violence and governmental killings, in particular, the murder of Archbishop Oscar Arnulfo Romero in March of 1980.\footnote{Call, supra note 28, at 546.}

The inability of Duarte’s government to broker a peace deal greatly boosted the Nationalist Republican Alliance’s (ARENA) rise to political power. According to 1987 national polls, 83 percent of the population supported a negotiated settlement to the war.\footnote{Id. at 549.} Supported by corporations and rural farmers alike, and capitalizing on the speculations of corruption within Duarte’s administration and the continually mounting casualties of civil war, ARENA’s Alfredo Cristiani ousted Duarte in the 1989 presidential elections.\footnote{“El Salvador–Background Notes,” US Department of State Bureau of Western Hemisphere Affairs. Available online at <http://www.state.gov/tr/pa/ei/bgu/2033.htm#history>, Accessed 3 February 2005.} Unfortunately, the change in government did not bring an end to the violence. It was not until the demise of the Soviet Union and the subsequent dissolution of the ideological motivations fueling the conflict that El Salvador truly considered a resolution.

A full appreciation of the political environment in which El Salvador decided to establish a truth commission requires an understanding of...
the conflict’s importance to and reliance upon international actors, or specifically, the United States. Due to the FMLN’s connections to the Marxist and populist movements, the United States had a sizeable interest in a governmental victory, which kept the money rolling in. By 1984, annual spending reached $197 million, staying between $80 million and $137 million per year for the remainder of the war. The U.S. influenced the El Salvadorian political scene as well, pressuring the government to draft a new constitution and pumping $1.8 million into the 1984 elections to ensure the victory of Jose Napoleon Duarte, which was then used to convince a skeptical U.S. Congress to continue funding the military campaign against the FMLN, at the cost of $1.2 million per day. All told, U.S. economic aid from 1980 to 1991 totaled $3.15 billion, and military aid totaled $1.1 billion.

With the fall of the Soviet Union, the ideological basis of support for the El Salvadoran government quickly lost its significance. Around the same time, the international community began to take note of the severity and atrocious nature of the governmental anti-insurgency campaigns. In November of 1989, the six Jesuit priests were brutally mutilated and murdered at Central American University. US intelligence correctly suspected the involvement of the El Salvadorian military and subsequently suspended all US military aid. The new Bush administration also reined back political aid, moving towards a more pragmatic, negotiated solution. Following widespread international attention and media coverage, the leaders of the other Central American countries appealed to the United Nations for assistance in ending the civil war in El Salvador. Having lost the backing of the United States and facing mounting international pressure, the El Salvadorian government grudgingly accepted UN-mediated negotiations.

The end of the Cold War also dealt a fatal blow to the FMLN. At its peak, the FMLN controlled one-third of the country’s territory. Without the continued US support, the potential for a FMLN victory weighed

38 Id. at 550.
42 Call, supra note 35, at 831.
heavily on the minds of the military. However, with the fall of the Soviet Union and the loss of Cuban and Nicaraguan support, the potential for a governmental victory weighed equally as heavily on the minds of the FMLN.

Peace negotiations were extremely slow. During the early rounds, the government offered amnesty to the guerilla forces in exchange for a cessation of hostilities and peaceful participation in an open election. The FMLN refused this offer, insisting upon a power-sharing arrangement, with political representation in the interim government as well, and the continued maintenance of an independent military force.\textsuperscript{43} Lisa Magarrell, senior associate and El Salvadoran expert at the International Center for Transitional Justice (ICTJ), commented that such sentiments prevented punitive prosecutions. In a paradox of sorts, the FMLN wanted justice for the governmental perpetrators, but knew that broad prosecutions could result in their own incrimination and a loss of international political support. Therefore, to successfully play a political role in the future, they had to avoid the potentially damaging effects of trials.\textsuperscript{44} Both sides were highly aware that possession of political power, or lack thereof, was critical. In the same train of thought, both sides avoided serious consideration of prosecutions, being equally fearful of the potential consequences in terms of international support and domestic election results. Eventually, the idea of a truth commission appeared within the United Nations-created independent negotiation committee and was deemed acceptable to both sides.\textsuperscript{45}

The story in El Salvador can be exemplified in the response to the report eventually released by the truth commission. Though the comprehensiveness and detail attempted and reached by the El Salvadorian commission’s report was quite impressive, hopes of consequential hard-line demands of individual accountability crashed to the ground following the sweeping amnesty passed five days after the report’s release. The Legislative Assembly effectively nullified all civil and criminal liabilities for political crimes committed during the war.\textsuperscript{46} In fact, few of the recommendations, including the compensation of victims and their families, institutional reforms, and public acknowledgment and apology by the perpetrators, have since been undertaken.\textsuperscript{47} The government had a great per-
sonal interest in avoiding prosecution and as a result, the truth commission had done all that it could.

