LEABHARLANN CHOLÁISTE NA TRÍONÓIDE, BAILE ÁTHA CLIATH | TRINITY COLLEGE LIBRARY DUBLIN
Ollscoil Átha Cliath | The University of Dublin

Terms and Conditions of Use of Digitised Theses from Trinity College Library Dublin

Copyright statement

All material supplied by Trinity College Library is protected by copyright (under the Copyright and Related Rights Act, 2000 as amended) and other relevant Intellectual Property Rights. By accessing and using a Digitised Thesis from Trinity College Library you acknowledge that all Intellectual Property Rights in any Works supplied are the sole and exclusive property of the copyright and/or other IPR holder. Specific copyright holders may not be explicitly identified. Use of materials from other sources within a thesis should not be construed as a claim over them.

A non-exclusive, non-transferable licence is hereby granted to those using or reproducing, in whole or in part, the material for valid purposes, providing the copyright owners are acknowledged using the normal conventions. Where specific permission to use material is required, this is identified and such permission must be sought from the copyright holder or agency cited.

Liability statement

By using a Digitised Thesis, I accept that Trinity College Dublin bears no legal responsibility for the accuracy, legality or comprehensiveness of materials contained within the thesis, and that Trinity College Dublin accepts no liability for indirect, consequential, or incidental, damages or losses arising from use of the thesis for whatever reason. Information located in a thesis may be subject to specific use constraints, details of which may not be explicitly described. It is the responsibility of potential and actual users to be aware of such constraints and to abide by them. By making use of material from a digitised thesis, you accept these copyright and disclaimer provisions. Where it is brought to the attention of Trinity College Library that there may be a breach of copyright or other restraint, it is the policy to withdraw or take down access to a thesis while the issue is being resolved.

Access Agreement

By using a Digitised Thesis from Trinity College Library you are bound by the following Terms & Conditions. Please read them carefully.

I have read and I understand the following statement: All material supplied via a Digitised Thesis from Trinity College Library is protected by copyright and other intellectual property rights, and duplication or sale of all or part of any of a thesis is not permitted, except that material may be duplicated by you for your research use or for educational purposes in electronic or print form providing the copyright owners are acknowledged using the normal conventions. You must obtain permission for any other use. Electronic or print copies may not be offered, whether for sale or otherwise to anyone. This copy has been supplied on the understanding that it is copyright material and that no quotation from the thesis may be published without proper acknowledgement.

From Swords into Ploughshares:

Transitions, International Law and Policy

James Gallen
PhD Candidate
08131589

I declare that this thesis:

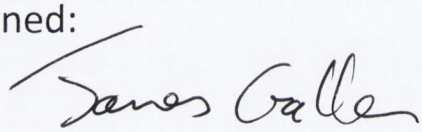
a) it has not been submitted as an exercise for a degree at this or any other University,

b) it is entirely the candidate's own work (in the case of a thesis for which the work has been carried out jointly; there must be a statement that it includes the unpublished and/or published work of others, duly acknowledged in the text wherever included) and

I agree that:

c) the Library may lend or copy the thesis upon request. This permission covers only single copies made for study purposes, subject to normal conditions of acknowledgement.

Signed:



Date:

12/19/12

TRINITY COLLEGE
2 4 MAY 2013
LIBRARY DUBLIN

Thesis 9816

Acknowledgments 8

Abstract 9

Summary 10

Chapter I: Introduction 12

Transitions 12

The Search for a Principled Account: Reasons for Examining Fields of Practice in Transitions 15

Mapping the Need for Principle: Thesis Outline 17

Roads Not Taken 20

Methodology 21

A History of Fields Relevant to Transitions: Overlaps and Overarching Components 21

A. Antiquity to World War I 21

Nuremberg and the Marshall Plan: The Post-World War II Agenda 26

The Cold War and Fragmented International Engagements 28

1990s: The End of History and the Beginning of a Consensus 36

The Modern Era: A Return to Convergence, A Search for Coherence 42

Current State of the Literature: Discrete Trends of Convergence 47

The Nature of "Fields" 55

Conclusion 56

Chapter II: The Circumstances of Transition 58

Introduction 58

The Circumstances of Transition 59

Civic Trust 66

The Fields 69

Transitional Justice 69

Peace-Building 75

Security Sector Reform 80

Economic Development 84
Interdependence and Structural Tensions 88
Risks of Incoherence and Tension 90
Conclusion 94
Chapter III: The Role of Law in Transition 95
Introduction 95
The Claims and Rule of Law 96
The Claims of Law 96
The Rule of Law 100
Building The Rule of Law in the Circumstances of Transition 105
Integrity 108
International Law 113
The Rule of Law, Integrity and International Law 117
Conclusion 120
Chapter IV: The International Legal Framework for Transitions 122
Introduction 122
International Law on Transitional Justice 122
Freedom from Gross Violations of Human Rights 123
Truth Regarding Gross Violations of Human Rights 130
Reparations 134
Amnesties 138
Conclusion 141
International Law on Peace-Building 141
International Law on Security Sector Reform 146
International Law on Development 152
Conclusion: International Law on Transitions as an Example of Fragmentation 157
Chapter V: International Policies for Transitions 159
Introduction 159

Mandates and Limitations of International Organisations 159
The United Nations 159
The World Bank 160
Organisation for Economic Co-operation and Development (OECD) 162
European Union 163
Transitional Justice 164
Security Sector Reform (SSR) 170
Peace-Building and State-Building 176
Beyond Policy Overlaps: Common Themes and Challenges 186
Context and Local Ownership 186
Coordination 189
Conclusion 190
Chapter VI: Measurement and Methodology: Indicators in Transitions 192
Introduction 192
Indicators 193
Transitional Justice Indicators 195
Peace Indicators 200
Security Indicators 202
Development Indicators 205
Indicators for Shared Framework 206
Civic Trust 207
The Rule of Law 209
Human Rights 214
Conclusion 218
Indicators and the Limits of Measurement 219
The Politics of Indicators 219
The Consequences of Indicators 222
Conclusion 224

Chapter VII: Jus Post Bellum - Integrity in Transitions 226

Introduction 226

Jus Post Bellum 227

Preliminaries: Capturing the Range of Transitions 229

Legal Frameworks and an Evaluative Approach 231

A New Approach: Organising Principles of an Evaluative Framework 234

Accountability 236

Proportionality 243

Stewardship 249

Conclusion 257

Figure 1: Jus Post Bellum: The Spectrum of Sovereign Functions 259

Chapter VIII: Nepal's Transition: The Role of International Law and Policy 260

Introduction 260

A Brief History of Nepal 261

The Armed Conflict 262

The Peace Negotiations and Comprehensive Peace Agreement 264

The Fields 265

Transitional Justice 265

Peace-Building 271

Security Sector Reform 272

Development 276

Jus Post Bellum: Accountability 280

Jus Post Bellum: Stewardship 287

Jus Post Bellum: Proportionality 291

Conclusion 291

Chapter IX: Timor-Leste: A Case Study on the Role of International Law and Policy in the Circumstances of Transition 293

Introduction 293

History of the Conflict and Transition in Timor-Leste 294
The Context: Renewed Violence and Insecurity 296
Transitional Justice 298
Peace-Building 307
Security Sector Reform 311
Introduction 311
Strategic Framework 313
Handover 315
Community Policing 316
Conclusion 317
Development 318
Jus Post Bellum: Accountability 322
Jus Post Bellum: Stewardship 325
Jus Post Bellum: Proportionality 329
Conclusion 330
Chapter X: Conclusion 333
Introduction 333
Integrity in Transitions 339
Expectations for Transitions 341
Bibliography 344

Acknowledgments

This PhD is dedicated to my parents for their integrity.

I would like to thank Dr. Rosemary Byrne for her constant support, encouragement and advice throughout my academic education career and in particular for the three years of this PhD.

In addition, I am deeply grateful for the insight, support and advice of Tony McDermot, Rob Stratton, Karen Quigley, and Sherry Hazlett through the PhD process. It would not have happened without them.

I am in the debt of all those who agreed to be interviewed in Kathmandu Nepal and Dili, Timor-Leste in 2010 and of the people of those countries, for welcoming a foreigner in a period of transition.

All errors, omissions, and limitations of this work remain the sole responsibility of the author.

Abstract

This thesis considers international assistance to transitions. In particular, it examines the relationship between the areas of transitional justice, peace-building, security sector reform and economic development in international law and in the policies of international organisations and donors. It argues that more coherent and effective international engagement is possible through the use of the principle of integrity by international actors. The thesis identifies that international actors pursue diverse goals across these areas, such as justice, truth, peace, reconciliation, an effective security sector, or economic growth. It contends that transitions generate distinct normative and factual circumstances: in pursuing their goals, each area seeks to achieve minimum conditions of civic trust and the rule of law to contribute to the re-constitution of a sovereign political community. These shared conditions render the areas inter-dependent. Nevertheless, the areas remain at risk of tension and conflicting practices, such as peace v. justice, without a conscious and explicit effort to reflect these shared conditions. The practice of these areas also pursues these diverse goals and shared conditions through law and formal legal institutions. This thesis contends that, when using law for these purposes, the explicit use of integrity among public officials and international organisations in transitions offers a new principle and process to consciously and publicly strive to avoid fragmentation, conflict and tension between these areas.

Fragmentation in these areas is evidenced in existing international law, current policies of international organisations at soft law level, and the absence of a shared means of assessment in indicators used by international organisations and donors. This fragmentation and tension generates particular areas of concern in the absence of systemic assessment and accountability, of a means of assessing priorities between the goals of international actors, and of a structure for international actors to respect local ownership and sovereignty. In response to these concerns, this thesis considers the application of the principle of integrity in a new framework for evaluating transitions and the role of international actors within them. Drawing from the just war tradition, this *jus post bellum* framework interprets pre-existing normative commitments to accountability, stewardship, and proportionality in international law and policy as manifestations of integrity in transitional societies. The cases of Nepal and Timor-Leste demonstrate the absence of systemic accountability, consistent respect for local ownership and proportionality in the existing practice of international actors and provide illustrations of the distinctive evaluation and proposals for reform that arise from applying integrity in *jus post bellum*. This thesis concludes by offering greater consciousness of integrity as a contribution to the reform of the practices of international actors and to greater respect and involvement of all citizens in transitional societies in these practices.

Summary

This thesis examines the relationship between transitional justice, peace-building, security sector reform and economic development, as expressed in public international law and in the policies of international organisations and donors. This relationship assumes increasing significance in light of emergent transitions in the Middle East and North Africa, dissatisfaction with the current approach from transitional societies, and the need for more financially efficient international aid in light of the 2008 financial crisis. Examination of this relationship seeks to identify structural, theoretical, legal and policy links that may provide a shared and interdependent framework considering issues of transitions relevant to each area.

This thesis first considers the historical relationship between these areas. While noting that the boutique discourse and practice of transitional justice, peace-building and security sector reform have their origin in the twentieth century, key challenges identified in each area can be identified in historical antecedents from antiquity to present. The relationship between these areas is largely not consciously integrated, despite significant temporal and practical overlap in a number of transitional periods. Concern for integration and coherence is cyclical, often contingent on re-evaluation after limits of a prior approach to transition were exposed.

Chapter II theorises that transitions generate distinct normative and factual circumstances in which these areas operate. At a theoretical level, the thesis notes that these areas share an interdependent relationship. Each area pursues an ideal of political philosophy but also operates in distinctive normative circumstances that I describe as the *circumstances of transition*. The combination of these goals can be seen as reflecting a common structural goal of social transformation in the re-constitution of a sovereign political community. Substantively diverse goals raise the risk of incoherence in each area and between each area.

Despite diverse substantive goals, Chapter III notes that each area seeks to achieve minimum conditions of civic trust and the rule of law to contribute to the broader project of the re-constitution of a sovereign political community. In addition, these areas moderate the pursuit of diverse goals and contribution to shared goals through the use of formal legal institutions. The effect of the circumstances of transition on the claims of legal institutions and international law is then examined. In particular, the thesis offers the perspective that the use of integrity among public officials and international organisations in transitions provides the basis of of a principle and process for pursuing coherence and better achieving the goals of area considered.

The moderation of these goals is then considered through examination of the the substantive rights and obligations of States in international law and the policies of international organisations at soft law level. The coherence of each area, the coherence between areas, and the scope for the application of these principles to individual transitions is interrogated. Chapter IV notes that the relationship between these areas is influenced, but not governed by, a nascent body of international law and norms. Chapter V notes that the relationship between these areas is practically implemented through a convergent policy framework that recognises the competing priorities of each area in the circumstances of transition. Analysis of the policy frameworks identify areas of coherence between each area and common structural challenges to engagement in transitions. Chapter VI examines how international actors seeks to assess and evaluate the success of their interventions and domestic efforts through a partially common framework and methodology of indicators and empirical measurement. It notes the shared interest in the measurement of human rights, civic trust, and governance across areas relevant to transitions, but also questions whether the current incentives and politics surrounding indicators make them a suitable basis for the distribution of international finance to transitions.

Upon considering the existing approaches in international law and policy, Chapter VII proposes a new interpretive framework for evaluating transitions and the role of international actors within them. Drawing from the just war tradition, this *jus post bellum* framework uses pre-existing normative commitments in international law and policy to seek to generate a coherent application of the principles of accountability, proportionality and stewardship in transition as manifestations of integrity. The case studies of transitions in Nepal and Timor-Leste illustrate the novel analysis and basis for reform that comes from integrity. In Nepal, the issue of accountability finds incoherent expression in the practices and attitudes of international actors and the Nepalese government. The application of stewardship is promising, with a number of trust fund mechanisms, but which may benefit from more dedicated public communication. The posture of international actors reflects a disproportionate support to domestic processes to exclude partial justice initiatives. In Timor-Leste, recent history of international support fails to evidence systematic concern for accountability of international actors, nor a mainstreamed concern for stewardship in donor practices, especially in SSR. The case also demonstrates the difficulty in pursuing partial justice strategies proportionate to competing geo-political interests. This thesis concludes by offering greater consciousness of integrity as a contribution to the reform of the practices of international actors and to greater respect and involvement of all citizens in transitional societies in these practices.

Chapter I: Introduction

I. Transitions

In 2011 widespread public revolts against authoritarian regimes broke out across the Middle East and North Africa. From Tunisia to Egypt, from Syria to Libya, mass demonstrations for political and democratic transition fundamentally altered regional and global politics. Accountability and criminal trials for authoritarian rulers featured highly among public demands in these states, supported by the referral of the Libyan situation to the International Criminal Court.[1] Accountability and reform of State institutions, in particular the security forces of each state, are also prominent in demands across the region.[2] Violence has also accompanied these transitions, generating international concern for the swift consolidation of peace. Furthermore, the re-distribution of national wealth and pursuit of economic growth have also been pronounced in public expectations for change.[3] These challenges of justice, security, peace, and development remain high priorities in North Africa and the Middle East in 2011 and beyond.

Western concern for this "Arab Spring" reflects a broader strategic view that so-called "fragile states" represent the most significant global security threat in the twenty first century. "Fragile states" reflect a modern understanding of the failure of a sovereign government to provide public goods, such as justice, security, peace, and development.[4] In 2010, U.S. Secretary for Defense Robert Gates acknowledged that fragile states are the primary security threat to the United States of America.[5] This acknowledgment follows from concern for fragile states in the aftermath of the terrorist attacks of 11th September 2001. The U.S. military campaigns in Afghanistan and Iraq highlighted the belief that global security depended on the operation of functioning states that would inhibit safe havens for international terrorism. The experience of the subsequent occupation of these States demonstrated the need for a coherent strategy for transitions and the

---

[1] UN SC Res 1970 The Situation in Libya (26 February 2011)

[2] International Center for Transitional Justice, Syria: UN and Arab League Must Act Swiftly to Address Crimes <http://ictj.org/news/syria-un-and-arab-league-must-act-swiftly-address-crimes> (accessed 1 August 2011); Steve Negus, "Mubarak's Trial and Errors" *Foreign Affairs* (2nd August 2011); David Kaye, "Wanted: Qaddafi & Co" *Foreign Affairs* (19 May 2011)

[3] Shashank Joshi, "Libya need not repeat others' mistakes", *The Guardian,* (24 August 2011); Bruce Rutherford, Now Comes the Hard Part *Foreign Policy* (10 February 2011)

[4] Gerald Helman and Steven Ratner, "Saving Failed States," *Foreign Policy,* No. 89 (Winter, 1992-1993), 3-20; Robert I Rotberg (ed) *When States Fail: Causes and Consequences* (Princeton University Press 2004); Ashraf Ghani and Clare Lockhart, *Fixing Failed States: A Framework for Rebuilding a Fractured World* (OUP 2009)

[5] Robert Gates, Helping Others Defend Themselves *Foreign Affairs* May/June 2010

attendant risks if coherence was ignored.[6] The "de-Baathification" process, subsequent rise in insurgent violence, the botched trial of Saddam Hussein and stagnant economic development of Iraq all point to limitations and lessons to be learned from the approach of the Coalition Provisional Authority.[7]

While fragile states remain a global strategic priority, recent events suggest the need for a fundamental re-evaluation of the coherence of international engagement in transitional societies and fragile states. First, the 2011 World Bank World Development Report offers recommendations on how the international community can secure development in these fragile and transitional environments.[8] The publication and focus of this report acknowledges not only the global strategic priority given to conflict, transitions and fragile states, but also the significant limitations in previous international approaches and the need for coherent reform of international policy in this area.

Second, representatives of developing countries affected by fragility, bilateral and multilateral donors and civil society actors combined in 2010 to produce the Dili Declaration on Peace-Building and State-Building.[9] The Declaration identified key areas of concern from fragile developing States and donors and international organisations in such environments. These concerns included the lack of a shared vision for transitions among key stakeholders, based on consultations with citizens and civil society; a lack of context and conflict analysis in international engagement; a lack of trust between developing countries and their development partners; overlapping plans and weak donor coordination and planning; unrealistic timeframes for reform, weak capacity to implement plans and limited effectiveness of the capacity building approach; and, significantly, the "need to strengthen linkages between development, security, justice and good governance." The Declaration identifies significant limitations to the existing approach of international actors and the fundamental dissatisfaction of fragile developing countries with this current approach. These concerns expressly identify incoherent international policy as a compelling limitation of the current approach.

---

[6] International Crisis Group, Aid and Conflict in Afghanistan Asia Report No. 210 (4 August 2011)

[7] Robin Luckham, "The international community and state reconstruction in war-torn societies", (2004) 4(3) Conflict, Security & Development, 481-507

[8] World Bank, World Development Report 2011 (World Bank 2011)

[9] Dili Declaration: A New Vision for Peace-Building and State-Building available at http://www.oecd.org/dataoecd/12/30/44927821.pdf

Third, due to the financial crisis originating in 2008, the commitment of donor states and the international community to finance international development aid has been called into question. Development aid represents a massively expensive enterprise for states and international organisations.[10] International engagement in Iraq is estimated to have cost upwards of $3 trillion U.S. dollars.[11] The commitment of Western states to development aid in recent years has been significant.[12] Though some states have "ring-fenced" their development spending, many others have adopted stringent cuts.[13] Current global economic circumstances has prompted bilateral donors to prioritise aid goals and called into question the capacity of several states to meet their commitment to contribute 0.5 GNP by 2015.[14] As donor states face challenging domestic political and economic environments, concern grows about their willingness to continue to pursue complex and costly international engagement in transitions and fragile states. In this context, the question arises whether coherent international assistance could be more financially efficient.

The combination of the urgency of transitions in the Middle East and North Africa, calls from fragile developing States to re-consider international policies on transitions, and the diminished finance available from international donors to support such change, all suggest the need for states and international organisations to fundamentally re-consider the nature and means of engagement in fragile states and transitions. Renewed by the relevance of these concerns, this thesis considers whether the current international approach in transitions, characterised by pragmatism and organic reform, is a suitable means of pursuing the stated goals of transitional societies and the international community. As a consequence, this thesis queries whether a more principled, coherent and self-conscious approach to international assistance in transitions is possible and desirable and whether such an approach could generate novel practical recommendations and solutions for reformed international engagement.

---

[10] OECD, Development aid rose in 2009 and most donors will meet 2010 aid targets, 14th October 2010, available at <http://www.oecd.org/document/11/0,3746,en_2649_37413_44981579_1_1_1_37413,00.html> (accessed 27 September 2011)

[11] Joseph Stigilitz, The Three Trillion Dollar War: The Truth Cost of the Iraq Conflict (WW Norton 2008)

[12] World Bank, Aid Flows, available at www.aidflows.org (accessed 26 September 2011)

[13] David Cameron, Why we're right to ringfence the aid budget, *The Guardian,* (11 June 2011)

[14] UN News Agency, UN chief reiterates need to accelerate efforts to achieve global anti-poverty goals, (22 August 2011); United Nations, Millenium Development Goals Report 2010 (UN 2010)

II. The Search for a Principled Account: Reasons for Examining Areas of Practice & Discourse in Transitions

This thesis asks whether principled, coherent and self-conscious international assistance can and should be pursued across discrete and specific fields of practice relevant to transitions. The range of demands and issues that compete for priority in transitions and fragile states is vast. This thesis focuses on the areas of transitional justice, peace-building, security sector reform, and development. By "transitional justice", this thesis describes the means by which transitional societies and the international community come to terms with a legacy of gross violations of human rights. "Peace-building" can be defined as actions undertaken by international or national actors to institutionalise peace, understood as the absence of armed conflict and at least a modicum of political process sustainable in the absence of an international peace mission. "Security sector reform (SSR)" can be defined as all activities aimed at the effective and efficient provision of state and human security within a framework of democratic governance. By "development" this thesis refers to processes whose most general aim is to improve the socio-economic conditions of individual citizens.

Several reasons exist for examining these areas and the relationship between them as a means of assessing the coherence and principled nature of international engagement in transitions and fragile states more generally. First, the overlap between these areas is a priority in modern assistance to transitions. Issues of impunity and a lack of accountability, central to transitional justice, may exacerbate insecurity and violence. However, the prospect of criminal justice for gross violations of human rights may also lead to a continuation of conflict and prolonged insecurity. In addition, the link between conflict and development has been expressly acknowledged as a major priority in fragile states discourse. A majority of modern armed conflicts occur in under-developed countries.[15] Poverty may contribute to armed conflict or authoritarian rule, while conflict and authoritarianism can in turn damage development.[16] Among the other areas, peace-building has become the dominant overarching framework for international assistance in transitions and fragile states. Finally, though a niche area of practice, security sector reform has also assumed increased significance in transitions, with the absence of effective SSR often cited as a cause of continued insecurity and renewed conflict in transitions. Each area therefore is a prominent area of concern in transitions.

---

[15] Graham Brown, Arnim Langer, and Frances Stewart, *A Typology of Post-Conflict Environments: An Overview* (UNDP 2007)

[16] Roger Duthie, "Introduction", in Roger Duthie and Pablo De Greiff (eds) *Transitional Justice and Development: Making Connections* (SSRC 2009) 19

A second reason for examining these areas is that they share formal regulation in domestic and international law. These areas therefore share a common challenge in attempting to use the moderating force of law to achieve their goals. In particular, international law seeks to regulate the content of these areas across diverse transitions and seeks to provide general normative guidance, regulation and theory in law despite the diverse contexts experienced in transitions. This thesis thus asks whether international legal regulation contributes to coherent and principled international engagement in fragile states in these areas.

A third reason for examining these areas and arises due to shared operational challenges. These areas operate in similar contexts of low domestic bureaucratic capacity, economic under-development, low levels of civic trust, and a multiplicity of international actors. These areas may therefore share common operational preconditions: sufficient state resources, personnel, capacity, political will, and cooperation and consensus among international actors. It is not clear that these preconditions obtain everywhere.[17] This thesis asks whether a principled and coherent account of international engagement may better respond to these shared operational challenges.

A fourth reason is an attempt to reconcile contestation within and between these areas. These areas can be understood as fields, discourses, as communities of practice, and as concepts. All remain contested in definition and theory, but share the structural aim of changing the attitudes, behaviours and perceptions of individuals and institutions in transitional societies. These areas could be considered to be definitional, but there is a risk that these definitions may make the areas mutually unintelligible. Finally, each field represents a contestation of disciplines seeking to assert dominance in the area. Christine Bell, Colm Campbell and Fionnuala Ní Aoláin argue that transitional justice has been largely dominated by legalism and legal scholarship.[18] Bell contends that there is a hidden politics to how transitional justice has been constructed as an interdisciplinary field that obscures tensions between the range of practices and goals that it now incorporates.[19] Similarly, security sector reform has been accused of seeking the "securitisation" of development and peace issues, and seeking to incorporate legal and judicial institutional

---

[17] Pablo de Greiff, "Articulating the Links Between Transitional Justice and Development: Justice and Social Integration" in Roger Duthie and Pablo De Greiff (eds) *Transitional Justice and Development: Making Connections* (SSRC 2009) 31

[18] Christine Bell, Colm Campbell and Fionnuala Ní Aoláin, "Transitional justice: (re)conceptualising the field", (2007) 3(2) International Journal of Law in Context 81–88

[19] Christine Bell, "Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'" (2009) 3 The International Journal of Transitional Justice 5–27, 13

reform. Development actors in turn have moved into areas traditionally within the legal profession, such as the rule of law and property rights. Though this picture of contestation is somewhat simplistic, this thesis queries whether an overarching coherent interpretation of these fields may resolve such contestation and facilitate a shared interdisciplinary framework.

A final reason relates to the goals pursued in each area - justice, peace, security and development and specific expressions of those goals, truth, accountability, democratically controlled armed forces, good governance of state institutions, etc. Philosophers, practitioners, international lawyers and policy makers contend with whether these areas and their attendant goals are interdependent and can reinforce one other in their contribution to the transformation of transitional societies and fragile states. The relationship between these areas thus raises complex questions of principle, morality and ethics. The resolution of such questions requires distinct consideration beyond pragmatic and reflexive activities in each transition: "to pretend otherwise is to show an arrogant disregard for the complexity of the problems and the real conflicts of principle that must be resolved to address them."[20] As issues of domestic and global politics, international engagement in transitions and fragile states is often considered pragmatically, in a State's own interests, and through the prism of a *realpolitik* world view. The dominance of a pragmatist posture emphasis the primary question of this thesis: whether a coherent and principled account can and should be given of international engagement in transitions across substantively diverse areas pursued by transitional societies and the international community.

The priority given to these areas in the practice of international support to transitions, their regulation in international law, their shared operational concerns, the contestation within and between areas, and the present pragmatic approach to major questions of morals and ethics across these areas, all suggest the necessity of examining whether a principled and coherent account can be given of international assistance to transitions and fragile states in the areas of transitional justice, peace-building, security sector reform, and development.

III. Mapping the Need for Principle: Thesis Outline

This thesis will proceed as follows. Chapter II examines theoretical frameworks for transitions. It contends that transitions generate distinct normative and factual circumstances across the operations of any field of practice. The chapter contrasts the circumstances political theorists

---

[20] Robin Luckham, "The international community and state reconstruction in war-torn societies" (n7) 501

expect in consolidated democracies with the distinct challenges faced in the circumstances of transition. The chapter contends that such circumstances enable us to see the conditions in which the four fields seek to make their claims and pursue their goals. This approach enables us to consider the shared assumptions of each field and provides a platform for considering their coherent application in distinct areas and specific transitions. In applying these conditions, the chapter notes that each field is value oriented and instrumental in pursuing some goal or ideal from political theory. Each of these ideals generates component goals in each field. The combination of these goals can be seen as reflecting a common structural goal of social transformation in the re-constitution of a sovereign political community. However, the fragmented nature of these components also raises the risk of incoherence in each field and between fields. The chapter concludes by considering examples and structures of those risks.

Chapter III seeks to explore whether these risks can be mitigated by pursuing coherence in the interpretation, evaluation and practice of these fields through the norm of integrity. Chapter III notes that each field seeks to achieve minimum conditions of civic trust and the rule of law to contribute to the broader project of the re-constitution of a sovereign political community. In addition, these fields moderate the pursuit of diverse goals and contribution to shared goals through the use of formal legal institutions. The effect of the circumstances of transition on the claims of legal institutions and international law is then examined. The value and process of integrity is employed to respond to the application of the general claims of law, and the rule of law in the circumstances of transition. In particular, integrity is considered from the perspective of citizens and officials of a transitional State and officials of foreign governments and international organisations engaged in transitions. Integrity is a value and process that acknowledges the particular challenges that arise in pursuing the goals of each field through law and legal institutions.

Chapter IV evaluates the impact of the international legal framework on the design and implementation of transitional justice, peace-building, security sector reform and development. The chapter examines whether international law contributes to coherence or fragmentation of each field, the relationship between fields, and the need for fields to integrate the context of individual transitions. It considers the specific human rights obligations relevant to transitional justice, the contextual and discretionary international legal framework for peace-building and the under-regulated areas of international law on security sector reform and development. This consideration identifies tensions between the mass nature of human rights and the ongoing use of amnesty for such crimes. Further tensions may exist between a rights based approach to

transitional justice and discretionary norms rooted in self-determination regarding the choices to be made by transitional societies in the fields of peace-building, security sector reform and development.

Chapter V examines the coherence of the policy frameworks of international organisations and multilateral donors. It examines the extent of the realisation of the international legal framework in practice and, in the absence of significant implementation, the alternatives adopted by these institutions. It also identifies convergence and dissonance between the policy frameworks adopted by multilateral institutions and the customary international legal practice of the States that constitute and are represented by such institutions. The chapter notes the contextual approach adopted in these policy frameworks and emphasises the tension between the desire for local context and ownership and the transformative goals pursued in policy frameworks in each field. The chapter identifies issues of individual and institutional accountability, the need for a means to assess the priorities pursued by national and international actors in transitions, and the need for a means to assess the nature of international institutions in transitional environments as key limitations of current policies.

