



**Geneva Centre for the Democratic Control of
Armed Forces (DCAF)**

Occasional Paper - № 13

**Transitional Justice and Security Sector Reform:
Enabling Sustainable Peace**

Eirin Mobekk

Geneva, November 2006

**GENEVA CENTRE FOR THE DEMOCRATIC CONTROL OF
ARMED FORCES (DCAF)**

OCCASIONAL PAPER - №.13

**Transitional Justice and Security Sector Reform:
Enabling Sustainable Peace**

Eirin Mobekk

Geneva, November 2006

About the Author

Eirin Mobekk's expertise lies within the areas of United Nations peace operations, security sector reform, post-conflict reconstruction and justice and reconciliation. She specialises in international policing, police and judicial reform and transitional justice. She received her doctorate at the Department of War Studies, King's College, London. She is currently a Research Associate at the Department of Peace Studies, University of Bradford. She acts as a consultant to several governmental and non-governmental organisations.

Copyright © 2006 by the Geneva Centre for the Democratic Control of Armed Forces

ISBN 92-9222-052-7

DCAF Occasional Papers are essays contributing to the policy dialogue on issues pertaining to the core mission of DCAF. These essays are commissioned by DCAF.

Table of Contents

Abstract.....	i
List of Acronyms.....	ii
1. Transitional Justice and Security Sector Reform.....	1
1.1. Transitional Justice.....	1
1.2. Security Sector Reform.....	3
1.3. Security Sector Governance.....	5
1.4. Crosscutting Issues.....	5
2. The Legal Dimension.....	8
2.1. Recent Developments in International Law.....	9
2.2. Trends and Obligations.....	12
3. Prosecution.....	13
3.1. Domestic Prosecution.....	13
3.1.1. Judicial Reform.....	14
3.1.2. Police and Penal Reform.....	16
3.1.3. Engendering Trust in State Institutions.....	18
3.2. Hybrid/Mixed Courts.....	19
3.2.1. Heightened Legitimacy and Transparency.....	20
3.2.2. Capacity-building.....	22
3.2.3. Strengthening Rule of Law and Law Reform.....	23
3.3. Challenges of Prosecution.....	25
3.3.1. Destabilisation.....	25
3.3.2. Selectivity.....	26
3.3.3. Individual Guilt and Re-victimisation.....	27
3.3.4. Witness Protection.....	28
3.3.5. Resources.....	29
3.3.6. Deterrence.....	30
3.4. Amnesties – A Problematic Alternative.....	30
3.4.1. (De)Stabilisation.....	31
3.4.2. Conditional Amnesties.....	33
3.4.3. Accountability.....	34
3.5. Lessons Identified.....	35
4. Truth-seeking: Truth Commissions.....	37
4.1. Truth Commissions.....	38
4.2. Contentious Concepts.....	39
4.2.1. Truth.....	39
4.2.2. Reconciliation.....	40
4.2.3. Healing.....	41

4.3.	Political and Legal Issues.....	42
4.3.1.	Destabilisation and Political Will.....	43
4.3.2.	Sequencing.....	45
4.3.3.	Due Process and Judicial Reform.....	46
4.3.4.	Acknowledgement, Accountability and Deterrence.....	47
4.4.	Lessons Identified.....	47
5.	Reconciliation and Traditional Informal Justice Mechanisms.....	49
5.1.	Traditional Informal Justice Mechanisms.....	49
5.2.	Challenges: In Need of Reform.....	51
5.2.1.	Human Rights.....	51
5.2.2.	Legitimacy and Accountability.....	52
5.2.3.	Types of TIJM.....	53
5.3.	Practical and Cultural Aspects.....	54
5.3.1.	Access to Justice.....	54
5.3.2.	Cultural Relevancy.....	55
5.3.3.	Reconciliation.....	56
5.4.	TIJM and Formal Judicial Systems.....	57
5.4.1.	Attitudes and Perceptions.....	57
5.4.2.	Undermining Formal Systems.....	58
5.5.	Lessons Identified.....	59
6.	Reparations.....	61
6.1.	Reconciliation and Accountability.....	62
6.2.	Facilitating and Impeding Factors.....	63
6.2.1.	Political Will.....	63
6.2.2.	Resources.....	64
6.2.3.	Eligibility and Proportionality.....	64
6.2.4.	Differing Needs of Victims.....	66
6.3.	Lessons Identified.....	67
7.	Vetting and Lustration.....	68
7.1.	Enhancing Institutional Reform.....	69
7.2.	Improving Trust.....	72
7.3.	Due Process.....	73
7.4.	Deterrence.....	74
7.5.	Conclusion.....	75
8.	Concluding Remarks: Key Challenges.....	76
9.	Selected Bibliography.....	80

Abstract

Transitional justice has received ever more attention since the end of the Cold War; new mechanisms have been elaborated, older ones enhanced and developed, all increasingly promoted. The aim is to avoid reoccurrence of human rights violations, establish a form of accountability and enhance reconciliation of war-torn nations. However, the advantages and disadvantages with all transitional mechanisms vary and are influenced by numerous factors in post-conflict society. Crucially, the link between transitional justice and security sector reform, although acknowledged, has not been sufficiently explored. They can mutually affect each other in a number of ways, which can have both positive and negative impacts upon long-term reform and sustainable peace. This paper will establish the link between transitional justice and security sector reform and how they can interact in a post-conflict setting, both strengthening and weakening each other. Moreover, it will evaluate the challenges faced by transitional justice mechanisms as well as their merits in obtaining the objectives of transitional justice, whilst arguing for a complementary approach to transitional justice.

List of Acronyms

CAVR	Commission of Reception, Truth and Reconciliation
CEH	Historical Clarification Commission
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CPA	Coalition Provisional Authority
DDR	Disarmament, Demobilisation and Reintegration
DRC	Democratic Republic of Congo
ICC	International Criminal Court
ICCPR	International Covenant of Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
IER	Equity and Reconciliation Commission
IGC	Iraqi Governing Council
JSSR	Justice and Security Sector Reform
NRC	National Reconciliation Commission
NTJC	National Truth and Justice Commission
RPA	Rwandan Patriotic Army
SSAJ	Security, Safety and Access to Justice
SRSG	Special Representative to the Secretary-General
TC	Truth Commission
TRC	Truth and Reconciliation Commission
TIJM	Traditional Informal Justice Mechanisms
UNDP	United Nations Development Programme
UNMBIH	United Nations Mission in Bosnia-Herzegovina
UNTAET	United Nations Transitional Administration in East Timor

Transitional Justice and Security Sector Reform: Enabling Sustainable Peace

Eirin Mobekk

1. TRANSITIONAL JUSTICE AND SECURITY SECTOR REFORM

With the end of the Cold War, international security underwent significant change, where before it had not been possible to intervene in the domestic jurisdiction of other states now a flurry of interventions aimed at protecting the citizens of other states were conducted. Expanded peace operations and post-conflict peacebuilding with subsequent security sector reform (SSR), as well as transitional justice processes for gross violations of human rights began to flourish. Key foci in post-conflict peacebuilding are security sector reform, demobilisation, disarmament and reintegration (DDR) and rule of law issues; these have often been addressed separately, but have more recently been attempted to be viewed in a holistic manner. Transitional justice and its linkages to SSR, however, have thus far not been.

The growth of post-conflict peacebuilding operations in the early 1990s led to an evolution in SSR and transitional justice. Yet the linkages between the two have been left largely unexplored, although the link between transitional justice and rule of law –accountability for the past to ensure rule of law in the future – has been acknowledged.¹ Both SSR and transitional justice are extremely political and context-specific processes and can be mutually-reinforcing and/or can affect and influence each other in several ways. These linkages between transitional justice and security sector reform need to be more firmly addressed in post-conflict peacebuilding so as to enable sustainable peace. Critical analysis of these linkages has both policy and operational implications, but they have thus far been under-researched – this paper aims to begin filling this gap.

1.1. Transitional Justice

The growth and support of transitional justice since the early 1990s has led to a myriad of means and choices that governments in post-conflict societies and the international community can use to address past human rights violations in an effort to curb reoccurrence, enhance reconciliation and provide a measure of accountability. In the context of post-conflict peacebuilding, each transitional

¹ See e.g. Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, S/2004/616, 23 August 2004. UNA-USA, DPKO, *Program on Peace Building and Rule of Law*, Partnership Program on Peace Building and Rule of Law, 2003. Rama Mani, 'Balancing Peace with Justice in the Aftermath of Violent Conflict', *Development*, vol. 48, no. 3, 2005. Pricilla Hayner, 'Justice in Transition: Challenges and Opportunities', Presentation 55th Annual DPI/NGO Conference, September 2002. DCAF-UNOG, *SSR: Its Relevance for Conflict Prevention, Peace Building and Development*, 2003.

justice mechanism established, from international tribunals to special courts, was heralded as bringing an end to human rights violations and war crimes and deterring future abuses. There was optimism that these judicial mechanisms would be the answer to the woes of crimes committed during conflict and be a means of redress for victims.² Alongside this proliferation of judicial means of addressing past human rights violations in post-conflict societies grew a discourse on the virtues of non-retributive reconciliatory mechanisms of justice versus that of criminal accountability. Non-judicial means of accountability, particularly truth commissions, were also increasingly promoted. Consequently a wide range of different types of judicial and non-judicial mechanisms to address past crimes were developed, enhanced or promoted in a relatively short period of time.

Transitional justice has become part of the post-conflict peacebuilding process, where it is viewed as essential to reconciliation and reconstruction of civil society after conflict. The debate on transitional justice has frequently been posited as one of peace versus justice, or judicial versus non-judicial measures for redressing past wrongs, where criminal prosecutions have often been argued to promote destabilisation and resumption of conflict, whereas truth-seeking as a means of accountability has been purported to enhance peace and reconciliation.

On a broad general level the primary objectives of transitional justice are in essence twofold: first, to begin processes of reconciliation among the parties to the conflict and the affected populations by establishing a process of accountability and acknowledgement; and second to deter reoccurrence, ensuring sustainable peace. Both judicial and non-judicial accountability can encourage reconciliation of post-conflict societies. However, reconciliation is a complex concept and not easily defined; it has been described in numerous ways from acknowledgement and repentance from the perpetrators and forgiveness from the victims,³ non-lethal co-existence,⁴ as democratic decision-making and reintegration,⁵ and as four concepts namely truth, mercy, peace and justice.⁶ Crucially, reconciliation is a process, which end-state can be reached by different means and lengths of time.⁷

To what extent any transitional justice mechanism on its own is able to achieve the second objective, ensuring that the human rights violations and abuse do not reoccur, can be questioned, but it is here the connection to security sector reform becomes particularly important. To minimise the chances of institutional human

² In this paper the term victim will be used throughout, although it is acknowledged that there is a discourse regarding the terms victim - survivor. Not all individuals who have experienced crimes against humanity or gross violations of human rights perceive themselves to be victims, but survivors. It is important to acknowledge the distinction, because it may affect the choice of transitional justice mechanism.

³ 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.

⁴ David Crocker in J.D.Tepperman, 'Truth and Consequences', *Foreign Affairs*, March/April 2002, p. 7.

⁵ Denis Thompson in *ibid*, p. 7.

⁶ 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

⁷ This paper will distinguish 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 his or her life in a *similar* manner as prior to the conflict, without fear or hate. This is an important distinction because each can come about independently of each other.

rights violations, the government institutions responsible for the violations must be reformed. This is a vital step in ensuring non-reoccurrence. Transitional justice mechanisms such as truth commissions can provide recommendations for what changes and reform need to take place within government institutions that perpetrated violations against its citizens. Domestic and hybrid courts can potentially enhance and reform the judicial system whilst ensuring accountability. Vetting can ensure that former perpetrators are not allowed positions in government institutions, whether they are military, police or intelligence services, oversight mechanisms or any other form of government positions. Traditional informal justice mechanisms can improve access to justice for all, not only as a way in which to avoid the formal mechanism due to their corruption and abuse, but as a complementary method of justice in countries where access to formal mechanisms is often limited. This paper argues that for transitional justice to achieve any of its objectives a complementary approach should be applied, utilising a combination of different transitional justice mechanisms, whilst co-ordinating and working with the processes of SSR. There can be no one-size-fits-all approach to transitional justice, or indeed to security sector reform.

1.2. Security Sector Reform

There has been a significant evolution of the concept 'security sector' in the last few years and hence what reform of it should entail. The early security sector debate was primarily dominated by a focus on the military, but this has developed substantially and a much broader and deeper definition of security sector has emerged, which in essence incorporates 'traditional' security actors (e.g. defence forces, police, border guards, intelligence services), justice institutions (e.g. judiciary, prosecution services), non-statutory security forces (e.g. PMCs, rebel groups), management and oversight bodies (e.g. ministries, parliament).⁸ Thus security sector reform now encompasses a *'transformation of the security system which includes all actors, their roles, responsibilities and actions working together to manage and operate the system in a manner that is more consistent with democratic norms and sound principles of good governance and thus contributes to a well functioning security framework'*.⁹ Security sector reform has also been described more simply as a *'process for developing professional and effective security structures that will allow citizens to live their lives in safety'*.¹⁰ The UNDP has also embraced a broad understanding of security sector reform by defining it as justice and security sector reform (JSSR), where the security sector encompasses criminal justice organisations, management and oversight bodies, military and intelligence services, non-core institutions such as customs, as well as non-statutory security forces and civil society.¹¹ The desired end-state of SSR is

⁸ See Heiner Hänggi and Fred Tanner, 'Promoting Security Sector Governance in the EU's Neighbourhood', Challiot Paper no. 80, July 2005, p. 13. And also e.g. Edward Rees, 'SSR and Peace operations: Matching Mandate and Means', UN Best Practices, 2005, p. 7.

⁹ DAC Guidelines and Reference Series, *OECD/DAC Security System Reform*, 2005, p. 20.

¹⁰ Dfid, *Security Sector Reform Policy Brief*, 2003, p. 2.

¹¹ UNDP, *Justice and SSR, BPCR's Programmatic Approach*, November 2002, p. 8. For more on SSR see e.g. Nicole Ball, 'Spreading Good Practices in SSR: Policy Options for the British Government', London: Saferworld, 1998. Alan Bryden and Philipp Fluri (eds.), *SSR: Institutions, Society and Good Governance* (Baden-Baden: Nomos Verlagsgesellschaft, 2003). DFID, 'Understanding and Supporting SSR, London, 2002. OECD-DAC, *Security System Reform and Governance: Policy and Good Practice*, 2004. Nicole Ball, 'Justice and SSR: A Conceptual Framework

frequently described as democratic control of security institutions, operating highly effectively and efficiently and in accordance with international law.¹² The objective is a security sector that is accountable, legitimate and transparent in the provision of internal and external security and rule of law to its population. This precipitates broad consultation with local populations and enhanced civil society oversight mechanisms.

Security sector reform has increasingly been acknowledged to be at the core of peacebuilding activities, since it is essential for continued stability in post-conflict societies – the link to rule of law, DDR and transitional justice has also been emphasised by the UN.¹³ Importantly, with the establishment of integrated UN missions, DDR, rule of law and SSR linkages are underlined, but transitional justice continues to be treated separately from these issues. Moreover, there is an existing tension between peace operations as a crisis response and SSR as a long-term development activity. Although peace operations have expanded in scope and mandate, the traditionally short timeframe of these operations complicates implementation in post-conflict peacebuilding.