B. GUATEMALA: THE THIRTY-SIX YEAR INSURGENCY

Guatemala’s civil war covered ideological, ethnic, and political conflicts; it pitted right-wing conservatives against left-wing liberals and intellectuals against the military, all the while laying the brunt of the violence and bloodshed upon the indigenous Mayan population inadvertently caught in the crossfire. The conflict began as a nonviolent socialist movement, originating in the growth of the Communist party, especially after it was officially legalized by President-elect Jacobo Arbenz. The movement drew support from the growing dissatisfactions of the poor, eventually expanding their influence over the government, labor organizations, and political parties. The CIA, alarmed that the Communists were targeting a country “in America’s backyard,” quickly launched a covert operation, PBSUCCESS, which eventually brought about the 1954 coup that successfully removed Colonel Arbenz from office.48

Though the military coup leaders handed over political power to the civilian government, they demanded a carte blanche with respect to defense matters and a veto over new governmental appointments.49 As a result, most of the “civilian” presidents were veterans of military counterinsurgency campaigns. In November of 1960, nationalists upset by the government’s decision to allow CIA operatives to train Cuban exiles on Guatemalan soil staged a rebellion that nearly toppled the administration.50 Backed by CIA forces, the revolt was suppressed, but many of the rebel leaders survived, leaving to join the guerilla movements that would keep Guatemala in civil war for the next thirty-six years.51

While the leftist rebel forces, organized under the umbrella Guatemalan National Revolutionary Unity (URNG), committed a sizeable number of human rights violations through forced disappearances, torturesessions, and mass killings, military forces bore responsibility for an overwhelming majority of the death count. According to the truth commission report, state actions, “although varying in intensity, were pro-

50 Stephen M. Streeter, Nation-Building in the Land of Eternal Counter-Insurgency: Guatemala and the contradictions of the alliance for progress, THIRD WORLD QUARTERLY, Vol. 27, No. 1, 57, 59 (Feb. 2006).
51 The main guerrilla groups included the Guerrilla Army of the Poor (EGP), the Revolutionary Organization of Armed People (ORPA), the Rebel Armed Forces (FAR), and the Guatemalan Labor Party (PGT). These organizations combined to form the Guatemalan National Revolutionary Unity (URNG) in 1982. (Source: Department of State Country Background Papers–Guatemala: 8/04, available at <http://www.state.gov/r/pa/ei/bgn/2045.htm>, accessed February 13, 2005.)
longed and continuous,” accounting for 93 percent of the total human rights violations.52 Though the civil conflict dragged on for over thirty years, 91 percent of the deaths occurred during the presidencies of Generals Romeo Lucas Garcia and Efrain Rios Montt, who employed the philosophy, “If you are with us, we’ll feed you; if not, we’ll kill you.”53 Over the course of their presidencies, the military massacred tens of thousands of civilians and extinguished over 400 villages.54 The government also gathered a wide-reaching database of informants that gave rise to a marked increase in assassinations and forced disappearances of opposition leaders and religious figures. Though resilient, the guerrilla forces lost any true hope for a military victory, relying instead on its alliances with social movements and civil society for survival.55 Montt was eventually displaced and subsequent leaders began, largely unsuccessfully, to reign in the military and push the Guatemala government towards reform and democracy. In the late 1980s, the presidential administrations finally began negotiations to end the civil war, a process that eventually took six years to complete.

The decision to establish a truth commission in Guatemala was the result of a three-way struggle for power between the government, the military, and the URNG. Though the government may have been willing to go further in terms of punitive accountability, the high degree of military influence prevented the civilian leaders from acting autonomously. According to a confidential State Department cable of 1994, the relationship between the government and the military was like a “marriage—they are mutually dependent and neither party will make a major decision without consulting the other, nor will either one pursue any course of action that the other strongly opposes.”56 According to academic experts, the situation was even harsher. Stanley and Holiday describe the civilian government as “extremely weak,” holding “only tenuous authority and autonomy,” against a military accustomed to autonomy.57 Sanctioned by the Constitution to “maintain the independence, sovereignty, and honor of Guatemala,” the military was accustomed to playing an active role in

peace negotiations or in any other situation where its own power might be threatened.\textsuperscript{58}

While the Guatemalan military recognized their control over the government and their superiority in military prowess in relation to the UNRG, they also recognized the importance of political power and their less dominant position in that realm. As stated in a secret US Defense Intelligence cable, “the generals were insistent that the army not allow the Guatemalan National Revolutionary Unity to force, through political and international pressure, the army into a truth commission that was one sided. The generals state[d] and believed that it was far better to continue fighting militarily rather than lose politically.”\textsuperscript{59} Bishop Gerardi\textsuperscript{60}, the guiding force behind the Recovery of the Historical Memory (REMH) project, told the United States Ambassador at the beginning of the negotiations that the guerrillas saw the government as weak and were consequently riding out the political situation before committing to serious negotiations. He further stressed that “while the armed forces may have won the war fought on the battlefields, the URNG has so far won the war fought in the political arena and in the press.”\textsuperscript{61}

Nonetheless, given the military’s well-known history of violence and brutality and its sizable influence on the government, the likelihood of a tribunal or other forms of punitive accountability was very low. In fact, even a truth commission struck a discordant note with the military. In a State Department cable from February of 1994, a meeting with the Minister of Defense is described in which a group of Guatemalan generals express “extreme displeasure at the course the peace talks were taking regarding the possibility of a truth commission.”\textsuperscript{62} Like the military of El Salvador, the Guatemalan military held private reservations over the poten-


\textsuperscript{59} “Army Generals Confront MOD Over Truth Commission,” Secret Cable.

