

Chapter 9

Transitional Justice in Post-Conflict Societies – Approaches to Reconciliation

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1 Transitional Justice and Sustainable Peace

The issue of transitional justice in post-conflict societies has taken on increasing importance in the last few years. In many cases where there has been external intervention, there has also been some effort towards establishing different forms of transitional justice. The international community will, in peace operations and during post-conflict reconstruction, begin to assist and supply transitional justice, in a space where some forms of justice mechanisms already exist, but also where there is a void of such mechanisms. These transitional justice mechanisms are essential to stability and sustainable peace.

Transitional justice mechanisms are created to deal with crimes that were committed during a conflict period, at a stage where that society is at the cusp of transition from a society of conflict to one of democracy and peace. There are wide-ranging options available, to the transitional governments and the international community assisting them, to tackle these crimes – not only a dichotomy of punish or forgive, and local ownership of these processes is paramount.

Transitional justice mechanisms may take a number of forms. Most prominently these include the international criminal court, international tribunals, special courts, truth commissions, local courts and traditional methods of justice. This paper will address the latter three; truth commissions, local courts and traditional methods of justice. The international criminal court, international tribunals and special courts for

past crimes will not be addressed, because these tend to be further removed from local ownership and this paper will focus on what can be termed local forms of transitional justice.

What this paper seeks to do is to examine the forms of transitional justice, where local ownership can be more easily established. It will analyse different methods of transitional justice in post-conflict societies, drawing on a number of cases, building on the assumption that some form of transitional justice is essential for reconciliation, future stability and peace, and moreover that it can serve to increase the sense of local ownership of the whole process of post-conflict reconstruction.

1.2 Reconciliation

It is impossible to discuss transitional justice without reference to certain key concepts, which are all interrelated – one of which is reconciliation.¹ Reconciliation is the ultimate objective in all post-conflict societies and post-conflict reconstruction processes, however, is often very vaguely defined, if at all. It has been referred to as acknowledgement and repentance from the perpetrators and forgiveness from the victims,² as non-lethal co-existence,³ as democratic decision-making and

¹ The discourse surrounding reconciliation is vast and cannot be detailed in this paper. This only serves to briefly outline the concept and establish how it will be used here. Please also note that there is an on-going debate regarding the terms victim or survivor. To simplify for this paper, the term victim will be used throughout, however, it is important to emphasise that not all are victims of crimes against humanity, but survivors. It is important that this distinction be acknowledged.

The concept of healing is also frequently applied in the discourse on transitional justice. However, in this paper it will only be referred to in the context of Mozambique. Healing is a very individual complex psychological objective after conflict and will not be addressed.

² Monteville in K.Avruch & B.Vejarano, "Truth and Reconciliation Commissions: A Review Essay and Annotated Bibliography", *The Online Journal of Peace and Conflict Resolution*, Issue 4.2, Spring 2002, p. 4.

³ David Crocker in J.D.Tepperman, "Truth and Consequences", *Foreign Affairs*, March/April 2002, p. 7.

reintegration,⁴ and as encompassing four concepts namely truth, mercy, peace and justice,⁵ concepts which in themselves are difficult to define.

In this paper, a distinction will be made between national reconciliation and individual reconciliation. National reconciliation is achieved when societal and political processes function and develop without reverting to previous patterns or the framework of the conflict. Individual reconciliation is the ability of each human being to conduct their lives in a *similar* manner as prior to the conflict without fear or hate. This distinction is crucial because it is possible to achieve national reconciliation without achieving individual reconciliation. National reconciliation may come at the expense of reconciliation at the individual level, although political processes may proceed and progress individuals may find greater difficulties in dealing with their experienced traumas. However, reconciliation at the individual level is also independent of reconciliation at the collective level.⁶ Moreover, some transitional justice mechanisms can promote one type of reconciliation more than others.

Although there is currently a growing consensus of the nexus between peace and justice, for example the UN Secretary General has emphasised the importance of integrating justice into the peace process,⁷ reconciliation is still frequently described as incompatible with justice. The justice versus reconciliation, justice versus peace, justice versus truth debates all emphasise that justice is retributive and reconciliation is restorative and that there is a trade-off involved.⁸ Hence inferring that justice, in the meaning of criminal proceedings of one type or another against individuals to attain individual guilt followed by punishment,

⁴ Denis Thompson in *ibid*, p. 7.

⁵ John Lederach in A. Odendaal, "For All Its Flaws. The TRC as a Peacebuilding Tool", *CCR*, vol. 6, no. 3/4, December 1997, p. 1

⁶ See also Winslow in Avruch & Vejarano, "Truth".

⁷ Draft report Wilton Park Conference, "Transitional Justice and Rule of Law in Post-Conflict Societies: The Role of International Actors", 24-26 January 2005, p. 2.

⁸ See e.g. L. Huyse, "Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past", *Law and Social Inquiry*, vol. 20, no. 1 Winter 1995; C. L. Sriram, "Truth Commissions and the Quest for Justice: Stability and Accountability after Internal Strife" in A. Adebajo & C. L. Sriram, *Managing Armed Conflicts in the 21st Century*, Taylor and Francis, 2001, pp. 92-93.

will not lead to reconciliation, stability or peace. However, as will be discussed this paper does not support this notion, but underlines that certain mechanisms of retributive justice, as well as restorative justice, can support reconciliation in particular contexts. It is the complementary characteristics of transitional justice mechanisms in conjunction with local ownership that will be emphasised, and how this can lead to sustainable long-term peace.

2 Truth Commissions

In the last two decades, establishing a truth commission in a post-conflict society has become increasingly popular. The demand for truth and truth-telling after conflict has grown and the international community has sought to strengthen the emphasis on truth commissions. Hence, since 1974, at least 25 such commissions have been established around the world, and often the first thing that newly elected politicians in a transitional democracy cry out for is the establishment of a commission. Truth commissions, as are currently perceived, stem from the numerous Latin American commissions held in the 1980s,⁹ however, they have changed somewhat, particularly in the context of a post-conflict society, which has experienced international intervention.

A wealth of literature has grown as a result of this expansion, which includes detailed analysis of a number of cases.¹⁰ However, it is

⁹ For details of the Latin American commissions see e.g. USIP, *Truth Commissions Digital Collection*, <http://www.usip.org/library/truth.html> and P. Hayner, *Unspeakable Truths. Facing the Challenges of Truth Commissions*, Routledge, London, 2002.