Due to its very political nature and the numerous different actors involved in the SSR arena, implementation of SSR is extremely varied, with diverse outcomes. The actors involved in SSR range from individual states, regional organisations, international organisations, non-governmental organisations and even private enterprises. These will have a diverging view of what is important to focus upon in SSR and hence it will frequently reflect their own agendas rather than that of the recipient country. Commonly the focus of SSR has been writing constitutions, reforming laws and penal and criminal codes and strengthening institutions, particularly through training, assistance and mentoring programmes of, for example, armed forces, police, intelligence services, border guards and the judiciary, as well as strengthening governance and management of the security structures. However, a major problem in SSR lies in the implementation of new laws, norms and values. It is therefore crucial to focus on the mindset shift. This is by far the most difficult task in any reform process. It is also what will take the longest time – changing minds towards an acceptance that reform will leave all actors better off is not achieved overnight, nor can this be enforced from the outside. There is an often un-stated understanding that this is the goal of the reform processes. As will be established, transitional justice can start the process of a mindset shift in a post-conflict society.

Security sector reform is a critical component in ensuring sustainable peace – which intersects with enhancing the operational effectiveness of security institutions (which is frequently a main objective of SSR) and ‘overcoming the legacies of violent conflict’.¹⁴ It is particularly in this intersection of addressing the legacies of violent conflict that transitional justice and SSR meet.

for BCPR’, UN, 2002. *Compendium of Good Practices on SSR* (GFN-SSR, 2005). Malcolm Chalmers, ‘SSR in Developing Countries: An EU Perspective’ (London: Saferworld, 2000).

¹² Nicole Ball, ‘The Security Sector Reform Strategy’, Dfid, Evaluation Report 647, March 2004, p. 6.

¹³ Statement of the President of the Security Council, S/PRST/2005/30, 12 July 2005.

¹⁴ Nicole Ball, ‘The Security Sector Reform Strategy’, Dfid, Evaluation Report 647, March 2004, p. 6.

1.3. Security Sector Governance

Security sector governance can be a useful approach through which to view the linkages between transitional justice and security sector reform. As seen above, the security sector is defined in this paper from a democratic governance perspective. Good governance of the security sector is critical to sustainable peace and moreover, security governance issues include SSR, DDR, rule of law and transitional justice.¹⁵ The key of security sector governance is developing sustainable security institutions providing internal and external security, as well as, effective civilian oversight mechanisms in the framework of democratic governance.¹⁶ There is broad agreement that good security sector governance from an institutional perspective would include civilian, parliamentary, judicial and civil society control, in addition to a legal framework.¹⁷ Legitimacy, accountability, transparency are paramount factors of good governance.

The key problem in post-conflict societies is the lack of governance of the security structures and non-accountability. Frequently, in these societies there is an absence of political will to improve democratic security sector governance, because both the political and security forces leadership see limited benefits in such change.¹⁸ Additional problems include limited resources and human capacity with which to conduct good governance of the security sector. In post-conflict societies resources are scarce and human capacity often extremely limited as a result of the conflict. External intervention and local ownership are two other crucial issues – there is an inherent tension between external intervention and the need to foster local ownership and capacity. In cases where there has been political will external interventions have repeatedly failed to promote local ownership sufficiently and/or ignored local context, and moreover, the intentions have not necessarily been to enhance security sector governance.¹⁹

These are all issues that are crucial in transitional justice as well. Moreover, as mentioned, both SSR and transitional justice are highly political processes and critically ‘presuppose(s) the existence of political institutions that are capable of enforcing principles of good governance and democratic accountability’.²⁰ Therefore viewing SSR and transitional justice through the prism of good security sector governance can identify lessons (to be) learned and be policy relevant.

1.4. Crosscutting Issues

The link between transitional justice and security sector reform is perhaps most evident in relation to criminal justice organisations: the judiciary, the police, and the correctional services, as well as oversight of these bodies. However,

¹⁵ Heiner Hänggi, ‘Approaching Peacebuilding from a Security Governance Perspective’, in Alan Bryden and Heiner Hänggi (eds.) *Security Governance in Post-Conflict Peacebuilding*, (Munster: Lit Verlag, 2005), p. 4

¹⁶ Nicole Ball, ‘Enhancing Security Sector Governance: A Conceptual Framework of UNDP’, 2002, para. III.

¹⁷ Hänggi and Tanner, ‘Promoting’, p. 15.

¹⁸ Ball, ‘Enhancing’, para. III.

¹⁹ Ibid.

²⁰ Hänggi, ‘Approaching’, p. 15.

transitional justice is also linked to military reform by means of vetting, ensuring that perpetrators of past human rights abuses do not participate in any government office, including military forces. Moreover, in a transitional society what is needed above all is a mind-set shift, changing from a political system where the security sector is abusive, corrupt and politicised to one which is accountable, transparent and legitimate.

It is not possible within the scope of this paper to discuss all parts of SSR and how it affects and is affected by transitional justice. However, it will discuss the reciprocal effects of transitional justice on domestic judicial systems, police and penal reform, its effect on accountability and transparency, good governance, a mind-set shift both among political leaders and civil society and its relation to military reform.

In brief this paper has two objectives: exploring the links between transitional justice and security sector reform and how they interact and under certain circumstances can be mutually reinforcing processes in post-conflict societies, whilst assessing the various forms of domestic transitional justice processes, highlighting their abilities to promote sustainable peace and reconciliation in a post-conflict society. The focus will be upon domestic mechanisms, with or without international influence, taking place within the borders of the country where the abuses took place.²¹ These mechanisms will have a greater opportunity of directly influencing and being influenced by security sector reform than an international mechanism outside the domestic sphere.

SSR and transitional justice have three key common objectives: First, accountability, for transitional justice to ensure accountability for past crimes, for SSR to ensure a security sector accountable for its present and future acts. Second, a broader aim of transitional justice is capacity-building and contributing to strengthening the rule of law, which is an intrinsic part of SSR. Third, transitional justice ultimately aims at non-reoccurrence, whilst SSR aims to provide this by focusing on establishing oversight and transparency of the security sector.

Crosscutting issues that affect the outcome of both transitional justice and security sector reform are:

- Local ownership
- External involvement
- Sequencing
- Context and history of the conflict
- Existence of a peace agreement and what it outlines
- Political will

²¹ The international transitional justice mechanisms, the International Criminal Court (ICC), the International Criminal Tribunal of Rwanda (ICTR) and the International Criminal Tribunal of the former Yugoslavia (ICTY), will not be discussed.

- Culture of the country
- Available resources
- Type and extent of atrocities committed

These are factors that can impede or facilitate the outcome of both processes individually and how they affect each other.

The paper discusses developments in international law which has evolved to support prosecutions of gross violations of human rights. Prosecution in the form of domestic prosecution and hybrid courts is analysed, as well as amnesties as a questionable alternative. Truth commissions and traditional informal justice mechanisms, and their role in furthering reconciliation and affecting sustainable reform of the security sector are explored. Reparations and vetting are examined as both transitional justice and SSR processes.

2. THE LEGAL DIMENSION

There has been increasing opportunity for transitional justice mechanisms to be implemented due to the evolving legal framework. Since the end of the Second World War international law has developed significantly in relation to states' obligations to protect their citizens and guarantee individual rights. There are three areas that attempt to ensure rights and obligations in relation to gross violations of human rights; international humanitarian law, international human rights law and international criminal law. These have evolved both in the context of customary international law and treaty law and frequently offer overlapping applicable provisions detailing the responsibility of the state and the need to respect human rights in armed conflict.²²

Although these laws are often overlapping they are nevertheless distinct; international human rights law focuses on placing obligations on the state and how the state should treat individuals in war, armed conflict and times of peace, whilst international criminal law emphasises individual criminal responsibility for acts committed.²³ The underlying principles of international human rights law, laid out in the Universal Declaration of Human Rights 1948, stipulate the existence of inalienable rights of all humans in all societies. The universal declaration affirms the right to freedom from oppression, slavery, torture and other inhuman and degrading treatment, the right to life, liberty and security of persons as well as the right to a fair trial and equality before the law,²⁴ yet needless to say these rights continue to be repeatedly violated.

Until the 1990s the United Nations was largely without the ability to enforce any of the human rights and humanitarian laws promulgated. Although articles 55 and 56 of the UN Charter promote respect and observance of human rights, article 2 (7) left the UN, during the Cold War years, unable to enforce this since it ensures that the UN cannot intervene in matters that are deemed to be within the domestic jurisdiction of a member state, unless it can be determined to fall under Chapter VII of the Charter, namely constituting a threat to international peace and security.²⁵ Although there were limited possibilities of enforcement, there was continued development and codification of international human rights law. This included the International Covenant on Civil and Political Rights 1966 (ICCPR), the Convention on the Elimination of Discrimination against Women 1979

²² See for example, Convention on the Prevention and Punishment of the Crime of Genocide, 1948. The Geneva Conventions (I-IV) 1949. International Covenant on Civil and Political Rights, 1966. International Covenant on Economic, Social and Cultural Rights, 1966. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

²³ Jane Alexander, *A Scoping Study of Transitional Justice and Poverty Reduction*, for Dfid, January 2003, p. 12.

²⁴ General Assembly Resolution 217A (III) (1948), 10 December 1948.

²⁵ Article 55 (c) states: 'The United Nations shall promote: universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'. Article 56 states: 'All Members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55'. Chapter VII, article 39 states: 'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security'.

Article 2(7) states: 'Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII'.

(CEDAW), and the Convention on the Rights of the Child 1989. In addition, slowly also a customary international body of human rights law grew.

In the aftermath of the Cold War the international community was capable of more effectively supporting the growth of international human rights law, resulting in an emerging trend towards a state obligation to prosecute for gross violations of human rights. This change evolved alongside the vast expansion of peace operations, with ensuing police, judicial and penal reform in post-conflict societies, and the continued development and expansion of transitional justice mechanisms. There was an increasing recognition at political level among different actors – individual governments, the UN, the European Union – of the importance of good governance of the security sector, as well as reform of security systems, as a means to minimise abuse.

Although substantial support for international law was garnered during and since the last decade of the 20th century the different transitional justice mechanisms from international tribunals, special courts and the International Criminal Court (ICC) to truth commissions, traditional mechanisms and amnesties have not been without problems – a primary problem perhaps being that the expectations of a new era of justice and end to impunity far exceeded the realms of possibility.

2.1. Recent Developments in International Law

The Rome Statute, even though it establishes the International Criminal Court, emphasises the primacy of nation states in ensuring justice and underscores state responsibility for crimes committed on national territory.²⁶ The Preamble to the Rome Statute states that ‘it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes’. Customary international law also affirms that certain crimes should be dealt with by domestic courts, including genocide and gross violations of human rights. In addition, international law establishes victims’ right to seek redress for human rights violations and to have their case heard.²⁷ International law has thus evolved to support the premise that there is a responsibility of the individual state to prosecute gross violations of human rights conducted on its territory. Simultaneously strong criticisms have been voiced against the use of prosecutions in the context of transitional justice.²⁸ Yet, what has been seen in post-conflict societies is an increasing demand for criminal prosecutions by civil society – whether in international tribunals, domestic courts or hybrid/mixed courts – following gross violations of human rights.²⁹ There has also been an increase in domestic prosecutions for past human rights violations in post-conflict societies.³⁰

²⁶ Rome Statute to the International Criminal Court, article 19. See also Diane Orentlicher, *Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat all Aspects of Impunity*, E/CN.4/2004/88, 27 February 2004, p. 11.

²⁷ See e.g. Universal Declaration of Human Rights, 1948, Article 8, ICCPR, article 9.

²⁸ See e.g. Martha Minow, *Between Vengeance and Forgiveness. Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998).

²⁹ For example, in South Africa, Timor-Leste, Haiti, Rwanda, Sierra Leone.

³⁰ K. Sikkink and C. Booth Walling, ‘Errors about Trials: The Political Reality of the Justice Cascade and Its Impact’, Paper presented at the annual meeting of the APSA, 2005, p. 10.

Alongside the developments of the rights of victims and the state's obligations to protect its citizens, rights of the accused have also evolved considerably to ensure their protection during criminal prosecution – this includes the right to a fair and public hearing.³¹ The Office of the High Commissioner for Human Rights has called upon states to ensure a fair and public hearing when trials are conducted to deal with past gross violations of human rights in a post-conflict context.³² Breaches of the rights of the accused when using criminal prosecution as a measure of transitional justice undermine the justice process and it is imperative that the rights of both the victims and the accused are protected.

International law has evolved in an attempt to minimise the chances of domestic trials being abused by reinterpreting the principle of *non bis in idem* – the prohibition of being tried twice for the same crime. Both the statutes of the International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) state that an alleged perpetrator may be tried again if the domestic courts were not impartial or independent or were trying to shield the accused from prosecution.³³ The Rome Statute of the ICC bolsters this and states that a perpetrator can be retried if the trial was not '*conducted independently or impartially in accordance with the norms of due process recognised by international law and were conducted in a manner which in the circumstances was inconsistent with an intent to bring the person concerned to justice*'.³⁴ This can exert some pressure on states to ensure that domestic prosecution does not deteriorate into victor's justice, or protect the perpetrators from criminal justice. However, there are limited means of enforcement and statutes have not become part of customary law, hence can be ignored.

In conjunction with evolving norms of prosecution for gross violations of human rights, there are also emerging principles of international law, which establish that general amnesties are illegal under international human rights law for certain crimes. The UN Secretary-General has stated that '*amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law*'.³⁵ The UN Human Rights Committee has declared that general amnesties are incompatible with the ICCPR because they promote impunity and deny victims the right to a remedy.³⁶ In this connection it is important to note that not all states are party to the ICCPR and therefore not bound by it. As of October 2005 there were 154 state parties to the ICCPR, several of whom had registered exceptions to the covenant. In 2004 the Commission on Human Rights adopted a resolution which stated that '*amnesties should not be granted to those who commit violations of human rights*'.³⁷ The Inter-American Commission, which has looked into a number of cases where amnesties have been granted, has found that *all* these amnesties were incompatible

³¹ Universal Declaration, article 10.

³² Office of the High Commissioner for Human Rights, resolution 2004/72, article 13.

³³ Articles 9 and 10 of the ICTY and ICTR respectively.

³⁴ Rome Statute of the ICC, Article 20.

³⁵ Quoted in Orentlicher, 'Independent', p. 12.

³⁶ Mendez, 'Accountability', p. 259.

³⁷ Office of the High Commissioner for Human Rights, *Impunity*, Resolution 2004/72.

with the American Convention.³⁸ International law in general identifies a number of fundamental human rights, which are violated by acts such as torture, extrajudicial execution, disappearances and prolonged arbitrary arrests, and for such acts a general amnesty cannot be granted.³⁹

A body of law has grown that supports not only criminal prosecution, but also a right to non-judicial means of addressing past crimes. There is a right to know the truth about what took place during conflict and the fate of the victims: *'every people has the inalienable right to know the truth about past events and about the circumstances and reasons which led, through systematic, gross violations of human rights, to the perpetration of heinous crimes....'*⁴⁰ – supporting truth-seeking processes in the aftermath of war. Moreover, international customary and treaty law sets out state responsibility to redress wrongful acts committed and ensure adequate reparations. International law on reparations has developed considerable in the last few years, and it establishes an emerging obligation on states to provide redress for violations of human rights abuses. For example, *The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* calls upon states to ensure reparations in the form of restitution and compensation for victims of human rights abuse.⁴¹ *The UN Articles on State Responsibility for Internationally Wrongful Acts* set out state responsibility to ensure that if a wrongful act is committed, to cease that act and offer 'assurances and guarantees of non-repetition'; they also state that it is an obligation on the state to provide full reparations for the injuries suffered by the wrongful act.⁴² In 2005 *The Revised UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* set out an obligation of state parties to provide effective remedies and reparations to victims of human rights abuse.⁴³ The principles outline that reparations should be prompt and effective and that they should be proportional to the harm suffered, it emphasises that where the state is to blame for the violations suffered the state shall provide reparations.⁴⁴

There has also been considerable development at regional level regarding reparations including within the European Union, the African Union and the Organisation of American States. All these developments deal directly with state responsibility for reparations after violations.⁴⁵ In addition, both the ICTR and the ICTY address reparations dealing with individual responsibility for reparations. The judges in both tribunals have suggested that the UN should create a special

³⁸ Orentlicher, 'Independent', p. 12.