Chapter VII examines how international actors seeks to assess and evaluate the success of their interventions and domestic efforts through a partially common framework and methodology of indicators and empirical measurement. It identifies the potential for a shared measurement of human rights, civic trust and the rule of law which would reflect theoretical, legal and policy overlaps and interdependence between each of the fields examined. It is contended that this approach would better enable the pursuit of integrity in the assessment and measurement of these fields and their goals. However, the chapter also argues for caution and humility in the use of indicators as a technology, given the politics and potential consequences involved in their use.

Upon considering existing approaches in international law and policy, Chapter VIII proposes a new interpretive framework for evaluating transitions and the role of international actors within them. Drawing from the just war tradition, this *jus post bellum* framework uses a number of pre-existing normative commitments in international law and policy to seek to generate a coherent application of these principles as the basis of integrity in transition. The principles of accountability, stewardship and proportionality are drawn from existing commitments of States and international organisations to provide new means of evaluating their conduct across diverse fields and represent manifestations of integrity in transitions.

The case studies of transitions in Nepal and Timor-Leste are considered in each of the fields examined and through the prism of the *jus post bellum* principles and illustrate the application of integrity to transitions. In Nepal, the issue of accountability finds incoherent expression in the practices and attitudes of international actors and the Nepalese government. In particular, limited donor accountability for practices during the armed conflict, as well as limited regulation on incoming peacekeepers and bilateral military training seem hard to reconcile with efforts to pursue accountability in transitional justice or ensure commitment to the terms of the unmonitored peace agreement. In Timor Leste a decade's worth of international engagement has produced mixed results across the fields examined in this thesis. The chapter examines the nature of international engagement with regarding the accountability mechanisms employed by international actors, the application of the stewardship conception of international engagement in donor activity and government resource management, and the proportionality between the fields pursued across the decade of international assistance to Timor-Leste.

A final chapter concludes by gathering appropriate expectations for international assistance to transitions reformed through the principle of integrity and applied through the principles of a *jus post bellum* framework. The chapter notes the practical consequences for reform from this approach and the resultant enhancement in the coherence and clarity of international assistance to achieve the stated goals of relevant actors.

IV. Roads Not Taken

In considering international engagement in these fields, this thesis will focus on specific institutional actors. The thesis will primarily consider multilateral international organisations relevant to each field, such as the United Nations, World Bank, and European Union. To reflect the practices of bilateral donors but also ensure sufficient coverage, this thesis also considers the practice of the Organisation for Economic Co-operation and Development. Issues relevant to transitions such as whether the international community, through international organisations or bilateral donors, *should* engage in activities in transitional societies. Such questions raise significant issues of the responsibility to protect, the legality of humanitarian intervention, the obligation to provide development aid, and other contentious issues that remain beyond the scope of the thesis.

Finally, despite a conceptual, legal and policy overlap, this thesis will not consider issues of gender in each field. gender has become a dominant cross cutting theme across each of the fields considered in this thesis. Issues such as UN Security Council Resolution 1325 on women peace and

security, issues of sexual violence, the role of women in peace-making, peace-building and reconciliation are significant issues. As such gender represents a significant area of potential coherence across these fields. However, because of the broad range of gender issues, a PhD thesis could not hope to do justice to the complexity of the relationship between these fields *and* the nature of gender as an organising and interpretive principle within that relationship in addition to the hypotheses identified in prior sections. It is hoped that this issue can be examined in future research in the area.

V. Methodology

This thesis uses traditional sources of public international law and sources of "soft law" as primary sources. It is also based on peer reviewed academic literature: books, monographs, articles, conference papers. In addition it includes significant reference to policy papers, strategic frameworks and country specific documents of donors and international organisations. Finally, the thesis also employs interviews conducted with practitioners, both domestic and international actors, government, NGOs, international organisations and donors in Kathmandu, Nepal and Dili, Timor-Leste in 2010. On these visits, the author conducted interviews with a range of international and domestic actors, from government officials, civil society actors, NGO activists, representatives from international donors and international organisations, local lawyers and political figures. These interviews are used to illustrate individual views or concerns regarding the issues considered in this thesis, and are not intended to establish broad popular conceptions of the views expressed. As a result neither qualitative nor quantitative analysis has been applied.

VI. A History of Areas Relevant to Transitions: Overlaps and Overarching Components

The primary question of this thesis concerns the principled coherence in the areas of transitional justice, peace-building, security sector reform and development. This question is primarily a recent one, as the fields themselves are often considered 20th century creations. However, a broader historical perspective demonstrates that elements of these areas have a long history and have long overlapped in discrete periods. A broader historical perspective also identifies previous attempts to provide a coherent and principled account of international involvement in transitions. This historical perspective sets the context for the current inquiry and enables the subsequent chapters to reflect a coherence with prior approaches to international engagement in transitions.

A. Antiquity to World War I

Societies have long wrestled with transitions from conflict to peace. Ancient Greece provides us with discrete but contemporaneous examples of transitional justice and development.[21] In 411 B.C. the restoration of democracy after four months of oligarchic rule included "a relentless prosecution of extremist oligarchs"[22]. A second oligarchy arose in 404 B.C., which killed over fifteen hundred Athenian citizens, often in revenge for these prosecutions. A significant proportion of Greek citizens were exiled, but eventually defeated the oligarchs in battle. In *The Constitution of Athens*, Aristotle describes trials for these homicides, an amnesty and the exclusion from public office in the subsequent peace agreement between the oligarchs and the exiled Athenians.[23] The peace agreement demonstrates a conscious shift in the measures aimed at the prior oligarchic regime and a sophisticated political discourse regarding the multiple pathways for dealing with the past. In addition, the Treaty of Kadesh between the Hittite and Egyptian empires, and evidence of Roman peace treaties offer further illustrations in early history of normative and legal commitments and peace-building at the end of hostilities.[24] The Ancient Greeks also are among the first to expressly consider a concept of development. In *Politics,* Aristotle contends that the best political and economic arrangement is one "according to which anyone whatsoever might do best and live a flourishing life."[25] Such a view is the basis for a concept of distributive justice and the correct principles for political governance. It is striking to see how the ancient civilisations possessed ideas reflective of each field in a roughly contemporaneous period. Even from antiquity, we have the potential for a coherent and principled account of transitions, though it appear such ideas remained disparate at this time.

Second, the emergence of a just war tradition in the Middle Ages demonstrated further potential for an overarching framework for engagement in transitions. The doctrine provided "the fundamental idea that the resort to armed force was justifiable if its purpose was the vindication of the rule of law."[26] However, such doctrines were largely not applied to peacemaking or the conclusion of conflicts, despite the works of Vitoria and Gentili including examination of this area

---

[21] Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge University Press 2004), 3-24

[22] Mark Ostwald, *From popular sovereignty to the sovereignty of law: law, society and politics in fifth century Athens* (University of California Press 1986), 401

[23] Aristotle, *The Constitution of Athens,* Ch XXXIX, available at http://www.gutenberg.org/ebooks/26095

[24] Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (OUP 2008), 80-3

[25] Aristotle, *The Politics,* 1323alF17, available at http://www.gutenberg.org/ebooks/6762

[26] Stephen Neff, "Conflict Termination and Peace-Making in the Law of Nations" in Carsten Stahn and Jan Kleffner *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (TMC Asser Press 2008), 78

under *jus victoriae.*[27] Despite this early potential, Jon Elster suggests that history provides "no important episodes of transitional justice in new democracies between the Athenian episodes and the mid-twentieth century."[28] Similarly with regard to development, Arndt takes the view that "it is not easy to see in what sense economic development represented a policy objective during the embryonic and infant stages of capitalism, between (say) 1200 and 1500 A.D."[29] However, the Middle Ages do provide evidence of peace agreements, some aimed at preventing future hostilities, or limited allowance of reprisals, while others enabled amnesties, restitution of property, and return of prisoners of war.[30] Such practices emerged as part of the emergence of a new international order, crystallising with the Peace of Westphalia in 1648. Christine Bell identifies that the importance of the Westphalian era was in the creation of a *nomos,* "as interaction of prescriptive text and both the prior and subsequent narratives which arose around what constituted the before and after."[31] The emergence of the just war doctrine thus provides an illustration of early attempts at the coherent regulation of conflict, but with limited concern for its cessation and transition.

The concept of sovereignty also offers a further potentially coherent basis for examining transitions in the post-Westphalian era. The trials of Charles I and Louis XVI contribute to a concept of limited sovereignty and raised meta-issues of who can appropriately try a head of state and the type of crime with which a head of state can be charged. In both cases, there was no factual doubt about the guilt of the kings for authorising violence against their people.[32] Charles was tried under an existing statute, whose primary use had been to extend English sovereignty over the whole of Ireland and the established church in England.[33] The charge re-conceived England as a state in which Charles had been entrusted with the powers of chief magistrate provided that he continue to act for the good of the people. In contrast, the trial of Louis XVI under a new constitution and new criminal code asserted principles of popular sovereignty and equality before the law first

---

[27] ibid 78-81

[28] ibid 48

[29] Heinz Wolfgang Arndt, *Economic Development: The History of an Idea* (University of Chicago Press 1989)

[30] Christine Bell, On the Law of Peace: Peace Agreements and the Lex Pacificatoria, (n25) 84

[31] ibid 88

[32] Michael Walzer, *Regicide and Revolution: Speeches at the Trial of Louis XVI* (Columbia University Press 1993), 69; Geoffrey Robertson, *The Tyrannicide Brief: The Story of the Man who sent Charles I to the Scaffold* (Vintage Books 2006) 138

[33] 25 Edward III, st. 5, c. 2 ; DA Orr, *Treason and the State: Law, Politics, and Ideology in the English Civil War* (Cambridge University Press 2002) 28

through the new political settlement and then enforced through a court of law. These trials thus evidence a new understanding of sovereignty, in which it is possible to separate the sovereignty of the State from the person of the individual monarch. This new concept of sovereignty has massive significance in the Enlightenment period and was a crucial step in the economic development of Europe and the industrial revolution.[34] For instance, Max Weber noted the particular form of law used in Europe, and its degree of "rationality", was a factor that distinguished Europe from the rest of the world and explained the emergence of the capitalist industrial economy, as it was only Europe that had developed this particular type of law.[35] The emergence of a modern concept of sovereignty thus features in the early formulations of both transitional justice and development and, through acknowledging the central relationship of citizen and state as moderated through formal law, provides a foundation for a coherent consideration of the four fields identified and transitions more generally.

However, the potential for coherence remained unfulfilled, as a pragmatist posture to international relations dominated where foreign States intervened in the domestic affairs of a fellow State. The two Restorations of the French monarchy in 1814 and 1815 were negotiated transitions, which involved decisions made by foreign States regarding how to deal with Napoleon's past crimes. Gary Bass suggests that the 1815 Restoration and this exile saw the exercise of naked state power against Napoleon and as such offers a favoured case for realists.[36] It is suggested the involvement of foreign States generated this pragmatism, in contrast to the internal approaches of the trials of Charles I and Louis XVI. By the middle of the 18th century, pragmatic compromise and negotiations became the dominant mode of conclusion of hostilities, affirming the primacy of consent among sovereign powers as the basis of international decision making.[37] However, Duncan Kennedy notes the emergence of globalisation in legal thought in the late nineteenth century, based on seeing law as a system "having strong internal structural coherence based on exhaustive elaboration of the distinction between public and private, individualism, and commitment to legal interpretive formalism.[38]

---

[34] David Trubek, "Max Weber on Law and the Rise of Capitalism" (1972) 1972 Wisconsin Law Review 720

[35] Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (Routledge Classics 1930 Reprinted 2006) xxxviii; 36

[36] Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press 2002)

[37] Stephen Neff, Conflict Termination and Peace-Making in the Law of Nations, (n27) 82-85

[38] Duncan Kennedy, Three Globalisations of Law and Legal Thought: 1850-2000, in David Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Reappraisal,* (CUP 2006) 19-73; 25-37

Within this globalisation of legal thought, renewed efforts at coherence and legalism characterise World War I era transitional justice, which emphasised its links with economic development: in both areas, the Treaty of Versailles adopted a punitive approach. This approach demonstrates a coherent principle of punishment and signals that a coherent approach is no guarantee sustained peace, security and development. The Treaty of Versailles agreed at the Paris 1919 conference set out a number of additional international criminal justice components to deal with crimes committed during World War I. The Allies formally demanded Willhelm II from the Netherlands under Article 227 of the Versailles Treaty "for a supreme offence against international morality and the sanctity of treaties." When the neutral Netherlands refused to turn over the Kaiser to the Allied powers, this provision became a dead letter. In addition, Article 228 provided for military tribunals for the prosecution of those Germany soldiers who committed breaches of the laws and customs of war. A compromise was reached with a Germany reluctant to hand over its own soldiers for trial that the Allied Forces would draw up lists of suspects but that the trials would take place in German courts. From an initial selection of approximately 900, only a dozen were actually tried, with several acquittals and modest terms of imprisonment. Punitive restrictions were also placed on German security forces.[39] The most controversial provision of the Treaty of Versailles remains Article 231, which stated:

> The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.

This clause sought to attribute blame for crimes committed during World War I to the German nation and people. In addition, it generated a justification for clauses 232-47, which imposed an obligation on Germany to provide vast economic reparations to the Allies for crimes committed during the war. These provisions operated at a punitive and prohibitive level, designed to keep the German economy weak and under-performing. J.M Keynes lamented the approach taken at Versailles:

> I believe that the campaign for securing out of Germany the general costs of the war was one of the most serious acts of political unwisdom for which our statesmen have ever been responsible. To what a different future Europe might have looked forward if either Mr. Lloyd George or Mr. Wilson had apprehended that the most serious of the problems which claimed their attention were not political or territorial but financial and economic, and that the

---

[39] Treaty of Versailles, available at <http://www.firstworldwar.com/source/versailles.htm> (accessed 27 September 2011), Articles 159-213

perils of the future lay not in frontiers or sovereignties but in food, coal, and transport. Neither of them paid adequate attention to these problems at any stage of the Conference.[40]

Keynes further bemoaned the absence of any provisions for the economic rehabilitation of Europe or the stabilisation of relations between States. The adoption of a model of retributive or punitive justice for both criminal justice and economic sanctions provided a coherent international response to armed conflict and transition, but failed to appreciate the particular normative circumstances of responding to mass crimes or widespread or systemic gross violations of human rights, which may go some way to explaining the significant failures of the Versailles Treaty. Allied actions after World War I were ground breaking in their punitive sanctions for international responsibility and the ambitious use of international law. The Covenant of the League of Nations affirmed the centrality of peace building to the emergent international system, with Article 11(1) providing that any war or threat of war was a matter of concern to the whole League." The protection of minority rights in that regime and the emergence of internationally administered territories were significant developments in international law's claim to legitimate interference in the internal affairs of States. These developments were important precursors for the modern post World War II international legal system and began a process of principled and coherent concern for the domestic affairs of States in the international arena.

B. Nuremberg and the Marshall Plan: The Post-World War II Agenda

The Nuremberg trials of the International Military Tribunal and the U.S. Marshall Plan for the economic recovery of Europe are among the most iconic examples of transitional justice and economic development and provide an illustration of principled and coherent international engagement. In 1943, the Allies affirmed their commitment in the Moscow Declaration to the prosecution of Nazi soldiers for war crimes.[41] The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT) was formally adopted on 8 August 1945, with jurisdiction for crimes against peace, war crimes and crimes against humanity. The creation of the IMT was greatly enabled by the unconditional German surrender, which removed the security concerns of continued risk to Allied soldiers evident in the cases of Leipzig and Constantinople.

---

[40] John Maynard Keynes, The Economic Consequences of Peace (1919), Chapter V, available at http://www.gutenberg.org/ebooks/15776

[41] Statement on Atrocities Joint Four-Nation Declaration October 1943, available at <http://www.ibiblio.org/pha/policy/1943/431000a.html> (accessed 27 September 2011)

The IMT also provides the first example of American leadership on international criminal justice. Despite an initial instinctive desire for a swift, furious and vengeful justice through executions and deportation of all Nazi soldiers, a reasoned legalism characterised the American approach. Contemporary accounts from US Secretary of War Henry Stimson demonstrate an understanding of the failure to differentiate between individual criminal accountability and mass punishment through economics in Leipzig. He says concerning the desire for a vengeful justice against the entire German people "I am very much afraid that it will result in our taking mass vengeance on the part of our people in the shape of clumsy economic action. This in my opinion will be ineffective and will inevitably produce a very dangerous reaction in Germany and probably a new war."[42] In addition to the IMT, the Allied Powers enacted Control Council Law No. 10, which provided the basis for prosecution of Nazi soldiers and collaborators by occupying Allied forces as well as by German courts in the subsequent decades.[43] Finally, the post-World War II period saw extensive trials in other European jurisdictions, as well as efforts at reparations and the denazification of the public sector. Across the world, the Allies established the International Military Tribunal for the Far East (IMTFE), which operated to prosecute the same category of crimes as at Nuremberg, albeit to a hostile reception among the Japanese.[44] Such measures of transitional justice represent one of the finest examples of successful legalism throughout the ages. In this period, it is surpassed only by the enormous success of the economic recovery of Europe through the Marshall Plan.

Greg Behrman contends that the United States' Marshall Plan is the "greatest act of statesmanship in the nation's history" as well as the best example of a concerted and coherent international effort to improve the quality of life and equality of opportunity in a foreign state.[45] In addition, the initiative was of massive strategic significance and represented an unprecedented commitment of U.S. resources, the equivalent of $100 billion dollars worth of aid in today's terms. Immediately following the end of World War II, the countries of Europe and the Soviet Union needed time to recover and avoid the recurrence of war. Shorn of resources and morale, there was a danger of significant inaction in the reconstruction and recovery of Europe. More than 50% of

---

[42] *Henry L. Stimson Diaries,* vol. 48, 26 August-3 September 1944, p. 30

[43] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946)

[44] Neil Boister and Robert Cryer, The Tokyo International Military Tribunal - A Reappraisal (OUP 2008)

[45] Greg Behrman, *The Most Noble Adventure: The Marshall Plan and the Time When America Helped Save Europe,* (Free Press 2007) 4

housing in major European cities was reduced to rubble. More people faced starvation during the year following the war than during all of the war years combined.

The Marshall Plan was not the first effort at providing economic relief from the effects of war. From 1943, the US had provided 75% of funding to the Relief and Rehabilitation Administration of the United Nations (which was at this stage the Allied forces). Nonetheless, in 1946 the US State Department recognised it had merely a piecemeal approach to aid in Europe and had underestimated the fragility of European recovery. It was further acknowledged that Europe needed not only financial aid but also technical and administrative support for its recovery.[46] General Marshall outlined the objective of the Plan: "the revival of a working economy in the world so as to permit the emergence of political and social conditions in which free institutions can exist."[47] This objective provided a coherent account of the essential links between post-war peace, justice and economic stability – there could be no sustainable peace in Europe as long as European economies were suffering. Framed in this mutually reinforcing fashion, the objective of U.S. post-World War II intervention was rooted in American security and economic interests as much as a humanitarian desire to restore Europe. The results were immediate. In September 1948, Europe had a 10% rate of growth. The Marshall Plan had already shifted from humanitarian relief to economy recovery. The Plan also played a key contribution to prompting closer European economic integration and facilitated the European dialogues that eventually gave rise to the European Coal and Steel Community, a pre-cursor to the European Union.

C. The Cold War and Fragmented International Engagements

The horrors and destruction of World War II compelled the Allies to respond coherently with the IMT and the Marshall Plan. These enterprises and Allied production, organisation and logistics during the war itself had demonstrated "the power of government action in mobilising economic resources" and thereby "generated a climate of optimism about what could be done to make the world a better place, abroad as much as at home.[48]" The emergence of a range of international institutions, the United Nations, the World Bank, the Organisation of American States, the European Court of Human Rights, and NATO are evidence of optimism and potential for coherent international cooperation. Amid this optimism, a nascent body of international human rights norms emerged in the Universal Declaration of Human Rights of 1948. In addition to the Geneva

---

[46] ibid

[47] ibid 69

[48] Heinz Wolfgang Arndt, *Economic Development: The History of an Idea*, (n30) 44

Conventions (1949) and the Genocide Convention (1949) the UDHR offered the potential cornerstone of a new coherent international order. However, the emergence of the Cold War posture between the United States and Soviet Union ensured that such potential remained largely unfulfilled until new opportunities in 1990s.

The norms of the UDHR crystallised in two International Covenants on Civil and Political Rights and Economic, Social, and Cultural Rights in the 1960s, though they did not enter into force until 1976.[49] The existence of two covenants reflected the ideological division between the West and Soviet Union, the prominence of civil and political rights in the West contrasted with Soviet and Marxist ideology informing programmatic socio-economic rights. This ideological division significantly limited the potential of the United Nations, among other international organisations, to fulfil their mandate and role in a coherent fashion. In particular, the actions of the United Nations Security Council, designed to pursue authoritative settlement of disputes threatening international peace and security, were struck by institutional paralysis and inertia. The veto powers of the permanent members of the Council precluded principled and coordinated international engagement in fragile states, as the authorising resolutions of the Council were *ad hoc*, pragmatic and exceptional.[50]

Other international processes operated during the Cold War era in a parallel but fragmented and often incoherent fashion. These fragmented processes advanced values and institutions relevant to transitions, but not in a fashion explicitly conscious of their relationship to other areas. The process of decolonisation that began in earnest after World War II reflected a practice of peace agreements between State and non-state actors.[51] Developing countries, including many former colonies, sought acknowledgment that their under-development was a consequence of their former status, and that developed States had an obligation to ensure their equitable development. As a result, the UN General Assembly adopted the Declaration for the Establishment of a New International Economic Order, which provided *inter alia* that developing countries should be free to expropriate foreign property on favourable terms and that international trade should be

---

[49] International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976; International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3,entered into force Jan. 3, 1976.

[50] David M. Malone (ed), The UN Security Council: From the Cold War to the 21st Century (Lynne Rienner 2004)

[51] Christine Bell, On the Law of Peace: Peace Agreements and the Lex Pacificatoria, (n25) 97-98

based on preferences equitable to developing nations.[52] This trend also led to the Declaration on the Right to Development in 1986.[53] Both initiatives were highly controversial and failed to lead to significant shifts in developed country policies or impact on the emergent human rights framework, but do demonstrate attempts to provide a coherent framework for socio-economic transitions from colonies to emerging economies.

It was also during this period that a distinct field of peace studies emerged through the work of Johan Galtung and several Scandinavian scholars, as evidenced by the foundation of the Journal of Peace Research in the 1960s. The emergence of this field provides an important expansion of consideration of peace beyond peace agreements and laid the groundwork for the express articulation of the practice of peace-building in international law and policy. However, while the study of peace research expanded in the 1960s to 1980s, the practice of international support to peace-building and transitions remained extremely limited outside of the decolonisation context, due to the impasse at the UN Security Council. The shadow of the Cold War dominated this area, with the focus of research primarily on international peace and conflict, with particular fears and risks of nuclear war.[54] Similarly, during the Cold War, the major powers in both East and West provided a substantial amount of security sector reform, through technical, financial, and material support to security services in allied or friendly countries, especially the military. The objective of security assistance during this period was to garner support for the foreign and security policy objectives of the major powers in East and West.[55]

It was also at this time that concepts and ideas of development theory began to prosper. These ideas exemplified what Arturo Escobar called "a growing will to transform drastically two-thirds of the world in the pursuit of the goal of material prosperity and economic progress."[56] William Easterly characterised this early period in development economics as the search for a panacea, a single, silver-bullet idea that will solve the problems of the developing world and enable

---

[52] UN GA Res S-6/3201 Declaration on the Establishment of a New International Economic Order (1 May 1974)

[53] UN GA Res 41/128 Declaration on the Right to Development (4 December 1986)

[54] Dylan Hendrickson, A Review of Security-Sector Reform, (1999) The Conflict, Security & Development Group Working Papers Number 1, 16

[55] Nicole Ball and Dylan Hendrickson, Trends in Security Sector Reform (SSR): Policy and Research, Workshop on "New Directions in Security Sector Reform" Peace, Conflict and Development Program Initiative International Development Research Centre (IDRC) Ottawa, Canada, 3-4 November 2005, 3 Dylan Hendrickson, A Review of Security-Sector Reform, (1999) The Conflict, Security & Development Group Working Papers Number 1,

[56] Arturo Escobar, *Encountering development: the making and unmaking of the Third World* (Princeton University Press 1995), 5

developing countries to achieve satisfactory rates of growth.[57] Several ideas attained short lived currency. For instance, the "law and development" movement originated as a by-product of U.S. development assistance programs as well as those by international agencies.[58] The significant interest in development assistance generally during this period created an incentive for the emergence of an express field of law and development, parallel to development economics, which would draw comparative lawyers, legal sociologists and theorists to the role of law in development. Law and development therefore was essentially disparate in nature. By attempting to use law instrumentally for development, the movement may have reinforced social inequalities in access to law, emphasised the capacity to use law as an instrument to authoritarian developing states, and generally hampered the process of both economic and legal development. As this practice played out in developing states, scholars and practitioners began to question the assumptions underlying the project – that the export of American legal values would be potent good for economic development. As swiftly as 1974, the field was in crisis, though it was to re-emerge in recent years.[59]

Development theories and the field also engaged with the ideological division of the Cold War Era. In 1960, W.W. Rostow published *The Stages of Economic Growth,* which contained the vivid idea of an economic "take-off" in developing countries given sufficient (5%) increase in foreign investment.[60] Easterly identifies that Rostow's approach played on Cold War fears, by suggesting a surging Soviet industry and economy. In providing an alternative model to communism for developing states, Rostow advocated that Western nations provide Third World nations with aid to fill the "financing gap" between the necessary investment for takeoff and actual national saving. The approach was immensely popular. Between 1950 and 1995, Western countries gave $1 trillion (measured in 1985 dollars) in aid. The Cold War battle for ideology and the perceived need for short term tactical advances in development encouraged and facilitated an overly simplistic panacea effect to development economics in this era.

Cold War paralysis of global international institutions continued throughout the 1970s and continued the absence of a coherent or principled framework for international engagement.

---

[57] William Easterly, *The Elusive Quest for Growth: Economists' Adventures and Misadventures in the Tropics* (MIT Press 2001)

[58] David Trubek and Mark Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' (1974) 4 Wisconsin Law Review 1062, 1063

[59] ibid 1071-3

[60] WW Rostow, *The Stages of Economic Growth: A Non-Communist Manifesto* (Cambridge University Press 1960)

Though the process of decolonisation continued, the UN otherwise remained inactive in engagement in transitions as the United States and Soviet Union engaged with with one another through proxies in third nations, often through supporting various authoritarian regimes divided along ideological lines.[61] However, agreements such as the Helsinki Accords (1975) marked international efforts to improve relations between the West and Soviet Union, and included civil rights provisions, which provided the basis for the foundation of NGOs that eventually formed Human Rights Watch.[62] Most notably however, it was during the 1970s that a fundamental shift in global economic policy paralleled patterns of systemic human rights violations. It was in this period that the general consensus in economics moved from its Keynesian foundation, which had grounded it since before World War II to a laissez-faire approach called monetarism, which sought to minimise interferences with the natural functioning of a market economy – a sort of pure unregulated capitalism. Proponents of this view argued that economic forces were like nature and would find their own equilibrium if left unregulated.[63]

Naomi Klein notes a trend where these harsh economic policies were adopted n Brazil, Uruguay, and Argentina, with violent methods of suppressing political dissent used in tandem.[64] The Brazilian truth commission report, *Brasil: Nunca Mas*, notes that certain sectors of society were targeted for human rights abuses, because of their opposition to the government economic philosophy and policies: "they feared the spread of resistance from the labour unions to their economic programs, which were based on tightening salaries and denationalizing the economy."[65] A similar point is made in the Argentina truth commission report, *Nunca Mas*.[66] More broadly, the Brazilian report concludes: "since the economic policy was extremely unpopular among the numerous sectors of the population, it had to be implemented by force." Orlando Letelier suggested that it is inappropriate to compartmentalise the Chilean approach to free-market liberalisation and the violent methods of political repression and gross violations of human rights:

---

[61] David M. Malone (ed), The UN Security Council: From the Cold War to the 21st Century (n51)

[62] Human Rights Watch, Our History, available at http://www.hrw.org/en/node/75134 (accessed 27 September 2011)

[63] Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Metropolitan Books 2007)

[64] ibid 102-108

[65] Archdiocese of Sao Paulo, *Brasil: Nunca Mais/Torture in Brasil: A Shocking Report on the Pervasive Use of Torture by Brazilian Military Governments 1964-1979* ed Joan Dassin, trans. Jaime Wright (University of Texas Press, 1986) 106-110

[66] *Nunca Mas: The report of the Argentine National Commission of the Disappeared* (Farrar, Straus and Giroux, 1986) 369

> The violation of human rights, the system of institutionalized brutality, the drastic control and suppression of every form of meaningful dissent is discussed (and often condemned) as a phenomenon only indirectly linked, or indeed entirely unrelated, to the classical unrestrained *free market* policies that have been enforced by the military junta... It is nonsensical, consequently, that those who inspire, support or finance that economic policy should try to present their advocacy as restricted to *technical considerations*, while pretending to reject the system of terror it requires to succeed.[67]

Klein considers Chile as an example of where the free market libertarian economic policies adopted by Pinochet generated such a public reaction that it generated the widespread torture and human rights abuse that afflicted both countries in the following decade. After his coup in 1973, Pinochet privatised several state-owned companies, decreased government spending and barriers to external trade. In 1974, inflation reached 375%. Pinochet's advisers suggested that this was merely caused by insufficient stricture in the privatisation and liberalisation approach, a view repeated by Friedman on his visit to the country.[68] Pinochet deliberately sent his country into a deep recession, based on the untested theory that the sudden contraction would jolt the economy into health. In the first year of this approach, Chile's economy contracted by 15 percent and unemployment reached 20%. While Pinochet had come to power in a violent and public coup, international reaction had condemned these repressive methods of seizing power and prompted some to lobby for trade embargoes with Chile. Pinochet moved to more covert means of terrorising the public and suppressing dissent – enforced disappearances.[69] As Klein notes, the use of libertarian economic policies in Latin America prefigured a broader consensus on deregulation and liberalisation of markets across development economics.[70] This trend later significantly fragments dominant international development policies from the attempted coherence of the international human rights framework. The experiences of Latin America demonstrate the potential for such policies to coexist with systematic human rights abuses. However the development of an international human rights civil society in the 1960s and 1970s provided the means for a rights based response to such abuses.