¹⁰ In addition to the other references for this section see also, e.g. R. Rotberg, D. Thompson, (Eds.), *Truth v. Justice: The Morality of Truth Commissions*, Princeton University Press, 2000. D. Shea, *The South African Truth Commission: The Politics of Reconciliation*, United States Institute of Peace Press, Washington DC, 2000. P. Hayner, "Fifteen Truth Commissions - 1974 to 1994: A Comparative Study", *Human Rights Quarterly*, Vol. 16, 1994. N. Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Volumes 1-3, United States Institute of Peace Press, 1995. M. Popkin & N. Bhuta, "Latin American Amnesties in Comparative Perspective: Can the Past Be Buried", *Ethics & International Affairs*, Vol. 13, 1999. P. Ball & A. R. Chapman, *The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala*, The Urban Morgan Institute, John Hopkins University Press, 2001. J. L. Gibson, "Truth, Justice, and Reconciliation: Judging the Fairness of Amnesty in South Africa.", *American Journal of*

significant that a large proportion of this literature focuses on a few key cases only, in particular the South African Truth and Reconciliation Commission (TRC) and the various Latin American commissions, and advice on how to design and operate a truth commission.¹¹ There is an underlying assumption that truth commissions are a path to reconciliation and peace for all post-conflict societies, and that they are to be preferred to other transitional justice mechanisms. However, as with all transitional justice mechanisms, a truth commission's aim, mandate and what it can achieve is context dependent.

2.1 Truth and Reconciliation in Truth Commissions

Its very name establishes that what a truth commission seeks is the 'truth'; however, the truth is a very complex concept that must be treated with caution. Truth, in the form of narratives, is never simply uncovered, but is partially constructed and affected by numerous processes and actors. At best it is subjective. Not all truth commissions acknowledge the complexities of 'truth', which is exacerbated even more in the aftermath of conflict. The TRC was one commission which recognised this problem and, consequently, outlined four different types of truths that could exist, namely, factual, personal, social and healing.¹² Although this acknowledged the complexity of 'truth', it may not have made it less problematic when applying it in the TRC's process. Unfortunately, numerous commissions have not even acknowledged the problematic nature of 'truth', but assumed that one truth could be established, and must be established so that reconciliation could ensue. Defining the truth as merely factual may be one method of circumventing the complexities of truth. However, 'shared facts do not necessarily conduce to shared truths.'¹³ This makes it vital that the problematic nature of truth is acknowledged and addressed when constructing a truth commission.

Political Science, Vol. 46 Issue 3, 2002. D. Gairdner, *Truth in Transition: the Role of Truth Commissions in Political Transition in Chile and El Salvador*, Chr. Michelsen Institute Development Studies and Human Rights, 1999.

¹¹ For creation and design of truth commissions see, e.g. <http://www.truthcommission.org>, which details setting up such commissions.

¹² Tepperman, "Truth", p. 6.

¹³ Avruch & Vejarano, "Truth", p. 3.

Reconciliation, as truth, is central to truth commissions. Numerous truth commissions have the very concept in their name and nowhere perhaps was it as strongly emphasised as in South Africa where forgiveness and *ubuntu* was underlying the whole process.¹⁴ Here the distinction between national and individual reconciliation becomes important. Truth commissions, because they are bodies where individual testimonies are heard can indicate to the individual victims that individual reconciliation is the objective. However, because a truth commission tracks the overall general pattern of human rights abuse and investigates the social and political factors leading to abuse, the focus and outcome is more that of national reconciliation. In East Timor, the political elite, headed by Xanana Gusmao, underlined the importance of reconciliation, and discouraged trials, but supported the work of the Commission of Reception, Truth and Reconciliation.¹⁵ There was an underlying assumption that trials would lead to instability rather than justice and that the truth commission was the best mechanism for reconciliation. However, on an individual level people felt aggrieved and wanted not only local trials, but also an international tribunal.¹⁶ This underscores the point made above that national reconciliation may come at the expense of individual reconciliation.

Truth commissions are established to investigate human rights abuses, perpetrated in a specific time period, usually during conflict and civil unrest. The human rights abuses investigated can vary in range from assault to mass killings. They investigate abuses usually perpetrated by military, government or other state institutions. They are non-judicial bodies, which do not have the authority of the courts and cannot punish – they give recommendations, however, whether or not these are implemented is entirely dependent upon political will. Truth commissions allow victims and their relatives to disclose human rights abuses; some commissions also let the perpetrators give their account of

¹⁴ *Ubuntu* is a concept which encompasses and emphasises healing, not vengeance, restorative justice and the nurturing of social relationships.

¹⁵ “Xanana Gusmao’s Views on Justice”, http://www.easttimor-reconciliation.org/Gusmao_Justice_E.htm, V.Hearman, “Leaders Reject International Tribunal”, *Green Left Weekly*, 25 June 2003.

¹⁶ Interviews by author of representatives of East Timorese civil society, Winter and Spring 2001.

events. They are established and given authority by the local governments or international organisations, in some cases by both. They only exist for a specified time period, but can have a multitude of different procedures and organisational arrangements. The focus is not so much on the individual, but on establishing the pattern of human rights abuse committed within a timeframe.¹⁷

A truth commission cannot determine culpability of the individual, and it cannot punish or sanction perpetrators of human rights abuses. It can give recommendations for broad reforms of state institutions based on its findings and suggest reparations for the victims, which a court cannot. It is a vehicle for truth-telling, and for establishing and voicing the victims' stories, which may otherwise remain untold.

The aims and objectives of truth commissions are broadly to determine and create a historical record of human rights abuses, whilst giving the victims an opportunity to be heard and instituting by its process an official acknowledgement that these acts took place and must not be forgotten, and ultimately leading to or assisting in reconciliation of the post-conflict society.

2.2 *The Significance and Limitations of Truth Commissions*

The main strength of a truth commission is that it gives a voice to the voiceless, to the people who for years have been persecuted by abusers, but have never been recognised for the trauma and pain they suffered. The acknowledgement that this took place and what effect it has had on the people testifying is crucial. In addition, truth commissions have the potential of having complete local ownership of the process of transitional justice and, in fact, this is crucial to their success.¹⁸ However, the limitations of a truth commission must be recognised not

¹⁷ For definitions see also e.g. USIP, *Truth Commissions Digital Collection, Background*, <http://www.usip.org/library/truth.html> and P. Hayner, "Commissioning the Truth: Further Research Questions", *Third World Quarterly*, vol. 17, no. 1, 1996, pp. 20-21.

¹⁸ M. Freeman & P. Hayner, "Truth-Telling" in D. Bloomfield, T. Barnes, L. Huyse (eds.), *Reconciliation after Violent Conflict. A Handbook*, IDEA, Stockholm, 2003, p. 129.

only by its founders but also by the victims. The key limitations and variations lie in the different mandates that these commissions have and the political will surrounding the commissions and transitional justice in general.