³⁹ Mendez, 'Accountability', p. 260.

⁴⁰ Principle 1, Annex II, 'Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity', *The Administration of Justice and The Human Rights of Detainees*, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CH.4/Sub.2/1997/20/Rev.1

⁴¹ Articles 8-13, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly resolution 40/34, 29 November 1985.

⁴² Articles 30 and 31, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, International Law Commission 53rd Session, November 2001.

⁴³ II, 3,d, Office of the High Commissioner for Human Rights, Human Rights Resolution 2005/35.

⁴⁴ IX, 15, *ibid*.

⁴⁵ Huyse in Bloomfield, Barnes, Huyse (eds.), *Reconciliation*, p. 150.

mechanism for reparations that would function together with the tribunals.⁴⁶ Moreover, the Rome Statute of the ICC places a strong emphasis on reparations, and also outlines that the court may order the awarding of reparations. It also establishes a trust fund for ‘the benefits of the victims of crimes within the jurisdiction of the court and the families of such victims’.⁴⁷ Hence the right to reparations is firmly entrenched in international law, but due to the numerous constraints on states in a post-conflict setting it is not always realisable.

2.2. Trends and Obligations

The development of international law has had a significant impact upon transitional justice and how it is conducted and enforced in the 21st century. However, the path of transitional justice is not a smooth one. It faces a host of problems, particularly because it frequently is looked upon as a choice between judicial and non-judicial mechanisms or even a choice between particular mechanisms of accountability.

Although there is an emerging trend towards an obligation to prosecute and investigate gross violations of human rights, and there exist a number of treaty obligations binding state parties – there is no agreement among legal scholars that there exists a customary legal obligation.⁴⁸ Critically however, even if an obligation to prosecute existed it would not solve all transitional justice issues in all post-conflict societies. Prosecution is not a solution for all post-conflict societies, arguing that it ignores the multitude of issues and actors influencing the processes in any given post-conflict country, and more importantly, such an argument ignores that enforcing prosecution in such a context may, rather than promote justice and sustainable peace, enhance instability and renew conflict. To heighten the chances of prosecution promoting sustainable peace it needs to be the choice made by the local population and have local ownership. If prosecution is enforced in a post-conflict society on the basis of an evolved customary obligation – even if the country lacks the capacity to conduct trials or it is against the wishes of the majority of the local population – it may have adverse effects.

Importantly it does not necessarily have to be a choice between criminal prosecution and non-judicial approaches. There is scope for a complementary approach to justice within the framework of emerging international law, where different mechanisms can be applied within a post-conflict society. International law will continue to evolve to protect the rights of victims and accused; however, what is the best approach in any given post-conflict society at any given time needs to be resolved taking all the different factors into account so as to best promote reconciliation and sustainable peace.

⁴⁶ XVI, para.55, Secretary-General’s Report on The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, S/2004/616, 23 August 2004.

⁴⁷ Articles 75 and 79, The Rome Statute for the ICC, entered into force 1 July 2002.

⁴⁸ See e.g. Alexander, *Scoping*, p. 13

3. PROSECUTION

Prosecution has received a lot of criticism as well as support as a transitional justice mechanism. There has been, as seen above, growing support in international law for criminal prosecutions of crimes against humanity and gross violations of human rights. But prosecution necessitates solid democratic security sector governance, where the process is accountable, transparent and legitimate. This is frequently lacking in post-conflict societies during a peacebuilding process. Domestic judicial systems are regularly characterised by an absence of good governance and legitimacy, which is a primary reason for instituting hybrid/mixed courts so as to ensure higher legitimacy and transparency. It also reduces the potential for 'victor's justice' which is a key objection raised against prosecutions. Prosecution is dependent upon a certain level of security sector reform to be successful, but it can also positively promote SSR. There exists in some cases, as will be established, a mutually reinforcing relationship between SSR and prosecution. It is a complex relationship, where sequencing of the different actions is paramount to success.

This section emphasises that judicial, police and penal reform are central for the ability to conduct domestic prosecution, but also that holding domestic trials can potentially enhance and strengthen trust towards state institutions, critical for ensuring legitimacy. It underlines that there are in some cases severe difficulties that need to be overcome for domestic prosecution to be a useful tool of transitional justice, but that it can under certain circumstances aid reconciliation of society. However, it underscores that domestic prosecution can never alone suffice to redress past abuses of human rights, but if used should be applied in conjunction with other transitional justice mechanisms. It emphasises that prosecution in the form of hybrid courts has the potential to positively influence SSR, particularly the development of the domestic judicial system and law reform, but the limitations of these courts are also underlined.

3.1. Domestic Prosecution

Domestic trials against alleged perpetrators of war crimes and gross violations of human rights take place within the formal judicial system, applying domestic laws, using national judges and prosecutors, and they have regularly been criticised as negatively affecting reconciliation and post-conflict reconstruction.⁴⁹ It is particularly the potential for bias and unfairness of trials and the possibility that they may lead to further destabilisation and continued conflict, which are voiced as objections – the potential for destabilisation increasing when there have been no attempts at SSR, particularly of the security forces. In essence the discourse on the suitability of domestic trials to deal with past crimes is on two levels: whether a domestic judicial system has the capacity, after prolonged conflict, to conduct fair and unbiased trials, which is dependent upon a certain level of security sector

⁴⁹ See e.g. J. Snyder and L. Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice', *International Security*, vo.28, no. 3, Winter 2003/04, p. 5 and p. 25

reform, and on a more fundamental level whether or not a punitive mechanism should at all be used in a post-conflict setting.

A main argument used against domestic prosecution as a transitional justice mechanism is that the trials may turn into ‘victor’s justice’. This is a risk principally where one party has won an outright victory and seeks to use the subsequent trials to secure its own position through the judicial process, and perhaps also to write a particular version of historical events through the medium of the court. This risk is lessened when the end of the conflict has been reached through a peace agreement and negotiations. Yet, it should not be assumed that when domestic prosecution is chosen as a means to redress past violations of human rights it will automatically constitute vengeance or victor’s justice. Crimes are prosecuted in all societies because there is a desire not to see them go unpunished, this does not mean that all prosecutions are vindictive.⁵⁰ Nor should they be viewed as such in post-conflict societies, although it is acknowledged that the risk is considerably higher.

3.1.1. Judicial Reform

Domestic prosecution has been and continues to be a choice for dealing with past abuses by many governments. A large number of Latin American countries held domestic trials following conflict and authoritarian regimes, and domestic prosecutions have increased significantly as a transitional justice process post-1990,⁵¹ for example it has more recently been used in Rwanda, the Democratic Republic of Congo (DRC) and Iraq.

Yet, often extensive judicial reform is needed in post-conflict societies which have experienced years of violent conflict. Commonly there is an absence of trust in the system, which may have been corrupt; non-functioning; condoning human rights violations conducted by security forces; or effectively non-existent. Immediately after the end of a conflict it is therefore extremely unlikely that fair and unbiased trials can be held. Not only can there be extensive corruption and abuse within the judicial system, but the infrastructure and personnel – judges, prosecutors, legal materials and courthouses, may also be lacking. The latter was the case in both Timor-Leste and Rwanda where there was an immense shortage of personnel. In Rwanda an estimated 80 per cent of all justice personnel were killed or had become refugees during the genocide. In addition, the courts, records, law books and supplies had been destroyed or stolen, and copies of the penal code and code of criminal procedure were non-existent.⁵² In Timor-Leste there was a lack of even the most basic infrastructure, most of which had been destroyed during the conflict, and there was a lack of court houses, law books, supplies and criminal and penal codes.⁵³ There are in most post-conflict settings considerable obstacles

⁵⁰ Neier in Mendez, ‘Accountability’, footnote 64, p. 276.

⁵¹ Sikkink and Walling, ‘Errors’, pp. 8-10.

⁵² ‘Prosecuting Genocide in Rwanda: A Human Rights First Report on the ICTR and National Trials’, Human Rights First, July 1997.

⁵³ The Conflict Security and Development Group, *A Review of Peace Operations: A Case for Change*, 2003, p. 257.

which need to be addressed before prosecutions can be conducted.⁵⁴ Sequencing in implementing prosecution and SSR becomes imperative.

The level of political will, corruption, functionality, and trust in the system will influence a) whether domestic prosecution can and will be chosen as a mechanism of transitional justice and b) how long time it will take before trials can begin. Domestic prosecution for past crimes and judicial reform are in many ways interdependent, there needs to be a level of judicial reform for domestic trials to be held, yet these can also affect long-term judicial reform. Judicial reform is a long-term process – how long-term is dependent upon the state of the judicial system – which can be contrary to the immediate demands for justice arising within a post-conflict setting. However, it is not necessary to fully reform or restore a judicial system prior to conducting domestic prosecution for past abuses, on the contrary domestic trials can also contribute to the development of rule of law,⁵⁵ as long as the minimum requirements of a fair trial are guaranteed. These trials can positively influence the development of the judicial system and strengthen it by establishing accountability for past crimes; serving as a role model for the judiciary dealing with ordinary crimes; and ensuring an end to impunity. A key challenge is therefore to ensure immediate support for judicial reform in post-conflict peacebuilding so that domestic prosecution can be a viable transitional justice alternative, and in turn strengthen long-term judicial reform.

Because of the need for judicial reform a number of states have chosen to conduct domestic prosecution only long after the conflict or abusive regime has ended. In Latin America and Central and Eastern Europe, the majority of trials were conducted after nearly a decade.⁵⁶ By sequencing the process this way it ensures a reformed judicial and security sector, which is transparent and accountable. But it can be complicated by civil society demanding an immediate process of justice. Inevitably postponing trials can be seen as denial of justice. Postponing prosecution for several years, to secure a level of judicial reform and security sector governance, may work in some contexts, but it is not necessarily something that should be viewed as a solution in all post-conflict settings. In Rwanda although over 100,000 alleged perpetrators were arrested after the genocide in 1994 still by 2002 only six per cent of the detained had been tried in a court of law; this postponement of justice led the Rwandan government to use the traditional *gacaca* courts, acknowledging that it would be impossible for all the accused to be tried within the Rwandan judicial system.⁵⁷

Delaying criminal prosecution, if this is a chosen mechanism by which to pursue justice after conflict, can be considered by civil society as a means to avoid dealing with the issue of justice. If so it can de-legitimise the government; negatively affect SSR by further eroding trust in the judicial system; disillusion civil society; and

⁵⁴ Christiane Wilke, *Domestic Prosecutions for Massive Human Rights Violations: Lessons from Argentina and Germany*, Memorandum for the International Centre for Transitional Justice, 18 November, 2004, p. 11.

⁵⁵ See also Smulovitz quoted in UNDP, *Access to Justice*, Practice Note, 9 March 2003, p. 29.

⁵⁶ Sikkink and Walling, p. 11.

⁵⁷ Genocide and Justice, The Government of Rwanda, <http://www.gov.rw/government/genociddef.html>, accessed 15 November 2005.

potentially encourage a cycle of vengeance. However, if a complementary approach to transitional justice is applied where other mechanisms come at earlier stages, for example a truth commission upon which prosecutions may be built⁵⁸, this could be minimised.

3.1.2. Police and Penal Reform

For a rule of law system to function effectively, reform of the judicial, penal and police systems need to be approached in a holistic manner. Moreover, if domestic prosecution is to be used as a transitional justice mechanism both police and penal reform, not only judicial reform, need to be addressed early on in post-conflict peacebuilding.

Deficient enforcement systems are the source of a large number of the problems faced in domestic judicial systems.⁵⁹ Therefore these need to be tackled if domestic prosecution is going to be a viable method of addressing past crimes in a post-conflict society. Police reform, including capacity building and human rights training, is irrevocably linked to domestic prosecution. Capacity-building is a key element of both SSR and transitional justice and the effect of police capacity-building upon transitional justice is vital. Police capacity and capability is frequently extremely limited in post-conflict settings, yet arresting perpetrators, their treatment and evidence gathering is central to ensuring fair domestic prosecution.

After the genocide in Rwanda in 1994, because the police did not have the capacity to arrest as a direct result of the genocide, all arrests were conducted by the military. However, it is 'a violation of the rule of law for a military force to conduct arrests'.⁶⁰ Using forces other than police services can adversely affect the validity of domestic prosecution. It may impinge on the rights of the accused thereby undermining the justice system as a whole. It can have a long-term negative effect on security sector reform, by violating rule of law norms it continues to set a negative precedent for the domestic justice system, not enhancing trust but undermining it and not instituting change in the justice system. If transitional justice mechanisms are to have a positive influence on security sector reform, in this case the domestic judicial system, they need to adhere to principles of rule of law and draw a line between past abuse and present accountability.

The existence of evidence and the police capacity to collect it is central for holding trials, but in a context where mass atrocities have been committed, perhaps in conjunction with widespread destruction, the very existence of sufficient evidence may be lacking. Cambodia and Sierra Leone are both examples where evidence

⁵⁸ See section on truth commissions, this will depend upon the mandate of the truth commission, political will and whether or not it includes conditional amnesty.

⁵⁹ UNDP, *Access*, p. 15.

⁶⁰ Rama Mani, *Beyond Retribution, Seeking Justice in the Shadows of War* (Cambridge: Polity Press, 2002).

has been difficult to find.⁶¹ Evidence can also more easily disappear in such contexts, particularly where the police service is corrupt. This is a concern that has been voiced in the DRC where although evidence existed it sometimes disappears.⁶² Moreover, the capacity to collect evidence in a domestic setting after conflict is often limited or lacking due to the absence of a proficient police investigative capacity. There may be numerous reasons for the lack of this proficiency including a near-eradication of the police as a service, as in Rwanda, a profound and deep-seated level of corruption, incompetence and abuse, as in Haiti, a near non-existent local force due to previous occupation, as in Timor-Leste, or simply that very few police services have the experience and capacity to deal with investigations of vast atrocities and breaches of human rights. Evidence-gathering is critical to domestic prosecution and a challenge for domestic prosecutors and police investigators when this is used as a transitional justice mechanism. Without sufficient evidence and correct evidence procedures the trials may be jeopardised. Building police capacity can therefore be of great importance to holding domestic trials. Again there is the issue of sequencing – police reform needs to be addressed at some level prior to holding domestic trials to ensure the legitimacy of the trials. To ensure a faster process of justice, international investigative assistance can be useful, although it is not without problems. International investigative assistance has been criticised because international investigators are not always experienced police investigators or lawyers, but human rights investigators without sufficient knowledge of what evidence is needed in a court of law and how to adequately collect it.⁶³ However, if conducted properly such assistance can be invaluable in that it helps build police capacity thereby contributing to police reform. Therefore, domestic prosecution as a transitional justice mechanism can directly affect police reform and capacity-building, if assistance to reform is given and the linkage between police reform and domestic prosecution acknowledged from early on. Significantly, without any efforts in the area of police reform, domestic prosecution may suffer very negative consequences.

Penal reform is given significantly less resources and attention in post-conflict peacebuilding. There is unwillingness among donors to support penal reform, but it is an essential part of the security sector. Moreover, the treatment of the accused – where and under what circumstances they are detained and ensuring that the rights of the accused are not violated pending trial – is critical in the context of criminal prosecution for past and present crimes. In Rwanda the accused awaiting trials were held in overcrowded facilities where deaths from disease and malnutrition were rife.⁶⁴ In the DRC there is severe overcrowding, there is limited to no food available for prisoners – in one prison they are only given food on Thursdays – military, civilians, men, women and children are incarcerated together, abuse, illness and death is the result.⁶⁵ This pattern is also repeated in Haiti where over 90 per cent of all detained were in pre-trial detention as of June

⁶¹ Mani, *Beyond*, p. 97.