In response to these systematic human rights abuses throughout Latin American and presented with opportunities to reckon with these systems of abuse upon regime change, disconnected

---

[67] Orlando Letelier, 'The Chicago Boys in Chile' August 28 1976 The Nation

[68] Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism*, (n64) 79-81

[69] ibid 152-3

[70] ibid 156-168

elements of human rights practice formed a distinct body of transitional justice practice and discourse in the 1980s.[71] The field of transitional justice appears to have emerged through the coordination and collaboration of activists and scholars through a series of conferences in the 1980s and early 1990s.[72] Paige Arthur argues that the idea of *transitions,* especially to democracy contributed the formation of this field of practice around a number of NGOs.[73] The emergence of transitional justice allied to a more general change in Latin America, Eastern Europe and parts of sub-Saharan Africa and Asia – the shift from authoritarian dictatorship to emergent democratic rule. Dubbed by Thomas Carothers "the transition paradigm", the shift to democracy generated massive interest in Western governments and donors and the inherent link from transitional justice to this process may have given the justice enterprise greater influence and legitimacy in donor States than might otherwise have been the case.[74] One of the disadvantages of this link is that transitional justice was in turn influenced by some of the structural conditions of the transition to democracy rhetoric and literature. Carothers outlines one relevant assumption in the transition paradigm:

> The underlying conditions in transitional countries, their economic level, political history, institutional legacies, ethnic make-up, sociocultural traditions, or other structural features will not be major factors in either the onset or the outcome of the transition process.[75]

One key feature of the emergence of the field of transitional justice is that it prompted a new institutional structure for achieving justice: truth commissions. A truth commission operates as a non-prosecutorial investigatory body designed to establish truth regarding past gross violations of human rights, usually in a published report. Arthur suggests that the very idea of transitions "explains why the measures of prosecutions, truth-telling, restitution, and reform of abusive state institutions – not some other measures of justice, such as those associated with claims for distributive justice – were recognised as *the* legitimate justice initiatives during a time of political change."[76] The emergence of transitional justice limited to civil and political reform must be

---

[71] Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice' (2009) 31 Human Rights Quarterly 321

[72] The 1988 Aspen Institute conference "State Crimes: Punishment or Pardon", the 1992 Charter 77 Foundation conference "Justice in Times of Transition", and the 1994 Democracy in South Africa conference "Dealing with the Past"

[73] Arthur identifies organizations such as Project on Justice in Times of Transition (1993), Justice in Transition (1994) and the International Center for Transitional Justice (2001)

[74] Thomas Carothers, "The End of the Transition Paradigm" (2002) 13(1) Journal of Democracy 5-21

[75] ibid 8

[76] Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice' (n71) 326

understood in the context of the emergence of international human rights. The weight of evolution in human rights was on the side of civil and political rights, which emerged from a heritage of directly enforceable justiciable rights in many domestic legal systems. The idea and enforceability of socio-economic rights was and remains far more controversial. Transitional justice thus represented the decoupling of social/political change and economic progress and contributed to the fragmentation of consideration of transitions. As Arthur puts it "the notion that a democracy could be established in almost any country without much reference to socioeconomic conditions – that is through a shortened sequence of elite bargaining and legal-institutional reforms rather than through long-term socio-economic stages – was something new."[77] The transitional justice approach is to limit the concept of transition to political reform rather than incorporate economic reform and result in a comprehensive social transformation. This limitation is understandable, given the fragile emergence of a new field and the desire to avoid the suggestion that transitional justice was exclusively aligned with the socialist or communist tradition. The emergence of transitional justice discourse and practice therefore came at a time of immense ideological and political change that had a direct effect on its own legitimacy and self-definition, resulting in the fragmentation of responses to transitions.

During this period, there was also an increase in publications examining the military's role in governance, particularly very detailed case studies of transition countries.[78] At a time when transition paradigm and democratisation were demonstrating the power and relevance of peoples and civil society in many parts of the world, dominant international development policies, characterised by the structure adjustment approach favoured by the international financial institutions in the 1980s, took a narrow view of the relevant actors in development. Seeking to avert a global economic collapse due to the debt crises in Latin America in the 1980s, development economists believed that aid and lending to developing countries should be made conditional on their making policy reforms. Previous loans had been for projects and carried conditions only about those projects. It turns out that there was much lending, little adjustment and little growth in the 1980s and early 1990s. In trying to answer why conditional lending failed, William Easterly submits that the problem is one of incentives: a government that was irresponsible before the

---

[77] ibid 338

[78] Eboe Hutchful and Robin Luckham, "Civil-Military Relations in Africa," Draft Framework Paper for the African Center for Strategic Studies; Alfred Stepan, *Rethinking Military Politics: Brazil and the Southern Cone*, (Princeton, NJ: Princeton University Press, 1988); Alain Rouquié, *The Military and the State in Latin America,* (Berkeley, CA: University of California Press, 1987)

adjustment loan has unchanged incentives to be responsible after the adjustment loan.[79] The World Bank later concluded that "at times the reforms were insufficiently owned by the country, subject to policy reversals, and were perceived as overly excessive or intrusive."[80] The limits of this approach would be ignored as they were applied to transitional economies shifting from communism to capitalism in the 1990s. The use of conditionality was a component in the emerging but misaligned consensus on transitions that demonstrated the incoherence of transitioning to a human rights regime and rapid market liberalisation and reflected a further attempt to provide a simple solution to complex development challenges.

The Cold War era saw the emergence of a number of substantial areas of international policy relevant to transitions: the international human rights regime, the fields of transitional justice and security and peace studies, as well as the use of a wide variety of international development policies and techniques. The emergence of the international human rights regime provided normative foundations that offered potential to link diverse areas relevant to transitions through international law. The de-colonisation process may have provided one such opportunity, but the use of newly independent States as proxies in the Cold War, and the demands for immediate independence from those states both mitigated any such opportunity. The overall paralysis of the international cooperation architecture of the UN due to US/Soviet antagonism provided limited opportunities for coherent international engagements in transitions. The consensus on coherent international action that followed World War II remained largely an area of unfulfilled potential during the Cold War. Renewed potential for coherence emerged at the end of the Cold War.

D. 1990s: The End of History and the Beginning of a Consensus

The late 1980s and early 1990s marked a sea change in global geopolitics, what Samuel Huntington called a "third wave" of democratisation.[81] The fall of the Berlin Wall and the collapse of communism saw the emergence of consensus on the ideological and political victory around Western views and principles. The end of the Cold War prompted renewed enthusiasm for the United Nations and an opportunity to pursue coherent international action and fulfil the potential of the post World War II foundational era.

---

[79] William Easterly, The Elusive Quest for Growth, (n57) 111

[80] World Bank, Review of World Bank Conditionality, (World Bank 2005) 1

[81] The other major ideological argument of this era was that the collapse of the Soviet Union and vindication of Western values represented the "end of history". This view again strengthened support for an acontexual application of Western principles to emerging democracies and developing states.

Seeking to assert a new paradigm for engagement in transitions, the United Nations endorsed a distinct concept of peace-building in 1992's *Agenda for Peace* report of the Secretary General.[82] This renewal of the United Nations saw a burst of Security Council activity, with peacekeeping missions in Namibia, El Salvador, Cambodia and Mozambique in quick succession.[83] The Vienna Declaration and Programme for Action (1993), declared by consensus at the World Conference on Human Rights, provided an opportunity to consolidate the consensus of this period into a broad coherent framework for international activity, including engagement in transitions and fragile states. The Declaration acknowledged that human rights purports to provide such a framework as a "common standard of achievement for all peoples and all nations". The Declaration affirmed the coherence of international human rights. Part I, para 5 states that "All human rights are universal, indivisible and interdependent and interrelated." Part I, para 8 similarly affirmed the coherence of human rights with other international values: "Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing." The Declaration also reasserted the right to development and noted that extreme poverty constituted a violation of human dignity. The World Conference is also significant for the creation of the United Nations Office of the High Commissioner for Human Rights, designed to provide an institutional centre point for all human rights activity within the UN, responding to calls in the Vienna Declaration for increased coordination on human rights within that organisation.[84] The Vienna framework is significant for affirming the centrality of human rights to a range of international affairs. It seized the opportunity in the post-Cold War era to articulate a coherent global ideology based on existing commitments and norms of international human rights. However, this framework provided a general approach to human rights not specifically tailored to the context of transitions and fragile states, despite the widespread transitions of the former Soviet States and increasing global insecurity in the post Cold War era and renewed peacekeeping and peace-building activities.

However despite this normative framework of human rights, fundamental failures of the international system soon emerged in the failure of the international community to prevent armed conflict in Somalia, and more damningly, genocide in Rwanda and Srebenica.[85] These fundamental failures prompted the establishment of international criminal tribunals for the former Yugoslavia and Rwanda, discussed below. In addition, military intervention in foreign States to prevent the

---

[82] UN SG Report, An Agenda for Peace A/47/277 - S/24111 (17 June 1992)

[83] James Dobbins, *The UN's Role in Nation Building* (Rand 2006)

[84] UN GA Resolution, World Conference on Human Rights 48/121 (20 December 1993)

[85] Samantha Power, *A Problem from Hell: America and the Age of Genocide* (Harper Perennial 2003)

occurrence of gross violations of human rights increased in the 1990s in Kosovo, Sierra Leone, and East Timor. These interventions generated discussions of a doctrine of humanitarian intervention, outside the legal authorisation of the the use of force in the UN Charter.[86] The practice was extremely controversial, leading to criticism of its selectivity, neo-colonialism, and pursuit of latent imperial goals.[87] Such increased intervention in transitional environments in turn generated greater concern for international practices after initial intervention.

The period is also significant for major advances in the internationalization of transitional justice and the crystallisation of international criminal law. In 1993, the U.N. Security Council decided to establish a tribunal mandated to prosecute "persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."[88] In November 1994, acting on a request from Rwanda, the Security Council created a second *ad hoc* tribunal, charged with the prosecution of genocide and other serious violations of international humanitarian law committed in Rwanda and its neighbouring countries during 1994. Both bodies have generated extensive and important jurisprudence in the burgeoning body of international criminal law, but have been severely criticised for a failure to focus attention on the attitudes and behaviours of populations locally affected by the respective conflicts.[89] In addition, the Truth and Reconciliation Commission in South Africa built on the experience of truth commissions in Latin America, but offered a conditional amnesty in exchange for testimony from perpetrators of gross violations of human rights. A key new component of the South African experience is a positive focus on social reconciliation, the idea that a transitional justice enterprise should take an active role in rebuilding social trust and cooperation among formerly antagonistic groups. The re-assertion of human rights as a coherent global framework provided the means to link diverse atrocities and repression under an increasingly effective and prominent international rights structure.

It was also in this period that a distinct concept of security sector reform emerged as a distinct practice to deal with the need to transform Eastern European and former Soviet security forces

---

[86] Jennifer M. Welsh (ed) *Humanitarian Intervention and International Relations.* (Oxford University Press, 2004)

[87] Richard Falk. "Humanitarian Intervention: Elite and Critical Perspectives." *Global Dialogue* 2005; Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press, 2003)

[88] UN SC Res 808 Tribunal for the former Yugoslavia (22 February 1993)

[89] Victor Peskin, "Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Program" (2005) 3 Journal of International Criminal Justice 950

and spread as a paradigm that combined civil-military relations and development studies. NATO and the EU made principles of democratic civil military relations a condition for membership.[90] A concept of security sector reform was championed by UK aid agency DFID and OECD DAC.[91] In addition, the increased complexity of peace building and peacekeeping missions called for a new response to international security focused on consolidating security standards in a given territory, rather than conquering an opposition army. The 1994 UNDP Human Development report provided for the emergence of a new concept of security: "human security" that affirmed the need for a coherent approach to security and development. The end of the Cold War created space for a discussion on the quality of development, governance, and security among local actors in developing countries and for the emergence of civil society organisations and coalitions that pressed for people-centred approaches to security and the application of democratic governance principles.[92] The emergence of SSR contributed to the convergence of development with security, and also reflected the integration of human rights into both areas. However, the nascent development of SSR has not yet turned consensus and convergence into coherence.

The broad ideological and political consensus of the period also reflected an emerging agreement on the "correct" approach to economic development, the so-called "Washington Consensus". This view drew on the market liberalisation principles of Milton Friedman, seeking to minimise state involvement in the market and generate greater freedom in international trade and globalisation. The approach was allied to the transition paradigm in the case of Russia and other former Soviet States, where talk of "transitional economies" dominated the discourse. Klein contends the effect of this consensus was to mainstream the shock doctrine approach used in Latin America.[93] Such an approach appears predicated on a belief of a natural response of markets to deregulation towards equilibrium. A variety of indicators on the Russian and former Soviet economies in this period show this was anything but the case.[94] The pursuit of rapid liberalisation of former Soviet economies led to significant wealth capture by elites of national resources and

---

[90] Nicole Ball and Dylan Hendrickson, Trends in Security Sector Reform (SSR): Policy and Research, (n56), 7

[91] ibid 10

[92] ibid 8

[93] Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism*, (n64) 156-168

[94] David Lipton and Jeffrey Sachs, Privatization in Eastern Europe: The Case of Poland, Brookings Papers on Economic Activity 1990, No. 2 (1990), pp. 80-89, 99-103, and 138-142.

public goods.[95] Attempts to foster a foundation of human rights and the rule of law in these countries met with mixed results, as these elites consolidated power through corruption.[96] The broader application of rapid deregulation and liberalisation and the use of conditionality failed to align in a coherent fashion with rapid democratisation and pursuit of international human rights. Most significantly, the structural adjustment approach portrayed the transitions required in shifting from communist to capitalist economies as technical choices, which minimised acknowledgment of the hugely political and ideological ramifications of these processes - and their potential relationships to the international human rights framework. International development policy also shifted in this period to include a distinctive human development approach.[97] The concept was promoted through UNDP's Human Development reports from 1990.[98] This approach represented a significant confluence of development with the broader human rights framework described above, but its general approach did not articulate a specific response to the transition paradigm that emerged contemporaneously, to counter to the use of structural adjustment in that area.

Despite renewed international activity through the United Nations and increased policy engagement through peace building and security sector reform frameworks, this era is thus characterised by consensus but not coherence. In particular, the tension between two areas of consensus on international human rights and dominant international economic policies became evident. For instance, in South Africa, rather than pursuing its stated aim to make the centrepiece of its policy the redistribution of wealth that was already in the country, the ANC, once it became the government, accepted the dominant logic that its only hope was to pursue new foreign investors who would create new wealth, the benefits of which would trickle down to the poor.[99] In 1996, Mbeki announced a new economic program, which called for more privatisation, cutbacks in government spending, and greater flexibility in labour laws, free trade and control on money flows.[100] In the end the Truth and Reconciliation Commission made the modest recommendation

---

[95] James K. Galbraith, Shock without Therapy, 13(15) The American Prospect (26 August 2002); Stanley Fischer, Socialist Economy Reform: Lessons of the First Three Years, (1993) 83(2) The American Economic Review 390-393

[96] Marshall Pomer, "Introduction", in Lawrence R. Klein and Marshall Pomer (eds) *The New Russia: Transition Gone Awry* (Stanford University Press 2001) 1-11

[97] Amartya Sen and Martha Nussbaum, The Quality of Life (Clarendon Press 1993)

[98] UNDP, Human Development Reports, available at http://hdr.undp.org/en/ (accessed 27 September 2011)

[99] William Mervin Gumede, Thabo Mbeki and the Battle for the Soul of the ANC (Zed Books 2007), 79-114

[100] Naomi Klein, *The Shock Doctrine*, (n64) 209

of a onetime 1% corporate tax to raise money for victims, entitled a "solidarity tax".[101] Yasmin Sooka, a truth commissioner, would favour a different approach if she could do the truth commission process again:

> I would look at the systems of apartheid – I would look at the question of land, I would certainly look at the role of multinationals, I would look at the role of the mining industry...I would look at the systematic effects of the policies of apartheid, and I would devote only one hearing to torture because I think when you focus on torture and you don't look at what it's serving, that's when you start to do a revision of the real history.[102]

The original position of the ANC can be found in the 1955 Freedom Charter, which *inter alia* sets out a vision for the distribution of wealth in a post-apartheid South Africa: "The national wealth of our country, the heritage of South Africans, shall be restored to the people; the mineral wealth beneath the soil, the Banks and monopoly industry shall be transferred to the ownership of the people as a whole; all other industry and trade shall be controlled to assist the well-being of the people."[103] Such provisions reflect the view that apartheid was not only a political system limiting franchise and freedom of movement on the basis of race, but also an economic system that used racism to enable a small white elite to amass fortunes at the expense of the black majority of the population. The ANC did not follow through on its original position. Klein argues "the country stands as a living testament to what happens when economic reform is severed from political transformation."[104] South Africa is now among the most economically unequal societies in the world.[105] Such an approach demonstrates the risks of an incoherent approach between human rights, including transitional justice, human development, and dominant neoliberal development policies.

The post-Cold War era presented the international community with a major opportunity to seize the potential for international cooperation and coherent action relevant to widespread transitional societies and economies, with the international architecture present from the establishment of global international institutions after World War II. The framework adopted in the 1990s saw the major influence of human rights as a paradigm that linked areas of peace building,

---

[101] ibid, 210

[102] ibid 211

[103] *Freedom Charter (1955)* available at www.anc.org.za

[104] Naomi Klein, *The Shock Doctrine,* (n64) 198

[105] UNDP, South Africa: The Challenge of Sustainable Development (UNDP 2003)

development, security and transitional justice with the normative foundations of a rights approach. However, while the content and approach in each field converged around normative and economic consensus, it did yet produce coherent outcomes. In particular, the re-affirmation of human rights, including the right to development, human development and socio-economic rights, was in direct tension to the rapid deregulatory approaches pursued across Latin America in 1980s and replicated in transition economies in the 1990s. The emergence of security sector reform, including human security, and human development affirmed the convergence around human rights of fields relevant to transitions. However, shifts in this Western consensus would be necessary to further pursue coherence.

E. The Modern Era: A Return to Convergence, A Search for Coherence

The trend of consensus and convergence established around human rights in the 1990s continued in the last decade as the broad normative foundation for consideration of international engagement in transitions. However, significant international events fundamentally challenged and critiqued this approach. The terrorist attacks of 9/11 and the subsequent "War on Terror" fundamentally altered the nature of international cooperation and coherence. The invasion of Afghanistan and Iraq and subsequent difficulties faced by both occupying forces generated significant literature and international policy on the nature of nation and state building. In addition, this period generated significant challenges for international law on the legitimate use of force, though it remains noteworthy that international law and human rights remained the paradigm through which these invasions were debated as violations of international law.[106]

Beyond this broad contestation of international law, each field has enjoyed a period of considerable expansion. Transitional justice institutions have widely proliferated, with broader geographical coverage and diverse institutional structures.[107] Priscilla Hayner's 2002 work *Unspeakable Truths* documents the work of 22 truth commissions.[108] Further modes of reckoning with the past have emerged. Acknowledging the expense and remoteness of *ad hoc* international criminal tribunals, hybrid domestic and international tribunals emerged in Sierra Leone and Timor-Leste, designed to build local criminal justice capacity as well as pursue international criminal law

---

[106] Phillipe Sands, Lawless World: America and the Making and Breaking of Global Rules (Allen Lane 2005)

[107] International Center for Transitional Justice, Regions and Countries, available at http://ictj.org/our-work/regions-and-countries (accessed on 27 September 2011)

[108] Priscilla Hayner, Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions (Routledge 2010)

standards through foreign judges and staff.[109] Sophisticated policies for reparations for victims of gross violations of human rights have emerged across Latin America in conjunction or in response to the work of truth commissions.[110] In conjunction with theses processes, the vetting of the public sector, in particular, the security forces, has become a significant part of transitional justice initiatives, particularly in Eastern Europe and the former Soviet Union.[111] Furthermore, building on the experiences of the South African Truth and Reconciliation Commission, interest has increased in dedicated processes of social reconciliation in post-conflict environments, particularly where such processes can build upon or adapt existing indigenous process dispute resolution. Allied with such processes, transitional justice practice has also engaged with processes of public acknowledgment and memorialisation as a means of State and community recognition of a legacy of gross violations of human rights. Finally, the Rome Statute of 1998 marked a considerable milestone in the pursuit of international criminal justice in the establishment of the International Criminal Court, though the work of the Court remains nascent at best.[112] The interaction between the ICC and these various transitional justice institutions remains unclear, but the prospect of investigation and prosecution before the ICC has shifted the nature of those transitions on which it has been focused, as the case of Uganda identifies.[113] Transitional justice initiatives are now routinely discussed as necessary components of modern transitions.

Second the mixed success of peace missions in the 1990s prompted the UN to evaluate and reconsider their approach in the Brahimi report.[114] The report called for more coherent strategies "to reassemble the foundations of peace and provide the tools for building on those foundations something that is more than just the absence of war."[115] The 2000s saw the continued use and expansion of both peacekeeping and peace-building missions in Bosnia and Herzegovina, Liberia, Burundi, Nepal, East Timor, Darfur and Chad, among others.[116] The 2005 World Summit saw the

---

[109] James Cockayne, "The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals" (2005) 28 Fordham Int'l L.J. 616

[110] Pablo de Greiff (ed) The Handbook of Reparations, (OUP 2006)

[111] Alexander Mayer-Rieckh and Pablo de Greiff, Justice as Prevention: Vetting Public Employees in Transitional Societies (Social Science Research Council and the International Center for Transitional Justice, 2007)

[112] Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, entered into force July 1, 2002.

[113] Marlies Glasius, "What is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court's First Investigations (2009) 31 Human Rights Quarterly 496-520

[114] The Report of the Panel on United Nations Peace Operations (The "Brahimi Report") UN SC Res 2000/809

[115] ibid 3

[116] James Dobbins, *The UN's Role in Nation Building* (n82)

"need for a coordinated, coherent, and integrated approach to post-conflict peace-building and reconciliation with a view to achieving sustainable peace."[117] As a consequence, the World Summit led to the establishment of a Peace-building Commission with a view to providing effective coordination and coherence on international peace-building policy and activities. It remains too early to assess the success of the Peace-Building Commission in this role, but its potential is limited by its advisory role. UN operations were overshadowed by the dominance of Iraq and Afghanistan on the international agenda, which led to the blurring of distinctions between peace building and nation and state building, and risked tainting a broader range of peace-building activities and international engagement with the perceived illegitimacy of those two interventions.

In addition, the normative foundation in human rights had led to humanitarian intervention missions in the 1990s. This momentum in turn generate the proposed doctrine of Responsibility to Protect (R2P). The norm was provided for in the Outcome Document of the 2005 World Summit and provides that nations have a responsibility to protect their own citizens from genocide, war crimes, crimes against humanity and ethnic cleansing and that the international community, through the UN, has a responsibility to help protect citizens from such crimes.[118] Though it remains controversial, the norm has been re-affirmed in subsequent Security Council and General Assembly resolutions.[119]

Other fields also underwent rapid development throughout the last decade. There has been significant development of international SSR policy as well as a proliferation of SSR programs. The United Kingdom, as the leading bilateral donor on SSR, first agreed its SSR strategy in 2002 and followed with a series of policy frameworks and documents.[120] In 2004 OECD DAC members agreed a policy statement and paper on Security System Reform and Governance.[121] However a survey conducted in 2003 affirmed that the majority of donors had yet to mainstream SSR in

---

[117] UN GA Res 60/18 The Peace-Building Commission (30 December 2005)

[118] UN GA Res 60/1 The World Summit Outcome (24 October 2005), paras 138-139

[119] UN SC Res 1674 Protections of Civilians in Armed Conflict; UN GA Res 63/67 Implementing the Responsibility to Protect(12 January 2009); UN SC Res 1973 (2011) on Libya

[120] DFID, *Poverty and the Security* Sector, 1999, http://www.dfid.gov.uk/pubs/files/poverty-security.pdf. See also Clare Short, "Security Sector Reform and the Elimination of Poverty," Speech at the Centre for Defence Studies, King's College, London, March 9., 1999.

[121] OECD Development Assistance Committee, *Security System Reform and Governance: Policy and Good Practice*, Paris: OECD, 2004

development or security practices.[122] Efforts to clarify and consolidate SSR theory and practice remain ongoing with the OECD Handbook a particular milestone. These efforts were significantly strengthened by international pressure to pursue security as a key foreign policy objective after 9/11.[123]

The 2000s also developed the distinctive approach to development acknowledged in the introduction of the concept of human development. The expanded use of this concept saw an increase in the analysis of the relationship between human rights and development, leading to several academic volumes and human rights based approaches across the policies of international organisations.[124] Beyond this general framework, the decade is noteworthy for the commitment of the international community to achieved specific development objectives. In 2000, the United Nations signed the Millennium Declaration, which included the Millennium Development Goals to be achieved by 2015. The goals marked significant political consensus clear set of objectives to pursue in developing States and a holistic approach to achieve specific international policies. The 8 goals combine with 21 targets and a series of indicators for each target mark an effort to pursue tangible progress on international development priorities. The MDGs emerged parallel to efforts from international civil society to see major debt cancellation for developing countries from donor states and international organisations.

In addition to this new normative framework for specific development objectives, the late 1990s and early 2000s saw a major shift in policies in international development. The failure of both the economic market and democratic politics to assert and establish themselves as if forces of nature through rapid liberalisation had prompted a re-consideration of the appropriate policies of donors in seeking to achieve market conditions and strong functioning democratic rule in transitional and developing states.[125] A solution to both problems, but one that also drew on values and principles relevant to transitional justice, was to focus on the state and craft of institutional governance in these states.[126] Put simply, the concept of governance was conceived as "government in good shape", with functioning and efficient institutions, respect for the rule of law

---

[122] Dylan Hendrickson (2005) 'Overview of Regional Survey Findings and policy Implications for Donors', in *Security System Reform and Governance* (OECD 2005) 55-69

[123] Nicole Ball and Dylan Hendrickson, Trends in Security Sector Reform (SSR): Policy and Research (n55)

[124] Martha Nussbaum, Creating Capabilities: The Human Development Approach (Harvard University Press 2011);

[125] Daniel. Kaufmann, Aartay. Kraay, and Pablo. Zoido-Lobaton, *Governance Matters* (World Bank Policy Research Working Paper 2196) (October, 1999)

[126] World Bank, *World Development Report: The State in a Changing World* (World Bank 1997)

and stable and efficacious market conditions and enforcement of contracts. Interest in governance prompted additional use of indicators and measurement of institutional performance. Furthermore, governance reform became a significant feature of the practice of security sector reform in this decade.[127] Moreover, the expanding practice of international territorial administrations under UN peace-building auspices raises the issue of international governance.[128] The emergence of governance as a development paradigm evidences belated acknowledgment of the intensely political nature of development and economic reforms in recipient societies. The nature of governance reform itself affirmed this political reality.

Finally, and most relevant to this thesis, recent years have developed significant literature and policies on economic responses to conflict, often described as post-conflict reconstruction.[129] The dominance of Iraq and Afghanistan on the international and specifically Western agenda focused the attention of international organisations and policy makers on the specific type of engagement required for a post-conflict environment. Allied with the broader trend for a focus on governance, this type of intervention took the form of state building or nation building, and sought to enhance the effectiveness and legitimacy of post-conflict or transitional State institutions. The focus on state building ensures that development policy is conscious of concerns shared with transitional justice, peace-building and security sector reform when engaged in transitions. In recent years, the stage has been set for a consideration of the relationship between these practices. These trends are explored in greater detail in subsequent chapters.

A number of overarching frameworks, from the just war tradition, including Allied responses to World War I and II, and to the present global international legal architecture, have demonstrated the potential to provide coherent international engagement in transitions. Given this continuity, we may question why "successful" transitions and coherent international assistance remain elusive. The repetition of renewal and pessimism makes it difficult to believe that international law and policy frameworks will or can be a universal good.[130] The diverse trends that were established during the Cold War era began to coalesce and converge in the 1990s and 2000s around the international human rights framework. However, major failings of intervention in Rwanda and

---

[127] *OECD Policy Brief on Security System Reform and Governance* (OECD 2004)

[128] Simon Chesterman, You the People: The United Nations, Transitional Administration and State-Building (OUP 2004); Richard Caplan, International Governance of War Torn Territories (OUP 2006)

[129] Paul Collier, Breaking the Conflict Trap: Civil War and Development Policy (World Bank 2003)

[130] David Kennedy, *When Renewal Repeats: Thinking Against The Box* , (2000) 32 N.Y.U. J. INT'L L. & POL. 335

Yugoslavia, continued contestation regarding international policy, and questions of the continued relevance of these approaches after 9/11, have led to concern to limit further international engagement in transitions and called into question the nature of existing engagement. In addition, the relationship between specific fields such as peace building and transitional justice, or SSR, remains unclear, as broad normative convergence around human rights and good governance has yet not led to coherence between these fields. A range of relationships relevant to transitions therefore remain to be considered between the areas of transitional justice, peace-building, security sector reform and development. An examination of existing literature reveals the beginnings of a response to clarify this range of relationships, but in a partial and contingent manner. The question of pursuing overall coherence in international engagement in transitions remains unanswered.

