

# THE POLITICS OF TRUTH: ON LEGAL FETICHISM AND THE RHETORIC OF COMPLEMENTARITY

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This paper questions the rhetoric of complementarity between truth commissions and criminal courts in the light of the normalization of a "right to truth" in international legal discourse. Once regarded as mutually exclusive institutions, they are now praised by the international community, human rights and transitional justice advocates as complementary in the fight against impunity. This paper reveals, beyond the consensus on complementarity, how the competition between truth commissions and criminal justice continues as truth advocates strive to negotiate the contours of the "right to truth" in international law. First, it highlights the role of global promoters of the "right to truth" in consolidating the theory of complementarity before international bodies. However, it then stresses their competing visions of complementarity and examines the tensions surrounding the normalization of the "right to truth" in relation to criminal justice and amnesties. Finally, it discusses why these tensions are nonetheless accommodated through the discourse on complementarity, especially in the context of an emerging "truth order" and globalized truth "industry" characterized by the rise of new types of expertise, practices and truth-seeking technologies concerned with the ascertainment and adjudication of mass atrocities.

Cet article interroge la rhétorique de la complémentarité entre les tribunaux pénaux et les commissions de vérité à la lumière de la formalisation d'un « droit à la vérité » dans le discours du droit international. Autrefois perçus comme des dispositifs qui s'excluent mutuellement, ils sont aujourd'hui célébrés par la communauté internationale, ainsi que les militants des droits humains et de la justice transitionnelle, comme « complémentaires » dans la lutte contre l'impunité. Cet article révèle, au-delà du consensus sur la complémentarité, la perdurance de la compétition entre commissions de vérité et la justice pénale à mesure que les entrepreneurs de vérité s'efforcent de négocier les contours du « droit à la vérité » en droit international. Il met d'abord en lumière le rôle des promoteurs globaux du « droit à la vérité » dans la consolidation de la théorie de la complémentarité. Toutefois, il souligne ensuite leurs visions concurrentes de la complémentarité et examine les tensions qui entourent la formalisation du « droit à la vérité » par rapport à la justice pénale et aux amnisties. Enfin, il suggère les raisons pour lesquelles ces tensions sont néanmoins accommodées dans le discours de la complémentarité, en particulier dans le contexte de l'émergence d'une ère et d'une industrie globale centrées sur la « vérité », caractérisée par la montée de nouveaux types d'expertises, de pratiques et de technologies de recherche de vérité spécialisées dans l'établissement et le jugement des crimes de masse.

Este artículo cuestiona la retórica de la complementariedad entre los tribunales penales y las comisiones de la verdad a la luz de la formalización de un "derecho a la verdad" en el discurso del derecho internacional. Anteriormente visto como dispositivos que son excluyentes entre sí, ahora se celebran por la comunidad internacional, los activistas de derechos humanos y de la justicia transicional como "complementarios" en la lucha contra la impunidad. Este artículo revela, más allá del consenso sobre la complementariedad, la forma en que la competencia perdura entre las comisiones de la verdad y la justicia penal, mientras los defensores de la verdad se esfuerzan para negociar los contornos del "derecho a la verdad" en el derecho internacional. En primer lugar, se destaca el papel de promotores mundiales del "derecho a la verdad" en la consolidación de la teoría de la complementariedad ante los organismos internacionales. Sin embargo, a continuación se enfatizan sus visiones opuestas de la complementariedad y se examinan las tensiones en torno a la formalización del "derecho a la verdad" en relación con la justicia penal y las amnistías. Por último, se analiza por qué estas tensiones están siendo alojadas en el discurso de la complementariedad, en

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particular en el contexto de la emergencia de una época y de una industria global centradas en la "verdad", que se caracteriza por el aumento de nuevos tipos de conocimientos, prácticas y tecnologías de búsqueda especializados en el establecimiento de la verdad y el juicio de crímenes masivos.

The complementarity between criminal justice and Truth and Reconciliation Commissions (TRCs) presently belongs to the truisms of international legal discourse. Once regarded as mutually exclusive alternatives, they are now overwhelmingly praised by the United Nations (UN), human rights non-governmental organizations (NGOs) and scholars as “complementary” tools in the global fight against impunity. Before this paradigm shift, the mid-1990s witnessed the “Truth vs. Justice” debate on the best option for State crimes accountability, which radically opposed TRC supporters to those of criminal courts, whether domestic or international(ized). If TRCs were first discredited as a trade-off for justice in Latin American experiences,<sup>1</sup> the South African TRC and its “amnesty for truth” component popularized the model and its diffusion in post-conflict settings. In particular, its Chairman Archbishop Desmond Tutu recasted TRCs within a restorative justice framework and glorified them as superior models of justice.<sup>2</sup> On the one hand, proponents of TRCs vindicated that unlike adversarial trials, their proceedings were more focused on victims and led to their “healing”. Where trials generally focused on individual guilt, delivering partial accounts of past conflicts, TRCs generated more detailed historical records, thereby broadening responsibilities, preventing revisionist denials and ultimately fostering peace and reconciliation.<sup>3</sup> On the other hand, backers of retributive justice criticized TRCs as weak surrogates of justice prone to political manipulation,<sup>4</sup> both on the part of governments and perpetrators who appear to testify before them. According to them, TRCs promoted impunity rather than accountability, in addition to undermining trials as they soak up resources and divert the attention of the international community from retributive justice.<sup>5</sup> Also, TRCs treatment of victims and history, their methodology and their mixed results in terms of follow-up recommendations have been equally criticized.<sup>6</sup>

However, although a growing literature actually suggests that the merits of both institutions remain putative assumptions,<sup>7</sup> if not refuted by empirical studies,<sup>8</sup> the

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<sup>1</sup> Bronwyn Anne Leebaw, “The Irreconcilable Goals of Transitional Justice” (2008) 30:1 Hum Rights Q 95 [Leebaw].

<sup>2</sup> Desmond Tutu, *No Future Without Forgiveness* (New York: Doubleday, 1999). On this issue, see Sandrine Lefranc, “La professionnalisation d’un militantisme réformateur du droit : l’invention de la justice transitionnelle” (2009) 73 Droit & Société 561 at 561 [Lefranc].

<sup>3</sup> See generally Robert Rotberg & Dennis Thompson, eds, *Truth v. Justice : The Morality of Truth Commissions* (Princeton: Princeton University Press, 2000); Priscilla Hayner, *Unspeakable Truths : Confronting State Terror and Atrocity*, 1st ed (Abingdon: Routledge, 2002) [Hayner]; Martha Minow, *Between Vengeance and Forgiveness : Facing History after Genocide and Mass Violence* (Boston: Beacon, 1999).

<sup>4</sup> Paul Seils, “The Limits of Truth Commissions in the Search for Justice: An Analysis of the Truth Commissions of El Salvador and Guatemala and Their Effect in Achieving Post-Conflict Justice” in Cherif Bassiouni, ed, *Post Conflict Justice* (Ardsley, NY: Martinus Nijhoff, 2002) 775.

<sup>5</sup> Jonathan Tepperman, “Truth and Consequences” (2002) 81:2 Foreign Aff 128 [Tepperman]; Reed Brody, “Justice: The First Casualty of Truth?”, *The Nation* (30 April 2001) online: The Nation <<http://www.thenation.com/article/justice-first-casualty-truth/>> [Brody].

<sup>6</sup> Richard Wilson, *The politics of truth and reconciliation in South Africa: legitimizing the post-apartheid state* (Cambridge: Cambridge University Press, 2001) [Wilson].

<sup>7</sup> David Mendeloff, “Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?” (2004) 6:3 Int Stud Rev 355; Janine Natalya Clark, “Transitional Justice, Truth and Reconciliation: An Under-Explored Relationship” (2011) 11:2 Int Crim Law Rev 24.

respective strengths of each institution are no longer questioned and the issue of their incompatibility goes unchallenged in legal discourse. Once hostile towards each other, supporters of TRCs and courts have now entered a new anti-impunity era of cooperation dominated by the paradigm of complementarity, to the extent that the opposition between truth and justice is negated as a “debate of the past”<sup>9</sup> or a “false dilemma”.<sup>10</sup> However, as Michel Foucault stated: “le problème ce n’est pas de faire le partage entre ce qui, dans un discours, relève de la scientificité et de la vérité et puis ce qui relèverait d’autre chose, mais de voir historiquement comment se produisent des effets de vérité à l’intérieur de discours qui ne sont en eux-mêmes ni vrais, ni faux.”<sup>11</sup> While scholarship usually addresses how complementarity might operate between TRCs and courts,<sup>12</sup> this contribution is thus primarily concerned with how shifts in ideas and representations emerge. How did legal discourse evolve to accommodate once rival institutions as being mutually reinforcing, to the point that their congenital incompatibility has become unproblematic for most scholars, practitioners and policymakers?

Although the literature is replete with case studies on complementarity, less attention has been paid to the study of advocacy and professional mobilizations which have contributed to the institutionalization of the theory of complementarity between TRCs and courts in legal discourse. In particular, this critical socio-legal essay situates this paradigm shift in the light of legal mobilizations of the “right to truth” in international law. This new human right has featured in the context of the right to know the fate about victims of enforced disappearances and had a marginal

<sup>8</sup> Wilson, *supra* note 6; Brigittine French, “Technologies of Telling: Discourse, Transparency, and Erasure in Guatemalan Truth Commission Testimony” (2009) 8:1 J Hum Rights 92; Janine Natalya Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia* (Oxon: Routledge, 2014).

<sup>9</sup> Naomi Roht-Arriaza and Javier Mariezcurrena, *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (Cambridge: Cambridge University Press, 2006). But see Leebaw, *supra* note 1; William Schabas and Shane Darcy, eds, *Truth Commissions and Courts: The Tension Between Criminal Justice and the Search for Truth* (Dordrecht: Kluwer Academic, 2004) [Truth Commissions and Courts].

<sup>10</sup> See Kenneth Roth’s report in the panel “Peace and Justice”, Kampala review conference of the Rome Statute (Kampala, 31 May-11 June 2010), 7 June 2010, RC/ST/PJ/1 at para 4-5 (intervention by David Tolbert for ICTJ) and summary at para 29; ICTJ, Media Campaign, “Peace Versus Justice: A False Dilemma” (9 May 2011), online: ICTJ <[http://ictj.org/news/peace-versus-justice-false-dilemma?utm\\_source=Partners++International+Center+for+Transitional+Justice&utm\\_campaign=751fc92505-Peace\\_and\\_Justice\\_Video\\_Release5\\_10\\_2011&utm\\_medium=email](http://ictj.org/news/peace-versus-justice-false-dilemma?utm_source=Partners++International+Center+for+Transitional+Justice&utm_campaign=751fc92505-Peace_and_Justice_Video_Release5_10_2011&utm_medium=email)> (all web references were last consulted on 1 September 2015); Amnesty International, “Commissioning Justice” (April 2010), online: Amnesty International <<http://www.iccnw.org/documents/pol300042010en.pdf>> at 1-16 [Commissioning Justice]; Linda Keller, “The False Dichotomy of Peace versus Justice and the International Criminal Court” (2008) 3:1 Hague Justice Journal 12; Darryl Robinson, “Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court” (2003) 14:3 EJIL 481 at 484 and 504; Pierre Hazan, *La Paix contre la Justice ?* (Bruxelles: GRIP/André Versaille, 2010) at 117.

