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EXECUTIVE SUMMARY

This study examines the range of “transitional justice mechanisms” (TJMs) that are employed in post-conflict, developing countries to address a legacy of gross human rights violations. It explores the impact that TJMs may have on achieving poverty reduction as primary among the Millennium Development Goals (MDGs). Using recent examples, the study outlines the objectives and limitations of the following TJMs: criminal prosecution in domestic, international and “mixed” courts, transnational criminal and civil proceedings, quasi-traditional justice mechanisms, truth commissions, lustration / vetting, reparations and amnesties. It explores the potential for such mechanisms to impact positively on reducing poverty, including both material disadvantage and a sense of exclusion, vulnerability and disempowerment.

The study concludes that while poverty reduction has not been among the stated aims of TJMs to date, an effective transitional justice strategy is critical to providing the conditions necessary for achieving poverty reduction as well as the full range of MDGs. TJMs have the potential to impact on the achievement of four key conditions: political and social stability; safety, security and access to justice; conflict prevention; and social and economic justice. Furthermore, TJMs may have a direct impact on the material and non-material well-being of victims of gross human rights violations, with related effects on levels of poverty and participation in economic activity. However, the impact of TJMs on poverty reduction will be particularly limited as long as reparative measures that address the economic and social consequences of human rights violations continue to be neglected, and while violations of economic and social rights remain largely excluded from the focus of TJMs.

The challenge of devising measures to address past human rights violations in the post-conflict phase is a highly contentious one, and formulating an effective, legitimate strategy entails balancing a variety of interests and objectives. There are key risks associated with implementing TJMs that relate directly to their impact on poverty reduction, including the risk of renewed tensions and conflict, the risk of causing further human rights violations, and the risk of diminishing trust in the state and its institutions.

International involvement in transitional justice has developed considerably in recent years, and includes direct interventions in the form of international or “mixed” accountability mechanisms, as well as the provision of political and material support for various TJMs. The international community has both increasing influence and a responsibility to support effective mechanisms to address human rights atrocities. The impact of TJMs on poverty reduction relies on the resources and political support afforded by governments and the international community to the process. However, levels of international commitment and funding for TJMs to date have varied significantly in different contexts, with correspondingly varied results.

Current practise by states and international organisations indicates an emphasis on criminal prosecution as an essential component of responding to past human rights atrocities. Furthermore, there are emerging duties upon states to prosecute certain international crimes under international law. At the same time, however, amnesties continue to feature in many post-conflict, transitional arrangements. There has also been a proliferation of supplementary mechanisms to criminal prosecution, including truth commissions and quasi-traditional justice mechanisms, and a tendency towards combining various TJMs in order to meet the multiple needs of the post-conflict situation. The multiple links between TJMs and poverty reduction further demonstrate the need to combine accountability and justice mechanisms with reparative measures for victims, a process of institutional reform, and efforts to tackle structural inequalities.

For TJMs to have a significant impact on poverty reduction, they must form part of a coherent overall strategy, be effective in meeting their objectives, and have relevance and legitimacy for those they aim to assist. Following the overview of TJMs and an examination of the key linkages between transitional justice and poverty reduction, the study offers some key “lessons learned” to date, with a view to devising effective TJMs in this context.
1. INTRODUCTION

Purpose

1.1 This scoping study has been carried out in the context of DFID’s work to achieve the UN Millennium Development Goals (MDGs), including halving world poverty by 2015. Among DFID’s core objectives is to enhance the capacity of governments to govern in ways that promote poverty reduction. The post-conflict transitional context poses particular challenges for governments, who must aim to restore security as the pre-condition to all other actions, to address the root causes of conflict, and prevent a recurrence. Failure to provide an effective response to conflict will hamper all other efforts to achieve poverty reduction and the MDGs.

1.2 A vital component of an effective response to conflict is the challenge of addressing gross human rights violations that were perpetrated during the conflict period, often on a vast scale. Providing accessible justice and reparative measures for victims of past abuses, who are often among the poorest citizens, is an essential part of post-conflict rehabilitation and reconstruction. Ensuring that those responsible for past violations are held accountable is also vital to preventing a renewed cycle of vengeance, and combating the culture of impunity that so often prevails during conflict. States and the international community have engaged in a wide variety of measures to respond to past abuses, with a view to preventing further conflict, and achieving the necessary conditions for alleviating poverty.

1.3 The term “transitional justice” is generally used to refer to the measures taken to address a legacy of human rights violations in the transition from violent conflict and/or authoritarian rule to peace-time and/or democracy. This study specifically examines the range of “transitional justice mechanisms” (TJMs) that are available in post-conflict, developing countries, outlining the pros and cons of each option with reference to specific examples.

1.4 It explores the linkages between TJMs and poverty reduction, where poverty is to be understood in the widest sense possible, to include not only economic and material disadvantage, but also a sense of vulnerability, powerlessness, discrimination and victimisation. The study aims to highlight the potential

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2 The Millennium Development Goals, to be achieved by 2015, are:
- To halve the proportion of the world's people whose income is less than one dollar a day and the proportion of people who suffer from hunger and the proportion of people who lack safe drinking water;
- To ensure equal access to all levels of schooling for girls and boys - preferably by 2005 for primary and secondary education - and primary schooling for all children everywhere;
- To reduce maternal mortality by three-quarters and under-five child mortality by two-thirds;
- To halt, and begin to reverse the spread of HIV/AIDS, malaria and other major diseases;
- To provide special assistance to children orphaned by HIV/AIDS;
- And by the year 2020, to achieve a significant improvement in the lives of at least 100 million slum dwellers.

3 For the purposes of this study, the “international community” refers to states and international organisations that participate in, support or influence the design and implementation of transitional justice initiatives – see paragraphs 2.20 – 2.25 below.

4 It is recognised that in some cases, there may not be a clear transition towards peace-time or democracy, but rather a shift between distinct phases of conflict, instability or governmental rule. See, for example, Carothers, Thomas, “The End of the Transition Paradigm”, Journal of Democracy 13:1 (2002).
for such mechanisms to impact positively on the goal of reducing poverty, as well as the potential risks associated with transitional justice strategies. It further outlines some of the key “lessons learned” to date with a view to devising effective TJMs in this context.

Scope

1.5 The scope of this study is limited to the context of post-conflict, developing countries, where there is a legacy of gross human rights violations to be addressed.\(^5\)

1.6 The study examines the following TJMs that have been employed to date by states and the international community: criminal prosecutions, transnational criminal and civil proceedings, quasi-traditional justice mechanisms, truth commissions, lustration / vetting, reparations, and amnesties.

1.7 The emphasis on officially-sponsored mechanisms is not to ignore the activities of civil society, community groups and individuals in responding to past human rights violations, for example by providing support to victims, facilitating reintegration of perpetrators, or contributing to the goal of reconciliation. While it is not possible to examine such activities within the scope of this study, the crucial role that civil society and communities play in the design and implementation of officially-sponsored TJMs is highlighted where particularly relevant.

Methodology

1.8 The findings of the study are based on a review of the existing literature dealing with transitional justice, and include developments up to December 2002 (unless otherwise specified). A number of interviews and informal discussions were also held with experts working in this field.

1.9 Material was selected on the basis of consultation of relevant bibliographies and bibliographical surveys, and advice from experts. General transitional justice literature was selected to combine ‘core’ texts and recent texts to include the latest developments. The selection of literature also provides a balance of views (for example, between legalistic and non-legalistic perspectives).

1.10 Literature was also selected to provide information on each type of TJM, ensuring a balance of sources (e.g. academic articles, NGO monitoring reports, official reports from relevant institutions). Relevant legal documents (e.g. statutes, regulations) were consulted for clarification where necessary. Examples from different countries were included to show how theoretical models and objectives have borne out in practise, providing a “reality check” on the conceptual analysis.

1.11 Rwanda and East Timor were selected for detailed study as two countries that have recently attempted to combine more than one mechanism to address the problem of past human rights atrocities. Both continue to develop their transitional justice strategy, and provide insights into current trends and challenges within this field. Both have faced the particular challenge of post-conflict reconstruction in the face of extreme levels of poverty and lack of resources.

1.12 The truth commissions in South Africa, Guatemala and El Salvador were chosen as three of the most widely-recognised, past examples of this particular mechanism. Although not located in a typical post-conflict situation, South Africa’s Truth and Reconciliation Commission is included as a unique example that has combined truth-seeking with the conditional grant of amnesty. These three examples also offer a comparison between the international (El Salvador), mixed (Guatemala) and national (South Africa) approaches.

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\(^5\) Transitional justice strategies may be relevant to a variety of other situations, such as developed countries, or countries emerging from repressive rule rather than violent conflict.
2. TRANSITIONAL JUSTICE: KEY ISSUES AND CONCEPTS

Poverty Reduction and the Role of Transitional Justice

2.1 Achieving the goal of poverty reduction in the context of post-conflict transitions poses particular challenges. The specific effects of conflict on exacerbating levels of poverty are by now well documented.\(^6\) They include the hampering of economic growth and productivity at the macro level, and destruction of state institutions and public infrastructure. At the micro level, individuals and communities experience increased insecurity, loss of assets and employment, and diminished access to essential public services. Vulnerable groups proliferate and are both exploited and abused.

2.2 Human rights violations committed during conflict are inextricably linked to exacerbating poverty. Those who suffer from poverty are more vulnerable to human rights abuse; at the same time, poverty is also often a direct outcome of human rights violations. TJMs (as defined in paragraph 1.3 above) have a significant role to play in providing remedies for past violations, and in re-establishing the trust of citizens in the state and its institutions. They also have a role in identifying the root causes of conflict, and highlighting the changes required to prevent a recurrence and create the conditions for poverty reduction over the longer term.

2.3 Various TJMs have the potential to impact on the goal of poverty reduction in post-conflict, developing countries in specific ways. Their impact will vary according to which mechanisms are used, and the context in which they are applied. Section 6 below examines the possibilities for TJMs to contribute to:

- *Providing the conditions* necessary for achieving poverty reduction – e.g. ensuring political and social stability; improving levels of safety, security and access to justice; diminishing prospects of renewed conflict; working towards the achievement of social and economic justice.

- *Alleviating material disadvantage, exclusion and vulnerability* – e.g. repairing some of the social and economic consequences of violations for victims and their families; increasing participation of victims and perpetrators in economic activity; facilitating the acknowledgment, inclusion and empowerment of victims.

2.4 Existing TJMs have a tendency to emphasise remedies for violations of civil and political rights. With a greater, concerted focus on incorporating violations of social and economic rights into the transitional justice framework, TJMs also have the potential to contribute to poverty reduction by highlighting structural inequalities that are often among the causes of both conflict and poverty. They can also provide remedies for victims of past violations of economic and social rights that exacerbate poverty, and ensure accountability of perpetrators of such violations as a step towards combating impunity.

Transitional Justice: Challenges and Dilemmas

2.5 Devising an appropriate strategy to respond to past human rights violations raises contentious issues in the post-conflict phase. While victims are entitled to seek justice, truth and reparations, perpetrators (who may retain varying degrees of power) may at the same time press for amnesty or exemption from punishment. Post-conflict situations are also complicated by the fact that many individuals are both victims and perpetrators of past human rights violations. Formulating an appropriate and effective response will require balancing a variety of interests and objectives. At the same time, transitional justice

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measures must be viewed within the international legal framework that outlines the obligations of states and entitlements of individuals (see Section 3 below).

2.6 The post-conflict government may have various reasons for resisting measures to address past violations, including fear of renewed instability or violence, or its own involvement in atrocities during the conflict. The balance of power between former parties to the conflict, and the position taken by the international community, are two critical factors that can determine the extent to which a new government is able or willing to address past atrocities. Various dynamics may also change over time, providing new opportunities for transitional justice, or restricting those that have been tried or contemplated. The responsibility of the government to meet the basic needs of the population in terms of adequate food, housing, healthcare and education may also limit its capacity or willingness to devote resources to accountability or reparative mechanisms for past violations.

2.7 Section 4 below outlines the advantages and limitations of various TJMs that have been used in post-conflict, developing countries to date. It is important to recognise that while TJMs can offer enormous benefits to post-conflict, developing countries, devising transitional justice policies is not a risk-free process, but brings with its serious implications for the transition from conflict to peace-time.

**Box 1: Risks associated with transitional justice**

*Risk of Renewed Tensions and Conflict*
There is a significant risk that the chosen response to a legacy of gross human rights violations may antagonise former parties to the conflict. Accountability and justice mechanisms may generate resentment and resistance among certain groups, while alternatives such as amnesties (or abstention from pursuing any form of accountability) may anger victims and increase the chances of vigilantism. Even if political consensus on a transitional justice strategy is achieved at the national level, measures may nevertheless result in tensions between communities and individuals. Renewed insecurity or violence will in turn hamper other efforts to achieve poverty reduction.

*Risk of Further Human Rights Violations*
There is a risk that in implementing a strategy to provide accountability and justice for past abuses, further human rights violations will be committed. The ability or willingness of the state to ensure full respect for due process standards may be limited, particularly where adequate resources have not been committed to the process, and the rights of both victims and those accused may be compromised as a result. An arbitrary, impartial or discriminatory process of justice is likely to diminish respect for the rule of law and exacerbate an existing culture of impunity, jeopardising prospects for achieving poverty reduction over the longer-term.

*Risk of Diminished Trust*
If the entitlements and expectations of victims in terms of justice/truth/reparations for past violations are not adequately met, this is likely to diminish their trust in the state, at the moment where re-establishing this trust is vital. An approach to transitional justice that is not inclusive will enhance the sense of marginalisation of vulnerable sections of the population and thus exacerbate poverty levels. Equally, international interventions that fail to include local actors throughout the process may not be regarded as legitimate, and may damage relations with government and civil society, with negative consequences for future co-operation.

2.8 The choices made in devising a transitional justice strategy are difficult, and have in the past resulted in certain trade-offs and compromises. The chosen response of governments and the international community has often depended on whether the principal goal is peace, justice or a different aim, and how such goals are seen in relation to each other. Poverty reduction as a primary goal brings in additional important factors. While there is a clear shift towards combining a variety of mechanisms in order to try and meet multiple goals simultaneously (see Section 5 below), in practise it is necessary to prioritise objectives and the allocation of resources.

2.9 Timing is also critical. For example, providing formal justice on a large scale may not be compatible with achieving political stability in the initial stages of a transition. At the same time,
abstaining from providing justice at an early stage may contribute to festering resentments and the potential outbreak of violence at a later stage. Each mechanism also brings with it difficult choices in the processes of design and implementation, such as prioritising certain types of violations over others.

**Key Concepts**

- **Justice**

2.10 In the context of addressing past human rights violations, justice may be defined as the provision of an “effective remedy” for such violations.\(^7\) This study takes a wider view of justice than criminal prosecution, and aims to reflect the diverse notions of justice that exist, particularly in some developing countries. Devising an effective transitional justice strategy entails reaching an understanding of local conceptions of justice and taking these into account.

2.11 Conceptions of justice may be *retributive*, emphasising punishment of perpetrators, or *restorative*, focusing on repairing the damage done to the victim, and restoring the relationships between the victim, perpetrator and society. Justice mechanisms may contain both retributive and restorative elements – for example, payment of monetary damages from the perpetrator to the victim constitutes both a punishment and an attempt to repair the damage done.

2.12 Transitional justice measures have usually focused on violations of civil and political rights. Addressing gross violations of social and economic rights calls for a conception of justice that is broader still, incorporating aspects of *distributive* justice that aim to address socio-economic inequalities and ensure equal access to existing resources.

- **Truth**

2.13 There is an emerging consensus around the existence of a “right to truth”, which places an obligation on the state to take all possible measures to disclose relevant facts to victims and their families, as part of providing an effective remedy. The question of what constitutes the “truth” remains elusive, however. Inquiries into past human rights violations are necessarily limited in scope, and the goal of creating a single, complete, common “truth” from all possible accounts is rarely expected, let alone achieved.\(^8\) This study takes the view that “truth-seeking” in the context of transitional justice should be understood as efforts to disclose the facts about past human rights violations.

- **Reconciliation**

2.14 The goal of reconciliation varies according to different conceptions, but in general aims to bring former enemies together to achieve a sustainable, peaceful co-existence. Conceptions of reconciliation range from “simple co-existence” limited to a mutual respect for the rule of law, to a more active form of “democratic reciprocity” involving dialogue. More robust conceptions involve ideas of mutual healing and forgiveness.\(^9\)

2.15 It is important to distinguish between reconciliation at the national, community and individual levels. National reconciliation, in its *political* form, involves consensus or interaction between political parties or elites. This constitutes a different process to *societal* reconciliation, which involves

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\(^7\) Article 8, Universal Declaration of Human Rights.


reconciliation at the community and individual levels. As such, societal reconciliation is a process that may never truly be completed.

- **Justice, Truth and Reconciliation**

2.16 It is important to avoid assumptions that draw causal links, or polarities, between objectives such as justice, truth and reconciliation. The transitional justice debate has moved away from assertions that a society must choose between a policy of “justice” or “truth and reconciliation”, towards a deeper understanding of the linkages between these concepts. The assumed polarity between these objectives stems in part from the past Latin American transition examples of official “truth and reconciliation” endeavours that were accompanied by general amnesties.\(^\text{10}\)

2.17 However, a policy of truth-seeking or reconciliation is not inherently contradictory to the pursuit of justice, and is not necessarily associated with the provision of amnesty. Official “truth-seeking” processes have provided the impetus within society to pursue justice for past violations,\(^\text{11}\) and Sierra Leone and East Timor provide new examples of criminal prosecution strategies accompanied by an independent truth and reconciliation commission. It has also been argued that truth and reconciliation commissions can provide a “restorative” form of justice that is both legitimate and relevant for that particular society – this is a complex question, however, that is addressed further below.

2.18 The assumption that truth and reconciliation are causally linked is equally open to question. While it may be likely that victims will need to know the facts as a minimum precondition to starting the process of reconciliation, there are many other factors that will inform the process. Justice may be a necessary precondition for long-lasting reconciliation at the community and individual levels, alongside contrition on the part of the perpetrator, repair of the damage done, or a notable improvement in the socio-economic circumstances of victims.

- **Peace**

2.19 Peace is often presented as the over-riding goal that must be met in order to justify the objectives of justice, truth and reconciliation. A government’s first priority in the immediate post-conflict phase is to secure and maintain stability, prevent an imminent relapse into conflict, and consolidate its own position. For this reason, many governments have developed strategies, and in some cases have agreed to compromises, in order to achieve an effective political transition and short-term stability. The international community plays an important role in providing the conditions in which a post-conflict government acting in good faith can pursue an effective transitional justice strategy without fear of its own demise.

2.20 The short-term goal of preventing an immediate relapse into conflict (often described as “negative peace”) must be balanced against the measures necessary to achieve a sustainable peace in the long-term (“positive peace”). These two goals may contradict each other, for example where a policy that contributes to short-term stability may nevertheless contribute to festering resentments and the potential outbreak of violence at a later stage. For this reason, the motivations of governments, and the needs and wishes of victims, perpetrators, communities and society must all be taken into account. In a case where calls for accountability mechanisms are not heard (for example, in post-conflict Mozambique), while reasons for this silence should be explored, international intervention may be more difficult to justify.

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\(^\text{10}\) See Cassel, Douglas, “Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities”, Law and Contemporary Problems, Vol. 59, No. 4 (1996). Some of those who have objected to South Africa’s chosen strategy of offering conditional amnesty in return for a statement of truth have also considered this an example of justice sacrificed at the expense of “truth and reconciliation”.

International Involvement

2.21 International involvement in post-conflict transitional justice strategies has increased considerably over the last decade. It is usually a direct response to the lack of capacity at the national level to deal with the challenge, due to a lack of infrastructure and resources, an absence of political will, or both. Post-conflict, developing countries are necessarily characterised by severely damaged institutions and infrastructure, and a lack of financial resources for reconstruction. Individuals with relevant skills and expertise may have been killed, or have fled the country. International military, political and material support can be vital in providing the necessary stability for a government to pursue an appropriate transitional justice strategy.

2.22 In the context of globalisation, the international community, including international civil society, has increasing influence over national policies. This is particularly true in the developing world where countries are more dependent on international support for their future stability and economic prosperity. The international community therefore has a crucial responsibility to respond appropriately to the challenge of transitional justice in developing countries. However, levels of international commitment and funding for TJMs to date have varied significantly in different contexts.