VII. Current State of the Literature: Discrete Trends of Convergence

At present, substantial bodies of literature exist within each field, reflecting their rapid development from the 1990s to present day. It is beyond the scope of this thesis to examine fully all the discrete issues that arise in each field. While several areas of literature are contingent upon the establishment of a given institution, such as a tribunal, or truth commission, an international peace-building and peace-keeping mission, comparatively little literature addresses the potential relationship between each field. Those areas of comparison that do exist largely focus on institutional interoperability of given activities within each field, with some exceptions examining broader bilateral relationships between two fields. The question of an overall necessary relationship between all fields relevant to transitions remains unaddressed.

In the case of transitional justice, a number of canonical texts emerged early in the evolution of the field.[131] These texts aligned with several high profile law review articles, which argued the international legal position for transitional justice. These articles considered whether this position include a duty on States to prosecute gross violations of human rights or extradite perpetrators if they failed to do so and the continued legitimacy of amnesty for gross violations of human rights.[132] While transitional justice literature appears across disciplines, such as peace studies, sociology, history, law, international relations, politics, a predominance of the literature continues

---

[131] Neil Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (USIP 1995); Ruti Teitel, *Transitional Justice* (OUP 2000); Naomi Roht Arriaza and Javier Mariezcurrena, (eds) *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (CUP 2006)

[132] Carlos Nino, The Duty to Punish Past Abuses of Human Rights Put into Context (1991) 100 Yale Law Journal 2619; Naomi Roht-Arriaza, State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law, (1990) 78 California Law Review 4

to engage with international law issues, such as amnesty for gross violations of human rights, international criminal law, the potential effects of trials, including hybrid and domestic tribunals, as well as the legal frameworks for other mechanisms such as vetting programs and truth and reconciliation commissions. Despite the widespread proliferation of transitional justice institutions, the literature has focused on a smaller sample of high profile cases, such as the Rwanda, South Africa, the former Yugoslavia, and Timor-Leste.[133] In addition, theorisation regarding transitional justice is pursued in a narrow context. Discrete areas of theory, such as conceptions of truth, and purported claims of the processes of truth commissions and trials, do not integrate with a broader framework of theorisation for social change.

Transitional justice literature, reflecting the practice of its primary institutions, also ignores several issues. Zinaida Miller contends that definitions of transitional justice are silent as to economic issues in particular: (1) the economic roots and consequences of the conflict (2) the economic liberalisation that accompanies political transition in many transitional contexts and (3) connected development plans of the new government for the future.[134] Miller suggests the division also legitimates the current state of affairs and allows a myth to form that there is a distinction between justice issues of conflict and economic or development issues. Rama Mani asks whether and how transitional justice could have a more direct impact on reducing social and economic inequality. One could examine whether social injustices are the underlying causes of conflict.[135] Roger Duthie suggests four possible relationship between transitional justice and development: (1) they could complement each other (2) inadvertently affect each other (3) be coordinated in order to generate positive synergies (4) directly address each other. He also asserts, without more, that it is unlikely that transitional justice efforts will lead directly or in any measurable way to macro-level economic growth.[136] In addition, transitional justice literature makes limited use of qualitative or quantitative literature. Although efforts are being made to address these gaps, the fundamental

---

[133] African Transitional Justice Research Network, Trends in Literature Review, available at http://www.transitionaljustice.org.za/~atjrnor/index.php?option=com_content&task=view&id=326&Itemid=53 (accessed 28 September 2011)

[134] Zinaida Miller, "Effects of Invisibility: In Search of the 'Economic' in Transitional Justice" (2008) 2 (3) The International Journal of Transitional Justice 266-291

[135] Rama Mani "Editorial-Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development" (2008) 2 (3) The International Journal of Transitional Justice 253-265; Rama Mani, Beyond Retribution: Seeking Justice in the Shadows of War (Polity 2002)

[136] Roger Duthie, Toward a Development-sensitive Approach to Transitional Justice (2008) 2 (3) The International Journal of Transitional Justice 292-309

relationship of transitional justice to the broader nature and process of social change in transitions remains unaddressed.

The concept of peace-building remains heavily contested in existing literature, with one survey noting widely diverse terminology employed by governments and non-governmental organisations.[137] Part of this diversity reflects the fact that peace building operations and associated literature are often specifically tailored to particular institutional mandates or preferences. This conceptual fluidity and contestation has resulted in an overlap in the literature between peace building and state building, and peace building and development, generating a risk of incoherence and indistinct concepts. Some authors have sought to situation peace building and peace operations in broader international relations theory.[138] Roland Paris contends that the study of peace operations must move "beyond practical operational issues and instead use "these missions as windows into larger phenomena of international politics", such as the role of norms, the prospects of revolutionary change in the world order and the nature of global governance."[139] Significant areas of peace building literature examine the legitimacy of peace operations, while others call into question the efficacy of the pursuit of a liberal conception of peace based on rapid democratisation and market liberalisation, discussed above.[140] However, a broad range of activities undertaken in transitional environments can be considered peace building literature, with SSR, development and transitional justice enterprises sometimes framed as peace-building.[141] Despite its broad and contested theoretical foundations, peace-building literature has focused on case studies, particularly those of international missions, especially UN missions, with significant literature focusing on Timor-Leste and Sierra Leone among recent cases.[142] Other areas examine regional perspectives on peacekeeping and peace missions more generally. Despite significant calls for policy coherence and coordination, there are little concrete examples or proposals in the literature. Reviews of case studies affirm this strategic deficit. The Utstein study evaluated 366 peace-building projects and concluded that more than 55% of the projects show no link to a

---

[137] Michael Barnett, Hunjoon Kim, Madalene O'Donnell, and Laura Sitea, Peacebuilding: What Is in a Name? (2007) 13 Global Governance 35–58

[138] Alan James Peacekeeping in International Politics (Palgrave Macmillan 1990); Michael Barnett, "The New United Nations Politics of Peace: From Juridical Sovereignty to Empirical Sovereignty", (1995) *Global Governance* 1(1) 79-97

[139] Roland Paris, "Broadening the Study of Peace Operations", (2000) 2(3) *International Studies Review* 27

[140] Michael Pugh "Peacekeeping and Critical theory," (2004) 11(1) *International Peacekeeping* 39-58; Roland Paris, "Peacebuilding and the limits of liberal internationalism" (1997) 22(2) *International Security* 54

[141] Vincent Chetail, Introduction in Vincent Chetail (ed), Post-Conflict Peacebuilding (OUP 2009) 26

[142] Ian Johnstone, Peace Operations Literature Review, (Center on International Cooperation 2005)

broader strategy for the country.[143] The fluidity of peace building literature facilitates an inter-disciplinary and overlapping approach, but does not address fundamental questions of theory, demarcating the field from others relevant to transitions. As a consequence it requires greater theorisation to provide a coherent account of the nature of international support to transitions.

In security sector reform, policy documents prominently engage with academic literature and discourse. Organisations such as the OECD and DCAF have made efforts to provide comprehensive literature and resources in guiding the development of security sector reform policy.[144] Comparative case studies in literature draw from Anglophone security sectors as example of best practice, whereas case studies of reform primarily consider Eastern Europe, the original site of the development of SSR practice, as well as African studies.[145] Literature also disaggregates into the constituent elements of security sector reform, such as democratic and civilian oversight, policing and intelligence services reform, and community policing approaches.[146] Ball and Hendrickson note that significant proportions of research in this area are donor driven, with limited research outside donor priorities.[147] Limits to SSR literature include the absence of critical scholarship, examination of the political economy of reform processes, community level security perceptions are limited, but primarily the relationship of SSR to broader processes of institutional reform and social change in transitions, for instance neo-liberal economic reform and SSR; the relationship between SSR in developed and developing countries; role of private security actors and threats.[148] In addition much of what has been characterised as SSR 'research' has in fact been more influenced by a normative framework and a standard set of assumptions about how 'reforming' countries should organise and operate their security sectors.[149] As a result "it has often been insufficiently sensitive to the complex institutional and political dynamics that affect reform processes."[150] The narrow range of SSR literature inhibits its contribution to broader processes of social change in transitions.

---

[143] David Smith, Towards a Strategic Framework for Peace-Building: Getting Their Acts Together. Overview Report of the Joint Utstein Study of Peace-building, Royal Norwegian Ministry of Foreign Affairs (2004);

[144] *OECD Handbook on Security Sector Reform: Supporting Security and Justice* (OECD 2008)

[145] Dylan Hendrickson, A Review of Security-Sector Reform, (n54)

[146] ibid

[147] Nicole Ball and Dylan Hendrickson, Trends in Security Sector Reform (SSR): Policy and Research (n55)

[148] ibid

[149] ibid 25

[150] Ibid

By comparison literature on development economics is extremely vast. Development literature does not suffer from want of theorisation. It is beyond the scope and relevance of this thesis to consider all such theories. Rather it will focus on the relatively recent emergence of conflict specific development policies and literature. This involves an examination of policies on state - building, which represents another area of inter-disciplinary inquiry , drawing interest and discussion from social sciences, international relations, political studies, anthropology, economics, international development and security studies.[151] Like peace-building, literature on state-building wrestles with the nebulous definition of the concept, with some overlap with peace-building and nation building. As a result, state building literature demonstrates inconsistent and multiple typologies of States.[152] Literature on state building from development economics focuses on its relationship to the general processes of governance reform that have become a dominant paradigm in that field in recent years.[153] Additional areas of research concern generating economic approaches to respond to specific challenges faced in post-conflict and fragile environments, most notably in the work of Paul Collier.

Scholarship in each field has dramatically expanded in the past 20 years. A significant proportion of it is responsive to the dominant case studies that have emerged in that period. Limited theorisation occurs in each field, leading to narrow theories in SSR and transitional justice, overlapping theoretical considerations of peace building and state building, and limited concern for the relationship between these processes and their relation to broader conceptions of social change in transitional societies. Much of this literature is examined throughout subsequent chapters. However it is noteworthy that no literature or policy exists that directly addresses the question of this thesis as to whether a coherent and principled account of international engagement in transitions is possible and desirable. The overriding concern of this thesis is in responding to the gap across all four fields to articulate a general account of transitions and fragile states, which reflects the relationship between these four fields at theoretical, substantive and operational levels. The limitation of the literature thus far inhibits the potential to provide a coherent account of international engagement in transitions across these fields.

---

[151] Zoe Scott, *Literature Review on State-Building* (GSDRC 2007)

[152] Michael Barnett, 'The Peace-builder's Contract: How External State-building Reinforces Weak Statehood', RPPS Working Paper, available at http://state-building.org/resources/Barnett_Zeurcher_RPPS_October2006.pdf

[153] Khan, M 'State Failure in Developing Countries and Strategies of Institutional Reform', draft of paper for the World bank ASCDE Conference, Oslo, 24-26 June.

Nonetheless, each field has begun the process of responding to the need for coherence and consideration of the relationship with other relevant fields, but this process remains at a contingent and organic level. For instance, transitional justice literature has recently examined its relationship with development, primarily in a special edition of the International Journal for Transitional Justice and an edited volume on the topic.[154] Despite some theorisation on the issue, the majority of this literature considers contingent relationships between specific transitional justice and development initiatives. Among the issues considered is the possibility of the direct expansion of transitional justice mechanism to incorporate concern for the economic and developmental causes and consequences of conflict, through for instance a truth commission investigation or prosecution of corruption or other economically driven offences.[155] Similarly, comparative analysis has examined the relationship between reparations programs and development policies.[156] This relationship may be competitive where resources for distribution are scarce and may either go to a reparations or development program. However, the relationship may also be complimentary, where the process of reparations enables citizens to begin trusting the state in a fashion that may ultimately see the citizen contribute to economic activity.[157] Furthermore, development activity may also contribute and enable more effective delivery of reparations, where such activity is focused on institutional reform and anti-corruption practices. A number of discrete areas of relationship have been noted between transitional justice and development as well. Issues such as land tenure, natural resource and environmental crimes provide an opportunity for common areas of concern for the two fields.[158] Further literature concerns the restitution of property in a transitional environment, which has a significant economic component. Additional literature examines the relationship between transitional justice and refugee law and migration.[159] Again, these areas make a valuable contribution to the substantive convergence of transitional justice and development, but do not explicitly articulate the foundations on which these fields and issues can or should be linked.

---

[154] Roger Duthie and Pablo De Greiff (eds) Transitional Justice and Development: Making Connections (SSRC 2009)

[155] ibid, 142-169

[156] Naomi Roht-Arriaza and Katharine Orlovsky, A Complementary Relationship: Reparations and Development in Roger Duthie and Pablo De Greiff (eds) Transitional Justice and Development: Making Connections (SSRC 2009), 170

[157] ibid 174

[158] Mark Drumbl, Accountability for Property Crimes and Environmental War Crimes: Prosecution, Litigation, and Development, ICTJ 2009; ICRC Review No. 879 - 2010 on Environment and War

[159] Steven Wolfson, Refugees and Transitional Justice (2005) 24(4) Refugee Survey Quarterly, 55-9

Further literature examines the relationship between transitional justice and SSR. Discrete examination of how vetting of the security forces on suspicion of gross violations of human rights is an area of shared concern for transitional and SSR.[160] Similarly, disarmament, demobilisation and disarmament programs reflect a discrete mechanism in which all four fields share an interest.[161] From its inception, SSR has been articulated explicitly in terms of its connection to development.[162] SSR "provided an overarching concept that intellectually justified the development community's venture into security related activities. Such literature notes that both fields employ concepts of the rule of law and accountability, but without awareness of the other field may lead to incoherent and diffuse use of these terms and ideas.[163] A common usage of these terms and awareness of the other field could contribute to the goals of both transitional justice and more effective and meaningful security sector reform. Furthermore, the socio-economic context will have a direct bearing on SSR. States with higher standards of living are more likely to establish sustainable security.

There are also well-rehearsed debates on the relationship between peace and justice.[164] This literature concerns the desirability of prosecutions as a peace-building measure, especially when compared to amnesties for gross violations of human rights.[165] In such debates nuanced concerns for the sequencing of justice within a broader peace process can be contrasted with simplistic calls for peace trumping justice as a form of impunity. Similarly, concern for the relationship between peace and development identifies a strong necessary link between minimum conditions of peace and the capacity of a state to pursue development. However, in pursuing and maintaining thicker conceptions of peace, literature blurs the distinction between peace building activities and conflict

---

[160] Alexander Mayer-Rieckh and Pablo de Greiff, Justice as Prevention: Vetting Public Employees in Transitional Societies (Social Science Research Council and the International Center for Transitional Justice, 2007); Ana Cutter Patel, Pablo de Greiff and Lars Waldor, Disarming the Past: Transitional Justice and Ex-combatants (Social Science Research Council 2009)

[161] Eric Witte, Beyond "Peace versus Justice": The Relationship Between DDR and the Prosecution of International Crime (ICTJ Research Brief February 2010); Ana Cutter Patel Transitional Justice, DDR, and Security Sector Reform (ICTJ Research Brief February 2010)

[162] Alexander Mayer-Rieckh and Roger Duthie, Enhancing Justice and Development Through Justice-Sensitive Security Sector Reform in Roger Duthie and Pablo De Greiff (eds) Transitional Justice and Development: Making Connections (SSRC 2009), 214

[163] Roger Duthie, Introduction, (n17) 1-17

[164] Robert I Rotberg and Dennis Thompson (eds) *Truth v Justice: The Morality of Truth Commissions* (Princeton University Press 2000)

[165] Suren Pillay and Chandra Lekha Sriram, *Peace versus Justice?: The Dilemmas of Transitional Justice in Africa*, (James Currey 2011)

sensitive development programming. The primary distinction remains the ultimate goal pursued in such activities remaining diverse across both fields. A further overlap emerges in the relationship between security and development. Literature on the relationship between peace and security note the significant overlap between thick concepts of peace and security. However such literature has yet to identify major areas of tension between security and peace actors, given the centrality of political class actors to decision making on both issues. Rather such literature may reflect two divergent bodies of literature but a significantly overlapping body of practice.

Among recent literature, the limited examination of *jus post bellum* provides an example of attempt to address comprehensive range of issues in transitions in a coherent and principled fashion. Writings in this area are primarily of a theoretical and legal nature, drawing from the just war tradition that has generated the categories of *jus ad bellum* and *jus in bello* that have been codified as the legitimate use of force in international law and rules of international humanitarian law respectively. Proposals for *jus post bellum* have been concerned to map the relationship between these existing categories and any proposed regulation of the termination of conflict. Beyond this theoretical examination, consideration of *jus post bellum* has been nascent and radically underdeveloped and remains disconnected from examination of the existing policy frameworks employed by international organisations, such as the peace and state building literature just identified. However, *jus post bellum* provides the most promising opportunity for a coherent understanding of international engagement in transitions.

These overlaps in the literature between each field have been necessarily narrow and partial. Such literature identifies a number of *contingent* relationships between these fields, dependent on the existence of one or more institutions established in each field. However, the best way of articulating the relationship between these fields is unlikely to fall out of observations about the direct consequences of the implementation of an institution in one field on the goals and institutions of another field.[166] Little literature examines the existence of *necessary* relationships between these fields and how does the regulation of law and international law affect this relationship. Moreover, little literature has addressed the fundamental purpose or shared and interdependent goals of societies in transitions. Consideration of contingent relationships between diverse institutions across these fields is important. It will offer guidance as to practical and operational challenges and options in the future design of institutions relevant to transitions. However, this approach will not directly address concern for coherence in international

[166] Pablo de Greiff, Articulating the Links Between Transitional Justice and Development (n18) 41

engagement in transitions generally. Nor does this approach directly respond to the shared concern for greater theorisation about the shared challenges and conditions faced by international engagement in transitions. Organic consideration of these issues and *ad hoc* reform will not address the question of whether there is a necessary, shared and interdependent relationship between all forms of international engagement in transitions and fragile states. An approach consciously orientated to pursuing a coherent integrated and overarching account of transitions remains absent: this question is the inquiry of this thesis.

VIII. The Nature of "Fields"

A number of different disciplines are involved in the areas of transitional justice, peace-building, security sector reform and development. Each can legitimately be said to involve issues of law, economics, peace, conflict studies, sociology, history, political science and theory and international relations, to name only some. There is thus an overlap in the definition, concepts and ideas employed between these disciplines and the narrower and more specific, though inter or cross disciplinary, application in these areas.

The scope of each area remains the subject of healthy contestation; so too does the very notion of whether these areas constitute a distinctive "field" of inquiry (and the implications or assumptions such a categorisation would necessarily entail). Some authors prefer to use the language of a transitional justice "network" without suggesting the establishment of a distinctive field.[167] There remains limited academic work on organisations themselves relevant to transitional justice and to the interaction of this area to others relevant to transitions.[168] The openness of these areas and their "field-ness" or otherwise runs the risk of criticism that they can be appropriated in pursuit of hegemonic legitimation.[169] Bell has also argued that the description of transitional justice as a field performs two highly political functions: "it assists in consolidating and legitimating transitional justice as a field, and it enables an attack on the perceived colonization of the field by law."[170]

---

[167] Kathryn Sikkink & Carrie Booth Walling, *Argentina's Contribution to Global Trends in Transitional Justice,* in Naomi Roht-Arriaza & Javier Mariezcurrena eds. Transitional Justice in the Twenty-First century 301 (CUP, 2006).

[168] Jelena Subotic, The Transformation of International Transitional Justice Advocacy (2012) 6 The International Journal of Transitional Justice, 106–125, 111

[169] Christine Bell, Colm Campbell and Fionnuala Ní Aoláin 'The Battle for Transitional Justice: Hegemony, Iraq and International Law', in John Morison et al. (eds.), Human Rights, Democracy and Transition: Essays in Honour of Stephen Livingstone (Oxford University Press 2007)

[170] Christine Bell, "Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field' (n19), 24

Within these debates regarding whether to categorise transitional justice and other areas relevant to transitions as "fields", it may be valuable to first distinguish between these areas as fields of practice and fields of discourse. It is clear that the four areas considered in this thesis are the subject of considerable academic writing which focuses in large part on the practice and operation of institutions, actors and processes relevant to transitions, undergirded by a plethora of theoretical frameworks and constructs that seek to inform the practice of these areas. The distinction between practice and discourse therefore will not be absolute. However this thesis seeks to be mindful of this distinction and offer a consistent and appropriate usage of that distinction throughout and thereby enable greater clarity on the claim to fieldness or otherwise from discourse or as established in practice.

Beyond making this distinction, I do not intend to offer "transitions" as a distinct or additional field within these debates. Rather, as will be demonstrated throughout, this thesis offers an interpretive framework for identifying, describing and evaluating areas of both discourse and practice, including those areas that contain actors or scholars that self-describe (or deny) the area as a field. Therefore my use of the term "transitions" is agnostic to the issue of whether transitional justice constitutes a distinctive or coherent field, as queried by Bell. Rather, this thesis focuses on issues common to the disciplinary approaches to issues *relevant* to transitions, that some have taken to constitute fields, whether distinctive, overlapping or otherwise. As will be demonstrated this thesis believes in the value of a coherent account of transitions across diverse actors and areas relevant to transition, whether or not those areas are conceived of as fields or not. The political question of the division of territory among these fields and non-fields is just one component of the interpretive project involved in practical and scholarly participation in the practice and discourse of transitions. In this way I wish to join Bell in seeing to bring practice, discourse and interdisciplinary analysis together:[171] to construct an argument for and to present evidence of a coherent account of assistance to transitions.

IX. Conclusion

The stakes are high for the effective management of transitions. A civil conflict costs the average developing country roughly 30 years of GDP growth, and countries in protracted crisis can fall over 20 percentage points behind in overcoming poverty.[172] Post-conflict societies face an alarmingly

---

[171] ibid, 6

[172] World Bank, World Development Report 2011, xii

high risk of reversion to conflict. The risk facing the typical post-conflict society during its first decade of peace at 40%.[173] The record of the international community and states in assisting transitions and developing countries more generally is one of mixed results, conflicting intentions, and, regrettably, often hubris.

This thesis acknowledges that transitions are deeply complex, messy, and frantic affairs that offer limited opportunities for principled action from domestic and international actors alike. The argument offered in this thesis suggests such complications should be embraced as a description of reality in transitions than variations on some ideal norm. In this way, individuals, organisations and states concerned with transitions can aim towards more appropriate expectations for change and the timing of change in transitions. In offering a principled foundation for evaluation of international engagement in transitions, this thesis proposes only holding states and international organisations to their previously stated goals, to mitigate hypocrisy and to pursue integrity in engagement in transitions and fragile states.

[173] Chauvet, Lisa & Collier, Paul & Hoeffler, Anke, The Cost of Failing States and the Limits of Sovereignty (UNU-WIDER 2007)

Chapter II: The Circumstances of Transition

I. Introduction

Transitions cover diverse factual circumstances. From the end of World War II, to the end of apartheid in South Africa, the aftermath of genocide in Rwanda, the collapse of the Soviet Union, and the toppling of dictatorships in Latin America and recently in the Middle East and North Africa, transitions are significant moments in global history. The idea of transitions as political, social, cultural and legal phenomena is of major interest to philosophers, political scientists, and others seeking to discern a theoretical understanding of these phenomena. Despite such interest, much analysis of transitions remains pragmatic and reactive. Though international organisations adopt theoretical frameworks, their theoretical implications are often neglected, as frameworks stress the complexity of transitions and prioritise local circumstances. The complexity and diversity of transitions may suggest that the possibility of coherent theorisation is limited. However, "while a descriptive account of transitions can acceptably stop at this point, a *theory* ... cannot afford such luxury."[174] Similarly, while it may be familiar to describe transitions as representing pragmatic compromises in local contexts, it is glib not to examine whether they are morally legitimate compromises.[175]

This chapter is designed to identify and evaluate theories of transition, across the fields of transitional justice, peace-building, security sector reform, and economic development. In particular, it identifies shared and interdependent components of each field that provide evidence of an existing structural relationship in distinct normative circumstances in transitions. Second, each field has an instrumental component, evidenced in the pursuit of values from political theory: justice, security, peace, and development. In pursuing its goals, each field contributes to and requires minimum conditions of civic trust and the rule of law. These conditions make the fields interdependent and thus offer a minimum framework for coherence, but the substantive diversity of each field also generate risks of incoherence between each field. The chapter concludes by noting the need for an interpretive framework to mitigate and avoid incoherence.

---

[174] Pablo de Greiff, Theorising Transitional Justice, 29 (on file with author) (parenthesis own)

[175] ibid 30; Jonathan Allen, Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission (1999) 49 University of Toronto Law Review 315

II. The Circumstances of Transition

"Transitions" could represent an overarching legal and political mantle designed to accommodate, manage and prompt change in societies moving from repression or armed conflict.[176] While originally conceived as a marginal theoretical construct, transitions have come to prominence in recent decades, while also creating radical challenges. Christine Bell notes that transitional justice scholars and practitioners are unclear as to whether there is or needs to be a bounded concept of "transitions" during which transitional justice applies.[177] Similarly, Naomi Roht-Arriaza observed the term "transition" remains elusive, with no clearly articulation of "what the state is 'transitioning' to".[178] The tensions of transitions foster social division, ethnic or religious hatred, and inhibit social cooperation and coordination. Peace-building thus assumes a situation of fragility that requires consolidation and strengthening, but also fails to articulate a definite end point for building and maintaining peace in a given society.[179]

The complicity in, or ineffectiveness to prevent, conflict by a security sector in a transitional society greatly diminishes the legitimacy of State institutions charged with restoring security and peace. Security sector reform takes its starting point as dysfunctional security arrangements in a given society, but also offers limited guidance as to when the process of reform can be tangibly said to be complete.[180] Armed conflict or authoritarian rule also significantly affect the capacity of a society to pursue economic development, once described as "development in reverse."[181] While economists refer to a "transition economy", where an economy moves from a system of central planning to a market economy, different nomenclature exist for the shift from war to peace economies.[182] For both categories, it remains unclear when an economy fully represents a functioning market economy.[183]

---

[176] Christine Bell, Colm Campbell and Fionnuala Ni Aolain, 'Transitional Justice: (re)conceptualising the field' (n19) 85-6

[177] Christine Bell, 'Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-Field"' (n20), 23

[178] Naomi Roht-Arriaza, The New Landscape of Transitional Justice in Naomi Roht-Arriaza & Javier Mariezcurrena (eds), Transitional justice in the Twenty-First Century: Beyond Truth versus Justice (CUP 2006) 1

[179] OECD, Concepts and Dilemmas of State Building In Fragile Situations: From Fragility to Resilience, (2008) 9(3) Journal on Development 2008 17-21

[180] Heiner Hänggi, Conceptualising Security Sector Reform and Reconstruction, DCAF Yearbook 2004, 13

[181] Paul Collier, *The Conflict Trap* (World Bank 2003), 1

[182] David Lipton, Jeffrey Sachs, Stanley Fischer and Janos Kornai, Creating a Market Economy in Eastern Europe: The case of Poland (1990) (1) Brookings papers on Economic Activity 75-147

[183] Lawrence R. Klein and Marshall Pomer, *The New Russia: Transition Gone Awry* (SUP 2002)

Existing theories in each field accept radical complexity in transitional societies and the need for local circumstances as guiding factors in establishing mechanisms that respond to these challenges.[184]

Transitions may be conceived of as having multiple dimensions of complexity. Identifying these dimensions may be useful in situating the circumstances of transition as the necessary conditions that hold across the radically diverse states that experience transition. For instance, Jon Elster describes transitional justice thus: "the regime as well as the process [of transitional justice] may be endogenous or exogenous. They may also be of short or of long duration."[185] Elster considers both whether the prior regime that perpetrated gross violations of human rights was endogenous or exogenous on a given society, and whether any subsequent process of transitional justice was either "initiated by the new regime or carried out under the supervision of a foreign power".[186] Paul Gready offers a similar distinction when assessing institutions of transitional justice between between "embedded" and "distanced" justice.[187]

The value of identifying these dimensions of transition is to enable an evaluation of transition as a process along the axis of whether it is imposed by external actors on a specific national society or as a process in which a society itself reckons with its own past legacy of gross violations of human rights without external prompting or coercion. Any risk of conceiving of these dimensions in a binary fashion can be avoided by considering the dimension of exogenous/endogenous as operating along a continuous spectrum rather than being opposable. Elster's identification of these dimensions of complexity is welcome. In particular the dimensions of exogenous and endogenous elements of transitional justice provides a mechanism for articulating and identifying the range of actors involved in transitional justice, whether national or international. However, this dimension of complexity is equally applicable to the other areas relevant to transitions and can therefore be abstracted to apply to transitions generally. Peace-building, security sector reform and development can each involve international and domestic actors in specific transitions. Moreover, the discourse in each area is a highly globalised one, reflecting a combination of both

---

[184] Ruti Teitel, *Transitional Justice,* (n131), 219

[185] Jon Elster, Closing the Books: Transitional Justice in a Historical Perspective, (n21) 73

[186] ibid

[187] Paul Gready, 'Analysis: Reconceptualising transitional justice: embedded and distanced justice', (2005) 5(1) Conflict, Security & Development, 3 — 21

international law and policy, considered in later chapters, and comparative analysis and experiences of diverse transitions.