In some cases, truth commissions have had broad mandates, such as in South Africa and Sierra Leone. In South Africa, the mandate and resources of the TRC were extensive and, at the time, it was the largest truth commission ever undertaken. When the report was submitted 21,297 victims had given statements, over 8,000 perpetrators had applied for amnesty and the report was contained in five volumes covering abuses over 34 years.¹⁹ It had the power to grant amnesties from prosecution to perpetrators in return for giving testimonies to the commission. The question of amnesties is a controversial issue, particularly because the perpetrators may tell their stories without remorse and with impunity. It also violates the rights of victims to redress and is *'inconsistent with a states' obligation under international law to punish perpetrators of serious human rights crimes.'*²⁰ The result of a truth commission structure, which incorporates amnesties, is that the perpetrator immediately walks free after testifying, whereas the victims are left waiting for reparations which may never come.²¹ This can delay or hinder individual reconciliation. It can reinforce impunity by establishing the idea that actions will not have consequences. The UN Human Rights Committee has stated that *'blanket amnesty and pardons are inconsistent with the ICCPR because they create a climate of impunity and deny victims their right to a remedy.'*²² This, in turn, can increase fear, instability and insecurity.

¹⁹ For further reading and facts on the TRC see: USIP, *Truth Commissions Digital Collection*, <http://www.usip.org/library/truth.html> and Hayner, *Unspeakable Truths*, pp. 40-45, and also <http://www.truthcommission.org>

²⁰ Freeman & Hayner in Bloomfield, Barnes, Huyse (eds.), *Reconciliation*, p. 137.

²¹ See also T. Ash in M.Minow, *Between Vengeance and Forgiveness. Facing History after Genocide and Mass Violence*, Beacon Press, Boston, 1998, p. 61.

²² R. Mosier, "Impunity, Truth Commissions: Peddling Impunity?", *Human Rights Features, Voice of the Asia Pacific Human Rights Network*, Special Weekly Edition for the Duration of the 59th Session of the Commission on Human Rights, Vol. 6, no. 5, 14-20 April 2003, p. 2.

Amnesties can serve the larger national reconciliation process; however, on an individual level people may still feel wronged. This has been indicated in a poll in South Africa, which reported after the end of the commissions work that two-thirds felt the TRC had fuelled their anger and contributed to a deterioration in race-relations. Only 17 percent predicted that forgiveness would result from the TRC.²³ Yet importantly, there were no revenge killings reported in the period of the TRC.²⁴

If amnesties are not incorporated in the mandate, the findings of the commission can potentially lead to criminal prosecutions after the end of its mandate. However, there are numerous problems with this – primarily an absence of political will or ability to conduct such trials and the question of due process, a truth commission does not have to follow the strict evidence procedures as a court of law hence the evidence gathered might be inadmissible. Irrespectively, commissions which have not included amnesty provisions have rarely led to trials, in El Salvador five days after the report of the commission was published full amnesties were given to the perpetrators.²⁵

A major shortcoming of truth commissions is that their recommendations, for example, reparations, can be ignored and often are. It is fundamental that victims have a forum in which to tell their story, but if the recommendations put forward by the commission are ignored then disillusionment, not reconciliation, can ensue. In Haiti, all the recommendations of the National Truth and Justice Commission were ignored. It was deemed sufficient that such a process had taken place. This led to profound disillusionment among the population who had expected far more from the commission and follow-up.²⁶ There will always be a discrepancy between expectations and outcomes in many of the processes in post-conflict societies. Limiting those expectations to what can ultimately and realistically be achieved from a truth commission process is one way to circumscribe disillusionment.

²³ Tepperman, "Truth", p. 4.

²⁴ Ibid., p. 9.

²⁵ Hayner, "Truth", p. 3.

²⁶ Interviews by the author with representatives from civil society in Haiti, 1998.

The potential for disillusionment can be exacerbated by a lack of media attention. For a truth commission to ensure a modicum of success there must be a high level of national media focus. The TRC had extreme media attention national, as well as international, where testimonies were often shown on television. However, this level of attention has been rare. More often, attention is limited. In Haiti, only 75 copies of the commission's final report were published. It was not until much later that 1,500 copies were published. In addition, the reports in the media were nearly non-existent.²⁷ Media and government attention is dependent upon the circumstances surrounding the conflict, and international pressure and interest. However, it is a crucial ingredient to ensure the success of truth commissions.

Limited government and media attention can be a deliberate strategy in the post-conflict setting. Due to the truth commissions' non-ability to punish, they are much less politically sensitive than trials and tribunals. Their limited power serve no direct threat to the out-going authoritarian regime and because they serve a limited threat truth commissions can often be used by new governments as the only process of dealing with the past. For some governments, it is not so much about wanting to set the historical record straight, but more of an acknowledgement that this is the least disruptive process and its findings and recommendations can be ignored. Furthermore, the government cannot then be accused of inaction because they have done their duty.²⁸ It can become a method in which to avoid the issues of transitional justice.

In truth commissions, as in all transitional justice mechanisms, there is also the issue of re-victimisation and reliving the trauma of horrific human rights abuses, whether the testimonies are conducted in public or given in confidential statements. Although there is an underlying assumption that telling is healing in the context of truth commissions, the extent of the trauma is often profound and reliving it through truth-

²⁷ *Si M Pa Rele* (If I Don't Cry Out) Preface, Mot du Ministre la Justice, March 1997. Moreover, it was until the end of 1998 only published in French - a language inaccessible to the vast majority of the population.

²⁸ See also Hayner, "Truth Commissions: Exhuming the Past", *North American Congress on Latin America*, Sep/Oct 1998, p. 2.

telling can serve to slow down the healing process,²⁹ particularly in a setting where there is little if any resources available for individual support to victims of violence. This is a problem in any type of transitional justice mechanism. However, it is important to highlight it in this context because truth commissions are emphasised as being restorative in nature. Still, they also can re-traumatise. Healing is perhaps a too vast goal for truth commissions or any transitional justice mechanism to seek. Yet, telling and acknowledgement by a truth commission of what was experienced by the victim is undoubtedly, for many, part of a process that leads to reconciliation.

There is also an assumption that by documenting past abuses it will deter abuses in the future. By recording abuses these can be acknowledged thereby ensuring that what happened will not be forgotten, but documented for all to see. The deterrence effect of such a process can, nevertheless, be questioned. There is no inherent deterrent within the framework of a truth commission in a post-conflict society. Moreover, accountability is a pre-requisite for a transition to democracy, accepting the lack of accountability that a truth commission *on its own* offers may in certain circumstances undermine the transition to a system of accountability in the rule of law.