2.23 International involvement in transitional justice strategies has taken the form of direct international interventions, such as:

- “Ad hoc” international criminal tribunals (former Yugoslavia, Rwanda);
- UN-sponsored truth commission (El Salvador);
- “mixed” judicial mechanisms (East Timor, Kosovo, Sierra Leone);
- “mixed” truth commissions (Guatemala, Sierra Leone, East Timor);
- criminal prosecutions and civil suits in foreign courts;
- arrest and extradition of suspects to national or international courts;
- brokering peace settlements, some containing provisions for TJMs.

2.24 Indirect involvement has included:

- advising and influencing governments on domestic strategies and mechanisms;
- providing funding, resources and support for state-sponsored mechanisms;
- providing funding and support for civil society initiatives;
- tracing assets of perpetrators abroad.

2.25 The involvement of the international community has not always been in support of national transitional justice strategies, however. Suspects have been, and continue to be, harboured abroad and protected from the prospect of criminal prosecution. Foreign states have failed to hand over information relevant to truth-seeking inquiries, especially relating to their own involvement in violent conflicts. The international community’s contribution to post-conflict transitional justice strategies must be viewed in the context of the involvement of foreign states in armed conflicts in other countries through the supply of funding, arms and technology to participants, as well as political support for regimes responsible for armed aggression and/or gross human rights abuses.

2.26 Direct international intervention, in its various forms, brings with it the essential dilemma of substituting local institutions with international mechanisms on the one hand, and ensuring “local ownership” on the other. The difficulties of international involvement in transitional justice strategies are

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13 Hayner (2001) - Chapter 15.
explored in detail below. Evidence indicates that while positive steps have been taken, some core lessons of strategy and implementation have not yet been learned.

**Recent Trends**

2.27 Transitional justice strategies have evolved considerably in recent years, and comparative analysis across countries and mechanisms is now increasingly feasible. This raises the possibility of devising international guidelines on the use of TJMs in the future, while bearing in mind the need to maintain a context-specific approach to transitional justice.

2.28 There have been unprecedented developments in the area of transnational and international criminal prosecutions, culminating in the recent establishment of the permanent International Criminal Court (ICC) on 1st July 2002.\(^{14}\) Developing more effective mechanisms for criminal prosecution has become a primary focus of the international community over the last decade. The limited impact of the international criminal tribunals on the development of national capacity to deal with past violations has led to a recent shift towards the “mixed” judicial mechanisms currently underway in East Timor, Sierra Leone and Kosovo. This represents a new emphasis on capacity-building, as well as a desire in the international community to find a less costly model for criminal justice in this context.

2.29 At the same time, alternative or supplementary mechanisms to formal criminal prosecutions are also being explored in greater depth, including recent innovations in the area of traditional justice. This reflects the difficulties encountered in implementing criminal prosecutions on a large scale, particularly in a situation where adequate resources are unavailable or have not been committed to the process. Truth commissions have become a feature in many countries since the early 1980s, and at least one commentator has proposed the establishment of a permanent international truth commission.\(^ {15}\) At the same time, amnesty provisions continue to feature in many transitional arrangements.

2.30 There is an increasing recognition that no single mechanism is able to address the various dimensions of transitional justice. This has informed a shift towards combining various mechanisms, at the same time raising critical issues of their legal and practical relationships to each other.

2.31 Current developments, both in practise and in the transitional justice field of study, indicate that in future post-conflict transitions, governments (and the international community) are likely to consider the following mechanisms:

- **Criminal prosecution of the highest-level perpetrators:**
  - for serious international crimes committed since 1st July 2002, in domestic courts or the ICC;
  - for serious crimes committed prior to 1st July 2002, in domestic courts, “mixed” judicial mechanisms or international criminal tribunals;
- **Accountability mechanism(s) to address the remaining cases of past human rights violations,** including quasi-traditional justice mechanisms where appropriate;
- **Reparative measures for victims;**
- **An official truth-seeking process;**
- **A process of institutional reform, incorporating non-criminal sanctions where appropriate.**

2.32 With respect to criminal prosecutions, it is important to note that in many future post-conflict situations, serious human rights violations committed both before and after 1st July 2002 will have to be addressed. Therefore, in a situation where the relevant state proves to be unwilling or unable to conduct

\(^{14}\) The Statute of the ICC was adopted in Rome on 17th July 1998. The required 60 ratifications were entered by 11th April 2002, and the court came into existence on 1st July 2002.

criminal prosecutions against those responsible in their domestic courts, it will be necessary to supplement the ICC with additional judicial mechanisms (whether “mixed”, international or transnational) to cover the full range of violations in question.

2.33 At the same time, a form of amnesty may also be considered in future post-conflict situations, particularly where the international community is involved in negotiations to end conflict and/or secure a regime change. The current US-led debate on amnesty for the top leadership in Iraq demonstrates the continued controversy around this issue.

3. INTERNATIONAL LEGAL FRAMEWORK

Relevant Standards in International Law

3.1 Measures to address a legacy of gross human rights violations in the post-conflict context are located within the existing framework of international law. International human rights law and international humanitarian law (or the “laws of war”) both provide applicable, and sometimes overlapping, provisions that outline the responsibilities of states and parties to armed conflict to respect human rights in conflict situations. They define the violations that are to be recognised and addressed by accountability mechanisms. In addition, evolving international criminal law further defines which violations can give rise to individual criminal responsibility.

3.2 International human rights law also provides the legal framework that regulates how past human rights violations are to be addressed. A transitional justice strategy must aim to conform to these standards as far as possible. Most importantly, an “effective remedy” for victims of past human rights violations should be provided, and appropriate “due process” standards should be respected in any measures taken against perpetrators.

3.3 The United Nations has taken steps to develop principles and guidelines that are particularly relevant to transitional justice, including the Joinet and Guissé studies on the impunity of perpetrators of human rights violations, and the Van Boven study on the right to reparation for victims. The Joinet study emphasises the right to know, the right to justice, and the right to reparations for victims of civil and political rights. This combination of rights corresponds to the trend within transitional justice to combine

16 An exhaustive list of all relevant provisions is not provided here; however, key instruments include:
Geneva Conventions (I- IV), especially Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949;
International Covenant on Civil and Political Rights, 1966 – noting non-derogable rights listed in Article 4;
International Covenant on Economic, Social and Cultural Rights, 1966;
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (“the Torture Convention”);
Declaration on the Protection of Women and Children in Emergency and Armed Conflict, 1974.
17 See, in particular, the following instruments:
Charter of the International Military Tribunal at Nuremberg, 1945;
Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 1968;
Statute of the International Criminal Tribunal for the Former Yugoslavia, 1993;
Statute of the International Criminal Tribunal for Rwanda, 1994;
19 Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (final version), prepared by Mr. Theo Van Boven, E/CN.4/1997/104, annex. See also revised version of the principles and guidelines prepared by Mr. Cherif Bassouini with a view to future adoption by the UN General Assembly, E/CN.4/2000/62, annex. The draft principles have not yet been adopted.
various mechanisms to meet these entitlements. The Guissé study focuses on preventive measures and remedies for violations of economic, social and cultural rights.

**State Obligations to Prosecute International Crimes**

“It is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes” – Preamble, Rome Statute of the ICC.

3.4 The question of whether states are obliged to prosecute certain categories of international crimes under international law is particularly relevant to transitional justice. Such a duty would mean that states must prosecute those responsible for certain gross human rights violations committed by prior regimes, as well as by governments that remain in power.\(^{20}\) The existing literature emphasises that the status of international law is unclear on this critical issue. While important treaty obligations apply to respective state parties, such as parties to the Genocide Convention, Torture Convention and Geneva Conventions, the existence of a customary legal obligation\(^{21}\) to prosecute international crimes is not widely supported by legal commentators. At the same time, much of the literature indicates that there is evidence of a trend within international law towards both reaffirming and expanding upon duties to investigate and prosecute international crimes and gross human rights violations, together with the prohibition of general amnesties for the same crimes.\(^{22}\)

3.5 This trend towards emphasising states’ duties to conduct criminal prosecutions has significant implications for future transitional justice strategies. Such duties potentially place a heavy burden on the state to conduct formal criminal prosecutions in cases where certain international crimes (such as genocide, torture, war crimes or crimes against humanity) were perpetrated on a vast scale during conflict. At the same time, governments and the international community increasingly view criminal prosecutions as both costly and time-consuming, and attempts, national and international, to prosecute perpetrators of such crimes on a large scale in this context have been largely unsuccessful.\(^{23}\)

3.6 The practise of states and international organisations appears to indicate that criminal prosecutions will continue to be limited in situations of mass atrocities. “Selective prosecution” is increasingly favoured, as most recently framed in the Statute of the Special Court for Sierra Leone, which is mandated to try only those with “greatest responsibility” for past atrocities.\(^{24}\) From a legal perspective, it has been argued that international law should not be interpreted to the point where de-stabilisation and further violations of human rights will result, therefore a state is not obliged to prosecute all perpetrators of gross

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\(^{21}\) Customary international law is formed by state practise, as well as the particular view taken by states as to their own practise and the practise of other states.

\(^{22}\) See, for example, Ratner and Abrams (2001), chapters 7 and 8, stating that “the practise of states and international organisations suggests any general duty to prosecute human rights abusers … has not yet solidified. Numerous states […] have passed broad amnesty laws governing past abuses or honoured amnesties of prior governments. […] Yet, in a positive development for an emerging norm requiring prosecutions, some of these amnesties have exempted international crimes or have been narrowed by courts to allow prosecutors to try serious offences.” See also Roht-Arriaza, Naomi, “Combating Impunity: Some Thoughts on the Way Forward”, *Law and Contemporary Problems*, Vol. 59, No. 4 (1996), stating that “international bodies continue to clarify the extent of a state’s international law obligations to investigate, prosecute and compensate victims of international crimes and serious human rights violations. The general tenor has been to reaffirm and expand on duties to investigate, prosecute and compensate, and to be critical of amnesties that preclude any of these things.”

\(^{23}\) The concluding remarks of the Joinet study (1997) highlight this dilemma, citing the example of Rwanda’s efforts to prosecute those responsible for genocide, and asking “how is it possible to combat impunity and therefore ensure a victim's right to justice when the number of persons imprisoned on suspicion of gross human rights violations is so large that it is technically impossible to try them in fair hearings within a reasonable period of time?”

\(^{24}\) Statute of the Special Court for Sierra Leone, Article 1.
human rights violations in such situations. The Joinet study also emphasises “the importance in conducting prosecutions of setting priorities, and trying first, wherever possible, those perpetrators of crimes under international law who were at the top of the hierarchy”.

3.7 The selective approach does not resolve the question of what measures are legally acceptable for the remainder of perpetrators of international crimes, however. A trend towards emphasising state obligations to prosecute has significant implications for the use of alternative or supplementary measures to criminal prosecutions. While it is generally accepted that self-serving, blanket amnesties are impermissible, other measures such as conditional or limited amnesties, non-criminal sanctions and quasi-traditional justice mechanisms have been and are being implemented, including for the most serious international crimes (such as genocide in Rwanda’s new gacaca courts) and the highest-level perpetrators (for example, in the case of the conditional amnesty granted by South Africa’s truth commission).

3.8 The key question here is the legal validity of alternative or supplementary measures to criminal prosecutions as a response to serious international crimes, in relation to existing and emerging principles of international law. What are the circumstances in which a state may legitimately pursue alternatives to criminal prosecutions in response to such crimes? A critical, related issue is that perpetrators who have been granted amnesty, or who have gone through an alternative accountability mechanism, may remain liable for prosecutions in the ICC, or for criminal prosecution or civil proceedings in the court of a foreign country on the basis of universal jurisdiction. This was discussed during the process of devising the Princeton Principles on Universal Jurisdiction in 2001, although this particular aspect of the debate was not resolved.

3.9 The South African Truth and Reconciliation Commission (TRC) itself recognised the potential for conflict between its provisions and emerging principles of international law. Its report commented that “the definition of apartheid as a crime against humanity has given rise to a concern that persons who are seen to have been responsible for apartheid policies and practices might become liable to international prosecutions. The Commission believes that international recognition should be given to the fact that the Promotion of National Unity and Reconciliation Act, and the processes of this Commission itself, have sought to deal appropriately with the matter of responsibility for such policies.”

3.10 It would seem imperative that the international community, in the form of states and international organisations, should be able to develop a coherent, strategic approach to this issue. It should be noted that the Statute of the ICC does not address this issue directly, but cases will be admissible where the state with jurisdiction “is unable or unwilling genuinely to carry out the investigation or prosecution”. In determining unwillingness the Court can assess, for example, whether measures were undertaken “for the purpose of shielding the person concerned from criminal responsibility”. Importantly, the ICC’s Prosecutor has some discretion to decide against taking a case forward if prosecution would “not be in the interests of justice”, presumably following a determination of whether an alternative mechanism was legitimately applied in each case.


See the Commentary on the Princeton Principles (2001): “Some participants were very strongly against the inclusion of any principle that recognised an amnesty for “serious crimes under international law”. Others felt that certain types of amnesties, coupled with accountability mechanisms other than criminal prosecution, were acceptable in some cases: at least in a difficult period of political transition, as a second best alternative to criminal prosecution. We considered trying to specify the minimum prerequisites that should have to be satisfied in order for accountability mechanisms to be deemed legitimate (including such features as individualised accountability), but in the end [we] decided not to try and provide general criteria.”

Rome Statute of the ICC, Article 17.1a).

Rome Statute of the ICC, Article 17.2 a).

Rome Statute of the ICC, Article 33.
3.11 The ICC may develop relevant jurisprudence on this issue in the future, which could also be taken into account by foreign courts when dealing with such cases, although a significant limitation will be that decisions by the Prosecutor not to take a case forward will not be part of the official record. Guidelines for international practise could contribute to ensuring a consistent and strategic approach by governments, international organisations (including the UN) and donors involved in supporting TJMs, as well as providing relevant guidance to prosecutors and judges. However, they should be carefully formulated to ensure that they are not used to justify the failure of states to fulfil their legal obligations. At the same time, the practice of states, largely influenced by political and economic considerations, will continue to contribute to the development of customary international law.

4. OVERVIEW OF TRANSITIONAL JUSTICE MECHANISMS

This section outlines the following TJMs that have been used by governments and the international community in post-conflict, developing countries to date:

- Criminal prosecutions - domestic courts, international tribunals and “mixed” judicial mechanisms
- Transnational justice mechanisms - criminal prosecutions and civil suits in foreign courts
- Quasi-traditional justice mechanisms
- Truth commissions (and commissions of inquiry)
- Lustration / vetting processes
- Reparations
- Amnesty

The existing literature on each mechanism is drawn together, summarising the objectives and limitations of the mechanism. Where appropriate, one or more examples are given to show how such mechanisms have borne out in practice. Each mechanism is to be viewed as a potential component of an overall transitional justice strategy, with the option of combining various mechanisms to complement each other.

TJMs also include the reconstruction and/or reform of key institutions across various sectors. Institutional reform may be carried out in conjunction with other mechanisms, either as a precondition for their implementation (e.g. re-building a destroyed judiciary in order to commence criminal prosecutions), or simultaneously. Emphasis has often been on the reconstruction or reform of the justice sector, although reform of other institutions, such as the military, has also formed a core part of transitional justice strategies. Recommendations for wide-ranging institutional reform to tackle discrimination, exclusion and structural inequalities have been provided by truth commissions. In-country international interventions have also included institutional capacity-building within their aims.

4.1 Criminal Prosecution

Objectives

4.1.1 A range of reasons may be given for pursuing a criminal prosecution strategy as the core component of a post-conflict transitional justice strategy. In addition to satisfying an instinctive moral urge for retributive justice, criminal prosecution aims, in principle, to:

- demonstrate and generate respect for the rule of law;
- individualise criminality and guilt, thereby preventing a renewed cycle of vengeance;
- protect society from further harm by providing for custodial sentences;
- provide the highest standards of due process;
• provide justice and satisfaction for victims;
• provide an effective deterrent against further human rights violations;
• represent an official condemnation of the violation by the state, and official acknowledgement of the victim’s suffering.

4.1.2 Criminal prosecution is regarded as an essential component of the international battle against impunity, demonstrating that serious human rights violations will not be tolerated, and that gross human rights violations will receive the same response as “ordinary” crimes. It is deemed essential to show that the strongest possible accountability measures will be employed against perpetrators of crimes committed during conflict.

Limitations

4.1.3 In representing the most severe option in terms of accountability mechanisms, criminal prosecution brings with it higher political risks in a situation where the post-conflict regime remains in a vulnerable position vis-à-vis perpetrator groups. A criminal prosecution process will also require significant financial and human resources, and prosecutions of those responsible for past human rights violations must be seen in the context of the strains that are likely to be placed on the judicial system in the post-conflict phase. Strong international support, and careful timing of such a strategy, will be required to ensure that the necessary resources are in place, and that the political risks of pursuing such a strategy are minimised.

4.1.4 A failed or only partially successful criminal prosecution strategy can have a detrimental effect on the rule of law and the process of post-conflict recovery. Public expectations may not be met if either too few, or only low-level perpetrators are tried. This can lead to perceptions that the process is arbitrary or discriminatory, thereby generating further distrust in the judicial process. Respect for the rule of law will be jeopardised if due process requirements are not met, or if the process is one-sided.

4.1.5 Evidence has shown that, depending on the circumstances, criminal prosecutions may also:

• generate resentment among perpetrators, leading to further violence, and even attempts to destabilise the post-conflict regime;
• be distant, inaccessible and unfamiliar to most people;
• damage the psychological health of victims and witnesses appearing in court;
• divert resources and attention away from measures more relevant to victims (e.g. reparations).

4.1.6 The following sections explore in more detail the advantages and disadvantages of using domestic, mixed and international court mechanisms to implement a criminal prosecution strategy.

➢ Domestic Courts

4.1.7 Domestic courts refer in this context to a situation where there is no direct international intervention in the judiciary. Past human rights violations may be tried in the regular domestic courts at various levels, or in a special mechanism (for example, an ad hoc court or special chambers) set up by the government specifically to deal with these cases.

31 The burden on the formal judiciary in the post-conflict context is often particularly heavy due to the legacy of outstanding legal issues that are left by conflict situations in addition to past human rights violations. These include, for example, land and property disputes following displacement patterns, and issues of property succession following high numbers of deaths.
32 This is considered to be particularly likely if an adversarial process is used.
33 For example, Indonesia’s ‘Ad Hoc Human Rights Court’ that was recently established to deal with human rights violations committed in East Timor in 1999.
34 For example, Rwanda’s special chambers established within the existing domestic judiciary to deal with genocide crimes.
Advantages

4.1.8 States have principal responsibility for criminal prosecution of perpetrators of past human rights violations within their jurisdiction, as a part of their responsibility to uphold the rule of law. National courts thus represent the starting point for accountability mechanisms. If a criminal prosecution strategy can be implemented at the domestic level in a manner that is generally fair and effective, it can have a significant impact on deterring future violations, restoring citizens’ trust in the justice system, and re-establishing the rule of law.

4.1.9 Domestic courts have the additional advantages that they:

- ensure local ownership of the judicial process;
- are located close to the scene of violations and the necessary evidence;
- are more accessible and familiar to people than courts located abroad.

4.1.10 For these reasons, there is a strong argument for providing international support to build the capacity of domestic judicial systems in post-conflict developing countries before devoting resources to international mechanisms, unless such an attempt is totally implausible (for example, if there is renewed conflict, or a genocidal regime remains in power).\(^{35}\) Highlighting the urgent task of prosecuting past human rights violations in the immediate post-conflict period can also assist in drawing attention to the most fundamental needs of the domestic judiciary and justice sector as a whole.

Disadvantages

4.1.11 The disadvantages of pursuing criminal prosecution at the domestic level in the post-conflict phase have provided the impetus for direct and indirect international intervention in the judicial process, as well as alternative transitional justice strategies to criminal prosecution. These disadvantages often (although not necessarily) include the following:

- lack of adequate material and human resources throughout the justice sector and particularly within the judiciary, including basic infrastructure and key personnel;
- absence of a culture of impartiality and fairness within the judiciary;
- lack of enforcement mechanisms to secure custody of high-level perpetrators;
- lack of political will on the part of the government to implement a criminal justice strategy, even if the resources are made available.