Conceiving of transitions as having an exogenous or endogenous dimension is an important component of describing the application of normative conditions that arise in the wide range of nations and circumstances in which the areas of transitional justice, peace-building, SSR and development operate. Identifying the dominant actors involved in rendering a transition endogenous or exogenous is important in situating the origins of the values, institutions and goals involved. However, the distinction is not one that necessarily leads to concrete normative judgments. We can conceive of endogenous transitions that involve victors' justice, revenge and witch-hunts at the same time as considering exogenous transitions that reflect the best of due process and the careful stewardship and regard of international actors for the transitional society and vice versa, where an endogenous process is preferable to a brutal or oppressive exogenous one.[188]

In this connection, Elster and others have also highlighted the flexibility of the temporal dimension of transitions as an important component in understanding the complexity of transitions. Teitel argues that "transitional justice implies a non linear approach to time."[189] The flexible use of "transition" as a temporal construction overcomes some of the limitations of a linear "post-conflict" descriptor and enables a dynamic sense of transition in contexts of established democracy or persistent forms of violence.[190] The circumstances of transition can also be used to describe cycles of violence and efforts to pursue public goods; it does not presume a linear expression of transition. It can therefore cover cases such as Colombia and Northern Ireland.[191] Transitions represent that period where a society rejects the prior expression and constitution of political community due to prior gross violations of human rights and seeks to pursue renewed construction of political community. The continued application of the circumstances of justice and politics must be considered in the context of these broader set of conditions.

---

[188] Marek M. Kaminski and Monika Nalepa, "Judging Transitional Justice: A New Criterion for Evaluating Truth Revelation Procedures," *Journal of Conflict Resolution* 50, no. 3 (2006): 383- 408.

[189] Ruti Teitel, "Transitional Justice Genealogy", (2003) 16 Harvard Human Rights Law Review 69-94, 86

[190] Fiona Ni Aoláinn and Colm Campbell, "The Paradox of Transition in Conflicted Democracies" (2005) 27 Human Rights Quarterly 172

[191] ibid; Lisa Laplante L and Kimberly Theidon, "Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz" (2007) 28 Michigan Journal of International Law *49*

Two broad structures of transition have dominated discourse to date that warrant the description as further dimensions of transition. As discussed in Chapter I, the "transition" rhetoric first became dominant through the shift in Latin America in the 1980s from dictatorship to democracy and through the end of the Cold War as the shift from authoritarian rule to elections spread across the world.[192] Trends across seven parts of the world between the 1970s and 1990s demonstrated the persistence of a process of transitions from authoritarian rule, dictatorships and communist states to elected civilian governments. This process has been described as the "third wave" of democracy.[193] Early transitional justice literature could be seen to fit within this discussion.[194] The frequent practice of trials of gross violations of human rights alongside broader transitions to democracy in this period came to be known as the "justice cascade" across Latin America and beyond.[195] However within a short period of time subsequent scholarship appreciated that significant challenges existed in assuming a strong and straightforward causation and sequencing in transitions to democracy. Thomas Carothers and others soon acknowledged that transitions to democracy cannot be boiled down to a set of universal assumptions that hold for the range of cases between the 1970s and 1990s and indeed in general.[196] Carothers concluded: "It is necessary for democracy activists to move on to new frameworks, new debates, and perhaps eventually a new paradigm of political change—one suited to the landscape of today, not the lingering hopes of an earlier era."[197] The challenge to the broader transition paradigm opened up space for the practice of transitional justice through trials and truth commissions to develop independent legitimacy and expand its remit to other forms of social and political change.

The idea of a determinative form of "transition" meaning a shift to genuine multi-party democracy was unwarranted given the decidedly mixed record of countries that sought to shift from some form of repressive rule to some form of democratic governance. In contrast, a second form of transition discourse is the shift from armed conflict or war to sustainable peace. This form of

---

[192] Guillermo O'Donnell and Philippe C. Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions About Uncertain Democracies* (Johns Hopkins University Press, 1986); Jaime Malmud-Goti, *Game Without End: State Terror and the Politics of Justice* (University of Oklahoma Press 2008); Lawrence Weschler, *A Miracle A Universe: Settling Accounts with the Torturers* (University of Chicago Press 1998);

[193] Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991).

[194] Neil Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (USIP 1995)

[195] Ellen Lutz and Kathryn Sikkink, 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America,' *Chicago Journal of International Law* 2(1) (2001): 1–34

[196] Thomas Carothers, "The End of the Transition Paradigm" (2002) 13(1) Journal of Democracy 5-21

[197] ibid, 21

transition uses "post-conflict" or "transitional" as broad synonyms to describe the variations in moving from a period of war to peace.[198] The establishment of the *ad hoc* international criminal tribunals in the mid 1990s affirmed the existence a distinctive institutional practice for situations of armed conflict giving rise to threats to international peace and security that also presented gross violations of human rights.[199] Over time the distinctive institutional practice of these international mechanisms was incorporated into a broader transitional justice discourse featuring both post-conflict and post-authoritarian situations.[200] This saw a further blurring of the goals of transitional justice to include the establishment of sustainable peace, democracy and the rule of law.[201]

One of the relevant differences between these forms of transition is that the latter by involving the shift from armed conflict to peace will necessarily involve the application of international humanitarian law as an operative body of law. This distinctive feature may suggest that it is preferable to think of these forms of transitions as separate and giving rise to unique normative and legal considerations. it is obvious that we can illustrate the distinction between these forms of transition by way of clear examples for both forms of transition that involve no element of the other. However in recent years it is also possible to speak of situations which involve the use of armed conflict, but may also involve a shift from one form of authoritarian or totalitarian government to democratic governance. One need only consider the ongoing conflict in Syria as involving both forms of transition in seeking to shift from civil war to peace and from a state of emergency with nominal elections to genuine multi party democracy. Therefore like other dimensions of complexity, such as endogenous and exogenous, it may be appropriate to consider these forms or dimensions of transitions as operating along a spectrum from a fully international armed conflict (war) to peace form of transition to a purely internal shift from dictatorship to democracy not involving violence at the level of armed conflict generating the application of international humanitarian law. This approach reflects policy level literature considered in detail in

---

[198] M.C. Bassiouni (ed.), *Post-Conflict Justice* (Ardsley, New York: Transnational, 2002); Jelena Subotic, Expanding the scope of post-conflict justice: Individual, state and societal responsibility for mass atrocity (2011) 48(2) Journal of Peace Research 157-169

[199] Payam Akhavan, Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal (1998) 20 HRQ 737-816; Kenneth Anderson, The Rise of International Criminal Law: Intended and Unintended Consequences (2009) 20 EJIL 331-358

[200] Christine Bell, "Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'" (2009) 3 The International Journal of Transitional Justice 5–27, 8

[201] Pablo De Greiff, A Normative Conception of Transitional Justice Politorbis Nr. 50 - 3 / 2010

Chapter VI regarding international assistance to so called "fragile" states.[202] Moreover, subsequent writings such as those of Ruti Teitel have re-interpreted historical cases in these two forms of transitions under a common genealogy of transitional justice.[203]

These dimensions of complexity identify some of the features of transitions that can be considered across multiple areas relevant to transition. However, few theories provide a general framework, which expresses the conditions common to multiple fields of practice that operate in these diverse environments. We can sketch the outlines of such a theory by comparison to the normal conditions of consolidated democracies accepted by political theorists. If we consider the challenges experienced in transition as non-ideal normative circumstances, we can draw on the work of John Rawls and Jeremy Waldron.[204] For Rawls, the *circumstances of justice* were the normal conditions, which make human cooperation both possible and necessary.[205] Rawls stated that the circumstances of justice were (a) the fact that material goods are scarce, but moderately so and (b) that there is, within society, a plurality of worldviews—"conceptions of the good" — moral, religious, and secular.[206] Rawls distinguishes two general kinds: the objective and subjective circumstances of justice.[207] For Rawls, such circumstances "set the stage for questions of justice."[208]

Jeremy Waldron draws an analogy from the circumstances of justice to the case of the "felt need among the members of a group for a common framework or decision or course of action on some matter, even in the face of disagreement".[209] He thus describes *circumstances of politics* as those

---

[202] The Fragile States Debate: Considering ways and means to achieve stronger statehood (2007) Politorbis 1/2007

[203] Ruti Teitel, "Transitional Justice Genealogy", (2003) 16 Harvard Human Rights Law Review 69-94

[204] John Rawls, *A Theory of Justice,* (OUP, 1999); Jeremy Waldron, *Law and Disagreement* (OUP 2001)

[205] John Rawls, *A Theory of Justice* (n204) 109-12

[206] ibid 109

[207] ibid 110: The former include physical facts about human beings, such as their rough similarity in mental and physical faculties, and vulnerability to attack. It also includes conditions of moderate scarcity of resources: there are not enough resources to satisfy everyone's demands, but there are enough to provide all with adequate satisfaction of their basic needs; unlike conditions of extreme scarcity (e.g. famine) cooperation then seems productive and worthwhile for people. The subjective circumstances are the relevant aspects of the subjects of cooperation, largely the fact that individuals often act in their self-interest or disagree on moral, religious or political matters, which gives rise to competing claims on the natural and social resources available. These circumstances therefore obtain generally whenever persons put forward conflicting claims to the division of social advantages under conditions of moderate scarcity and assume parties are mutually disinterested.

[208] ibid, 112

[209] Jeremy Waldron, *Law and Disagreement* (n204) 102

where (a) a society wishes to coordinate and cooperate on a given framework, decision or action and (b) where members of said society disagree as to the proper course of framework, decision or action.[210] Waldron emphasises that both sets of circumstances come as a pair. Disagreement would not matter if there did not need to be a concerted course of activity and vice versa.

Both sets of circumstances require necessary conditions in which to operate. The circumstances of justice requires *moderate* scarcity of material goods. The circumstances of politics requires a shared desire among citizens of a society to cooperate and operate within a social environment, even if they disagree on the proper outcome. What of Rawls' so-called outlaw societies and burdened societies, societies that fail to operate under the circumstances of justice and politics?[211] Where theses assumed conditions are absent, the pursuit of justice and politics cannot be achieved. Thus conceived, the circumstances of transition seek to identify further conditions in which the assumed conditions of the circumstances of justice and politics are absent and must re-asserted. These conditions describe these *circumstances of transition,* as where there are:

- Intense demands and expectations for the achievement of public goods in political community, but also
- Minimal bureaucratic capacity and legitimacy to achieve such goods, due to a breakdown of civic trust and the rule of law, relative to the prior commission of gross violations of human rights.

The former criterion is readily identifiable from existing transitions. Each field seeks to achieve broad public value goals such as justice, peace, security and economic growth considered below. The work of Rawls and Waldron acknowledges that disagreement about these goals will be inevitable and indeed essential for a democracy. The demand for these public goods is particularly acute in moments of transition due to the recent breakdown of the political community's ability or willingness to deliver such goods. Such demands also reflect the broader reality that public goods are only ever achieved in political community. Periods of transition do not represent a society's consideration of *whether* to re-constitute a sovereign political community, as if there is another option to remain in some Hobbesian or Lockean state of nature, but rather *how* to re-constitute

---

[210] ibid 101-103

[211] John Rawls, *The Law of Peoples* (HUP 2001) 90. For Rawls, outlaw societies are those regimes that think a sufficient reason to engage in war is that war advances, or might advance, the regime's rational (not reasonable) interests. Burdened societies are those societies whose historical, social, and economic circumstances make their achieving a well-ordered regime, whether liberal or decent, difficult if not impossible.

such a community.[212] Thus members of such societies have an obligation, not an option, to enter into political community with those around them.[213] The demand for public goods thus reflects a broader desire and effort to re-constitute a sovereign political community and return to operating in the circumstances of politics and justice alone. High levels of expectation for the achievement of these goals also reflect the expectation of continued political community and role for the State, while also placing significant pressure on the State in transition.

Practitioners and scholars recognise the latter criterion as a necessary but insufficient condition for describing transitions.[214] The commission of gross violations of human rights by a State or its inability to prevent such offences represent an extremely weak commitment to such rights and to principles of justice and politics within that political community. Furthermore, the occurrence of gross violations of human rights demonstrates a clear lack of capacity for prevention. There are two principal structural consequences to the commission of gross violations of human rights: the breakdown of civic trust and the rule of law.

III. Civic Trust

A State complicit in or unable to prevent such violations fundamentally breached the trust of the citizens they were meant to serve. Ensuring such trust is the purpose of sovereign political community: "whom society hath set over it self, with this express or tacit Trust, That it shall be imployed for their good, and the preservation of their Property."[215] Breakdown in the rule of law is considered in Chapter IV.

Civic trust has not been an object of significant focus in current literature on transitions but may provide a coherent basis for considering the relationship between diverse fields. The destruction of civic trust imperils the conditions necessary for the circumstances of politics and justice: "the rapid and successful transition to post-authoritarian modes of governance and the consolidation of

---

[212] This view holds for questions of secession. However, even in such cases, a splinter group from society purports to separate in order to operate as a political community.

[213] Jeremy Waldron, Religious Foundations of International Law, available at: http://ssrn.com/abstract=1823702, 20; John Rawls, *A Theory of Justice* (n204) 98-99

[214] Paul Van Zyl, *"Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission"* 52 J Int'l Aff 647 (1999); William Schabas, 'Justice, Democracy and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems', 8 Criminal Law Forum (1997) 523; William Schabas, 'The Rwanda Case: Sometimes it's Impossible', in M.C. Bassiouni (ed.), *Post-Conflict Justice* (Ardsley, New York: Transnational, 2002) 499. More generally see UNSC, Report of the Secretary-General on peace-building in the immediate aftermath of conflict, A/63/881 S/2009/304, 4; World Bank, World Development Report 2011, 99

[215] John Locke, Two Treaties on Government, (first published 1689, CUP 2004) 381

liberal democratic regimes is seen to be greatly hindered by the absence of trust."[216] As a further consequence, such violations destroy civic trust between groups in society, however configured, as individuals look for protection and trust within identifiable groups of affinity.[217] Trust is a complex moral concept that has not received significant attention in philosophy.[218] It is not sensible to claim that trust is morally required generally because it cannot be morally required that we trust those who would clearly take advantage of our trust to cheat or harm us or others. If trust is moral, it is moral only contingently.[219] To say I trust another with respect to some matter means that I have reason to expect another to act in my interest with respect to that matter because another has good reasons to do so, reasons grounded in my interest. Therefore A trusts B to do x (or with respect to x).[220] Trust is not related to expectations of behaviour in general, but to what is to be expected of someone in their role relative to the person who trusts.[221] Trust is also therefore perceptional, based on one's expectations of another.

Civic trust is evidently a qualifier on the broader concept of trust. We can distinguish between horizontal civic trust (between citizens) and vertical civic trust (between citizen and State).[222] Civic trust thus constitutes both trust in government and trust in other citizens as anonymous relationships). All societies need government to maintain civic order that enables us to invest in our own well-being and to deal with others in the expectation we will not be violated.[223] We should recognise that issues of scale, absence of civic trust and the rule of law are matters of

---

[216] Clause Offe, "How can we trust our fellow citizens?" in Mark Warren (ed) *Democracy and Trust* (CUP 1999), 43

[217] Seth Kaplan, "Identity in Fragile States: Social cohesion and state building" (2009) 52(4) Development 466–472

[218] Annette Baier, *Moral Prejudices: Essays on Ethics* (HUP 1995): Mark Warren (ed) *Democracy and Trust* (CUP 1999); Eric Uslaner, "The Moral Foundations of Trust" Available at SSRN: http://ssrn.com/abstract=824504 (accessed 27 September 2011)

[219] Russell Hardin, "Do we want trust in government?" in Mark Warren (ed) *Democracy and Trust* (CUP 1999) 24

[220] ibid, 26: B must have the competence to do x and A must have the competence to judge B

[221] Rom Harré, "Trust and its surrogates", in Mark Warren (ed) *Democracy and Trust* (CUP 1999) 257

[222] Clause Offe, "How can we trust our fellow citizens?" (n216) 55-63

[223] Russell Hardin, "Do we want trust in government?" (n219) 22

degree from society to society.[224] Challenges to civic trust in consolidated democracies are frequent, such as the parliamentary expenses scandal in the United Kingdom.[225] In transition however, the failure or complicity of the State in such fundamental crimes and violations destroys citizens' trust in the State to perform the core and existential functions of political community.[226] A breakdown of civic trust threatens the circumstances of politics because it threatens citizens' desire and capacity to coordinate and cooperate on frameworks, decisions or actions. This is so as successful coordination depends upon cooperation, and the latter upon the presence of perceptions, dispositions and expectations that induce agents to cooperate.[227]

The operation of civic trust may vary depending on the dimensions of complexity relevant to transition identified above, for example whether the transition is primarily one from authoritarian rule to democracy or one from armed conflict between groups to peace. Civic trust may operate across different groups of combatants, where there is strong intra-group trust on one side, with strong distrust regarding the other. Similarly this may operate for those who supported a dictatorship versus those who supported democratic change and transition. The operation of civic trust may be more complicated in a transition that predominantly concerns the shift from authoritarian rule to democracy, where the prevalence of secret police, informers and other forms of subversion and secrecy (and the perception of same) render the operation of trust across groups to other anonymous members of society extremely challenging.

It is in attempting to reconcile the imperative to pursue public goods, to re-assert the circumstances of justice and politics, with this normative reality of breakdown that particular considerations, challenges and tensions arise. The circumstances of transition fit because these circumstances operate as a pair – the intense demands for public goods would not be problematic

---

[224] Clearly, not all transitional scenarios resemble the challenges facing transitional justice in, say, Rwanda or Sierra Leone. For instance, the case of Northern Ireland represents an exception where efforts were made during the Troubles to prosecute terrorists wherever possible. In addition, consider the efforts in Argentina to continue prosecutions some 25 years after the moment of transition. Mark Freeman and Drazan Djukic describe this core dilemma facing transitional justice "of high demand, but low prospects, of delivering adequate justice." Mark Freeman, Mark and Drazan Djukic, *Jus Post Bellum* in Stahn Carsten and Kleffner Jann, *"Jus Post Bellum: Towards a Law of Transition from Conflict to Peace" (*TMC Asser Press 2009)

[225] Anthony Seldon, *Trust: How we lost it and how to get it back* (Biteback Publishing, 2009)

[226] Destruction of civic trust aligns with low levels of State capacity. Low levels of capacity are typically caused by decimated, corrupt, or complicit public institutions. Weakened capacity may also affect public trust in the institution to achieve public goods, given that it was unable to prevent the commission of gross violations of human rights.

[227] Clause Offe, "How can we trust our fellow citizens?" (n218) 43

if there was capacity and trust sufficient to meet them. Transitions thus challenge and seek to re-assert the assumptions under which Rawls' and Waldrons' circumstances operate.

Transitions concern the application of principle in context, across the operation of distinct fields of practice and the pursuit of distinct value goals. The circumstances of transition operate at a high level of abstraction, and seek therefore to re-build the use of a transition paradigm from the overly prescriptive and unrealistic assumptions of prior paradigms criticised by Thomas Carothers.[228] Setting out the circumstances of transition gives us a better understanding of the common conditions for the application of principle in each field, namely the breakdown of civic trust and the rule of law. Each field seeks to pursue particular public goods. It thus becomes incumbent on each field to acknowledge and engage with these conditions, especially the deficiencies of civic trust and the rule of law in which it operates. The idea of the circumstances of transition is a new means of demonstrating the tension between the pursuit of goals in each field and the challenging reality in which they operate. We will now consider the extent to which each field embraces that challenge.

IV. The Areas

A. Transitional Justice

Transitional justice generally describes the means by which societies come to terms with a legacy of gross violations of human rights. Some theorists have attempted to describe an overall theory of transitional justice. One view is that transitional justice is a particular, socially constructed form of justice, necessitated by the existence of radical social violence and distinct because of its complex temporal nature, where institutions are simultaneously forward-looking and backward looking, struggling between adherence to established convention and radical transformation.[229] This approaches privileges the moment of transition, the shift from a violent to post-conflict paradigm, as automatically giving rise to particular normative considerations. This is the view taken by Ruti Teitel in her treatise on the subject *Transitional Justice*. As a result of focusing on the moment of transition, the "correct" response in transitional justice in a given state is highly contextualised and politicised, which negates the suggestion that there is one correct answer for all states to adopt in responding to the past.[230]

---

[228] Thomas Carothers, The End of the Transition Paradigm, (2002) 13(1) Journal of Democracy 5-21

[229] Ruti Teitel, *Transitional Justice* (n128), 19; 215

[230] ibid 219

A second view is that taken by Eric Poser and Adrian Vermeule, who argue against any qualitative difference in transitional justice, because "ordinary" justice includes its own series of transitions.[231] They contend that regime changes are not a self-contained subject, and that the prevalence of this approach in transitional justice inhibits comparison and analogy with other transitions that occur in the legal systems of consolidated democracies. They contend that legal and political transitions lie on a continuum, of which regime transitions are merely the endpoint. Posner and Vermeule contend that other approaches to transitional justice offer a mere stylised version of ordinary law in consolidated democracies, without appreciation of the complexities and pragmatic elements in these legal systems: "The conceptual mistake here is to hold courts doing transitional justice to moral standards that would be unrealistic even for courts in settled liberal democracies."[232] This approach recognises the potential for profound social transformation and symbolism through legal institutions in, for instance *Brown v Board of Education.*[233] On this view, challenges to legalism and legal values in transitional justice are not unique, but are faced in ordinary lawmaking, which copes with "policy shifts caused by economic and technological shocks and by changes in the value judgments of citizens and legal elites".[234]

A further view has been offered recently by Pablo de Greiff, who believes the core issue here is to "account for the fact that in the wake of massive abuses some of the ordinary expectations concerning what justice requires will not be satisfied."[235] De Greiff's approach pursues mediate and final goals as preconditions and consequences of the effort to give expression to the abstract notion of justice through law based systems.[236] He argues that civic trust and recognition are mediate goals, whereas reconciliation and democratisation are the final goals.[237] For de Greiff, "transitional justice articulates the requirements of a general understanding of justice when applied to the peculiar circumstances of a very imperfect world, that is, a world characterized by massive rule breakdown and great risks to the institutions that attempt to overcome such

---

[231] Eric Posner and Adrian Vermeule, "Transitional Justice as Ordinary Justice" 117 Harvard Law Review 761, 763-4

[232] ibid 797

[233] *Brown v Board of Education* 1954 347 U.S.483 (Supreme Court)

[234] Eric Posner and Adrian Vermeule, "Transitional Justice as Ordinary Justice" (n204), 764

[235] Pablo de Greiff, *Theorizing Transitional Justice* (2009), on file with author, 28

[236] ibid 4

[237] ibid 12-27

breakdowns."[238] Thus transitional justice concerns the relationship between context and principle, rather than a trade off between them. De Greiff contends that this debate concerns the *application* of justice, "in the...fundamental sense of coming to an understanding of what it is reasonable to expect the principles in question to imply under specific circumstances.[239]"

These approaches evidence a number of similarities. First, each version or theory offered refers to values that transitional justice pursues, discussed below. Second, the theories are formalist in operating through legal institutions, accepting a difference in formal institutions from criminal justice in consolidated democracies and not excluding of any formal institution.[240] Third, these institutions constitute the goals by their processes, as well as their substantive outcomes and retain the potential for potent symbolism through these processes. Finally, all authors acknowledge that the particular normative and factual circumstances in which transitional justice operate generate concerns not prominent in consolidated liberal democracies. However, De Greiff's approach alone acknowledges the need to apply a general concept of justice to distinct circumstances, while eschewing a distinct conception of justice or scepticism about any meaningful distinction. A sceptical account fails to acknowledge the challenge to conditions necessary and present in consolidated democracies in the circumstances of justice and politics. However it also remains unclear why normative discontinuity and a distinct conception of justice are required to express the application of justice to an environment where a distinct and limited array of normative conditions hold. De Greiff's approach reflects the distinct concerns of transitions, but does so in a way that provides continuity between these particular challenges and general theories of justice.

Despite this contested theorisation, a number of structurally similar definitions of the field exist.[241] Each definition describes transitional justice as both the pursuit of distinct value goals that are responsive to a legacy of gross violations of human rights and the establishment of formal institutions designed to achieve those goals. The United Nations definition of transitional justice:

---

[238] ibid 4

[239] ibid 32

[240] Why, for instance, should the use of *gacaca* in Rwanda as a measure of criminal accountability be excluded from a narrow definition of transitional justice that equates the goal of accountability with formal criminal trials?

[241] UN Secretary-General,'The rule of law and transitional justice in conflict and post-conflict societies' (United Nations Security Council, 2004) S/2004/616; *The Encyclopedia of Genocide and Crimes Against Humanity* (Macmillan Reference USA, 2004), 1045-1047; http://ictj.org/en/tj/; Alex Boraine, "Transitional Justice: A Holistic Interpretation"(2006) 60(1) Journal of Int. Affairs 17

> Comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.[242]

This definition is instrumental, offering value goals: "to ensure accountability, serve justice and achieve reconciliation". Other existing definitions identify a number of goals that transitional justice institutions seek to pursue, such as to "seeks recognition for victims and to promote possibilities for peace, reconciliation and democracy"[243]; or to "build a more democratic, just, or peaceful future".[244] Theory surrounding each of these goals acknowledges the circumstances of transition, in particular the need for transitional justice to contribute to structural conditions of civic trust and the rule of law. The goal of accountability was originally conceived of as the primary the means for responding to mass atrocity through the use of criminal law.[245] Increasingly however, scholarship and practice recognises that (international) criminal justice alone is an insufficient response to a legacy of gross violations of human rights. The scale and nature of 'radical evil' complicate not only the goals of punishment, but also the very analogy of extraordinary evil to ordinary crime.[246] Hence of the goals borrowed from traditional criminal law "none can blindly be transposed from the domestic context".[247] The nature of mass violence renders more likely that commission of rights violations shall be a general rule rather than the exception; ordinary criminal law operates in circumstances where the commission of an offence is the exception and not the rule. This effect denigrates the rule of law because of the systemic breach caused by the violation and gives it a social character. That breach of the rule of law and

---

[242] UN Secretary-General,'The rule of law and transitional justice in conflict and post-conflict societies' (n214) 4

[243] International Center for Transitional Justice, "What is Transitional Justice?" available at http://ictj.org/en/tj/ (last visited 19 January 2010)

[244] Louis Bickford, *The Encyclopedia of Genocide and Crimes Against Humanity* (Macmillan Reference USA, 2004), 1045-1047

[245] Jon Elster, *Closing the Books* (n21) 1-47

[246] Hannah Arendt Karl Jaspers: Correspondence 1926-1969 (Mariner 1993) #109, 166; Carlos Nino, Radical Evil on Trial (Yale University Press 1998); Immanuel Kant, Kant: Religion within the Boundaries of Mere Reason: And Other Writings, (Cambridge Texts in the History of Philosophy), Cambridge University Press (January 28, 1999)

[247] Miriam Aukerman, Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice (2002) 39 Harvard Human Rights Journal 39, 45

the extent of crimes committed is destructive of civil trust because it demonstrates the failure of the State and its capacity to rule through law or under the rule of law.[248]

Second, establishing the truth about past gross violations of human rights has come to be seen as a necessary goal for the pursuance of further transitional justice initiatives, and as a vital good in itself. The report of the South African Truth and Reconciliation Commission considered four types of truth: (i) objective, factual, forensic truth; (ii) personal or narrative truth of both victim and perpetrator; (iii) social or dialogical truth; (iv) restorative truth.[249] Truth seeking thus seeks to narrow the range of permissible lies regarding the past.[250] In this way, truth seeking responds to public demands for greater knowledge on which to base decisions about any new political order. Pursuing this range of truth constitutes a process of civic dialogue and deliberation, which in turn contributes to building civic trust.[251]

Third, the goal of reconciliation differs significantly from a criminal justice paradigm and carves out distinct space for transitional justice.[252] There is a long standing and well-rehearsed "peace vs. justice" debate, that suggests reconciliation as a by-word for impunity, drawing from the experience of the Argentinian *junta.*[253] However, the experience of the South African Truth and Reconciliation Commission, the rise of intra-state conflicts, and further scholarship prompted the idea of reconciliation as a necessary condition for establishing a human rights regime based on consent and shared norms.[254] A number of views existing regarding the definition of reconciliation.[255] One such view of reconciliation is that it provides a minimum level of social

---

[248] Pablo De Greiff,, "Truth-Telling and the Rule of Law," in Tristan Anne Borer (ed) *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies*, (Notre Dame, IN: University of Notre Dame Press, 2006), 181-206.

[249] Alex Boraine, "A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission"; Alex Boraine, "Transitional Justice: A Holistic Interpretation" (n214), 20-21

[250] Michael Ignatieff, "Articles of faith," *Index on Censorship*, Vol. 25 (1996), No. 5, Issue 172, p. 110- 122: 119

[251] Amy Gutmann and Dennis Thompson, The Moral Foundations of Truth Commissions, in Robert Rotberg and Dennis Thompson (eds) Truth v. Justice, Princeton University Press, 2000. 35-6

[252] David Bloomfield, "On Good Terms: Clarifying Reconciliation." Berghof Report No. 14, (2006), 3-35

[253] Emilio Crenzel, Argentina's National Commission on the Disappearance of Persons: Contributions to Transitional Justice (2008) 2(2) IJTJ 173-191

[254] Jose Zalaquett, Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations (1992) 43 Hastings L.J. 1425; Paul Van Zyl,*"Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission"* 52 J Int'l Aff 647 (1999)

[255] SIDA, Reconciliation - Theory and Practice for Development Cooperation, 13-20

reality as "co-existence".[256] However, as a necessary condition, a transitional justice organisation and a new government are seeking to establish and maintain coexistence between the various groups and thus seeks to restore minimum conditions of civic trust.[257]

Fourth, modern theories of transitional justice expressly seek to provide recognition to victims and survivors, acknowledging their standing not only as victims of gross violations of human rights but also as rights-holders and citizens entitled to freedom from such violations. In this way, the goal of recognition seeks to re-affirm victims as citizens, as persons of significance and value to the State.[258] This process of reparation through renewed State-citizen relations contributes to the restoration of civic trust.[259] In addition, reparations seek to achieve some measure of social solidarity as an element of re-constituting a social contract between victims and the State.[260] Finally, transitional justice has begun to interact with broader processes of institutional reform, most notably through the vetting of the security sector. These processes are considered as part of other fields below.