2.3 *The Demand for Truth Commissions*

Truth commissions are a positive contribution to the overall reconciliation process of a post-conflict society. Knowing and establishing the truth is a right in such societies, however, the question is whether or not it is a duty. Should all post-conflict societies have truth commissions, is it the best solution for all? Not all states have found this to be so – both Mozambique and Cambodia declined, for different reasons, from establishing truth commissions because they did not want

²⁹ This has found to be particularly so in relation to women and rape, see forthcoming, Josi Salem-Pickartz, “Psychosocial Interventions in Post-War Situations” in M. Vlachova & L. Biason (eds.), *Women in an Insecure World – Facts and Analysis on Violence against Women*, DCAF, 2005, pp. 279-280.

to relive the historical facts, fearing in part what the consequences of such a process might be.³⁰

Truth-telling is often seen as a first step in the process of achieving justice and reconciliation on an individual level. Yet, truth commissions without any other process of justice, as evidenced by numerous cases, will not be sufficient for many of the victims.³¹ Moreover, although they are, in effect, established for the victims of abuse it can be questioned as to whether or not they have helped them.³² For example, the Commission of Reception, Truth and Reconciliation in East Timor facilitated reconciliation between East Timorese very well. However, the key opponents in the conflict were Indonesia and East Timor. It is doubtful that the commission's work will be able to influence reconciliation between these two key parties to any significant extent. Conducting reconciliation between East Timorese is made easier by the fact that Indonesia is seen as the key perpetrator of human rights abuse and that in many instances the militias were trained by them and that they have less responsibility than Indonesians.³³

There is a right for all to know the past and have human rights abuses documented; however, it should not be an obligation or duty to establish a truth commission in a post-conflict society.³⁴ The decision of what types of transitional justice mechanisms should be applied must be related to the specific context. A truth commission may not necessarily be the answer in all cases. Truth commissions undoubtedly contribute, and can contribute significantly to reconciliation and stability, but they are not the only mechanism and if they are conducted with the absence of other justice mechanisms they are, on their own, unlikely to lead to national *and* individual reconciliation. Reconciliation is too large a task

³⁰ For details on each case see Hayner, *Unspeakable*, Mozambique, pp. 186-195 and Cambodia, pp. 195-200.

³¹ See also Hayner, "Truth", p. 3.

³² See also R. Bacic, "Truth Commissions: One option when Dealing with the Recent Past in Countries that Have Endured War or Dictatorships", *Committee for Conflict Transformation Support*, Newsletter 18, <http://www.c-r.org/ccts/ccts18/trucomm.htm>

³³ Interviews with representatives of civil society in East Timor, 2001.

³⁴ See also P. Hayner, "International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal", *Law and Contemporary Problems*, vol. 59, no. 173, Autumn 1996, pp. 177-178.

to be obtained by only a truth commission. It is not an issue either, as some argue, that truth commissions 'could well be a better option than prosecutions.'³⁵ It is a combination of different mechanisms, which together may lead to reconciliation. What combination is better for each particular post-conflict society is dependent upon several factors. Three of these factors are: First, the context, history and background of the conflict, which includes peace agreements and political will and ability to co-operate. Second, the international community, its support for transitional justice and how it influences the processes in the country. Third, the culture of the country, how this affects rule of law norms and the way in which perpetrators are dealt with in general. These three factors are essential when discussing all transitional justice mechanisms. The discussion on truth commissions must therefore be viewed with these factors in mind. It is not possible to say that a truth commission is or is not the right tool in all circumstances. The solution to dealing with past crimes in one post-conflict society will vary significantly from that of another. A holistic approach to reconciliation, which may or may include truth commissions, must be applied.

3 Local Trials

Holding local trials in post-conflict societies is another transitional justice mechanism to deal with past crimes and human rights abuses. These types of trials can be conducted with or without the direct assistance of the international community. They can include the participation of international judges, for example, judging panels where two out of three judges are local, and one is international, or they can consist entirely of local judges and prosecutors. They can apply local law only or they can apply a transitional form of law, which may include international human rights law or UN laws and treaties. In a transitional period, if local trials are chosen as a vehicle for justice for past abuses, a multitude of combinations may be employed during this period in a court of law. There are numerous positive and negative outcomes and effects of applying local trials to deal with the past in a transitional

³⁵ Minow, *Between Vengeance*, p. 57.

period. However, the key issue which need to be addressed prior to even contemplating the potential of local trials to deal with human rights abuses is the state of the judiciary and the judicial system in post-conflict societies.

3.1 The Judicial System and Judiciary in Transitional Societies

In many post-conflict societies that have been marred by conflict for years, it is not only the military, police and other government agencies that need extensive reform, but also the judicial system. The judicial system may have stopped functioning during the conflict or it may not have functioned even prior to the conflict. It may have been entirely corrupt, encouraging or supportive of human rights abuse conducted by government agents, or simply close to non-existent. An authoritarian regime is always reflected in its judicial system and by its judiciary. The extent of its corruption and/or non-functioning is entirely variable depending on the state and can be found along a continuum from non-existent/non-functioning to fully functioning containing minor cases of corruption. It is extremely unlikely, almost certainly impossible, that any post-conflict society will immediately upon the cessation of hostilities be able to conduct fair and impartial trials. This is not necessarily only the result of corruption and abuse, but also due to the fact that judges or prosecutors might no longer exist. Even the infrastructure, such as a court room, where trials are held might have disappeared.³⁶

It is futile to discuss the positive and negative effects of locally held trials, with or without the support of the international community, if the judicial system is completely flawed. Irrespective of whether or not local trials are chosen as a means of addressing past crimes, the judicial system must be a priority in post-conflict settings – reform must be at the top of the agenda, because the rule of law is the underpinning of security and stability. If judicial reform is undertaken as part of a holistic approach towards the rule of law in a post-conflict setting then the

³⁶ In, for example, East Timor not even the most basic infrastructure was available, let alone judges and prosecutors.

primary obstacle towards applying local trials to redress past crimes is dealt with.

Judicial reform cannot be obtained within a short timeframe. It requires an extended period of time as well as extensive resources. However, prior to obtaining full reform of the judicial system interim solutions can be established. In a transitional period, the international community plays a crucial role in supporting not only the development of the judicial system to ensure a stable transition to democracy, but also to ensure fair trials in local courts should the state choose this mechanism to deal with human rights abuses. There have been several examples of these types of ad hoc solutions. In East Timor, special panels were created which consisted of both international and East Timorese judges.³⁷ This is a hybrid type solution which is cheaper than a fully-fledged international tribunal and it can be of more value because of the inherent local ownership of such a process. Additionally, civil society will see the effects of this mechanism. It involves their own government taking control of the process, signalling a change towards accountability. This hybrid can be a solution in transitional countries, which seek to prosecute perpetrators during the transitional period. It is not without its problems. In East Timor, it suffered from a lack of resources and understaffing. The pressure to conduct such trials without having had sufficient judicial reform was severe and it was observed that 'the Dili District court fails to meet even minimal standards for a fair trial',³⁸ which undermines justice and accountability rather than serving them.

Local trials have been criticised for conducting emergency justice and for their potential violation of rule of law norms.³⁹ This should not be an argument for never using local trials, only that before such trials are conducted, a certain level of reform must have taken place. For this to be possible international assistance is crucial. In a transitional society, it can

³⁷ For more on these special panels see e.g. E. Mobekk, "Truth, Justice and Reconciliation in East Timor", in report on East Timor by the Geneva Centre for the Democratic Control of Armed Forces (DCAF), November 2003, http://www.dcaf.ch/publications/Working_Papers.128.pdf

³⁸ Charles Scheiner in "East Timor Still Awaits Justice One Year after UN Call for International Tribunal", East Timor Action Network, 31 January 2001.

