I. Introduction

The purpose of the present study is to identify the role of transitional justice mechanisms within the framework of state-building with particular emphasis in cases of Central and South America. The international community has been taking part in seeking for justice by introducing the mechanisms such as tribunals and truth commissions1 in a post-conflict state. As former Secretary-General of the United Nations states in his 2004 report “The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies”, strategic approaches are required in seeking for justice: not only prosecuting perpetrators through tribunals but also reforming domestic 

1 A variety of truth commissions have been established since the 1970s. For detailed studies, see Priscilla B. Hayner (2002), Unspeakable Truth: Facing the Challenge of Truth Commissions, Routledge, Naomi Roht-Arriaza and Javier Mariacurrena (eds.) (2006), Transitional Justice in the Twenty-First Century, Cambridge University Press.
institutions and enhancing capacity-building. Whereas such importance is well recognized in theory, transitional justice mechanisms do not always function as a part of state-building strategy in practice. In fact, each mechanism has been established reactively, not as a part of comprehensive framework of state-building. On several occasions, frictions have arisen between the principle of state sovereignty and the international standard of justice.

The number of truth commissions established from 1974 till 2009 amounts to 27\(^2\). Central and South American countries have a rich experience in coming to terms with past human rights abuses under military regime in the 1970s, introducing truth commissions and trials in transition to democratic societies. Though most of Central and South American countries went through transition from repressive military regimes to democratic governments, which is distinctive from the situation in post Cold War period in 1990s, the experience of America indicates the necessity of strategic approaches to transitional justice. By exploring the experiences from dictatorship to democracy, this article examines features of transitional justice in Central and South America. It also demonstrates dilemmas between the theory and the practice of transitional justice.

II How state-building is defined and the role of transitional justice

1. Conception of state-building

   As the number of regional conflicts increased and more and more civil wars were waged in the 1990s, the international community has been dealing with peace-building in addition to peace-keeping operations both quantitatively and qualitatively. The issue of state/nation-building\(^3\) was put on the agenda both among academics and in practice in the 21\(^{st}\) century. The international community is required to be engaged in the regions or countries not only to keep peace but also to build peace in the post-conflict phase as were in the cases of Iraq, the former Yugoslavia and


\(^3\) The difference between state-building and nation-building could be argued. OECD makes distinctions as follows: State-building is a broader concept of state formation as a process, not a deliberate strategy of action. Nation building refers to deliberate strategies to forge a common national identity around the idea of the nation. Recently it has also been associated with the idea of international assistance provided in a militarized environment. OECD (2008), *Concepts and Dilemmas of State Building in Fragile Situations: From Fragility to Resilience*, OECD/DAC Discussion Paper, p.13. According to this definition, state-building is a broader conception encompassing the process whereas nation-building emphasizes on deliberate strategies. This paper uses the terms interchangeably.
Rwanda in 1990s. After the attack of September 11, 2001, followed by military intervention to Afghanistan and Iraq, the international community learned that comprehensive approach toward nation/state building is more pertinent to a war-torn society, which would, in the end, bring stability to the local and the international society. In order to achieve so a called “seamless” transition from post-conflict phase to development people focus more on long-term, strategic and comprehensive approaches to state-building at the policy level as well as in academic discussions.

In academic debates, state-building is defined in many ways. A broader definitions has it that “[state-building is] purposeful action to develop the capacity, institutions and legitimacy of the state in relation to an effective political process for negotiating the mutual demands between state and societal groups”4, another that “[n]ation-building … involves the use of armed force as part of a broader effort to promote political and economic reform with the objective of transforming a society emerging from conflict into one at peace with itself and its neighbors”5. Some narrower or simpler explanation of state-building is (1) “actions undertaken by international or national actors to establish, reform, or strengthen the institutions of the state which may or may not contribute to peacebuilding”6, (2) “the construction of legitimate, effective governmental institutions”7, and (3) “the creation of new government institutions and the strengthening of existing ones”8.

While definitions vary, the main difference lies whether the term includes aspects of processes and functions of state-building, or focuses on institutions. At a minimum level, state-building is activities or operations that aim to establish, reform or strengthen government institutions such as the administrative, the executives and the judiciary one. Whatever the difference, it is assumed that a state to be built should be effective, legitimate and resilient9, meeting the international standard, requiring the involvement of actors such as government officials, members of civil societies and international community in the process.