There is growing consensus that the goals are best pursued holistically and may be inter-dependent. This inter-dependence is evident at the level of shared necessary conditions of these goals.[261] Each goal of transitional justice aims to contribute to the restoration of civic trust. Pablo De Greiff identifies this restoration of trust as an element of transitional justice in facilitating an expectation in society of a shared reciprocal normative commitment to certain patterns of behaviour.[262] The goals of transitional justice thus depends on each other in their shared pursuit of civic trust.

---

[256] David Bloomfield, "On Good Terms: Clarifying Reconciliation." (n252) 13-16

[257] Louis Kriesberg,"Changing Forms of Coexistence," in Mohammed Abu-Nimer (ed) Reconciliation, Justice and Coexistence: Theory and Practice (Lexington Books 2001) 47-64; Alexander L Boraine, "Transitional Justice: A Holistic Interpretation" (n214) 22-23.

[258] Pablo De Greiff, Articulating the Links between Transitional Justice and Development: Justice and Social Integration (n18), 57

[259] Pablo De Greiff, Justice and Reparations in Pablo De Greiff (ed), The Handbook of Reparations, 462; see also Anthony Giddens, Modernity and Self Identity: Self and Society in the Late Modern Age (Polity Press, 1993) 35–6

[260] Pablo De Greiff, Justice and Reparations in Pablo De Greiff (ed), The Handbook of Reparations, 465

[261] Pablo de Greiff, Theorizing Transitional Justice, (n208) 7-8, describing the relationship between components as bi-directional.

[262] Pablo De Greiff, Articulating the Links between Transitional Justice and Development: Justice and Social Integration (n18) 58

These goals and their claimed impact is achieved in the practice of this field through the medium of formal institutions. The practice of this field and the pursuit of these goals includes, but is not limited to, the use of prosecutions, truth commissions, reparations to victims and survivors, vetting of security sector forces, and memorialisation and acknowledgment enterprises.[263] In addition, there is increased recognition of the potential value of indigenous processes of conflict resolution as mechanisms for reckoning for a past legacy of gross violations of human rights and social conflict.[264] It is not only through the substantive results achieved by each institution that they seek to change the behaviours, attitudes and perceptions of the affected society, but through the *process* of each institution as well. Public participation and deliberation are thus seen as key features in the establishment and operation of transitional justice institutions. Such institutions both need civic trust and the rule of law to operate, but also seek to enhance and develop these goals.[265] The normative inter-dependence of each goal suggests the need for external and internal coherence between the formal institutions that are established to pursue the goals.[266]

The tendency therefore has been to define transitional justice with reference to its existing institutional devices, a broad set of value goals, with an emphasis on national or local ownership and leadership in the design of institutions and choice of goals. Such approaches have developed a rich concept of justice pursued through these components goals and institutions. This expression of justice seeks to reconcile and re-constitute a society as a political and democratic community through a contribution to the rule of law and civic trust.[267] By relating this contribution to that of other fields, this chapter will show not only the inter-dependence of all four fields, but also the serious risks of incoherence.

B. Peace-Building

Peace-building can be defined as as actions undertaken by international or national actors to institutionalise peace, understood as the absence of armed conflict and at least a modicum of

---

[263] Alex Boraine, "Transitional Justice: A Holistic Interpretation" (n214); Ruti Teitel, 'Human Rights in Transition: Transitional Justice Genealogy', (2003) 16 Harvard Human Rights Journal 69; Carsten Stahn, 'The Geometry of Transitional Justice: Choices of Institutional Design', (2005) 18 Leiden Journal of International Law 425.

[264] Peter Harrell, Rwanda's gamble: gacaca and a new model of transitional justice (iUniverse 2003)

[265] Pablo de Greiff, Theorising Transitional Justice, (n174) 17

[266] Pablo de Greiff, Repairing the Past: Compensation for Victims of Human Rights Violations in Pablo de Greiff (ed) The Handbook of Reparations, (OUP 2006), 10-12

[267] Pablo de Greiff, Theorising Transitional Justice, (n174) 18-27

political process sustainable in the absence of an international peace mission.[268] Conceptions of how to achieve international peace have a long heritage heading back to Immanuel Kant, Jeremy Bentham, and Jean-Jacques Rosseau.[269] Modern theories of peace recognise the inherent contextual nature of each peace settlement and process, limiting complex theorisation. The United Nations introduced peace building in *Agenda for Peace*.[270] The then Secretary General Boutros Boutros-Ghali defined peace building as "action to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict."[271] In 2000 the Brahimi Report on Peacekeeping Reform defined peace-building as: "activities undertaken on the far side of conflict to reassemble the foundations of peace and provide the tools for building on those foundations something that is more than just the absence of war."[272] The 2008 UN Peacekeeping Operations: Principles and Guidelines provide:

> Peace-building involves a range of measures targeted to reduce the risk of lapsing or relapsing into conflict by strengthening national capacities at all levels for conflict management, and to lay the foundation for sustainable peace and development. Peace-building is a complex long term process of creating the necessary conditions for sustainable peace. It works by addressing the deep rooted structural causes of violent conflict in a comprehensive manner. Peace-building measures address core issues that effect the functioning of society and the State, and seek to enhance the capacity of the State to effectively carry out its core functions.[273]

Further definitions of peace-building are expansive, generating: "A comprehensive concept that encompasses, generates, and sustains the full array of processes, approaches, and stages needed to transform conflict toward more sustainable peaceful relationships."[274] We can see that there continues to be considerable variation in the meaning of peace-building as the concept evolved over time and because organisations have adopted varied definitions aligned with their existing

---

[268] Charles T. Call and Elizabeth M. Cousens, Ending Wars and Building Peace: International Responses to War-Torn Societies, (2008) 9 International Studies Perspectives 2008 1–21

[269] Immanuel Kant, Perpetual Peace; Rousseau, Jean-Jacques, A Lasting Peace through the Federation of Europe tr. C. E. Vaughan; Bentham, Jeremy, A Plan for an Universal and Perpetual Peace

[270] *An Agenda for Peace* (n81)

[271] ibid, para 21

[272] Report of the Panel on United Nations Peace Operations (n111) para 13

[273] *UN Peacekeeping Operations: Principles and Guidelines*, (UNDPKO 2008) 18

[274] John Paul Ledrarch, Building Peace - Sustainable Reconciliation in Divided Societies (USIP 1997) 20

mandates and preferences.[275]

Based on above definitions, peace-building could thus be conceived of as an overarching concept that incorporates aspects of economic development, transitional justice, constitutionalism and security sector reform, but explicitly designed as seeking to prevent relapse into conflict. There is a risk that blurred and overlapping theory and practice could result in the "most important factors driving potential conflict may not be addressed."[276] For present purposes, it is important to carve out distinct space for the concept, beyond an all encompassing approach. We can first distinguish peace-building negatively from peace-making and peace-keeping. Peace-making is the process of conflict resolution through negotiation, mediation or arbitration.[277] Peace-keeping aims to immediately end violence and hostilities through the use of armed forces.[278] However, there appears to be some overlap between peace-building and preventive diplomacy. In the *Agenda for Peace,* the UN stated: "the concept of peace-building as the construction of a new environment should be viewed as the counter part of preventive diplomacy...preventive diplomacy is to avoid a crisis; post-conflict peace-building is to prevent a recurrence."[279] Theoretical ambiguity in peace-building thus persists, and "stems from the fact that it designates both the process of establishing a sustainable peace and the political and institutional strategies used to do so."[280]

We can however further derive a distinct function from the constructive character of peace-building. The field is conceptually founded on the distinction between "negative" and "positive" peace. Negative peace can be defined as "the absence of direct and organised violence between human groups or nations". In contrast, positive peace can mean "the establishment of a sustainable peace through cooperation between these groups or nations and the eradication of the root causes of the conflict" respectively.[281] Thus peace-building seeks to achieve "the creation

---

[275] Michael Barnett, Hunjoon Kim, Madalene O'Donnell, and Laura Sitea, Peacebuilding: What Is in a Name? (n134)

[276] Michael Lund, What Kind of Peace is Being Built? Taking Stock of Post-Conflict Peace-building and Charting Future Directions, Discussion paper prepared for the International Development Research Center, Ottawa, 2003, 27

[277] *An Agenda for Peace* (n81) para 20

[278] ibid

[279] ibid, para 57

[280] Vincent Chetail, "Introduction" in Vincent Chetail (ed), Post-Conflict Peacebuilding (OUP 2009) 26

[281] Johan Galtung,"Three Approaches to Peace: Peacekeeping, Peacemaking and Peacebuilding," in his Peace,War and Defense—Essays in Peace Research, Vol. 2 (Christian Eljers, 1975): 282-304

of structures for the institutionalisation of peace".[282] As a result peace building seems distinctly aimed at the consolidation of peace through building the *civic* relationship of groups in the transitional society as expressed in sovereign institutions. Therefore it is a constructive process designed to change behaviours, perceptions and attitudes. In this way, peace-building may seek to incorporate elements and practices from other fields, but offers a distinct set of ultimate goals: seeking to ensure the ongoing absence of violence but also pursuing broader long term examination of the root causes of conflict.

Due to this focus on relationships and distributions of power in a given society, existing theories of peace-building acknowledge that it is primarily a national challenge and responsibility. The United Nations Peace-Building Commission notes: "peace-building strategies must be coherent and tailored to the specific needs of the country concerned, based on national ownership, and should comprise a carefully prioritised, sequenced, and therefore relatively narrow set of activities..."[283] Christine Bell argues that this under-theorisation and conceptual fluidity is valuable, indeed "if the law should actually move from developing to developed, it would in all likelihood unravel."[284] There is thus a double ambiguity, combining the lack of international or scholarly consensus on the concept, and the highly contextual nature of its application. The concept of peace-building must also interact with different conceptions of peace. The liberal peace model, which emerged at the end of the 1980s, is premised on the belief that the promotion of a liberal democracy and market economy in post-conflict countries will create the conditions for lasting peace.[285] There also remains significant dissensus on this view, both in terms of its normative desirability and its empirical successfulness. Second, the republican peace model places greater emphasis on deliberation and debate within the framework of parliamentary democracy.[286] Such conceptions and others, such as communitarian peace, reflect broad divisions in political philosophy and are signposts for the future directions of the political community in a given state.

---

[282] *Supplement to the Agenda for Peace* UN GA Res 50/60; UN SC Res 1995/1, para 49

[283] UN Peacebuilding Commission, Statement by the Assistant Secretary-General for Peacebuilding Support to the Hiroshima Peacebuilding Centre, 15th September 2007

[284] Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (n25) 237

[285] John Heathershaw, Unpacking the Liberal Peace: The Dividing and Merging of Peacebuilding Discourses, (2008) 36 *Millennium - Journal of International Studies* 597

[286] Michael N Barnett, Michael, Building a Republican Peace Stabilizing States after War (2006) 30(4) International Security 87-112

In this way, peace-building purports to express the internal self-determination of the affected State and the re-constitution of the State as a political community in the circumstances of transition.[287] The field seems to offer a given society a choice of means to sustain peace, but also choice in the conception of peace it wishes to achieve, or the new political and constitutional community it wishes to establish. Peace-building thus orientates social and political forces towards the re-constitution of a legitimate political community through the deliberative consolidation of peace focusing on the civic relations between individuals. The process of peace-building is therefore instrumental in the pursuit of a new normative social, political and security environment. In this way, peace-building is structured at achieving sustainable political discourse with the exclusion of violence as a means to achieve it, what some have turned "Clausewitz in reverse".[288]

Despite this role for self-determination, peace-building acknowledges that certain structural conditions will accompany any consolidation of peace and transition to a chosen expression of a new political and constitutional order. Convincing parties to a peace agreement to adhere to its terms, or for civil society and the general populace to accept the new political and constitutional order requires the enhancement of civic trust from levels that led to armed conflict or the fluid transitional environment. The ambiguity of peace-building, and the scope for ambiguous and incompletely theorised terms in a peace agreement generate the need for potential future negotiation and deliberation about particular issues. Maintaining this structure of deliberation requires civic trust among all parties that all will continue to commit.[289] In this way, peace-building acknowledges the conditions of the circumstances of transition.

Peace-building processes seek to consolidate the legitimacy of the arrangements concluded at the cessation of gross violations of human rights, but also to transform social foundations of public legitimacy for the long term. Though both immediate and long term processes seek to formalise this renewed legitimacy through legal form, whether elections, peace agreement or constitution, the participatory nature of peace-building remains the primary means of effecting change in behaviours, perceptions and attitudes. Thus, the initial elite arrangement and distribution of power is then legitimised through peace-building processes. This process both depends on and seeks to

---

[287] Wouter G Werner, "Self-Determination and Civil War" (2001) 6(2) Journal of Conflict and Security Law 171-190

[288] Oliver Ramsbotham "Reflections on UN Post-Settlement Peacebuilding" in Tom Woodhouse and Oliver Ramsbotham (eds) *Peacekeeping and Conflict Resolution* (Frank Cass & Co Ltd, 2000), 172

[289] Michael Doyle, "The John W. Holmes Lecture: Building Peace", (2007) 13 Global Governance 1–15

constitute civic trust and the rule of law as conditions for future deliberation of particular issues in the re-establishment of a political and constitutional order.

C. Security Sector Reform

The "security sector" is a broad term often used to describe the structures, institutions and personnel responsible for the management, provision and oversight of security in a country.[290] Security sector reform (SSR) can be defined as all activities aimed at the effective and efficient provision of state and human security within a framework of democratic governance.[291] SSR describes a process of assessment, review and implementation as well as monitoring and evaluation led by national authorities that has as its goal the enhancement of effective and accountable security for the State and its peoples without discrimination and with full respect for human rights and the rule of law.[292] Thus broad conceptions of security sector reform can be defined to include all institutions, groups, organisations, and individuals with a stake in internal and external security provision, together with bodies responsible for their administration, tasking and control.[293] However, SSR remains "ill-defined" on two levels.[294] First, there is no generally accepted definition of the security sector or what SSR entails.[295] Difficulties of universal definition arise as all states and societies define and pursue security according to their particular contexts, histories, cultures and needs. No single model of a security sector exists.[296] International policy and regulation of this area remains diffuse and contested, a result of the multidisciplinary nature of SSR: "it is the bastard child of Civil-Military Relations and Development Studies".[297] Second, given the prescriptive nature of the field, SSR is viewed with suspicion by some states, where it resonates with the imposition of Western values, methods and approaches in core national

---

[290] *Securing peace and development: the role of the United Nations in supporting security sector reform Report of the Secretary-General* UN GA Res 62/659 UN SC Res 2008/39, para 14

[291] Heiner Hanggi, Security Sector Reform in Vincent Chetail (ed), Post-Conflict Peace-building A Lexicon, 337; OECD, Security System Reform and Governance: Policy and Good Practice (2004), 19

[292] *Securing peace and development: the role of the United Nations in supporting security sector reform Report of the Secretary-General* (n290) para 17

[293] David Chuter, "Understanding Security Sector Reform", 4(2) (2006) Journal of Security Sector Management, 7

[294] Philip Fluri, "Oversight and Guidance: The Relevance of Parliamentary Oversight For the Security Sector and its Reform" in Hans Born, Philipp Fluri, Anders Johnsson (eds.) Handbook for Parliamentarians No 5, Oversight of the Security Sector: Principles, Mechanisms and Practices, IPU/DCAF, Geneva, Belgrade, 2003, p. 16.

[295] David Chuter, "Understanding Security Sector Reform" (n264) 1

[296] *Securing peace and development: the role of the United Nations in supporting security sector reform Report of the Secretary-General* (n290) para 15

[297] David Chuter, Understanding Security Sector Reform, (n264) 3

security concerns.[298] Both concerns question the merit of SSR when not conceived in response to articulated concerns or fears of a given population.[299]

Despite ambiguities about definition, two broad conceptions of security have informed reform of the security sector. State security or national security represent the traditional security concept.[300] The basis of national security acknowledges the centrality of the sovereign state in the international system in the Westphalian model. Max Weber conceived of state sovereignty as the monopolisation of the legitimate use of force within a territory.[301] National security therefore encompasses many attributes traditionally associated with the state, such as military, political and economic security, as well as environmental and resource security.[302] Traditional conceptions of national security are thus great respecters of state sovereignty, and determined by national politics and context. On this approach, security sector reform has largely focused on enhancing the effectiveness of military and police forces in providing and maintaining this conception of security. However, discussions of institutional reform have extended to include components of institutional accountability and the need for democratic oversight of the security forces.[303]

In contrast, modern security rhetoric has assumed a greater international character. In 1994, the UNDP Human Development report defined human security as "safety from such chronic threats as hunger, disease and repression...[and]...protection from sudden and hurtful disruptions in the patterns of daily life—whether in homes, in jobs or in communities."[304] The report went on to identify human security by reference to threats in seven areas: economic, food, health, environmental, personal, community, and political security.[305] A human security approach shifts from a pure sovereignty focus to origin neutral security governance, regardless of the source of insecurity or the provider of security, more appropriate in complex transitional environments,

---

[298] Alan Bryden, "From Policy to Practice: the OECD's Evolving Role in Security System Reform", Geneva Center for the Democratic Control of the Armed Forces Policy Paper No22, 1

[299] Eric Scheye, Eric and Gordon Peake, 'To arrest insecurity: time for a revised security sector reform agenda', (2005)5(3) Conflict, Security & Development, 295 — 327

[300] Cynthia Ann Watson, *U.S. national security: a reference handbook ABC-CLIO*, 2008

[301] Max Weber, *The Theory of Social and Economic Organization* (Free Press 1964) 154

[302] Joseph Ramm, Defining National Security: the non-military aspects Pew Project on America's Task in a Changed World (Council on Foreign Relations 1993) 122

[303] *OECD Handbook on Security Sector Reform: Supporting Security and Justice* (n144), 112-124

[304] United Nations Development Programme, Human Development Report (UNDP 1994)

[305] ibid, 24-25

typically with multiple security actors. As a result, the concept of human security provides a linkage between security, development, and human rights. A number of academic approaches to human security includes these components.[306]

Since the emergence of this concept, two broad trends of human security have emerged. The first reflects Roosevelt's "freedom from want" focused on ensuring basic human needs in economic, health, food, social and environmental terms.[307] The second reflects "freedom from fear", human security as removing the use or threat of force and violence.[308] There is a risk that a "freedom from want" conception could become open-ended and not necessary link to security or security institutions.[309] Relatedly, the so-called "securitisation" of non-traditional security issues describes the colonisation of other fields of practice by such conceptions of human security and SSR practice.[310] In contrast a "freedom from fear" conception has focused towards practical enhancement of local security. Such a conception of human security could be defined as "protecting individuals from existential and pervasive threats to their personal safety and physical well-being".[311] Definitions of human security tend to be expansive and vague, encompassing physical security to psychological well-being, which provides policymakers with little guidance in the prioritisation of competing policy goals.[312] The risk of this approach is to collapse any analytical distinction between security and development. We can thus see that the same type of activities may be undertaken for both security and development purposes, but pursue differently expressed values. Security sector reform is a field that draws from a number of different traditions, assumes a relationship with associated fields and interacts with a number of social groups in transitional societies. In its instrumentality, security sector reform promotes accountability, a goal shared by

---

[306] Roland Paris "Human Security: Paradigm Shift or Hot Air?" (2001) 26(2) International Security 87-102; Shahrbanou Tadjbakhsh, & Anuradha M. Chenoy, *Human Security: Concepts and Implications* , (Routledge, 2006); Commission on Human Security, *Human Security Now* (2003)

[307] Caroline Thomas, Global governance, development and human security the challenge of poverty and inequality. (Pluto Press 2000) Sabina Alkire, "A Conceptual Framework for Human Security", Centre for Research on Inequality, Human Security, and Ethnicity (CRISE), Working Paper 2, London: University of Oxford, 2003, #15

[308] King, Gary and Christopher Murray. Rethinking Human Security. Political Science Quarterly, Vol.116, No.4 #585-61

[309] Keith Krause, Human Security in Vincent Chetail, Post-Conflict Peace-building A Lexicon, 150

[310] Rita Floyd, Human Security and the Copenhagen School's Securitization Approach: Conceptualizing Human Security as a Securitizing Move (2007) 5 Human Security Journal 38

[311] Keith Krause, "Human Security" in Vincent Chetail, *Post-Conflict Peace-building A Lexicon* (OUP 2008), 152

[312] Roland Paris "Human Security: Paradigm Shift or Hot Air?" (2001) 26(2) International Security 88

transitional justice. It shares the dynamic need for context and appreciation of local circumstances and ownership with transitional justice and peace-building, i.e. national ownership.

Regardless of which conception is adopted, the point of departure for security sector reform is a dysfunctional security sector, i.e. a security sector which does not provide security to the state and its people in an efficient and effective way or, even worse, which is itself a cause of insecurity and violent conflict.[313] The OECD handbook provides that "The overall objective of international support to security system reform processes is to increase the ability of partner countries to meet the range of security and justice challenges they face, in a manner consistent with democratic norms, and sound principles of governance and the rule of law".[314] Across both conceptions, a number of component elements have been accepted as key to the practice of security sector reform. Broadly, measures can be divided into those aimed at enhancing the capacity of security forces and justice institutions, and those aimed at strengthening civilian management and oversight. The OECD states that the focus for international actors should be to support partner countries in achieving four overarching objectives: (i) Establishment of effective governance, oversight and accountability in the security system; (ii) Improved delivery of security and justice services; (iii) Development of local leadership and ownership of the reform process and (iv) Sustainability of justice and security service delivery.[315]

More fundamentally, both approaches to security are predicated on enhancing the sustainability of the sovereign arrangements of a given state and its interaction with its peoples. Both conceptions of security also mirror the other fields, in seeking to develop the expectations of society for security through enhancing civic trust in the security sector. The human security paradigm expressly acknowledges the need for civic trust in the achievement and maintenance of human security.[316] Paul Roe describes the value of trust for security, in "routinization" as a response to ontological insecurity: "Routinzation 'regularizes social life making it, and the self, knowable'. With a basic trust in others, the individual can go about his/her day-to-day business with a reasonable expectation that many of the dangers in life can simply be put to one side."[317] Specific SSR activities, such as vetting State institutions on the basis of the commission of gross violations of

---

[313] Heiner Hänggi, "Conceptualising Security Sector Reform and Reconstruction" in DCAF Yearbook 2004, 13

[314] OECD Handbook on Security Sector Reform, (n144) 28

[315] OECD Handbook on Security Sector Reform, (n144) 10

[316] Commission on Human Security, Human Security Now, (n306) 63

[317] Paul Roe, "The value of positive security", (2008) 34 Review of International Studies 777, 783

human rights, are explicitly designed to restore civic trust and legitimacy in security sector institutions.[318] In addition, insecurity dynamics produce "prisoner's dilemmas," where lack of trust between two actors undermines their ability to cooperate to produce mutually beneficial outcomes.[319] Security sector reform therefore seeks to reduce legitimate civic distrust in the security sector.

Security sector reform seeks to transform dysfunctional security services into services which respect the rule of law and contribute to civic trust. It does so on both national security and human security paradigms, and across diffuse activities and frameworks adopted by international actors. Human security paradigms demonstrate the overlap between SSR and development, while concern for accountability and the rule of law reflect priorities shared with transitional justice and peace-building. SSR is thus a field that seeks to contribute to the shared goals of civic trust and the rule of law, despite its diffuse and contested principal theories.

D. Economic Development

Development is a concept that evidences less theoretical consensus than the other fields examined.[320] Despite a vast range of motivating theories, the enhancement of living conditions remains an essential if not the essential object of the entire economic exercise and an integral part of the concept of development.[321] This chapter has neither the scope nor ambition to pronounce upon a universal theory of development. Since the 1990s, modern development scholarship and discourse of international development organisations has introduced the concept of governance as a key organising principle and condition for the enhancement of human capabilities and economic growth, believed to be a central goal of development.[322] As a broader but more contested discourse and field of practice, development seeks to colonise discussions about economic and political change in affected societies, in a way that the narrower areas of transitional justice, peace-building and security sector reform cannot. However, development is also an acontextual concept, by comparison to the narrower domains of transitional justice, peace-building and

---

[318] OHCHR, *Vetting: an operational framework* (HR/PUB/06/5), 3-5

[319] Robert Axelrod, *The Evolution of Cooperation* (Basic Books, 2006)

[320] Ruth Gordon and John Sylvester, "Deconstructing Development" (2004) 22(1) Wisconsin International Law Journal 2

[321] Amartya Sen, "The Concept of Development", in Thomas Pogge (eds), *Global Ethics: Seminal Essays*, (Paragon House 2008) 158

[322] Pranad Bardhan, *Corruption and Development: A Review of the Issues*, in (1997) 35(3) Journal of Economic Literature 1320-1346; Daniel. Kaufmann, *Rethinking Governance Matters: Empirical Lessons Challenge Orthodoxy* (March 2003).

security sector reform. It becomes incumbent to identify priorities for development in the circumstances of transition and consider whether a distinct conception of development for transitions is desirable.

It is thus the case that development theory may be applied to transitions in a way that is unnecessary for transitional justice, peace-building and security sector reform. International development organisations have acknowledged the need for a distinctive and specific response in development policy to conflict and the circumstances of transition. One of the key ways in which transitional societies differ from most other developing countries is that they inherit economic policies that are highly dysfunctional.[323] Since the consequences of violent conflict are enormous, the government's first priority should evidently be to endeavour to reduce these risks. Thus, one important issue for economic policies during the post-conflict period is how they affect the risk of reversion to conflict. The risk of further conflict is considerably higher in post-conflict societies than in other societies. Hence, bringing this risk down becomes the over-riding priority and this rebounds on policy choices. The other is that the economic consequences of conflict create both constraints and opportunities that are distinctive.[324] Economic policies turn out to be important as a means of building peace, but they are effective only in the longer term and so need to be complemented by other policies that maintain the peace in the interim.

International policy reflects the need for distinct theories for development in transitions. The OECD Principles for Good Engagement in Fragile States & Situations identify the central objective of engagement in fragile states as state-building. This approach flows from the definition of fragility as "when state structures lack political will and/or capacity to provide the basic functions needed for poverty reduction, development and to safeguard the security and human rights of their populations." The understanding of fragility employed by the OECD suggests that fragility arises from "substantial disequilibrium in state-society relations"[325] in states which lack resilience, i.e. the ability to cope with changes in capacity, effectiveness or legitimacy. The OECD identifies resilience in the social contract as the basis of stability in a state. The absence of resilience can itself be determined by the absence of underlying factors. A dynamic model of fragility incorporates "the relationship between the political processes for managing the state-society contract and the attributes of a given state in question, including its organisational capacity, resources, the will of its

---

[323] Paul Collier, Post-Conflict Recovery: How Should Policies be Distinctive? (2007), 2

[324] ibid, 3; Paul Collier, On the Economic Consequences of Civil War, *Oxford Economic Papers* 1999

[325] OECD, Concepts and Dilemmas of State Building In Fragile Situations: From Fragility to Resilience, (n171) 16

elites, its intrinsic or historical legitimacy and its resource base. In addition to these constitutive factors, radical shifts in expectations can also generate fragility, as demonstrated by significant political transitions such as coups, regime change or the division of Statehood. Therefore the overall priority of state building must be to improve political governance: the articulation of a set of political processes or accountability mechanisms through which the state and society reconcile their expectations of one another.

Growing academic literature among development economists acknowledges the need for a distinctive response to development in transitions. Paul Collier identifies a number of policies distinctively responsive to the economic conditions of transition and fragility. One effective strategy may be to counter youth unemployment: if unskilled young men can be employed, they are less likely to be recruited into violence. Indeed, the link through employment may account for why growth is so effective in bringing down risks.[326] Second, a reduction in military spending may be a signal to transitional societies of a state commitment to exclude return to conflict from their intentions. A further evident economic opportunity post-conflict is the high return to the reconstruction of infrastructure.[327] The most evident infrastructure needs are power, ports, and roads. Further policies address capital flight in fragile states and transitions, construction booms after conflict, and donor aid flows.

Most fundamentally, development can be considered as a matter of economics that raises significant questions of ethics, that economists and development practitioners cannot avoid answering as they design and implement development policy. Thus much of traditional development economics has proceeded on the implicit assumption of an intersection of valuations of the objects of development, i.e. its priorities. We do not value economic growth for its own benefit, but rather because of the goods and opportunities, which it can generate and facilitate. A concept and theory of economic development must therefore at least refer to these ultimate value goals and acknowledge the instrumentality of the exercise. Acknowledging the instrumental nature of development necessarily renders existing theories that prioritise a particular mode of development alone as insufficient to define the entire concept.[328] The application of development to transitions would therefore be dependent on those certain conditions that operate in the

---

[326] Paul Collier, Anke Hoeffler and Dominic Rohner, "Beyond Greed and Grievance: Feasibility and Civil War", CSAE, Oxford (2007)

[327] Collier Post-Conflict Recovery: How Should Policies be Distinctive? (2007), 12

[328] Amartya Sen, "The Concept of Development" (n321) 170-173

circumstances of transition. Above we identified that there is an intense demand to pursue public goods - in this instance growth and development. The consequence of this intense demand is high social capital and expectations to achieve outcomes associated with this goal.[329] However, this demand is countered by the legacy of prior gross violations of human rights: low civic trust and the absence of a rule of law. In the context of fragile states, the absence of civic trust impacts on the cooperation and coordination necessary for economic activity:

> Virtually every transaction has within itself an element of trust, certainly any transaction conducted over a period of time. It can be plausibly argued that much of the economic backwardness in the world can be explained by the lack of mutual confidence'[330]

Cultural and new institutional theories of economics seek to enable conditions that allow for the transformation of social or cultural preferences regarding inter and intra group trust. The argument is that greater civic trust between groups will enable greater cooperation and thus economic activity. Theories of development predicated on good governance also seek to foster trust in state institutions through anti-corruption mechanisms and reform in institutional design, as such theories purport that these changes will engender economic growth.[331] In the context of transitions, the absence of civic trust produces dysfunction: "With actors lacking the means to make credible commitments to reform, societies are unable to break free from the threat of violence. A low-level equilibrium of dysfunctional institutions and recurrent violence is thereby created."[332] Typically such conditions exacerbate existing low levels of bureaucratic capacity caused by prior economic policies and mismanagement that may have contributed to the causes of gross violations of human rights.

