

Transitional Justice in East Timor

Howard Varney¹ Speech on the Fourth Regional Forum on Establishing Transitional Justice in Post-Yugoslav States, Pristina, Kosovo, October 28, 2009.

Thank you, it is a privilege to be with you here today. My short paper is not in your folder, but perhaps we can make a plan to have it translated and distributed. Actually, until tea time this morning I wasn't aware that I was talking so, in fact, I'll be referring to some notes on my computer here. What I want to do this morning is talk a bit about the experiences of transitional justice in East Timor. And, why I think it's interesting for you is because it involves both local and international dimensions, not only in terms of dimensions of the conflict itself, but also in terms of the means and mechanisms that were put together to address the past conflict. And, so, what I think might be fascinating for you is that it not only involved truth commissions, in plural, and justice mechanisms, but it did so at a local level, and then more recently, in fact, this year, it happened at a regional or international level. So, I'm quickly going to whiz through the historical background, I'll then look at the local parallel initiatives that took place in Indonesia and East Timor, and then finally, will look at the international or bilateral truth commission that took place last year and this year. For those of you who don't know much about Indonesian and Timorese politics, this history goes back into the 1970s. East Timor was a colony of Portugal. But, with the carnation revolution in Portugal in 1974 and the introduction of more liberal policies, decolonization took place in most of the former territories of Portugal. Unfortunately, in 1975 tensions broke out in East Timor between the different political parties that had recently engaged and were fighting for dominance on the island. Sadly, this become violent, and Indonesian intelligence and security forces started to make incursions into the country, and towards the end of '75 there was a full scale invasion. From the end of '75 all the way to 1999 Indonesia occupied East Timor and in fact annexed it as one of its provinces. There was something of a backlash and Timorese organizations formed military groups and started to fight the occupation that Indonesia was enforcing through its military and police. And the estimates say that this particular struggle devastated the local population. Around 18,000 people were killed at that time, or disappeared and some 80,000, some estimates are even higher, the highest estimates put some ten percent of the population perished through starvation and disease as a direct result of the conflict. However, with the fall of the Suharto regime in 1998, things changed. The new Indonesian president decided to offer East Timor a referendum, or what he called a popular consultation. The choice was between independence and special autonomy which in reality was more of the same, staying as province of Indonesia. And so an agreement was reached between Indonesia, the UN and Portugal for the holding of this referendum, to be administered by the UN, and for "security" to be provided by Indonesia. In August of that year, the people voted overwhelmingly for independence. But, sadly, the period leading up to the referendum, the referendum itself and the months that followed it were characterized by widespread and extreme violence and, there are some pretty dramatic estimations of the numbers of people who were affected. Some 400,000 people were displaced, some seventy percent of all structures in

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the capital and in other cities and villages around the island were destroyed and some 1,500 people were killed. So, let's now turn to what the response was, what the transitional justice initiatives were put in place to deal with this past. Not just the violence of 1999, but the years of occupation going back to '75. And I've described this little section as parallel regional initiatives. It first kicked off with two UN commissions of inquiry. Both inquiries concluded that the Indonesian military were responsible for, not just gross human rights violations, but international crimes. And both bodies recommended the establishment of a credible judicial process and more specifically, the suggested an international tribunal should be established. However, notwithstanding the recommendation of the UN's own experts, oddly enough, the UN didn't follow the advice of its experts, Indonesia said that it could carry out its own prosecutions, and the UN accepted Indonesia's word on that matter, which proved to be something of a mistake. So, let's first deal with what happened in Indonesia. The Indonesian government established through its Human Rights Commission a special commission of inquiry, it's called Special Commission of Investigation, and locally as KPPHAM. Now, you might be surprised to hear that this turned out to be quite a credible commission of inquiry. It implicated Indonesian security forces and senior government officials in systematic violations in East Timor and actually went so far as to name 53 persons suspected of bearing individual responsibility. It also recommended that there be justice in these cases. And, in response to that recommendation, and, of course, international pressure, Indonesia then set up an ad-hoc human rights court in 2001 to try crimes committed by Indonesian military and police officers in East Timor. The attorney general's office was charged with the investigations, and ultimately issued indictments against eighteen persons. However, these prosecutions were less than serious and ultimately the prosecutors and investigators bowed to political pressure and only one conviction survived the appeals. Turning quickly to East Timor, there were also, there was also a criminal response and a truth and reconciliation response. In 2000, United Nations set up a special Panel for Serious Crimes and it did so within the local justice system. And, this particular body was tasked with investigating the most serious crimes, war crimes and crimes against humanity. Each Serious Crimes Panel comprised of two international judges and one Timorese judge and they were meant to apply both international and Timorese law. The UN established a Serious Crimes Unit within the East Timorese prosecution service and it was this body that had to investigate and put together the cases. Time doesn't permit me to give you a detailed analysis of what went down, but the SU did indict some 390 persons, and this resulted in 84 convictions. However, the most serious perpetrators, particularly those that were in Indonesia, the generals and the politicians, they fell outside the jurisdiction of this inquiry, or rather, not the legal jurisdiction, but Indonesia refused to hand them over to stand trial. So, those most responsible escaped justice. And, in the final response was the setting up of a truth commission in East Timor. It was established by the UN in 2001. It was called the Commission for Reception, Truth and Reconciliation in East Timor. It was most commonly known by its Portuguese acronym CAVR. Its mandate included truth-seeking, investigating and reporting on violations together with their causes, reconciliation, conducting what is referred to as community reconciliation procedures for non-serious offenders, and here a form of amnesty or immunity was provided to those persons for crimes such as looting, assault and arson if they disclosed in full and if they