<sup>11</sup> Michel Foucault, “Vérité et pouvoir. Entretien avec M. Fontana” (1970) 70 L’Arc 16 at 21: “what matters is not to draw distinctions between what belongs in a discourse to science and truth on one hand, and the rest on the other, but rather to see *how truth effects are being historically produced in discourses that are per se neither true, nor false*” [personal translation, my emphasis]

<sup>12</sup> Alison Bisset, *Truth Commissions and Criminal Courts* (Cambridge: Cambridge University Press, 2012) [Bisset]; *Truth Commissions and Courts*, *supra* note 9.

development in UN discourse until 2004, which clearly coincides with the institutionalization of the theory of complementarity. As soon as 1997, Louis Joinet, UN Special Rapporteur on the question related to the impunity of perpetrators of human rights violations, mentioned in his *Set of Principles to Combat Impunity* [Joinet's Principles] that "[e]very people has the inalienable right to know the truth about past events and about the circumstances and reasons which led [...] to the perpetration of aberrant crimes".<sup>13</sup> However, the UN Human Rights Commission never endorsed his report. In addition, Joinet did not expressly mention "truth commissions". By bringing to the fore truth entrepreneurs' strategies of alignment and nonalignment regarding the cause of complementarity,<sup>14</sup> it argues that the debate on the competition between TRCs and courts has not expired: rather, it continues under more subtle forms, as illustrated by ongoing struggles to construct the contours of a "right to truth" in international legal discourse. To this end, the paper addresses the relationship between the ascent of the doctrine of complementarity and the concurring normalization of the "right to truth" under three aspects. First, it highlights the pivotal role of global promoters of the "right to truth" in crafting the theory of complementarity before international bodies, especially the UN (I). However, it then underlines their ambivalence towards complementarity as it unveils their preferences and turns to the tensions surrounding the formalization of the "right to truth" (II). Finally, it explores why these tensions are nonetheless accommodated through the discourse on complementarity and discusses the effects of the rise of a multifaceted "right to truth" in international legal discourse, especially in the context of an emerging truth "order" and globalized truth "industry" dominated by certain types of knowledge, truth-seeking technologies and practices concerned with the adjudication and ascertainment of mass atrocities (III). In doing so, this paper invites scholars to critically examine the discourse on complementarity as a product of deliberate advocacy strategies by truth activists, which are vested with particular interests in the advent of paradigm shifts in scholarship and practitioners' representations.

## I. Building Consensus: The "Right to Truth" as the Missing Piece of Complementarity

The institutionalization of a "right to truth" coincides with the institutionalization of the discourse of complementarity in UN bodies. From 2003 onwards, the "right to truth" has been mobilized within UN bodies by human rights defenders as a common legal ground for both TRCs and courts, although Joinet's

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<sup>13</sup> Louis Joinet, *Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)*, Revised Final Report Prepared by Louis Joinet Pursuant to Sub-Commission Decision 1996/119, UNCHR, 49<sup>th</sup> sess, UN Doc E/CN.4/Sub.2/1997/20/Rev.1 (1997), annex II, principle 1, at 16 [Joinet's *Set of Principles to Combat Impunity*].

<sup>14</sup> I use the term of "truth entrepreneurs" in reference to Martha Finnemore and Kathryn Sikkink's concept of "norm entrepreneurs". See Martha Finnemore and Kathryn Sikkink, "International Norms Dynamics and Political Change" (1998) 52:4 *International Organization* 887, at 896-99.

*Principles* mainly assigned the enforcement of the “right to justice” to criminal courts, and the “right to know” to “extrajudicial commissions of inquiry”.<sup>15</sup> This section outlines this alignment between TRCs and courts and shows how the doctrine of complementarity has benefited from these different mobilizations for the “right to truth”, who have sought to promote TRCs *or* courts as equally suited instruments to implement the “right to truth”. I first dwell on global advocates of transitional justice as an international professional practice to show how they have reframed TRCs as *legal* tools to combat impunity (A), before showing how supporters of criminal justice have similarly campaigned for the contribution of courts to the “right to truth” (B).

#### A.      **The Global Transitional Justice Project: Revisiting TRCs as Anti-Impunity Tools**

The refashioning of the relationship between the rights to truth and justice has been at the core of the mission of *The International Center for Transitional Justice* (ICTJ), the first professional NGO dedicated to the global promotion of transitional justice.<sup>16</sup> Founded in New York in 2001 with a dozen offices worldwide, ICTJ’s own definition of “transitional justice” enshrines the cause of complementarity, as it advocates a “holistic approach to justice” that includes judicial and non-judicial mechanisms to address legacies of massive human rights violations, alongside reparation programs and institutional reforms. However, its unique expertise lies with the design of TRCs and other truth-seeking programs, as described on its website:

ICTJ supports the work of truth commissions in 12 countries, working with governments, civil society, and the international community. We also facilitate and assist on several unofficial truth projects. We work with memorialization efforts to maximize their potential to educate and transform. We provide advice on the memorial design, commissioning and victim consultation.<sup>17</sup>

This general promotion of TRCs was not only a departure from previous governments which had set them up, but also from other human rights NGOs, as ICTJ initially explained:

While human rights organizations have traditionally focused on documenting violations and lobbying against abuse, the ICTJ was founded on the concept of *a new direction in human rights advocacy*: helping societies to heal by accounting for and addressing past crimes after a period

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<sup>15</sup> Joinet’s *Set of Principles to Combat Impunity*, *supra* note 13 at para 18 and principle 19. See however Diane Orentlicher, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity. Addendum*, UNCHR, 61<sup>st</sup> sess, UN Doc E/CN.4/2005/102/Add.1 (2005), principle 5 [Orentlicher’s *Updated Set of Principles*].

<sup>16</sup> Sandrine Lefranc and Frédéric Vairel, “The Emergence of Transitional Justice as a Professional International Practice” in Liora Israël and Guillaume Mouralis, eds, *Dealing with Wars and Dictatorships. Legal Concepts and Categories in Action* (The Hague: Asser Press/Springer, 2014), 235.

<sup>17</sup> ICTJ, “*Truth and Memory*”, online: ICTJ <<http://ictj.org/our-work/transitional-justice-issues/truth-and-memory>>.

of repressive rule or armed conflict.<sup>18</sup>

This therapeutic vision is related to the fact that ICTJ founders are former members of the South African TRC who benefited from its religious aura<sup>19</sup>: Alex Boraine, was its Vice-Chairman and Paul Van Zyl, its Secretary General. They associated with Priscilla Hayner, a Ford Foundation researcher who contributed to rationalizing TRC experiments into one model.<sup>20</sup>

Since its creation, ICTJ has successfully worked towards the international endorsement of TRCs. First, ICTJ has pursued a legal strategy to ground TRCs in international law in order to enhance their legitimacy. Before this, the creation of TRCs was justified by ideals of restorative justice or, more pragmatically, by rhetoric of reconciliation from governments keen to avoid trials for perpetrators who retained power. More generally, transitional justice initiatives in Latin America and Eastern Europe were barely discussed under legal arguments, but rather moral or political ones.<sup>21</sup> ICTJ claims this new orientation, noting: “[t]he Center will promote understanding and acceptance of the obligations of states in responding to rights violations, *especially those established in international law*.”<sup>22</sup> However, this strategy was also a response to initial accusations raised from within the human rights community by key players of the anti-impunity movement, especially *Human Rights Watch* (HRW). In particular, Kenneth Roth and Reed Brody vigorously opposed ICTJ’s project to diffuse TRCs worldwide, considering that they fostered a culture of impunity and fundamentally undermined the prospect of criminal justice.<sup>23</sup> According to them, “flawed compromises” to justice such as TRCs should no longer be supported following the creation of the International Criminal Court (ICC) in 1998 and the developments of universal jurisdiction as in “the Pinochet effect”.<sup>24</sup>

In response, ICTJ has used the “right to truth” as a resource to anchor TRCs in international law. Hence, it shows its interest to “advance the right to truth, and [provide] support and advice to truth and memory initiatives worldwide.”<sup>25</sup> Under the heading “Knowing the Truth is a Right”, ICTJ website notes that “[i]nternational law continues to develop in this area and on the concept of a society’s right to the truth.”

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<sup>18</sup> Pierre-Yves Condé, editorial note of the special issue “À l’épreuve de la violence, figures de la ‘justice transitionnelle’” (2009) 73:3 *Droit & Société* 549 at 554 [my emphasis].

<sup>19</sup> On this issue, see Wilson, *supra* note 6.

<sup>20</sup> Hayner, *supra* note 3.

<sup>21</sup> Paige Arthur, “How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice” (2009) 31:2 *Hum Rights Q* 321 at 336.

<sup>22</sup> See ICTJ, “Annual Report 2001-2002”, online: ICTJ <<http://ictj.org/reports>> [my emphasis]. See also Sara Dezalay, “Des droits de l’homme au marché du développement” (2008) 174:4 *Actes de la recherche en sciences sociales* 68 [Dezalay].

<sup>23</sup> Jonathan Tepperman, “Truth and Consequences” (2002) 81:2 *Foreign Affairs* 128; Brody, *supra* note 5.

<sup>24</sup> Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philadelphia: University of Pennsylvania Press, 2006).

<sup>25</sup> Visit e.g., ICTJ, “Truth and Memory”, online: ICTJ <<http://ictj.org/our-work/transitional-justice-issues/truth-and-memory>>.

The “right to truth”, although still under construction,<sup>26</sup> thus appears as a tailored solution to compensate TRCs legal vacuum in terms of foundations. The fact that the generic term now used is “truth commissions” and that the term “reconciliation” has been dropped indicates how these devices have espoused the contours of the “right to truth”.

Therefore, ICTJ has successfully permeated UN human rights organs to lobby for complementarity and reframe TRCs as *legal* devices to combat impunity. For instance, ICTJ has provided input to update Joinet’s *Principles to Combat Impunity* in 2004 which clearly present TRCs as privileged instruments to ensure the “right to truth”, while defending complementarity.<sup>27</sup> It also achieved the UN institutionalization of “transitional justice” and TRCs as generic post-conflict models of transition and useful complementary tools to criminal justice in the 2004 UN Secretary General (UNSG) report on transitional justice.<sup>28</sup> According to ICTJ President David Tolbert: “[i]t was a very rich report and a groundbreaking one, and everyone knew that ICTJ had been quite influential in shaping it behind the scenes.”<sup>29</sup> Indeed, from 2004 until 2007, Juan Méndez, one of the main architects of the theory of complementarity, was simultaneously ICTJ President and Kofi Annan’s special adviser for the prevention of genocide, which has led him to effectively advocate complementarity before the UN Security Council.<sup>30</sup> ICTJ was also the consultant of the UN Office of the High Commissioner on Human Rights (OHCHR) for Sierra Leone’s TRC and the Special Tribunal. Finally, following the Commission on Human Rights,<sup>31</sup> the OHCHR recognizes the “right to truth” as a legal foundation for TRCs in the first exclusive UN thematic report on TRCs, shaped by Priscilla Hayner for the ICTJ.<sup>32</sup> The legal development of the “right to truth” thus contributes to normalizing the field of transitional justice, and vice versa. Transitional justice initiatives are now *predominantly* justified as being mandated by international law and the “right to truth”, as evidenced by the 2010 UNSG *Guidance Note on United Nations Approach to Transitional Justice*.<sup>33</sup> The surge of TRCs now established in peace agreements

<sup>26</sup> Yasmin Naqvi, “The right to the truth in international law : fact or fiction ?” (2006) 88:862 *Int Rev Red Cross* 245.