\textsuperscript{60} Bishop Juan Jose Gerardi Conedera was a leading figure in Guatemala’s human rights landscape. Under his guidance, the Catholic Church began the REMHI project to augment the official truth commission report. The report was published in April of 1998, compiling over 7000 interviews with victims and their families. The report attributed over 90 percent of the atrocities to the Guatemalan military. Two days after the report was published, Bishop Gerardi was murdered in his garage. Three military officers were eventually convicted of the murder though the case still retains a high degree of ambiguity and various conspiracy theories have been formulated. For more information on REMHI, please visit the official website, http://www.fhrg.org/remhi. For more information about the Gerardi trial, see http://www.ghrc-usa.org/Resources/GerardiBio.htm.

\textsuperscript{61} “Ambassador Meets with Bishop Gerardi.” State Department Confidential Cable No. 12007. From McAfee, Marilyn, the American Embassy in Guatemala, to the Secretary of State, 28 October 1993, 4 pages. National Security Archives Document GU01776, section 1, paragraphs 5–7.

tial damage a truth commission would bring. Unlike the El Salvador military who operated from backstage, however, the Guatemalan military’s openly influenced the negotiations. As the officers were quick to mention, “[t]he Salvadoran Army agreed to a commission since it did not win its war, in contrast to the Guatemalan Army victory.”

The URNG, however, would not be content without some form of justice. A secret cable from the United States Embassy in Guatemala reported that the guerilla forces could not back down from calling for a truth commission because to do so would “undermine their legitimacy in guerilla ranks, popular groups and, importantly, among international support organizations.”

When the military finally accepted a truth commission, they did so while expressing severe reservations and injecting strict limitations on its authority and power. At first, they reportedly demanded full disclosure from the URNG of its membership base, its activities during the thirty year conflict, as well as the names of all outside supporters, including nongovernmental organizations, church groups, and foreign governments. Later, in a discussion with the United States Ambassador to Guatemala, the Guatemalan Minister of Defense reported that the army officer corps had voted 69 to 1 in acceptance of the truth commission, but only under certain conditions:

The commission would conduct its investigation but the results would initially remain secret. The results would only be revealed after sufficient time had passed in order that old passions not be inflamed and generate reprisals against anyone named by the investigation. The MOD [Minister of Defense] did not specify exactly how long “sufficient time” would be. Likewise, anyone named by the commission, be they army or URNG, would have to be immune from prosecution.

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Though the army had been persuaded to accept the truth commission for appearances sake, they were going to minimize its effects as much as possible.

In Guatemala, the existence of any accountability response was a testament to the strength of the rebel forces, but the choice of a truth commission instead of trials demonstrated prosecutorial restraint and appeasement towards the military. As the current Deputy Ambassador of Guatemala to the United Nations admitted, “the army had won the war […] but the insurgency had created a lot of awareness and that was why they were powerful, not man power. For the army to come to terms and settle everything, they knew it would be open but would not end in trials.”67 Indeed, the commission’s mandate reads, “the Commission shall not attribute responsibility to any individual in its work, recommendations and report nor shall these have any judicial aim or effect.”68 In other words, the commission could exist and attempt to achieve a social accountability of sorts, but it was forbidden to name any individual perpetrators, preventing any chances for punitive accountability.

C. PERU – THE MILLENNARIAN WAR

The Peruvian conflict was a conflict of Marxist origins fought between the Peruvian government and rebel groups drawn from the poor, rural communities, the most prominent of which was the Sendero Luminoso, or the Shining Path. Originally created in the 1960s by Abimael Guzman, Sendero Luminoso was founded on the principles of Maoist theory and communistic doctrine.69 Operating through acts of violence and sabotage such as car bombings and assassinations, the group targeted leftist organizations, political leaders, and other anti-Marxist individuals and quickly became infamous for their extreme brutality.70

The government’s response to such tactics was swift and merciless, authorizing widespread massacres to root out the insurgency’s power in the Peruvian countryside, stating that “[i]f to kill two or three senderistas it is necessary to kill 80 innocents, then it does not matter . . . The peasants will have to decide where they wish to die: with Sendero or the armed forces.”71 According to the Peruvian Human Rights Ombudsman’s office, more than 4000 individuals have disappeared over the past 20 years, 400,000

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68 Ibid, Operation, section III.
have been internally displaced, 30,000 have been victims of political violence, and hundreds of thousands subjected to torture.\textsuperscript{72}