4.1.12 While it is clear that certain basic conditions should be met before investigations and trials can commence, the key question is whether alternative approaches should be pursued instead of, or alongside, efforts to build up the capacity of the justice sector at the domestic level.\(^{36}\) An assessment of whether a government is generally unable or unwilling to pursue an effective criminal justice strategy is essential. The following examples demonstrate this important distinction.

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\(^{36}\) See Ratner and Abrams (2001), who cite four conditions that should be met before criminal trials are conducted at the domestic level: “a workable legal framework through well-crafted statutes of criminal law and procedure; a trained cadre of judges, prosecutors, defenders and investigators; adequate infrastructure, such as courtroom facilities, investigative offices, record-keeping capabilities, and detention and prison facilities; and a culture of respect for the fairness and impartiality of the process and the rights of the accused.” They recognise, however, that standards expected in the post-conflict situation must be realistic. See also Alvarez (1999), arguing that deficiencies at the domestic level should be addressed by the international community, rather than providing an international mechanism as a substitute.
Box 2a: Domestic Trials in Rwanda

Based on the premise that justice is a precondition for both lasting peace and reconciliation, the Rwandan government has pursued a policy of criminal prosecution of perpetrators of the 1994 genocide, aiming to combine this objective with the rehabilitation of the justice system.

Achievements
Between January 1997 to 2002, more than 7,000 individuals have been tried (some in group trials) within specialised chambers, under the Organic Law adopted in August 1996. This represents a significant achievement in many respects, particularly with the limited resources available. The process has contributed to the re-building of the criminal justice system, and the government has maintained a sense of ownership over the justice process. The government’s demonstration of its will to provide justice for survivors of the genocide has arguably assisted in achieving a measure of internal stability, and reducing the potential number of revenge attacks.

Problems Encountered
Security issues, shortages of personnel (it is estimated that some 80% of justice system personnel were killed or fled as a result of the genocide), lack of a suitable legal framework, and the targeted killings of some 300 scheduled witnesses led to significant delays in commencing trials until 1997.

The trials conducted to date amount to only 6% of those detained so far for genocide offences. As a result, the satisfaction afforded to survivors of the genocide has been limited, leading to proposals for additional measures (the gacaca courts) to help address the vast numbers of remaining cases. The most serious problem has been the detention conditions of between 100,000 and 150,000 suspects. The sheer numbers have been overwhelming, and deaths from disease, malnutrition and overcrowding have been in the thousands. Feeding and clothing prisoners has been a huge drain on Rwanda’s economy. Attempts to introduce plea bargaining and confessions had the potential to significantly reduce the prison population, but have largely failed due to an absence of effective measures to inform prisoners of their rights, facilitate their submissions, and reduce the potential for intimidation of those who chose to confess.

A major issue of controversy has been the political emphasis by the Rwandan government on the 1994 genocide, and their unwillingness to take measures to address crimes committed by their own forces, the Rwandan Patriotic Army (RPA). This has led to perceptions among Hutus that one-sided “victor’s justice” is being done, limiting the potential impact of the trials on combating the culture of impunity and preventing a renewed cycle of vengeance.

Many problems have stemmed from the fact that prosecutors, judges, and investigators have been poorly paid, as well as subject to pressure and threats from all sides. A range of due process concerns have been documented, including difficulties in obtaining evidence and witnesses, and the treatment of prisoners.

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37 The genocide took place between April and June 1994, resulting in the killing of up to one million Tutsis and moderate Hutus by the Hutu regime in power at the time, perpetrated by the military, government-supported militia, and civilians. The Tutsi-led Rwandan Patriotic Front re-took power in the aftermath of the genocide, and has continued to be embroiled in internal and regional conflict since that time, related to Hutu insurgency from within the Democratic Republic of Congo. In this sense Rwanda has not been a typical “post-conflict” situation, which has had a major impact on the ability of the country to deal with the transitional justice issue. The lesson to be learned is that efforts to mete out justice while human rights violations continue to be committed are of an inherently limited value.

38 Organic Law No. 08/96 on the Organization of Prosecutions for offences constituting the Crime of Genocide or Crimes against Humanity. This law gives the special chambers jurisdiction over genocide and crimes against humanity, committed between 1st October 1990 and 31st December 1994, and includes provisions for confessions and guilty pleas. It divides perpetrators into four categories as follows: Category 1 - planners, organisers and leaders of the genocide, people in positions of authority, “notorious murderers”, and torturers; Category 2 - all others who committed murder; Category 3 - all others who committed assaults; Category 4 - all others who committed crimes against property.


including illegal arrests, lengthy detention without judicial review, no legal representation for defendants, one-sided investigations, threats against defence witnesses, and re-arrests after release. Application of the death penalty, including 22 public executions in Kigali in April 1998, has also caused controversy. A number of these problems have reportedly improved since 1999.

Donor support for re-building the judiciary is reported to have amounted to approximately US $10 million per year over the first five years following the genocide, assistance that has been described as both slow and insufficient. It is worth comparing this figure with the annual budget of the ICTR, approximately US $90 million at present. Proposals for more direct international involvement in the domestic judiciary, in the form of international judges, were rejected by the National Council.

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**Box 2b: Domestic Trials in Indonesia**

Following sustained pressure from the international community and civil society, including the UN’s “threats” to establish an international tribunal for East Timor, Indonesia has recently commenced domestic trials of its own military, police and government officials in connection with gross human rights violations committed in East Timor during 1999. These trials are widely condemned as politically-motivated “sham trials”.

The trials are being conducted in an Ad Hoc Human Rights Tribunal established in March 2001, the jurisdiction of which is limited to the two months of April and September 1999, and to just three out of thirteen districts in East Timor. This is despite that fact that the violence is widely acknowledged to have spread throughout the entire territory during 1999, in addition to the atrocities committed throughout the 1975–1999 military occupation.

Eighteen individuals have so far been indicted for serious crimes, predominantly former military and police officers. The trials commenced in March 2002, and by the end of December a total of ten of the eighteen accused had been acquitted. A three-year sentence was given to the former East Timorese governor (although ten years was the minimum sentence given by law for the crime in question), and a ten-year sentence was handed down to the only East Timorese militia leader indicted. No Indonesian military or police have yet been found guilty. Both the indictments and defence arguments have portrayed the conflict as a civil conflict between pro-independence and pro-autonomy factions in East Timor, diminishing the role of the Indonesian military to observer status.

The example of Indonesia shows the risks entailed in putting faith in a domestic process where the political will does not exist. It also demonstrates the importance of distinguishing between “sham prosecutions” and legitimate efforts to provide accountability and/or justice. This is essential in order to determine whether the state has fulfilled its international legal duties, and to determine the appropriate international response.

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44 Amnesty International, “Rwanda: The Troubled Course of Justice” (2000). Areas that have improved include fewer illegal arrests, release of detainees and fewer threats against defence witnesses.
47 The trials relate specifically to the widespread, systematic violence surrounding the referendum on independence that was conducted under the auspices of the UN in August 1999. The violence was organised and perpetrated by the Indonesian military with the support of local militia groups. The Indonesian government has so far refused to extradite any Indonesian suspects to the UN-sponsored “mixed” tribunal mechanism located in East Timor.
49 The basic facts of the violence committed by the Indonesian military and East Timorese militia have been documented in the Indonesian Commission on Human Rights (Komnas HAM) report of January 2001, and the report of the UN Commission of Inquiry of January 2001.
International criminal tribunals

4.1.13 The International Military Tribunal at Nuremberg, established by the Allied powers to try German war criminals and perpetrators of crimes against humanity in the aftermath of World War Two, set the precedent for international criminal tribunals.\(^5^2\) In the mid-1990s, the two ad hoc International Criminal Tribunals for former Yugoslavia (ICTY) and Rwanda (ICTR) were established by the UN Security Council under its Chapter VII powers.\(^5^3\) Most recently, the permanent International Criminal Court was established on 1\(^{\text{st}}\) July 2002, and there should in theory be no requirement for international criminal tribunals to deal with international crimes committed after that date.\(^5^4\) However, many international crimes committed before this date remain un-addressed, and there may yet be increasing calls for additional international criminal tribunals (and/or “mixed” judicial mechanisms) in the future.

Advantages

4.1.14 As an alternative or addition to domestic trials, an international criminal tribunal represents an official international recognition and condemnation of the violations it is established to address. Depending on the particular circumstances, it also offers the potential to:

- substitute for lack of judicial capacity and/or political will at the domestic level;
- gain access to high-level suspects that foreign countries would be unwilling to extradite for trial at the national level;
- contribute to the development of relevant areas of international law;
- contribute to the battle against impunity that aims to deter high-level would-be perpetrators in the future.

Disadvantages

4.1.15 There are a number of significant drawbacks with substituting domestic judicial processes with an international criminal tribunal. An international body, especially if located outside the territory where the violations occurred, is likely to be seen as remote from local people. This will limit the tribunal’s contribution to creating a sense of “justice done” within the territory, and to re-establishing citizens’ trust in the state and its ability to protect human rights in the future. An international tribunal will not necessarily be seen as impartial, depending on whether it achieves a balanced approach.

4.1.16 While the financial costs of international tribunals are significantly higher than any other TJM used to date, so far they have given relatively limited results in terms of actual trials and convictions. Assumptions about the efficiency of international criminal tribunals and their ability to meet international standards of justice are questionable. Judges, prosecutors and lawyers from different jurisdictions all over the world have different approaches to legal and procedural matters, which can lead to tensions, confusion and inefficiency.\(^5^5\) Staff are not necessarily of a sufficiently high quality or highly motivated simply because they are “internationals”.

4.1.17 International criminal tribunals may also:

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\(^{5^2}\) Ratner and Abrams (2001), noting that the International Military Tribunal (IMT) at Nuremberg was established by the London Agreement, signed by four allied states in August 1945. The IMT for the Far East (the “Tokyo Tribunal”) was, by contrast, established in January 1946 by unilateral proclamation of General Douglas MacArthur, Supreme Allied Commander, who also appointed all eleven judges. For this and other reasons, the Tokyo Tribunal has not enjoyed the same degree of attention and authority as the “Nuremberg Tribunal”.

\(^{5^3}\) ICTY was established under Security Council Resolution 827 of 25\(^{\text{th}}\) May 1993. ICTR was established under Security Council Resolution 995 of 8\(^{\text{th}}\) November 1994.


\(^{5^5}\) Ratner and Abrams (2001).
• detract funding and/or attention away from rebuilding and reforming the national judiciary;
• undermine domestic efforts to provide justice;
• generate conflict around issues of primacy over national courts.

ICTY and ICTR

4.1.18 The establishment of ICTY and ICTR were direct responses to the horrendous atrocities committed during the conflicts in former Yugoslavia and Rwanda, and the international community’s failure to provide the necessary means to stop them. Both were set up to prosecute the offenders of international crimes, and provide a gesture of international support to victims. They were agreed to on the assumption that capacity did not exist at the national level to undertake this task.56 A variety of internal and external factors have contributed to the relative progress of the ICTY and ICTR, and their achievements and effects of the tribunals obviously go beyond the numbers of trials completed, particularly in providing the impetus for the ICC. The budgets of ICTY and ICTR for 2002/03 are US$ 223,169,800 and US$ 177,739,400 respectively.57

4.1.19 The following table provides a summary of proceedings to date. In both cases, considerable preparation time was required, and four years elapsed before the first ruling was handed down.58

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<th>ICTY</th>
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<tr>
<td>Final Convictions</td>
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<tr>
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<tr>
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<td>22</td>
</tr>
<tr>
<td>Pre-trial Detainees</td>
<td>26</td>
<td>31</td>
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Information according to ICTY and ICTR websites (as at 30th December 2002).

Box 3: The International Criminal Tribunal for Rwanda (ICTR)

The ICTR was established with a wide-ranging mandate to contribute to sustainable peace, justice, national reconciliation and the prevention of further violations in Rwanda.59 The expectations of the Security Council may have been limited to the hope that the ICTR would secure the arrest and trial of the leaders of the genocide. However, the “lamentable” record of the ICTR and repeated “unjustifiable delays” have led to serious doubts as to whether it will be able to achieve even this limited goal by the target date of 2008.60

Achievements
ICTR has provided a limited contribution to the goal of justice in Rwanda, through securing the arrest and trial of a number of individuals, including the former Prime Minister of Rwanda. It has also provided an official, international recognition of the genocide that is now beyond any dispute, which was one of the principal reasons for

57 Information taken from www.un.org/icty and www.un.org/ictr. The cost of ICTY from its inception, up to and including 2001, was US$ 471,000,000. The cost of ICTR from its inception, up to and including 2001, was an estimated US$ 360,000,000, based on ICG’s findings that ICTR had cost a total of US$270 million up to December 2000, and was functioning in 2001 on a budget of approximately US$ 90 million.
58 It is notable that this four-year period is approximately the same time that the Rwandan domestic courts required to start their genocide trials.
59 Its temporal jurisdiction is restricted to the year 1994, however, and while it has jurisdiction over both the genocide and crimes committed by the Rwandan Patriotic Front (RPF) in that period, it does not have jurisdiction over the serious crimes committed since that year (by contrast to ICTY, whose mandate extends from 1991 indefinitely).
the Rwandan government’s initial support for the tribunal. It has also arguably contributed to the neutralising of Hutu extremism within the political arena, and the discrediting of its radical ideology.\footnote{Akhavan (2001), suggesting that RPA attacks in the Democratic Republic of Congo are the main reason for the defeat of Hutu insurgency, while asserting that ICTR has contributed to diminishing the legitimacy of Hutu extremism.}

The tribunal has also contributed to the development of international criminal law, specifically in relation to violations against women. It has firmly established the legal principle that rape can be categorised both as genocide and a crime against humanity. ICTR has encouraged inter-state co-operation with respect to extradition of suspects\footnote{Information according ICTR’s website: “Of the accused persons detained in the United Nations Detention Facility in Arusha, nine persons were arrested in Cameroon, twelve were arrested in Kenya, two each in Belgium, Benin, Côte d’Ivoire, Namibia, Togo, and Zambia, and one each in Burkina Faso, Mali, South Africa, Switzerland and the USA”.}, although it is reported that a number of the top leaders of the genocide remain harboured in countries as diverse as the Democratic Republic of Congo, Gabon, Kenya, France and Belgium.\footnote{International Crisis Group (2001).}

Problems Encountered

Despite these achievements, and notwithstanding the constraints of its operational environment, many observers regard ICTR’s performance as a serious failure on the part of the international community to provide international justice for post-genocide Rwanda.\footnote{Roht-Arriaza (2001); International Crisis Group (2001).} Although it has received considerable financial resources, ICTR has been characterised by:

- poor leadership and administrative management;
- a lack of skilled and experienced personnel;
- an absence of prosecutorial strategy;
- a serious lack of oversight and international commitment;

Its relationship with the Rwandan government has been problematic. Although the Rwandan government backed proposals for the establishment of the tribunal initially, it voted against the Security Council Resolution in 1994 for several principal reasons, which have continued to create tensions between the government and ICTR.\footnote{Cobban, Helena, “The Legacies of Collective Violence: The Rwandan Genocide and the Limits of Law”, Boston Review, April / May 2002; Pankhurst (1999).}

The Tribunal’s primacy over national courts has been an added source of tension. ICTR has asserted jurisdiction over suspects that the Rwandan government wished to try itself, on the basis that this was necessary for its own credibility, and because such crimes are “truly international” in nature.\footnote{Goldstone, Richard J., “Justice as a Tool for Peace-making: Truth Commissions and International Criminal Tribunals”, International Law and Politics, Vol. 28:485 (1996).}

By virtue of its location in Tanzania and its all-international composition, the ICTR has been unable to contribute to the development of Rwanda’s national judiciary and wider justice system. This objective has been addressed separately through international donor funding. However, ICTR has also apparently failed to establish effective co-ordination mechanisms with the national courts.\footnote{Cobban, Helena, “The Legacies of Collective Violence: The Rwandan Genocide and the Limits of Law”, Boston Review, April / May 2002; Pankhurst (1999).}

Despite some improvements in the internal management of the tribunal since 1998, there is widespread cynicism regarding ICTR within the government and Rwandan society. The slow pace of justice has led to dissatisfaction, and its failure to indict a single member of the RPA to date has led to a lack of credibility within the majority Hutu population. ICTR has evidently failed to generate a positive dialogue with the community it is established to serve.\footnote{Peskin, Victor, “Conflicts of Justice – An Analysis of the Role of the International Criminal Tribunal for Rwanda”, International Peacekeeping, July-December 2000. The government’s four objections were that: 1) it wanted the tribunal to be located in Rwanda; 2) it believed the tribunal should have the power to administer the death penalty, in line with Rwanda’s own judicial system; 3) it wanted the tribunal’s jurisdiction to extend back to 1990; 4) it proposed that Rwandan judges should participate in the tribunal.}

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\footnotesize{61 Akhavan (2001), suggesting that RPA attacks in the Democratic Republic of Congo are the main reason for the defeat of Hutu insurgency, while asserting that ICTR has contributed to diminishing the legitimacy of Hutu extremism.

62 Information according ICTR’s website: “Of the accused persons detained in the United Nations Detention Facility in Arusha, nine persons were arrested in Cameroon, twelve were arrested in Kenya, two each in Belgium, Benin, Côte d’Ivoire, Namibia, Togo, and Zambia, and one each in Burkina Faso, Mali, South Africa, Switzerland and the USA”.


66 Peskin, Victor, “Conflicts of Justice – An Analysis of the Role of the International Criminal Tribunal for Rwanda”, International Peacekeeping, July-December 2000. The government’s four objections were that: 1) it wanted the tribunal to be located in Rwanda; 2) it believed the tribunal should have the power to administer the death penalty, in line with Rwanda’s own judicial system; 3) it wanted the tribunal’s jurisdiction to extend back to 1990; 4) it proposed that Rwandan judges should participate in the tribunal.


4.1.20 As a means of bridging the gap between international intervention and support for the national judicial system, a recent trend within transitional justice has been to create a “mixed” judicial mechanism located within the country itself. This has taken a variety of forms, including mixed Special Panels in East Timor, international participation in the domestic court system in Kosovo, and most recently a mixed Special Court in Sierra Leone. Negotiations are also ongoing for mixed judicial mechanisms in Cambodia, and Bosnia and Herzegovina.

Advantages

4.1.21 This approach aims to combine the advantages of domestic judicial processes, with the benefits of international criminal tribunals, as laid out above. Located in-country, the mixed mechanism should be closer to the lives of the local population, and should facilitate the capacity-building of the domestic justice system through the transfer of skills and experience.

4.1.22 The international component should, in principle:

- guarantee an impartial process;
- minimise domestic political influences;
- ensure compliance with international legal and due process standards.

4.1.23 The participation of nationals should simultaneously:

- increase the legitimacy of the process in the eyes of the local population;
- ensure sustainability of the process;
- allow the state to retain a measure of ownership.

4.1.24 An additional reason for this trend is the international community’s wish to reduce the costs of direct international intervention in such endeavours. However, evidence indicates that cost-cutting as an objective in itself can lead to poor results. Establishing a mixed mechanism takes up considerable time and resources, as is the case with creating an international criminal tribunal or re-building a national judicial system.

Disadvantages

4.1.25 The mixed approach brings with it a number of the potential drawbacks that have been outlined with respect to domestic courts and international criminal tribunals. Unless the necessary measures are taken, rather than representing “the best of both worlds”, a mixed mechanism may instead reflect the weaknesses of its international and national components. Tensions between the international and national components may additionally impede results. Unless sufficient national participation is ensured, a government may not feel it is retaining a measure of national sovereignty over the process, and may withdraw its support. In addition, ensuring adequate participation of nationals on a daily basis within mixed institutions requires particular effort and skills on the part of the international actors involved.

4.1.26 The example of East Timor shows that while the “mixed” judicial model may represent the optimum solution on paper, consistent and adequate international and domestic commitment is required if this approach is to succeed. Specific resources, strategic planning and a long-term commitment are required to translate the objective of local capacity-building into a reality.
Box 4: East Timor’s Special Panels and Serious Crimes Unit

The “mixed” judicial mechanism established in East Timor to deal with its legacy of past human rights violations is the first such example in a post-conflict, developing country.69 The “Special Panels with Exclusive Jurisdiction over Serious Crimes” were created in 2000 by the UN Transitional Administrator in East Timor (UNTAET)70. They each comprise two international judges and one Timorese judge, and are formally located within the domestic judicial system. In addition, the “Serious Crimes Unit” (SCU) is headed by an international Deputy General Prosecutor for Serious Crimes, and staffed by predominantly international prosecutors and investigators. The mechanism is essentially a UN creation under its mandate to directly administer the territory until independence in May 2002.