<sup>27</sup> Orentlicher’s *Updated Set of Principles*, *supra* note 15; Diane Orentlicher, *Independent study on best practices, including recommendations, to assist States in strengthening their domestic capacity to combat impunity in all aspects*, UNCHR, 60<sup>th</sup> sess, UN Doc E/CN.4/2004/88 (2004) at paras 3 and 10; See also ICTJ, “Our Work: Policy relations”, online: ICTJ <<http://ictj.org/my/node/1961>>.

<sup>28</sup> *Report on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies. Report of the Secretary-General*, UNSCOR, 2004, UN Doc S/2004/616 at paras 26 and 50.

<sup>29</sup> ICTJ, “Transitions April 2011: An Inspiring Time” (April 2011), online: ICTJ <<http://ictj.org/transitions-april-2011>>.

<sup>30</sup> *Summary of the 5052<sup>th</sup> session*, UNSC, 5052<sup>th</sup> sess, UN Doc CoS/PV.5052 (2004) at 4-5.

<sup>31</sup> *The Right to Truth*, UNCHR RES 2005/66, UNCHROR, 61<sup>st</sup> sess, UN Doc E/CN.4/RES/2005/66 (2005); *Impunity*, UNCHR RES 2005/81, UNCHROR, 61<sup>st</sup> sess, UN Doc E/CN.4/RES/2005/81 (2005).

<sup>32</sup> Office of the United Nations High Commissioner on Human Rights (OHCHR), *Rule-of-Law Tools for Post-Conflict States: Truth Commissions* (New York/Geneva: United Nations, 2006) [OHCHR/Hayner].

<sup>33</sup> *Guidance Note of the UNSG, “United Nations Approach to Transitional Justice”* (March 2010) at 4 and 8, online: United Nations Rule of Law <[http://www.unrol.org/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf)>.

suggests that international law provides a more neutral framework to justify their creation than empirically controversial moral claims on their virtues for victims and societies. Hence, the “principle” of complementarity now underpins the transitional justice framework endorsed by international institutions.

## B. Criminal Justice Advocates: Recasting Courts as Guarantors of the “Right to Truth”

Just as promoters of TRCs have insisted on how truth contributes to retributive justice, supporters of international criminal justice have simultaneously insisted on the contribution of the latter to truth by re-characterizing Courts as equally natural purveyors of the “right to truth”. Two examples illustrate this re-appropriation of the “right to truth” as encompassing international criminal justice practices. In 2006, the UN High Commissioner for Human Rights (OHCHR), Louise Arbour – former ICTY and ICTR Prosecutor – issued the first UN comprehensive study of the “right to truth” in international law. It clearly situates the concept within the pole of the “right to justice” and emphasizes the role of national and international(ized) criminal tribunals in upholding the “right to truth”.<sup>34</sup> It was officiously written by Federico Andreu-Guzmán, a human rights defender of the *International Commission of Jurists*<sup>35</sup> and leading architect of the “right to truth” in the context of the struggle against enforced disappearances and impunity. His previous mobilizations already vindicated for a “right to truth” enforced through *courts* to urge the prosecution of perpetrators of gross human rights violations, whether at the Inter-American Court of Human Rights<sup>36</sup> or within the drafting Group of the *International Convention for the Protection of All Persons from Enforced Disappearance*.<sup>37</sup>

More generally, international criminal justice practitioners increasingly vindicate their role in enforcing the “right to truth” – including in its collective dimension<sup>38</sup> – to the dismay of TRCs promoters.<sup>39</sup> For instance, a few ICC pre-trial judges have recognized victims’ “right to truth” to expand their participation rights at

<sup>34</sup> OHCHR, *Study on the right to truth*, UN CHR, 62<sup>nd</sup> sess, UN Doc E/CN.4/2006/91 (2006) at paras 47, 48 and 61 [OHCHR, *Study on the right to truth*].

<sup>35</sup> See online: International Commission of Jurists <<http://www.icj.org/>>.

<sup>36</sup> See International Commission of Jurists, *Amicus curiae submitted to the Inter-American Court of Human Rights in the case of Efraín Bámaca Velásquez vs Guatemala* (27 June 2000), reprinted in (2009) 129 *Revue de la Commission internationale de juristes* at 54-56 and 62-63.

<sup>37</sup> International Commission of Jurists (Federico Andreu-Guzmán), *Aide mémoire on the right to know and enforced disappearance* (2001), distributed to the group participants during the first two sessions of the WG (archives from the UN Office at Geneva).

<sup>38</sup> Following its resolution 9/11, see UN Human Rights Council (UNHRC), *Panel on the right to truth*, Geneva, 9 March 2010, the statement of Dermot Groome (attorney at ICTY Office of the Prosecutor) [UNHRC, *Panel on the right to truth*].

<sup>39</sup> See ICTJ’s campaign “Can we Handle the Truth?” launched on the 2<sup>nd</sup> anniversary of the International Right to Truth Day, online: ICTJ <<http://ictj.org/gallery-items/rights-truth>>, and especially the section on judicial truth “Judgments in cases of mass human rights abuse do not purport to provide a comprehensive historical record of the conflict or repression within which the crimes examined have occurred”, online: ICTJ <<http://ictj.org/gallery-items/judicial-truth>>.

the pre-trial stage.<sup>40</sup> In particular, Judge Sylvia Steiner recognized victims' interest to participate in pre-trial hearings on the issue of guilt or innocence of indicted persons, to oppose the prosecutor and defense attempts to exclude victims from such proceedings. However, the judgment deliberately avoids taking a stance on complementarity and whether the rights to truth and justice can be enforced through "mechanism alternative to criminal proceedings".<sup>41</sup> In contrast, certain TRC practitioners have stated that TRCs may be better suited than courts to enforce the "right to truth".<sup>42</sup> For instance, the report of the Sierra Leone TRC contends that "[j]ust as the Commission may address the 'right to truth' component of the struggle against impunity better than the Special Court for Sierra Leone, the contrary may be the case with respect to the 'right to justice' component."<sup>43</sup> Meanwhile, the functions of the "right to truth" have espoused the claims of what trials and TRCs could accomplish: reconciliation, healing, deterrence, strengthening of the rule of law, victims' catharsis, etc.<sup>44</sup> While mobilizations of the "right to truth" have thus facilitated the rise of the discourse on complementarity, the latter has also been useful to consolidate the recourse to the courts and TRCs in post-conflict settings. However, as one navigates through the discourse on complementarity, truth entrepreneurs paradoxically continue to hold preferences for *either* Courts *or* TRCs as responses to the fight against impunity, which explains their ambiguity and misalignment on certain debates.

## II. The Ambivalence of Truth Entrepreneurs Towards Complementarity

Despite the consensus on complementarity, a closer scrutiny of mobilizations of the "right to truth" rather reveals continuing frictions between proponents of TRCs and those of criminal justice regarding the content of the "right to truth" (A) and the type of complementarity envisioned in relation to amnesties and the ICC (B). As I will argue next, the doctrine of complementarity comes closer, in certain aspects, to a *modus vivendi* between competing visions of the "right to truth", rather than a

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<sup>40</sup> *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-474, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case (13 May 2008) at paras 31-36 (ICC, Preliminary Chamber I) [ICC, Katanga & Ngudjolo, 13 May 2008].

<sup>41</sup> *Ibid* at para 33 and 40.

<sup>42</sup> UNHRC, *Panel on the right to truth*, *supra* note 38, intervention by Yasmin Sooka at 6 according to whom by denying the request of indicted persons to appear before the TRC "[t]he Special Court (...) did not explore the right to the truth for victims and Sierra Leone society".

<sup>43</sup> *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, vol. 1 (Freetown: Sierra Leone Truth & Reconciliation Commission, 2004) at § 80 [*Witness to Truth: Report of the Sierra Leone TRC*].

<sup>44</sup> UNHRC, Pablo de Greif's *Report of UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, UNHRC, 24<sup>th</sup> sess, UN Doc A/HRC/24/42 (2013) at paras 20 and 90 [*Report of Special Rapporteur on the promotion of truth, justice, reparation*].

commonly shared goal among truth activists, which in turn begs the question of whether this theory is more than a convenient expedient to elude these tensions (C).

#### A. Conflicts over Content: Is Truth Extensible to the Identity of Perpetrators?

The first example of tensions underlying the formalization of the “right to truth” is illustrated by its diverging definitions put forward by advocates of TRCs and trials. The controversy about TRCs “naming names” has inevitably protracted in another debate: whether the “right to truth” includes victims’ right to know the identity of the alleged perpetrators of human rights violations. On this issue, the reports of OHCHR seem inconsistent. On one side, Guzmán’s report includes it as a core element of the “right to truth” as follows:

The right to the truth implies knowing the full and complete truth as to the events that transpired, their specific circumstances, *and who participated in them*, including knowing the circumstances in which the violations took place, as well as the reasons for them.<sup>45</sup>

This approach is also endorsed by the IACtHR and ICC pre-trial judge Sylvia Steiner, who considered that “the victims” core interest in the determination of the facts, *the identification of those responsible* and the declaration of their responsibility is at the root of the well-established right to the truth for the victims of serious violations of human rights.<sup>46</sup> Second, it raises the difficulties of upholding the “right to truth” by TRCs in relation to the identity of the perpetrators, as follows:

if the right to the truth is addressed in the frame of criminal judicial procedures or after the determination of criminal responsibilities by a tribunal, there is no conflict between the right to the truth and the principle of the presumption of innocence. *There is a potential problem, nevertheless, where perpetrators are named pursuant to an extrajudicial mechanism, such as a truth commission, given that not all truth-seeking processes apply due process guarantees.*<sup>47</sup>

Guzmán’s preference for criminal courts seems clear. Even if he equally acknowledges the impact of TRCs on the development of the “right to truth”, he seems more cautious with their use when he asserts that “experiences show they are frequently subject to greater constraints”.<sup>48</sup> The study further marginalizes TRCs compared to courts as it sheerly omits them under the section analyzing the collective dimension of the “right to truth”.<sup>49</sup> Overall, Guzmán’s study primarily seems to favour a vision of the “right to truth” as a judicial truth enforced through criminal justice institutions and encompassing the identity of the perpetrators. This is

<sup>45</sup> OHCHR, *Study on the right to truth*, *supra* note 34 at para 3 [my emphasis].

<sup>46</sup> ICC, Katanga & Ngudjolo, 13 May 2008, *supra* note 40 at para 32 [my emphasis].

<sup>47</sup> OHCHR, *Study on the right to truth*, *supra* note 34 at para 39 [my emphasis].

<sup>48</sup> *Ibid* at para 50.