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5 Dobbins, Jones, Crane, and DeGrasse *op.cit.*, p.xvii.
9 OECD/DAC (2007), "Principles for Good International Engagement in Fragile States and Situations", OECD.
2. The role of transitional justice in state-building

Transitional justice, i.e., the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes\textsuperscript{10}, became one of the major topics of academic debates since 1980s, reflecting the change to democratic regime in Latin America and Eastern Europe, the establishment of new states in Balkans, mass atrocities or genocide in Africa, and recovery of war-torn societies in Afghanistan or Iraq. Transitional justice includes such mechanisms or programs as trials, truth commissions, vetting or reparations. The functions and mandates vary depending on the situation, its general objectives include: to identify the past human abuses, atrocities or mass killings; to prosecute those responsible for violations of human rights and international humanitarian law; to facilitate reconciliation among perpetrators and victims; and to create the history of the past\textsuperscript{11}. While transitional justice is located in the period when transition of government to democracy takes place, it is incorporated in the rule of law\textsuperscript{12}, which may have been destroyed in conflicts or does not function after a military regime.

It has been argued that transitional justice mechanisms is said to have practical political effects. By prosecuting those who -often former political leaders- hold accountable for the past human rights violations, a trial de facto delegitimizes a past political regime, drawing a line between the past and present governments. Thus demarcated by transitional justice a new regime is formally legitimized. By demonstrating its legitimacy through transitional justice mechanisms, the new government receives wider supports from domestic and the international communities. When its credibility is enhanced, people perceive the new government as reliable.

As for truth commissions, they are often tasked to collecting information about the past events. Though they do not serve as the judiciary to determine who are responsible for misdeeds, the compiled facts are often treated as valuable sources to identify the past incidents, being referred to as valuable information at trials. Collecting and presenting information in an authoritative record is a process of creating


\textsuperscript{11} The generally recognized effect or legacy of transitional justice has been criticized for not being scientifically proved. As this paper aims at analyzing the functions of transitional justice in Central and South America, not to verify the effects, wherefore they are assumed to be valid. For an analysis of war criminal trials and its limited role in social reconstruction after conflicts, see Laure E. Fletcher and Harvey M. Weinstein (2002), “Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation”, \textit{Human Rights Quarterly}, Vol.24, pp.573-639.

\textsuperscript{12} Dobbins, Jones, Crane, and DeGrass, \textit{op.cit.}, p.76.
These arguments lead us to the issue of legitimacy: how one could evaluate the transitional justice mechanisms are legitimate, and whose values are taken into consideration in the work of the mechanisms. The new government may attempt to oust past political leaders purporting to strengthen the new regime, and use truth commissions or trials. Or it may be impelled to seek for “justice”, to exclude former political powers from politics. Therefore, introducing the transitional justice mechanisms hold political implications: it would enhance the credibility of the government by eliminating wrongdoers. Or the government may lose it if the measures introduced are considered to be arbitrarily used.

In selecting mechanisms, truth commissions were choices than trials, as new governments remained unstable while military forces had political powers. Or when an international agreement was concluded between a government and a conflicting party, a truth commission was introduced as the second best choice. Selection of mechanism depends on the state, in many cases a truth commission is the preferred choice than a trial either by a state could not sustain trials in terms of resources, or there is a strong opposition to hold a trial, or it was clear that there was no domestic support or rather hostilities toward hold a trial domestically.

It does not mean however, that a trial would never been introduced. In some case a truth commission and a trial are introduced consecutively in longer period of time. Argentina and Chile first established truth commissions, as they were unable to mount prosecutions during the years of transition, later they prosecuted senior leaders who were responsible for the past human rights abuses. When a government introduces a trial it would be years after a transition to democracy was completed, the political situation having made amnesty and truth commissions the opted for instruments during or right after the transitions began. It may be that some aspects of justice prove easier to attain after time has distanced the actors, and the society, from the past

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13 As discussed in Chapter III, there are pros and cons whether a commission’s report should documents names of those who are alleged to be engaged in human rights abuses. In the case of Guatemala, the commission took restrictive approach not assigning individual responsibility to correspond to the general thrusts of its mandate. Christian Tomuschat (2001), “Clarification Commission in Guatemala”, Human Rights Quarterly, Vol.23, p.243.

events of repression or human rights violations\textsuperscript{15}.