engaged in community reparations, such as handing over a goat, or engaging in other forms of symbolic reparation. And, if an agreement was struck between the perpetrator and the community as overseen by the commission, then this immunity was granted. And the final two objectives were rehabilitation of the victims and then the making of recommendations, including recommendations for prosecutions and reparations. The commission ran from 2002 to 2005 and collected some 8000 statements. It conducted more than a thousand interviews and held 52 district victim's hearings. It ultimately produced a 2000 page report with detailed recommendations. It made findings on accountability including very serious findings against Indonesia and its security forces and just like the UN bodies it recommended the establishment of an international tribunal should the serious crimes process fail to get its hands on the most serious suspects. I'm now turning to the international or regional initiative. This was a bilateral truth commission struck between Indonesia and East Timor. Now, firstly, why did this take place? As far as I know it's the very first international regional truth commission that has ever been held so it's important to interrogate the reasons why it happened. As we have just seen, there were many calls for justice. The Indonesian ad-hoc trials had produced only one conviction. The serious crimes process in East Timor couldn't try the most serious offenders. And, so, there were now very compelling calls for international tribunal. Of course, Indonesia would never accept such a body. And East Timor, this is a tiny little country, situated next to one of the largest countries and most powerful countries in that region. And, East Timor's priorities have changed over time and now good relations, particularly good economic relations, became a priority, and the Timorese leadership no longer wanted to offend Indonesian leaders. So, in the end, justice was sacrificed in favor of an increasingly reconciliatory approach to the past. So, both countries now wanted to address this massive impunity gap, but they wanted to do so without going down the road of justice for the most serious offenders. So, an idea was floated for an international panel to be sanctioned by the United Nations. This concept eventually evolved from an international panel to a bilateral commission, to be called the Commission of Truth and Friendship. CTF, I'll probably refer to it as the CTF going forward. So, rather than be established by a UN resolution, it was set up by the two governments and they agreed to fund the commission and both countries would supply the commissioners. Thanks, I have five minutes and I intend to keep to that time. It was, it was build as the new unique approach to confronting the past. The stated goals were to conduct a shared inquiry with the aim of establishing the conclusive truth, whatever that may mean. Well, we won't have time to interrogate that today. But, the conclusive truth about human rights violations and institutional responsibility, and then to make recommendations to promote reconciliation and friendship and insure the non-recurrence of similar events. In its report, which was only released two months ago, CTF claimed that it was the worlds first bilateral truth and friendship commission. It claimed further that it represents a model for cooperation and the development of mechanisms for arriving at consensus on even the most difficult and challenging of issues facing different countries. However, the final product, I don't believe can lay a claim to being a perfect regional model. As some commentators have said, there was too much friendship and too little truth. Rather than being composed of international experts, it included only commissioners from the two countries, in terms of reference provided for recommendations for amnesty, and the rehabilitation of wrongly accused persons, but not