Two of the more famous incidents occurred in Barrios Altos, a suburb of Lima, and at La Cantuta University. In November of 1991, a neighborhood gathering in Barrios Altos was interrupted by as gunmen arrived and fired indiscriminately into the crowd, killing fifteen civilians, including a young boy. Widely suspected to be a military operation against Sendero bases, the government displayed little interest or political will in investigating the matter.\textsuperscript{73} In July of 1992, a similar group of gunmen took over La Cantuta University, a historically hot-spot for Sendero Luminoso supporters, and took away nine students and a professor–none were ever seen again. Once again, the case languished in military trials though the individuals responsible for the crimes were widely known.\textsuperscript{74} Similar incidents occurred throughout the decade with violent atrocities committed on both sides. In 1992, governmental forces captured Abimael Guzman, Elena Ipanaguirre, and several other leaders of the Shinning Path, forcing the rebels into hiding, operating on through isolated attacks to remind the government of its presence.\textsuperscript{75}

Though Fujimori was relatively successful in quelling the movements of Sendero Luminoso, his own heavy-handed approach left the Peruvian public highly critical of his government and his leadership. Furthermore, his third victory in the 2000 presidential polls was accompanied by rather obvious bribery and manipulation, which quickly expanded to an expose of the widespread corruption and atrocities running throughout his administration. Finally, as a last straw, in late 2000, a tape leaked of Fujimori’s right hand, General Vladimiro Montesinos, secretly bribing a congressman. Due to the mounting pressure surrounding these events, Fujimori stepped down from power and fled the country in November of 2000.


\textsuperscript{75} W. Alejandro Sanchez, “The Rebirth of Insurgency in Peru,” SMALL WARS AND INSURGENCIES, vol. 14, no. 3, Autumn 2003, p. 188.

In June of 2001, Paniagua established the Truth Commission in Peru with a mandate to investigate the human rights abuses and violations that occurred on both sides of the civil conflict between May of 1980 and November of 2000, thus covering the atrocities committed under the Presidential terms of Belaunde, Garcia, and Fujimori. The commission was called to report on the conditions that led to the violence, to contribute directly to potential judicial accountability pursuits, to propose reparations possibilities, and to recommend reforms within the governmental system.

While the Peruvian truth commission seemed to occur under absolute regime change, the reality more resembles the continued government situations in El Salvador and Guatemala; the mere presence of a new government under Toledo does not translate into an absence of power from former governments and perpetrators. As Eduardo Gonzalez commented, “it is true that some perpetrators were not in power, but not true that all perpetrators were powerless.” He went on to point out that much of the democratic opposition that ousted Fujimori had previously been governmental officials in the 80s, when a large portion of the atrocities had occurred.\footnote{Fujimori’s reign of power followed that of Alan Garcia (1985–1990). Though Garcia’s relationship with the military remained shaky and conflicted throughout his administration, he certainly tolerated their attacks on the Sendero Luminoso, and even personally authorized the attacks that left 240 prisoners dead in June of 1986. After Fujimori’s auto coup of 1992, Garcia claimed asylum in Colombia. “GOP Orders Investigations of Prison Deaths,” U.S. State Department Secret Cable, from the U.S. Embassy in Lima to the Secretary of State, 23 June 1986, section 2, paragraph 6. National Security Archives Electronic Briefing Book No. 64. Ed. Tamara Feinstein. 22 January 2002. Available online at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB64>, accessed 14 May 2005.}

After Fujimori’s departure, generals from former administrations returned to power.\footnote{Eduardo Gonzalez. Personal Interview. New York City, 15 December 2004.} A few members of Fujimori’s own administration continued on with positions of prominence as well. During the interim government, Ketin Vidal, the former head of the police’s anti-terrorism unit credited with the capture of Shining Path leader Guzman, took the position of interior minister.\footnote{“Peru’s Interim President Swears in Centrist Cabinet,” CNN Online, 25 November 2000, from Reuters. Available online at <http://archives.cnn.com/2000/WORLD/americas/11/25/peru.cabinet.reut>, accessed 15 May 2005.} Many members of the congressional government bore strong connections to past atrocities and as such, the post-Fujimori
Peruvian legislative body was not devoid of individuals who would be hurt by a thorough investigation and prosecution process.  

However, the new government could not gloss over past humanitarian violations completely due to a vocal commitment to human rights and accountability. During the final years of the Fujimori regime, opposing political parties struck hard at Fujimori’s human rights record and repeated humanitarian violations in their efforts to oust his administration. Due to the notoriety of Fujimori’s atrocities, the selective nature of his targets, and the unmistakable fingerprints of the perpetrators, the opposition’s use of humanitarian atrocities severely eroded the political legitimacy of Fujimori’s regime. As a result, when Fujimori fell, the new government was stuck with a self-imposed vigilance against humanitarian violations. Though they may have recognized the double-edged sword and its potential dangers, they had no choice but to follow through on their threats and promises to retain legitimacy for their democratic government. As they obviously did not want to risk criminal prosecutions that might incriminate their own past actions, a truth commission fit the bill.