Development economics is an area of broad and monopolising theories. The distinctive response of development organisations to fragility and transition has been to focus on restoring the citizen-state relationship of civic trust to one of mutual and shared expectation. Civic trust is seen as a necessary component of the state building exercise believed to be necessary to provide the

---

[329] Paul Collier, Post-Conflict Recovery: How Should Policies be Distinctive? (2007); Chauvet, L. and P. Collier, 2006, Helping Hand – Aid to Failing States, CSAE, Oxford. available at http://users.ox.ac.uk/%7Eeconpco/research/pdfs/HelpingHand-AidtoFailingStates.pdf (accessed 28 September 2011)

[330] Kenneth Arrow "Gifts and Exchanges", (1972) 1(4) Philosophy and Public Affairs 343, 357

[331] World Bank, World Development Report 1997 (World Bank 1997); Daniel Kaufmann, Aart Kraay, Pablo Zoido, Governance Matters, World Bank Policy Research Working Paper No. 2196

[332] World Bank, World Development Report 2011, 117

conditions for economic growth and development in the circumstances of transition. The predictability inherent in meeting such expectations is one of the values enabled by the rule of law. This is the application of the ethical priority given to governance in general development policy, but also reflecting the distinct conditions that operate in the circumstances of transition.

V. Interdependence and Structural Tensions

Each field seeks to change the behaviours, attitudes, and perceptions of citizens to generate greater levels of trust between them and in their relationship to the State. Each field seeks to contribute to the restoration of minimum conditions of civic trust necessary to pursue its discrete goals. However, these fields may seek to do so independent of one another. A distinct case needs to be made that the contribution of each field to civic trust is dependent on the contribution of other fields.

The interdependence of contributions to civic trust can be shown by recognising civic trust as a social norm and a social convention. Given that civic trust is impersonal in nature, concerning "everyone else", i.e. other citizens as strangers, perceptions of horizontal civic trust operate in conditions of anonymity, diversity and pluralism.[333] Membership of this "everyone else" may be contested. However, because this category is anonymous and impersonal, efforts to modify civic trust appear to treat trust as a social norm. For a norm to exist, there must be a collective belief that the behaviour dictated by the norm is widespread, as well as a shared belief that one is expected to engage in such behaviour when appropriate and that transgressions might be punished.[334] Thus we have seen above civic trust described as a shared reciprocal normative commitment to certain patterns of behaviour.[335]

The social normative nature of civic trust ensures that it is partially conventional in nature. We have seen that civic trust is valued for enabling cooperation and coordination. It may be therefore be described as also a partially coordinative convention. David Lewis' analysis sees conventions as solutions to recurrent co-ordination problems.[336] A co-ordination problem arises where there are several alternatives open to agents in a set of circumstances, each of whom have their own set of

---

[333] Clause Offe, How can we trust our fellow citizens? (n218) 57

[334] Bicchieri et al, "Trustworthiness is a social norm, but trusting is not" (2011) 10(2) Politics, Philosophy & Economics 173

[335] Pablo De Greiff, Articulating the Links between Transitional Justice and Development (n18) 58

[336] David Lewis, *Convention: A Philosophical Study* (Harvard University Press, 1969), 5-42

preferences. Where this recurs, a conventional rule may emerge to provide a solution, the existence of which, if efficacious, provides a reason for each agent to follow it.[337] Andrei Marmor notes two key features of co-ordination conventions.[338] First, they are necessarily arbitrary, in that a rule must have a conceivable alternative if it is a solution to a co-ordination problem, i.e. citizens can drive on the left or right of the road, as long as they all do the same. It is important to note that the alternative must be conceivable in the sense that it is supported by the same reasons or functions that the original rule served for the relevant community[339]. Second, co-ordination conventions lose their point if they are not followed and thus necessitate efficacious practice in a community. They must be practiced by a population to exist.[340] A coordination function necessarily renders civic trust interdependent: "coordination may be rationally achieved with the aid of a system of concordant *mutual* expectations...about the agents' actions, preferences, and rationality."[341]

However to describe civic trust as a pure coordination convention would miss the other reasons for its value we have noted. Civic trust has been valued for its role in enabling the re-constitution of a sovereign political community. It may also be the case therefore that it is a partially constitutive convention. For this type of convention, no specific prior co-ordination problem is required. Such social conventions serve numerous functions by constituting means by which citizens interact. Social practices, such as chess, on this understanding, are partly constituted by the conventional rules of the practice, which regulate the conduct within.[342] Marmor contends that the functions or values of such conventions radically underdetermine the content of the rules constituted, allowing for a number of alternative formations of rule.[343] Second, he notes that reasons for following constitutive rules are compliance-dependent, and practice is required to constitute the rules. Thus constitutive conventions both constitute the practice and regulate conduct with it.[344] Civic trust, as a contribution to the felt need of individuals to operate in political

---

[337] ibid

[338] Andrei Marmor, "How Law is Like Chess" (2006) 12 *Legal Theory* 347, 354

[339] ibid 356

[340] *Ibid,* 355

[341] David Lewis, *Convention*, (n307) 33

[342] *ibid;* Andrei Marmor, "How Law is Like Chess", (n338) 357

[343] Andrei Marmor, "How Law is Like Chess" (n338) 360

[344] John Searle, *Speech Acts* (Cambridge University Press, 1969) 33

community due to the circumstances of justice and politics, fit this description. Constitutive conventions come in systems of rules.[345] The contribution of each field to civic trust thus represents an element of this system of rules. As a consequence of these forms of conventionality, efforts to enhance or alter its content are necessarily systemic and interdependent. Thus despite substantively diverse functions, each field seeks to contribute to civic trust in shared circumstances and through shared methods. The normative, conventional and necessarily cooperative nature of civic trust also demonstrates why it is absent in the circumstances of transition.

VI. Risks of Incoherence and Tension

The circumstances of transition thus structure the fields of practice designed to respond to gross violations of human rights in a interdependent fashion through their contribution to building conventional social norms of civic trust. Beyond structural commonality at the level of conventions, some substantive overlap is also present between fields. For instance, the provision of security is seen as a necessary condition for the pursuit of the goals in other fields: "security is a precondition for sustainable peace, development and human rights."[346] In development contexts, an inefficient and unaccountable security sector can be a major obstacle to democratic governance and can undermine the implementation of poverty-reduction strategies.[347] The United Nations has acknowledged "the need for security arrangements that take into account the linkages between the different actors."[348] Security sector theory acknowledges that "the security system should be managed according to the same principles of accountability and transparency that apply across the public sector, in particular through greater civil oversight of security processes".[349] Reference to principles of democratic accountability and oversight recognise security sector reform as an element of broader processes of political legitimacy, inclusiveness and accountability in the State, and in that way feed into broader processes of State-building and institutional/governance reform.[350] The substantive overlap between development and security is well established among international policies and theories in both SSR and development: "[w]ar retards development, but

---

[345] ibid 35-7; Joseph Raz, *Practical Reason and Norms* (Hutchinson, 1975)111-13

[346] *Securing peace and development: the role of the United Nations in supporting security sector reform Report of the Secretary-Genera*l (n261) para 35

[347] ibid, para 28

[348] ibid, para 18

[349] OECD, Security System Reform and Governance 2004, 23

[350] Securing peace and development: the role of the United Nations in supporting security sector reform Report of the Secretary-General (n261) para 36

conversely, development retards war".[351] As a result, security sector reform can be described as a process that is inter-dependent with other fields in pursuing these goals.

As averred to above, there is also a well rehearsed debate on the relationship between peace and justice. Both justice and peace scholars contend that justice and peace must be established before the other can be sustainable within a transitional society. The debate alters around minimal conditions of peace, equivalent to minimum conditions of security, and maximalist conceptions of peace involving the full re-assertion of the conditions of sustainable peace. In addition, conceptions of justice alter around prosecutorial tribunals to reconciliatory commission. Similar concerns reflect the relationship between justice and security. These concerns reflect the need for minimum conditions of security before the establishment of any justice mechanisms. However, beyond minimal conceptions of security, there is greater debate as to the security pre-conditions for the operation of justice mechanisms.

However, the theories and analysis of transitions examined also emphasise the complexity of these phenomena. In particular, each field has a number of component parts with a distinct value purpose or orientation. While we have seen potential complementarity but also broad areas of contestation at a broad level of abstraction, it remains unclear how component parts of the theory of each field interact. The internal complexity of each field has the potential to generate significant tension in each field and between fields. For instance, tensions also arise within each field, in the sequencing and coordination of discrete institutions, i.e. whether to have a truth commission or trials, together or one before another, or how to sequence institutional reform for development and governance, etc. These issues reflect different priorities in goals within a given field.

One prominent example of tension between goals and components in transitional justice is in South Africa, where the South African Truth Commission remains one of the paradigmatic examples of truth commission processes and outcomes. Nevertheless, there remains a growing risk that its legacy may be diminished by limited socio-economic transformation or economic development subsequent to publication of its report. Socio-economic inequality was acknowledged in the report and more generally as a significant consequence of the apartheid regime.[352] Second, in Sierra Leone the amnesty for gross violations of human rights in the Lome

---

[351] Frances Stewart, *Development & Security*, CRISE Working Paper, May 2004; Robin Luckham and Gavin Cawthra, *Governing Insecurity* (Zed Books 2004); Paul Collier, *Development and Conflict*, Center for the Study of African Economies, Department of Economics, Oxford University, October 2004.

[352] Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (n64), 211

Peace Accord had the potential to frustrate the purposes of the Special Court for Sierra Leone; a creative but questionable interpretation of that agreement by the Special Court overcame this difficulty, but may have affected the legitimacy of the trial process and the potential for such uses of amnesty in the future. Furthermore, the relationship between the truth commission and prosecutions in Sierra Leone evidenced a number of problems of coordination and sequencing regarding the testimony of Hinga Norman.[353] Similarly, the effectiveness of a successful process of truth seeking and social reintegration in Timor-Leste was inhibited by limited international support for a prosecutions process and ongoing challenges in security sector reform in the country. As a consequence, the impact of a successful transitional justice endeavour was overcome by renewed violence in 2006-8. Despite a relatively successful truth commission process in Morocco, the country continues to experience human rights violations, but this time directed against alleged Al-Qaeda terrorists.

Similarly, other fields have often failed in crucial respects. It has been argued that poor development practices contributed to or ignored the circumstances leading to genocide in Rwanda and violence in Burundi.[354] We saw in Chapter I how severe development policies coincided with gross violations of human rights in Latin America in the 1970s and 1980s. Despite a sophisticated reparations program, issues of development have undermined efforts in Peru to recognise the suffering caused to indigenous groups. Similar concerns arise in the overlapping activities and jurisdictions of institutions across diverse fields, such as prosecutions overlapping with DDR programs, or amnesty programs overlapping with security sector reform or anti-corruption governance reform.

Furthermore, the broad conditionality claimed by each area that, for instance, transitional justice depends on peace-building, or peace-building depends on security sector reform, has led each to be accused of seeking to dominate transitions, and by implication, to colonise the sphere of activity of other areas. Often this takes the form of purported uni-directional dependence between areas: that a society must establish security before it can pursue justice or development, or must pursue development before it can examine justice, or peace before justice, etc. Competing claims of dominance may result in significant wastage and duplication of activities. More fundamentally, such incoherence may produce competing terms, concepts and practices, within the same

---

[353] Marieke Wierda, Priscilla Hayner and Paul van Zyl, *Exploring the Relationship between the Special Court and the Truth and Reconciliation Commission of Sierra Leone,* (ICTJ 2002)

[354] Peter Uvin, *Aiding Violence: The Development Enterprise in Rwanda* (Kumarian Press 1998)

transition. This process can be exacerbated by competing international engagement, where donors with competing priorities and models seek to dominate the transitions of a given society, through competing use of financial aid based on adoption of their paradigms.

Finally the global nature of each field creates tensions as well, for instance between favouring formal or traditional sources of authority and law in a given society, or favouring national or international law more generally. Examples include early concern about the due process of *gacaca* as a method of responding to gross violations of human rights in Rwanda.[355] Further concern was expressed about the *biti bot* process in Timor-Leste.[356] International approaches have not been immune from criticism. In particular, the prosecution strategy of the International Criminal Court has frequently been criticised as inhibiting or precluding domestically negotiated settlements for transitions in Libya, Sudan and Uganda.[357] Similar concerns surround the arrest and trial of Charles Taylor before the Special Court for Sierra Leone.[358] These concerns speak of the role of the ICC as taking the decision on how to reckon with a past legacy of gross violations of human rights out of the hands of a given society.

Such a range of tensions ensures that transitions are justifiably described as complex. However as we noted at the outset, complexity is necessary and sufficient as a description, but insufficient as a theoretical framework. The risks of getting it wrong in the sequencing and priority of institutions, goals and values in transition is significant. The risk of daubing these fields and ideas with the memory of renewed violence, dashed expectations and ongoing fragility closely align with the risk of damaging the potential for future international support for transition in a given state. Moreover, the fundamental risk of failure in transition is a return to armed conflict or authoritarian rule under a new regime. History shows us many examples of both types of relapse. The case of Iraq shows the risk of misaligned SSR, peacebuilding and transitional justice strategy. The debaathification process, involving the summary disbanding of Iraqi guard, led to insecurity/violence, causing a failure as a peace-building and SSR process. It also contributed to difficulties in ensuring a coherent justice strategy, exacerbating the difficulties in the trial process and strategy of Saddam Hussein

---

[355] Jacques Fierens, "Gacaca Courts: Between Fantasy and Reality" (2005) 3 Journal of International Criminal Justice 896-919

[356] Tanja Hohe, Justice without judiciary in East Timor', (2003) 3(3) Conflict, Security & Development 335 — 357

[357] Kenneth Rodman, "Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court" (2009) 22 Leiden Journal of International Law, 99–126

[358] Zsuyzsanna Deen-Racsmány, "Prosecutor v. Taylor : The Status of the Special Court for Sierra Leone and Its Implications for Immunity" (2005) 18 Leiden Journal of International Law 299–322

and other leaders. The risks of incoherence and misalignment between these fields are real and significant, not merely a matter of theoretical tidiness. Getting it wrong in transition can risk lives and cause a return to conflict.

VII. Conclusion

This chapter has sought to identify coherence and interdependence in complex theories relevant to transition as a necessary component of offering overall coherence to international engagement in transitions. The chapter employed the circumstances of transition as a distinctive means of identifying the conditions under which transitions operate. These conditions challenge the assumptions under which the circumstances of justice and politics operate, which exist in consolidated democracies and to which transitions are oriented towards restoring. The condition of civic trust was described as a social norm and conventional in nature, providing both a coordinative and constitutive function in enabling social interaction and cooperation, but also contributing to the re-constitution of a sovereign political community in transition.

Despite this structural relationship, the nature of each field, as constituted by several discrete components, raises significant risks of substantive incoherence and tension between component goals and institutions in each field and between fields. The role of international actors also contribute to this already complex picture. Each field remains internally debated. The relationship between fields generates a risk of tension, conflicting practices and incoherence with tangible consequences in transitions, such as a return to violence or human rights violations. Substantive incoherence is no guarantee of failure, but may fail to appreciate the interdependence of seemingly diverse fields. By demonstrating shared conditions, this chapter illustrates that these fields depend on one another to achieve their ultimate goals. It concludes that tension and risk of incoherence in any field can thus damage the claims, goals and values of each field, such as truth, accountability, good governance, effective security provision. Before examining an interpretive framework to mitigate the risk of incoherence, we must consider how law purports to operate in the circumstances of transition.

Chapter III: The Role of Law in Transition

I. Introduction

In chapter II, we saw the interdependence of substantively diverse fields in the circumstances of transition. Each field seeks to contribute to the restoration of civic trust and that civic trust can be described as a conventional social norm, a shared normative commitment. As a consequence those fields that seek to contribute to this convention do so in a mutually dependent fashion. Chapter II concluded by noting, despite interdependence, the significant risk of incoherence in the relationship between substantively diverse fields. It identified the need for a new interpretive framework to mitigate the risk of incoherence and to enable each field to pursue its diverse goals, such as truth, growth, peace, etc.

In examining the need for an interpretive framework, this chapter will first examine how these fields claim to achieve their goals through the use of law and formal legal institutions. In considering the moderating and mediating function of law and formal institutions, this chapter will consider the claims of domestic and international law from legal theory. It will then consider the application of these claims in the circumstances of transition. The chapter notes that ensuring the rule of law and international rule of law in such circumstances are necessary conditions for any field to contribute to restoring civic trust through formal institutions. Nonetheless, the chapter recognises that the breakdown in the rule of law in transitional societies requires a distinctive means of reconstruction.

As a consequence, this chapter contends that there is a moral responsibility on members of each transitional society, officials of each transitional government and concerned states to interpret activities in transition with the political virtue and process of *integrity*. The application of integrity to the circumstances of transition seeks to reflect the desirability of a process of contestation and deliberation of political ideals in all societies and as the basis for the re-constitution of sovereign political communities.

The application of the principle of integrity in the circumstances of transition in each transitional society constitutes the legal commitment of that society to a constellation of values and processes of political theory. The configuration of rule of law and other political values and the relationship between them remains contested in general political theory or jurisprudence. This chapter does not seek to complete the theorisation of contested concepts, nor to override the self-

determination of individual transitional societies. The chapter claims that it is inappropriate to comprehensively determine the conduct of transitions by global rules, rather than by the application of broader principles to the context of each transition. This approach places the interpretation of political community with integrity by the citizens of a transitional society as a central organising principle. This principle requires public officials and officials of international organisations and donors to fit their interpretation and practices to existing laws, policies and practices, but also to justify such existing commitments in their best light. The process of integrity therefore privileges the context of a transitional society and is distinct from a concession by the international community.

Finally, the chapter examines the distinct challenge facing international actors in contributing to this process of integrity in transitional societies. International actors are required to interpret their engagement with a transitional society with integrity. This means reconciling their membership of a political community or political expression of an international organisation, with the political community of that transitional society and the fact that in providing international assistance in transitions they contribute to general rules and practices of international law and policy that claim to have a global effect. This process of reconciling these overlapping political constituencies requires an interpretation of the law policies and practices of each group. In particular, the chapter examines the role of the rule of law in the international arena, and the multiple political communities which an international actor is required to interpret with integrity. In this way, the chapter seeks to provide a novel means of evaluating the application of these theories in the legal regulation, policies, and practices of each field in subsequent chapters.

II. The Claims and Rule of Law

A. The Claims of Law

We have seen that each field is independently normative, that it has a instrumental structure that seeks to change the behaviours, attitudes, and perceptions of citizens with which it interacts. However, each field also seeks to use law, in particular formal legal institutions, to pursue its goals. We must therefore look at what law generally claims to achieve and specifically how it impacts on the instrumental nature of each field. We can first consider the case as a matter of general jurisprudence. Law purports to render conduct non-optional, which enables it to perform a function in guiding individual conduct.[359] This is a view that is shared across a number of traditions

[359] "The most prominent general feature of law at all times and places is that its existence means that certain kinds of human conduct are no longer optional, but in *some* sense obligatory" HLA Hart, *The Concept of Law,* (OUP, 1994) 6

in legal philosophy. The sovereign command theory renders conduct non-optional and subject to sanction for disobedience.[360] HLA Hart makes a number of well-known criticisms of this approach, rendering it largely defunct in modern jurisprudence. Hart's preference is for a rule-based theory, claiming that individuals are subject to an obligation only when a social rule exists requiring an act or omission.[361] His own approach is not without difficulties.[362] Under an exclusive positivist conception, law purports to render conduct non-optional authoritatively,[363] by creating exclusionary reasons for action,[364] a position also accepted in some modern natural law accounts.[365] In contrast, the obligation to obey the law is, according to Ronald Dworkin, an "associative" obligation. He defines such obligations as "special responsibilities which social practice attaches to membership in some biological or social group, like the responsibilities of family or friends or neighbors."[366] They are, on Dworkin's view, moral obligations and provide moral reasons for action. In Western legal philosophy therefore, there appears to be significant consensus on the need to include obligation as a feature of a legal system, despite broader theoretical disagreement.

In chapter II we considered the goals such as justice, security, reconciliation, democratic governance, pursued in each field. Legal theory would suggest that formalising these goals through law would contribute to ensuring these values are obligatory in a given legal system. The claim to authority in legal theory expresses the legal claim to the internal sovereignty of a State. Using law to achieve the aims of each field seeks to do so in a fashion that is thus constitutive of the sovereign political community of that transitional society, through the authoritative settlement of

---

[360] John Austin, The Province of Jurisprudence Determined (1832) W.E. Rumble (ed), (Cambridge University Press 1995), 18

[361] This is Hart's general consideration of the nature of obligation; for the purposes of a legal system it goes without saying that law purports to create such obligations where provisions are legally valid in Hart's sense in *The Concept of Law.*

[362] In Legal Obligation and Authority, available at http://plato.stanford.edu/entries/legal-obligation, Leslie Green notes:

> People readily speak of obligations when they are well aware that there are no relevant social practices, as might a lone vegetarian in a meat eating society. And Hart's practice conditions may be satisfied in cases where there is no obligation but only generally applicable reasons, as when victims are regularly urged to yield their wallets to a mugger. At best, Hart's theory will apply only to a special class of obligations in which the existence of a conventional practice is an essential part of the reasons for conformity, though even here, the theory is open to doubt.

[363] Joseph Raz *The Authority of Law,* (OUP, 1979) 28-37

[364] ibid, 17, 22-3

[365] John Finnis, Natural Law and Natural Rights, (Oxford University Press, 1980), 231-59

[366] Ronald Dworkin, *Law's Empire*, (Harvard University Press (Belknap), 1986) 196

disputes and pursuit of public goods. However, the claim to authority also reflects the foreclosure of debate by rendering conduct non-optional. This can be valuable, as in law we may value settlement and predictability, but may also inhibit understanding and compliance with a given law.

Law's claim to render conduct obligatory is a State's primary means of changing perceptions, behaviours and attitudes. However, it is well recognised that law and legal sanctions cannot of their nature determine one's behaviour or attitudes completely.[367] Law does not seek to provide *complete* reasons for action. One additional element in changing conduct is the existence of social norms.[368] Social norms may provide a more efficient means of controlling conduct than the formal rules of a legal system, though this is factually contingent.[369] For instance, if I can be deterred from theft because of the social pressure condemning theft, this is clearly a more efficient means of deterrence than the costly process of incarceration. Changes in the law may thus influence social norms and may inspire changes in preferences, i.e. signal a community's intolerance for given behaviour.[370] It is important to recognise that the effect of legal change has at best a limited immediate impact on social norms and may take extended periods of time to fully alter social behaviour and attitudes and indeed may be contingent on the pre-existing state of social normativity.[371] Nonetheless, this effect remains viable as long term and secondary effect of law on social norms. In this regard, law has the effect of not only providing second order (exclusionary) reasons for action *as law;* it has the potential long-term effect of entering the first order moral reasoning of society as a moral reasons for action. This interaction of formal law and social norms occupies the use of law in each of the four fields.

---

[367] Joseph Raz, *The Authority of Law* (n334) 32-3; Here Raz notes that law claims merely to provide *exclusionary* reasons for an individual to act, i.e. reasons that preclude access to the ultimate moral reasons one has to act. Indeed, it goes without saying that positivsts do not accept that a legal obligation determines one's conduct. Finally, a Dworkinian conception of law enables acts of conscientious civil disobedience, see Dworkin, *Law's Empire,* (n337) 208-15; see further John Finnis, *Natural Law and Natural Rights,* (n336) 351-367

[368] Social norms are first order reasons for action, in contrast to the second order reasons for action such as exclusionary reasons. In this regard social norms could form an almost complete reason for action, if sufficiently influential and understood by the actor. See Joseph Raz, Joseph, *Practical Reasons and Norms* (OUP, 1990)

[369] Eric Posner, *Law and Social Norms,* (HUP, 2002) 176: "Whether it will improve behaviour depends on the equilibrium that exists within those groups, which may be more or less efficient, and on the competence of the legal institutions that intervene."

[370] Robert Cooter, "Expressive Law and Economics" (1998) 27 J Legal Stud 585, 594-5; Cass Sunstein, "On the Expressive Function of Law" (1996) 114 U Pa L Rev 2021

[371] John Drobak (ed), *Norms and the Law* (Cambridge, CUP, 2006), 1

In the specific instance of transitions, the legal system, and the organisation of legal institutions, may be used to pursue the specific value goals stated in each field and to mutually contribute to the restoration of civic trust. These fields seek to both make an immediate difference through the authoritative settlement of legal disputes and configuration of the State's pursuit of public goods, but also a long term difference in changing social norms. Regardless of the diverse goals of each field, and across the shared goal of restoring civic trust, each field claims to achieve this secondary goal in the same fashion, through the influence of law on social norms.

However, a number of risks are inherent in the legal regulation of issues of justice, peace, security and development. Such issues are essential and fundamental political matters for each society. The use of law shifts the language employed in considering these issues, from the political and general, to the technical and specific - from the purview of morality and politics to law. Critical legal scholarship has attempted to show that such language is necessarily vague and indeterminate, but has perhaps failed to so it is more so than the use of language more generally, in spheres of politics and morality.[372] Legal regulation is also capable of a number of specific defects. It can create arbitrary distinctions between classes of persons, or objects of regulation. It can be vague and contradictory. It can be applied retroactively, disabling the ability of citizens to follow its commands. It can fail to be predictable, disabling the protection of property and other legal rights. Furthermore, legal regulation can be seen as inherently conservative in issues of social change.[373] All of this before acknowledging that legal regulation can be compatible with great evil.

Further risks of using law arise acutely in transition. In particular, there is the paradox that the State, through the use of law, seeks to use untrusted institutions and mechanisms, such as legislation, to increase supply of civic trust. The misuse of legal regulation may deepen civic mistrust and make it harder for citizens to trust the State and one another. In the aftermath of gross violations of human rights, there is an attempt to use law to regulate conduct after the breakdown of respect for the legal system and the rule of law. Defective legal regulation in matters responsive to such violations fail to demonstrate the recognition and respect owed to victims, survivors and citizens in reckoning with the past and claiming their allegiance to a renewed political community. The State attempts to meet the intense demands and expectations of a transitional society using a legal system that in that society's recent past proved itself grossly inadequate and incapable for the task. A renewed failure to meet such expectations will further

---

[372] Margaret Jane Radin, "Reconsidering the Rule of Law" (1989) 69 B.U. L. REV. 781

[373] Morton Horwitz, "The Rule of Law: An Unqualified Human Good?" (1977) 86 Yale Law Journal 561

diminish citizens' cooperation, trust and interest in the State as the provider of public goods. The attempts at legal regulation in each field purport to be responsive to this reality in the circumstances of transition. As we saw at the end of chapter III, the failure to successfully implement transitional justice, peace-building, security sector reform or economic reform may have serious consequences, such as contributing to the return to violence, armed conflict, and gross violations of human rights.

B. The Rule of Law

Law's claim to authoritative obligation and influence of social norms thus comes with risks. Some are inherent in the nature of legal regulation. Others arise acutely in the circumstances of transition and heighten the consequences of defective legal regulation. A long standing response to the inherent risks of legal regulation is the rule of law: "the rule of law is designed to minimize the danger created by the law itself".[374] Several eminent jurists have generated criteria necessary for the existence of the rule of law.[375] For these authors, the rule of law is fundamentally concerned with proposition that no one is above the law, that an individual cannot can be punished except by a breach of a law, knowable in advance that is relatively clear and applicable. For example, for Lon Fuller, a system of legal rules may fail in eight ways: arbitrariness, publication, retroactivity, clarity, contradiction, *ultra vires,* frequent changes, and failure of congruence. A total failure in any one of these directions results in something that is not properly called a legal system. A man cannot have a moral obligation to obey such laws.[376] There remains ongoing contestation about the content of such criteria and the form and purpose of the rule of law.