³⁹ L. Huyse, "Justice" in Bloomfield, Barnes, Huyse (eds.), *Reconciliation*, p. 105.

be problematic deciding which laws to apply – the laws that the previous abusive regime applied might have been against human rights law and retroactive penal reform which cover such abuses is then technically violating rule of law norms, because they cannot be punished if it was not covered in the law when they committed the act.⁴⁰ There are two points, which must be emphasised in this connection. First, international human rights law concerning crimes against humanity and genocide is considered binding on all states, so that regardless of local law during the conflict or authoritarian regime, the perpetrators can be tried for these crimes. Second, this is why it might be pertinent, particularly where there is an international mission, to establish a transitional law for post-conflict societies which can be applied until such time as the new regime has been able to determine and legislate on new laws, which include criminal codes and penal law. This transitional law and its application must be accepted in full by the local government, and not enforced by the international community. Perpetrators can then be tried under such law, which would be based on customary human rights law and any treaty that the country is a signatory to which protects human rights.⁴¹ This is similar to the Justice Rapid Response (JRR) initiative, which argues for short-term assistance until long-term assistance can be given.⁴² This may also limit the chances of ‘victor’s justice’, which is often raised as an argument against local trials. The risk of victor’s justice is greater unless there is a reformed judicial and penal system or a hybrid transitional court in place.

Ensuring that minimal standards for a fair trial are in place is not an impossibility in a post-conflict setting, but it must be prioritised from the beginning. Resources and adequate support must be given. It is only in such a context that it is even relevant to discuss whether or not local trials can be a mechanism for reconciliation and stability or whether it heightens instability, vengeance and anger.

⁴⁰ Minow, *Between Vengeance*, p. 30. On retroactivity in trials in general. Ibid., pp. 30-38.

⁴¹ United States Institute for Peace is developing such a transitional law, which aims to be published by the end of 2005.

⁴² Draft report, “Transitional”, p. 9, #18.

3.2 *A Question of Retributive Justice*

Prosecution in a court of law is termed retributive justice and is often linked to a westernised way of seeking to right wrongs, where the punitive element is crucial. Yet, civil society in numerous post-conflict societies in the developing world have demanded trials and argued that without them impunity reigns.⁴³

Numerous objections have been raised against the use of trials in post-conflict societies. One of these is that the political situation may be such that trials are not a possibility⁴⁴ – it may destabilise the peace agreement or obstruct the transition to democracy. Many new regimes avoid using retributive justice because they do not want to jeopardise their positions by angering the outgoing regime and its supporters, which in turn can incite to violence if they feel persecuted, and this must be acknowledged as a very real possibility. However, the new regime and stability may be threatened if no action is taken. In post-conflict societies, particularly in a transition to democracy, civil society expects change. Accountability for acts of torture and violence is a crucial underpinning of a democratic society. If this is not forthcoming, it may threaten stability and reconciliation, whilst fostering disillusionment. Furthermore, it can send a signal to the perpetrators that impunity and not the rule of law reigns, indicating that there has been little real change. Accountability for human rights abuse must be established from the very beginning in a transitional society. This does not necessarily mean that it has to be established through local courts of law, but the significance of the change from authoritarianism to democracy is one of accountability and the importance and symbolism of this shift is not to be underestimated or ignored.

Retributive and punitive justice is often equated with vengeance. However, vengeance can be avoided if trials are properly conducted. Instead of heightening the chances of vigilante justice and a spiral of vengeance and violence, a judicial process can reduce it, because civil society conceives that the judicial system is dealing with the alleged

⁴³ For example, in South Africa, East Timor, Haiti, Rwanda, Sierra Leone.

⁴⁴ Huyse, "Justice" in Bloomfield, Barnes, Huyse (eds.), *Reconciliation*, p. 97.

perpetrators. In other words, it ‘transfers the individual’s desires for revenge to the state or official bodies.’⁴⁵ Vigilante justice has a higher chance of increasing when there are few or no attempts at dealing with past crimes by any transitional justice mechanism.

It might seem that a punitive mechanism will provide a higher deterrence effect than a non-punitive mechanism. However, the level of deterrence in trials for human rights abuse during conflict and war is very questionable. As Justice Jackson stated, ‘*personal punishment, to be suffered only in the event the war is lost, is probably not to be a sufficient deterrent to prevent a war where the war-makers feel the chances of defeat to be negligible.*’⁴⁶ The deterrence effect of local trials may lie, not in deterring future conflicts or wars, but in deterring further acts of violence in a transitional post-conflict society, not by members of an armed force, but by individuals and former combatants recognising that there is a transition to another type of regime, where accountability is the rule not the exception.

Another criticism against trials is that local judicial systems are not able to handle the potentially vast number of cases and hence only a few cases will be heard and the process will seem arbitrary and unfair.⁴⁷ The *gacaca* courts attempted to circumvent this problem by dealing with nearly all perpetrators of the genocide through this process of criminal justice.⁴⁸ After the genocide in 1994, over 130,000 people were detained in prisons, eight years later 125,000 were still in detention. There are

⁴⁵ Minow, *Between Vengeance*, p. 26.

⁴⁶ Justice Robert Jackson, opening statement to Nuremberg tribunal, The Trial of German Major War Criminals, the International Military Tribunal at Nuremberg, 1945 in Minow, *Between Vengeance*, p. 25.

⁴⁷ See e.g. Minow, *Between Vengeance*, p.45 and L. Huyse, “Justice” in Bloomfield, Barnes, Huyse (eds.), *Reconciliation*, p. 105.

⁴⁸ The *gacaca* courts are mentioned here under local trials rather than traditional methods, since they are in fact a hybrid of the two. Particularly since they have had people in detention for long periods of time whilst determining the pace of trials, which is not something, which is usual in general for traditional methods. There are numerous problems with the *gacaca* courts and for further discussion see, e.g. R. Webley, *Gacaca Courts in Post-Genocide Rwanda, Report*, UC Berkely War Crimes Studies Center, 2003, P. Uvin, *The Introduction of a Modernized Gacaca for Judging Suspects of Participation in the Genocide and the Massacres of 1994 in Rwanda*, a discussion paper prepared for the Belgian Secretary of State for Development Cooperation, 2000.

over 10,000 courts established and 250,000 judges to deal with the crimes committed during the genocide.⁴⁹ There is a reported consensus among Rwandan government leaders and the international community that the process is flawed, in particular it does not incorporate international standards guaranteeing a fair trial.⁵⁰ Putting a whole country on trial, in effect, leads not only to immense practical and ethical problems, but also to questions of how useful such an approach is and what can be achieved.