⁶² Interview by author with Congolese lawyer in Kinshasa, May/June 2005.

⁶³ Interview by author with UN staff member in Kinshasa, May/June 2005.

⁶⁴ Alexander, *Scoping*, p. 18.

⁶⁵ Interviews by author with UN staff in Eastern Congo and Kinshasa, September 2006.

2006, there was severe overcrowding (4,000 prisoners to 2,500 square metres of cell space), lack of medical attention and food.⁶⁶ Penal reform as part of ensuring a fair accountability structure, including capacity-building of correctional officers, needs to be addressed or it can undermine domestic prosecution as a transitional justice mechanism. Prosecution cannot be an option if the punishment will contravene the same international human rights laws that the prosecution was meant to address in the first place.

Police and penal reform are both therefore closely linked to the capability of holding domestic trials. Holding domestic trials in an environment where the rights of the accused will be violated either during the trial itself, prior to or after incarceration will undermine rule of law and security sector governance. It will not be an accountable or legitimate process. It is difficult to achieve the same standards of domestic trials in a post-conflict society as those of a democratic stable country which has not experienced conflict for decades, and all transitional justice mechanisms should be seen in this context, and undertaken in the framework it provides. However, building a reformed rule of law system and security sector upon trials that violate the self-same rights that the accused are on trial for will not lead to reform or stability in the long-term. Judicial, penal and police reform affects and is affected by transitional justice, and the sequencing of these issues are critical and therefore they need to be holistically focused upon so as to ensure that the effects of implementing domestic prosecution are not negative.

3.1.3. Engendering Trust in State Institutions

Security sector reform is not only limited to changing institutions, ensuring oversight and accountability mechanisms and creating non-corrupt efficient management structures. It is also about ensuring that civil society trusts the new security sector mechanisms, whether they be the police services, military forces, intelligence services, judicial systems or oversight mechanisms. It is here where the link between domestic prosecution and security sector reform becomes particularly evident.

In times of conflict and under authoritarian regimes, judicial systems lack legitimacy and there can be profound distrust of the system among the civilian population, in particular because these systems are often used as part of the systematic abuse of the population or silently endorse the sitting regime's pattern of violence, whilst doing little to encourage change. Domestic prosecution of past human right violators can therefore play a central role in enhancing trust in a system where trust may for years have been non-existent.

Using domestic courts can enhance this trust not only towards the judicial system, but towards the new government which has chosen this as a way to deal with past crimes. It can give additional legitimacy to the new regime, if applied in a fair and

⁶⁶ Interviews by author with UN staff in Haiti and Haitian correctional officers, June 2006.

unbiased manner. It establishes an accountability, which previously did not exist. It emphasises that the government acknowledges that the violations should not have taken place.⁶⁷ In this way domestic prosecution strengthens accountability and transparency, which is not only central to reconciliation, but also critical to reform.

Trust in state institutions can also be enhanced because domestic prosecution is a more locally owned process than an international transitional justice mechanism, and additionally it takes place where the violations occurred, thereby having a more direct impact upon victims, reconciliation and reform than justice mechanisms situated outside the country.⁶⁸ This may also reinforce human rights norms and strengthen democracy.⁶⁹ If domestic prosecutions are conducted fairly, the effect it can have upon the formal judicial system can therefore potentially be far-reaching; however, the challenges are many.

3.2. Hybrid/Mixed Courts

As a result of the multiple inherent problems with applying domestic prosecution in post-conflict societies, particularly the potential lack of transparency and legitimacy and the need for oftentimes considerable SSR, in the 1990s a different type of transitional justice mechanism became increasingly promoted: hybrid or mixed courts, also referred to as ‘internationalised’ domestic trials. These hybrid courts were not only perceived to have numerous advantages over domestic prosecution, but also international tribunals and the ICC. They do, for example, need far less resources than an international tribunal.⁷⁰ The framework of these courts is diverse using a combination of international and domestic elements and containing a variety of different features. They may have a structure incorporating judging panels with both national and international judges and they may apply a mixture of domestic and international law.

Hybrid courts as a means of prosecuting alleged human rights perpetrators in a post-conflict setting have been promoted because they ensure greater fairness and impartiality in the proceedings, enhance local ownership of the justice process, have a positive impact upon rule of law, influence capacity-building, and promote sustainable peace. It is especially in three areas that hybrid courts can potentially positively influence SSR: legitimacy and transparency, capacity-building, and strengthening the rule of law and law reform. However, the lessons that we can thus far draw from the experience of hybrid courts both as a transitional justice mechanism and as a factor influencing SSR have been mixed.

Hybrid/mixed courts have been used as a means to redress past crimes in, for example, Kosovo, Timor-Leste, Cambodia and Sierra Leone. There are similarities

⁶⁷ See also Wilke, *Domestic*, p. 5.

⁶⁸ See also Alexander, *Scoping*, p. 23.

⁶⁹ Wilke, *Domestic*, p. 1.

⁷⁰ Antonio Cassese, ‘The Role of Internationalised Courts and Tribunals in the Fight Against International Criminality’, in Cesare P. Romano et al (eds), *Internationalised Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (Oxford: OUP, 2004), p. 6.

in all the hybrid courts that have been established thus far and generalisations can be made, although in the different contexts the hybrid courts have taken on different forms – reflecting the conflict, the actors, the international community’s role and the historical, cultural and political framework. In Timor-Leste ad hoc courts consisting of national and international judges were established termed Special Panels, and in Kosovo international judges and prosecutors have been used on a case-by-case basis in the domestic justice system rather than establishing a court in which the international staff was present at all times. These two are examples of internationalising domestic prosecution, by introducing elements of international law and judges. However, the Special Court of Sierra Leone is similar to an international court, but with domestic features. In Cambodia the Extraordinary Chambers contains a majority of Cambodian judges, but gives the international judges a ‘super-majority’, that is any judicial decision taken should have the agreement of at least one international judge.

3.2.1. Heightened Legitimacy and Transparency

Conducting trials in hybrid courts to address past human rights violations has the advantage that they can be perceived as more legitimate and fair than domestic prosecutions. Due to the inherent difficulties with domestic prosecutions, an inclusion of international elements in whatever combination or form can heighten legitimacy and transparency of the trial process. In particular the chances of domestic prosecution turning into victor’s justice is eliminated by applying a form of hybrid or mixed court, which is one of the key reasons why many actors in post-conflict societies support such a form of transitional justice and international involvement.

One objective of the hybrid model in Kosovo – utilising a case-by-case international participation approach and only applying domestic law – was also to enhance the legitimacy and impartiality of the domestic courts.⁷¹ This hybrid court was a reflection of the particular circumstances in Kosovo and the ethnic tensions which were prevalent throughout the judicial system. It was difficult to find qualified and experienced people who also were politically acceptable. A key problem with this case-by-case approach is that the decision on what cases should have international involvement rests with the Special Representative to the Secretary-General (SRSG). Although an international, and impartial decision it is a nevertheless a political decision, which may weaken the legitimacy of the process, because it is not sufficiently de-politicised. It is of particular importance as setting an example of legitimacy and the division of the political and judicial spheres for the domestic judicial system. If this becomes viewed as a political act it can negatively affect judicial reform by setting a precedent for political involvement in the judicial process.

⁷¹Michael Hartmann, ‘International Judges and Prosecutors in Kosovo: A New Model for Post-Conflict Peacekeeping’, *USIP Special Report 112*, October 2003.

Increased legitimacy was also one objective of the Special Panels that were set up in Dili District Court in Timor-Leste in June 2000,⁷² which combined international and Indonesian law, and had both international and national judges. There were, however, a range of problems with the hybrid court; it suffered inadequate staffing, funding and administration. This was also reflected in the court proceedings where the court found it difficult to provide competent defence lawyers for the alleged perpetrators.⁷³ This rather than strengthening legitimacy added to undermining it. The problems of the court were, particularly in the beginning, so profound that it was commented that the court did not meet the minimal standards of a fair trial.⁷⁴ These problems reflected the state of the domestic judicial system. When the United Nations Transitional Administration in East Timor (UNTAET) was established, the Timorese justice system was non-existent and needed to be rebuilt. The Special Panels therefore worked in an environment that not only lacked the human capacity, but also the infrastructure to handle such cases. Consequently local judges were fast-tracked so that they could sit on the Special Panels together with the international judges. The candidates who went through the fast-tracking process were often young students right out of law school, who were trained in a few weeks to become judges.⁷⁵ This process of fast-tracking did not strengthen legitimacy since a situation arose in which young inexperienced judges were confronted with cases where figures of authority sought to undermine their position. However, despite the problems of the Special Panels the fact that they were a hybrid solution gave them more credibility, authority and legitimacy than a transitional justice mechanism consisting only of national judges. The existence of the Special Panels was especially critical since the Indonesian Human Rights Court did not provide any adequate measure of justice, an international tribunal was not created and the Commission of Truth, Reception and Reconciliation (CAVR) had a limited mandate. Therefore, although their legitimacy was questioned due to significant problems in the proceedings, it nevertheless had higher legitimacy than a purely domestic process would have had.

Civil society organisations and local lawyers in the DRC supported the prospect of the establishment of a hybrid/mixed court to deal with the crimes committed during the war.⁷⁶ They argued that a hybrid court would heighten the legitimacy of the proceedings, by limiting political influence and military involvement in the prosecution.⁷⁷ Congolese civil society groups and other organisations came together in June 2005 to discuss the advantages and disadvantages of a hybrid court. They unanimously adopted a declaration stating that the participants firmly

⁷² The Special Panels were formed by UN Transitional Administration in East Timor regulation 200/15.

⁷³ The Conflict Security and Development Group, *A Review of Peace Operations: A Case for Change*, 2003, para. 270.

⁷⁴ Charles Scheiner in 'East Timor still awaits justice one year after UN call for international tribunal', *East Timor Action Network*, 31 January 2001.

⁷⁵ Interviews by author with Timorese judges, 2001.

⁷⁶ A war in which over 3.8 million died. Matt Hobson, *Forgotten Casualties of War. Girls in Armed Conflict, Save the Children*, 2005, p. 14.

⁷⁷ Interviews by author in Kinshasa, DRC, May/June 2005.

supported the creation of a special mixed chambers for the DRC to hear crimes against human rights.⁷⁸

Hybrid courts can ensure that fair and unbiased trials are conducted, thus strengthening the chances of reconciliation of war-torn societies. In addition, hybrid courts can serve as an example of how legitimate court cases should proceed, thereby influencing reform of the domestic judicial system. However, when they have problems with legitimacy or are seen to be politicised, the impact on reform of the domestic judicial system can become negative rather than positive, thus undermining judicial reform. A key challenge is therefore, when hybrid courts are established, to ensure that they have legitimacy, are non-politicised and are adequately funded and staffed, so that they can have a direct positive effect upon wider domestic judicial reform.

3.2.2. Capacity-Building

Capacity-building is a crucial component of security sector reform, it is vital for sustainable development and ensuring the functionality of all parts of the security sector. Hybrid courts can play a special role in which to attempt capacity-building through transitional justice within the wider framework of judicial reform. As a consequence of working side-by-side with international judges and prosecutors, local legal staff can learn and increase their own skills and capacity in their various functions. International staff can effectively serve as role models in the context of a hybrid court. There can be a transfer of skills, which can have a long-term impact upon domestic judicial reform. However, whether or not there will be capacity-building and its extent is dependent upon a variety of factors including: the state of the domestic judicial system, the focus upon capacity-building by the hybrid courts, resources, and whether or not hybrid courts are viewed as a possibility for influencing judicial reform.

An objective of the Special Court in Sierra Leone is to leave a legacy of judicial capacity, as stated by the prosecutor to the court ‘we need to leave them....a cadre of trained and dedicated court personnel to carry on the hard work after we depart’.⁷⁹ This is in addition to the material resources that will be left such as the court house, detention facilities and the court library.⁸⁰ Sierra Leoneans work in both professional and administrative capacities within the court, as lawyers, judges, investigators, outreach associates and witness protection officers, and comprise 50 per cent of all staff; hence it has been argued that the court helps build the professional capacity of Sierra Leoneans.⁸¹ Although there has been an extensive emphasis upon the importance of leaving behind a legacy in the judicial system in terms of capacity-building, some Sierra Leonean government officials, as

⁷⁸ Coalition Congolaise pour la Justice Transitionnelle, *Rapport Final du Seminaire sur les Chambres Specialisees Mixtes au sein des Juridictions Congolaises*, Centre Catholic Nganda, Kinshasa, Juin 2005.

⁷⁹ David Crane, *Dancing with the Devil. Prosecuting West Africa's Warlords Current Lessons Learned and Challenges*, 2004.

⁸⁰ President of Special Court for Sierra Leone Briefs Security Council: *Addresses Funding Shortfall, Security, Status of at-large Indictes*, UN Security Council, 5185th Meeting, SC 8391, 24 May 2005.

⁸¹ Human Rights Watch, *Accessibility and Legacy*, September, 2004, B.1.

well as civil society, have expressed a desire that they should play a more prominent role in the court, which is felt to be dominated by international actors, and more was expected.⁸² It has also been commented that the transfer of skills has been and will continue to be relatively absent, because the Special Court is distinctly different from the domestic judicial system, and more international than other hybrid mechanisms, and doubts have been raised as to whether it can have a significant impact upon capacity-building.⁸³ It is too early to determine the extent of the impact the Special Court will have upon the domestic judicial system in terms of capacity-building, but the critique arisen from participating Sierra Leoneans is troubling. Nevertheless, due to the number of professionals involved with the court it is hoped that this will have some influence on the judicial system.⁸⁴

Local capacity was not built as a result of the Special Panels in Timor-Leste, although UNTAET had transitional authority, after international withdrawal there was still not sufficient expertise or capacity to continue the Special Panels. This could have been a reflection of the complete devastation of the judicial system in combination with fast-tracking judges and prosecutors and that the Special Panels operated only for a limited period, which was not sufficient to ensure adequate capacity-building. Or more probably it was not a key focus on the Special Panels at the time – wider judicial reform was not part of the Special Panels’ mandate with the result that they were not sustainable upon the withdrawal of international assistance.

Capacity-building can be a beneficial effect of hybrid courts, but it needs to be focused upon from early on. Even when capacity-building is an emphasis from the beginning, as in Sierra Leone, it does not necessarily follow that it will be successful or perceived as such by the population. For capacity-building to be an effect of hybrid courts there needs to be significant coordination and cooperation with SSR processes and donors, a political willingness to expand the mandate of hybrid courts to explicitly incorporate capacity-building, sufficient resources allocated and local ownership throughout.

3.2.3. Strengthening Rule of Law and Law Reform

In post-conflict countries hybrid or purely international mechanisms are frequently favoured, not only for their legitimacy and impartiality, but also for how they can potentially affect the rule of law and law reform. The existing laws in a post-conflict country may not be suitable for addressing past violations of human rights, or any other type of crime, since they may in themselves be abusive. In relation to peace operations, the Brahimi report suggested that generic penal and criminal codes could be established to be used in an interim period until the

⁸² Ibid.

⁸³ Interview by author with staff of the Sierra Leonean truth commission, New York, April 2005.

⁸⁴ See also Human Rights Watch, *Accessibility*.

country has developed and agreed upon its own reformed codes and laws.⁸⁵ These may not only serve as a practical tool in an interim period, but also influence local law reform. It is critical however, that these transitional codes are viewed as an interim measure only, and that they should not intentionally set out to influence law reform; law reform should be locally owned. Yet, they can positively influence reform; for example in Kosovo, although the UN's powers are interim some of its legislation will undoubtedly last beyond the end of the UN mandate. The use of different types of laws in the hybrid courts, such as a combination of local and international law, as for example in Timor-Leste, can promote reform of laws by incorporating international standards of human rights law.