3. Cases of Central and South America

Most countries in Central and South America the region went through transition from authoritarian to democratic regime, introducing truth commissions or trials. The mechanisms of transitional justice are diverse in terms of mandate and function, and the relationship between mechanisms is unique\textsuperscript{16}. From America’s experiences one deduces common features of transitional justice, their dynamism reflecting political transition from military to democracy in the region. They present the reactive approaches of governments to the past events rather than strategic ones, a common feature of these countries which prioritizes coming to term with human rights abuses while maintaining the social stability, to keep a balance between what is expected as a government and what can be done when military still maintain the power.

Firstly, as the situation of civil wars in Central and South America was complex there was no simple explanation of the causes and conditions that generated human rights violations. Military-oriented South American governments cooperated together to deal with anti-subversive activities, conducting trans-boundary operations. With diverse interpretations of the past events, political leaders were considered as heroes who liberated the country on the one hand, they were criticized as human rights abusers on the on the other. Military regimes conducted human right violations systematically, under the pretext of ousting communist powers. In some occasions there was no clear distinction between a winner and a loser. These complexities help explain diverse mechanisms and functions introduced in the transitional periods, especially favoring truth commissions. Some countries went through a lengthy civil strife between the government and anti-governmental guerrillas, wherefore armed activities served as a pretext for the government to introduce dictatorship. In the case of El Salvador, the civil strife continued for more than a decade, finished without clear distinction between a winner and a loser. Military forces linked to the regime influenced government policy and controlled the society, even after a democratic government had been elected. Though a transition of government has taken place, the maintenance of military powers hindered past human rights abuses from being revealed. In other cases like Guatemala, after thirty-six years of internal strife, a peace agreement was concluded between government and guerillas under the auspice of the

\textsuperscript{15} Naomi Roht-Ariaza (2005), \textit{The Pinochet Effect: Transnational Justice in the Age of Human Rights}, University of Pennsylvania Press, p 220.

\textsuperscript{16} See appendix for truth commissions and trials established in Central and South America.
international community, followed by the deployment of a peace-keeping operation, United Nations Mission for the Verification of Human Rights and of Compliance with the Commitments of the Comprehensive Agreement on Human Rights in Guatemala (UNUGUA)\(^\text{17}\). In either case, the transitional period remains unstable making the establishment of a truth or investigation commission rather than trials the practical choice\(^\text{18}\). According to Naomi Roth-Arriaza, truth commissions were the favorite choice.

“In Latin America, the rationale [for the emphasis of truth] was tied to the nature of the repression. For the most part, the military governments did not openly kill their opponents. Rather, large numbers of people were disappeared, picked up by official or unofficial security forces that then refused to acknowledge the detention. Almost all were killed, often after extended torture, and in many cases the bodies were never found. Unofficial death squads wore civilian clothes and provided a measure of deniability. The families of those who disappeared were ostracized as a climate of generalized terror set in”\(^\text{19}\).

In El Salvador, those with political power under the military regime assumed an office in the transition governments, with profound implications for the local truth commission\(^\text{20}\). Again, when a judiciary has yet not enough capacity to hold an impartial and independent trial there are no prospects for prosecuting those accused of human rights violation.

Secondly, since a democratically established new government often remains fragile in politics, in order to prevent a country from returning to the military rule amnesty or impunity for past crimes by the military forces was the price paid\(^\text{21}\). With the establishment of a truth commission, giving amnesty to political leaders or military

\(^{17}\) The Government and the Unidad Revolucionaria Nacional Guatemalteca (URNG) signed the Agreement on a Firm and Lasting Peace on 29 December 1996. The Comprehensive Agreement on Human Rights of 1994 was already verified by the United Nations.

\(^{18}\) An exception is the case of Peru, whose transition was not the result of a negotiated arrangement. International community did not pressure the government for talks with guerrillas as the conflict was almost over. Eduardo González Cueva “The Peruvian Truth and Reconciliation Commission and the challenge of impunity”, Roht-Arriaza and Marieacurrena (eds.) (2006), op.cit., pp.71-74.


\(^{21}\) Orentlicher, op.cit., p.11.
forces was implicitly agreed upon in order to receive cooperation from them. There are several variations in the process: an amnesty is introduced before a truth commission in order to sustain still fragile governments (Argentina, Chile, Uruguay) or it is adopted following a truth commission as a means to protect former leaders (El Salvador, Guatemala). The introduction of an amnesty laws, however, does not necessarily prevent prosecution permanently. For example in Argentine, after the change of government it followed the public’s demand for trials, invalidated previously granted impunity and had senior leaders of the former military dictatorship indicted.