<sup>49</sup> *Ibid* at para 36.

confirmed when he pleads for an absolute “non-derogable right” while he writes that “[a]mnesties or similar measures [...] must never be used to limit, deny or impair the right to the truth”.<sup>50</sup>

In contrast, if ICTJ/Hayner’s report on TRCs encourages complementarity, it does not go as far as stretching “truth” to the identity of the perpetrators. On the contrary, it defends that “[t]here are legitimate reasons why a commission may choose not to name the wrongdoers or to name only those most responsible or most senior in the chain of command”.<sup>51</sup> It also concludes that “[t]o allow flexibility, the best practice is for a truth commission’s terms of reference to *allow but not require the identification of perpetrators*, leaving the matter to the discretion of the commission.” TRCs are, indeed, not generally mandated to investigate individualized guilt,<sup>52</sup> and rather focus on assigning broader institutional responsibilities.

The General Observation of the UN Working Group on Enforced or Involuntary Disappearances (WGEID) on the “right to truth” further illustrates how these tensions are negotiated, as it draws a distinction between *absolute* non-derogable elements of the right’s content (the fate of the victims and their whereabouts) and *relative* elements subject to exceptions, when it writes:

The right to know the truth about the circumstances of the disappearance, in contrast, is not absolute. State practice indicates that, in some cases, hiding parts of the truth has been chosen to facilitate reconciliation. In particular, the issue whether the names of the perpetrators should be released as a consequence of the right to know the truth is still controversial.<sup>53</sup>

Referring specifically to TRC proceedings, the WGEID thus justifies limitations to courts as instruments enforcing the “right to truth”, although it ultimately denies that this limitation on the “right to truth” affects the “right to justice”. It alleges that the decision not to publicly name perpetrators does not prevent any prosecutions. In any case, this legal artifact shows the limits of a “two-track evolution” of “the right to truth” and how tensions linked to separate paths of development are formally reconciled in the legal realm.

## **B. “Complementarity” as Cohabitation or (Temporary) Exclusion?**

A second example of ongoing tensions between TRC supporters and those of criminal justice lies within the type of complementarity they have pressed for before

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<sup>50</sup> See also *ibid* at para 60.

<sup>51</sup> OHCHR/Hayner, *supra* note 32 at 22.

<sup>52</sup> A notable exception is El Salvador’s Truth Commission. On the difficulties raised by these issues, see Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge: Cambridge University Press, 2011), chapter 7.

<sup>53</sup> Working Group on Enforced or Involuntary Disappearances, “General Comment on the Right to Truth in Relation to Enforced Disappearance” in *Report of the Working Group on Enforced or Involuntary Disappearances*, UNHRC, 16<sup>th</sup> sess, UN Doc A/HRC/16/48 (2011), at paras 8 and 39 [WGEID, *General Comment on the Right of Truth*].

international institutions. On the one hand, as previously mentioned, ICTJ was a fierce defender of complementarity before the UN Security Council as a principle of non-interfering cohabitation between Courts and TRCs, as in Sierra Leone where both operated simultaneously. However, on the other hand, it has pressed for a specific interpretation of complementarity before the ICC, which prioritizes TRCs over prosecutions. The principle of “complementarity” in the Rome Statute has a specific meaning and initially refers to a principle of jurisdiction between the ICC and *national criminal courts*, not TRCs.<sup>54</sup> It initially meant that the ICC would only intervene if domestic courts were unwilling or unable to do so. Since the creation of the ICC, many backers of truth commissions, including those formerly involved in the South African TRC, feared that the Court would interpret its mandate as foreclosing the use of truth commissions.<sup>55</sup> This has led supporters of TRCs, including the ICTJ, to lobby the ICC Prosecutor’s Office in two ways. First, it recasted complementarity as a principle of non-intervention of the ICC, equally applicable between TRCs and the Court.<sup>56</sup> Second, it presented TRCs as valuable mechanisms of justice under Article 53(2)(c) of the ICC Statute, which provides that the Prosecutor can decline to open an investigation if he deems that “[a] prosecution is not in the interests of justice”. For instance, Marieke Wierda, then ICTJ Director of the prosecutions program, urged the Prosecutor to *defer* prosecutions to respect the operation of a truth commission, as she declared:

In determining what is in the interests of justice, we [the ICTJ] would ask that the Office of the Prosecutor consider the totality of the justice mechanisms, which are operating in any particular context. *Although it is unlikely that a transitional justice policy without prosecutions would be considered adequate, this possibility should not be entirely dismissed.* It may, for instance, be that a country may currently only be able to sustain a commission of inquiry or a truth commission, but that these will make possible a domestic prosecution in the future.<sup>57</sup>

The excerpt shows that ICTJ thus campaigned the Prosecutor to bar a criminal investigation to avoid impeding on a TRC’s work, alongside many other

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<sup>54</sup> See *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002), art 1, 17; William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010) at 659 and 31; ICC Office of the Prosecutor [OTP], “Paper on some policy issues before the Office of the Prosecutor” (September 2003) at 4, online: ICC <[http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905\\_policy\\_paper.pdf](http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf)>.

<sup>55</sup> Alex Boraine, *A Country Unmasked: Inside South Africa’s Truth and Reconciliation Commission* (Oxford: Oxford University Press, 2000) at 482; Charles Villa-Vicencio, “Why Perpetrators Should not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet” (2000) 49 *Emory Law Journal* 205.

<sup>56</sup> See OHCHR/Hayner, *supra* note 32 at 27-28.

<sup>57</sup> Oral statement by Marieke Wierda, transcript of the public audience of the ICC OTP, The Hague (17-18 June 2003) at 2, online: ICC <[https://www.icc-cpi.int/iccdocs/asp\\_docs/library/organs/otp/ph/030714\\_otp\\_ph1s1\\_Marieke\\_Wierda.pdf](https://www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/ph/030714_otp_ph1s1_Marieke_Wierda.pdf)> [emphasis is mine]; see also OHCHR/Hayner, *ibid* at 28.

commentators.<sup>58</sup> This illustrates on the part of ICTJ an understanding of complementarity that prioritizes TRCs over criminal justice. In the OHCHR *Rule-of-Law Toolkit for TRCs*, Hayner equally presents them as catalysts for criminal justice and insists on the usefulness of information gathered by TRCs, as she writes:

Generally, a truth commission should be viewed as complementary to judicial action. Even where prosecutions are not immediately expected, it is important to keep that option open, and to act accordingly. Possibilities for prosecution may open up in time, and the commission's report and its other records might then be important as background materials and to provide leads to witnesses.<sup>59</sup>

This rhetoric is efficient insofar as it allows to justify *in abstracto* the interest of TRC reports and archives for future criminal justice options. It is also paradoxical, as Hayner further suggests the granting of immunity, “whereby individuals can be assured that information they provide will not be used against them in any criminal proceeding”, as incentives to testify before TRCs.<sup>60</sup> Second, it allows minimizing the failure of ICTJ's own orchestration of the relationship between the TRC and the Special Court in Sierra Leone, especially in terms of the refusal of cooperation.<sup>61</sup> Finally, the ICC Office of the Prosecutor (OTP) has eventually adopted this approach in its 2007 Policy Paper on the Interests of Justice.<sup>62</sup>

Noting that the contemporaneous operation of TRCs and trials “has given rise to tension”, Alison Bisset notes three areas of conflict: the reluctance of certain witnesses and perpetrators to testify before the TRC for fear that information will be passed on to prosecutorial authorities; the discrepancy between the TRC interests in non-disclosure of information and those of prosecutors in accessing all information; and finally, the need for prosecutors to protect the rights of accused persons to a fair trial and against self-incrimination, and the overall objective of TRCs in having people sharing their accounts publicly.

In any case, this postponement of immediate criminal justice, motivated by the potential usefulness of TRCs for the latter, is rendered acceptable to many anti-impunity fighters sensitive to flexible responses to mass atrocities, as it reconceptualizes prosecutions within the realm of a horizon of justice that starts to materialize with TRCs. It further suggests that the ICC Prosecutor should assess a State's unwillingness to prosecute *following the conclusions of a TRC*, instead of interpreting the establishment of a TRC as a State response for eluding justice.

However, ICTJ's vision of complementarity with TRCs as forerunners to trials is precisely rejected by the Inter-American Court of Human Rights (IACtHR)

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<sup>58</sup> The doctrine on this issue is well known: see works cited in Bisset, *supra* note 12, ch 4 at notes 13, 23 and 31.

<sup>59</sup> OHCHR/Hayner, *supra*, note 32 at 27.

<sup>60</sup> *Ibid* at 10.

<sup>61</sup> On this issue, see *Witness to Truth: Report of the Sierra Leone TRC*, *supra* note 43, vol 3 B, 5, chapter VI at 363-430.

<sup>62</sup> OTP, “Policy Paper on the Interests of Justice”, (Sept. 2007) at 7-8, online: ICC <[https://www.icc-cpi.int/iccdocs/asp\\_docs/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf](https://www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf)>.

when States justify their delay in prosecuting perpetrators by setting up a TRC instead of undertaking immediate pursuits. The IACtHR refuses to consider that States would fulfill their duty to investigate gross abuse in doing so, as it assimilates promises that trials will follow the conclusions of a TRC to excuse and avoidance strategy to perpetuate impunity and shield the perpetrators from prosecution.<sup>63</sup> Hence, the Court's vision of complementarity prioritizes prosecutions over TRCs.<sup>64</sup> In contrast, ICTJ welcomed the Brazilian TRC announced by Rousseff's government in 2011, although this decision was a response to Brazil's condemnation by the IACtHR regarding the maintaining of amnesties which continue to prevent the prosecution of former military officials.<sup>65</sup>

These diverging visions of complementarity are also reflected in tensions among truth entrepreneurs about the interplay between the "right to truth" and amnesties. TRC supporters are generally more flexible towards amnesties, as the majority of TRCs has operated side-by-side with amnesties, whether legal or *de facto*.<sup>66</sup> If the IACtHR has recognized the "right to truth" under the "right to justice", using it as a bar to amnesties,<sup>67</sup> other bodies have also used the "right to truth" as the barometer of the legality and acceptability of amnesties to *justify* certain types of amnesties. For instance, the WGEID stance on amnesties illustrates the dilemmas of complementarity and the ambivalence of supporters of TRCs in relation to amnesties for authors of forced disappearances,<sup>68</sup> as it recognizes that "the realization of the right to the truth may in exceptional circumstances result in limiting the right to justice".<sup>69</sup> On the one hand, it mobilizes "the right to truth" to proclaim amnesties incompatible if, *inter alia*, they lead to "[c]oncealing the names of the perpetrators of disappearance, thereby violating the right to truth".<sup>70</sup> However, on the other hand, the WGEID allows amnesties and measures of clemency "when States consider it necessary to enact laws aimed to elucidate the truth and to terminate the practice of enforced disappearance".<sup>71</sup> In short, the "right to truth" is used to *justify* conditional and individualized amnesties and measures of leniency. This example shows how the

<sup>63</sup> *Zambrano Case (Ecuador)* (2007), Inter-Am Ct HR (Ser C) No 166, at para 129.

<sup>64</sup> On this issue, see Laurence Burgorgue-Larsen and Amaya Ubeda de Torres, *Les grandes décisions de la Cour interaméricaine des droits de l'homme* (Bruxelles: Bruylant, 2008); Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford: Oxford University Press, 2009).