In addition to the capacity-building part of the legacy programme of the Special Court of Sierra Leone, the programme also focuses on propagating rule of law norms and values. Judicial reform is not part of the mandate of the court, but it aims to contribute to the processes through conducting training programmes for, for example, magistrates and prison officers, whilst holding a continued dialogue with the communities.⁸⁶ An objective has been to 'engender public awareness that criminal accountability for such crimes was possible.'⁸⁷ As with capacity-building it was at the time of writing not clear how this has influenced the people working with the judicial system, or affected the perceptions of human rights and the domestic justice system by the population at large. However, what is apparent is that there is still need for extensive reform of the domestic judicial system of Sierra Leone.

If hybrid courts incorporated judicial reform programmes within their mandate, they could have a significant impact upon domestic judicial systems. It is a key challenge therefore that the potential impact of hybrid courts is understood and assessed, resources allocated and where possible judicial reform programmes incorporated as part of the mandate of the court. However, it is acknowledged that resources are commonly scarce and addressing past violations complicated enough without having a greater mandate of judicial reform. Coordination of efforts between hybrid courts and agents of SSR is in this context important. Yet, even without such mandates the potential for influence is nevertheless present in terms of leading by example: by working alongside international judges and prosecutors, implementing impartial and unbiased trials, which can affect positive change.

⁸⁵ *Report of the Panel on United Nations Peace Operations*, A/55/305-S/2000/809, 21 August 2000, pp. 79-83. Currently there are a number of such codes being established. United States Institute of Peace have been developing these codes. See <http://www.usip.org>

⁸⁶ Crane, *Dancing*.

⁸⁷ President of Special Court for Sierra Leone Briefs Security Council: Addresses Funding Shortfall, Security, Status of at-large Indictées, UN Security Council, 5185th Meeting, SC 8391, 24 May 2005.

3.3. Challenges of Prosecution

In post-conflict societies even where the minimal standards of a fair and unbiased trial can be ensured, there are multiple, both practical and political, challenges facing both domestic prosecution and hybrid courts.

3.3.1. Destabilisation

The fear of destabilisation and renewed conflict is a primary reason why new regimes sometimes avoid prosecution and why commentators frequently argue against it – emphasising other more reconciliatory methods of transitional justice. It has been repeatedly stressed that prosecution may affect political stability and hence lead to destabilisation or obstruct the transition to democracy.⁸⁸ This view has also frequently been reflected by government officials in post-conflict societies. For example, a Ministry of Justice official in the DRC, although in favour of domestic trials for past abuses, felt that in the transitional phase it would most likely lead to destabilisation.⁸⁹ President Xanana Gusmao in Timor-Leste favoured a truth and reconciliation commission over any type of prosecution fearing that it could create difficulties for Timor-Leste's relationship with Indonesia and lead to destabilisation.⁹⁰

Instability as a result of trials, because the perpetrators of human rights violations feel persecuted and therefore incite to violence and/or because the security sector has not been reformed and still has significant power, is a risk in some, but not all post-conflict societies. It should therefore not be used as a blanket argument against criminal prosecution in all post-conflict settings, but assessments as to the level of risk should be undertaken prior to determining the type(s) of transitional justice mechanisms to be applied. Critically, unless past crimes are dealt with in some way, whether by prosecution, truth commissions or traditional mechanisms and that this is a method supported by the majority of the population, instability may still result. If the victims of violence feel that they have been betrayed by their new government in relation to past crimes, not only can this result in a lack of trust and de-legitimation of the government, but it can lead to violence from a population who feel they need to take justice into their own hands. There is an expectation of change towards accountability in post-conflict societies; if this expectation is not met in any form it can threaten stability and eradicate the potential for reconciliation. It can also strengthen impunity, thereby undermining rule of law and security sector reform. Allowing impunity to reign without setting in place any accountability structures whether judicial or non-judicial or dealing in some way with the past, will ultimately affect security sector reform, because it is extremely difficult to build an accountable and transparent security sector upon impunity. If former abusers have not gone through a process of accountability or

⁸⁸ See e.g. Huyse, 'Justice' in Bloomfield, Barnes, Huyse (eds.), *Reconciliation*, p. 97.

⁸⁹ Interview by author with Ministry of Justice official, Kinshasa, May/June 2005.

⁹⁰ 'Xanana Gusmao's Views on Justice', http://www.easttimor-reconciliation.org/Gusmao_Justice-E.htm

acknowledgement there is little to stop them from continuing their abusive behaviour.

The fear of destabilisation in a post-conflict society is influenced by numerous factors including the context of the conflict, history, personalities of key actors, type of abuses, the strength of the outgoing regime and security sector, particularly the military forces, police and intelligence services. This can lead to a situation in which trials are avoided and other mechanisms promoted to stifle the supporters of a criminal process of justice. The strength of the security forces – and the level of security sector reform – can dictate whether or not prosecutions are chosen. For example, after the conflict in Chile an inquest was held, but due to the continued power of the military no trials were conducted, a conflict between the new government and the military was thus avoided.⁹¹ A general amnesty was granted to the military in Uruguay, because it was thought that destabilisation would result if the government were to proceed with prosecutions, because of the strength of the military and lack of reform.⁹² Yet Argentina conducted prosecutions of the perpetrators of the Dirty War, because the relationship and power of the military and government were different to that of Chile and Uruguay. Transitional justice and its outcomes are affected by the position and power of the security sector – if it is still powerful, transitional justice will be limited since the new government in all probability will fear reigniting the conflict. It then becomes a strategic choice viewed as one between peace and justice. There needs to be a certain level of reform of the security forces so that, for example, the military forces can no longer unduly influence the government's choices of transitional justice.

Sequencing is therefore vital; transitional justice will have a greater chance of success if there is some level of SSR prior to the transitional justice process. However, at the same time if prosecutions are conducted it can positively influence security sector reform, by emphasising accountability and transparency and limiting the influence of the security sector upon political choices. A key challenge for policy makers is therefore to promptly assess the strength of the stakeholders and begin a process of SSR so as to ensure that the government's choices in relation to transitional justice are not influenced by the power of the security forces.

3.3.2. Selectivity

Trials have also received criticism for the inability to prosecute vast numbers of cases, and hence it will ultimately be a selective process, seeming arbitrary and unfair.⁹³ No criminal justice system or hybrid court is structurally able to deal with all crimes committed during a conflict, but this 'should not be construed as de-

⁹¹ D. Pion-Berlin, 'To Prosecute or to Pardon? Human Rights Decisions in the Latin American Southern Cone', *Human Rights Quarterly*, vol. 15, 1994, p. 117.

⁹² Pion-Berlin, 'To Prosecute', p. 106 and p. 121.

⁹³ See e.g. Martha Minow, *Between Vengeance and Forgiveness. Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998), p. 45 and L. Huysse, 'Justice' in Bloomfield, Barnes, Huysse (eds.), *Reconciliation*, p. 105. Alexander, *Scoping*, p. 16.

legitimation of the role of prosecution or punishment in dealing with past crimes'.⁹⁴ Unavoidably there is selectivity in all forms of criminal prosecution, including ordinary crime; not all cases of theft or assault will be heard in a court of law, yet this does not become a problem unless this selectivity is based on discrimination. Selectivity does not therefore by default de-legitimise prosecution as a transitional justice mechanism or set a negative example for judicial reform.

Prosecution, if used as a transitional justice mechanism, can only ever be a partial response to human rights violations.⁹⁵ Therefore, selectivity is not in itself a problem if other perpetrators are dealt with by other mechanisms of justice – if there is a complementary process of justice. Prosecuting key perpetrators, which may include the chiefs of police, heads of militia movements and military commanders, who exhibit a pattern of human rights abuse and where sufficient evidence to prosecute exists, should be prioritised,⁹⁶ and this will not inevitably undermine the judicial system. Moreover, if other mechanisms are in place to deal with the other perpetrators, it will not automatically lead to those facing criminal prosecutions being perceived as scapegoats or induce acts of impunity among lower-ranking abusers.⁹⁷

In connection with selectivity is the issue of perpetrator/victim; in post-conflict societies this distinction can frequently be blurred, but criminal prosecution demands that the parties are either victims or perpetrators. The selectivity and arbitrariness of criminal prosecution may seem to be further underlined by applying prosecution in a context where most people are both victims and perpetrators. However, viewing all as perpetrators and victims ignores the important distinction between different levels of perpetrators, for example, actively participating in or ordering gross violations of human rights versus not actively opposing the injustices carried out. Although all have been affected in different ways in a post-conflict society this does not absolve anyone from individual responsibility for human rights violations, nor should it be used as an argument against all criminal prosecutions in domestic or international courts.

3.3.3. Individual Guilt and Re-victimisation

Critics of prosecution also express a concern that trials may lead to re-victimisation during the court proceedings, thereby intensifying antagonistic feelings between the perpetrator and victim,⁹⁸ and that they focus on individual guilt rather than establishing wider patterns of abuse.⁹⁹ Testifying in a court of law may undoubtedly lead to re-traumatisation and re-victimisation, hence hindering individual healing. There is always an in-built risk in telling the truth, whether this

⁹⁴ Paul van Zyl, 'Promoting Transitional Justice in Post-Conflict Societies', in Alan Bryden and Heiner Hänggi (eds.), *Security Governance in Post-Conflict Peacebuilding*, (Geneva: DCAF, 2005), p. 211.

⁹⁵ See also Zyl, 'Promoting', in Bryden and Hänggi (eds.), *Security*, p. 211.

⁹⁶ Wilke, 'Domestic', p. 16.

⁹⁷ Which is an argument that has been presented, see e.g. Stephan Landsman, 'Alternative Responses to Serious Human Rights Abuses: of Prosecution and Truth Commissions', *Law and Contemporary Problems*, vol. 59, no. 4, Autumn, 1996, p. 85.

⁹⁸ Mani, *Beyond*, p. 100.

⁹⁹ Huyse, 'Justice' in Bloomfield, Barnes, Huyse (eds.), *Reconciliation*, pp. 104-105. Theissen, *Supporting*, p. 3.

is in a court of law or to a truth commission. Having to relive horrific experiences can reawaken memories and lead to continued victimisation, particularly in an environment where there is little or no support for victims of abuse. Nevertheless, there are advantages with going through such a process. Testifying in a court of law establishes a public record of the abuse; it gives an acknowledgement of the violations in a formal government-sponsored setting; it serves to emphasise that the crimes perpetrated were wrong and should not have happened. In this way, by publicly acknowledging that abuses took place, it may start a process of individual reconciliation.

Although courts emphasise individual criminal culpability and their primary objective is not to establish the social, political and economic factors that led to this abuse, this is not inevitably negative. Victims can feel the need to establish individual guilt for the crimes perpetrated against them and their families, as evidenced by the rise in and demand for criminal prosecution for human rights violations.¹⁰⁰ Individualising guilt can therefore aid the complex process of individual reconciliation. Furthermore, an individualisation of guilt critically eliminates the perception that whole communities or ethnic groups are responsible for the human rights violations, thereby removing the label of perpetrator from innocent members of these communities and groups.¹⁰¹ Eliminating a perception of community responsibility can limit chances of renewed conflict.

3.3.4. Witness Protection

Witness and victim protection is a significant problem in both domestic trials and to a lesser extent in hybrid courts. The key issues involve a lack of resources to construct adequate witness protection programmes, a lack of capacity to ensure that such safeguards are in place, a reflection on the domestic judicial system where protection for witnesses may not exist under more normal circumstances, and as a method by which to undermine and sabotage the trials. The latter was evident in the Human Rights Court established by Indonesia to hear cases of crimes against humanity perpetrated in Timor-Leste during the violence of 1999. Witness protection was effectively non-existent; although the witnesses had been traumatised by the events and feared retaliation for testifying, this was in most parts ignored by the court, and adequate protection procedures not implemented. Consequently several crucial witnesses refused to give evidence and the prosecution suffered substantially.¹⁰² The absence of witness protection was also evident in the DRC, where witnesses habitually received death threats and were frightened of reprisals.¹⁰³ The problem in the DRC was compounded by the fact that these particular trials took place amidst a conflict that was still on-going, a judicial system that was in need of extensive reform, and a profound absence of

¹⁰⁰ Sikkink and Walling, p. 8-10.

¹⁰¹ Mendez, 'Accountability', p. 277.

¹⁰² *Situation of Human Rights in Timor-Leste*, Report of the UN High Commissioner for Human Rights, E/CN.4/2003/37, 4 March 2003. For more on the Indonesian Human Rights Court, see also e.g. Amnesty International, *Indonesia and Timor-Leste International Responsibility for Justice*, 2003.

¹⁰³ Interviews by author with Congolese lawyers in Kinshasa, May/June 2005.

resources to allocate to justice issues, let alone witness protection. If prosecution is to be used to address past violations of human rights, then witness protection programmes need to be given sufficient support and priority from the outset. If it is not it may undermine the process by scaring witnesses away from testifying. These trials can serve to set a prominent example for subsequent trials in the domestic judicial system. Ensuring adequate protection measures can help to provide these in later cases, thereby acting as a positive influence on the domestic system. If a precedent is set for witness protection by domestic prosecution for past crimes, this can filter into the domestic judicial system and further the development of judicial reform. Focusing on witness protection in prosecution of past crimes, is not only vital for the transitional justice process, but can also play a crucial part in wider judicial reform and should be a priority for external donors. These efforts should therefore be coordinated with judicial reform programmes.

3.3.5. Resources

On a practical level, adequate resources are a problem for both domestic and hybrid courts. Post-conflict societies may not have the option of domestic prosecution due to the non-existence of sufficient funds.¹⁰⁴ Societies recovering from war will rarely have the financial resources to conduct criminal prosecutions which may take several years. If already scarce resources are allocated to pursuing domestic prosecution it can create problems for the reconstruction process in other areas as well as long-term development. The international community although commonly unwilling to support domestic prosecution due to a fear of unfairness, should consider allocating more resources to domestic prosecution, if this is a local choice of transitional justice, but importantly in conjunction with judicial reform. In Haiti, after the first intervention in 1994, donors refused to fund trials because there had been a truth commission, although civil society was firm in their demands for criminal proceedings.¹⁰⁵ As a consequence of the absence of support for judicial reform and domestic trials, the justice system continued to unravel in Haiti.¹⁰⁶ Supporting domestic or hybrid courts in circumstances where this is viable would not only enhance the judicial system and the wider process of security sector reform, which in the long-term is a central underpinning of prolonged sustainable peace, but for the international community it is also a cheaper option than, for example, international tribunals.¹⁰⁷ Importantly, however, the international community should support the local choice of transitional justice working together with local stakeholders to ensure that prosecution complies with fair and unbiased trials.

¹⁰⁴ Mani, *Beyond*, p. 96.

¹⁰⁵ Eirin Mobekk, 'The Missing Ingredient: Justice in the International Intervention in Haiti', *International Relations*, vol. XV, no. 1, April 2000.

¹⁰⁶ *Ibid.*

¹⁰⁷ The international tribunals have been notoriously expensive, for example, the ICTR's budget was for 2004-05 over US\$255 million and had, at the time of writing, indicted 83 people and delivered 19 judgements. Coalition for International Justice, *ICTR*, 2005. <http://www.cij.org/index.cfm?fuseaction=faqs&tribunalID=2#q7>

3.3.6. Deterrence

Deterrence, although argued by some to be a potential positive consequence of prosecution,¹⁰⁸ has by others been questioned as an effect of domestic trials.¹⁰⁹ This difference may be explained by support for either retributive or reconciliatory justice. However, the deterrence effect of *all* transitional justice mechanisms in their ability to deter future massive wars may *on their own* be limited. But they can serve to deter continued acts of violence perpetrated by individuals in a post-conflict society because they establish individual accountability and culpability. By establishing accountability, they can ensure that both victims and perpetrators recognise the change taking place within society so that committing these acts in the future will be more difficult. Crucially they can strengthen civil society's resistance to renewed conflict and authoritarian regimes.¹¹⁰

Although the deterrence effect of criminal prosecution can be questioned in relation to its effect on hindering future wars, equally there is no evidence that forgiving and forgetting deters future abuses.¹¹¹ In situations where abuses have not reoccurred after a process of forgiving and forgetting, as in Mozambique¹¹², this does not indicate that this in itself has deterred abuses. There are many other factors that need to be taken into consideration. Similarly where trials have been conducted and no violence ensued, this does not constitute sufficient evidence that this will be the case in all other post-conflict societies. Although prosecution influences the actors in a post-conflict society and can deter violence, it will not necessarily deter a new massive conflict with other actors, interests, means and objectives.