Under an agreement with the Inter-American Commission on Human Rights, Argentina guarantees the right to truth by obtaining clarification of situation of disappeared people. Pinochet’s arrest in London led him under domestic justice in Chile, implying the possibility for prosecution of the former head of the states and political/military leaders who had once enjoyed immunity.

Thirdly, most institutions of transitional justice in the region were established as national organs by a decree of a president. Out of ten truth commissions in America, the two in El Salvador and Guatemala were introduced by peace agreements between the governments and anti-military forces under the auspice of the United Nations, the

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22 In Guatemala, Historical Clarification Commission was established as a part of peace agreement between the government and URNG on June 1994. The National Reconciliation Law (1996) renders de fact blanket amnesty for crimes committed by the States and its agents. There is a case of Sierra Leone, Africa an amnesty was introduced in conjunction of peace agreement, along with the establishment of truth commission. The peace agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Lomé Peace Agreement, 1999) grants absolute and free pardon to all combatants and collaborators in respect of anything done by them(Article IX). The agreement also provides the establishment of Truth and Reconciliation Commission in order to “address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations.” (Article XXVI). Louise Mallinder (2007), “Can Amnesties and International Justice be Reconciled?”, The International Journal of Transitional Justice, Vol.1, p.224.

23 In Argentine a truth commission was initially established in 1983, followed by trials. Facing the military threat, two amnesty laws were adopted under Alfonsín’s regime, 1976-1983. However in 2001, these laws were declared unconstitutional by the Federal Court and the Federal Court of Appeals, and in 2005 by The Supreme Court. In 2003, the laws were annulled by the Congress. Cases against former perpetrators moved forward in the domestic courts. Ellen Lutz, “Transitional Justice: Lessons learned and the road ahead”, in Roht-Arriaza and Marieacurrena (2006), op.cit. p.333.

24 In El Salvador, FMLN was not defeated and enjoyed substantial support inside as well as outside the country, and the international community was deeply involved into the whole process of peace negotiation. Particularly human rights’ issues drew attentions as a UN Independent Expert was assigned. Members of Inter-American Human Rights Commission and Inter-American Human Right Courts were also committed to the transitional justice efforts. Popkin and Roht-Arriaza (1995), op.cit.,
rest were domestic institutions. The establishment of domestic institution requires a strong leadership to deal with the past events, also the support of the administrative or judiciary.

III. Gaps between theory and practice of transitional justices

As truth commissions and trials are increasingly introduced to deal with the past human rights abuses in post-conflict phases, discussions arise regarding the significance of transitional justice, its role or influence in society, and the relationships between mechanisms. Critiques regarding the presumed objectives of transitional mechanisms are voiced25. As more operations are conducted worldwide, the dilemmas between theory and practice, or the friction between diverse objectives become apparent26. This section examines gaps arose in the process of transitional justice focusing on its objectives and some practical obstacles.

1. Promoting reconciliation

It is maintained that one major purpose of transitional justice is to promote reconciliation. Some truth commissions are tasked to facilitate reconciliation. Haiti’s Truth and Justice Commission’s mandate includes helping the reconciliation of all Haitians. Peruvian Truth and Reconciliation Commission purports to “foster national reconciliation based on the investigation it has conducted”27. The purpose of Chilean National Commission on Truth and Reconciliation was to “help the nation come to a clear overall understanding of the most serious human rights violations committed in recent years in order to aid in the reconciliation of all Chileans”28. Some truth commissions held no presumption of achieving reconciliation in the course of their work. Reconciliation has never been assumed in Argentina, and there is a resistance to the

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suggestion that reconciliation has taken place.

Obviously, there was no consensus on the transitional justice positive effect on promoting reconciliation. For instance, it is questioned among whom reconciliation will be made: whether between wrongdoers and victims, between fighting parties, or among political leaders and the public. The adderser and addressee relationship in terms of reconciliation is not clear. It is also doubted whether reconciliation is something to be promoted through transitional justice mechanisms.

Though promoting reconciliation is considered as one objective of transitional justice, this understanding is not uniformly shared among the various national groups.