Achievements

As of August 2002, twenty-three individuals had been tried for a range of serious criminal offences committed in 1999 - these were middle to low-level East Timorese militia members. At the end of 2002, the Special Panels are trying the second of ten “priority cases” from 1999 that have been selected for their relatively high profile and serious nature.

Crimes of rape and sexual violence have been given some attention, with resources being specifically devoted to investigating these types of crimes. Charges of rape as a crime against humanity have also been included in indictments issued by SCU.

Problems Encountered

The Special Panels / Serious Crimes Unit mechanism has been subject to serious criticism, from both outside and within East Timor, with emphasis on the lack of international commitment to the process.71 It is regarded by some as a “missed opportunity”, as the formal structures put in place had the potential to achieve far more than has been accomplished, including the potential to gain access to high-level perpetrators in Indonesia. In quantitative terms, the trials of 23 individuals in two years appear to outpace both ICTY and ICTR. However, many have been indicted on single charges of murder or sexual offences under the Indonesian Penal Code, rather than on charges of crimes against humanity.72 Although some indictments have been issued against Indonesian suspects by SCU, none have been extradited by the Indonesian government for trial before the Special Panels.

Local NGOs have questioned the suitability of the “mixed” model for East Timor, and their dissatisfaction with the process has led to calls for an international criminal tribunal.73 There has been a lack of engagement on the part of the UN with local officials, civil society and the public; there also appears to be an evident lack of political will within the new East Timorese government to continue with the process after the international presence is removed.74

The mechanism has suffered from insufficient human and material resources.75 SCU has faced shortages of staff, equipment, vehicles and data collection facilities, and has been characterised by a high turnover. Panel resources and courtroom facilities have also been inadequate, limiting the Panels’ ability to comply with international human

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69 A “mixed” model was first proposed for Cambodia, however. Negotiations between the UN and the Cambodian government for a mixed judicial mechanism there are still ongoing, following suspension for a period of months in 2002.

70 UNTAET Regulation 2000/15. The Special Panels have exclusive jurisdiction over genocide, torture, war crimes, crimes against humanity, and over the offences of murder and sexual offences as provided for in the Indonesian Penal Code.


73 In an October 2001 press release, local NGOs expressed their concern that the failure to provide justice in East Timor “seems to be happening without international diplomats raising an eyebrow over what is turning into a farce.”

74 Linton (2001).

75 Cohen (2002), reporting that the budget for 2002 totalled just US $ 6.3 million, of which $6 million was allocated to the SCU, and most of the remainder provided salaries for the international judges.
An additional major issue has been the disparity between the international prosecution teams and the mainly Timorese public defenders. A series of internal problems formed a debilitating network of incompetence and inefficiency within SCU. Key international staff have lacked the necessary management and leadership skills, and this, combined with an absence of oversight, permitted serious inefficiencies to persist within SCU. An internal re-structuring process was carried out in early 2002, and the situation has reportedly improved, particularly in terms of co-operation between prosecutors and investigators. However, the perceived legitimacy of the mechanism has largely been lost, and resources remain insufficient.

SCU initially focused on individuals that were detained by international police and military in the early stages of post-conflict transition, which has distracted from a focused prosecutorial strategy. It has chosen to limit its indictments to crimes committed in 1999, leaving a long legacy of gross human rights violations committed between 1974 and 1999 un-investigated. It is currently working on the expectation that it will wind down investigations at the end of 2002, and prosecutions at the end of 2003, unless further international support is forthcoming. This is of particular concern in light of the fact that no Indonesian suspects have yet been transferred to East Timor, although a Memorandum of Understanding has been signed between UNTAET and the Government of Indonesia. Sustained international pressure could potentially have produced a different outcome.

The “mixed” mechanism has primarily been staffed with internationals in order to get the process started in the absence of qualified and experienced nationals. The small number of Timorese judges and prosecutors may benefit considerably from the experience, but there has been an absence of strategy to transfer skills and knowledge on a systematic, long-term basis. Capacity-building for public defenders has been wholly insufficient. Time pressures and lack of interpreting facilities limit the possibility of training efforts on a more informal, daily basis.

### 4.2 Transnational Justice Mechanisms

#### 4.2.1 In response to the failure of domestic judicial mechanisms to provide adequate remedies to victims of gross human rights violations, there has been an emerging trend in recent years towards attempts to address such cases in the courts of foreign states, otherwise known as “transnational justice”. This trend has predominantly been in the area of “third country prosecutions”, but there have also been significant developments in relation to civil suits conducted in the courts of a foreign state.

- **Criminal Prosecution in Foreign Courts**

Criminal prosecution of those accused of international crimes in the courts of foreign states is usually based on the principle of universal jurisdiction, although the nationality of victims has sometimes been incorporated as a further justification for the exercise of jurisdiction by that particular state. The landmark case is that of General Augusto Pinochet, former military dictator of Chile, who was arrested in London in October 1998. The case raised many complex legal issues, and involved a number of judgements and political decisions. Although Pinochet did not face extradition or trial in Spain, the key

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76 Cohen (2002); JSMP report (2001); Amnesty International report (2001). Some serious violations of international due process standards include lengthy detentions, some without review; absence of an official record of court proceedings; and lack of interpreting facilities leading to trials in which suspects and witnesses did not properly understand the proceedings.

77 Reiger (2002).

78 Cina, Jon, unpublished article (2002), on file with the author.

79 For a concise summary of the rulings, see Zalaquett, Jose, “The Pinochet Case: International and Domestic Repercussions”, in Henkin, Alice H. (Ed.), *The Legacy of Abuse: Confronting the Past, Facing the Future*, Aspen Institute, New York University School of Law (2002). Spanish Judge Baltazar Garzon issued an arrest warrant and an extradition request to the United Kingdom government while Pinochet was visiting that country for medical treatment. These were issued on the basis of criminal charges brought to the Spanish courts accusing Pinochet and others of killing 200 individuals in Operation Condor, and further charges brought on behalf of Spanish citizens killed, tortured or disappeared in Chile during the Pinochet regime.
principle established by the Law Lords was that Pinochet was not immune from prosecution abroad for acts of torture on the basis of his status as a lifetime senator and former head of state.\footnote{Pinochet returned to Chile on 3\textsuperscript{rd} March 2000, ruled unfit to stand trial due to his medical condition, after 503 days under house arrest in the UK.}

4.2.3 Additional cases of transnational prosecutions have been conducted against Rwandans (in France, Belgium and Switzerland) and Bosnians (in Denmark, Switzerland, the Netherlands, Austria and Germany)\footnote{Ratner and Abrams (2001); Roht-Arriaza (2001).}, among others.

**Objectives**

4.2.4 This transnational mechanism provides the opportunity for foreign countries to act on behalf of victims, and bypass the decisions of political elites to grant themselves immunity from prosecution for past human rights violations. Given expectations that the ICC will be limited to handling a small number of high-level suspects only, foreign courts will have the opportunity to play a role in conducting supplementary prosecutions in the future. Transnational justice represents the ascendance of human rights principles within the international sphere, and offers the potential for:

- an alternative route for some victims to seek an effective judicial remedy;
- a positive political and legal impact in the country that is affected\footnote{This was arguably the case in Chile, with the revival of domestic justice efforts following Pinochet’s detention in London, including the pursuit of criminal justice through the domestic courts, judicial review of domestic amnesty laws, and judicial rulings on the question of immunity from prosecution. On 8\textsuperscript{th} August 2000, the Supreme Court confirmed the ruling of the Court of Appeals to lift the immunity of Pinochet. See Zalaquett (2002), arguing that increasing efforts to call Pinochet to account would have taken place in any event, but this would probably have taken a different form, or a slower pace.};
- increased deterrence at the highest levels of political and military leadership;
- de facto travel and emigration restrictions on suspected perpetrators, which may be viewed as a limited form of non-criminal sanction.

**Limitations**

4.2.5 So far, transnational prosecutions have been limited to a relatively small number of “ad hoc” cases initiated where an interested state is able to assume custody of the suspected perpetrator. Such cases have not necessarily targeted those with greatest responsibility for past human rights violations. As such, foreign courts are unlikely to contribute to a coherent prosecutorial strategy to deal with a country’s legacy of abuse, offering instead a form of “patchwork justice”\footnote{Zalaquett (2002).}.

4.2.6 While transnational prosecutions reflect an emerging consensus among states on the principle of universal jurisdiction, international consensus is not required for a single state to take such measures in the individual case. The decision of a foreign state to prosecute perpetrators of gross human rights violations has the potential to upset the prospect of negotiations for the transition from conflict to peacetime in the country in question. Such negotiations may include agreements on alternative accountability mechanisms to formal prosecutions, which would not be recognised by the transnational approach. This may have significant implications and risks where a newly-elected government has endeavoured to devise such policies in good faith, to ensure stability of the country in question.
Civil Suits in Foreign Courts

4.2.7 A related development is the emergence of civil suits conducted in the courts of a foreign state, to deal with past human rights abuses. This provides a further opportunity for some victims to directly pursue compensation through a mechanism that overrides those established at the domestic level.  

4.2.8 To date, the primary example of this has been in the courts of the United States, on the basis of the Alien Tort Claims Act (ATCA), which provides aliens (i.e. non-US citizens) with the opportunity to initiate cases for torts committed in violation of customary international law. This legislation has provided the basis for civil suits conducted in US Federal Courts, beginning with the landmark case of Filartiga v. Pena-Irala in 1980 where the court ruled against a former Paraguayan police chief accused of torturing and killing a 17-year-old boy. The ATCA has been supplemented in some cases by the Torture Victims Protection Act (TVPA).

4.2.9 Cases have been initiated under the ATCA and TVPA by individuals from countries including Ethiopia, Bosnia and Herzegovina, Guatemala, Paraguay, Nicaragua, Indonesia, Argentina, Chile, Burma and the Philippines. Some have resulted in the award of multi-million dollar damages, although these have rarely been enforced. Among the most high-profile cases has been that of Kadic v. Karadzic, a case against the former leader of the Bosnian Serbs in the war in Bosnia and Herzegovina, Radovan Karadžić, in which the jury imposed a US $4.5 billion judgement against the accused.

Objectives

4.2.10 The objectives of such a strategy include that it may provide:

- a mechanism for the award of monetary compensation for damages to victims;
- a mechanism for ordering punitive damages from the perpetrator, possibly deterring future abusive conduct;
- an opportunity for the victim to tell their story and directly confront the defendant;
- a symbolic recognition of the damage done and the suffering of the victim;
- public condemnation of the violation and the perpetrator responsible for the violation.

Limitations

4.2.11 The principal limitation of this particular approach is the difficulty of actually collecting the damages from the perpetrator, which often renders the value of the judgement to one of symbolic value. In addition, the process entails considerable time and costs for individual plaintiffs, who in most cases will not be able to reach a country where they can pursue such a strategy.

4.2.12 As with transnational prosecutions, the process is “ad hoc”, depending on the resources available to the victim, and the whereabouts and resources of the perpetrator. The value of this approach lies in its contribution to the transnational battle against impunity, rather than a strategy to provide large-scale

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84 Roht-Arriaza (2001), highlighting that apart from the ATCA, the other main avenue to be explored is the use of the partie civile institution in civil law countries, by which an individual plaintiff is able to initiate criminal action without the consent of the state authorities, resulting in the award of civil remedies.

85 United States Alien Tort Claims Act (1789).

86 Ratner and Abrams (2001), case reference 630 F.2d 876 (2d Cir. 1980). See also Ratner, Michael, “Civil Remedies for Gross Human Rights Violations” (2001). The ATCA is not based on universal jurisdiction, but on the right of aliens to initiate cases for torts committed in violation of the law of nations (customary international law). In Filartiga v. Pena-Irala, the court ruled in favour of the plaintiff, on the basis that torture is such a violation of customary international law.


redress for past human rights violations. The same, critical issues are also raised of utilising transnational mechanisms to “over-ride” domestic laws and policies, with potential repercussions at the domestic level.

4.3 Quasi-traditional Justice Mechanisms

4.3.1 The formal incorporation of elements of traditional justice mechanisms by the state into its transitional justice strategy is a relatively recent development. A common approach to this issue has not yet been developed, and the observations below are made with reference to the two contrasting examples of Rwanda and East Timor. For the purposes of this study, “traditional justice” is broadly defined as justice mechanisms or processes that exist outside the formal state framework, that have been established over time, and are generally recognised as having legitimacy within the local population.

Objectives

4.3.2 The use of quasi-traditional justice mechanisms has so far been a direct response to the inability of the state judiciary to cope with the volume of cases that are generated in the conflict situation, and an attempt to find a form of justice that is relevant and meaningful to those seeking a remedy for past violations. The potential benefits of utilising elements of an existing traditional justice system are that, under certain circumstances, it may be able to offer:

- a means of diminishing the burden on the formal state justice system after conflict;
- a familiarity, legitimacy and relevance for victims, perpetrators and local communities;
- an existing framework that is already established in some form throughout the country;
- an opportunity for communities to participate directly in the process of justice;
- a relatively low cost compared to formal justice institutions;
- a form of “restorative justice” that can assist in repairing the damage done to the victim, and re-building the relationships between victims, perpetrators and communities.

4.3.3 Supporting traditional justice mechanisms in the post-conflict environment may also provide an opportunity to improve the existing traditional justice framework, particularly with reference to core human rights principles such as non-discrimination. However, there should be no illusions about the prospects for achieving such reforms, as challenging the basis of deep-rooted traditions is a complex and highly sensitive task.

Limitations

4.3.4 Utilising a traditional justice system for the purposes of addressing large-scale human rights atrocities may be regarded as a distortion of the existing structures, which were not designed for such a purpose. Furthermore, depending on the context, some victims may regard the use of an alternative to criminal prosecutions as a “compromise” form of justice, providing limited satisfaction and diminishing their trust in the formal justice system to respond to human rights violations in the future.

4.3.5 The process is also likely to reflect the irregularities and flaws of the traditional justice system itself. As informal processes that are rooted in tradition, they are often dominated by local power structures, and may display tendencies to administer justice in an arbitrary or discriminatory manner. They may also be difficult for a government to control once they are operating on a large scale. The more complex dimensions of traditional justice systems are beyond the scope of this study – however, some key components that may be relevant include minimum standards of due process, the basis of the authority of those who mete out justice, and treatment of women and children by the system.
4.3.6 There is a risk that such an endeavour will place undue strain on the traditional justice system, and erode its ability to deal with its “ordinary” task. It may also be unrealistic to expect community leaders and members to participate in the process, particularly in poor, rural, subsistence farming communities, where giving up farming time may jeopardise their very survival. Using traditional justice systems in essence transfers the “burden” of dealing with past atrocities from the state system to local communities, which may be seen as shifting responsibility onto those who have already suffered.

**Box 5a: The gacaca courts in Rwanda**

Plans for the gacaca courts were initially formulated in 1999 by the Rwandan government, following which discussions were held with NGOs and donors. The process builds on the existing gacaca system of traditional justice, through which communities resolve low-level disputes, usually between families. The traditional goal is one of reconciliation, and the outcome would normally include an act of restoration or reparation to be fulfilled by the perpetrator, having been collectively agreed upon by the victim, perpetrator and members of the community.

In the post-genocide context, the government has introduced a new gacaca law, which regulates the handling of genocide cases through newly-established gacaca courts located at the cell (village), sector and district levels. The gacaca courts have jurisdiction over the perpetrators of genocide-related crimes that fall under Categories 2, 3 and 4 of Organic Law 08/96. They are able to sentence those convicted to the full range of prison terms, including 25 years or life sentences for those under Category 2. All sentences may be reduced following a confession, with up to 50% of the sentence being converted to a community service order.

Some 254,000 judges were elected in October 2001 to serve in the gacaca courts, and pilot projects commenced in twelve sectors in June 2002. Full trials are expected to begin nation-wide in March 2003. Most importantly, the judicial component of the gacaca process is to be accompanied by reparations for survivors, and the community service programme for perpetrators who receive this type of sentence.

**Potential Achievements**

A variety of objectives related to both justice and reconciliation have been suggested as the motivation for the government’s particular formulation of the gacaca process in this case. These include:

- expediting the processing of the remaining cases of genocide perpetrators;
- reducing the current prison population;
- establishing the truth about the genocide of 1994;
- consolidating the unity of the people of Rwanda;
- introducing a participatory, “restorative” form of justice that will assist community reconciliation;
- assisting with the re-building of communities.

Ideally, the gacaca courts will result in a considerably increased rate of processing genocide cases. As many detainees have been imprisoned for some years, the prison population should be reduced as many will have served their time, or will be released to carry out community service. The vast amount of information that is already “known” by communities will be gathered on a systematic basis, and the submission of evidence by community members in a public forum will constitute a form of public “truth-telling”, with the potential benefits this entails.

The introduction of community service represents a shift from purely retributive justice to a more “restorative” approach, with emphasis on the perpetrator’s duty to restore some of the damage done to the community. The gacaca court forum will also provide the opportunity for acts of contrition on the part of perpetrators. The participation of the community should enhance their acceptance of the judgements and punishments that are meted out, and provide a stronger sense of satisfaction to victims and survivors.

**Potential Problems**

In terms of providing “restorative justice”, the gacaca hearings will provide the opportunity for confessions and acts of contrition, and the community service component is restorative in nature. However, in many cases the gacaca...
The traditional form of *gacaca* did not deal with serious crimes, did not emphasise the punishment of perpetrators, and did not pronounce heavy penalties. The extent to which the new *gacaca* formulation still represents a form of restorative justice is therefore questionable.\(^{93}\)

The *gacaca* courts’ contribution to national unity and reconciliation will depend on its perceived legitimacy among both the accused and the survivors. Much of the Hutu population is dissatisfied with the fact that RPA crimes will not be tried through the *gacaca* system. Survivors have been dissatisfied with the attitude of many of the accused, who, far from expressing remorse, have presented their case in an arrogant and aggressive manner. This is exacerbating ethnic tensions still further.\(^{94}\)

Additional problems that have been raised include the following:

- the process will not be able to offer some minimal standards of due process, such as legal defence;\(^{95}\)
- judges have received minimal training, at most a few days;\(^{95}\)
- the impartiality of judges has been questioned on both sides;\(^{96}\)
- there have attendance problems by communities and judges during the pilot projects;\(^{96}\)
- witness safety and protection concerns may discourage participation;\(^{97}\)
- new suspects will be identified during hearings, which may lead to an increased prison population;\(^{97}\)
- public submission of evidence may lead to renewed trauma for those testifying;\(^{97}\)
- it is unclear how the accuracy of information provided during hearings will be verified.\(^{97}\)

The reparations and community service components must also be implemented alongside the judicial component. The potential for the *gacaca* process to contribute to repairing the damage suffered by victims, and to re-building communities, may be lost without these components, for which funding and procedures are not yet in place.\(^{98}\)

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**Box 5b: The “Community Reconciliation Process” in East Timor**

East Timor’s “community reconciliation process” (CRP), facilitated by the recently established Commission for Reception, Truth and Reconciliation (CAVR\(^ {99}\)) aims to supplement the work of the Special Panels dealing with “serious crimes” with a process to deal with low-level offences at the community level.

The CRP is based on the existing traditional justice structures in East Timor that deal regularly with resolving disputes between individuals and families within the community.\(^ {100}\) These existing structures vary considerably throughout the country, but in general the process is facilitated by traditional leaders, and may include agreement on a form of (usually material) reparation to be fulfilled by the perpetrator. As in Rwanda, the emphasis is one of reconciliation, and reintegration rather than punishment of the perpetrator.

The CRP is initiated by a voluntary statement of guilt from the perpetrator. The process is facilitated by Regional Commissioners who, together with community members, form a “panel” responsible for determining the final agreement in each case. A significant degree of flexibility is given to the panels to follow the model of traditional justice relevant to their location. Victims and members of the community can suggest the terms of the agreement to be fulfilled by the perpetrator. Following fulfilment of these terms, the perpetrator is granted immunity from both criminal and civil liability for the crimes dealt with by the CRP, and the case is registered with the local court.