<sup>65</sup> ICTJ, Press Statement, "Brazilian Truth Commission Has Historic Responsibility" (11 May 2012), online: ICTJ <<http://ictj.org/news/brazilian-truth-commission-has-historic-responsibility>>.

<sup>66</sup> Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Oxford: Hart Publishing, 2008) at 168.

<sup>67</sup> See the following cases of the Inter-American Court of Human Rights: *Barrios Altos Case (Peru)* (2001), Inter-Am Ct HR (Ser C) No 87, at para 43; *Gomes Lund et al. (Guerrilha do Araguaia) Case (Brazil)* (2010), Inter-Am Ct HR (Ser C) No 219 [*Gomes Lund Case*]; *Almonacid Arellano et al. Case (Chile)* (2006), Inter-Am Ct HR (Ser C) No 154; *Gelman Case (Uruguay)* (2011), Inter-Am Ct HR (Ser C) No 154.

<sup>68</sup> WGEID, "Disappearances, Amnesty and Impunity: General Comment on Article 18 of the Declaration on the Protection of all Persons from Enforced Disappearance", *Report of the Working Group on Enforced or Involuntary Disappearances*, UNCHR, 62<sup>nd</sup> sess, UN Doc E/CN.4/2006/56 (2005) at para 49 [WGEID, *General Comment on Disappearance, Amnesty and Impunity*].

<sup>69</sup> WGEID, *General Comment on the Right of Truth*, *supra* note 53 at para 7.

<sup>70</sup> WGEID, *General Comment on Disappearance, Amnesty and Impunity*, *supra* note 68 at para 2 (c).

<sup>71</sup> WGEID, *General Comment on the Right to Truth*, *supra* note 53 at para 8. See also para 4.

legal language tries to reconcile heterogeneous logic since it reflects how the “right to truth” may be used as leverage for both combating and justifying impunity, just as governments do most generally.<sup>72</sup>

Although all these visions of the “right to truth” are not entirely incompatible, I have thus demonstrated that the discourse on complementarity nevertheless perpetuates conflicts between truth supporters that are ultimately reflected in the legal construction of the “right to truth”. Despite this persisting competition between advocates of TRCs and of criminal justice, why have both camps subscribed to the doctrine of complementarity between these different and sometimes antagonist visions of a “right to truth”?

### C. “Truth and Justice Underway”: Faith or Rhetorics?

In 2010, the ICC Prosecutor finally ended speculation about his treatment of TRCs and adopted a policy of “positive complementarity”<sup>73</sup> in Kenya, allowing simultaneous room for the ICC, national courts and TRCs alike in order to close the “impunity gap” according to differentiated levels of responsibilities.<sup>74</sup> This “inclusive approach” of complementarity was further discussed at the Kampala conference review of the Rome Statute<sup>75</sup> and finally aligns with the vision shared by the UN human rights bodies. On a more pragmatic level, the ideology of complementarity appears as a “win-for-all” theory for actors of transitional justice and criminal justice. It transforms the “right to truth” into a perfect norm as it allows legitimating any solution according to the political context and *realpolitik*, while it overlooks tensions between TRCs and trials. This flexibility is now defended by all actors involved in the fight against impunity. As both TRCs and international criminal courts have suffered from discredit as to their real achievements, complementarity is paramount to assume the limits and shortcomings of each other’s mandate. In this respect, the ideology of complementarity appears as a safeguard for the ICC prosecutor against criticism related to the poor number of cases investigated, their selectivity, and most fundamentally, the fragility of its fact-finding competences. Likewise, it spares TRCs from accusations of fostering impunity as they are now re-conceptualized as a “first step” towards a purportedly ever-materializing path towards “full” justice or “full” complementarity. States can, on their part, pledge their commitment to the fight against impunity by establishing TRCs, while delaying prosecutions. The yearning for

<sup>72</sup> See States intervention at the UNHRC, *Panel on the right to truth*, *supra* note 38.

<sup>73</sup> OTP, “Report on Prosecutorial Strategy” (14 September 2006) at 4-5, online: ICC <[https://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914\\_English.pdf](https://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf)>; OTP, “Prosecutorial Strategy: 2009-2012” (1 February 2010) at 4-5, online: ICC <<https://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf>>.

<sup>74</sup> OTP, “OTP Weekly Briefing n° 20” (12-18 January 2010), online: <[https://www.icc-cpi.int/NR/rdonlyres/BEDF7DF7-76FD-4116-8D08-A92E2454CC9A/281459/OTPWBJanuary\\_Issue20.pdf](https://www.icc-cpi.int/NR/rdonlyres/BEDF7DF7-76FD-4116-8D08-A92E2454CC9A/281459/OTPWBJanuary_Issue20.pdf)> at para g.

<sup>75</sup> Assembly of States Parties to the ICC, *Report of the Bureau on Stocktaking: Complementarity*, ICC ASP, 8th sess, ICC Doc ICC-ASP/8/51 (2010) at 7, para 25.

a “maximalist” vision of the “right to truth” thus compensates the limitations of each institution, especially since its horizon of enforcement can be ever-deferred, according to the evolution of political possibilities.

Obviously, the theory of complementarity is not only an expedient to elude the competition between different promoters of the “right to truth”. Nor is it a purely cynical rhetoric from governments. What unites most transitional justice activists is a sincere faith that all options can strengthen each other over time. This shared belief in a “March of History” towards the end of impunity,<sup>76</sup> despite contrary empirical evidence of widespread impunity,<sup>77</sup> commonly fuels the advocacy of human rights defenders. In the writings of complementarity advocates, the “success story” of Argentina, which has reopened trials against military officers of the *junta*, 20 years after amnesty laws were passed, tends to be interpreted as a consequence of the National Commission on the Disappeared.<sup>78</sup> Although only a relatively small number of countries have held trials after a TRC, complementarity believers tend to purport a causal relationship between the existence of a TRC and the arising of prosecutions later in time.<sup>79</sup> This causal lens leads to flawed reasoning that attributes eventual trials to TRCs rather than broader and more significant factors such as a change in the political context.

Disregarding the beliefs of anti-impunity fighters, and further moving away from the assumption that actors’ behaviour is guided by legal norms,<sup>80</sup> the next section also pinpoints broader stakes in endorsing the theory of complementarity.

### III. The Politics of Complementary Truths: Towards a New Truth Order?

The institutionalization of the “right to truth”, TRCs and transitional justice are only a few indicators of an anti-impunity turn, which radically transforms the way atrocities are thought and administered. What are the broader effects of the consecration of a multifaceted “right to truth” in international discourse, and what does the rhetoric of complementarity allow? This part elaborates on other social and economic dimensions of the doctrine of complementarity to show that its endorsement is also guided by various *rationale* at the intersection of advocacy, professional and

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<sup>76</sup> Diane Orentlicher, “*Settling Accounts*’ Revisited: Reconciling Global Norms with Local Agency” (2007) 1:1 Int J Transitional Justice 10 at 22 [Orentlicher (2007)].

<sup>77</sup> Even the reports of UN Special Rapporteur Pablo De Greiff acknowledge this: “*In practice, only a fraction of those who bear responsibility for violations are ever even investigated.*” *Report of the Special Rapporteur on the promotion of truth, justice, reparation, supra* note 44 at para 24.

<sup>78</sup> Orentlicher (2007), *supra* note 76 at 22; Jo Pasqualucci, “The Whole Truth and Nothing but the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System” (1994) 12 Boston Univ Int Law J 321.

<sup>79</sup> See Commissioning Justice, *supra* note 10.

<sup>80</sup> Pierre Bourdieu, “La force du droit. Éléments pour une sociologie du champ juridique” (1986) 64:1 Actes de la recherche en sciences sociales 3-19.

routinized logics.<sup>81</sup> The next sections suggest that the politics of complementary truths globally benefit anti-impunity stakeholders as they enter a new “truth era” characterized by a flourishing truth market about how to document mass atrocities (A), which also opens up new avenues for activism (B), along with new career prospects (C).

### A.      **Knowledge/Power: A Globalized Truth Industry for New Epistemologies**

The advent of a new “age of truth” is deeply intertwined with the institutionalization of emerging forms of knowledge specialized in the ascertainment of “truth” relating to mass atrocities. This new “truth order” feature a few characteristics.

First, these practices are materially valuable on the globalized truth and memory market devoted to documenting State violence, whether in the form of TRCs, trials, memorials, museums, archive centers or new technologies.<sup>82</sup> The cause of complementarity thus sustains and coincides with a prosperous truth industry, which has thrived since the anti-impunity turn of the international community. However, unlike the 1990s, the impetus for creating TRCs now derives more from international institutions and aid donors than from governments in search of alternatives to trials.<sup>83</sup> International policy-makers, multilateral agencies, aid donors and NGOs set the demand for truth by pressuring governments in the global South, while countless actors specialized in “truth technologies” offer expert consulting services to assist victims, local activist groups and governments in dealing with mass crimes. These goods circulate internationally as truth agents import and export them in post-conflict societies with the help of regional networks, using a common therapeutic frame<sup>84</sup> centred on the “universal” and consensual figure of suffering victims.<sup>85</sup> Massive public and private capital flows are injected in this market, which unfolds at the intersection of various overlapping fields that have re-appropriated the question of impunity: human rights, transitional justice, development, peace-building and post-conflict management. As Jonathan Tepperman observed in 2002, regarding the

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<sup>81</sup> See also Patricia Nafali, “Crafting a ‘Right to Truth in International Law: Converging Mobilizations, Diverging Agendas?” (2015) *Champ pénal* (special issue coordinated by Julien Pieret and Marie-Laurence Hébert-Dolbec, eds, *La justice pénale internationale comme projet critique*).

<sup>82</sup> On the merchandizing of memory in Latin America and the concept of “memory market”, see Ksenija Bilbija and Leigh Payne, eds, *Accounting for Violence: Marketing Memory in Latin America* (Durham, NC: Duke University Press, 2011). On the industry of reconciliation from the South African TRC experience, see Claire Moon, *Narrating Political Reconciliation: South Africa’s Truth and Reconciliation Commission* (New York: Lexington Books, 2009).

<sup>83</sup> Nicole Fritz, “Made to Order? Transitional Justice Initiatives in the Developing World, or the Truths We Should be Telling” in Christopher Eisgruber & Andras Sajo, eds, *Global Justice and the Bulwarks of Localism in Human Rights Context* (Leiden: Martinus Nijhoff Publishers, 2005), 317-331 [Fritz].

<sup>84</sup> Claire Moon, “Healing past violence: traumatic assumptions and therapeutic interventions in war and reconciliation” (2009) 8:1 *J Hum Rights* 71.