for prosecutions. The commission was not required to determine individual responsibility, only institutional responsibility, so it couldn't name names. It also didn't have powers to compel attendants or force witnesses to produce documents. So, many of its failings can be traced back to the original motivation behind the commission, and it something of an ulterior purpose as opposed to a more legitimate purposes, and, of course, these terms of reference. If one looked at the terms of reference, the word victim doesn't appear once in those terms. And, of course, this angered human rights groups and led to very poor relations between the CTF and civil society. And on that score, there was very little consultation between the government setting up the commission and civil society, and this was notwithstanding the criticism that had been leveled at the design of the commission. Moreover, the parliaments of both countries failed to debate or ratify the terms of reference. So, all this weak consultation meant that those perceptions that civil society had of the exercise were entrenched. And then, of course, when the commission started operating and turned to civil society for support to find witnesses, produce information, and civil society refused to provide any assistance. And, not only that, they campaigned against the commission itself. I've spoken about the terms of reference, which was really skewed towards, it was perpetrator friendly, it was focused on settling outstanding demands for justice by actually removing the threat to perpetrators rather than requiring them to account for their actions. I'm skipping over some matters that we don't really need to talk about. It also unjustifiably limited the mandate of the commission to one year. And thereby prevented the commission from going into the deeper context, so the commission couldn't really interrogate the underlying causes of that conflict. Just quickly about the hearing process. They did in fact conduct six public hearings and a smaller number of closed hearings. These hearings themselves were problematic as those accused of serious crimes were given a platform to defend themselves, and promote and provide very self-serving and questionable explanations that were not subject to rigorous questioning. And this resulted in something of a biased version of events being aired in public. Independent experts and witnesses were generally not included in these hearings and victims received very few opportunities to speak. And when they did, they felt that they were not being sufficiently protected. So there were very few inducements for truth-telling. Although there was this amnesty that I spoke about, a so called amnesty in exchange for truth.

Because the commission excluded the prosecutions as an option, I don't have to tell you that there was almost no incentive for anybody to come forward to speak the truth because there was no prospect of any prosecutions emerging. On a positive note, however, the report recently released did make some strong findings against the Indonesian state. It did find that gross human rights violations, such as crimes against humanity, murder, torture, rape, forced displacements and deportation were committed throughout East Timor and that the main perpetrators of these crimes were the pro-autonomy militia groups. It targeted supporters of independence and they acted with the support and, at times, direct involvement of the Indonesian military and police. Now, that is somewhat of an astonishing finding to make, given the context. Also remarkable was that these findings were accepted by the Indonesian president, and this marked the very first time that Indonesia officially recognized its role in East Timor. All right, in conclusion, I think there are certain lessons to be learned from what is claimed to be the first regional or bilateral commission. Firstly, one shouldn't do it unless one has the

committed support of the relevant governments, international organizations and, of course, civil society. And to this, it is necessary to generate by and through thorough and methodical consultation. The stated objectives of the exercise must be genuine and legitimate, not ulterior, as in the case that I've just spoken about, where there was this preemptive attempt to stop justice from taking place. And defining the terms of reference must meet and serve the objectives and they shouldn't be skewed in favor of one group or faction. Thank you very much.

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Rape and sexual crimes was one of the defining features of the East Timor conflict. Certainly, it was part of the mandate of the truth commission in East Timor to investigate sexual crimes, and, indeed, the CFR report devotes a whole chapter to sex crimes and makes damning findings against the Indonesian security forces including that rape and related crimes were part of a strategy and tactic to undermine the resistance of the Timorese. In relation to the prosecution, sadly, none of the prosecutorial initiatives devoted much attention to rape and sexual crimes. Only one of the prosecutors decided to focus on this particular issue but, by that stage, it was very late in the day and she complained that very few witnesses were willing to come forward. So, I think it is true to say that although the truth commission devoted time and attention to this issue and did hold several closed hearings on the question, little or no justice has been delivered to the victims.