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\(^{93}\) In addition, community participation is only likely to take place at the lowest cell level, which deals with Category 4 crimes only.

\(^{94}\) Penal Reform International, Report III (2002), reporting this as a crucial problem that must be addressed to avoid tensions.

\(^{95}\) 44% of those at *cellule* level have not completed primary education.

\(^{96}\) Penal Reform International, Report III (2002). A quorum of 100 community members, and 15 out of 19 judges is required for hearings to be conducted. Reasons for non-attendance include farming activities (“these meetings will bring us famine”), the exclusion of RPA crimes from the jurisdiction of the *gacaca* courts, and lack of recompense for judges.

\(^{97}\) Penal Reform International, Report III (2002): some signs of trauma have already been evident in initial hearings.

\(^{98}\) The objective of “re-building” is also compromised by the government’s “villagisation” program implemented over the past few years, which means that local communities are not based on previous (pre-genocide) locations or population profiles. See, for example, Human Rights Watch (1999).

\(^{99}\) The Commission’s Portuguese title is Comissão de Acolhimento, Verdade e Reconciliação (CAVR). It was established in July 2001 by UNTAET Regulation 2001/10.

\(^{100}\) CAVR Update (October - November 2002): “All hearings have involved local traditional *lutik or adat* ceremonial rites.”
It is interesting to note that the CRP is handling crimes such as house burnings, which, when committed as part of a widespread, systematic attack, may constitute a crime against humanity. Granting immunity from criminal prosecution for such crimes following a traditional justice process may be controversial in light of the ongoing debate around state obligations to prosecute such crimes. However, both CAVR and SCU considered that a measure of flexibility in determining which crimes should be formally prosecuted was beneficial in light of the limited capacity of the formal judiciary, and the position taken was officially endorsed by the UN.

Following considerable delays, CRP hearings commenced in August 2002. By the end of December, close to 200 perpetrators had voluntarily submitted statements to the Commission, and 84 individuals had been through the process, in groups of varying size. The following initial observations are based on early reports of hearings, although it remains to be seen whether the longer-term objectives of the CRP will be met, including whether agreements will be properly enforced, and whether the process will contribute to the reintegration of perpetrators.

Potential Achievements
The principal objectives of the CRP are to:
- provide justice for low-level violations that cannot be addressed by the formal judicial system, at a low financial cost;
- assist the reintegration of returning refugees from West Timor;
- contribute to reconciliation between perpetrators of low-level violations, victims and communities;
- contribute to the re-building and development of communities.

To a large extent, existing traditional justice processes are followed according to local community customs. Ownership by the local community is thus ensured to a relatively high degree. The Regional Commissioners primarily fulfil a facilitating role, providing a measure of consistency to the process and overseeing compliance with Regulation 2001/10 (such as ensuring that allegations of serious crimes are referred to the General Prosecutor).

The most significant change to the existing traditional justice structures is the legal requirement that women must constitute 30% of the Regional Commissioners. There are indications that the participation of women in the CRP has had a positive effect on the recognition of the impact of violations on women’s lives. For example, the wives of male victims have been called upon during hearings to give their perspective and experiences.

Potential Problems
As the CRP is initiated by a voluntary statement of the perpetrator, its success will be determined largely by incentives to participate. Inefficiency by the formal justice system may lead many to feel that securing immunity from criminal and civil liability is unnecessary. Furthermore, the right of victims to choose to pursue the formal judicial process in these cases is potentially infringed upon by the CRP. The value of the CRP in reintegrating returnees from West Timor may also be limited, as the vast majority had returned to East Timor before the CRP began to function. Most have found a way to live peacefully within their communities, and many have used the existing traditional justice structures, which continue to deal with such cases regularly.

The traditional justice system itself holds some flaws that may also impact on the value of the CRP. Victims are not always given sufficient attention during proceedings, and may be left with a reduced sense of satisfaction. Remorse has not been expressed by perpetrators in all cases, and it remains to be seen whether the “reconciliation” that is achieved at the end of the process is genuine and sustainable.

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101 It is debatable whether the CRP may be viewed as a form of “conditional amnesty” as although it provides for immunity from formal prosecution and civil proceedings, “appropriate” punishment is meted out as part of the community reconciliation process.
102 This official endorsement is reflected in the amendment to UNTAET Regulation 2001/10 adopted in May 2002, which allows greater flexibility in the scope of crimes that may be dealt with by the CRP, but ensures that the General Prosecutor will choose whether or not to exercise his exclusive jurisdiction over serious crimes in every case.
103 These delays were partly attributed to the draft amnesty law proposed in June 2002, which would potentially have conflicted with the CAVR’s mandate to implement the CRP.
104 CAVR Update (October - November 2002).
105 CAVR Update (October - November 2002).
106 CAVR Update (October - November 2002).
4.4 Truth Commissions (and Commissions of Inquiry)

4.4.1 Truth commissions have emerged in recent years as a component of transitional justice strategies in many countries. They are broadly defined as officially-sanctioned bodies that are set up on a temporary basis to investigate a period of human rights abuses. Countries with past or ongoing truth commissions include: Argentina, Bolivia, Chad, Chile, East Timor, Ecuador, El Salvador, Ethiopia, Federal Republic of Yugoslavia, Germany, Ghana, Guatemala, Haiti, Honduras, Nepal, Nigeria, Panama, Peru, Philippines, Sierra Leone, South Africa, Sri Lanka, Uganda, Uruguay, Zambia, Zimbabwe.\(^{107}\)

4.4.2 Commissions of inquiry have also fulfilled a similar function, usually with a focus on investigating violations committed during a specific event, rather than over a period of time. Some commissions of inquiry have been categorised as truth commissions as they share a number of the same key characteristics.\(^{108}\)

4.4.3 To date, truth commissions have been funded by a range of sources, including national governments, institutional, bi-lateral and private international donors, and voluntary contributions from UN member states. The cost of truth commissions has varied considerably, ranging from less than US $500,000 to more than US $35 million for a period usually between one and three years.\(^{109}\)

Objectives

4.4.4 The objectives set for truth commissions in their mandates have been extremely varied. Core objectives that are common to most truth commissions include:

- compiling a comprehensive record of human rights violations;
- providing a suitable platform for victims to share their suffering and experiences;
- providing an official acknowledgement and condemnation of violations;
- identifying root causes and the institutions responsible for violations;
- making recommendations for further measures related to, for example, prevention of further violations, accountability, justice, reparations or institutional reform;
- promoting respect for human rights.

4.4.5 Evidence shows that the principal value of a truth commission lies in its potential capacity to break the silence and denial that frequently surrounds state-sponsored violations, to shed light on systematic patterns of violations, and to uncover facts previously not known. Perhaps most importantly, they can also empower victims by providing them with an opportunity to voice their experiences, and by officially acknowledging their past suffering.

4.4.6 Further objectives that have been included in the mandates of some truth commissions, and that have been the subject of some controversy or doubt, are:

- publicly naming names of individual perpetrators;
- granting amnesty to individual perpetrators in return for disclosure of the full truth\(^{110}\);
- facilitating “restorative justice” as an alternative to criminal (retributive) justice;
- setting up or administering a reparations programme for victims;
- contributing to the psychological healing of victims;
- promoting reconciliation.

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\(^{108}\) For example, USIP categorises Commissions of Inquiry in Chad, Nepal, Sri Lanka and Zimbabwe as truth commissions.

\(^{109}\) Hayner (2001).

\(^{110}\) To date, this form of conditional amnesty has only been implemented by South Africa’s TRC.
4.4.7 Truth commissions can also have a positive impact on strengthening civil society, inspiring the creation of organisations and initiatives, such as victim support groups, with the potentially longer-term benefits this entails.\textsuperscript{111} At the same time, truth commissions are often dependent on civil society to encourage popular participation in the process, and to provide existing information on human rights violations.

\textit{Limitations}

4.4.8 The “truth” that is documented by a truth commission is necessarily selective, as it is not possible to document all violations in such a context, let alone incorporate all relevant perspectives. The methodology of truth-seeking is highly complex, and avoiding bias or errors of some kind is extremely difficult.\textsuperscript{112} It is now widely recognised that the function of a truth commission, rather than providing the “whole truth”, is rather to “purify the argument, to narrow the range of permissible lies”.\textsuperscript{113}

4.4.9 Evidence shows that carrying out truth-seeking investigations, and publishing the findings of the commission, can result in increased tensions, possibly leading to further violence.\textsuperscript{114} For example, an A.C. Nielsen Market Research Africa survey reported that two thirds of those South Africans interviewed believed that the TRC’s investigations had led to a deterioration of race relations.\textsuperscript{115}

4.4.10 Truth commissions are reliant on other institutions to implement their various recommendations. This means that their longer-term impact is determined to a large extent by the political context. In many cases, the recommendations made by truth commissions to governments, particularly on reparations, have not been implemented.\textsuperscript{116}

4.4.11 The psychological healing or “cathartic” effect of truth-telling for victims (and perpetrators) has also been questioned. Truth commissions offer a one-time opportunity to individuals to tell their story, often to a staff member that they will never see again. Evidence shows that while some individuals may have a positive experience, in many cases further trauma can result.\textsuperscript{117} Truth commissions generally do not have the capacity to provide long-term trauma counselling, and efforts to provide effective referral services, such as those made by South Africa’s TRC, have not yet been successful.\textsuperscript{118}

4.4.12 The broader mandates of recent truth commissions bring with them raised expectations, and assumptions that their multiple objectives can be achieved simultaneously. The limitations of what can be expected of a single institution, operating within time and resource constraints, should be carefully considered.\textsuperscript{119} The following examples demonstrate the potential and limits of what can be achieved.

\begin{itemize}
  \item \textsuperscript{111} Hayner (2001).
  \item \textsuperscript{112} For a detailed study of truth-seeking methodology, see Chapman, Audrey and Ball, Patrick, “The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa and Guatemala”, Human Rights Quarterly, Vol. 23 (2001).
  \item \textsuperscript{113} Hayner (2001), quoting Michael Ignatieff.
  \item \textsuperscript{114} See, for example, Amnesty International, “Guatemala’s Lethal Legacy: Past Impunity and Renewed Human Rights Violations” (2002), reporting violent incidents in Guatemala following the publication of the Catholic Church’s truth commission report.
  \item \textsuperscript{115} Rotberg and Thompson (2000).
  \item \textsuperscript{116} Hayner (2001).
  \item \textsuperscript{117} Hayner (2001); Hamber, Brandon, “Does the Truth Heal? A Psychological Perspective on Political Strategies for Dealing with the Legacy of Political Violence”, in Biggar (2001); Boraine, Alex, \textit{A Country Unmasked}, Oxford University Press (2000).
  \item \textsuperscript{118} Hayner (2001).
  \item \textsuperscript{119} Chapman and Ball (2001); Rotberg, Robert, “Truth Commission and the Provision of Truth, Justice and Reconciliation”, in Rotberg and Thompson (2000).
\end{itemize}
Box 6a: South Africa - Truth and Reconciliation Commission (TRC)

The TRC in South Africa raised the profile of truth commissions considerably in the mid-1990s, primarily through its innovative public hearings and controversial amnesty provisions. It was initially proposed by the African National Congress (ANC), was established by an act of parliament in 1995, and operated on a budget of US $18 million per year over two-and-a-half years.\(^{120}\) The Commission was led by 17 national commissioners, and comprised three committees dealing with the truth-seeking, amnesty and reparations aspects of its wide-ranging mandate.\(^{121}\) Opinions vary widely regarding its principal goals, achievements and drawbacks.

**Achievements**

In implementing its truth-seeking function, the TRC:

- held some fifty public and closed hearings throughout the country;
- produced a “final” report in October 1998, including evidence of violations committed by the ANC;\(^{122}\)
- incorporated the names of perpetrators in some 400 cases into the report.

It is widely agreed that the TRC’s primary achievement was to attain official and public recognition of the past. It has thus “broken the silence” that surrounded the atrocities of the apartheid regime, including the crucial declaration of apartheid as a crime against humanity. Furthermore, the TRC achieved this goal without seriously jeopardising the prospects for a peaceful transition. It has arguably changed the face of South African public life by raising the profile of the language and values of truth, reconciliation and human rights in public discourse.\(^{123}\) It may also have contributed to individual healing and reconciliation in some cases, for which there is anecdotal evidence.

The achievements of its “amnesty” function are more controversial.\(^{124}\) The TRC’s grant of amnesty in exchange for truth was evidently a compromise that formed a crucial part of the transition negotiations. The architects of the TRC considered that the amnesty component was a necessary means to achieving political stability, particularly in the context of the former government’s continued control over the military and police.\(^{125}\) Proponents also argue that the individualised, conditional amnesty process provided some accountability where large-scale criminal prosecutions were not possible, and “de facto” amnesty was the alternative. The amnesty process generated the disclosure of new evidence that may otherwise never have been exposed, and which contributed to the findings in its “final” report.

**Problems Encountered**

The TRC’s findings were lengthy, but inevitably incomplete. Investigative inquiries were limited to extreme violations of civil and political rights, while the everyday manifestations of apartheid were excluded.\(^{126}\) Sectoral hearings were conducted to expose systematic violations by institutions, but the TRC was nevertheless seen by many as failing to address the wider search for social and economic justice.\(^{127}\)

The TRC had access to substantially greater resources than any other truth commission to date, and faults in its methodology highlight the potential risks for any such commission in attempting to establish the “truth”. A number of serious problems were identified with the TRC’s search for truth, including:

- significant gaps identified in the “final” report;

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\(^{120}\) Hayner (2001), commenting that this is by far the largest truth commission of any to date.  
\(^{121}\) The TRC was established by the Promotion of National Unity and Reconciliation Act (1995), with a mandate to investigate human rights violations between 1\(^{s}\) March 1960 – 10\(^{th}\) May 1994, and was led by its Chairman, Archbishop Desmond Tutu.  
\(^{122}\) Wilson, Richard, “Justice and Legitimacy in the South African Transition”, in Barahona de Brito (2001). The TRC took 21,298 statements, documenting 38,000 allegations of human rights violations, including 10,000 killings. Annexes to the 1998 “Final” Report have not yet been published.  
\(^{123}\) Interview with Fanie Du Toit, December 2002.  
\(^{124}\) The Promotion of National Unity and Reconciliation Act (1995) stated that an amnesty could be granted only if the act, omission or offence was committed with a political objective, in the course of the conflicts of the past, and only in exchange for full disclosure of all relevant facts.  
\(^{125}\) See, for example, Van Zyl, Paul, “Dilemmas of Transitional Justice: The Case of South Africa’s Truth and Reconciliation Commission”, Journal of International Affairs, Vol. 52, No. 2 (Spring 1999), stating that the leaders of the apartheid regime would “never have allowed the transition if its members had been exposed to arrest, prosecution and imprisonment”.  
\(^{126}\) The TRC’s truth-seeking inquiries were limited to investigating cases of killing, abduction, torture, and severe ill-treatment.  
• significant flaws within the TRC’s “truth-seeking” investigative methodology, including lack of corroboration of evidence, poor investigations and serious errors of analysis;  
• political influences leading to omissions from the contents of the “final” report.

Evidence also indicates that while testifying promoted the healing process for some victims, many others suffered from further trauma after testifying.

For its critics, the amnesty component of the TRC was a denial of justice, a damaging blow to the battle against impunity, and an obstacle to reconciliation. The prosecutions that were to accompany the TRC, targeting those who did not receive amnesty (more than 5,392 applicants had been denied amnesty by November 2000), have been largely unsuccessful, providing a limited incentive for amnesty applications and generally discrediting the TRC’s amnesty process. Its credibility was also damaged by the imposition of collective amnesty for ANC members in one key instance. The impact of amnesty as an incentive for disclosing the “truth” was limited by the low level of applications from the military and security services. Some observers have advocated that the TRC should, as a minimum, have been given the power to apply non-criminal sanctions to those granted amnesty, in particular dismissal from public employment, or individualised reparations by perpetrators.

The TRC itself recognised the limitations of the truth-for-amnesty process in attempting to provide the “restorative justice” that it hoped to achieve. Its final report stated:

“Restorative justice demands that the accountability of perpetrators be extended to making a contribution to the restoration of the well-being of their victims. […] The fact that people are given their freedom without taking responsibility for some form of restitution remains a major problem with the amnesty process. Only if the emerging truth unleashes a social dynamic that includes redressing the suffering of victims will it meet the ideal of restorative justice”.

Many consider the TRC’s greatest weakness to be its failure to achieve a significant impact on reparations for victims. Responsibility for implementation of reparations ultimately lies with the South African government; however, mistakes were made that led to delays in the TRC’s recommendations on reparations, leading to missed opportunities to provide the most urgent reparations, which remains the source of much dissatisfaction.

The TRC itself realised the limitations of its potential impact on the process of reconciliation. While it has arguably been key to achieving national (political) reconciliation, it has failed to focus on reconciliation at the community level where serious tensions remain, and has been criticised for the moral pressure it is said to have exerted on some individuals to “forgive” perpetrators in the context of amnesty hearings. As long as the reparations aspect of the TRC’s work is not implemented alongside the amnesty mechanism, its contribution to reconciliation will be severely limited.

129 Wilson, Richard (2001), commenting that the successful court injunction obtained by (then Ex-) President de Klerk, leading to the deletion of allegations against him from the TRC’s report, was described as “an ironic memorial to apartheid censorship”.
130 Hamber (2001); Hayner (2001), reporting that Trauma Centre for Victims of Violence and Torture in Cape Town estimated that 50 – 60% of victims suffered difficulties after testifying to the TRC, or expressed regret at having done so.
131 McGregor, Lorna, “Individual Accountability in South Africa: Cultural Optimum or Political Façade?”, American Journal of International Law, Vol. 95:32 (2001). The grant of collective amnesty was overturned by the High Court, but nevertheless constituted a major breach of the TRC’s mandate.
132 Interview with Fanie Du Toit, December 2002.
134 Wilson, Richard (2001), commenting that “popular principles of justice were violated when perpetrators obtained amnesty without even expressing regret, which was not called for by the Act”.
136 Wilson, Stuart (2001); Pankhurst (1999).
Box 6b: El Salvador - Commission on the Truth

El Salvador’s “Commission on the Truth” was established as part of the UN-brokered peace accord in July 1992, following the country’s 12-year civil war.\(^{137}\) It is a unique example of a UN-administered commission, led and staffed by non-Salvadorans only. It received some $2.5 million for a period of eight months, with a general “truth” mandate for the investigation of atrocities during the civil conflict, and its report was published by the UN in March 1993.\(^{138}\) It did not have amnesty powers or hold public hearings, but took statements from some 2,000 individuals in closed hearings, almost always on a confidential basis. It is the only truth commission to date whose recommendations have been binding on a government.\(^{139}\)

**Achievements**

The commission’s primary achievement has been to expose the facts of atrocities committed by the parties to the civil conflict, and prevent further denial of past violations. By naming names of individual perpetrators in a significant number of cases, including high-level members of the military, police, security forces and civilian government, it has lifted the “veil of impunity” and publicly called those responsible to account.\(^{140}\) It developed a detailed framework for assessing levels of evidence, only naming names where the highest levels were attained.\(^{141}\) It achieved a relatively balanced approach, and included violations by opposition forces in its report.

The commission is arguably the best example to date of a truth commission that has succeeded in contributing directly to institutional reform, particularly within the justice sector, through implementation of its recommendations. Combined with UN pressure, it gave considerable weight to reforms that had previously been proposed by civil society but ignored by the government.\(^{142}\)

The commission also recommended wide-ranging non-criminal sanctions in the form of dismissal of military officers, civilian government officers and members of the judiciary named in the report, and disqualification of any individuals implicated by the commission from holding public office for at least ten years. Together with the report of the “Ad Hoc Commission” on the military, the commission contributed directly to the removal of some of those named from the armed forces, including the Minister of Defence.

**Problems Encountered**

The commission reportedly suffered from an initial lack of funding, and relied on the various contributions of states to a special UN fund set up for the purpose. Its eight-month life-span was extremely limited in time, obliging the commission to limit its investigative inquiries to a number of specific cases.