3.4. Amnesties – A Problematic Alternative

Amnesties have repeatedly been used and promoted as an alternative to prosecution in post-conflict societies, either as a last act of the out-going regime to safeguard their own positions or by the new regime frightened of potential repercussions by the perpetrators if they should feel threatened in any way. The risk of destabilisation and continued violence has often been the argument in support of amnesty in a fragile transitional society trying to cope with reconciliation, reconstruction and the legacies of past abuses. The power of the security sector is often a determining factor in the implementation of amnesties.

Amnesty is defined as an act granting an individual or group immunity from criminal prosecution for crimes committed in the past. There are two types of amnesties: general amnesty, which covers all crimes committed in the given time period; and conditional amnesty, where the perpetrator must meet a number of conditions set out by the people granting the amnesty; individual responsibility is

¹⁰⁸ Zyl, 'Promoting', in Bryden and Hänggi (eds.), *Security*, p. 211.

¹⁰⁹ See e.g. Minow, *Between Vengeance*, p. 25.

¹¹⁰ See also section on truth commissions.

¹¹¹ Mendez, 'Accountability', p. 266.

¹¹² See Amnesties section 3.4.1.

in this case assessed, which it is not in a general amnesty, the perpetrator nevertheless escapes punishment.¹¹³ Amnesties can explicitly be granted by political or military leaders, by the new or out-going regime, but they can also be granted *de facto* by avoiding applying any transitional justice mechanism whether judicial or non-judicial.

3.4.1. (De)Stabilisation

Amnesties have been applied primarily by new regimes to ensure stability or by old regimes as a means of escaping a process of criminal justice. They have been applied in a vast variety of post-conflict contexts. In more recent years amnesties were granted in Chile to military officers who had committed human rights violations, amnesties for the key actors of the military regime in Haiti were part of the Port-au-Prince agreement signed prior to the UN-sanctioned international intervention in 1994 and in Sierra Leone human rights perpetrators of the long-standing conflict were granted amnesties in 1999. Therefore, regardless of the emerging principles against general amnesties, they have continued to be used as a means to deal with political realities.

Supporters of the use of amnesty in a post-conflict setting argue that if implemented in a proper manner they can help to curb a resurgence of violence and abuses, whilst strengthening the peace process.¹¹⁴ They state that amnesties can help to build a stable society and that they are part of the post-conflict bargaining process.¹¹⁵ This seems to be a reiteration of the argument that criminal justice cannot lead to peace and stability under any circumstances, but that it per definition must lead to instability. However, as argued in the previous sections, it is the contention of this paper that criminal prosecution can, as part of a complementary approach to justice, aid reconciliation of society and lead to stabilisation. Only focusing on criminal prosecution will rarely suffice, however, ignoring it due to a preconceived notion that it can never support stability may in certain circumstances jeopardise peace. Moreover, the amnesties=equals-peace proposition has been nullified by a number of cases in which amnesties have been granted, but have been followed by further abuse.¹¹⁶ For example, the Lome peace agreement in Sierra Leone included provisions of amnesties, nevertheless it was followed by vast atrocities. In Haiti the amnesties granted to the military in conjunction with a flawed truth commission process and absence of any other transitional justice mechanism for human rights perpetrators fuelled violence and breaches of human rights in a climate of impunity.¹¹⁷

Mozambique is a frequently cited example in which amnesties were granted after a protracted and violent conflict and where peace and reconciliation ensued, but this

¹¹³ Alexander, *Scoping*, p. 43.

¹¹⁴ Snyder and Vinjamuri, 'Trials', p. 6.

¹¹⁵ *Ibid.*

¹¹⁶ Alexander, *Scoping*, p. 45.

¹¹⁷ See e.g. Eirin Mobekk, 'DDR in Haiti: Past Negligence, Present Problems, Future Possibilities', in Ann Fitz-Gerald (ed.) *From Conflict to Community: A Combatant's Return to Citizenship*, GFN-SSR, 2005.

only tells a very small part of the story and ignores several important factors. There are three issues in particular that help to explain why conflict was not reignited in Mozambique. First, the conflict in Mozambique was a proxy war, and it was perceived as such by the parties to the conflict; therefore, when it ended there was a strong desire to put it all behind them.¹¹⁸ Second, traditional healing and justice mechanisms were used in the aftermath of the conflict to deal with the traumas and violations perpetrated during the conflict. These were applied throughout Mozambique with great success. Third, the choice of not prosecuting and not having a process of truth-seeking through a truth commission was a choice not only by the government but also by civil society, who wanted to use traditional methods to reconcile, reintegrate and heal.¹¹⁹ Mozambique was not a situation in which amnesties were chosen and no other mechanisms applied – traditional mechanisms were chosen as a means to reconciliation. It was because of the particular context and history of the conflict in conjunction with a desire to use traditional mechanisms that conflict did not reignite, not because amnesties necessarily lead to stability, it was these other factors that were central in ensuring continued peace.

It is crucial to underline, however, that if amnesty after conflict is a choice by the population of the country, as long as it does not contravene international law – granted for the crimes of genocide and gross violations of human rights – it should be accepted by the international community. Local populations should be able to choose the methods in which to deal with the complex process of coming to terms with conflict, reconstruction and reconciliation. Algeria may be a case in point, although there are some doubts concerning the true nature of the referendum at the time of writing. The referendum was held on 29 September 2005 and over 97 per cent endorsed an amnesty granting exemption from prosecution to any member of armed groups for crimes committed since 1992 – official estimates state that the conflict have left over 200,000 dead.¹²⁰ President Abdelaziz Bouteflika strongly campaigned for the amnesty, and the campaign and pressure exerted has been harshly criticised by international organisations.¹²¹ Human rights groups in Algeria have also expressed concern that the truth regarding the disappeared, estimated to be between 6,000 and 18,000, will never be known.¹²² Additionally, there have been claims that the opposition was silenced and the populace manipulated.¹²³ If this is, however, a true reflection of Algerian popular will, then it should be heeded, but efforts to ensure the validity of the referendum should be made. It is far too soon to evaluate the effect of the

¹¹⁸ Interview by author with specialist on Mozambique, October 2005. For more on Mozambique see J. Hanlon, *Bringing It All Together: A Case Study of Mozambique*, in Gerd Junne and Willemijn Verkoren, *Post-Conflict Development*, (Boulder: Lynne Rienner, 2005).

¹¹⁹ Interview by author with UN official working in Mozambique, November 2003.

¹²⁰ *Amnesty International*, Algeria: President calls referendum to obliterate crimes of the past, AI Index Mde 28/010/2005, 28 August 2005.

¹²¹ *Ibid.* *Human Rights Watch*, 'Algeria: Amnesty law risks legalising impunity for crimes against humanity', 14 April 2005. *International Center for Transitional Justice*, 'Algerian Charter risks reinforcing impunity and undermining reconciliation', 26 September 2005.

¹²² Daikah Dridi, , 'Victims groups question Algeria amnesty' *Algeria-Watch*, 28 August 2005. *Middle East Online*, 'Algeria to Vote on Controversial Peace Charter', 9 September 2005.

¹²³ Daho Djerbal, 'Algeria: Amnesty and Oligarchy', Carnegie Endowment for International Peace, 30 September 2005. *Foreign Report - Janes.com*, 'Algeria: Amnesty or Amnesia?', 26 October 2005.

amnesty on reconciliation of Algerian society; crucially, the largest insurgency group which would benefit from the amnesty has chosen to ignore it.¹²⁴

Arguing *against* the use of general amnesties in a transitional society is not arguing *for* the use of criminal prosecution in all contexts. The best solution for each post-conflict society will vary according to the context of the conflict, internal and external actors and individual solutions should be sought in each case. However, there is a need to underline the potential problems inherent in granting amnesties whether general or conditional.

3.4.2. Conditional Amnesties

Conditional amnesties were first included as part of the truth-seeking procedure with the establishment of the South African Truth and Reconciliation Commission (TRC), where the perpetrator did not risk prosecution if he/she came forward and testified to the commission about past violations of human rights. This type of conditional amnesty has been promoted as a way of ensuring that the ‘whole’ truth can be known in a post-conflict society.

Conditional amnesties are extremely controversial, since on the one hand they may lead to knowing more about the violations that took place and what happened to the disappeared and to establishing a truer picture of the past, on the other hand they can be another means for perpetrators to avoid justice. They ignore the rights of the victims to remedy and can be seen as ‘inconsistent with a state’s obligation under international law to punish perpetrators of serious human rights crimes’.¹²⁵ A central problem with a conditional amnesty is that the perpetrators after testifying walk free, while the victims will have to wait for reparations, which may never come.¹²⁶ Moreover, the objective of truth-seeking mechanisms such as truth commissions is reconciliation. For a process of reconciliation to begin in a context of conditional amnesties, the narratives of the perpetrators must be more than factual – there must be claims of remorse and if these are expressed they must be found credible by the victims. But the perpetrators may narrate factual events without regret and with impunity, they may acknowledge that they have committed these acts, but feel that they were justified in doing so under the circumstances, for example due to considerations of national security. This may therefore not further reconciliation.

This is where the distinction between national and individual reconciliation becomes important.¹²⁷ Conditional amnesties may hinder individual reconciliation, by emphasising that actions will not have consequences.¹²⁸ Not all victims will feel satisfied by knowing what took place, or that the perpetrators have acknowledged

¹²⁴ *World Tribune.com*, ‘Salafists again Ignore Amnesty Offer in Algeria’, 10 November 2005.

¹²⁵ Freeman & Hayner in Bloomfield, Barnes, Huyse (eds.), *Reconciliation*, p. 137.

¹²⁶ See also T. Ash in Minow, *Between*, p. 61.

¹²⁷ See footnote 6.

¹²⁸ 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.

that they committed particular crimes with or without remorse. They may still feel wronged. On a national level a conditional amnesty can in certain circumstances help national reconciliation in that it establishes the wider patterns of abuse and creates a detailed historical record of what took place. Although South Africa's TRC with its conditional amnesty meant a detailed historical record was created and families of victims learned what had happened to them, it does not mean that it is a solution in all contexts. Crucially, Archbishop Desmond Tutu in 2005 acknowledged that criminal prosecution should also have been conducted in South Africa.¹²⁹ Conditional amnesties should therefore be treated with great caution.

3.4.3. Accountability

Although it has been stated that '*amnesties should be recognised as a legitimate tool when it serves the broader interest in establishing the rule of law*',¹³⁰ granting amnesties in particular general, but also conditional amnesties, can have an adverse effect upon security sector reform. It becomes very difficult to establish accountable rule of law systems when no perpetrators for past gross violations of human rights are held accountable, particularly in a context where the previous security sector consistently violated the rights of civil society. Establishing a rule of law system and reforming the security sector in any post-conflict society is extremely difficult, but it becomes even more complex to 'build a rule of law system while allowing complete impunity for major violations of human rights'.¹³¹

A prominent example of how amnesties may potentially undermine security sector reform and rule of law is that of Haiti. There was an attempt at security sector reform in Haiti after the intervention in 1994. There was reform of the police, a special riot police was created, an effort was made to disarm the army and they were as a force officially abolished, there were weak attempts to reform the judiciary, in conjunction with discussions for the need for oversight mechanisms for the security forces. However, there was a demand by civil society for a process of justice which was never met. The amnesties established a culture of impunity, which encouraged the former military and their paramilitary supporters; in addition to the lack of a process of justice for any other human rights perpetrator, this was one of the reasons leading to increasing levels of violence in Haiti. The police and security forces grew increasingly violent and abused human rights regularly, whilst becoming politicised. The judiciary remained weak and oversight mechanisms non-existent. Whilst there were numerous interconnected reasons for the flawed security sector reform in Haiti – the existence of amnesties and the continued impunity did nothing to help this process.¹³²

¹²⁹ 'Tutu Urges Apartheid Prosecutions', BBC News, 16 December 2005.

¹³⁰ Snyder and Vinjamuri, 'Trials', p. 14.

¹³¹ Sikkink and Walling, 'Errors', p. 29.

¹³² For more on the situation in Haiti after the 1994 intervention see e.g.: Mobekk, 'The Missing'. Eirin Mobekk, 'International Involvement in Restructuring and Creating Security Forces: The Case of Haiti', *Small Wars and Insurgencies*, vol. 12, no. 3, Autumn 2001. Mobekk, 'DDR', in Fitz-Gerald (ed.) *From Conflict*.

It is vital to create trust in state institutions when conducting security sector reform and establishing rule of law. Amnesties can undermine this trust. If the population is calling for criminal justice, or non-judicial truth-seeking, or both, ignoring this can have severe repercussions when subsequently or concurrently trying to reform the security sector. From a civil society perspective it may delegitimise the SSR process, and undermine trust. In practice it can mean that, unless there is vetting, former perpetrators can partake in the security or governance sector, with potentially disastrous results. Moreover, if the desire in the population is strong for criminal prosecutions, destabilisation may ensue if civil society decides to reap justice in the form of vengeance. If impunity is allowed to fester, former abusers may continue to conduct violations, hence destabilising SSR efforts.

3.5. Lessons Identified

What the forays into prosecutions in response to gross violations of human rights in post-conflict societies have taught us regarding these mechanisms and security sector reform are manifold. First, what has been established is that careful sequencing of prosecution and security sector reform is essential for successful outcomes. Second, coordination of security sector reform with prosecution as a transitional justice tool is vital. Third, a mutually influencing and sometimes reinforcing relationship exists between SSR and transitional justice. Fourth, that prosecution can have a negative as well as positive impact upon SSR. Fifth, the absence of SSR can be in certain cases detrimental to applying prosecution in response to gross violations of human rights.

Because numerous problems exist with domestic prosecution after conflict and war, it is a tool of transitional justice which should be applied with caution, but which can in certain contexts be an option. Under these circumstances security sector reform and domestic prosecution can affect each other positively. There is a need for a certain level of security sector reform prior to conducting domestic trials, which can reduce the inherent problems of domestic prosecution. Judicial, police and penal reform is central for successfully conducting domestic trials. Additionally, the power and influence of the security forces are determining factors in a new government's choices of transitional justice mechanisms and subsequent success. At the same time the security sector can also benefit from such trials being held since they can serve as an example of accountability and transparency for the security services, strengthen trust in state institutions, and establish that impunity will no longer reign.

Hybrid courts have the potential to affect change in the security sector, particularly the judicial and penal sectors, where the international elements can serve as role models, promote rule of law, oversight, democratic governance and accountability, whilst giving criminal prosecution a heightened legitimacy that the domestic system may be without in the immediate aftermath of conflict. They can by their presence build capacity in the local communities which have a significant

effect upon the continued development and reform of the domestic judicial systems. The link of hybrid courts to security sector reform should be made more explicit in the hybrid courts mandates so that this can enhance and ensure the scope for capacity-building and domestic judicial reform. Nevertheless, even without an expanded mandate because of the flexibility and versatility of the hybrid court, and the higher legitimacy it provides to criminal prosecutions, it is an important mechanism of transitional justice.