Admittedly, the new government did not expect or anticipate such a detailed or forceful truth commission. Many believed that an investigation would only strengthen their own positions. As Gonzalez lamented, the problem with the Peruvian truth commission is that "every actor had his own version of the past and believed it [...] many supported the truth commission because they thought the truth commission would support their view of history. But they erred in that. Absolutely." While they originally hoped for a document focusing on the atrocities of Fujimori to validate their own perspectives, they ended up with a document that took an equally objective position with the other governments and the guerilla forces as well, in a surprisingly unprejudiced and accurate account of the conflict.

Thus, when the truth commission finished its investigations and finally released its findings, some of the very groups spearheading the opposition against Fujimori and calling for accountability found themselves criticized in the final report. Cardinal Cipriani, accused by the commission of indifference to the suffering of the Peruvian Indians caught in the conflict’s crossfire, responded with absolute denial, saying, “I do not accept it because it is not true.” Retired General Jose Valdiva, accused the

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81 The argument described here is drawn from the comments of Eduardo Gonzalez, Personal Interview, International Center for Transitional Justice, 15 December 2004.
commission of pro-Sendero Luminoso bias and commented on the unexpected tone of the commission, “instead of being honored for the work the armed forces did, they accuse us for the work we did. That is unjust.”

The social elite found themselves unable to swallow the accusations of blame and the military elite found themselves suddenly faced with real threats of prosecutions. Had they foreseen the results, the military campaigns for full amnesty would likely have found many more supporters.

Finally, a certain amount of credit must be given to the Peruvian civil society. In fact, the truth commission option was brought to the table for the first time after the 2000 presidential elections by civil society leaders. Beginning with the interim government of Paniagua, human rights activists took on an unprecedented role within politics, with the appointment of Diego Garvia Sayan, a respected human rights expert, as justice minister. The entire cabinet reeked more of professionalism than politics, drawn largely from careers other than domestic government. Following the interim government’s departure, President Toledo appointed Fernando Olivera to replace Sayan as the new justice minister. Extremely well-known for his commitments to human rights and accountability, Olivera was responsible for publicizing the corruption video often credited with the toppling of Fujimori’s administration. In both the interim and Toledo governments, cabinet posts went to human rights experts with extensive experience within nongovernmental organizations, confirming a certain commitment to human rights.

In addition to their influence through political posts, civil society groups built an extremely well-prepared and concentrated case for the need for accountability. Eduardo Gonzalez, specialist on Peru’s post-conflict transition, described the Peruvian human rights movement as "remarkably professional and very well organized in comparison with other countries in the region." The human rights movement also takes the credit for keeping the possibility of prosecutions open for future discussion, what many regard as the most valuable aspect of the truth commission. Some ana-

lysts go so far as to credit the human rights movement with the successful campaign for accountability in general.\(^92\)

With the complete surrender and exile of Fujimori, the virtual defeat of the Shining Path,\(^93\) the potential for self-incrimination, and the lack of international pressure to pursue judicial accountability, the new Peruvian government must have seen amnesty or complete inaction as an attractive option. Some may insist that the truth commission came into existence under Paniagua, vocally opposed to the Fujimori regime, who thus had no personal fears of prosecution. However, Paniagua first entered Peruvian politics under the appointment of President Belaunde and held strong ties to Belaunde’s Accion Popular party, thus linking him to a certain degree with the atrocities of Belaunde’s presidency.\(^94\) Regardless of the qualifications, the fact remains that a Peruvian political scene acquiesced to a potentially self-incriminating truth commission explicitly tied to the support of judicial courts and accountability.\(^95\) The domestic influence of civil society and the past promises of human rights activist-turned politicians would not allow impunity, but the continued prominence of the past military and governmental officials removed the option of outright prosecutions. Once again, the truth commission results from an intricate balance of power.

**II. WARS OF INDEPENDENCE**

**A. EAST TIMOR: GEOPOLITICS AND SOVEREIGNTY**

The conflict in East Timor stemmed from the fall of the Portuguese fascist regime, leaving the local Fretilin movement battling for independence with an Indonesian government fearful of a Communist, left-leaning presence in the region. Supported by the United States and Australia based on anti-Communist and regional stability agendas, Jakarta strongly en-


\(^93\) The continued threat of insurgency from the Shining Path and other rebel forces is explored by Alejandro Sanchez. He claims that the Shining Path has internationalized its movement and is ripe to regain popular support in Peru, taking advantage of the limited economic and military capabilities of the current administration. W. Alejandro Sanchez, “The Rebirth of Insurgency in Peru,” SMALL WARS AND INSURGENCIES, vol. 14, no. 3, Autumn 2003, p. 188.


couraged Indonesian integration as an alternative. As a result, when Fre-telin made its declaration of independence on November 28, 1975, the international community turned a blind eye to Indonesia’s immediate military offensive and takeover. In fact, President Ford of the United States personally assured President Suharto of Indonesia on the eve of the invasion that Indonesian actions taken in response would be accepted without questions. The invasion was extremely bloody; by the time East Timor had become an official province of the Republic of Indonesia, over 60,000 Timorese were dead. As early as 1976, the Security Council passed Resolution 389, calling upon the Indonesian government to “withdraw without further delay all troops from the Territory.” Over the next two decades, several General Assembly resolutions called for the immediate withdrawal of Indonesian forces. Indonesia responded to each resolution with complete inaction. In reality, the non-binding resolutions served more of a symbolic purpose to pacify calls for an international response to the atrocities committed by Indonesia. During the Cold War, Indonesia became the pet project of Southeast Asia as “the domino that did not fall.” As a result, the authoritarian regime in Jakarta was rewarded, irrespective of its abysmal human rights record. Over the course of the next two decades, the Indonesian government continued its brutal repression of independence movements, leading to the deaths of 200,000 Timorese.