It is not necessary to deal with all the perpetrators of a conflict in one mechanism of justice. Rwanda indicates that using local trials in this manner may exacerbate problems rather than solve them. However, prosecuting a number of key perpetrators, which ordered numerous violations of human rights - which may include, the chief of police, head of militia movements, military commanders – will serve as a significant symbol that impunity no longer reigns. A combination of methods is necessary for reconciliation to occur in any post-conflict setting. One method of transitional justice will rarely suffice to bring about reconciliation and sustainable stability and peace. It is the combination of different forms of justice that will have a greater probability of achieving the rather large objective of reconciliation, at both the national and individual levels. The so-called arbitrariness of prosecuting a few rather than all can serve a purpose, namely that key individuals are dealt with in this manner, others by means of traditional methods, and some only referred to in the context of a truth commission. What must be stopped in the discourse on justice in post-conflict societies is the setting up of dichotomies; peace versus justice, reconciliation versus justice and trials versus truth commissions. It is not a choice between one or the other. It is a plurality of complementary ways of reaching continued stability, peace and reconciliation.

Additional criticisms against local trials emphasise that they focus on the perpetrator not the victim, they can lead to re-victimisation and they

⁴⁹ Webley, *Gacaca*. Note that estimates on the number of courts, judges and alleged perpetrators vary according to different sources.

⁵⁰ IRIN, "Gacaca Courts Get under Way", 21 June 2002.

focus on individual guilt not patterns of widespread abuse.⁵¹ Unfortunately, there is little doubt that trials can lead to re-victimisation and the reliving of trauma and, therefore, complicate the process of individual healing. Truth-telling is always a risk, a risk as discussed, which is also present in giving testimony to truth commissions. Whether the risk is greater in local trials than in truth commissions is something that must be further researched in countries that have had both a truth commission and local trials to establish the extent of re-traumatisation in both groups. However, in both instances there are advantages with finally being able to tell the truth to a body of authority, which may change the victim's own situation and, in the case of a trial, punish the perpetrator. It is not necessarily negative that trials focus on the perpetrator. It may be what the victims want. Courts are not able to deal with the traumas experienced by the victims but they are, however, a vehicle to reduce fear. If perpetrators are punished, it may reduce the general fear in civil society which is always present, particularly when perpetrators of past crimes roam the streets freely and live in the neighbourhoods of their victims. Reconciliation can come about as a result of seeing the change in society, when impunity is no longer present and by the fact that violations have been acknowledged by a court of law. Local trials in post-conflict societies are hampered by many shortcomings; however, their positive effects should not be ignored.

3.3 *Plagued by Shortcomings or Strengthening Reconciliation?*

It has been stated that *'retributive justice, especially in the context of a post-conflict society, is at best plagued by certain shortcomings and at worst may endanger reconciliation and democratisation processes.'*⁵² All mechanisms of transitional justice are beset by shortcomings and are by their very nature not flawless and in certain contexts they might all endanger reconciliation and democratisation. However, these mechanisms are in many respects complementary; the court's job is to establish individual guilt. Truth commissions are there to establish patterns of abuse. The primary objective of a trial in any context is not

⁵¹ Huyse, "Justice" in Bloomfield, Barnes, Huyse (eds.), *Reconciliation*, pp. 104-105.

⁵² Ibid, p. 106.

reconciliation. However, this is not to discount that individual reconciliation can come about as a result of trials. Victims often feel the need to establish individual guilt, which can help to foster individual reconciliation more than establishing patterns of abuse. The acknowledgement of violations, the public record of abuse, recognition that certain actions were wrong and should not have been perpetrated, as well as the individualisation of guilt can all serve as tools in the complex process of individual reconciliation. In addition, individualising guilt eradicates the perception that whole ethnic groups or communities are responsible for the abuse,⁵³ which serves reconciliation on a national level. If communal responsibility can be eradicated it limits the chances of promoting segregation and vilification of ethnic groups.

Local trials should not be a measure to deal with past abuses in all post-conflict societies. However, contrary to what many currently argue, in particular circumstances when certain criteria are fulfilled, local trials can be one of the many ways of redressing crimes committed during conflict. Local trials and to what extent they can promote stability and peace is dependent upon, as with truth commissions, the three factors mentioned above: the context of the conflict, the international community and the culture of society. There is no single best way for *all* post-conflict societies to deal with past crimes – it must be tailor-made for that specific context and country with local ownership as the crucial ingredient. However, the extent of the symbolism of prosecution in a society where accountability has been absent should not be ignored or minimised. Using ad hoc solutions, hybrid courts and a combination of justice mechanisms may seem arbitrary to well-established democracies with long traditions of rule of law. However, a transitional society must be recognised for its differences and the work must be undertaken within the restrictions that this framework ultimately provides.

⁵³ Ibid, p. 98.

4 Traditional Methods of Justice

Traditional methods of justice can take many different forms, and vary extensively from community to community. They are generally considered restorative justice, but they can also have punitive functions. However, on a broad and general level they are mechanisms for solving disputes, conflicts and crime at the community level. It is where a village or tribal council, community meeting or council of elders is held to deal with crimes perpetrated towards the community or individuals, or it can focus on resolving conflicts such as marital disputes and domestic violence. The council, elders or group then decide on the punishment for the perpetrator. The punishment can vary extensively depending upon not only the seriousness of the crime or transgression, but also on the culture of the country and community. It can include public humiliation of the perpetrator, paying fines, community labour, physical punishment or what the community or council determines to be the best solution for the transgression. It is often focused on the fact that the perpetrator is part of the community and although he/she can be punished for the crimes committed, it is not in the sense of incarceration. The perpetrator may serve the community and repay for his/her crimes. This serves the greater good of the community rather than separating the perpetrator from the community.

Different variations of traditional justice mechanisms are used all over the world in developing countries. Where there have been long periods of conflict, authoritarian regimes or where the judicial system is perceived to be unfair and corrupt, they are sometimes used more extensively, because of a lack of trust in the system.

Unlike truth commissions and the type of ad hoc/hybrid local trials discussed above these mechanisms are in constant use for present crimes and conflict resolution, they are not a mechanism created or developed to deal particularly with past crimes of human rights abuse in a post-conflict setting. They can, because of their focus on reconciliation and their both restorative and retributive nature, be a valuable mechanism to use in the context of post-conflict transitional justice. However, several cautionary notes must be struck before unequivocally embracing all

traditional mechanisms in all their forms as ways of dealing with past crimes.

4.1 *Dealing with Past Crimes*

There are several arguments for both applying and being cautious with promoting traditional mechanisms to past crimes in a post-conflict setting. In the last few years, traditional mechanisms to address past crimes have been increasingly promoted, particularly in a UN peace operation context.⁵⁴ Internationally, they have therefore taken on a greater importance, but without establishing what it is they can achieve. They are often purported as a means of reconciliation and tools of conflict resolution and it is in this role that they are promoted as a vehicle for dealing with human rights abuse in post-conflict societies. There are, however, a number of issues that must be raised.