<sup>85</sup> Tshepo Madlingozi, “On Transitional Justice Entrepreneurs and the Production of Victims” (2010) 2:2 *J Hum Rights Pract* 208; Sandrine Lefranc and Lilian Mathieu, eds, *Mobilisations de victimes* (Rennes, Presses universitaires de Rennes, 2009).

worldwide dissemination of TRCs, “[t]he truth business [...] is booming.”<sup>86</sup> A decade later, this assertion is truer than ever.<sup>87</sup>

These international agents of a globalized truth industry create the local demand in various ways. They build networks between Northern experts and southern elites as well as religious community-based organizations in order to organize local workshops and campaigns in conflict-ridden societies to acclimatize local policy-makers and civil society groups to truth-seeking endeavors experimented abroad.<sup>88</sup> For instance, in the wake of the Arab Spring revolutions, ICTJ’s media campaigns promoted “broader justice strategies” than trials in Arab media.<sup>89</sup> This top-down approach is even more salient as INGOs increasingly tend to assist the drafting of domestic legislations to incorporate truth regimes. For instance, in Tunisia, ICTJ helped to pass a “Law on Transitional Justice” in 2013, which provides for the creation of a “Truth and Dignity Commission” alongside special chambers to try former leaders, as well as a “Ministry for Human Rights and Transitional Justice”.<sup>90</sup> Although international human rights NGOs insist on avoiding a “one size fits all” approach, they contribute to the standardization of truth mechanisms as they provide expertise and guidelines for their design.<sup>91</sup>

This truth business has a promising future ahead as the notion of transitional justice further dilutes to overstretch to additional fields such as aid and development,<sup>92</sup> which in turn provide additional material and symbolic resources.<sup>93</sup> ICTJ has successfully lobbied the World Bank to include transitional justice as part of the international agenda of development,<sup>94</sup> so that aid is increasingly conditioned to

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<sup>86</sup> Tepperman, *supra* note 5 at 129.

<sup>87</sup> Kimberly Theidon, “Editorial Note”, (2009) 3:3 Int J Transitional Justice 295; Fritz, *supra* note 83.

<sup>88</sup> See Anna Di Lellio and Caitlin McCum, “Engineering Grassroots Transitional Justice in the Balkans: The Case of Kosovo” (2013) 27:1 East European Politics & Societies 129.

<sup>89</sup> Paul Veils/ICTJ, “International Justice Day: Accountability breeds dignity” (opinion), *Al Jazeera newspaper* (17 July 2012), online: Al Jazeera <<http://www.aljazeera.com/indepth/opinion/2012/07/2012716105920997156.html>> “[W]e should not limit our focus to the work of the court or criminal justice as such. It is vital we have a wider conception of how justice can be achieved in the aftermath of atrocities...”.

<sup>90</sup> Tunisian Republic, *Loi organique relative à l’instauration de la justice transitionnelle et à son organisation* (December 2013), art 8 and 16 respectively.

<sup>91</sup> OHCHR/Hayner, *supra* note 32; Amnesty International, “Truth, justice and reparation: Establishing an effective truth commission” (June 2007), online: Amnesty International <<https://www.amnesty.org/en/documents/POL30/009/2007/en/>> [Amnesty International, *Truth, justice and reparation*]; Amnesty International, “Checklist for the establishment of an effective truth commission” (September 2007), online: Amnesty International <<https://www.amnesty.org/en/documents/POL30/020/2007/ru/>> [Amnesty International, *Checklist*]. See also Jelena Subotic, “The Transformation of International Transitional Justice Advocacy” (2012) 6 Int J Transitional Justice 106.

<sup>92</sup> Rama Mani, “Dilemmas of Expanding Transitional Justice, of Forging the Nexus between Transitional Justice and Development” (2008) 2 Int J Transitional Justice 253.

<sup>93</sup> Dezalay, *supra* note 22.

<sup>94</sup> World Bank, Report on Development, “Conflict, Security and Development” (2011), online: World Bank <<http://wdr2011.worldbank.org/fulltext>>; ICTJ/Pablo de Greiff, *Transitional Justice, Security and Development* (input paper) (29 October 2010) at 5, online: World Bank <<http://web.worldbank.org/archive/website01306/web/transitional%20justice.html>>; See also ICTJ website “ICTJ participated in the WDR process through a commissioned background paper, taking part

the establishment of truth-seeking initiatives in post-conflict societies. Transitional justice experts intervene not only in regime transitions, but also during ongoing conflicts<sup>95</sup> to advise peace mediators or design peace agreements, which increasingly provide for the creation of TRCs or special criminal courts.<sup>96</sup> In this sense, mobilizations for the “right to truth” have acted as field connectors between international criminal law, human rights, peace-keeping and transitional justice.

Second, these truth-finding methods and practices are characterized by a scientific and positivistic appeal. Richard Wilson raised the issue of international law’s epistemologies in the following terms:

What is law’s ‘will to truth’ and how might its truth-finding methods selectively include and exclude various types of knowledge about social reality? We know that law establishes truth to render judgment but what exactly do we know about international law’s theory of knowledge and its concrete truth-finding practices? How do international legal research practices construct knowledge about society that facilitates and legitimizes the operation of State and intergovernmental power?<sup>97</sup>

In this regard, one must acknowledge that only a few tokenised truth-finding practices that were once peripheral to the law and jurists, have gained particular prominence as specialized fields of knowledge concerning mass atrocities, and have consequently been subsumed under the “right to truth” to bolster the legitimacy of investigations by TRCs and courts. For instance, forensic anthropology aimed at identifying and returning human remains to victims’ relatives has coalesced with the field of transitional justice,<sup>98</sup> to the extent that the notion of “forensic truth” has featured in TRC reports<sup>99</sup> and international judgments,<sup>100</sup> not without raising serious

in consultations, and providing comments throughout the drafting process of the report”, online: ICTJ <<http://www.ictj.org/news/human-rights-and-transitional-justice-2011-world-development-report>>; ICTJ, “UN Secretary General: Transitional Justice Key to UN’s Work on Rule of Law”, *Focus Newsletter*, n° 10 (November 2011), online: ICTJ <[http://www.unrol.org/files/S\\_2011\\_634EN.pdf](http://www.unrol.org/files/S_2011_634EN.pdf)>.

<sup>95</sup> See Rodrigo Uprimny Yepes and María Paula Saffon, *Usos y Abusos de la justicia transicional en Colombia* (Bogotá: DeJusticia, 2007), online: DeJusticia <[http://dejusticia.org/interna.php?id\\_tipo\\_publicacion=2&id\\_publicacion=352](http://dejusticia.org/interna.php?id_tipo_publicacion=2&id_publicacion=352)>. See also *Report of Special Rapporteur on the promotion of truth, justice, reparation*, supra note 44 at para 27.

<sup>96</sup> *OHCHR analytical study on human rights and transitional justice - Addendum - Inventory of human rights and transitional justice aspects of recent peace agreements*, UNHRC, 12<sup>th</sup> sess, UN Doc A/HRC/12/18/Add.1 (2009) [OHCHR, *study on human rights*].

<sup>97</sup> Richard Wilson, “Tyrannosaurus Lex: The Anthropology of Human Rights and Transnational Law” in Mark Goodale & Sally Engle Merry, eds, *The Practice of Human Rights. Tracking Law Between the Global and the Local* (Cambridge: Cambridge University Press, 2007), 342 at 360.

<sup>98</sup> See *Report of the OHCHR on the right to the truth and on forensic genetics and human rights*, UNCHR, 15<sup>th</sup> sess, UN Doc A/HRC/15/26 (2010) [OHCHR, *Reports on the “right to truth”*]; Claire Moon, “Interpreters of the Dead. Forensic Knowledge, Human Remains and the Politics of the Past” (2013) 22:2 Soc Leg Stud 149 [Moon].

<sup>99</sup> *Witness to Truth : Report of the Sierra Leone TRC*, supra note 43 at para 22.

<sup>100</sup> Melanie Klinkner, “Scientific Evidence Before International Criminal Tribunals” in Gerben Bruinsma & David Weisburd, eds, *Encyclopedia of Criminology and Criminal Justice* (New York: Springer, 2014), 4682.

difficulties.<sup>101</sup> Other examples include techniques to preserve archives<sup>102</sup> and to design witness and victim protection programs.<sup>103</sup> These instruments exacerbate the overly procedural nature of the “right to truth” and the types of knowledge – and corresponding actors and networks – carefully selected in the adjudication of State-sponsored violence and top-down monitoring of local civil society groups and individuals. As Michel Foucault stated in his account of biopolitics and governmentality:

Truth is produced only by virtue of multiple forms of constraint. And it induces regular effects of power. Each society has its regime of truth, its “general politics” of truth: that is, the types of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true<sup>104</sup>.

The resort to these truth technologies seeks to overcome the inherent limits to truth finding when dealing with contexts of State crimes characterized by denial, destruction and concealment of evidence. In this respect, the over-emphasis on the use of these uncertain techniques and artefacts strives to compensate the fragility of the findings of TRCs and international criminal courts,<sup>105</sup> and hence the contingency and socially constructed nature of “the Truth” they purportedly reveal, notwithstanding claims of universality and science.<sup>106</sup>

These expert mobilizations are invariably employed in courtrooms and TRC investigations, and conflate with a range of claims associated with the “right to

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<sup>101</sup> Melanie Klinkner, “Proving Genocide? Forensic Expertise and the ICTY” (2008) 6:3 J Int Crim Justice 447 [Klinkner]; Moon, *supra* note 98. See also *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute (14 mars 2012) at para 176 (ICC, Trial Chamber I).

<sup>102</sup> *Report of the OHCHR on the seminar on experiences of archives as a means to guarantee the right to the truth*, UNHRC, 17<sup>th</sup> sess, UN Doc A/HRC/17/21 (2011).

<sup>103</sup> *Right to the truth - Report of the OHCHR*, UNHRC, 15<sup>th</sup> sess, UN Doc A/HRC/12/19 (2009) at 9, para 32.

<sup>104</sup> Michel Foucault, *Power/Knowledge – Selected Interviews and Other Writings 1972-1977* (New York: Prentice Hall, 1980) at 131.

<sup>105</sup> On the evidentiary limitations of international criminal justice, see Nancy Combs, *Fact-finding without facts: the uncertain evidentiary foundations of international criminal convictions* (Cambridge: Cambridge University Press, 2010). For those of TRCs, see the *Report of the Special Rapporteur on the promotion of truth, justice, reparation*, *supra* notes 44; OHCHR, *study on human rights*, *supra* note 96; OHCHR, *Reports on the “right to truth”* *supra* note 98.