After the collapse of the Soviet Union, Western governments came under increasing public pressure to drop their support for Indonesia and encourage a free referendum of independence in East Timor. In 1999, facing mounting international pressure and no longer able to depend on anti-Communism supporters, the Indonesia government finally allowed a referendum for independence to be held in East Timor. Though the East Timorese were under heavy pressure and intimidation from Indonesia, 78.5

100 Nair, “Human Rights,” p. 112.
102 Candio and Bleiker, “Peacebuilding in East Timor,” p. 68.
104 Candio and Bleiker, “Peacebuilding in East Timor,” p. 68.
percent of the vote went for an independent East Timor.\textsuperscript{105} In retaliation, Indonesia paramilitary and governmental forces went on a month-long rampage of destruction against the East Timorese population. In one month, they murdered 2,000 people, raped hundreds of women and girls, displaced three-quarters of the population, and demolished seventy-five percent of the country’s infrastructure.\textsuperscript{106} Under severe international criticism and the threat of lost IMF funding, the Indonesian government finally withdrew its troops from East Timor and allowed an Australian-led multinational protection force to take over and assist in East Timor’s transition to independence.\textsuperscript{107}

The truth commission was established by the United Nations Transitional Administration in July of 2001 with a mandate to investigate human rights violations, to facilitate reconciliation and reintegration of minor criminal offenders through “Community Reconciliation Processes,” and to make recommendations on the promotion of human rights and reconciliation.\textsuperscript{108} Surprising those who expected the usual mix of academics and political figures, the Commission for Reception, Truth and Reconciliation (CAVR) was comprised of seven individuals drawn from the legal profession, the church, civil society, human rights organizations, and the corporate world. Granted the power to authorize searches and seizures of persons and property, the CAVR had broad investigatory powers over crimes committed during the Indonesian occupancy from 1974 to 1999, leaving the crimes committed in the violent aftermath of the 1999 referendum to the judgments of the United Nations Serious Crimes Unit. Crimes committed since independence have been deemed more appropriate for local prosecution; even if they are tied to events that occurred during the occupation or month-long post-referendum period, they are nonetheless turned over to the local Timorese courts.

Though a loud international outcry followed the violence of 1999, according to Frederick Rawski, former member of the UN human rights monitoring team in East Timor, the United Nations quickly backed off from pushing for trials and prosecutions due to geopolitical sensitivity towards Indonesia.\textsuperscript{109} Given the comparative strength of Indonesia to East Timor, even unanimous East Timorese calls for prosecutions would be extremely difficult without the full weight of the international community. In fact, even the East Timorese are less than anxious for actual prosecutions to occur, which helps to explain their support for the truth commission and

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\textsuperscript{106} NOAM CHOMSKY, RADICAL PRIORITIES. Black Rose Books, 1985, p. 72.
\textsuperscript{109} Frederick Rawski, Personal Interview, 16 December 2004.
\end{footnotesize}
their caution in regards to serious criminal proceedings. Rawski, drawing from his experiences in the eventual production of the commission’s report, commented, “The balance of power between the former enemies is by far the most important aspect here. East Timor is grasping for leverage in areas that are far more important to the government than justice, no matter how important that is. [...] East Timor’s fate is inextricably tied to Indonesia in every way.”110 Another scholar summarized, “[the East Timorese government] would be happy with a truth commission that says well, this is what happened, we suffered a lot, [but] let’s close the books.”111 When questioned on this issue, Neil Kritz, director of the US Institute of Peace’s Rule of Law program, agreed that a certain “political weariness” existed on the part of the government officials to press too hard on accountability and prosecution. In fact, he noted that even when the international prosecutor in East Timor wanted to pursue some of the crimes and perpetrators, there was a real unease in having to proceed on the part of the East Timorese government.112 Rawski confessed that he has been amazed at the intensity of the Timorese government’s avoidance of confrontation, which rhetorically undermines accountability efforts that have taken place.113