Traditional mechanisms frequently deny the perpetrator the rights of a fair trial, as the African Commission on Human and Peoples' Rights has pointed out, *'it is recognised that traditional courts are capable of playing a role in the achievement of peaceful societies and exercise authority over a significant proportion of the population of African countries. However, traditional courts are not exempt from the provisions of the African Charter relating to a fair trial.'*⁵⁵ Not only the trial, but also the punishments meted out can be against international human rights law and standards. They may, in particular, not respect women's rights. For example, frequently in numerous countries a man accused of raping a woman will, by traditional justice, be forced to marry the woman and pay her parents. This means that the crime committed against the woman will continue for the rest of her life. In other countries, the woman will be blamed for the rape and killed by a male relative for dishonouring her family.⁵⁶ In East Timor, a man who

⁵⁴ For example, the UN Secretary General mentioned traditional mechanisms in the Introductory Statement at the Security Council meeting on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, 6 October 2004. In practice, in for example East Timor, the international civilian police were encouraged to support it.

⁵⁵ Huyse, "Justice" in Bloomfield, Barnes, Huyse (eds.), *Reconciliation*, pp. 113.

⁵⁶ Honour killings are particularly rife in Arabic countries.

had raped a woman was caught and sentenced by the village council – he was chained to her bed as punishment.⁵⁷ Arguably, the victim in this case suffered more from this punishment than the perpetrator. She had to endure the trauma repeatedly until he was no longer chained to her bed. In Rwanda, one of the judges of the *gacaca* trials was accused of having used a machete to cut the thigh of a young woman because she had refused to sleep with him, the judge admitted this act and explained that ‘it was ok’ because she then ‘agreed’ to live with him.⁵⁸ The level of agreement versus that of enforcement is here questionable at best. The ability of some traditional mechanisms to deal with large-scale human rights abuse, because of their own non-adherence to international standards of human rights, is extremely problematic.

Applying mechanisms whose punishments may contradict international human rights laws, to deal with breaches of those very same human rights laws should not be encouraged by the international community. This is not to argue against using traditional mechanisms, however, blanket support of *all* justice mechanisms termed ‘traditional’ should not be given just because there is an assumption that these, by their very definition, will be superior to any other mechanism due to local ownership and culture. Assessments of not only the mechanisms in each case and country, but also when and to what crimes it can best be put to use in a post-conflict setting must be made.

Traditional mechanisms must not only be assessed as to their ability to deal with past crimes, but there must also be awareness that they can undermine the new judicial systems that are being reformed in transitional societies. During times of conflict and authoritarian regimes traditional mechanisms often become more relied upon because of the abuse perpetrated by such regimes. Hence, during reform of the judicial systems extensive international support for traditional systems may induce a lack of belief in the new judicial system. Civil society is understandably more comfortable using these types of mechanisms because the courts have tended to work against them during periods of conflict and authoritarianism. Heightened support for these mechanisms

⁵⁷ Interview by author of the police officer who found him in East Timor, 2001.

⁵⁸ IRIN, 21 June 2002.

by the international community can have the undesired side-effect of undermining the very rule of the law system that is being established.

If a new judicial system is to function, a balance must be created. Education as to what the new judicial system entails, what it can do for the community, the change and fairness and unbiased nature of it must be explained. It can easily revert to a system where the traditional mechanisms are applied more constantly. This is not only a problem for the reformed judicial system but also for the public security forces, both international and local. If international and local public security forces tend to use traditional mechanisms arbitrarily, without guidelines as to when they should be applied, it can undermine the role of the public security forces. In East Timor, the local police force (PNTL) have had to face the existence of these structures without having any policies of their own to establish when and where it would be right to support such mechanisms. In turn, it has led to a situation where, due to the absence of police accountability structures, some of the complaints against PNTL officers have been solved by traditional methods.⁵⁹

These criticisms must be carefully evaluated before implementing traditional justice mechanisms in post-conflict societies as a tool to deal with large-scale atrocities. Numerous problems can arise by unequivocally supporting these mechanisms without knowing what exactly they entail in each case and how they may affect and interact with the other types of justice mechanisms present in the country. Once this has been established, in certain contexts, traditional justice mechanisms can positively contribute to reconciliation and sustainable peace.

4.2 Promoting Reconciliation

Traditional mechanisms can, undoubtedly, promote reconciliation in certain circumstances. In the case of Mozambique, which rejected both trials and a truth commission, traditional methods of healing in the post-

⁵⁹ Amnesty International, *East Timor Police*, 2003, p. 36.

conflict context were used with great success.⁶⁰ The combatants of the conflict returned to their communities and went through traditional healing and justice mechanisms. Reasons for Mozambique's success included the particular context of the conflict, the focus on not reawakening the traumas of the war and society's desire for healing.⁶¹ It is important to underline that as with trials and truth commissions the extent of the potential for success of these mechanisms are dependent upon numerous factors including the context of the conflict, the culture of the country and the international community's role.

Traditional mechanisms are designed, in general, to deal with minor altercations and crime – if they are to be applied in a post-conflict society dealing with past crimes it may be better to utilise them at this level, for example, house burning, assault and minor altercations and violence on property and person. For larger crimes, including crimes against humanity, other mechanisms may serve the purpose of reconciliation more effectively. In East Timor, traditional mechanisms were used for militia members that had burned houses and conducted minor assaults. They were asked by the community to rebuild houses and perform community services and thus were reintegrated into the community. However, frequently the community did not want people who committed major human rights violations to return and they were transferred to other parts of the country.⁶² However, again, it is entirely dependent upon context, since in Mozambique the healing rituals worked even in more severe cases. The reintegration of boy soldiers was particularly successful.⁶³

⁶⁰ For more on Mozambique and use of traditional methods see e.g. A.Honwana, "Sealing the Past Facing the Future: Trauma Healing in Rural Mozambique", *Conciliation Resources*, http://www.c_r.org/accord/moz/accord3/honwana.shtml, J. Chissano, "Healing Wounds of Past Conflicts: Mozambique Opts for a culture of Peace", *UN Chronicle*, Winter 1998. C. Thompson, "Beyond Civil Society: Child Soldiers as Citizens in Mozambique", *Review of African Political Economy*, vol. 26, issue 80, June 1999.

⁶¹ Interview by author of UN representative who had been working in Mozambique, November 2004.

⁶² Interviews by author of East Timorese civil society and international civilian police in East Timor, 2001.

⁶³ Thompson, "Beyond", p. 192.

Traditional methods have additional advantages. They are entirely the ownership of the local population. It is not something that is enforced from the outside, and they decide how to deal with the perpetrator without external interference. In this way, they can start reconciling with each other, the past and with the crimes committed. Moreover, the local population see an immediate and direct effect of the justice procedure. It is taking place in their midst. Both truth commissions and local trials take place either in capitals or in the larger cities and are, therefore, removed from large parts of the population. Traditional methods have an immediacy of which importance should not be ignored.