“The Commission does not regard itself as the primary instrument to carry out national reconciliation, but rather expects reconciliation to occur once the truth about past human rights violations has been revealed. The political goal of reconciliation inspires the Commission as a “central aspect of its mandate, and directly influences the recommendations made to the Haitian government”.

In Central and South American countries, there was no clear winner-loser distinction at the end of repressive regime. When human rights abuses were conducted systematically as a confidential governmental policy, identifying the past incidents was challenging, sometimes requiring long period of time. Truth commissions focused on investigating cases of disappearance and human rights abuses or issuing reports rather than sharing experiences of people by holding meetings as were done in other regions in Africa or and Asia. Peruvian Truth and Reconciliation Commission organized public hearings. In Chile a dialogue between

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29 Hayner, op.cit., p.160.
30 Fletcher and Weinstein, op.cit., p.600.
32 In South Africa, the Truth and Reconciliation Commission was empowered to establish as complete a picture as possible of the causes, nature and extent of the gross violation of human rights: to facilitate the granting of amnesty to those who make full disclosure of all the relevant facts relating to act associate with a political objective: to establish and make known the fate or whereabouts of the victims: and to compile a report providing as comprehensive an account as possible of the activities and findings of the Commission. Promotion of National Unity and Reconciliation Act, Chapter 2, 1995, Act 95-34, 26 July 1995.
33 In East Timor, Commission for Reception, Truth and Reconciliation was tasked to inquire into human rights violations between 1974 and 1999 in the context of the political conflicts, to establish the truth about these violations, to report its findings based on factual objective information and evidence, and to assist in restoring the human dignity of victims. It also organized community-based hearings as a Community Reconciliation Process, in order to assist in receiving and reintegrating perpetrators into the community. UNTAET/REG/2001/10, 13 July 2001.
victims family and military was convened followed by the creation of the fact-finding mechanisms, which had both positive and negative assessment.

2. Enhancing rule of law

Enhancing the rule of law is said to be another major objective of transitional justice. In the process of state-building, the development of a framework for the rule of law is one of the three dimensions of policy to be in focus, alongside with the political process that legitimates the state and the re-establishment of a framework of security34.

Recognizing the enhancement of the rule of law as a development of state’s capacity to draft and implement laws and observe its obligations, it becomes important to identify the strengths and limits of the transitional justice mechanisms under discussion.

**Strengths**

A Truth Commission’s report includes recommendations to a government, proposing reforms of governmental institutions or follow-up on past human rights situations. In El Salvador, recommendations by the truth commission were introduced into a judicial reform. A new Criminal Procedures Code, which contains basic reforms, would not have been possible without the truth commission’s recommendations35. In Chile, the National Corporation for Reparation and Reconciliation grew out of the Commission for Truth and Reconciliation. It established a monthly pension for the families whose names were in the report, medical benefits for the families and a subsidy for the education of the victims’ children36. Argentine adopted a reparation policy in 1991 as a form of decree for former prisoners. Benefits were expanded to all persons detained without charges in 1994, later to children born in captivity in 200437.

Rule of law is further enhanced when trials are perceived to be held fair and independently. Prosecuting perpetrators implants the notion that the law is reliable because it holds everyone accountable for his or her conduct, which consequently makes trials a strong mechanism. When Pinochet was indicted in Spain and in Chile, people learned that “no one is above the law”, facilitating indictment of political leaders.

**Limits**

In some occasions the establishment of a truth commission _per se_ becomes

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34 OECD, _op.cit._, p.29.
35 Hayner, _op.cit._, p.166.
36 Popkin and Roht-Arriaza, _op.cit._, pp.85-86.
means of a government, justify its efforts in seeking for justice. Or the lack of political will undermines the work of transitional justice. In the Bolivian case, the first truth commission in Latin America, National Commission of Inquiry into Disappearance (1982-1984) was mandated to investigate disappearances between 1967 till 1982. No final report was issued by the Commission due to limitation of funding from government. Likewise, the Truth and Justice Commission in Ecuador (1996) could not complete its mandate of one year, operated only five months due to the lack of resources and the removal of the president from his office.