Although most individuals it approached agreed to be interviewed, the commission had great difficulty in obtaining relevant documents, which limited the scope of its findings.\(^{143}\) It was also unable to develop a co-operative relationship with local human rights groups for several months, and gained only limited access to their information. Its international character or “outsider” quality was cause for some rejection of the commission’s work.\(^{144}\)

In direct response to the commission’s report, a general amnesty law was passed just days after its release of the report, in March 1993. This is also said to have deflated the public’s interest in the commission’s work considerably.\(^{145}\) The commission did not propose criminal prosecution of named perpetrators, and critics have argued that the commission and the UN should both have been more explicit both in recommending prosecutions, and precluding a blanket amnesty as an option.\(^{146}\)

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\(^{137}\) Hayner (2001), summarising the facts of the civil war (1980 – 1991), conducted between the government of El Salvador, and supported by the United States with $4.5 billion of military and other aid, against leftist guerrillas (FMLN).

\(^{138}\) Report of the Commission on the Truth for El Salvador: From Madness to Hope. The report included some recommendations to promote national reconciliation, but the Commission’s work was focused almost entirely on achieving “truth” as an objective. Hayner (2001).


\(^{140}\) The Commission only named names when “overwhelming” or “substantial” evidence was found.

\(^{141}\) Hayner (2001).

\(^{142}\) Buergenthal (1994).


\(^{144}\) Hayner (2001).
Box 6c: Guatemala - Historical Clarification Commission (CEH)

The CEH was established under the auspices of the UN as part of the 1996 peace accord that followed the 35-year-long civil war. It operated on a budget of US$ 9.5 million over 18 months, with a mandate to investigate atrocities committed throughout the civil conflict and make recommendations for future reforms. Its design was partly informed by the El Salvador experience, and its principal features included:

- a “mixed” leadership of three commissioners (two Guatemalans and one international);
- all statements were taken in confidence;
- it did not have the power to “name names”;
- it could not compel individuals to provide information.

It did not contain any provision for the grant of amnesty. A separate amnesty law was, however, passed immediately prior to the CEH’s establishment, although its application excluded genocide, forced disappearances and torture.

Achievements

The principal achievement of the CEH is considered to be its contribution to preventing national denial of the atrocities that took place, publicly exposing the facts of what happened and “lifting the taboos”. It has thereby laid a part of the necessary foundations for future reforms to take place. Its report was released in February 1999 and included the hard-hitting finding that genocide had been committed by state agents against the Mayan Indian population between 1981 – 83.

The national / international hybrid model is generally viewed to have been successful in achieving both actual and perceived impartiality, and efficient decision-making was deemed more important than attempting a broad representation within the CEH’s leadership. The CEH report included evidence of crimes committed by guerrilla forces as well as state agents.

The CEH report was based primarily on statements taken from victims in confidence, due to the political and security situation and fear of repercussions against deponents. It was able to compile a report that reflected the voice of victims, and its staff did not suffer from threats. By contrast, the release of the report of the Catholic Church’s “Recovery of Historical Memory” (REMHI), which included the names of perpetrators, led to the murder of its director, Bishop Gerardi, two days after its release. The work of both CEH and REMHI have been associated with an increased motivation within communities and civil society to push for formal justice for civil war atrocities, although the CEH report was specifically barred from having any “judicial purpose or effects”.

Problems Encountered

Resources were a major problem for the CEH from the outset. There was insufficient planning, and neither the Guatemalan government nor the UN offered to contribute funding. The CEH survived on ‘ad hoc’ contributions from international donors, but the substantial fund-raising efforts required, with inconsistent results, led to serious inefficiencies and time-wasting. The CEH did not receive political support or co-operation from the government.

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146 Cassel (1996).
147 Comisión de Esclarecimiento Histórico (CEH).
148 Garrett, Stephen A., “Models of Transitional Justice – A Comparative Analysis”, Columbia International Affairs Online (CIAO), June 2000, summarising the facts of the civil war, following the right-wing military government’s successful overthrow of Jacobo Arbenz’ leftist government in 1954. In 1960, a leftist insurgency attempted to topple the military regime, leading to a 35-year civil war that claimed an estimated 200,000 lives. By the early 1990s, 77% of Guatemalan families were living below the poverty line.
151 Hayner (2001). The CEH registered 42,000 victims, including 23,000 killings, 6,000 disappearances and 626 massacres. 93% of violations were attributed to the military or state-backed paramilitaries, and 3% to guerrilla forces.
153 Remoción de la Memoria Histórica de la Oficina de Derechos Humanos del Arzobispado de Guatemala (REMHI).
154 The killing of Bishop Gerardi took place on 26th April 1998.
which refused to hand over relevant evidence.\textsuperscript{157} Evidence related to external factors contributing to the conflict was also limited. The US government provided some partial information, but observers have commented that this was a fraction of the relevant information available to them.\textsuperscript{158}

Additional problems that were encountered include:

- the six-month time-frame initially given to the CEH was unrealistic;
- the scope of its work was restricted to investigating violations of the right to life and physical integrity, excluding all other effects of the conflict;
- some bias was evident in the CEH’s inquiries;\textsuperscript{159}
- lack of co-operation by the military and police, who had no incentives to come forward and could not be compelled to do so, meant that the findings were also partial in this respect.

The CEH's contact with victims and communities was arguably too brief. Investigations were “the time of the victims”\textsuperscript{160} but these lasted just eight months. This, combined with the limited impact of dissemination efforts, is considered by some observers to have produced a minimal public understanding of the process, and minimal reaction to the report outside the city-based circles of political and human rights activists.\textsuperscript{161}

None of the recommendations of the CEH, which included measures for prosecution of perpetrators and reparations for victims, have been implemented by the government to date. The negative official reaction to the report was viewed by some as inevitable, and by others as extremely disappointing.\textsuperscript{162} Progress on criminal prosecutions has been minimal to date due to deficiencies in the justice sector, lack of political will, and public apathy.\textsuperscript{163}

\section*{4.5 Lustration / Vetting}

4.5.1 Lustration or vetting measures refer to the practise of excluding certain individuals from holding public office or employment, through processes such as dismissal, forced retirement, or setting out certain criteria to be met by future candidates for public positions. The equivalent practise of “purging” was practised on a vast scale against alleged Nazi collaborators in Europe following the Second World War, and has been practised against alleged communist collaborators in Eastern Europe since the early 1990s.

4.5.2 Such measures have not received much attention among TJMs to date. They have not yet been applied in many post-conflict countries, although recommendations for the exclusion of certain individuals from positions of authority have been made by truth commissions\textsuperscript{164}, and screening processes for public institutions such as the police have been adopted in at least one country.\textsuperscript{165} It remains to be seen whether they could be appropriately applied on a significant scale in a post-conflict, developing country.

\textsuperscript{157} Tomuschat (2001).

\textsuperscript{158} Hayner (2001). The US Freedom of Information Act was used to access documentation relevant to the enquiries of the truth commissions in both Guatemala and El Salvador, assisted by the National Security Archives.

\textsuperscript{159} Chapman and Ball (2001), reporting (among other examples) a bias towards violations against the Indian population in the 1980s, and away from violations against the Ladino in the late 1960s.

\textsuperscript{160} Tomuschat (2001).

\textsuperscript{161} See, for example, Seils (2002), reporting that translation of the report did not assist much due to high illiteracy rates. His view contrasts with that of Christian Tomuschat who considers the accessibility of report to have been “fully assured” through translation and dissemination efforts.

\textsuperscript{162} Seils (2002).

\textsuperscript{163} Ratner and Abrams (2001); Seils (2002); Amnesty International report (2002); Garrett (2000).

\textsuperscript{164} For example, by the Commission on the Truth for El Salvador.

\textsuperscript{165} Kritz (2002), citing the example of Bosnia and Herzegovina, where the UN’s International Police Task Force (IPTF) was charged with screening all candidates for the reconstituted local police, rejecting anyone who has engaged in persecution of ethnic minorities.
Objectives

4.5.3 Non-criminal sanctions can provide an effective, alternative form of accountability and punishment to criminal justice. Vetting / lustration practices may contribute to institutional reform in the post-conflict context through the removal or exclusion of individuals responsible for past human rights violations from public institutions. They may also suitably target those responsible for corruption and economic mismanagement. The “cleansing” of institutions in this way can reach a much larger pool of perpetrators than a criminal prosecution strategy. The process can be conducted using an administrative mechanism that is arguably more cost-efficient than the judicial process.

4.5.4 Such measures do not in principle exclude the possibility of criminal sanctions, although they may provide an effective substitute where appropriate. For some observers these alternative sanctions warrant greater attention by governments and the international community as an option for the transitional justice context. The further objectives of such measures include:

- reforming institutions to improve their capacity to uphold the rule of law and respect for human rights principles;
- re-establishing citizens’ trust in the state and its institutions;
- providing satisfaction to victims in cases where criminal prosecution may be inappropriate, or is unlikely to be carried out;
- deterring perpetrators from further violations due to the punitive nature of the measures.

Limitations

4.5.5 Lustration / vetting practices have been criticised on the basis that they impose serious punitive sanctions without applying the necessary due process requirements. When applied collectively, such as on the basis of past affiliation rather than individual actions, they are likely to violate a range of fundamental rights, including the right to non-discrimination and the right to a fair hearing. This problem arose in a number of Eastern European countries where lustration laws were struck down on human rights grounds by constitutional courts, leading to their amendment or abolition. On the other hand, if individual responsibility is to be determined in each case, the burden becomes sufficiently heavy that the incentives to pursue such a strategy over criminal justice may be lost.

4.5.6 The effects of lustration / vetting practices on the process of institutional reform may also be limited. In a post-conflict situation, a certain amount of experienced personnel will often be required to ensure that state institutions are able to continue functioning during the transitional period. As such, if extended too broadly, such measures may have a detrimental effect on post-conflict recovery and development. They also have the potential to create a large, ostracised and unemployment element in society. It should be noted that past affiliation may not necessarily indicate an inability or unwillingness to conform to a new set of principles or institutional culture.

4.5.7 Some commentators regard vetting or lustration practices as less effective than other TJMs in achieving the objectives of accountability, truth and justice. They have the potential to be heavily

166 Kritz (2002), describing non-criminal sanctions as “a missing link in the evolution of a comprehensive approach to transitional justice.”
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politicised, and past examples have shown that such measures do not necessarily increase political stability, or re-establish citizens’ trust in state institutions.170

Box 7: El Salvador – Ad Hoc Commission on the Military

The most notable recent example of lustration / vetting processes in a post-conflict developing country is that of El Salvador, where an Ad Hoc Commission was established under the 1993 Peace Accords to review the past performance of Salvadoran military officers, with reference to their human rights record, their professional competence, and their capacity to function in a democratic society.171

To the surprise of many, particularly within the military, the all-Salvadoran Ad Hoc Commission produced a secret report which charged more than one hundred officers with serious violations of human rights and called for their dismissal. The members of the Commission remained outside El Salvador for some time, due to safety concerns.172

The work of this Commission, combined with the efforts of the UN-administered truth commission that followed it, resulted in the successful removal of 102 active military officers (including all those named by the truth commission), and the Minister of Defence. However, it is notable that this was carried out in most cases by retiring the officers, rather than firing them, which may have considerably reduced the punitive effect.

4.6 Reparations

4.6.1 Reparations for victims of past human rights violations have received minimal attention within the sphere of TJMs, although they are an essential component of providing victims with an effective remedy for past violations. Calls for reparative measures from victims, civil society and other bodies such as truth commissions have frequently been ignored by governments.173 While the right of victims to seek reparations is recognised internationally, and reflected in the UN’s work on principles and guidelines,174 this has not yet been accompanied by international commitment to ensure that such a right is fulfilled.

4.6.2 The term “reparations” covers a wide spectrum of measures aimed at relieving the suffering of and affording justice to victims, including forms of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.175 There are key linkages with other TJMs that may contribute to providing satisfaction (such as criminal trials or truth-seeking endeavours) and guarantees of non-repetition (such as institutional reform). Reparations can be divided into individual and collective measures. These may also take tangible or more symbolic forms.

4.6.3 Individual measures may include:

- compensation in the form of cash payments, pensions, or assistance with services such as housing, healthcare or education;
- restitution in the form of release from confinement, returning access and title to property, reinstatement to former employment;

171 The Commission consisted of three Salvadorans, with two retired Salvadoran generals acting as advisers. The government was obliged to implement the Commission’s recommendations within two months.
172 Buergenthal (1994).
173 Hayner (2001), citing the examples of South Africa, Guatemala and El Salvador.
175 Van Boven (1997).
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- rehabilitation in the form of medical or psychological treatment;
- satisfaction in the form of declarations of responsibility, judicial remedies, official investigations, exhumations and re-burials.

4.6.4 Collective measures may include:

- rehabilitation in the form of community assistance, such as reconstruction of destroyed public buildings, religious sites, education or health facilities;
- satisfaction in the form of public apologies, memorials, days of commemoration, re-naming public spaces.

4.6.5 A range of avenues exist for individuals to pursue reparations from governments on the basis of state responsibility for past human rights violations, or from perpetrators on the basis of individual accountability. Judicial proceedings may be initiated at the domestic level, depending on the legal framework that is in place. Where the available domestic remedies have been exhausted, victims may seek reparations from governments through regional and international human rights bodies, or occasionally from perpetrators through foreign courts.

4.6.6 Alternatively, governments may also establish “ad hoc” reparations programmes in response to a particular event or period concerning gross human rights violations. These usually offer the prospect of an administrative form of redress for victims, requiring relatively low standards of evidence compared to formal judicial mechanisms. They normally focus on individual measures of restitution, compensation and rehabilitation, but may also incorporate collective measures such as small-scale development activities.

Objectives

4.6.7 Reparations have the potential to fulfil a number of essential objectives. They are victim-centred measures, aimed at achieving one or more of the following:

- officially acknowledging the suffering of victims and the impact of the violation;
- repairing the damage done to victims;
- alleviating the suffering of victims and improving their quality of life;
- assisting the reintegration of victims into society;
- providing a sense of justice and satisfaction to victims, thereby diminishing prospects of a renewed cycle of violence;
- restoring victims’ trust in the state and its institutions.

4.6.8 In addition to fulfilling an important legal entitlement, reparations also play a central role in rehabilitating and reintegrating victims into society, providing the conditions necessary for them to contribute to the social and economic development of the country. The importance attached to victim-centred notions of justice in many post-conflict societies means that measures directed against perpetrators may be insufficient to provide the victim with a sense of “justice done”, as they have seen no

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177 There is general consensus that states are obliged to provide reparations to victims in cases where a previous government was responsible for violations, and where individual perpetrators are unwilling or unable to fulfil their obligations.

178 Relevant regional human rights bodies include the African Commission, the European Court of Human Rights, and the Inter-American Commission and Court of Human Rights; international bodies include the Human Rights Committee and the Committee Against Torture. The Statute of the ICC also contains provisions for the establishment of a Trust Fund for Victims, and for the transfer of payments or other assets from those convicted into the Trust Fund.

179 In this context, victims are defined to include those who have been subject to past human rights violations, and those who have suffered indirectly as a result of violations against others, such as their family members. As well as direct victims, the UN principles include “a dependant or a member of the immediate family or household of the direct victim as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations, has suffered physical, mental, or economic harm.”
tangible change in their own circumstances. At the same time, however, victim-centred reparations may not be considered an adequate substitute for retributive justice.\textsuperscript{180}

**Limitations**

4.6.9 The opportunities for victims to pursue judicial remedies are frequently limited, due to inadequate domestic laws, poorly functioning judicial mechanisms, and political resistance to such measures. Civil proceedings against individual perpetrators are often not possible as their identity and location is unknown, or domestic amnesties may preclude this avenue. Victims may be unable to afford the time and costs involved, or may be fearful of the consequences. Regional or international mechanisms may be inaccessible due to lack of information or the necessary means. Governments facing the prospects of significant payments to individual claimants may restrict the possibilities for judicial remedies, or implement limited reparations programmes to try and satisfy potential claimants.

4.6.10 The alternative to pursuing judicial remedies - designing and implementing reparations programmes - also entails considerable difficulties, which are often presented by governments as reasons for avoiding such measures. Concerns centre around the cost of reparations, and responsibility for providing the means for reparations. Cost is a major issue in a post-conflict situation of poverty, where resources available to the government may be extremely limited. If a government were able to indemnify itself by fining or confiscating the wealth of perpetrators responsible for the violations, this would be particularly appropriate, but is often not possible.\textsuperscript{181}

4.6.11 In addition to providing the funds for reparations, there are difficulties in determining:

- eligibility criteria;
- proportionality of the benefit to the violation;
- how to cater for the varying needs of victims.

4.6.12 Designing and implementing a programme that is received by victims as fair and efficient is challenging, and programmes may lead to a sense of exclusion for those who do not benefit, entrenching certain divisions within society. In particular, basing criteria for eligibility on a narrow conception of violations can lead to dissatisfaction for other victims. Victims of gross violations of economic and social rights have usually been excluded from the design of reparations programmes, just as these types of violations are marginalised within criminal justice and truth-seeking initiatives.

4.6.13 A common response to the dilemma of individual reparations has been for a government to propose local service-providing development projects as reparations for communities.\textsuperscript{182} The use of development activities as a form of reparation is of questionable value, however, as they are associated with providing services that are considered to be the basic entitlements of citizens. As such, their reparative effect with respect to the violations that have been suffered by victims is likely to be minimal. Similar problems arise with the provision of services (e.g. housing, education, healthcare) on an individual basis for victims as a form of “compensation”.

\textsuperscript{180} For example, compensation was provided by the Guatemalan government to the relatives of some 350 men, women and children massacred in 1982 by the Guatemalan army. Relatives and human rights groups welcomed the payments but continued to insist that the perpetrators be brought to justice. Amnesty International report (2002).


\textsuperscript{182} Seils (2002), citing the example of the Guatemalan government’s offer to rehabilitate water and road systems as part of compensation packages. However, these have not been well received as the criteria for selection have not been explained, the linkage between development and compensation has been confused, and the moral imperative for the activity is not clear.
4.7 Amnesty

4.7.1 For the purposes of this study, amnesty is an act by which an individual or a group of people is granted immunity from criminal prosecution, and in some cases civil liability, for a crime committed in the past. An amnesty is to be distinguished from a pardon, which “forgives” the perpetrator and reduces or removes their punishment, although the conviction for the crime remains intact.\footnote{See Orentlicher (1991), noting that the terms amnesty and pardon are sometime used interchangeably, with amnesties granted to those already serving custodial sentences, and pardons referred to as measures applied before the criminal conviction stage.}

4.7.2 The grant of amnesty in response to gross human rights violations is a highly controversial issue. Both general amnesties and individual or conditional amnesties continue to be adopted in a large number of post-conflict situations as a response to the transitional justice question.\footnote{Cassel (1996), citing the Latin American examples of Argentina, Brazil, Chile, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Peru, Suriname and Uruguay. Other recent examples include Mozambique and Sierra Leone, as well as the “conditional amnesty” granted by the truth commission in South Africa.} The UN has a mixed record with regard to amnesties, and while some have been supported by the international community, others have been opposed, and/or overturned or reviewed by domestic courts and human rights bodies.\footnote{A recent example of the UN’s current position on the issue is the UN’s reservation entered in response to the general amnesty component of the 1999 Lomé peace agreement for Sierra Leone, stating it did not recognise amnesty for genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. See Roht - Arriaza (1996), highlighting the mixed record of the UN in the past. Cassel (1996) cites the past example of Guatemala where the UN did not know which crimes could be amnestied under international law - in the end, the 1996 Law of National Reconciliation did not permit amnesty for genocide, torture or forced disappearances. Dugard, John, “Dealing with Crimes of a Past Regime: Is Amnesty Still an Option?”, 12 Leiden Journal of International Law (1999) also highlights the ambiguous role of the UN with respect to amnesties in Latin America, and its support for the South African approach.}

4.7.3 The legality of a domestic amnesty may be assessed partly in relation to the state’s duty to prosecute certain categories of international crimes. As discussed in Section 3 above, the exact scope of this obligation remains unclear, and there have been lengthy debates as to whether amnesty for certain international crimes is prohibited by customary international law.\footnote{Sadat, Leila Nadya, The International Criminal Court and the Transformation of International Law: Justice for the New Millennium, Transnational Publishers, (2001).} Nevertheless, in many cases amnesty provisions are evidently in breach of a state’s treaty obligations. In addition, the validity of a domestic amnesty also relates to the state’s obligations to provide an effective remedy to victims of human rights violations under international human rights law. Amnesties must therefore be considered together with the transitional justice measures that accompany it, such as accountability or reparative measures.