Amnesties will continue to be a part of post-conflict strategies, but the positive effects of these measures have been exaggerated. They do not by default lead to stability; on the contrary they may lead to unrest among victims who feel that they are unfair measures. It is a mechanism that should be applied with great caution in post-conflict societies. It increases the risk of impunity and continued abuse of human rights by actors who see amnesties as a method of getting away with crimes, and can adversely affect the process of security sector reform. It is difficult to build rule of law and reform the security sector on a basis of absence of any form of accountability, this can undermine continued efforts of reform and encourage continued institutional abuse.

What the last years of expanding transitional justice and security sector reform have shown is that solutions should be tailor-made to each post-conflict society and there is no single way of tackling the issues of past human rights violations or security sector reform. But the symbolism of criminal accountability, where there previously has been none, and how this can influence further security sector reform by establishing accountability and transparency, strengthening the judicial system, enhancing legitimacy of government institutions should be recognised as potential effects.

4. TRUTH-SEEKING: TRUTH COMMISSIONS

The use of truth commissions as a truth-seeking transitional justice mechanism in post-conflict peacebuilding has been expanding since the early 1990s. Both the international community and post-conflict governments have frequently supported this form of truth-seeking. Although in many ways reflecting the Latin American truth commissions in the 1980s,¹³³ present day truth commissions have undergone a distinct evolution in mandate, powers, resources and capacity. Truth commissions are often promoted as the primary vehicle to ensure reconciliation after conflict and as being better at enhancing reconciliation than other transitional justice mechanisms.¹³⁴ They have, however, in the last few years also received criticism.¹³⁵

Truth commissions, in addition to potentially enhancing reconciliation, can lay the ground for deep-seated institutional change within a post-conflict society. The report of truth commissions commonly includes recommendations for reform of the security sector; if these are implemented, truth commissions can promote significant change. Choosing this truth-seeking mechanism may ensure the beginning of transparency and oversight of the security sector and encourage a mind-set shift towards greater accountability of the security forces. Silence can undermine SSR whilst truth may strengthen it.

This section discusses the potential beneficial effects that truth commissions can have on security sector reform. It analyses the advantages and disadvantages of truth commissions as a means of transitional justice. The section emphasises that truth commissions should not be viewed as an alternative to prosecution, but as part of a complementary approach to truth-seeking, reconciliation and justice. It argues that truth commissions will not necessarily further reconciliation in all contexts, but that their success is dependent upon a range of factors, and that the problems inherent with these commissions have frequently been underestimated.

¹³³ For details of the Latin American commissions see e.g. USIP, *Truth Commissions Digital Collection*, <http://www.usip.org/library/truth.html> and Pricilla Hayner, *Unspeakable Truths. Facing the Challenges of Truth Commissions*, (London: Routledge, 2002).

¹³⁴ For discussion on truth commissions e.g. Hayner, *Unspeakable*, R. Rotberg, D. Thompson, (Eds.), *Truth v. Justice: The Morality of Truth Commissions*, (Princeton: Princeton University Press, 2000). D. Shea, *The South African Truth Commission: The Politics of Reconciliation*, (Washington, D.C.: United States Institute of Peace Press, 2000). Pricilla Hayner, 'Fifteen Truth Commissions- 1974 to 1994: A Comparative Study', *Human Rights Quarterly*. Vol. 16, 1994. Neil Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes. Volumes 1-3*. (Washington, D.C.: 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. (Baltimore: John Hopkins University Press, 2001). J. L. Gibson, 'Truth, Justice, and Reconciliation: Judging the Fairness of Amnesty in South Africa.' *American Journal of 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).

¹³⁵ J.D.Tepperman, 'Truth and Consequences', *Foreign Affairs*, March/April 2002, p. 1.

4.1. Truth Commissions

Truth commissions (TC) investigate past human rights abuses committed during conflict and civil unrest. Generally they examine violations perpetrated by the military, government, other state institutions and non-state parties to the conflict. They are non-judicial bodies, which can give recommendations, but they do not have the authority to punish. These recommendations can contain suggestions for broad reforms of state institutions and reparations for the victims. A truth commission is a truth-seeking mechanism allowing the victims, and in some instances the perpetrators, to expose human rights violations. They are established and given authority by the local governments or international organisations, sometimes by both. They are only operational for a limited time-period – commonly no longer than two years – and can be organised and structured in many different ways.¹³⁶ Importantly, a truth commission's structure is influenced by the context of the conflict as well as the political, historical, and cultural framework.

The aims and objectives of truth commissions are largely to create a historical record of human rights violations, to give the victims a voice, to officially acknowledge that the violations took place, to assist in the healing and reconciliation of a post-conflict society, to bolster and legitimise the new political authorities, to make recommendations for reform and change and to provide a measure of accountability and transparency.¹³⁷ It is particularly the last three objectives that are critical to security sector governance and intersect with security sector reform. How this intersection can be beneficial to both SSR and truth commissions will be detailed below. Moreover, truth commissions seek to establish a pattern of human rights abuse perpetrated within the time-period contained in the mandate. These aims and objectives are vast and have been beyond the capabilities of many truth commissions.

The mandate of a TC is essential in determining whether or not it will reach its objectives, what effects the commission will have on reconciliation of society, and in the long-term on security sector reform.¹³⁸ The mandates outline the period of inquiry to be investigated by the TC and it is important that this does not exclude certain time periods during the conflict or abusive regime, but that it is as encompassing as possible. If only particular events or a short period are chosen, it runs the risk of de-legitimising the truth-seeking process. This may be perceived as an attempt to hide actions perpetrated outside this timeframe, which can heighten distrust in both the TC and the government, thereby weakening security sector

¹³⁶ For definitions see also e.g. USIP, *Truth Commissions Digital Collection, Background*, <http://www.usip.org/library/truth.html> and Pricilla Hayner, 'Commissioning the Truth: Further Research Questions', *Third World Quarterly*, vol. 17, no. 1, 1996, pp. 20-21.

¹³⁷ See also Pricilla Hayner, 'International guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal', *Law and Contemporary Problems*, vol. 59, no. 173, Autumn 1996, p. 176, USIP, *Truth and Margareth Popkin and Naomi Roth-Arriaza* quoted in Eric Brahm, *Truth Commissions*, 2004, www.beyondintractability.org/m/truth_commissions.jsp

¹³⁸ The powers of the truth commissions are also influenced by their resources. TCs are considerably less expensive than many other mechanisms of transitional justice. Earlier TCs rarely exceeded \$5 million, but after the Guatemalan and South African commissions, which spent \$11 million and \$18 million per year respectively, the budgets have generally increased.

governance. Moreover, it can undermine the truth commission's role as a vehicle for supporting security sector reform, since, by limiting the investigations to a short time-period, it suggests only partial transparency and accountability.

The mandates also stipulate the violations under investigation; and the powers of the commission, which include interviewing victims, witnesses, perpetrators and the power to subpoena. The powers of truth commissions have expanded greatly since the establishment of South Africa's TRC in 1996, which was granted substantial powers including the power to subpoena. Ghana's National Reconciliation Commission (NRC) followed this example and had the powers to subpoena, the powers of the police in relation to entry, search, seizure and removal of any document and the right to question any person.¹³⁹ Sierra Leone's TC also had broad powers, which also included the right to subpoena.¹⁴⁰ Yet, these powers have not been common. In, for example, Guatemala the Historical Clarification Commission (CEH) could neither subpoena, nor search and seize, and an amnesty law preceded it.¹⁴¹ Also the powers of Morocco's Equity and Reconciliation Commission (IER) were limited; it could investigate, but could not compel testimony.¹⁴² The lack of power to impose cooperation has been a weakness of many truth commissions, which can lead to only part of the truth being uncovered. The mandate also usually outlines follow-up procedures to be instituted by the government after the publication of the commission's report.¹⁴³

4.2. Contentious Concepts

There are a number of advantages to using truth commissions as a tool of transitional justice, as well as the potential positive impact they may have upon SSR, but there are also numerous challenges that need to be met and disadvantages with promoting truth commissions in all contexts. This section outlines some contentious concepts closely linked with truth commissions: truth, reconciliation and healing.

4.2.1. Truth

A truth commission's aim is to establish the 'truth' about what took place during a specific time in history, but truth is an extremely complex concept, which is rarely only uncovered, but is partially constructed and affected by numerous processes and actors. To clarify the complexities of truth a typology has been proposed:¹⁴⁴ factual/forensic truth, which only details what can be verified; personal/normative/narrative truth, a subjective form of truth; dialogue truth,

¹³⁹ The National Reconciliation Act, Ghana, 2002, paras. 10 and 11.

¹⁴⁰ The Truth and Reconciliation Act 2000, Sierra Leone, 8.2., a-h.

¹⁴¹ Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence that have Caused the Guatemalan Population to Suffer, 1994.

¹⁴² See Des Statuts de L'Instance Equité et Réconciliation, Morocco, 2004, also Eric Goldstein, 'A New Moroccan Commission, but How Much Truth?', *Human Rights Watch*, June 2003.

¹⁴³ See also Freeman & Hayner, in Bloomfield, Barnes, Huyse (eds.), *Reconciliation*, pp. 131-132.

¹⁴⁴ See e.g. Joanna Quinn, 'Dealing with a Legacy of Mass Atrocity: Truth Commissions in Uganda and Chile', *Netherlands Quarterly of Human Rights*, vol. 19, no. 4, 2001. pp. 387-388.

where truth is reached via discussion between perpetrator and victim; restorative truth, which may come through acknowledgement of the past.¹⁴⁵

The problems of the concept of ‘truth’ have not been recognised by most TCs. However, South Africa’s TRC did and distinguished between four different types of truths namely, factual, personal, social and healing.¹⁴⁶ Yet it is unclear how effective this was in practical terms and it was never linked to SSR. Other TCs have addressed it as if one truth could be found, which frequently has meant defining the truth as factual. But truth is never as simple as factual; victims and perpetrators may disagree not about the fact that violations took place, but whether or not they were justified. The perpetrators can feel that under the circumstances they were justified in using extraordinary security measures, including extrajudicial killings and torture to obtain information; this, for example, was the case among many military in Latin America.¹⁴⁷ Therefore, under these circumstances telling a factual truth may not lead to reconciliation because the perpetrators will feel no remorse. Establishing factual truth can ensure transparency of abuses committed by government agencies and be a first step towards reform of those agencies. Truth-telling can therefore aid and positively influence security sector reform. Factual truth in the form of transparency and oversight is essential for sustainable security sector governance. But if there is no accountability in conjunction with factual truth-telling *and* the perpetrators feel justified in their actions, because of the context in which the abuses were conducted it can adversely affect SSR and security sector governance, by sustaining a notion that this is a manner in which to deal with similar matters in the future. Therefore the problems with the concept should be acknowledged by TCs and the different levels of truth recognised.

4.2.2. Reconciliation

Reconciliation is a primary objective of truth commissions; several truth commissions refer to it in their mandate or include it in their name. But here the distinction between national and individual reconciliation again becomes important.¹⁴⁸ A truth commission aims to establish a general pattern of human rights violations and investigates the social and political factors leading to these violations, hence promoting national reconciliation. In pursuing this aim truth commissions hear individual testimonies and victims may expect to obtain individual reconciliation. Victims realising that the focus is on national reconciliation can be disappointed.

Nevertheless, placing an individual case of abuse within a pattern of abuse can in some cases lead to individual reconciliation. It can create an understanding of why the individual had to suffer, relating it to the fact that this was part of violations by

¹⁴⁵ Others have added historical and moral truth to this typology. 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. 3.

¹⁴⁶ Tepperman, ‘Truth’, p. 6.

¹⁴⁷ Avruch & Vejarano, ‘Truth’, p. 3.

¹⁴⁸ See definition footnote 6.

state institutions perpetrated on, in many cases, a vast scale. Reconciliation is an extremely individual process and whether or not it will result from placing the abuses in a larger framework will vary according to the personal experience of violations. However, individual reconciliation is much more difficult to achieve through a truth commission, because forgiveness, healing and reconciliation are such personal experiences.¹⁴⁹

Truth can be central in many circumstances to begin a process of reconciliation, but it is not imperative in all, although it may be necessary to sustainable SSR. Reconciliation can be started without truth-seeking through a truth commission. For example, both Mozambique and Cambodia chose not to establish truth commissions, because the countries feared the potential consequences of such a process.¹⁵⁰ Although Mozambique and Cambodia are examples of cases where the non-existence of a truth commission did not lead to renewed conflict, silence may renew conflict and strengthen impunity. Silence over past abuses can in particular be detrimental to security sector reform if perpetrators are allowed to continue in positions of power, the social and political reasons for the violations not established, and hence impunity can continue to be entrenched within the security services. Truth-telling, identifying and acknowledging the crimes committed by state institutions are important in rebuilding the security sector and ensuring rule of law. Silence, although perhaps not the primary reason, has not helped judicial reform in Cambodia, where government control of the judiciary is widespread.¹⁵¹ If there is no acknowledgement of the abuses entrenched within the security sector then reforming it can be difficult. The international community is continuously promoting truth-seeking as a way to reconcile the parties of conflicts; however, if there is a genuine choice of no truth-telling then this should be accepted by the international community.¹⁵² The diversity between post-conflict societies and their different needs to recover should be recognised. A key challenge is to ensure that non-truth-seeking does not become a means to suppress SSR, and that other mechanisms are applied to deal with past crimes in conjunction with a process of SSR.

4.2.3. Healing

Because truth commissions are a non-judicial transitional justice mechanism, the concepts of forgiving, healing and reconciliation are frequently mentioned in their context.¹⁵³ The healing potential of truth commissions is underlined by those who see truth-telling as the way in which to address the problems of justice in a transitional society. Yet, it can be questioned how much individual healing can result from a truth commission.

¹⁴⁹ See also Freeman & Hayner, in D. Bloomfield, T. Barnes, L. Huyse (eds.), *Reconciliation* p. 122.

¹⁵⁰ For details on each case see Hayner, *Unspeakable*, Mozambique, pp. 186-195 and Cambodia, pp. 195-200.

¹⁵¹ *Human Rights Watch*, 'Serious Flaws'.

¹⁵² See also Hayner, 'International Guidelines', p. 177.

¹⁵³ See e.g. Eric Brahm, *Truth*, p. 1. Stephan Landsman, 'Alternative Responses to Serious Human Rights Abuses: of Prosecution and Truth Commissions, *Law and Contemporary Problems*, vol. 59, no. 4, Autumn, 1996, p. 88.

Healing assumes a restoration of individual mental health to people who have been subjugated to physical and mental abuse for a period of time. This objective is considerably different and much more complex than establishing patterns of abuse and their underlying political and social causes. Moreover, emphasising healing also changes the focus from justice, truth and accountability to mental health. There seems to be an assumption that healing can be a consequence of truth-telling. But healing is, as is forgiving, an extremely personal experience, and will not only take different lengths of time for different people, but will also depend upon the type and extent of abuse experienced. Research has established that talking about events and traumas can lead to healing¹⁵⁴ and that it can be important to face, not forget, trauma.¹⁵⁵ However, this is usually in an individual therapy environment. A truth commission is very different. Victims will either testify to the commissioners, in public or private, or give their statement to a statement-taker, whom they will meet once. This does not in any way mirror a therapy setting with one therapist, one victim and meetings conducted over a length of time. Healing by truth-telling in the context of truth commissions can therefore be limited.

In fact research has found that healing can be slowed down when reliving trauma through truth-telling.¹⁵⁶ Because a truth commission is a non-judicial mechanism the scope for re-victimisation and re-traumatisation within such a setting is frequently underestimated. Regardless of whether it is a judicial or non-judicial mechanism, and the testimonies are given in public or private, reliving traumatic events can re-victimise. Women especially frequently do not want to detail abuses conducted against them, which was for example highlighted in Morocco's IER, where testimonies did not discuss rape.¹⁵⁷ Individual healing is too great an objective for any transitional justice mechanism – in a context where victim support is minimal to non-existent – and claiming that truth-telling alone can achieve it is over-simplifying an immensely difficult task, while at the same time increasing the chances of failure.