Some commissions’ mandated are restrictive. Chilean Commission was tasked “to establish as complete a picture as possible of the most serious human rights violations; to gather evidence that may make it possible to identify the victims by name and their fate and whereabouts; to recommend reparations for the families of the victims and to recommend legal and administrative measures designed to ensure that such violations would never occur again”\footnote{Report of the Chilean National Commission on Truth and Reconciliation, (Phillip El. Berryman, trans., 1993), pp.6-7.}. The mandate presented the commission’s “possible” efforts in identifying victims and their treatment, but had no reference to perpetrators. The cases dealt with were limited to those of death or disappearance, not extended to torture not resulting in death, one of the major human rights abuses in the country. Then president’s advisors felt it would be a too unwieldy enterprise to complete within the allotted time if the commission was given broader mandates\footnote{Popkin and Roht-Arriaza, op.cit., p.84-86.}\footnote{Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer, III, 23 June 1994. Tomuschat, op.cit., p.243.}\footnote{Hayner, op.cit., pp.121-123.}.

Some commissions are not mandated to name names in the final report. The Guatemalan Commission for Historical Clarification “shall not attribute to any individual in its work, recommendations and report nor shall these have any judicial aim or effect”. The commission took a restrictive approach not assigning individual responsibility to correspond to the general thrusts of its mandate\footnote{Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer, III, 23 June 1994. Tomuschat, op.cit., p.243.}. Also Chilean Commission refrained from publishing names of individuals. In the case of Haiti, it was decided to include names of individuals only in a report submitted to the president\footnote{Hayner, op.cit., pp.121-123.}. The list of the names remains confidential. If naming is thought to render negative political impacts on the government, as leaders might have connection with those who would be named or that may lead to unstable circumstance, naming would not be preferred. On the other hand, if it would not affect the regime, or if it would be beneficial for it in strengthening its power, then the list of names of
perpetrators are added to the report.

Recommendations of the commission in the final report are not always welcomed. As in the case of El Salvador, the government never accepted the commission’s findings. Furthermore, soon after the Commission referred to the desirability of prosecution of those who are accountable, a blanket amnesty was granted. In Guatemala, the report of the Commission for Historical Clarification was not positively received by the government whereas human rights organizations welcomed it. The experience of El Salvador, where the commission enjoyed a broader mandate in investigating the past events, was said to serve as a lesson of Guatemalan government rendering a limited mandate to the Clarification Commission, as in both cases international community took initiatives in establishing commissions.

3. Complimentary role of transitional justice mechanisms

As varieties of transitional justice mechanisms are established, the importance of strategies among transitional justice is increasingly recognized. The Secretary-General of the United Nations points it out as follows:

“Where transitional justice is required, strategies must be holistic, incorporating integrated attention to individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or an appropriately conceived combination thereof...It is now generally recognized...that truth commissions can positively complement criminal tribunals, as the examples of Argentina, Peru, Timor-Leste and Sierra Leone suggest.”

There are few instances of a strategic plan being designed before launching transitional justice. In Central and South America, most mechanisms were introduced in response to a public demand while the power relations with former regime or military forces are taken into consideration. As the political situation became stable or demands from public became stronger, new mechanisms were introduced.

“If the passage of time has reinforced the need for a comprehensive approach in addressing systemic abuses of the past in which various measures—among them truth commissions; trials; institutional, social and economic reforms; and reparations

42 Tomuschat *op.cit.*, pp.233-258.
43 Hayner, *op.cit.*, pp.122-123.
programmes play a distinct and unique part, it has also underscored the
interdependence of these measures: to a considerable degree, the effectiveness of each
of these measures turns upon the broader context in which it unfolds, including its
relationship with other dimensions of transitional justice.”

In Argentine, the National Commission on the Disappearance of Persons
(CONADEP) preceded so called “truth trials” where courts solicited and analyzed
information and testimony to find out the truth about the disappeared in 1995. The
first took place in Buenos Aires, and then was conducted other areas of Argentine.
Truth commissions’ activities strengthen subsequent court actions, and most
are directed to forward their records to prosecutors or to the courts for possible legal
action where they find evidence of criminal wrongdoing. Reports prepared by
commissions contained reliable sources, and were referred to by domestic courts as
supporting document. Again in Argentine, CONADEP was mandated to clarify the
acts related to the disappearance of persons and if possible determine the location of
remains. It collected nearly 9,000 case files that enabled the domestic court to indict
the senior leaders of the former military regime. Argentine cases suggest truth
commissions and trials can be beneficially combined. In extraditing Pinochet from
England, Spanish judge Garzón relied on reports by the Chilean Truth Commission. A
Guatemalan leader of indigenous people, Rigoberta Menchú, together with Guatemalan
groups, submitted the full report of Guatemala’s Historical Clarification Commission in
support when she filed her case in Spain charging military and political leaders with
genocide. The Peruvian Truth and Reconciliation Commission had a special unit to
cumulate and organize evidence of crimes that could be presented to prosecutors.