➢ General amnesty

4.7.4 “General” or “blanket” amnesty refers to amnesty given to groups of individuals, usually covering all crimes committed during a specific period of time. These are granted by governments in post-conflict or post-authoritarian transitions to members of specific institutions, for crimes committed during the relevant period. The crimes are “forgotten” in the sense that they are erased from legal memory, and the perpetrators are not held accountable.

➢ Conditional amnesty

4.7.5 Conditional amnesty refers to the grant of amnesty upon fulfilment of certain conditions. Conditional amnesties differ from general amnesties on the crucial point that as individual responsibility must be determined for the amnesty to be granted, the crime is not “forgotten”, but the perpetrator is exempt from certain forms of punishment. In this sense a conditional amnesty is somewhat closer to the meaning of a pardon.
Objectives

4.7.6 A general amnesty is often self-granted by the government, aimed at exempting its own members from the judicial process. It is generally agreed that blanket, self-serving amnesties are impermissible, and they, together with “de facto” amnesties resulting from judicial inaction, have provided the impetus for the creation of transnational and international criminal justice mechanisms.

4.7.7 Justifications given for granting amnesties in response to mass atrocities have varied, including one or more of the following reasons:

- political leaders have demanded immunity from prosecution as a condition for relinquishing power or ending a conflict;\(^\text{187}\)
- the society in question prefers to forget the past and amnesty will contribute to achieving national reconciliation and/or sustainable peace;
- the new government is too fragile to undertake criminal prosecutions of perpetrators, which are costly, not practically feasible on a large scale, and may contribute to renewing tensions.

4.7.8 Criminal justice is essentially traded for peace and stability, with the hope that further atrocities will not be committed, and society will be able to “move on”\(^\text{188}\). In response to objections on human rights grounds (elaborated further below), it has been commented that “international opinion, often driven by NGOs and Western activists who are strangers to repression, fails to pay sufficient attention to the circumstances of the society which chooses amnesty above prosecution”\(^\text{189}\).

4.7.9 Conditional amnesty has been justified in the past on the basis that the socio-political circumstances sometimes demand some form of amnesty in order to achieve peace\(^\text{190}\), and that it is legitimate to provide incentives for perpetrators to reveal the truth.\(^\text{191}\) Furthermore, in a situation where criminal prosecutions are beyond the capacity of the justice system, it has been argued that as ‘de facto’ amnesty would be the alternative, it is better to lay down conditions and gain benefits from the amnesty.

Limitations

4.7.10 Concerns about the use of amnesties centre around the notion that they violate the essence of justice and core human rights principles by granting impunity to perpetrators of violations. The direct causal effects of amnesties are difficult to determine, particularly in light of the fact that “de facto” amnesties often apply to large numbers of perpetrators in post-conflict situations. In general, however, those who oppose amnesties argue that they have the effect of:

- undermining the rule of law;
- contributing to a culture of impunity, thereby encouraging further violations;
- denying victims of human rights violations the right to an effective judicial remedy;
- allowing resentments about past violations to fester, resulting in renewed tensions and potential conflict at a later stage.

\(^{187}\) For example, South Africa’s conditional amnesty.

\(^{188}\) There are some specific examples of general amnesties, such as those adopted in post-Franco Spain, and most recently in post-conflict Mozambique, where calls for justice have been minimal. Such examples are cited in the literature as instances where the decision to refrain from adopting punitive measures has contributed to achieving a sustainable peace.

\(^{189}\) Dugard (1999).

\(^{190}\) Boraine (2000).

\(^{191}\) Zalaquett (1989).
4.7.11 The argument that amnesties assist in achieving stability and peace has been disproved by numerous examples of post-conflict situations where a general amnesty has accompanied ongoing human rights abuses. A recent example is that of Sierra Leone, where far from achieving stability, the general amnesty provisions included as part of the 1999 Lomé peace agreement paved the way for continued widespread atrocities. One commentator argues that a “no-negotiation” policy may be adopted towards perpetrators of gross human rights violations, as is often adopted towards terrorists.\textsuperscript{192}

4.7.12 Concerns that a government is too fragile to attempt criminal prosecutions, or that the capacity does not exist to implement such a strategy, may lead to consideration of alternative accountability mechanisms or responses to the transitional justice question. However, such concerns alone do not provide a justification for choosing amnesty (including conditional amnesty) over other alternatives that may provide a stronger form of accountability, such as the application of non-criminal sanctions, or the introduction of traditional justice mechanisms.

4.7.13 The purpose of a chosen policy in response to past atrocities should be explicitly assessed in this context.\textsuperscript{193} Evidence shows that in most situations where a policy of amnesty has been adopted, this has been a self-serving measures aimed at ensuring continued impunity. The response of victims and civil society has indicated that in many cases, the amnesty is not considered legitimate by the population, and has the effect of depriving victims of the opportunity to seek an effective remedy, with the further effect of undermining respect for justice institutions and human rights principles.

Summary

The overview given above has provided an outline of the relative benefits and limitations of the various officially-sponsored TJMs that have been used in post-conflict, developing countries. The examples serve to highlight the particular constraints and difficulties of applying such mechanisms in post-conflict situations characterised by a severe lack of resources and high levels of poverty. While it is essential to avoid a “one-fits-all” approach to transitional justice, there is considerable value in conducting comparative analysis, assessing the longer-term value of past initiatives, and working to ensure that the mistakes of the past are not repeated. The process of devising a transitional justice strategy should always be context-specific, but may nevertheless be usefully informed by past experience.

5. COMBINING TRANSITIONAL JUSTICE MECHANISMS

5.1 It is now widely recognised that a single officially-sponsored mechanism will make a limited contribution to the goal of post-conflict reconstruction and recovery. TJMs are increasingly combined in an attempt to meet a range of objectives, such as accountability, justice, truth and institutional reform.\textsuperscript{194} Where a combination is contemplated, mechanisms should ideally be designed to generate a coherent transitional justice strategy, and to ensure that conflict does not arise between their mandates and operations. Clear objectives are essential, as is an effective public information strategy to ensure that the local population understands the implications of each mechanism, and their relationships to each other.\textsuperscript{195}

5.2 Where TJMs are designed to co-exist, gaps may nevertheless remain, and the failings of one mechanism can impact on the other(s). In East Timor, many serious crimes cases may be left untouched

\textsuperscript{192} Sadat (2001).
\textsuperscript{193} Ratner and Abrams (2001).
\textsuperscript{194} At the same time, it should be remembered that there are countries which continue to choose not to take measures to address the question of transitional justice for a variety of reasons, some of which may be more legitimate than others.
\textsuperscript{195} Judicial System Monitoring Programme, “What will be the Effect of the Draft Amnesty Law?” (2002), referring to the existing “concerns and confusion in the community” in East Timor about processes for providing remedies for past violations.
as the capacity does not exist within the formal judiciary to handle them, and the jurisdiction of the CAVR’s community reconciliation process does not extend that far. In South Africa, the limited number of formal prosecutions has had a negative impact on the legitimacy of the conditional amnesty process, which relies on the prosecution of those who do not seek amnesty.

Box 8: Criminal Prosecutions and Truth Commissions – Sierra Leone and East Timor

Particular concerns have been raised with respect to the relationship between the criminal prosecution process and truth commissions, where their investigations are conducted in parallel. There are a number of positive instances where truth commissions have contributed to the judicial process by forwarding their evidence to the prosecution. However, concerns were raised recently by ICTY in response to the proposal for a truth commission in Bosnia and Herzegovina, arguing that the tribunal was developing an objective “truth”, and highlighting potential problems such as contradictory findings of facts by the two bodies, and “contaminating” of evidence through repeated interviews.

Sierra Leone and East Timor provide two recent examples of combining a “mixed” judicial mechanism with a truth commission. Both have faced the issue of how information will be shared between the two bodies, including:

- in what circumstances the prosecution may request information from the truth commission;
- in what circumstances evidence should be transferred from the truth commission to the prosecution;
- confidentiality of statements given to the truth commission, if they may later be requested and used by the prosecution.

Defining the relationship between the two bodies is critical, and impacts on the confidentiality of statements given to the truth commission, which in turn affects its ability to gather evidence, particularly from perpetrators. For many victims, however, an evident relationship with the prosecution may further encourage them to provide testimony to the truth commission.

In the case of East Timor, a Memorandum of Understanding (MoU) was agreed in mid-2002 with a view to ensuring a co-operative relationship between the truth commission and the Office of the General Prosecutor (OGP). The MoU takes into account the OGP’s existing powers to request information from the truth commission, but includes agreement that such requests will be limited to cases that are already under prosecutorial investigation. It is clear that the absolute confidentiality of statements given to the truth commission cannot be guaranteed since there is a chance that they will later be requested by the prosecution, and it remains to be seen what effect this may have on the commission’s truth-seeking inquiries.

By contrast, in Sierra Leone, no agreement has been reached between the Special Court and the Truth and Reconciliation Commission (TRC), although public statements have been made to the effect that the prosecution does not intend to use the truth commission’s information for its own investigations, and the truth commission’s evidence will not be handed over to the Special Court. However, the Special Court arguably retains the power to subpoena the TRC, with potential implications for confidentiality of the TRC’s evidence in the future.

5.3 Amnesty laws pose particular problems as they specifically preclude the option of criminal prosecution (and civil suits). In East Timor, the draft amnesty law that was proposed by the President’s office in June 2002 created considerable confusion as it potentially contradicted the existing mandates of the Special Panels and the Commission for Reception, Truth and Reconciliation. The draft law has so far not been adopted, but it highlights the need for coherence, and for international organisations to coordinate efforts closely with national governments. The amnesty law that remains in place in Sierra

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196 Hayner (2001), Chapter 7, citing the examples of Uganda, Haiti and Chile.
197 Section 44 of UNTAET Regulation 2001/10 states: “At the discretion of the Commission, any person shall be permitted to provide information to the Commission on a confidential basis. The Commission shall not be compelled to release information, except on request of the Office of the General Prosecutor.”
198 Concord Times (Freetown), “Special Court will not use TRC’s Evidence”, 30th September 2002; Interview by all.africa.com, “Sierra Leone’s Special Court: Will it Hinder or Help?”, 21st November 2002.
199 The Special Court Agreement (Ratification) Act 2002, Section 21(2) states, “Notwithstanding any other law, every natural person, corporation, or other body created by or under Sierra Leone law shall comply with any direction specified in an order of the Special Court”.

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Leone leaves the question of measures to address cases that fall outside the Special Court’s jurisdiction unresolved.

5.4 Direct international intervention raises difficult questions in this context. Ideally, it should be designed to complement domestic initiatives, and take into account the local political context to avoid contradictory results. The challenge arises, however, when the responsible state is considered to be failing to take adequate steps to respond to past human rights violations. International intervention in this case is likely to contradict measures put in place at the domestic level - for example, an international court indicting individuals who have either received amnesty, or been subjected to a domestic judicial process that is regarded internationally as inadequate.

6. TRANSITIONAL JUSTICE AND POVERTY REDUCTION

6.1 This section examines in more detail the relationship between TJMs and poverty reduction. This linkage has not yet been explored in the existing literature on transitional justice. It is essential to reach an understanding of the impact that TJMs may have on achieving poverty reduction, as well as the full range of Millennium Development Goals (MDGs). For the purposes of this study, poverty is to be understood in the widest sense possible, to include not only economic and material disadvantage, but also a sense of vulnerability, disempowerment and victimisation.

6.2 The analysis below frames the linkages between TJMs and poverty reduction on two levels. The first level is the impact of TJMs on providing the conditions necessary for achieving poverty reduction, which are also key conditions for achieving the full range of MDGs. The second level is the more direct impact that TJMs may have on alleviating the material disadvantage, exclusion and vulnerability of individuals.

6.3 It is evident from the overview of TJMs given above that poverty reduction has not been among their stated aims to date. Nevertheless, an effective, post-conflict transitional justice strategy is vital to ensuring the political, social and economic conditions that are necessary to achieve poverty reduction, as well as the full range of MDGs. Most importantly, the absence of effective mechanisms to respond to past violations will impede prospects for achieving poverty reduction. Tensions between former parties to the conflict will remain unresolved, threatening political stability and economic growth. Large sections of the population will remain marginalized, vulnerable and traumatised, in many cases unable to participate in economic activity due to the injuries and losses they have suffered.

6.4 While TJMs have the potential to make a significant contribution to poverty reduction, the extent of their impact will rely on their successful implementation and their perceived legitimacy for the society within which they are located. The impact of TJMs on poverty reduction will also be limited as long as they continue to give minimal attention to violations of economic and social rights committed during conflict. The possibilities for incorporating these types of violations alongside violations of civil and political rights warrant greater emphasis, including exploring avenues for accountability mechanisms as well as the potential for TJMs to investigate and expose structural inequalities that impede the achievement of social and economic justice.

6.5 TJMs should also be implemented in harmony with other tasks related to post-conflict recovery, following an overall process of prioritisation of goals and available resources. Relating TJMs to poverty reduction brings a particular perspective on the choices made in determining strategies for transitional justice – for example, the economic consequences of sustaining extremely large prison populations should be considered; greater emphasis may be given to forms of justice that bring individuals back into economic activity, such as reparations (for victims) or community service (for perpetrators); and
mechanisms that provide the means for individuals to invest in their future, such as property restitution, may be prioritised.

6.6 An approach to transitional justice that incorporates the goal of poverty reduction calls for particular attention to be paid to the perspectives of victims. It requires an examination of the linkages between poverty and human rights violations, and of structural inequalities as a root cause of conflict. Greater emphasis should be placed on vulnerable groups that constitute the bulk of the world’s poor, including women, children, older people and the displaced, with TJMs designed to address their specific needs and provide genuinely accessible justice. It also suggests an approach to lower-level perpetrators that incorporates an understanding of their experiences as victims of coercion and exploitation.

6.7 The following sections outline the linkages between TJMs and poverty reduction on the two levels described above. Reference is given where appropriate to the key governance capabilities outlined by DFID as essential for states to achieve the MDGs, which also relate closely to the principles that form the basis of a rights-based approach to development.

**Providing the Conditions Necessary for Achieving Poverty Reduction**

6.8 It is by now well accepted that economic growth is essential to achieve poverty reduction, although by itself it is insufficient and must be accompanied by equity. Generating economic activity and growth depends upon achieving a sufficient level of political and social stability. It also depends on the establishment of and respect for the rule of law, which may be measured by levels of safety, security and access to justice. Insecurity and an absence of accessible justice diminish both investor confidence and economic performance. It also has a particularly detrimental effect on the poor, deterring them from investing in their future and enhancing their sense of vulnerability.

6.9 Given the detrimental effects of conflict on exacerbating levels of poverty, preventing further conflict is a vital pre-condition for achieving poverty reduction. Preventing further conflict entails addressing the root causes of conflict, combating an existing culture of impunity, and working towards achieving political and societal reconciliation at the national and/or community levels.

6.10 Achieving economic and social justice (otherwise termed “distributive justice”) is also a vital condition for alleviating poverty, for two principal reasons. Firstly, it corresponds directly to achieving the equity that must accompany economic growth in order to achieve poverty reduction. Secondly, it entails addressing the structural inequalities and corruption that are frequently among the root causes of both conflict and poverty.

6.11 Having outlined these principal conditions (which are by no means exhaustive) that are necessary for achieving poverty reduction, the following sections explore the impact of TJMs on achieving these conditions.

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201 See DFID, *Realising Human Rights for Poor People*, October 2000, outlining the three principles for a rights-based approach to development as “participation”, “inclusion”, and “fulfilling obligation”.
202 DFID, *Making Government Work for Poor People*, Para 2.2.1. See also Governance Capability 2: “to provide macroeconomic stability and to facilitate private sector investment and trade so as to promote the growth necessary to reduce poverty”.
203 See Governance Capability 5: “to ensure personal safety and security with access to justice for all”.
204 See Governance Capability 6: “to manage national security arrangements accountably and to resolve differences between communities before they develop into violent conflicts”.
205 See Governance Capability 4: “to guarantee the equitable and universal provision of effective basic services”; and Governance Capability 7: “to develop honest and accountable government that can combat corruption”.  

• Political and social stability

6.12 TJMs have a significant impact on the political and social stability that is achieved in the immediate post-conflict phase. Politically, it is vital to tackle the issue of past violations and related grievances of former parties to the conflict in order to achieve a lasting peaceful settlement. Socially, measures that address and remedy the devastating effects of past violations on the lives of ordinary people are essential to assist the recovery of large sections of the population, to provide an outlet for resentments and tensions, and to ensure the participation of society in the peace-building process.

6.13 At the same time, TJMs have the potential to threaten political and social stability at a time where this is most urgently required. Attempts to provide large-scale justice or public truth-telling processes can exacerbate tensions, particularly in the short term. The balance of power between former parties to the conflict will evidently be a determining factor, and the position of the post-conflict regime is often fragile in situations where a change in government has occurred. TJMs may also have a significant impact on patterns of displacement and return, which in turn affect levels of political and social stability.

6.14 In a number of cases, the desire to ensure political stability has raised the controversial issue of whether some form of amnesty may have a legitimate role to play. However, it should be noted that amnesty will not necessarily lead to increased stability, and the detrimental effects of blanket amnesties in the context of combating impunity are now well documented. Furthermore, measures agreed to at the political level that compromise or limit the rights of victims are unlikely to win approval within society at large, and social stability will not necessarily be achieved. Individual and community perceptions of what constitutes an effective form of accountability or justice will partly inform the choice of mechanisms appropriate to reducing tensions.

• Safety, security and access to justice

6.15 TJMs, where they take the form of accountability mechanisms, may contribute to improving levels of safety, security and access to justice in various ways - by providing victims with an effective remedy, sanctioning perpetrators of serious crimes, and demonstrating that perpetrators of such violations will be held accountable in the future. Accountability mechanisms reinforce respect for existing law enforcement mechanisms, and may thereby contribute to preventing further violations. Establishing a formal framework within which past violations and abuses will be addressed also reduces the impetus for individual vigilantism, thus further diminishing levels of insecurity.

6.16 A successful attempt to provide justice for past human rights violations should assist in restoring the trust of citizens in the state and its institutions. However, a strategy which fails to target those with greatest responsibility for past violations, which does not meet adequate due process standards, or which is perceived as one-sided, can have a detrimental effect and diminish the trust of citizens in the justice system. The limitations of what can be achieved by the formal judicial system should be assessed, and consideration should be given to providing for supplementary sanctions against perpetrators, and/or forms of satisfaction for victims (such as reparations). Utilising existing justice mechanisms at the local level may be particularly effective in providing a meaningful form of accessible justice in certain contexts.

6.17 TJMs are closely related to the process of institutional reform in the justice and security sectors. Firstly, attempts to provide justice following large-scale atrocities are likely to highlight the deficiencies within the justice sector as a whole, providing the impetus for sector-wide reforms. Where a criminal justice strategy is contemplated, primary emphasis should be on utilising and building the capacity of the domestic judicial system. “Mixed” judicial mechanisms have the potential to assist in capacity-building of the domestic judiciary through the transfer of skills and experience from international staff to nationals. The limitations of the formal judicial system in responding to large-scale violations can also lead to
greater recognition of existing non-state / traditional justice systems, and to supporting and reforming these as appropriate.

6.18 Secondly, reform of the security sector, including the military and police force, is vital to improving levels of safety. Truth commissions may contribute to the process of institutional reform within the security sector by investigating and exposing the past practices of these institutions. Appropriate sanctions are essential to ensure that military and security personnel are not permitted to engage further in criminal acts, such as organised crime, corruption and intimidation, as is often the case in the aftermath of conflict. TJMs offer the possibility of criminal prosecution of military / security officers responsible for past atrocities, and effective non-criminal sanctions such as lustration or vetting should limit their capacity to abuse their authority in the future.

- Conflict prevention

6.19 Addressing the root causes of conflict is vital to preventing renewed conflict in the future, and requires detailed analysis of the dynamics that contribute to conflict. Investigative bodies such as truth commissions may be of some assistance in highlighting the root causes of conflict and its manifestations, and have often been tasked with identifying these factors. Their recommendations may contribute to devising and implementing measures to address the causes of conflict, although the extent of their influence is frequently limited by the political context.