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I'll first deal with what I think is quite an important question, which is "why follow these models when they don't deliver justice for the victims". Firstly, let me say, we are not putting up these models for them to be followed but rather so that you can look at other experiences and, perhaps, not follow down the same road or at least to learn from other mistakes that they made. And certainly the East Timor experience with its different dimensions at a local and international level, I think there are many lessons to be drawn from that experience, but I certainly wouldn't propose a commission for truth and friendship along the lines of East Timor. I wouldn't suggest you simply replicate that, you would need to examine the conditions in this region more closely before going down that particular road. After that I'd offer some experiences from Sierra Leone where rape and sexual slavery was quite central in that particular conflict. I was also involved in the Sierra Leonean Truth and Reconciliation Commission and what struck me was the decision by many women, victims of rape and sexual slavery, to testify openly when they had the opportunity, of course, to testify in private, in closed hearings. And, of course, the open hearings were open to the public at large and both radio and television broadcasters were present as well. But, a few very courageous and determined women felt that the entire country had to know firsthand the suffering that they experienced at the hands of perpetrators through sexual crimes. And, the decision of those women to testify openly, I think, really did bring home the horrors of that particular conflict and what measures needed to be taken to prevent the repetition of such crimes again. And, in fact, the truth commission did devote a particular chapter to the issue of gender crimes, together with recommendations, and these included reforming criminal procedures to ensure that evidence was collected and protected, that prosecutions would actually

happen, and that women were adequately protected when they choose to employ the criminal justice system. The recommendations went further, and they were also aimed at raising the dignity and position of women in society. Being a very traditional society based on customary law, I don't have to tell you that in such societies women occupy second class status, so several recommendations were also made looking at issues of equality, customary law reform, even laws of succession, which effectively made women minor persons or their lives, and even recommendations to build the economic positions of women through micro financing and so on. And, finally, the special court for Sierra Leone included rape and sexual slavery in its international crime charges against its accused, so there are also good examples to be gleaned from Sierra Leone.

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I was involved in a case back in the 1990s. We were involved in investigating hit squads within the police force and witnesses spoke of a particular hit. And, when our investigators went to find the records, they looked at the death certificate and the post mortem report, which suggested that this victim of a police hit squad, in fact, had died in a motor car accident. And, yet, our detectives were pretty sure that that couldn't have been the case. We had several witnesses who were part of the hit, and they say they drove up next to this trade union activist in another car and fired repeatedly at him until that car crashed and the man died. In those days, in the early 1990s, the district surgeon's office and the doctors carrying out the post mortem reports were in the apparel of the state and couldn't always be trusted. So, given that fact, we decided to do an exhumation of this particular body. We were lucky in that he had been buried in a particular place. The family was able to point out the grave site. Following the exhumation and the second post mortem, it was discovered that indeed the person hadn't died as a result of his injuries in a car crash and this would be able to show conclusively, not only because of several entry and exit wounds caused by a bullet, but also because the pathologist carrying out the second post mortem actually recovered the projectiles, the spent bullets in the man's lungs. So, that's simply an example of going to take it a step further to show that primary evidence, in the form of a death certificate or a post mortem report, can't always be trusted and sometimes you have to go with the instinct of the detectives and the witnesses and look behind official documents.

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I was actually hoping that that kind of question wouldn't be put to me because I must first make a disclaimer, I don't believe that I qualified to make such recommendations. I simply don't know enough about the Balkans and its different dynamics to give you some kind of definitive recommendation around mechanisms. Having said that, I think one can make some high level observations. The picture you paint, I don't think could be more complex. Although, around the world we have terrible situations where we're trying to address what happened in the past. Few of them have the complexity of what happened in the former Yugoslavia. And as you said, now that you have several countries at different stages of political and economic development, that certainly complicates things. The fact that one of those countries doesn't recognize another might be a total stumbling block to such initiative. The example from Asia, where you had two countries, Indonesia and East Timor, there, there was really something of a meeting of minds. And that was

largely because they shared certain underlying objectives. Once you share certain objectives, the rest may very well fall into place. So, that really, I think, is the starting point, is to see what objectives are common between these different countries. The way you can identify certain objectives that all countries hold dear, that really is the starting point. So don't start with the question "what mechanisms", the first question is "what are the objectives" that these different countries want to achieve. And of those different objectives, which are common to all the countries. Once you've engaged in that exercise, you can then start looking at the mechanisms and the terms of reference. And that sequencing is also important because you can only really determine what mechanisms you want to put in place when you know what objectives you want to achieve because the objectives would definitely determine the mechanisms. And, of course, those mechanisms must serve the objectives. They mustn't be irrelevant to the objectives. And that's why I spoke at some length this morning about the inadequate terms of reference of that particular bilateral commission. Another possibility is to go down the road of what is possible at this stage. Is it possible that one can lower one's expectations and ambitions of a regional inquiry? Is it possible that, perhaps, in the shorter term there can be inquiries, perhaps, involving most, but not all, of the countries? I don't know whether that kind of sequencing or a somewhat measured or integrated approach is possible or even desirable, for that matter. But it may be that if you start off small, then other countries, in time, might come on board. But that's for local experts, yourselves to think about and consider.