4.3. Political and Legal Issues

This section discusses political and legal issues of truth commissions and their relationship to SSR, destabilisation, political will, media attention and due process. In addition, it highlights the importance of establishing a historical record, acknowledgement, accountability and deterrence.

¹⁵⁴ See e.g. Herman, Agger and Jensen in Martha Minow, *Between Vengeance and Forgiveness. Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998) pp. 65-66.

¹⁵⁵ Minow, p. 66.

¹⁵⁶ This has found to be particularly so in relation to women and rape, see Josi Salem-Pickartz, 'Psychosocial Interventions in Post-War Situations', in M. Vlachova & L. Bion (eds.), *Women in an Insecure World - Facts and Analysis on Violence against Women*, (DCAF 2005) pp. 279-280.

¹⁵⁷ Susan Slyomovics, 'Morocco's Justice and Reconciliation Commission', *Middle East Report Online*, 4 April 2005, p. 6.

4.3.1. Destabilisation and Political Will

Compared to domestic prosecution, truth commissions have much less potential to constitute a destabilising factor in a transitional society, and hence meet less opposition as a transitional justice mechanism by outgoing and incoming regimes. Because they are politically less sensitive they may be chosen as the only means to deal with justice in a post-conflict society. They do not have to be an alternative to prosecution, either domestic or international, but have been so in many cases.¹⁵⁸ Often it is not a desire to uncover the truth about past abuses that drives the decision for the establishment of a truth commission by new governments, but that it is the least politically disruptive justice process. Even so in some cases they have been feared by new governments as destabilising, particularly where the security sector is powerful and limited SSR has taken place. The truth about the past can have a powerful effect and if there is not a simultaneous process of SSR or vetting, members of the security forces may resist such a process taking place, because it heightens the chances both of individuals being held accountable and of the institutions being reformed, with a subsequent reduction of institutional or individual power. For example, due to the fragile political situation of the Guatemalan government the CEH had a weak mandate.¹⁵⁹ The truth commissions in Bolivia and Ecuador were viewed as very politically sensitive and hence disbanded before they were able to finish their work¹⁶⁰ and in Chile the post-report discussions were stopped out of a fear of continued destabilisation.¹⁶¹

The fear of destabilisation, or the weak position of the new regime versus the strength of the military or security forces, is often also reflected in the lack of implementation of the truth commissions' recommendations. These recommendations can suggest significant changes in the police service, the military forces and the judicial system and oversight mechanisms and hence can promote considerable reform of the security sector. However, whether these are implemented is entirely dependent upon political will since a truth commission has no power to ensure that a follow-up process is operationalised. The recommendations of a truth commission, particularly those relating to reparations and institutional reform of the security sector, are vital to enhance sustainable peace. Yet, if there is no political will to implement them recommendations can be ignored. For example, all the recommendations of the National Truth and Justice Commission (NTJC) in Haiti were disregarded. A Follow-Up committee was established, but all its demands were rejected by the government.¹⁶² A Compensation Committee to address reparations, also outlined by the NTJC, was never created.¹⁶³ The Haitian government did not have the political will necessary

¹⁵⁸ Landsman, 'Alternatives', p. 82.

¹⁵⁹ Tepperman, 'Truth', p. 5.

¹⁶⁰ USIP, Truth Commissions Digital Collection, Bolivia and Ecuador. Bolivia: National Commission of Inquiry into Disappearances. Ecuador: Truth and Justice Commission.

¹⁶¹ Mike Kaye, 'The Role of Truth Commissions in the Search for Justice, Reconciliation and Democratisation: the Salvadorean and Honduran Cases', *Journal of Latin American Studies*, vol. 29, p. 697. Rettig was the chair of the commission.

¹⁶² Amnesty International, *Haiti: Still Crying Out for Justice*, July 1998, p. 7. This committee suggested the creation of a special tribunal to facilitate the judgement of the accused of crimes during the coup era. 'Le Ministère de la Justice Déclare Soutenir une Résolution des Victimes du Coup d'Etat', *Le Matin*, 15 May (1998), p. 1.

¹⁶³ Report of Secretary-General, A/51/935, 26 June (1997).

to implement the recommendations of the NTJC. The truth commission was used to show that a process of justice had occurred. This had a severely negative effect upon, in particular, police and judicial reform in Haiti. Although it can be of great significance for victims to have a truth-seeking process, if their recommendations are discounted and no further changes are forthcoming, it can undermine trust and create disillusionment towards the TC and the government.¹⁶⁴

When no recommendations are implemented and a TC is chosen because it is less politically challenging, it can become a way to avoid addressing the issues of justice. Truth commissions can be an important measure of transitional justice, but should not be used to avoid accountability.¹⁶⁵ Yet, it becomes difficult to accuse the government of not addressing justice, because a truth commission has been put in place.¹⁶⁶ In such circumstances if a truth commission is the only type of transitional justice mechanism chosen, it not only reduces the impact it may have upon reconciliation of society, but it also raises the risk of continued distrust towards state institutions. A TC then does not have an effect upon reform because recommendations are avoided and the TC used as a tool to placate the civilian population. Rather than ensuring stability, it could increase vigilante justice, perpetrated by victims feeling unfairly treated, and encourage continued abuse perpetrated by the security sector, who have seen no change towards accountability.

Political will to take truth commissions seriously is also reflected by the level of media, public and government attention. This comes on two levels: attention during the truth-seeking process such as on victim testimonies, and after the publication of the report, its findings, conclusions and recommendations. After South Africa's TRC there was an evolution in attention paid to testimonies, which earlier were much more limited. The TRC had vast national and international media attention and testimonies were televised every day. Both Ghana and Morocco subsequently followed the example set by the TRC and held public hearings, where testimonies were televised, unless otherwise desired by the commissioners or victims.¹⁶⁷ High levels of attention are critical to achieving the aims of a TC, but even if they exist during the statement-taking and testimonies, it is just as vital that the findings and recommendations are fully disseminated and made known to the public. *Nunca Mas*, the report of the Argentinean commission, was widely published and became a best-selling book. Yet, this has been rare. In Haiti only 75 copies of the commission's final report were published and only much later 1,500 copies were published.¹⁶⁸ Victims in Timor-Leste also began questioning why they did not see any outcomes of the testimonies they gave to the Commission of Reception, Truth and Reconciliation (CAVR), because the time

¹⁶⁴ In Haiti this was the result. Interviews by author with representatives from civil society in Haiti, 1998.

¹⁶⁵ Priscilla Hayner, 'Justice in Transition: Challenges and Opportunities', Presentation to 55th Annual DPI/NGO Conference, *Rebuilding Societies Emerging from Conflict: A Shared Responsibility*, United Nations, 9 September 2002, p. 6.

¹⁶⁶ See also Hayner, 'Truth Commissions: Exhuming the Past', *North American Congress on Latin America*, Sep/Oct 1998, p. 2.

¹⁶⁷ Meredith Wain, 'Ghana's National Reconciliation Commission', *Peace Magazine*, April-June 2003, p. 3. Slyomovics, 'Morocco's', p. 3.

¹⁶⁸ *Si M Pa Rele* (If I Don't Cry Out) Preface, Mot du Ministre de 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.

period between testimonies and publication was lengthy.¹⁶⁹ Publicising the report and its recommendations not only reflects a government's commitment to justice, but also to change and security sector reform.

4.3.2. Sequencing

A major benefit of truth commissions is that they have the potential of starting a process of security sector reform with their outlined recommendations, and begin to create a mind-set shift towards accountability; but non-implementation due to the absence of political will can undermine accountability, belief in change and transition to democracy. Although a TC's recommendations can influence SSR, it is a question of sequencing, and whether the report and its recommendations will come prior to reform being undertaken or after the security sector has undergone considerable reform.

Sequencing, as is underlined throughout this paper, is as always a critical issue. If a truth commission's recommendations are made after SSR has begun, it may render the recommendations largely irrelevant. But on the other hand SSR can ease the establishment of a truth commission and expand its powers. This will vary from case to case. In El Salvador some of the TC's recommendations led to reform of the military; in Timor-Leste SSR had been undertaken from the very early stages and the report was published much later hence having less of a direct influence upon reform. Truth commissions broadly have a mandate of around two years, in that time period it is common that some form of SSR has already begun. It is vital to sequence the publication of the recommendations and SSR so that both have the maximum mutually reinforcing impact. If there has been no SSR conducted, the power within the security sectors may be such that it will significantly circumscribe the mandate and abilities of the truth commission to conduct its work. Hence its recommendations, if allowed to be published will be limited. However, if the recommendations come in a context where significant SSR has been undertaken, similarly the effects of the recommendations will be limited. Therefore, truth commissions' reports and SSR need to be coordinated for mutual beneficial outcomes.

To enhance the impact of the recommendations of TCs upon SSR, it is therefore advisable that the reports are published rapidly after the conclusion of the TCs' mandates. It is critical though that the truth commission is not established too early, when there is still on-going conflict; if it is, the truth commissions' chances of success become increasingly limited both as a process of transitional justice and as a mechanism by which to enhance security sector reform.

¹⁶⁹ Interview with former adviser to the CAVR, December, 2005.

4.3.3. Due Process and Judicial Reform

Where there is sufficient political will, no previous amnesties granted, limited fear of destabilisation and the capacity exists, the findings of truth commissions can lead to criminal prosecutions. For example, the Argentinean TC, which traced the fates of the disappeared, gave its files to the prosecutors and they provided grounds for the subsequent prosecution of the junta leaders.¹⁷⁰ However, legally this is not without problems; the issue of due process is critical in this regard.

Due process establishes that the accused are given the chance of defence, but if a truth commissions' report names the accused as perpetrators this opportunity is not given.¹⁷¹ This can undermine judicial reform; naming names – hence contravening the principle of due process – can set a negative example for a judicial reform process aimed at ensuring a fair system. There are, however, different views on whether or not a truth commission should name the names. One of the Chilean commissioners stated that naming names would be equal to convicting a perpetrator without due process.¹⁷² The Guatemalan commission was not allowed to name names, but this was criticised by the chair of the commission.¹⁷³ The truth commissions in El Salvador, Chad and South Africa allowed the naming of names. The El Salvadorian TC concluded that not to do so would be to reinforce impunity.¹⁷⁴ Morocco's IER chose not to name names, which seems to be more a reflection of the absence of political will to conduct prosecutions in the aftermath of the commission, rather than out of respect for due process.¹⁷⁵ On the one hand the rights of the accused must be protected, but on the other uncovering the truth without naming perpetrators may mean it becomes a less effective means of transitional justice.

Due process and naming names is a contentious issue, particularly since if names are named, but prosecutions are not forthcoming it may incite victims to vengeance and popular justice. An alternative solution was found in Haiti where a confidential appendix with the names was attached to the report, so depending on the evidence produced they could be prosecuted.¹⁷⁶ In practice, however, this will only work if there is political will and a judicial system able to conduct prosecutions. However, when transitional justice mechanisms are authorised to deal with gross violations of human rights, they should not contravene the rights whose breaches they are meant to ensure accountability. Critically, the effect this can have on judicial reform and rule of law should also be taken into consideration when deliberating the effects of naming names – breaching due process when pursuing transitional justice can set a very negative precedent for rule of law. The long-term effect that TC can have on rule of law has in many cases been ignored but needs to be focused upon by policy-makers. Breaching

¹⁷⁰ Priscilla Hayner, 'Truth Commissions: Exhuming the Past', *North American Congress on Latin America*, vol. 32, issue 2, Sep/Oct 1998, p. 31.

¹⁷¹ See also Freeman & Hayner in Bloomfield, Barnes, Huysse (eds.), *Reconciliation*, p. 136.

¹⁷² Jose Zalaquett, quoted in Kaye, 'The Role', p. 701.

¹⁷³ Christian Tomuschatof quoted in Tepperman, p. 5. The Guatemalan commission published the report 'Memory of Silence' in February 1999, in which the military was blamed for nearly all violations.

¹⁷⁴ Minow, *Between Vengeance*, p. 86. For more on El Salvador see also Kaye, 'The Role'.

¹⁷⁵ Slyomovics, 'Morocco's', p. 4.

¹⁷⁶ Amnesty International, *Haiti*, p. 8.

rules during transitional justice processes to uncover the truth when at the same time reform of the judicial system is taking place to ensure that it will not be abused again, can work at cross-purposes. Improved coordination of these mechanisms is therefore necessary.

4.3.4. Acknowledgement, Accountability and Deterrence

Truth commissions, by focusing on the victims, give people who have been denied an opportunity to voice their grievances a chance to tell the truth about the pain and trauma they have suffered. A truth commission is a forum which publicly acknowledges that violations took place; this acknowledgement is critical to reconciliation. Furthermore, this acknowledgement and creating a written record of events is one factor which can contribute to ensuring that these types of violations are not repeated. It educates society about the past and what happened, as well as, the political and social reasons for abuse by state institutions, in this way it can be a ‘most powerful tool to inoculate a society against dictatorial methods’.¹⁷⁷ It shows that the government is taking responsibility for past actions and desires change. It can have a particular direct effect because it takes place where the violations were committed. This process of public and state acknowledgement can signal a change from an authoritarian, brutal regime and conflict to a transparent, accountable form of government. It can encourage a change of mentality among the civilian population and members of the security sector. Deterrence is not a natural consequence of acknowledgment and recognition of past abuses. The extent to which a truth commission’s report on a particular conflict can deter future conflict with different parties, actors, reasons and causes, may be limited. However, it is a way of insuring against ‘collective amnesia’.¹⁷⁸ Powered with the knowledge of past systematic abuses, civil society can work against the return of abusive regimes. Additionally, it guarantees that perpetrators know that if they violate human rights it can become public knowledge. Furthermore, if a process of truth-seeking is followed by reform of state institutions ensuring transparency and accountability of the security forces, it can minimise the chances of such abuses reoccurring within the institutional framework – therefore remembrance is vital.

4.4. Lessons Identified

Truth commissions can in many contexts promote reconciliation in a post-conflict society, yet, as has been established above, the system is not without its flaws. It is frequently seen by victims as a method to ensure individual reconciliation, but it promotes national reconciliation. Truth commissions are not the answer in all post-conflict contexts as a solution to the conundrum of past abuse; moreover, if they are to be applied as the only justice mechanism, they are unlikely to bring

¹⁷⁷ Landsman, ‘Alternative’, p. 88.

¹⁷⁸ Avruch and Vejarano, ‘Truth’, p. 3.

about both individual and national reconciliation. Truth-telling can be a significant part of the process of reconciliation, but many victims feel it is insufficient.¹⁷⁹

Truth commissions with their recommendations can have a substantial impact upon security sector reform by not only outlining the social and political reasons for institutional abuse, but by suggesting different types of change, yet this is entirely dependent upon political will for implementation and that the report is published prior to SSR. Sequencing is hence a critical issue, where the publication of the report of the TC needs to come at an early stage, but yet is dependent upon a level of SSR to be published. However, the very process of a truth commission can ensure transparency and accountability over acts committed by former military, police and judicial sectors, hence promoting transparency of these services in the future. But in their pursuit of justice TCs should not disregard the effect this can have on the domestic judicial system if there is not sufficient regard for due process – which can have a negative effect on the rule of law.

Additionally, the establishment of truth commissions can imply a mind-set shift in the governments creating them towards transparency and accountability; this shift can be mirrored by the security forces and the civilian population who see that the government is taking responsibility for previous acts of abuse, which is part of a broader SSR framework where a mind-set shift of all parties is crucial. Although TCs have for too long been promoted as a tool of transitional justice with limited acknowledgement of their inherent problems, it can be an essential component of a complementary approach to justice and encourage reconciliation and security sector reform.

¹⁷⁹ See also Hayner, 'Truth', p. 3.