6.20 TJMs have so far failed to give sufficient attention to socio-economic structural inequalities that are among the root causes of conflict – this issue is examined further below. They also have not yet given sufficient emphasis to the role of external actors in contributing to conflict, and could further highlight the responsibilities of the international community to refrain from exacerbating conflicts through military, political or economic means. TJMs, particularly transnational justice mechanisms, offer the potential to hold foreign actors accountable for their contribution to past human rights violations in the future.

6.21 Conflict prevention requires combating a culture of impunity where this exists, both at the domestic level and internationally. TJMs, particularly those that provide accountability and impose punitive sanctions, have a significant role to play in this respect. Holding the perpetrators of past violations accountable in order to demonstrate that future violations will not be tolerated is a critical step towards combating impunity at the domestic level. In addition, the creation of the international criminal tribunals and the ICC, and the development of transnational justice mechanisms, are important steps on the road to combating impunity at the international level, although the continuation of mass atrocities emphasises the limitations of what such bodies can achieve.

6.22 Achieving a sustainable peace and preventing further conflict also entails working towards the somewhat elusive goal of “reconciliation”. Reaching agreement between former parties to the conflict on how to respond to past atrocities has been a core element of achieving national (political) reconciliation, and a variety of TJMs have contributed to this goal. The controversial issue of amnesty is again raised in this context, as the goal of national reconciliation is closely associated with achieving political stability and preventing further conflict.

6.23 Accountability mechanisms also have a significant impact on the goal of societal (rather than political) reconciliation at the level of “simple co-existence”, by reinforcing respect for human rights principles, and improving levels of safety, security and access to justice. Furthermore, various TJMs may contribute to the next level of reconciliation, “democratic reciprocity”, by raising the profile of human rights issues, promoting public dialogue and strengthening civil society. At the community level, TJMs have so far had a limited impact, although an initiative such as East Timor’s CRP has the potential to contribute to this goal by assisting the return and reintegration of perpetrators. TJMs may inspire or
strengthen civil society or community initiatives that can support communities and individuals in the reconciliation process.

- **Social and Economic Justice**

6.24 Achieving social and economic justice in the post-conflict phase requires examining the structural inequalities that existed prior to and during conflict, as well as addressing the social and economic consequences of human rights violations perpetrated during the conflict phase. TJMs have so far been limited in their emphasis on structural inequalities and discrimination as root causes of conflict. Violations of economic and social rights are rarely prioritised for attention, despite their serious consequences and linkages with fundamental rights such as the rights to life and liberty. Most importantly, reparations that address the social and economic consequences of human rights violations are rarely implemented.

6.25 The responsibility for addressing distributive inequalities lies firmly with governments, and TJMs will necessarily have a limited role in this regard. Nevertheless, investigative bodies, such as truth commissions, can play a role in highlighting the facts of economic and social discrimination and deprivation as both causes and characteristics of conflict. This was partly achieved in South Africa through the institutional hearings of the TRC. Such findings can generate the impetus for reforms that will address structural inequalities. One such example was the TRC’s recommendation of a wealth tax whereby those who benefited from apartheid policies could contribute towards poverty reduction.²⁰⁶

6.26 There is also the potential for TJMs to provide accountability for those who have been responsible for gross violations of economic and social rights in the future. Criminal or non-criminal sanctions may be applied against perpetrators responsible for targeted discrimination in the allocation of resources, or for deliberate deprivation of essential services to individuals or communities. Criminal charges may be included within the existing framework of international criminal law - for example, by categorising the deliberate deprivation of food or healthcare during conflict as acts that “intentionally caus[e] great suffering, or serious injury to body or to mental or physical health” which may constitute crimes against humanity when committed as part of a widespread, systematic attack against a civilian population.²⁰⁷ Including such charges within a criminal justice strategy would strengthen the basis for reparative measures to be made towards victims.

6.27 Achieving social and economic justice also requires combating corruption that leads to the pilfering and diversion of resources away from those with the greatest need. Some truth commissions have highlighted issues of corruption, economic mismanagement and discrimination within key public institutions,²⁰⁸ and further steps could be taken in the form of criminal prosecution or non-criminal sanctions against state officials responsible for such crimes.

**Measures that Alleviate Material Disadvantage, Exclusion and Vulnerability**

6.28 In addition to contributing to the general conditions that are necessary to achieve poverty reduction, TJMs also offer measures that directly affect the material and non-material well-being of individuals in the aftermath of conflict. In this context, it is recognised that where TJMs provide assistance to victims of human rights violations, they do not necessarily target the poor in all cases. Nevertheless human rights violations and poverty are inextricably linked, as those who suffer from poverty are more vulnerable to abuse, while poverty is also often a direct outcome of human rights violations. As a result, many victims of human rights violations during conflict are also among the poorest citizens.

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²⁰⁶ Boraine (2000).
²⁰⁷ Rome Statute of the ICC, Article 7.
²⁰⁸ For example, the truth commission in Chad.
6.29 **Repairing past violations and increasing participation in economic activity** are vital to achieving poverty reduction in the aftermath of conflict. Violations of fundamental rights have severe economic consequences for victims, even where the violation itself is of a civil or political nature (such as illegal detention, torture or forced displacement, all of which diminish productive capacity). Large-scale atrocities lead to the exclusion of large sections of the population from economic activity and exacerbate poverty levels. Large numbers of perpetrators may also be excluded from economic activity in the post-conflict phase for reasons such as displacement, social exclusion or punitive sanctions. Addressing these effects is essential for enhancing the economic prospects of previously vulnerable groups, and maximising economic growth.

6.30 Discrimination and exclusion cause and exacerbate poverty, and ensuring the **acknowledgement, inclusion and empowerment** of those that have previously been marginalised is an essential step to achieving poverty reduction.\(^{209}\) Official acknowledgment by the state constitutes a vital step towards recognition and inclusion of the needs and perspectives of vulnerable groups by governments in their policy-making processes. Reducing the sense of exclusion and vulnerability of victims is closely correlated with alleviating levels of poverty, by strengthening the psychological and emotional capacity of victims to move forward with their lives.

6.31 The following sections explore how TJMs can offer such measures that contribute directly to poverty reduction.

- **Repairing past violations and increasing participation in economic activity**

6.32 TJMs in the form of reparations offer the most direct assistance to victims of past human rights violations. Monetary compensation may improve the material situation of those who have lost the means to earn their own income, or whose income has significantly reduced as a consequence of violations. The primary difficulty in providing compensation for victims following mass atrocities lies in the fact that the numbers of victims outweigh the available resources. Individuals have successfully sought monetary compensation through judicial means in some cases – however, the prospect of large numbers of victims successfully using such avenues seems remote. Additional problems arise with the award of large sums to a select few individuals, which may create tensions or divisions when others are receiving minimal or no reparations. Furthermore, while the award of financial compensation fulfils a fundamental legal entitlement and may have a strong reparative effect, it does not necessarily offer a form of reparations that is conducive to achieving poverty reduction in a sustainable manner.

6.33 Restitution of property or employment can ensure a more secure economic future for those who lost such vital assets during conflict. Reparations that take this form warrant greater attention among TJMs, as they are closely linked to providing incentives for return and can thereby reverse the economic and social consequences of displacement. Furthermore, they can provide a sustainable means of alleviating the poverty of those who suffered such losses.

6.34 Rehabilitation can also improve the physical and psychological health and well-being of victims to the extent that they can re-engage in economic activity and cope better with the consequences of past violations. Rehabilitation and healing of victims entails addressing their wider socio-economic circumstances, indicating the need to address structural inequalities and ensure access to basic services.

6.35 Collective measures in the form of local-level development activities may appear attractive from the perspective of alleviating poverty, contributing to sustainable development, and reducing the financial burden upon governments. However, they provide a poor substitute from the point of view of individual

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209\ See Governance Capability 1: “to operate political systems which provide opportunities for all the people, including the poor and disadvantaged, to influence government policy and practise”.
acknowledgement and reparative effect. The diversity of victims’ needs poses major challenges. In the context of poverty reduction, it would seem logical to prioritise reparative measures that will assist victims in resuming economic activity, tailored where possible to their individual circumstances.

6.36 Certain TJMs can also enhance the possibility for re integrating perpetrators into the community and renewing their participation in economic activity. The effect of accountability mechanisms on patterns of displacement, return and reintegration of perpetrators warrants further examination, as the prospect of punitive sanctions may cause perpetrators to flee, or deter those already displaced from returning. At the same time, TJMs that are designed to facilitate the reintegration of perpetrators may encourage returns and enhance prospects for reconciliation. Community service (which may be attached to criminal prosecutions or quasi-traditional justice mechanisms) provides an alternative to large-scale custodial sentencing, which excludes a significant proportion of the population from economic activity.

- Acknowledgement, inclusion and empowerment

6.37 In addition to repairing the material consequences of past violations, it is essential to address the non-material consequences, including the sense of victimisation, vulnerability and disempowerment of victims. State-sponsored TJMs offer an official acknowledgement of past human rights violations, which is widely considered to be an essential part of the healing process. TJMs that provide satisfaction to victims may improve levels of mental health among victims, and processes that recognise the individual victim rather than collective suffering are likely to have the strongest impact on the healing process. However, the linkage between TJMs and the psychological health of victims requires close examination, and where measures involve submission of individual testimony or confrontation with perpetrators, they may entail a risk of further traumatisation.

6.38 Mechanisms such as official truth commissions are particularly conducive to providing victims with an opportunity to voice their experiences, and a chance for those that were previously marginalised or abused to participate in post-conflict decision-making processes. The information they provide can form the basis of recommendations for tackling discrimination and abuse through legal, policy and institutional reforms. While relying on an active civil society for their successful implementation, truth commissions have also inspired the creation of and strengthened civil society initiatives, including those that represent the interests of the most vulnerable groups in society. However, TJMs are limited in that they are unlikely to offer all victims the opportunity to voice their experiences, or to participate in processes of justice and accountability. As such, they may enhance the sense of exclusion of others.

6.39 TJMs that provide satisfaction to victims offer the prospect of empowering those that were previously exploited and marginalised within society. Participatory and community-based forms of justice, such as those offered by quasi-traditional justice mechanisms, can give victims a sense of empowerment by facilitating their involvement in the process of giving evidence and determining appropriate penalties for perpetrators of past abuses. They can also strengthen community support systems, although there is the potential risk of increased community tensions. Formal criminal prosecution can provide empowerment in the form of satisfaction to victims in cases that are successfully completed, but these often operate on a more limited scale, and formal courts do not necessarily provide a platform that allows the victim to recount their experience in an empowering manner.

7. LESSONS LEARNED

7.1 A variety of related lessons can be drawn from past examples of TJMs. This section aims to draw together some of the lessons to consider when designing or supporting such mechanisms in the future. Some may appear obvious, but are arguably worth repeating given the scope for improvement of transitional justice strategies at this stage.
7.2 For TJMs to provide an effective response to conflict and contribute to the goal of poverty reduction, they must:

- form part of a coherent overall strategy;
- be effective in meeting clear and realistic objectives;
- have relevance and legitimacy for those they aim to assist.

Lesson 1: Political Context

7.3 It has been commented that “in questions of post-war justice, there is only the political.”\(^{210}\) Policy decisions around transitional justice are taken in a highly charged political atmosphere, and it is crucial to be aware of the local and international political context. Assessing local political conditions may inform decisions as to whether certain mechanisms are feasible or appropriate in the circumstances. This includes assessing whether sufficient political will exists, and what the effects might be on exacerbating or renewing conflict. Existing mechanisms that are already in use at the local level to respond to past violations (such as traditional justice processes) should also be taken into account.

7.4 Where international involvement is contemplated, it is important to examine the goals and motivations of governments, and to distinguish between domestic efforts made in good faith that may warrant international assistance in the form of resources or other support, and those that are characterised by a lack of political will or political manoeuvring aimed at ensuring impunity. A common criticism of “internationals” working in post-conflict developing countries is that they do not pay sufficient attention to the political dynamics on the ground, leading to mis-directed interventions.

Lesson 2: Consultations and Dialogue

7.5 Consultations are a crucial component of the design of effective TJMs. They are necessary to ensure that the mechanisms meet the needs of the particular society, and that they have legitimacy and a meaningful impact at the local level. Consultations that are inclusive of previously marginalised groups such as victims of human rights violations, women, or the poor, can empower these individuals. Sustained dialogue and outreach throughout the implementation period is equally vital to ensure that the public understands their rights and the remedies available to them. Past examples have shown that where the public do not understand the reasons behind decisions (for example, cases selected for prosecution, or priorities chosen for a truth commission’s inquiries), this leads to a diminishing trust and participation in the process.

7.6 Where international or “mixed” mechanisms are contemplated, international actors must consult and establish close co-operation with the government, as its support will be vital throughout. At the same time, it should be considered that political elites may influence consultation processes according to their particular agendas. Involving civil society has also been key to the success of many TJMs. However, local NGOs should not automatically be assumed to represent the interests of victims or other marginalised groups. Consultations and sustained dialogue must aim to reach those who are normally excluded from decision-making processes.

Lesson 3: Nature and Scale of Violations

7.7 The nature of the violations that were committed during conflict may partly determine which mechanisms will best contribute to post-conflict recovery. For example, truth-seeking inquiries have frequently been used to address forced disappearances, while property restitution may be required in a

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situation characterised by displacement, or illegal expropriation / theft of land. It is also important to move beyond an emphasis on serious violations of civil and political rights, and consider mechanisms to address violations of economic and social rights, where this is appropriate. The consultation process should be used to ensure that those types of violations that are often under-reported (such as sexual violence) are fully recognised, and testimony by such victims facilitated in an appropriate manner.

7.8 The scale of violations may have a bearing on the feasibility of certain mechanisms, such as limitations on conducting criminal prosecutions. Consideration should be given to supplementary or alternative justice mechanisms to handle cases that are unlikely to be addressed by a formal judicial process.

Lesson 4: Setting Objectives

7.9 An effective transitional justice strategy requires setting objectives that are clearly defined, mutually coherent, and realistic. Evidence shows that giving multiple, wide-ranging objectives to a single mechanism can place a heavy burden on that institution, resulting in failed expectations and disillusionment with the process. Where applicable, objectives may be set in line with an overall goal such as poverty reduction, and the limitations of individual mechanisms in achieving such objectives should be taken into account.

7.10 Simplistic assumptions should be avoided – for example, that a truth-seeking process will necessarily achieve reconciliation. The response of various groups within society to TJMs cannot easily be predicted, and the implications of each stage of a transitional justice strategy should be considered.

Lesson 5: Vulnerable Groups

7.11 The existing, mainstream literature on transitional justice does not address the impact of TJMs on vulnerable groups such as women, children, older people and the displaced. Renewed focus on such groups is required to ensure that TJMs are designed to incorporate their particular needs. In particular, it is vital that the specific violations experienced by such groups during conflict are recognised and addressed by officially-sponsored TJMs. Vulnerable groups such as women and children also have specific needs as victims, witnesses and perpetrators. Their perspectives should be incorporated into the design of TJMs, and their involvement in implementation should be ensured where appropriate.

7.12 The potential impact of TJMs on patterns of displacement and return should be taken into account, as they may constitute a deterrent or incentive for return among refugees and displaced persons. As long as these groups remain displaced, they should also be provided with relevant information and access to TJMs that have been established in their country / region of origin.

Lesson 6: Combining mechanisms

7.13 Mechanisms should be designed to fit the specific objectives of a coherent transitional justice strategy from the outset, and not combined in an “ad hoc” manner that can lead to significant gaps, overlap or contradictions. Evidence shows that neglecting reparative measures for victims alongside accountability mechanisms will reduce the effectiveness of the overall transitional justice strategy. Different mechanisms may appropriately be considered for dealing with serious or less serious violations, and high- or low-level perpetrators.

7.14 Existing justice mechanisms / processes on the ground, which may already be addressing past human rights violations in some form, should be recognised and taken into account. The legal relationships between combined TJMs also require attention at an early stage. Compatibility and cooperation between officially-sponsored TJMs will be essential to achieve an effective transitional justice
strategy, and tensions between them may diminish the perceived legitimacy of the strategy, and of the state and/or international community.

Lesson 7: International Involvement

7.15 International involvement should aim to develop national capacity to properly address past human rights violations, where this is both feasible and appropriate. It may provide the conditions and tools for a national government to implement an appropriate transitional justice strategy, thereby allowing the state to retain ownership over the process.

7.16 Direct international intervention may be justified in situations where the capacity or political will does not exist at the national level. It is important to distinguish between the absence of resources and political will, and to ensure that direct international interventions do not jeopardise domestic efforts that are conducted in good faith. Experience shows that direct interventions must place more emphasis on achieving capacity-building at the local level, and that a strategy for sustainability of the process following international withdrawal is essential.

Lesson 8: Legal Principles

7.17 A transitional justice strategy must aim to conform to the applicable international standards. International human rights law places an obligation upon states to provide an effective remedy for victims of human rights violations. In addition, existing and emerging duties upon states to prosecute certain categories of international crimes are particularly relevant. Clear guidance on the status of international law is necessary to ensure a common approach by international organisations and donors, for example in countering self-serving, general amnesties. At the same time, international law continues to evolve, and will be influenced by the future practise of states and international organisations. In this context, supplementary mechanisms to criminal prosecutions should be considered in relation to the legitimacy of their purpose or goals.

7.18 Problems encountered in implementing various mechanisms in the past show the importance of respecting due process standards. However, some consideration may legitimately be given to the constraints of the post-conflict context in a developing country. Criminal prosecution processes demand particularly high standards to be applied, given the severity of punishments that are meted out. Other accountability measures (such as naming names), non-criminal sanctions (such as removing or barring officials from public employment) and alternative justice mechanisms (such as quasi-traditional justice mechanisms) also require particular attention in terms of protecting the rights of those accused.

Lesson 9: Resources and Time

7.19 Many of the problems encountered by TJMs have stemmed from a lack of sufficient resources and time commitment. In particular, a number of truth commissions and judicial mechanisms have suffered from inadequate and insecure funding, leading to inefficiencies and time wasting. Consideration may usefully be given to delaying implementation of certain mechanisms until sufficient resources are in place. The time period given for implementation has also led to severe restrictions on the scope of investigations and other activities. A long-term view is often required when committing to TJMs.

7.20 Measures aimed at cost-cutting should be clearly distinguished from the goal of improving cost-efficiency. Cost issues have a significant influence on the form that TJMs take, including those with direct international involvement. However, cost-cutting as an objective in itself can produce poor results. At the same time, measuring the output of TJMs is particularly difficult as their value is not limited to

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short-term, tangible results, but also includes their longer-term impact on a variety of issues at the domestic and international levels.

**Lesson 10: Oversight**

7.21 Evidence shows that some of the most serious problems in implementing TJMs have arisen from a lack of external oversight. At the domestic level, providing support for local civil society to hold governments accountable for the mechanisms that they choose to adopt is often important, and this support can be an effective form of international involvement. International civil society and donors that support TJMs may also contribute through monitoring and evaluation of state-sponsored initiatives.

7.22 A lack of oversight has also caused serious problems with “mixed” and international criminal justice mechanisms. International oversight is essential to ensure accountability of those responsible for leadership and management, that resources are not wasted, and that minimum targets are met. Where international funding has been provided, donors can play a role in strengthening accountability, and international civil society has a critical “watchdog” role that should not be neglected.

**Lesson 11: Enforcement mechanisms**

7.23 Enforcement of judgements, decisions and recommendations made by TJMs is vital to their legitimacy and success. Experience shows the value of putting the necessary measures, including resources and political commitment, in place at the outset. Where a criminal justice strategy is adopted, the international community has a prominent role to play in securing custody of high-level perpetrators, and extraditing suspects harboured abroad to the appropriate jurisdiction. It may also play a role in securing the assets of perpetrators, either to enforce the award of civil damages, or to contribute to a reparations programme.

7.24 Non-mandatory recommendations of truth commissions have proven particularly weak, and UN support has been critical in achieving implementation of proposed reforms in the past. Where enforcement is achieved on a selective, “ad hoc” basis, this may contribute to a culture of impunity and a reduction of faith in the overall process of achieving accountability and justice.
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United States Institute for Peace: [www.usip.org](http://www.usip.org)

International Centre for Transitional Justice: [www.ictj.org](http://www.ictj.org)

Amnesty International: [www.amnesty.org](http://www.amnesty.org)

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