In addition to the geopolitical concerns, East Timor’s quest for punitive justice is blocked by sovereign jurisdiction issues. As of 2004, the Serious Crimes Unit of East Timor has issued 81 indictments out of a list of 369 accused individuals.114 Of the 369, however, 281 remain in Indonesia, beyond the territorial jurisdiction of the East Timorese courts. Even if Dili were seeking full judicial accountability under another form of prescriptive jurisdiction, the Indonesian perpetrators are protected by the Indonesian government’s refusal to extradite them for prosecution elsewhere. Unfortunately, the Indonesian created tribunal and the convictions made in that court have been, as one expert noted, “a true farce–all the military officers were acquitted. There were two people convicted, the only two East Timorese on trial, and they were both acquitted on appeal.”115 It becomes extremely difficult to justify the trial and punishment of less serious offenders in East Timor when their counterparts guilty of much heavier atrocities in Indonesia remain free. Former U.S. Ambassador for War Crimes Pierre Prosper did note that “the fact that [the Indonesians] went through some prosecutions, however, is somewhat promising–since they

110 Frederick Rawski, Personal Interview. 16 December 2004.
111 Bill O’Neill, Phone Interview, 15 December 2004.
113 Frederick Rawski, Personal Interview, 16 December 2004.
115 Frederick Rawski, Personal Interview, 16 December 2004.
weren’t open to doing that before. The fact that they’re willing to raise the profile of the need for accountability [is promising].”

Finally, from a broader perspective, attempts to investigate the past oppressive acts of a sovereign state against its own peoples runs into tricky questions of sovereignty. While human rights groups would immediately point to international treaties and agreements, such as the Geneva Conventions and the International Covenant on Civil and Political Rights (ICCPR), and jus cogens norms prohibiting such brutality and violence, many governments would insist that a government’s actions within its territorial borders are barred from any outside review. In East Timor’s case, the United Nations conveniently by-stepped the issue by adopting Portugal’s view that Indonesia’s original occupation was illegal, which meant that East Timor remained a non-self-governing territory. Even so, the United Nations would likely have faced heavier opposition from traditionally pro-sovereignty nations had it attempted to bring about harsher forms of judicial accountability.

Given East Timor’s eagerness to avoid confrontation, one might wonder why any trials or truth commissions were formed at all. While the severity of the violence led to such furor amongst international human rights organizations that demanded a just response, it must be noted that East Timor’s situation is different from all other truth commissions established to date in one critical aspect: it was created by a legal act of the United Nations. Though the East Timorese cabinet signed off on the basic concept of a truth commission, the commission’s membership, scope, and all other attributes were determined by UNTAET’s Human Rights Unit, albeit after consultation with international and local experts. Indonesian hopes for blanket amnesty and non-investigation could not trump UNTAET’s mandate.

Furthermore, the threat of prosecutions from an international tribunal, however slight, would have prompted Indonesian support for any alternatives. According to Rawski, “the threat of an international tribunal led to the compromise of hybrid tribunals, [and] the threat of the international community enforcing some of the indictments through Interpol led to the consideration of truth and reconciliation as a better fit.” Rawski also suggests that East Timor was prudent in accepting the compromises, if it had instead waited for the international community to fulfill their

119 Frederick Rawski, Personal Interview, 16 December 2004.
pledges and promises, the truth commission and the Special Court would likely still be nonexistent.\textsuperscript{120}

East Timor’s experience highlights the particular difficulties arising from transitions of independence. Newly independent states will, by definition, be weaker, less experienced, and less influential on the international playing field. The likelihood of establishing a truth commission to investigate crimes committed against its people during pre-independence periods is, consequently, extremely low. Only with the direct involvement of the United Nations was East Timor able to pursue a transitional justice mechanism. Even then, the geopolitical status of Indonesia squashed any chance of substantial prosecutions. Unfortunately, the truth commission in East Timor likely represents the most a newly independent state could possibly hope for.

\section*{III. \textsc{Implications for Law-Makers}}

In each story chronicled above, the details and circumstances were different, but the central theme was always of limitations and a need for compromise.

In the analysis of El Salvador, the conflict clearly depended on the heavy support of foreign governments; at the height of the Cold War, the El Salvadorian government received over 197 million dollars worth of U.S. economic and military aid.\textsuperscript{121} Without such extensive support, analysts doubt that the government could have avoided military defeat.\textsuperscript{122} After the fall of the Soviet Union and the consequential retraction of the copious foreign financiers, the El Salvadorian government and the FMLN could no longer sustain the conflict, resulting in a drawn-out strategic stalemate on the battlefield. Having seen the writing on the wall, the parties reluctantly came to the negotiating table.\textsuperscript{123}

The truth commission in Guatemala was another result of give-and-take. The URNG’s lack of military power led to a certain amount of desperation at the negotiations, lowering their bargaining power for stronger accountability.\textsuperscript{124} The government’s stance on accountability was essen-

\textsuperscript{120} Frederick Rawski, Personal Interview, 16 December 2004.
\textsuperscript{121} Call, \textit{supra} note 28, at 548 (quoting JAMES DUNKERLEY, \textsc{The Pacification of Central America: Political Change in the Isthmus} 1987-1993 (New York: Verso, 1994), Appendix 7).
\textsuperscript{122} \textit{Id.} at 545–50.
tially irrelevant given their close relationship with the military. While the military did not lack strength on the battlefield, it feared political ramifications. Though none of the parties saw the truth commission as the best option, all accepted it as the lowest common denominator.