<sup>106</sup> Klinkner, *supra* note 101; Moon, *supra* note 98; Susan Marks, “False contingency” (2009) 62:1 *Current Legal Problems* 1; Adam Rosenblatt, “Sacred Graves and Human Rights” in Mark Goodale, ed, *Human Rights at the Crossroads* (Oxford: Oxford University Press, 2012), 122; Santiago Del Carril’s interview of Mary Aileen Bacalso (Secretary-General of the Asian Federation Against Enforced Disappearances), “I envy the Argentine human rights movement”, *Buenos Aires Herald* (15 December 2013), online: Buenos Aires Herald <http://www.buenosairesherald.com/article/147509/> “In the Kashmir region of India, where there are mass graves, there are 98,000 cases. Argentina sent a forensic team secretly to investigate mass graves last year. But it’s very difficult because the Muslims are against exhumations”.

truth”: facilitate the grieving of victims’ families, reconciliation, establish an accurate record of violations, deterrence, etc.<sup>107</sup> Benchmarks, international guidelines, protocols and new UN fact-finding mechanisms and positions are promoted to standardize and mainstream these practices,<sup>108</sup> while training manuals, modules with professional certificates<sup>109</sup> and accredited experts reinforce their scientific ambition.<sup>110</sup> These truth technologies are similarly promoted in academia by advocates who often combine scholar affiliations,<sup>111</sup> which also contributes to increase their credibility and professionalization. The increasing scientization and technicization of these truth-finding practices contribute to the objectivation of the “right to truth” and its official methods of truth-production, just as the legal development of the “right to truth” enables these actors and networks in the margins of the law to occupy the terrains related to the field of human rights and atrocities.<sup>112</sup> As Richard Wilson notes concerning the South African TRC’s methods of truth-delivery:

[r]ights transform political problems into technical ones and thereby remove them from the reach of parliamentary legislation. The combination of scientism, legal positivism and human rights seeks to create the conditions for greater legitimacy by raising truth out of the realm of political struggle and negotiation into the rarefied ether of scientific objectivity.<sup>113</sup>

In this regard, the “right to truth” perfectly incarnates the convergence of law and science in keeping alive the positivistic ideal of “the Truth”: it offers an ideal frame to truth-seeking technologies as it cumulates the language of human rights, science and legal positivism. The scientific ambit of these practices further contributes to depoliticizing the social and political responses that societies may imagine for dealing with past crimes, by reducing them to technical issues delegated to global experts.<sup>114</sup> In this respect, it is worth recalling that family-based associations of victims, such as Argentine *Madres de Plaza de Mayo*, originally rejected the creation of a TRC as they favoured a parliamentary commission of inquiry with politically responsible members, instead of a commission composed of civil society

<sup>107</sup> See OHCHR, *Reports on the “right to truth”*, *supra* note 98 at 102-103; Robert Kirschner and Kari Hannibal, “The application of the forensic sciences to human rights investigations” (1994) 13:5-6 *Med Law* 451; Moon, *supra* note 98.

<sup>108</sup> See especially, *Report of Special Rapporteur on the promotion of truth, justice, reparation*, *supra* note 44 at paras 102-106.

<sup>109</sup> See the section “Get Involved: Events & Training” on ICTJ’s website, online: ICTJ <<http://www.ictj.org/events-training>>.

<sup>110</sup> *Forensic genetics and human rights*, UNHRC RES 10/26, 10<sup>th</sup> sess, UN Doc A/HRC/RES/10/26 (2009).

<sup>111</sup> Leslie Vinjamuri & Jack Snyder, “Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice” (2004) 7:1 *Annu Rev Polit Sci* 345.

<sup>112</sup> OHCHR, *Reports on the “right to truth”*, *supra* note 98, at 102-103, reflect this increasing technicization of truth technologies.

<sup>113</sup> Wilson, *supra* note 6 at 225.

<sup>114</sup> On the issue of depoliticization and managerialization of international law theory and *praxis*, see Martti Koskeniemi, “The Politics of International Law – 20 Years Later” (2009), 20:1 *EJIL*, 7. On the depoliticization and ambivalent uses of the “right to truth”, see Patricia Naftali, “‘Toute la vérité, rien que la vérité? Les mobilisations du ‘droit à la vérité’ dans les affaires Mignone et Lapacó en Argentine” in Julie Allard, Olivier Corten, Martyna Falkowska, Vincent Lefebvre & Patricia Naftali, eds., *La vérité en procès. Les juges et la vérité politique* (Paris: LGDJ/Droit et Société, 2014), 73.

representatives.<sup>115</sup> Similarly, one faction of the Madres rejected exhumations as they were embedded within a political framework of amnesties.<sup>116</sup>

Another particular effect of this increasing reliance on scientific tools and expertise relates to the effects of depoliticization seemingly inferred by the ideology of complementarity in terms of “micropower” relations – as Foucault coined it. In this respect, the perception of ICTJ’s advocacy in Sierra Leone by grassroots activists provides an interesting example of the contestation of this depoliticization. In an evaluation report of the TRC, a group of local civil society defenders criticized the “incestuous relations” between UN bodies and ICTJ, as well as ICTJ’s ubiquitous position, stressing that:

A number of Sierra Leonean stakeholders that we interviewed expressed the view that the role of international NGOs in the TRC process was not always as positive as it could have been. There was particular reference to the way in which certain international NGOs, most notably the International Centre for Transitional Justice (ICTJ), based in New York, failed to address apparent ‘conflicts of interest’. The ICTJ has provided ‘expert services’ not just to the TRC but also to the Special Court. At the same time, it has sought to work with local civil society. Some felt that its role as provider of expert services undermined its capacity to support effective independent monitoring or advocacy by local civil society of either the TRC process or the Special Court.<sup>117</sup>

The status of purported “expertise” acquired by transitional justice advocates tends to overshadow the political nature of societal responses to State crimes. The obfuscation of tensions between TRCs and trials is thus problematic as it overlooks crucial power relations among different stakeholders in “the fight against impunity”.<sup>118</sup> More generally, as mentioned earlier, ICTJ members write OHCHR reports in which they praise the benefits of TRCs for political transitions, and the importance of consulting international NGOs specialized in these issues, among other actors.<sup>119</sup> As complementarity between TRCs and courts is increasingly promoted as a specific expertise by several NGOs, the risk of multiplying opportunities for conflicts of interests remains important. This risk is further exacerbated by the interchangeability of skills and competences that NGOs seek to transfer from one mass crime scene to another.

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<sup>115</sup> Jo Fisher, *Mothers of the Disappeared* (Boston: South End Press, 1989) at 124.

<sup>116</sup> Claire Moon, “Who’ll Pay Reparations on My Soul?” *Compensation, Social Control and Social Suffering* (2012) 21:2 *Soc Leg Stud* 187; Patricia Naftali, “Mobilisations des victimes des dictatures en Amérique latine et construction du ‘droit à la vérité’: entre ressource et contrainte” (2015) *Revue interdisciplinaire d’études juridiques* 2 (special issue coordinated by Julie Ringelheim, ed, “Les droits humains saisis par les mouvements sociaux”).

<sup>117</sup> The Sierra Leone Working Group on Truth and Reconciliation, “Searching for Truth and Reconciliation in Sierra Leone. An Initial Study of the Performance and Impact of the Truth and Reconciliation Commission” (February 2006), at 9-10, online: Fambul Tok International <<http://www.fambultok.org/TRCStudy-FinalVersion.pdf>>.

<sup>118</sup> Lia Kent, *The Dynamics of Transitional Justice: International Models and Local Realities in East Timor* (New York: Routledge, 2012).

<sup>119</sup> See OHCHR/Hayner, *supra* note 32, and above, Section I. A. in general.

## B.      Multiplying Fields of Intervention

Similarly, new epistemologies in international legal discourse open up new repertoires of action as the cause of complementarity conquers new terrains of intervention for human rights NGOs. The constant expansion of the field of transitional justice means that supporters of complementarity can mobilize their know-how at any stage of conflict management, from prevention and peacemaking to disarmament and the monitoring of truth-seeking mechanisms.<sup>120</sup> In addition, NGOs interchangeable skills and competences can be equally deployed in courts and TRCs. Considering the common challenges faced by these overburdened institutions when investigating complex large-scale atrocities, many NGOs are invited to maximize the use of their truth techniques in both settings by local or international human rights NGOs, UN organs, tribunals or national judiciaries. For instance, the pioneering *Argentine Team of Forensic Anthropology* (EAAF) has conducted exhumations in more than 30 countries, including assisting TRCs and international trials for gross human rights violations.<sup>121</sup> NGOs specialized in filing lawsuits to declassify archives, such as *Open Society Justice Initiative* and *National Security Archive* have similarly promoted the “right to truth”<sup>122</sup> and cooperated with TRCs and courts to document State abuse.<sup>123</sup>

As “truth” has become the lynchpin of the “right to justice” and “right to reparations”,<sup>124</sup> expertise previously gained in TRCs is transferred to courtrooms and vice-versa. For instance, Alex Boraine, former South African TRC Vice-Chairman, has re-used his savvy on reconciliation and victims’ needs at ICTY to stress the importance of the accused’s guilty pleas, repentance and sincere apologies for reconciliation in the *Plavšić* trial.<sup>125</sup> Similarly, ICTJ imports a language of restorative justice when designing outreach programs for courts, like in the treatment of victims’

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<sup>120</sup> See eg. ICTJ/Kofi Annan Foundation, “Challenging the Conventional. Can Truth Commissions Strengthen Peace Processes?” (16 June 2014), online: Kofi Annan Foundation <<http://kofiannanfoundation.org/our-work/truth-and-reconciliation-symposium>> and ICTJ <<http://www.ictj.org/publication/challenging-conventional-can-truth-commissions-strengthen-peace-processes>>.

<sup>121</sup> For instance, EAAF not only assisted the work of TRCs in Peru, Paraguay, Sierra Leone and Morocco, but also the work of ICTY in Bosnia-Herzegovina. See EAAF Annual Reports, online: EAAF <[http://eaf.typepad.com/eaf\\_reports](http://eaf.typepad.com/eaf_reports)>, and especially EAAF, Annual Report, “Update: The Right to Truth”, 2003 at 128-135.

<sup>122</sup> OSJI was *inter alia* involved in “right to truth” litigation before the IACtHR, including the *Gudiel Álvarez et al (Diario Militar) Case (Guatemala)* (2012) Inter-Am Ct HR (Ser C) No 253 and *Gomes Lund Case*, *supra* note 67.

<sup>123</sup> *The National Security Archive*, a US-based NGO specialized in the declassification of State secret archives, provides evidence and expert witness testimony for TRCs and human rights trials in Argentina, Chile, Colombia, Mexico, Guatemala, Peru, Brazil, Uruguay, El Salvador, and Paraguay. See, online: Unredacted <<http://nsarchive.wordpress.com/2012/03/21/notes-from-the-evidence-project-human-rights-prosecutions>>.

<sup>124</sup> See *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, UNGA RES 60/147, UNGAOR, 60th sess, UN Doc A/RES/60/147 (2005) at 22(b) and 24.

<sup>125</sup> *The Prosecutor v Biljana Plavšić*, IT-00-39&40/1-S, Sentencing Judgment (27 February 2003) at paras 75-77 (ICTY, Trial Chamber).

complaints at the Khmer Rouge Tribunal.<sup>126</sup> It equally provides consultancy on reparation programs for courts, capitalizing on its expertise for TRCs.<sup>127</sup> Likewise, NGOs historically involved in the creation of the ICC, such as *Amnesty International*<sup>128</sup> and *No Peace Without Justice*,<sup>129</sup> have appropriated the thematic of TRCs to provide expertise in the design of TRCs<sup>130</sup> and complementarity to combat the “impunity gap” mentioned by ICC Prosecutor.<sup>131</sup> Even *Human Rights Watch*, despite initial hostility to TRCs, has aligned with other NGOs to support the creation of TRCs in Sierra Leone, Brazil and Morocco,<sup>132</sup> and concentrates on improving legislation creating TRCs.<sup>133</sup>

More generally, given resources limitations, operational and evidentiary constraints, complementarity is an opportunity for human rights NGOs to increase the visibility and authority of their fact-finding missions. Due to the absence or limitations of State cooperation in the repression of international crimes, prosecutors and TRCs increasingly rely on information provided by NGOs, to the extent that the International Bar Association issues guidelines to improve the reliability of human rights fact-finding.<sup>134</sup> Human rights NGOs archives are officially valued for their contribution to TRCs and courts and to the rights to truth, justice, reparation and guarantees of non-repetition.<sup>135</sup> Training manuals of best practices thus proliferate to

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<sup>126</sup> ICTJ, “Practical, Feasible and Meaningful: How the Khmer Rouge Tribunal Can Fulfill its Reparations Mandate” (11 January 2009).