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I'll deal with the question about whether this should be NGO or civil society initiative first, and perhaps, at a later stage, be endorsed by governments and, perhaps, the international community. Well, that's not a bad idea, actually, and it has happened. In fact, it has happened in Latin America, in countries like El Salvador and Guatemala where the catholic church, correct me if I'm wrong, you probably know more about this than me, at first launched quite a big inquiry. It wasn't styled as a truth commission and they didn't hold public hearings as far as I'm aware, but they did conduct hundreds of private interviews, took thousands of statements, and eventually published a very compelling report. And, it was that report, now I'm speaking of Guatemala, which really did prompt the international community and the United Nations to take the matter further and, in time, a UN sponsored investigation did take place. There are other smaller, more discreet examples of civil societies engaging in investigations and even holding hearings. So, in South Africa, during the 1990s, before the democratic elections, civil society groups did come together from time to time and conducted investigations and they did so in a very public way. And, this then did prompt the government to set up an official inquiry. I'm not even talking about the truth commission, I'm talking about another public inquiry into political violence that took place in the early 1990s. In the US, over the last few years, the community of Greensborough, off on their own initiative and using their own funds, came together to look into an event that took place back in the 1960s, in which the Ku Klux Klan was involved, I don't have to tell you about the history of the Ku Klux Klan, there was a protest march which was opposed by the Ku Klux Klan, and police opened fire and several people were killed. And so, an inquiry was held, entirely run by civil society, and involving high profile figures in that community in public

hearings. So, there's much that can be done, but of course, those examples all deal with what took place in individual communities and individual countries. It would be a little more challenging to do the same across national borders, but not impossible to do.

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No, that's absolutely correct, in South Africa we came up with this notion, or concept of truth for amnesty, that if the truth was disclosed in full and certain other criteria were met, then amnesty would be given for the crimes. The criminal record would be completely extinguished, and no further prosecutions or even civil actions could be brought. And the main motivation for that was we wanted to keep the former enemies together in this process. They didn't want to see Nuremberg type trials, and we were concerned that they would return to the bush, and that a very fragile agreements that we had would fall apart. So, it was part of the compromises made at the time to keep the process on track. Certainly, in the early-mid 1990s, South Africa was not very stable. In the early 1990s, it seemed, several thousand people died in political conflict, and there were right wing elements, very powerful right wing elements in the security forces. So, this really was a historic compromise that was made, and, of course, it was the victims who made it. And so, in the interim constitution, there were sections that said we had to make this compromise across the historic bridge from the violent past to a peaceful and democratic future. But it was never intended to be a blanket amnesty and part of the bargain was that those who were denied amnesty and those who spurned the process and never planned for amnesty, would face justice and prosecution. And, today, in South Africa, looking back, you know, we have to accept that that wasn't terribly successful. The truth commission itself, we believe, was quite successful, they did put a lot of truth on the table. But, the fact of the matter is that not much truth was generated out of the truth for amnesty program and this was largely because the offenders, particularly those who had been in the state security forces, were well aware of the capacity and the inclination of the prosecutors to actually bring these cases. And, they were aware that the threat wasn't in fact that great. It's classic carrot and stick. You only offer the carrot if you have the stick. So, they simply spurned the process. The victims, of course, now wanted to see prosecutions in deserving cases, where there was evidence. And, in South Africa today, almost none of those cases have been prosecuted, even though the truth commission handed a list, few hundred strong, with evidence, to the prosecutors. Not only have there been almost no prosecutions, I can only think of two or three, and those weren't pursued enthusiastically, but in 2005, the government proclaimed a new prosecution policy which, basically, allowed prosecutors even more discretion to refuse a prosecution and it effectively amounted to a re-run of the amnesty process behind the closed doors of a prosecutor's office. And so, even where evidence was given to prosecutors, the perpetrator could go to the prosecutor's office and say: "I'm going to disclose in full" and speak about the very same amnesty criteria we had used in the truth commission, and gain a decision not to prosecute, which is effectively the same thing as an amnesty. But I can tell you that I'm in court in just three weeks' time on this very issue because we have challenged this new prosecution policy on behalf of several victims. And, we are arguing that it's unconstitutional to provide further avenues for perpetrators to escape justice.