Peru was even further constrained, given the continued political participation of governmental officials and military officers with ties to the human rights atrocities. In fact, President Toledo’s closest competitor in the 2001 elections was former President Garcia, directly responsible for countless atrocities committed by the armed forces under his rule. Defeated by a mere five percent in the second round run-off vote, Garcia remains active within the Peruvian political scene. Similarly, Ketin Vidal, the former head of the police’s anti-terrorism unit credited with the capture of Shining Path leader Guzman, assumed the position of interior minister. Yet, having built their case against Fujimori based on human rights violations, Toledo’s government had to provide the powerful Peruvian civil society with some form of accountability.

Finally, East Timor, where the story boiled down to a single factor: Indonesia. Though Indonesia’s economic and security powers prevented any endeavors against the wishes of Jakarta, extreme international outcry following the 1999 massacres led to a certain expectation of reprimands. In particular, “the threat of an international tribunal led to the compromise of hybrid tribunals, [and] the threat of the international community enforcing some of the indictments through Interpol led to the consideration of truth and reconciliation.”

The analysis of the balance of power within these case studies suggests an underestimated relevancy of domestic power dynamics to the establishment of a truth commission. In each case, compromise was necessary in moving forward with transitional justice; the truth commission always emerged as the “last option standing.”

125 “Ambassador Meets with Bishop Gerardi.” State Department Confidential Cable No. 12007. From McAfee, Marilyn, the American Embassy in Guatemala, to the Secretary of State, 28 October 1993, 4 pages. National Security Archives Document GU01776, section 1, paragraphs 5–7.
130 Frederick Rawski, Personal Interview. 16 December 2004.
131 Candio and Bleiker, “Peacebuilding in East Timor,” p. 64.
132 Frederick Rawski, Personal Interview, 16 December 2004.
There are two main implications of this research for academics and policymakers dealing with post-civil conflict transitional justice and the option of establishing a truth commission. The first stems directly from the findings of this Article: policy makers and academics should focus more on the effects of domestic power dynamics. More importantly, however, a shift should be made from examining transitional justice mechanisms as an ends-based choice to a means-based choice.

Policy-makers and scholars need to realize that due to political factors and restrictions, every transitional justice option may not be available. Ratner and Abrams, in their discussion of human rights accountability, write that, “in choosing the means by which to advance these goals [of punishment, deterrence, trauma relief, reparations, or reforms], states must balance the legal, ethical, and social imperatives served by each approach against its social and political risks and costs,” implying that all transitional options are available and that policymakers should pick transitional mechanisms based on their potential effects instead of their innate feasibility.\(^\text{133}\) Gary Bass, in an attempt to convince policymakers of the superiority of trials to informal acts of vengeance, simply assumes that trials are possible – telling policymakers “[i]f at first you don’t succeed, try again.”\(^\text{134}\) By focusing on why governments should support a tribunal, he ignores the question of whether governments could actually establish one. Aryer Neier similarly pushes for the rejection of amnesty agreements on the grounds that “justice should be done” without acknowledging the potential impossibility of formal justice.\(^\text{135}\) Martha Minow, while acknowledging the need for widespread societal cooperation and sufficient investigative authority and noting that difficulties could arise in the testimonies of victims who were also perpetrators,\(^\text{136}\) nonetheless maintains that the potential benefits of truth commissions far outweigh the potential costs and that consequentially, they should always be considered.\(^\text{137}\) By assuming that each transitional justice option is possible, the current research focuses almost exclusively on the effects of transitional justice.

My research suggests, however, that the options available to a state after a civil conflict may be limited by the domestic power dynamics. Though the Guatemalan government may have preferred trials as a way to exercise control the military, the military’s lingering influence excluded the possibility of harsher forms of accountability. Though much of Peru’s government may have preferred to forget the past and avoid any chances


\(^{134}\) Bass, supra note 5, at 310.


\(^{136}\) Minow, supra note 14, at 60, 147.

\(^{137}\) Id. at 83–87, 90.
for prosecution, the restraints of civil society and democratic promises resulted in a truth commission. In such situations, the government’s available means overruled their preferred ends.

CONCLUSION

Academics and policy makers alike should take note of this divergence from the traditional transitional justice literature. On the academic end, further research should be devoted to the causes of specific transitional justice mechanisms. Given that specific circumstances and factors may remove options such as trials or truth commissions from the table, academics should focus more on the discovery and analysis of those circumstances and factors. Understanding what works best for a conflict is relatively pointless without first understanding what could work. On the policy end, governments and international organizations should realize that the choice to implement a truth commission or trial is not independent from domestic political restraints. Instead of debating the appropriateness of specific options, they should instead focus on the feasibility of each option. Though truth commissions serve a great need within transitional justice and societal reconciliation, they generally rank low on the wish lists of governmental and rebel negotiators. Time and time again, the truth commission emerges as a compromise between parties. In hindsight, many countries and transitional governments could have saved themselves valuable time and resources if the options available to them had been clear from the outset. To better deal within the chaos that is transitional justice, we should focus our energies on removing tangles as opposed to further defining current tangles.