<sup>127</sup> ICTJ: Briefing, “Reparations and the Lubanga case. Learning from Transitional Justice” (18 April 2011), online: <<https://www.ictj.org/sites/default/files/ICTJ-DRC-Reparations-Lubanga-ICC-Briefing-2012-English.pdf>>.

<sup>128</sup> Amnesty International, Commissioning Justice, *supra* note 10 at 7. AI website also features a special section on TRCs.

<sup>129</sup> See its strategic program in international criminal law, online: No Peace Without Justice <<http://www.npwj.org/ICC/Promoting-implementation-principle-complementarity.html>>.

<sup>130</sup> Amnesty International, *Truth, justice and reparation*, *supra* note 91; Amnesty International, *Checklist*, *supra* note 91.

<sup>131</sup> No Peace Without Justice, “Closing the Gap” (June 2010), online: No Peace Without Justice <<http://www.npwj.org/ICC/Non-Judicial-Accountability.html>>.

<sup>132</sup> Expressing support for the establishment of a truth commission in Brazil: Human Rights Watch, “Brazil: Letter to President Rouseff on Truth Commission” (16 May 2012), online: Human Rights Watch <<http://www.hrw.org/news/2012/05/16/brazil-letter-president-rousseff-truth-commission>>; Human Rights Watch, “Morocco’s Truth Commission: Honoring Past Victims during an Uncertain Present” (28 November 2005), online: Human Rights Watch <<http://www.hrw.org/reports/2005/11/27/moroccos-truth-commission-0>>.

<sup>133</sup> See for instance Human Rights Watch, “Kenya: Proposed Truth Commission Bill Seriously Flawed: Parliament Should Amend Legislation to Close Loopholes” (14 May 2008), online: Human Rights Watch <<http://www.hrw.org/news/2008/05/13/kenya-proposed-truth-commission-bill-seriously-flawed>>; Amnesty International, Human Rights Watch, ICTJ and the International Commission of Jurists (*inter alia*), “Nepal: Joint memorandum on the Disappearances of Persons (Crime and Punishment) Bill” (17 September 2009), online: International Commission of Jurists <[http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal\\_Documentation&id=23280](http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=23280)>.

<sup>134</sup> International Bar Association Human Rights Institute/Raoul Wallenberg Institute, “International Human Rights Fact-Finding Guidelines” (2009), online: International Human Rights Fact-Finding Guidelines <<http://www.factfindingguidelines.org/about.html>>.

<sup>135</sup> *Report of the OHCHR on the seminar on experiences of archives as a means to guarantee the right to the truth*, UNHRC, 17<sup>th</sup> sess, UN Doc A/HRC/17/21 (2011) at paras 52 and 7.

enhance NGOs skills in human rights investigations to fulfill victims' rights to truth, justice and reparation.<sup>136</sup>

### C.      **New Career Paths for Polyvalent Agents**

Finally, the cause of complementarity regenerates new activist and career opportunities related to the prestige that these fields have gained in the academic as well as the practitioners' spheres.<sup>137</sup> The complementarity doctrine fosters careers at the intersection of human rights advocacy, international criminal justice, transitional justice and academia. It thus diversifies opportunities to migrate from one sector or field to another and allows for professional reconversions. This is particularly relevant for careers in temporary *ad hoc* international or hybrid tribunals, which are scarce, short-term and highly selective. ICTJ's recruiting policy has evolved over the years to hire more specialists in international criminal law.<sup>138</sup> For instance, David Tolbert became ICTJ President after working for 9 years at ICTY and then as ICTY's representative in negotiations for the ICC Statute, and having no professional experience related to TRCs. Alex Boraine has replicated positions in TRCs as international commissioner of the Mauritius TRC.<sup>139</sup>

The mainstreaming and global institutionalization of the transitional justice and anti-impunity agendas has also generated a plethora of bureaucracies and even positions in direct reference to the "right to truth" in international organizations.<sup>140</sup> In addition, many human rights secretariats in Latin American administrations now form part of interior ministries and explicitly tackle transitional justice issues.<sup>141</sup>

The highly respected cause of complementarity also enables leading figures of the anti-impunity movement to occupy important positions in prestigious INGOs and international organizations.<sup>142</sup> In addition, advocates of the cause of

<sup>136</sup> See, *inter alia*, Dermot Groome, *Handbook of Human Rights Investigation*, (a member of the ICTR Prosecutor's team) (Northborough: Human Rights Press, 2001); Gerald M. Steinberg, Anne Herzberg, and Jordan Berman, *Best Practices for Human Rights and Humanitarian NGO Fact-Finding* (Leiden: Martinus Nijhoff Publishers, 2012); ICTJ (Louis Bickford, Patricia Karam, Hassan Mneimneh & Patrick Pierce), "Documenting Truth" (January 2009), online: <<https://www.ictj.org/sites/default/files/ICTJ-DAG-Global-Documenting-Truth-2009-English.pdf>> at 30.

<sup>137</sup> On symbolic capital, see Liora Israël and Brigitte Gaïti, "Sur l'engagement du droit dans la construction des causes" (2003) 16:62 *Politix* 17; Lefranc, *supra* note 2.

<sup>138</sup> See ICTJ annual and financial reports, online: ICTJ <<http://www.ictj.org/reports>>.

<sup>139</sup> See the summary of Mauritius truth commission on USIP digital collection on TRCs, online: USIP <<http://www.usip.org/publications/truth-commission-mauritius>>.

<sup>140</sup> OHCHR vacancy announcement for a "Human Rights Officer (P-3-Administration of Justice and Right to Truth)", 10/OHCHR/053R/GENEVA (23 December 2010), online: UN Jobs <<http://unjobs.org/vacancies/1294087084140>>.

<sup>141</sup> Wilson, *supra* note 6 at 28.

<sup>142</sup> For instance, Richard Goldstone, an early advocate of the South African TRC and former ICTY and ICTR Prosecutor from 1994 to 1996, is an advisory board member of ICTJ, HRW and *Physicians for Human Rights*. Juan Méndez, now emeritus President of ICTJ, sits on the advisory boards of *Open Society Justice Initiative* and the *Global Centre for the Responsibility to Protect, to name but a few*. See OSJI members, online: Open Society Justice Initiative <<http://www.soros.org/about/programs/open-society-justice-initiative/background>>. He was appointed UN Special Rapporteur against Torture

complementarity often combine human rights advocacy and academic prestige as transitional justice is recognized as a specific field and academic discipline<sup>143</sup>: for instance, both Goldstone and Méndez are advisory board members of the *International Journal for Transitional Justice*, the first review specialized in transitional justice created in 2007 and published by Oxford University Press. The combination of activist and academic profiles is even openly assumed as ICTJ's hiring policy.<sup>144</sup>

In 2011, the UN Human Rights Council created a new position of UN "Special rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence",<sup>145</sup> occupied by ICTJ's candidate, Pablo de Greiff, its research unit director.<sup>146</sup>

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Can legal fetishism defeat reality? Looking at the evolution of representations in the legal discourse of "right to truth" activists, this paper suggests that the ideology of a right to "complementary truths" comes close to perform this. "TRCs are not substitutes for justice" is a commonplace credo that anti-impunity fighters regularly need to repeat, as if this could undo the reality that States continue to use TRCs to avoid trials. However, "[n]o century has had better norms and worse realities",<sup>147</sup> recalls David Rieff. As TRCs and criminal justice advocates now both contemplate hand in hand the common horizon of the fight against impunity, the "right to truth" embodies a constant project in progress which allows to legitimate flexible solutions in contexts characterized by political crimes and where power relations largely prevail.

However, legal engineering has its limits. If the doctrine of complementarity remains a compelling formal argument in legal discourse, this paper has highlighted both the legal lobbying of truth activists for complementarity, while underscoring

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in 2010, after serving as adviser of the ICC Prosecutor's Office for crime prevention from 2009 to 2010.

<sup>143</sup> See, eg. Christine Bell, "Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'" (2009) 3:1 IJTJ 5.

<sup>144</sup> Interview of Juan Méndez by Benoît Guillou (Amnesty International Belgique francophone), "Argentine: Juan, expert de la justice transitionnelle" (29 November 2005) at 2, online: Amnesty International <<http://www.amnesty.be/archives-2708/dons/soutenir-amnesty/informations-aux-donateurs-70/ces-temoignages-qui-nous-99/article/argentine-juan-expert-de-la>> ("[n]otre centre cherche à renforcer les liens entre chercheurs, militants et décideurs politiques engagés sur le terrain").

<sup>145</sup> *Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, UNHRC RES 18/7, UNHRCOR, 18<sup>th</sup> sess, UN Doc A/HRC/18/7 (2011).

<sup>146</sup> See ICTJ, "Pablo de Greiff among Candidates for Special Rapporteur on Transitional Justice" (6 January 2012), online: ICTJ <<http://ictj.org/news/pablo-de-greiff-among-candidates-special-rapporteur-transitional-justice>>.

<sup>147</sup> David Rieff, *A Bed for the Night. Humanitarianism in Crisis* (New York : Simon and Schuster, 2002) at 70.

their ambivalence. The paper finds that the “triumph” of the cause of complementarity between TRCs and international criminal justice is deeply intertwined with the legal formalization of a “right to truth” in international law and the coterminous institutionalization of hegemonic practices that revolve around it. It shows that as truth advocates construct the cause of complementarity before international bodies, they mobilize strategies, which are mutually reinforcing, and partly mutually undermining. As outlined above, these strategies evolve over time and vary according to advocacy or professional logics, as well as routinized practices, which human rights and transitional justice advocates have come to internalize. On the one hand, truth entrepreneurs’ efforts have been mutually reinforcing in terms of building adherence to the discourse of complementarity and institutionalizing TRCs and international criminal justice as appropriate legal responses to State crimes. They have also successfully consolidated a new “truth order” dominated by a globalized truth industry and new epistemologies and techniques to document atrocities. On the other hand, the paper stresses that the doctrine of complementarity is the result of distinct mobilizations that continue to privilege either TRCs or courts. They thus inevitably reproduce tensions between TRCs and courts that affect the formalization of “right to truth”, as truth activists need to readjust their advocacy strategies to negotiate the contours of the “right to truth” in international legal discourse concerning its content and relationship to amnesties. Paradoxically, the competition around the formalization of “right to truth” thus echoes the very tensions that the theory of complementarity tries to elude.

As truth advocates embark on the fight against impunity and navigate the theory of complementarity, they constantly need to renegotiate the tensions between truth and justice. Just as the global transitional justice project desperately strives to purify courts and TRCs from politics, the “right to truth”, despite its legalistic consecration, is firmly entrenched in politics; this renders its polyphony and open-ended texture even more prone to political use, including those of truth advocates.