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The United Nations played an interesting role in relation to the East Timor saga. At times, I would say, it was negative and at other times positive. In terms of the different assessments that they made, the very first assessment which was a telling one was that assessing of the state of the capability of the justice system in Indonesia to run the human rights trials, even though a UN commission had already said that this wouldn't be possible and that an international tribunal was necessary, the United Nations felt that because there had been regime change in Indonesia, and because there had been a credible commission of inquiry that made quite strong findings, that there was a chance that justice would be delivered. But, they didn't follow this up with an investigation of what was actually going on in the prosecuting authority and in the courts. And, if they had looked more closely, we suspect that they would have concluded that it wasn't possible to achieve justice in the most sensitive of political cases in Indonesia, so that was one serious shortcoming. On the positive side, they played a constructive role in establishing the CAVR, that's the truth commission in East Timor, and they supplied consistent support to that structure throughout its life. They also played a constructive role in the establishment of the serious crimes unit and the Serious Crimes Panel in East Timor. Sadly, when the crunch came in relation to that exercise, the UN was found wanting. I mentioned this morning that, perhaps I didn't mention it, but when general Wiranto, the highest ranking general who headed the occupation forces in 1999, at the time of the worst violence, when the Special Crimes Panel indicted general Wiranto, one would have expected the United Nations to stand by that indictment and at least be neutral on it. Instead, the UN, at least the UN representative in East Timor distanced himself and the UN from that indictment which really, effectively said that the UN was abandoning the justice program in East Timor. This had been preceded by the Timor government also disassociating itself from the particular indictment. However, one can understand East Timor's position. This is a tiny, poor country sitting next to a very powerful economic and military power, right on its doorstep. One can understand that such power imbalances why East Timor would take that view. But, the UN was expected to stand up for justice and particularly, given such power imbalance, the UN should have stood between the powerful and the powerless. And, so, that was a very sad day for justice in East Timor, and I would also argue international justice. In relation to the most recent commission, that's the Commission for Truth and Friendship, there, I believe, the UN ultimately took the correct stand and not play any part in that particular role. And the UN has even gone so far as to criticize some of the procedures adopted by the Commission for Truth and Friendship. This is the bilateral commission between East Timor and Indonesia. However, the UN hasn't acted upon a more recent report that it commissioned. It commissioned a group of experts, called the Commission of Experts. In 2006 that commission sought the establishment of an international tribunal, which the UN has still to act upon. Should I comment on some of the other questions or should I...? Thank you. Just quickly on the lifespan of a commission. I agree that 180 days is wholly unrealistic, even with a few more months added on top of that. That may work for a discreet commission of inquiry into a narrow subject matter or topic. So, for example, if you are investigating a particular phenomenon within a police force, or a particular set of crimes that can't be resolved, if it's a discreet, narrow inquiry, six months might do it. But for a truth commission which is to inquire into a conflict that has lasted over several

years, involving tens of thousands of different incidents, six months certainly won't cut it. Historically speaking, most commissions have been in the region of one year, or two years. And, I would argue that two years is the abstract minimum that a commission should have and that's even cutting it a little fine. By the time you've conducted your operations and you are ready to start writing the report, the two years has come and gone. I believe the ideal time span, in fact, would be three years. And, finally, the question on a commission inquiring into the role of the international community and making findings of responsibility in relation to what different countries did in the region, that really ought to be part of the mandate of a truth commission. Certainly, the commissions I've been involved in South Africa, Sierra Leone and East Timor, all of them have looked at the role of external actors and so, for example, in Sierra Leone we had a small team of people working on a theme called external actors and we sent our investigators into neighboring countries to speak to witnesses and to find documents. And, in the final report of that commission it is a separate chapter dealing with external actors and specific findings were made in relation to specific countries. And, then, recommendations were made in relation to those countries and in relation to regional dynamics.