45 Orentlicher (2007), op. cit., p.16.
46 Kathryn Sikkink and Carrie Booth Walling, “Argentina’s contribution to global
trends in transitional justice”, Roht-Arriaza and Marieacurrena, op.cit., p.316.
47 Roht-Arriaza (1995), Chapter 11 “Overview”, Impunity and Human Rights in
International Law and Practice, Oxford University Press, p.158.
48 Hayner, op.cit., pp.16, 29.
49 Ibid., pp.93-94.
50 Sikkink and Walling, op. cit., p.321.
51 Hayner, op.cit., pp.38, 49. In 2000 the Spanish court rules against the Guatemalans,
holding that Spanish courts had no jurisdiction over the alleged crimes by giving two
reasons: (1) Inquiry into genocide or torture committed outside Spain by non-Spanish
had to be subsidiary to the state where the crimes took place; (2) the CEH published its
report in 1999 and the Law of National Reconciliation permitted genocide allowed
genocide prosecution, there was insufficient evidence in the record that the
Guatemalan courts were not able or willing to prosecuted those who are accountable to
the crimes. The decision was also upheld by the Supreme Court in 2003.
the other hand, the mandate of the Commission for Historical Clarification in Guatemala excluded the possibility of using its results for subsequent prosecutions.\textsuperscript{52} The work of a truth commission may have negative impacts on or generate hostility within a society as it happened. In El Salvador, where the Parliament passed the amnesty law soon after the commission’s release of a report although the report did not recommend the prosecution of wrongdoers or dissuaded amnesty, underlined the impotence of the judicial system. “[I]t is clear that the quick passage of the amnesty legislation was in direct response to the commission’s naming perpetrators in its report, and was a great disappointment to those who hoped the truth commission would be a step toward accountability.”\textsuperscript{53} In Chile, when the report of Truth and Reconciliations confirmed wide spread killings and disappearance by the military, the army rejected the report’s findings. Furthermore, it did not cooperate with the Commission or the courts in the search.\textsuperscript{54} It poses a question whose justice would be pursued through transitional justice mechanisms when governments and people do not agree with what happened in the past and who should be accountable to it. In such circumstances, transitional justice mechanisms were arbitrary used to minimize one’s responsibility in the past or to maximize one’s political strength. It would also give negative conception about truth commissions and trials that they are means of politics to maintain the power of a regime rather than impartial mechanisms to seek for justice.

IV. Conclusion

This paper examined diversities of transitional justice mechanisms from experiences of Central and South America. Their cases demonstrated following features. (1) Given the background of complex situations in the region transitioning from a repressive regime to democracy, truth commissions were adopted as the practical choice. The adoption of mechanisms was relied upon by the initiatives of presidents, often being introduced with amnesty of former political leaders. (2) The adoption of truth commissions did not however prevent governments from introducing other measures such as trials. As the political situation changes, trials were held and amnesty once rendered to political leaders were demolished or overruled. (3) International community has been involved in introducing transitional justice mechanisms and such involvement bore both advantages and disadvantages. If it took an initiative when there was no strong support from a government, which may hinder

\textsuperscript{52} Roht-Arriaza (1995), op. cit., p.158.
\textsuperscript{53} Hayner, op.cit., pp.90-93.
\textsuperscript{54} Roht-Arriaza (2005), op.cit., p.87.
the efforts of transitional justice. The international community’s efforts would be accepted positively if the country is ready to pursue transitional justice.