4.3 *International Operations and Traditional Mechanisms*

There has been a tendency in international peace operations of equating the concept of ‘traditional’ with ‘fair’, ‘good’ and ‘impartial’, particularly in situations where international interveners are sensitive to trampling over the culture and customs of the mission country. Accusations of cultural imperialism and the enforcement of western values in such missions have been rife for years and, in several instances, these criticisms have been valid. Nevertheless, care must be taken so that during a peace operation, in the pursuit of supporting and protecting the mission country’s cultural norms and values, international human rights standards are not sidelined or obliterated all together.

Although traditional mechanisms can be an invaluable part of dealing with past crimes in post-conflict societies, where there is an international mission, several factors should be taken into consideration, assessed and dealt with. First, what the traditional mechanisms are must be established prior to supporting them unconditionally, so that human rights, public security forces and the rule of law will not be undermined. Second, the mechanisms must be implemented in a consistent way throughout the mission area. They may vary according to community, but they should not deliver punishments which are a violation of international human rights. Third, it must be decided as to what crimes can be dealt with in this manner. This must be decided through a consultation process with the local government and not enforced by the

intervener, thus ensuring local ownership. Fourth, it should be run in conjunction with the court system. They can be and are complementary. Fifth, education in the new type of judicial system must be established so trust can be created. It must not be because of a lack of trust that the judicial system is not used, but rather because it is a choice in terms of certain times and crimes to apply traditional mechanisms.

It is always difficult for an international mission to find the right balance between supporting and encouraging local justice mechanisms and not enforcing their own particular version of justice, while simultaneously ensuring that international standards of human rights are followed when dealing with past crimes in transitional justice. However, to achieve this balance is crucial for stability and security of post-conflict societies.

5 Complementary Mechanisms of Justice – a Means to Sustainable Peace

Addressing the issues of human rights violations and crimes against humanity in a transitional society trying to recover from years of conflict and violence amidst numerous international actors attempting to support the different processes in the post-conflict reconstruction phase is far from a simple task. There are several factors that must be weighed, assessed and determined before starting the process of transitional justice. What must first be acknowledged is that each transitional society is unique, although it contains numerous similarities to other post-conflict societies, the way in which to approach past crimes must be specifically designed for that country. There cannot be a ‘one size fits all’ approach to transitional justice.

Among the factors influencing the choices and outcome of any process of transitional justice is the context of the conflict, which incorporates all aspects of the conflict from its inception to its end. This, in large part, determines what types of transitional mechanisms can be applied, but also leads to greater societal reconciliation. The level of international involvement and willingness to contribute also affects these processes and cannot be ignored. Lastly, the culture of the country and how it deals

with issues of human rights violations will significantly impact upon the outcome.

What is crucial is that local ownership is not only promoted, but ensured throughout the implementation of transitional justice mechanisms – without local ownership, the success of the processes will be diminished. Truth commissions, local trials and traditional mechanisms all commonly share a greater potential for local ownership.

There must be an awareness of the distinction between national and individual reconciliation, particularly since different types of transitional justice mechanisms can advance one type of reconciliation more than another. This underlines the importance of implementing more than one type of mechanism to address past abuses. If reconciliation is reached on one level, but not on another, instability and insecurity can result.

The prevalent tendency to promote one type of mechanism over another to deal with past crimes endorsing a dichotomous approach to transitional justice, which stresses restorative versus retributive justice must be abolished. Although there has been some progress in this area in international operations, greater emphasis must be placed on the complementary nature of the transitional justice mechanisms so that they might serve the different needs of reconciliation in the mission country.

No transitional justice mechanism is flawless and considering that they have to address gross human rights violations in a context of turbulent post-conflict settings whilst trying to achieve reconciliation this is not surprising. However, reconciliation cannot be obtained by transitional mechanisms alone, it takes more time and effort than any time-restricted trial, truth commission or traditional process can achieve. Transitional mechanisms are steps towards reconciliation, not its achievement. Nevertheless, there are certain factors that could improve transitional justice mechanisms and the chances of stability, security and sustainable peace.

5.1 Recommendations

Irrespective of what type(s) of transitional justice mechanisms are implemented three factors must be ensured in a post-conflict society with an international mission:

- Local ownership must be assured throughout the processes.
- Needs assessments must be conducted prior to establishing or recommending any or several types of transitional justice mechanisms for dealing with past crimes to establish the best option(s).
- The international community should make several options available to the mission country and make clear that it is not a choice between commissions or trials, but that these can be implemented in a complementary manner, should they so choose.

Truth Commissions

Detailed recommendations have been made elsewhere regarding truth commissions in post-conflict societies.⁶⁴ What will be emphasised below are recommendations of particular importance in a post-conflict setting with an international mission.

- ‘Truth’ must be acknowledged as a difficult concept, and its use in the particular context clarified and defined.
- Distinguish between individual and national reconciliation, and emphasise that truth commissions have a tendency to focus on national reconciliation.
- Cover the process extensively in the media, both nationally and internationally. In peace operations, the international community can assist with dissemination of both the process of the truth commission and its findings and recommendations.

⁶⁴ See in particular all of P. Hayner’s work, e.g. “Commissioning”, p. 25.

- Assess the use of amnesties and its consequences – lessons learnt from other amnesty processes should be made available to the local decision-makers by the international community.
- Local political willingness to implement the recommendations of the truth commission must exist for its success – international pressure to ensure co-operation from the local government in a transitional society during peace operations to fulfil its obligations in relation to the truth commission can be applied.
- Inform and educate civil society as to what a truth commission can achieve and what its objectives are – this can limit expectations so as to limit disillusionment – the international community can play a role in this information process.

Local Trials

- Reform the judicial system and the judiciary from the beginning in a post-conflict society with international assistance.
- Rebuild the judicial infrastructure.
- Establish international ad hoc or hybrid solutions to address perpetrators of past human rights abuses and crimes against humanity.
- Develop an international transitional law based on international human rights standards, norms and laws and the human rights treaties the country is a signatory to, to be applied in all transitional post-conflict societies until the local authorities can legislate on the appropriate laws – local variations and additions should be included.
- Acknowledge the significance that trials can have as a symbol of accountability in a transition to a new democracy and regime.
- Acknowledge that local trials under certain conditions can promote stability and security in a country.

Traditional Mechanisms

- Assess what these mechanisms are before encouraging their implementation.
- Be aware that they frequently do not respect international human rights law, both in relation to a fair trial and in their punishments.
- Establish what level of crimes they can be applied to in a post-conflict transitional society.
- Acknowledge the vast variations between these mechanisms and assess their applicability to deal with vast numbers of human rights violations.
- Be aware of their potential effects on the judicial regime and the public security forces – educate civil society in the new system so that the traditional mechanisms will be complementary and not undermine the reformed judicial system.
- Implement the mechanisms consistently throughout the mission area – variations between communities will exist, but should not deviate in reference to human rights standards when applied to deal with past crimes.