This paper further explored the gaps between ideal and reality transitional justice have encountered. It concluded theoretical objectives may not always be achieved in the practice. Experiences of the region indicated that the mechanisms were introduced reactively rather than strategically. An absence of strategic approaches not only undermines the function of mechanisms but also gives negative perceptions about the transitional justice as political means.
# Appendix

<table>
<thead>
<tr>
<th>Name of Commission Foundation, (Dates covered by a commission)</th>
<th>Publication (date)</th>
<th>Major Mandates</th>
</tr>
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<tbody>
<tr>
<td><strong>Argentina</strong> Comisión Nacional para la Desaparición de Personas (National Commission on the Disappearance of Persons, CONADEP) by President Alfonsín 1983-1984 (1976-1983)</td>
<td>Nunca Mas: Informe de la Comision Nacional sobre la Desaparicion de Personas(1984)</td>
<td>Clarify the acts related to the disappearance of persons and if possible, determine the location of the remains Reparations programs included?</td>
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<tr>
<td><strong>Bolivia</strong> Comisión Nacional de Investigación de Desaparecidos (National Commission of Inquiry into Disappearances) by President Hernán Siles Suazo 1982-1984 (1967-1982)</td>
<td>No final report</td>
<td>To investigate cases of enforced disappearance</td>
</tr>
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<td><strong>Chile</strong> Comisión Nacional para la Verdad y Reconciliación (National Commission for Truth and Reconciliation) by executive decree of President Patricio Aylwin 1990-1991, (1973-1990)</td>
<td>Report of the Chilean National Commission on Truth and Reconciliation (The Rettig Report)</td>
<td>To establish as complete a picture as possible of the most serious human rights violations To gather evidence that may make it possible to identify the victims by name and their fate and whereabouts To recommend reparations for the families of the victims To recommend legal and administrative measures designed to ensure that such violations would never occur again</td>
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<td><strong>Ecuador</strong> Truth and Justice Commission by Minister of Government (Ministerial Accord No.012) 1996 , (1979-1996)</td>
<td>No completion of report</td>
<td>To receive denunciations of human rights violations since 1979, carry out an investigation, and in appropriate case, submit the evidence compiled to the judiciary. It may also issue reports on particular themes or cases when merited.</td>
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| **El Salvador** Commission on the Truth for El Salvador (1992) by Mexico Agreement between the government and Frente Farabundo Martí para la Liberación Nacional (FMLN) 1992-1993 (1980-1991) | *“From Madness to Hope: the 12-Year war in El Salvador*’ Report of the Commission on the Truth for El Salvador released at the UN (1993) | Annex to the Mexico Agreement 27 April 1991 The Commission shall have the task of investigating serious acts of violence that have occurred since 1980 and whose impact on society urgently demands that the public should know the truth. The mandate of the Commission shall include recommending the legal, political or administrative measures which can be inferred from the results of the
<table>
<thead>
<tr>
<th>Country</th>
<th>Body Name</th>
<th>Report/Title</th>
<th>Purpose</th>
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<tr>
<td>Guatemala</td>
<td>Comisión para el Esclarecimiento Histórico (Commission to Clarify Past Human Rights Violations and Acts of Violence That Have Caused the Guatemalan People to Suffer)</td>
<td>Guatemala: Memoria del Silencio (Guatemala: Memory of Silence) (1999)</td>
<td>To clarify the human rights violations and act of violence that have caused suffering to Guatemalans, related to the armed conflict. To prepare a report that contains the findings of the investigations and provides objective information about events during the period. To formulate recommendations to encourage peace and national harmony in Guatemala. The Commission recommends measures to preserve the memory of the victims, to foster a culture of mutual respect and observance of human rights and to strengthen the democratic process.</td>
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<td>Haiti</td>
<td>National Truth and Justice Commission by President Jean Bertrand Aristide's executive order, 1994 (1991-1994)</td>
<td>“Si M Pa Rele... (If I Don’t Cry Out..., February 1996) to the president and the judiciary</td>
<td>To globally establish the truth concerning the most serious Human Rights violations perpetrated between September 29, 1991 and October 15, 1994, inside and outside the country and to help to the reconciliation of all Haitians without any prejudice against seeking legal action based on these violations.</td>
</tr>
<tr>
<td>Uruguay</td>
<td>Comisión para la Paz (A Peace Commission)</td>
<td>Final report (2003) was</td>
<td>To receive, analyze, file and compile information related to</td>
</tr>
</tbody>
</table>
Commission) established by resolution 858/2000 of President Jorge Battele 2000 (1973-1985) submitted to the Supreme court those detained/disappeared. It was committed to act with reserved and confidentiality towards its source. It was not allotted full power of inquire. No competence to interview senior officers of the armed forces.

Sources:
Priscilla B. Hayner (2002), Unspeakable Truth: Facing the Challenge of Truth Commissions, Routledge