Ronald Dworkin has distinguished between two broad structures of existing conceptions of the rule of law.[377] The "rulebook" conception insists that the power of the State should never be exercised against individual citizens except in accordance with rules explicitly set out in a public rulebook available to all. The government must play by the rulebook until they are changed in

---

[374] Joseph Raz, The Authority of Law, 224

[375] ARISTOTLE, POLITICS, III, Chapters 10-11 & 15-16 (Stephen Everson ed., 1988); A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION, Ch. 4; Ronald Dworkin, Political Judges and the Rule of Law in his collection A MATTER OF PRINCIPLE (1985), Ch. 1; Richard Fallon, The Rule of Law as a Concept in Constitutional Discourse, 97 COLUMBIA LAW REVIEW 1 (1997); F.A. HAYEK, THE ROAD TO SERFDOM 72; F.A. HAYEK, THE CONSTITUTION OF LIBERTY (1960); JOHN LOCKE, SECOND TREATISE, Ch. 11, Joseph Raz; The Rule of Law and its Virtue, in his book THE AUTHORITY OF LAW 210 (1979); JOHN RAWLS, A THEORY OF JUSTICE 55-60, and 235-41 (1971), and BRIAN TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004)

[376] Lon Fuller, The Morality of Law, (Yale University Press 1969), 39

[377] Ronald Dworkin, Political Judges and the Rule of Law in Ronald Dworkin, A Matter of Principle (OUP 1985), Ch. 1

accordance with rules as to their change. The content of the rules are determined by a separate ideal of substantive justice. In contrast, the rights conception assumes that citizens have moral rights and duties with respect to one another and political rights against the State as a whole. It insists that the moral and political rights be recognised in positive law so that they may be enforced upon the demand of individual citizens through courts. This conception does not distinguish between substantive justice and the rule of law. Similar accounts incorporate respect for human rights into the rule of law.[378] This can be described as a substantive conception. In some rule of law literature these are described as thin and thick conceptions respectively.

We can see a variety of approaches in what scholars strive to do with the rule of law. Some think we seek to make power less arbitrary, others that we seek to diminish the inequality between ruler and ruled or make the use of power less personal, or make its exercise less unpredictable or unjust. These all seem to relate to some form of achievement or goal. Given such ongoing debates one may be tempted to dismiss the rule of law as a side show from more concrete legal concerns and the direct pursuit of values. However, such debate, when framed within the legal system, may in fact constitute the proper role of the rule of law. W.B. Gallie claimed that some concepts exist whose proper use involves endless dispute about their proper use. This involves *essential* contestation, i.e. at the core of the concept.[379] Such concepts must be normative with a necessary internal complexity. Jeremy Waldron takes Gallie's suggestion that the contestation surrounding the use of such a concept advances the quality of argumentation using that concept.[380] In that regard, one cannot hope to prove one's view of the concept conclusively correct – but rather hope the concept is better for your contribution. The rule of law seems to fit this bill quite well. There are several levels of complexity to its concept: there is contestation about its content, requirements and about its point or objective. The core idea is that respect for law can take the edge off human power, but scholars disagree whether and to what extent this can be done. Its essential contested nature makes the rule of law the type of concept about which societies and philosophers should debate and deliberate. This form of contestation seems different than the mere exercise of arbitrary power. As E.P Thompson concluded:

> The inhibitions upon power imposed by law seem a substantial legacy of the struggles of the ordinary people. We should insist therefore on a difference between arbitrary power and the rule of law. The rule of law imposing effective inhibitions on power and the defense of the citizen from power's all intrusive claims seems to be an

---

[378] Tom Bingham, The Rule of Law (Allen Lane 2010)

[379] WB Gallie, 'Essentially Contested Concepts' (1955-1956) 56 Proceedings of the Aristotelian Society 167;

[380] Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?" (2002) 21(2) Law and Philosophy 137-16

unqualified human good.[381]

Each field seeks to employ this idea of the rule of law in pursuit of its goals, and to ground law's claim for allegiance in re-constituting a political and legal community. Criminal trials seek to demonstrate and signal that no one individual is above the enforcement of law. Truth seeking exercises can contribute to the rule of law as public, un-biased investigations established under law that respect due process.[382] Thicker conceptions of reconciliation also contribute to substantive conceptions of the rule of law.[383] Processes of acknowledgment and solidarity in reparations programs seek to contribute to the equal and non-arbitrary treatment of all individuals, especially victims, as citizens of a political community. Transitional justice scholars have claimed that the enterprise contributes to both narrow formalist and to thicker substantive conceptions of the concept.[384]

Peace-building is a process constitutive of the rule of law, seeking to hold all parties to peace accountable under a legal system, rather allow than a return to violence. The constitutive aspects of peace-building are significant, whether setting the parameters for future components of a peace agreement, the distribution of power in elections, or the expression of State authority in a constitution. As a result, the constitutive nature of peace-building may also be broadly *constitutional* in nature. Christine Bell has identified that recent practice of peace agreements and peace processes "link ceasefires to new constitutional orders aimed at developing and sustaining the ceasefire."[385] In this way peace-building becomes necessarily a long term process, seeking the consolidation and social acceptance of a new constitutional and/or political order, with the eventual goal of integrating it into social acceptance of a newly constituted rule of law.

Security sector reform too seeks to contribute to the rule of law. Conceptions of national security are necessarily constitutive of the rule of law, being formal in nature and seeking to maintain security through the use of formal rules, institutional structures and procedures. Though military regimes have often been responsible for gross violations of human rights, more recent conceptions

---

[381] E.P. Thompson, from Whigs and Hunters (Pantheon Books 1975) 266

[382] Mark Freeman, "Procedural Fairness and Truth Commissions; David Crocker, Truth Commissions, Transitional Justice, and Civil Society", in Robert Rotberg and Dennis Thompson (eds) *Truth v. Justice*, 105-6

[383] Colleen Murphy, "Political Reconciliation, the Rule of Law, and Genocide" (2007) 12(7) The European Legacy 853-65

[384] Rama Mani 'Exploring the Rule of Law in Theory and Practice' in Agnes Hurwitz (ed.) *Civil War and the Rule of Law* (Boulder, Lynne Rienner Publishers, 2008), pp. 21-46.

[385] Christine Bell, On the Law of Peace: Peace Agreements and the Lex Pacificatoria (n25) 286

of natural security have recognised the need for accountability and the rule of law in the security sector.[386] Similarly, a human security paradigm acknowledges the need to restore the rule of law as a necessary condition for ensuring broader human security.[387] Through its various activities, security sector reform seeks to establish a security sector that is accountability to a democratic government and thus operate under the rule of law. It also seeks to establish an effective security sector capable of enforcing the laws of a political community. It further seeks to hold the security sector to account through vetting and DDR practices.

Furthermore, the rule of law is claimed to as have significant explanatory power for foreign investment and economic growth.[388] The rule of law has often been associated with the protection of property rights.[389] Modern development understandings of this relationship contend that if the rule of law is used to secure property rights then this enables greater economic and commercial activity as a driver of credit expansion and economic growth.[390] The economic causality of these views has been questioned.[391] Nevertheless, there is also increasing acceptance that building the rule of law as an element of state-building, good governance and the protection of property rights, may be an intrinsic good worth pursuing as well. In the specific context of transition, the restoration of the rule of law and protection of property rights is seen as an essential component to move toward long-term institutional violence prevention.[392]

The rule of law enables citizens to know where they stand as regards the legal system, to know how to avoid its sanctions. It renders the legal system predictable. It acknowledges the risk of the abuse of power under law and the appropriateness of civic distrust caused by this risk. It offers citizens some security against the abuse of power. It provides a causeway that establishes secure

---

[386] *OECD Handbook on Security Sector Reform: Supporting Security and Justice* (n141), 112-124

[387] Commission on Human Security, Human Security Now, (n277) 68

[388] Robert Barro, "Democracy and the Rule of Law" In Bruce Bueno de Mesquita & Hilton Root (Eds.), *Governing for prosperity* (Yale University Press 2000) 209-231

[389] Jeremy Bentham, Principles of the Civil Code; Ronald Cass, "Property Rights Systems and the Rule of Law" in Enrique Colombatto (ed) *The Elgar Companion To The Economics Of Property Rights* (Elgar 2006); Jeremy Waldron, "Legislation and the Rule of Law" (2007) 1 Legisprudence 91

[390] Hernando De Soto, The Mystery of Capital (Black Swan 2000)

[391] Kevin Davis and Michael Treblicock, The Relationship Between Law and Development: Optimists versus Skeptics, (2008) 56(4) American Journal of Comparative Law 895-946

[392] Douglass North, John Joseph Wallis, and Barry Weingast, *Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History* (CUP 2009)

avenues for social interaction. This acknowledgment of legitimate distrust and the enabling capacities of the rule of law it offers citizens represents a normative commitment from the legal system, rather than a merely empirical regularity. It is through the values, formalities, and processes of the rule of law that law can hope to foster civic trust. We have seen how each field seeks to contribute to civic trust. We also saw how each field acknowledged it pursued its goals through formal legal structures. Enhancing the supply of civic trust in a society remains significantly dependant on State institutions:

> Trusting institutions means knowing and recognising as valid the values and form of life incorporated in an institution and deriving from this recognition the assumption that this idea makes sufficient sense to a sufficient number of people to motivate their ongoing active support for the institution and the compliance with its rules.[393]

Each field thus seeks to use legal institutions to generate civic trust through the rule of law. The rule of law broadly reflects the need for a legal system to moderate the use of power where it is inappropriate for citizens to trust those in authority and have difficulties trusting one another. The rule of law thus provides an opportunity to assess the validity of distrust and to enable the trust of state officials, institutions and citizens that withstand the scrutiny of its mechanisms of distrust. A political system in which distrust is easily articulated and listened to, and its presumed reasons easily and impartially assessed as valid or refuted, deserves to be trusted for the assurance this transparency provides to the citizens.[394] The contribution of each field to the rule of law is a means of engaging with social norms of civic attitudes, which both acknowledges short term distrust and seeks to foster long term civic trust. It may be felt that the contribution of the rule of law to civic trust is primarily regarding vertical civic trust between citizen and State. However, the conditions set by the rule of law apply to all and would enable all citizens to comply:

> If it appears to be beyond any doubt that political institutions condition a fair and truthful conduct of government, there remains little respectable reason for non-compliance, nor is there any reason to suspect that fellow citizens will fail to comply.[395]

By virtue of using the rule of law and its suite of legal institutions and actors to respond to legitimate civic distrust, these fields seek to contribute to the restoration of civic trust in a systemic

---

[393] Clause Offe, How can we trust our fellow citizens? (n218), 70

[394] ibid, 76

[395] ibid, 85

fashion, despite remaining substantively diverse at the level of immediate goals, institutions and actors. However this systemic nature also complicates restoring such trust in modern government and law, due to the technical and vast nature of the State. Citizens cannot be expected to know the entire State apparatus or legal system for its complexity is beyond their reach.[396] While similar information deficits lie at the core of all trust relations, political relations heighten this concern owing to the suspicion that not all interests and motives are shared by either fellow citizens or officials of the State institutions. As a consequence, it becomes vitally important that institutions such as elections, the rule of law, parliament, the media, be capable of being trusted. The extent to which the legal system and the rule of law can be clearly demarcated is also questionable. Thus in developing trust with State institutions, lawyers and officials may become mediators of knowledge of the State and legal system for the general public. What if people do not trust in the claims of the rule of law because they arise from the non-trustworthy source of the State and its legal system? How does a transitional society build the rule of law in that context?

III. Building The Rule of Law in the Circumstances of Transition

Each field has been shown to depend on contributing to civic trust and the rule of law to pursue any of its goals. Whatever choice a State, society or practitioner makes regarding the goals of each field, they will seek to use law to exert the influence of that choice on an affected population and seek to change its attitudes and behaviours with that instrument. In so doing, a State is seeking to use law and rely on the rule of law in a reality where the legal system has failed to protect individual human rights in a widespread or systemic fashion, where a dysfunctional rule of law is a starting point. The legitimacy of state institutions is diminished, divided and contested in these circumstances of transition. As a result, the legal system is failing in its claim to act authoritatively, to respect the rule of law, and to engender trust of the State, yet law also purports to be the vehicle to remedy those ills. For Lon Fuller, law should be denied that title if it failed to contain the values of the rule of law as as it would not be capable of serving any useful social purpose (partly because it would be unlikely to elicit citizens' voluntary co-operation) and that the social purposes performed by law are crucial.[397]

It may be the case a legal can be formally reformed to operate under a plausible conception of the rule of law and thus be in legally good shape. Yet because of these background conditions of

---

[396] Niklas Luhmann, "Trust: A Mechanism for the reduction of social complexity" in *Trust and Power: Two Works by Niklas Luhmann* (Wiley 1979) 46

[397] Lon Fuller, The Morality of Law, (n347) 220-224

dysfunction, the values of each field, acceptance of civic trust and belief in the rule of law may remain absent from the social norms of a transitional society. The division between formal legal structures and social acceptance of them remain the key stumbling block in re-constituting political communities in transition. Existing scholarship is aware of this challenge. Rule of law discourse surrounding security or economic development, for instance, is often criticised for making grand claims of social transformation through law that risk equating the rule of law with a panacea to solve all the woes facing a transitional society. The claim of the four fields examined, to contribute to the rule of law through their formal legal and institutional processes, risks exacerbating this equation.

However, rule of law scholarship can also be used to place this concept in its political context. Theoretical scholarship on the rule of law enables us to see that rule of law issues can be viewed not only systematically, across the legal system, but also as a matter of the political values and virtues that society espouses and seeks to espouse. While very much concerned with formal and procedural aspects of a given legal system, the rule of law remains fundamentally a political value about law. The legal system of a given transitional society does not exist outside the context of the social and political environment of that society.[398] Past failure to acknowledge this in rule of law programming in transitions has lead to an underestimation of the difficulty and complexity of legal development, where law as a technology rather than as sociology or politics.[399]

This type of criticism of rule of law programs has been stylised as "formal law bad, folk law good," suggesting a preference for traditional sources of authority, which are seen as more legitimate than imported formal legal structures.[400] Such a position is pessimistic about the possibility of promoting the rule of law as a value in such environments. Yet in the circumstances of transition, this pessimism fails to acknowledge or respond to intense social demands for public goods. It further fails to engage with the fact that after gross violations of human rights, reliance on existing social norms may be implausible. Such norms have allowed the commission of gross violations, whether through absent normative commitment to human rights or through norms being

---

[398] Frank Upham, "Mythmaking in Rule of Law Orthodoxy" in Thomas Carothers, *Promoting the Rule of Law Abroad: In Search of Knowledge* (Carnegie Endowment for International Peace 2006), 75

[399] David Trubek and Marc Galanter "Scholars in Self-Estrangement: Reflections on the Crisis in Law and Development Studies in the United States," (1974) Wisconsin Law Review 1062-1102

[400] Michael Trebilcock and Ronald Joel Daniels, *Rule of law reform and development: charting the fragile path of progress* (Edward Elgar Publishing 2008), 36

overcome by social conditions placed on groups and individuals.[401] Furthermore, social norms will form and re-assert themselves anyway in a transitional environment after the cessation of conflict or removal of authoritarian rule. The question is how a legal system hopes to feature in contributing to the content of such norms, including civic trust. An inert and inactive legal system gives citizens no further reasons to trust or believe the legal system and State, nor to accept its legitimacy. The formal structures of the State and its legal system will always remain the primary means by which a State seeks to change the behaviours, attitudes and perceptions of its citizens - and fundamentally remains the basis on which it claims their allegiance and obedience, through its authoritative commands. If a State has any interest in re-building its relationship with its citizens, and re-constituting itself as the expression of citizen's sovereign political community, it can only use formal laws to do so.

If engagement through law is the necessary avenue for State action in transition, it is important to acknowledge the risks and limitations of this approach and to seek to mitigate and respond to them. Above we identified that trusting legal institutions is complicated by the nature of the modern state and legal system, which is vast, technical, and may use languages and mechanisms distinct from common usage in a society. Yet the rule of law is a contested idea, with different conceptions requiring different priorities and values to be pursued. Furthermore we saw that the four fields examined in this thesis seek to contribute to the rule of law in specific ways. However, there is also a risk of substantive incoherence and overlap between these fields. What if each field continues to contribute to the rule of law, but in a substantively incoherent way? Or in a way that uses competing conceptions of the rule of law? It may be the case that, for instance, transitional justice practice contends that the rule of law is thick, and includes protection of human rights. At the same time, development practices in that society, believe the rule of law is exclusively concerned with the protection of property rights and enforcement of contracts. The risk of substantive incoherence and contestation around the rule of law may not preclude individuals from coming to trust the State and obey its laws, but it does make it significantly more difficult for citizens to assess the legitimacy of their distrust of the State. We therefore need some strategy to facilitate a State's efforts to build the rule of law in the political and social context in which it operates, which addresses concerns of incoherence and contestation, but also enables the pursuit of civic trust and the discrete goals of each field.

---

[401] Stanley Miligram, *Obedience to Authority* (Harper Perennial, 1974) 23, 48-49; Jeffrey J. Rachlinski "The Limits of Social Norms" (2000) 74 Chicago-Kent L. Rev. 1537, 1558-62

IV. Integrity

How can we ensure that substantively diverse fields continue to support the interdependent reliance on civic trust and the rule of law in the circumstances of transition? This problem has been examined before as a matter of general jurisprudence. Ronald Dworkin described checkerboard statutes as those that are incoherent or arbitrary on matters of principle.[402] Overcoming checkerboard statutes can be achieved through their interpretation with reference to the principle of integrity.[403] Integrity operates in non-ideal normative circumstances: ideally, coherence between values in each field expressed in law would be guaranteed because officials would always do what would be perfectly just and fair.[404] If there must be compromise because views are divided, then the compromise must be external not internal; it must be compromise about a scheme of justice not a compromised scheme of justice.[405] Integrity fundamentally concerns the process of interpretation inherent in all human activity. Stephen Carter describes integrity by reference to three steps: (1) discerning what is right and wrong; (2) acting on what you have discerned, even at a personal cost; (3) saying openly that you are acting on your understanding of right from wrong.[406] Each transitional society will interpret its own practices in re-constituting a sovereign political community. These practices will expressed partially in law. In interpreting the contribution of the four fields to this re-constitution, such societies can interpret these fields with reference to the interdependent conditions of civic trust and the rule of law. Interpretation with integrity would ensure that dependence on those values is reflected in the practices of the four fields examined.

Dworkin conceives of the obligation to pursue integrity as "fidelity to a scheme of principle each citizen has a responsibility to identify, ultimately for himself, as his community's scheme."[407] Warren Bennis describes integrity as "the basis of trust".[408] It is on the basis of a legal system founded on integrity that Dworkin argues that claims of political obligation are made legitimate for those made subject to them:

---

[402] Ronald Dworkin, Law's Empire, (n337) 178-186

[403] ibid 225; Ronald Dworkin, *Justice for Hedgehogs* (Belknap Harvard, 2011) 99-191

[404] Ronald Dworkin, *Law's Empire*, (n337) 176

[405] Ibid, 179

[406] Stephen Carter, *Integrity*, (Harper Collins, 1996), 7

[407] Ronald Dworkin, *Law's Empire*, (n337) 190

[408] Warren Bennis, *On Becoming a Leader* (Addision-Wesley 1989), 41

> Law as integrity denies that statements of law are either the backward looking factual report of conventionalism or the forward-looking instrumental programs of legal pragmatism...It insists that legal claims are interpretive judgments and therefore combine backward and forward-looking elements; they interpret contemporary legal practice seen as an unfolding political narrative.[409]

To achieve this legitimation analytically, Dworkin distinguishes between "fit" and "justification". The former is concerned with providing an interpretation that matches the existing practice and body of law. The latter seeks to identify a justification for this practice that shows it in its best light.[410] In recent work, Dworkin suggests that such interpretation as moral argument is epistemologically necessary.[411] Fundamentally therefore integrity is concerned with interpreting through a coherent set of principles about citizens' rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community. The principle of integrity asks State officials to make the law coherent as a whole, so far as they can, and this might be better done by ignoring academic boundaries and reforming some departments of law radically to make them more consistent in principle with others.[412] Nonetheless, the division of fields into discrete areas of law may be of benefit in protecting expectations and enhancing predictability. Dworkin thus favours an approach of local priority, where such divisions are of constructive value: "Law as integrity requires a judge to test his interpretation of any part of the great network of political structures and decisions of his community by asking whether it could form part of a coherent theory justifying the network as a whole."[413]

It is on the basis of integrity that Dworkin distinguishes three forms of community. Each model describes the attitudes members of a political community would self-consciously take toward one another if they held the view of community the model expresses.[414] We noted in Chapter II that the continued desire for public goods in the circumstances of transition suggest the demand to re-constitute a sovereign political community in transitions. We can now identify which form of community. A "bare" community supposes that members of a community treat their association as

---

[409] Ronald Dworkin, *Law's Empire*, (n337) 45–53, 225–27

[410] Ronald Dworkin, "Hard Cases" (1975) 88 Harvard Law Review 1057; Dennis Patterson, Dworkin on the Semantics of Legal and Political Concepts (2006) 26(3) Oxford J Legal Studies 545-557

[411] Ronald Dworkin, *Justice for Hedgehogs* (n374) 40-68

[412] Ronald Dworkin, Law's Empire, (n337) 250-254

[413] ibid, 254

[414] ibid, 209

only a de facto accident of history and geography.[415] The "rulebook" model of community supposes that members of a political community accept a general commitment to obey rules established in a certain way that is special to that community, but also one that represents a compromise between antagonistic interests or points of view.[416] Finally, a model of principle insists that people are members of a genuine political community only when they accept that their fates are linked in the following strong way: they accept that they are governed by common principles, not just by rules hammered out in political compromise. As a result, each member of such a community accepts political integrity as a distinct political ideal and treats the general acceptance of that ideal, even among people who otherwise disagree about political morality, as constitutive of political community.[417] Such an approach is predicated on and demands equal concern for each citizen as part of this community. The use of integrity in the practice of fields relevant to transition enable those fields to contribute to meeting their shared and interdependent conditions of civic trust and the rule of law, as part of re-constituting not merely a bare or rule book political community, but a thicker community of principle: which will better achieve civic trust and the rule of law.

Integrity thus seeks to make seemingly substantively diverse areas of law coherent by reference to deeper principles and values inherent in the legal expression of a society's political community. By developing its coherence and thus its legitimacy, the process of interpretation by integrity seeks to give reason to citizens to share in trusting in the legal expression of political community. For four fields of practice, the process of integrity provides the mechanism for justifying the choices and preferences of a given society in the pursuit of the value goals of each field, for example why they choose a truth commission over trials, or peace-building over transitional justice, or governance reform over a DDR process. Integrity ensures that these fields are not seen as fragments, but rather as constitutive and inter-dependent components of a broader political project in transition, to re-constitute a coherent sovereign political community, predicated on civic trust and the rule of law.

To apply integrity to the circumstances of transition we must account for the necessary conditions of civic trust and the rule of law in those circumstances. Furthermore, we must acknowledge that the pursuit of civic trust and the rule of law in transition operates through a range of substantively

---

[415] ibid

[416] ibid, 209-210

[417] ibid, 211

diverse areas of law and policy, such as transitional justice, peace-building, etc. Each of these areas remains internally complex and allows for a range of priorities and configurations. The responsibility of integrity therefore requires the interpretation of the substantive components and practices of each of those fields with reference not only to the shared and interdependent goals of civic trust and the rule of law, but also with reference to the whole network of political structures and decisions of that transitional society.[418] In this way, fields of practice and discourse such as transitional justice and peace-building can mesh with the existing norms and practices of that society to offer an expression of the legal system and the political community of that transitional society in its best light.

The operation of these fields is a reflection of the choices and self-determination of each society in how to reckon with its past. Accepting the principle of integrity as an obligation of actors in the circumstances of transition affirms the primacy of the decisions of that transitional society in best determining how to re-constitute itself as a political community and community of principle. It is through the responsible (re)construction of a legal system through the principle of integrity that a State seeks to claim the allegiance of its citizens and the respect and tolerance of other members of the international community for its decisions and its expression of political community. On this view, other nations, including their citizens, would respect the decisions of a transitional society only so far as they accept the responsibility to pursue principle, morality and integrity predicated on an equal respect for all citizens of their political community.[419]

The principle of integrity may be contested by officials and citizens in transitional societies as well the objects of interpretation. However, contestation surrounding principle requires more in interpretation than mere espousal of value of political theory and the rule of law. It forms a process where actors can claim the respect for their views based on the responsible process by which they were reached.[420] Interpretive disagreement is not a peripheral problem that interferes with or complicates integrity—it is the basis for integrity in the first place.[421] Integrity offers guidance to those who have the special responsibility to interpret legal norms on behalf of the

---

[418] Ronald Dworkin, Hart's Postscript and the Character of Political Philosophy (2004) 24(1) Oxford Journal of Legal Studies 1-37

[419] For an ethical, and thus individual, conception of this view, see Ronald Dworkin, Justice for Hedgehogs (n374), 112-13

[420] Ronald Dworkin, Law's Empire, (n337) 190; Justice for Hedgehogs (n374), 112-113

[421] Jeremy Waldron, "The Circumstances of Integrity"(1997) 3 Legal Theory 1

polity in question'.[422] In Dworkin's work these are paradigmatically judges, but can extend to all law creating, applying or enforcing officials.[423] In the circumstances of transition, the necessary conditions of civic trust and the rule of law, call for a more explicit use of integrity as an organising principle of public reason. The public and explicit use of integrity follows from the transparency required to assess the validity of civic trust and the congruence and clarity required under the rule of law. Alex Schwartz notes that "As people become more accustomed to treating political disagreement as also a function of interpretive disagreement, the activity of constructive interpretation becomes part of the routine grammar of public reason."[424] Amartrya Sen has recently affirmed the value of a publicly observable and contested conception of justice.[425]

Analysis of the role of social psychology on social norms reveals the need for an explicit and public engagement in interpretation to counteract risks of the misinterpretation of norms. Explicit and public use of integrity would therefore be necessary. First, individuals actively interpret the social situations in which they find themselves, making their subjective reality as important a determinant of behaviour as "objective" reality.[426] Thus, a citizen's perception of social norms is constitutive of the said norms. Second, others' conduct can alter the social meaning of behaviour.[427] Studies of John Darley and Bibb Latane focused on the murder of Kitty Genovese in New York City. Ms. Genovese was murdered in an alley in New York while some thirty-six neighbors apparently watched from their apartment windows without so much as calling the police to help her. Latané and Darley reasoned that when faced with a mildly ambiguous situation, such as unidentified screams from an alley outside one's window, people look to others to help them interpret the situation. Unfortunately, what they often see is other people looking to them for help interpreting the situation, rather than aiding the victim. This leads the bystanders to believe that the victim does not actually need assistance, or, if they do, the other bystanders must already have called for it. It is not that the bystanders subscribe to a social norm of not helping, it is that they

---

[422] Alex Schwartz, "Patriotism or Integrity? Constitutional Community in Divided Societies" (2011) Oxford Journal of Legal Studies 1–24, 17

[423] Ronald Dworkin, Law's Empire (n337), 12

[424] Alex Schwartz, Patriotism or Integrity? Constitutional Community in Divided Societies, 17

[425] Amartya Sen, The Idea of Justice, (Allen Lane 2009) 392-394

[426] Jeffrey Rachlinski "The Limits of Social Norms', 74 Chicago-Kent L. Rev. 1537, 1539-42

[427] Bibb Latané, Bibb & John Darley, "Group Inhibition of Bystander Intervention in Emergencies, (1968) 10 Journal of Personality and Social Psychology 215

unwittingly influence each other's interpretation of the situation.[428] Thus active and explicit interpretation of transitions by reference to integrity may offer some means to mitigate these risks and contribute to the formation of social norms regarding civic trust, the rule of law, and the discrete goals of each field.

An example of explicit public engagement in the circumstances of transition are victim, perpetrator, and community perception surveys on issues of justice, security, development, and peace.[429] Such empirical work reflects the need for heightened information regarding social normative foundations of society, but also for increased communication with citizens in the circumstances of transition. Similarly, formal legal institutions in the four fields examined increasingly incorporate outreach programs to align the goals values and mandates of those institutions with the perceptions, attitudes and priorities of affected populations.[430] Such mechanisms acknowledge and respond to the need to seek social attitudes and perceptions of legal mechanisms in transitions, with a view to better aligning the goals of institutions in each field with the behaviours, attitudes and perceptions of a transitional society.

Each field seeks to offer a reason for compliance with the rule law and renewed civic trust through formal legal institutions. This process comes with risks of incoherence and obfuscation inherent in legal regulation and exacerbated in the circumstances of transition. This proposal for the practice of integrity, expressed and pursued publicly and explicitly, offers a new and coherent approach to the re-constitution of political community in transitions and seeks to mitigate these risks and offer further reasons for compliance by drawing on existing social norms of a transitional society. In this way, these fields, and the responsible interpretation of them through the principle of integrity, seek to re-constitute the sovereign political community of that transitional justice. They seek to make legitimate the claim to authority of the legal system of that community.

V. International Law

Our account thus far has been concerned with the relationship of a transitional society to its legal system in the circumstances of transition - and the pursuit of such a society to re-constitute itself as a sovereign political community. The circumstances of transition note the limited capacity

---

[428] Jeffrey Rachlinski "The Limits of Social Norms', (n397) 1554

[429] ICTJ, Iraqi Voices: Attitudes Toward Transitional Justice and Social Reconstruction (2004); UNDP, Public Perceptions on Transitional Justice (UNDP 2007)

[430] Victor Peskin, "Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Program" (2005) 3 Journal of International Criminal Justice 950

of transitional societies to deal with intense public demands and expectations in transition. Often as a consequence transitional societies seek the assistance of international actors in pursuing these goals. In this process, a distinct case must also be made for supporting transitions through international law: "a case for foreign aid is not yet a case for international law."[431] If international actors seek to support transitions directly or through advocating that transitions societies adhere to international law, its content and practice is likely to play a role in transitions, given that they have become the global and interconnected events described in Chapter I.

International law is evidently a different type of legal system to domestic law, but its precise nature remains unclear. Traditionally conceived, it lacks elements of many domestic legal systems: a centralised legislature, enforcement mechanism or compulsory means of adjudication. Classical conceptions of international law operated in circumstances where States were the sole juridical actor in the international legal system, largely reflecting the priority of sovereignty. As a result international law was often considered a system of horizontal and bilateral obligations rather than a legislative system of law, with little scope for a hierarchy of norms. The emergence of the individual as an international legal actor altered this picture and introduced a necessary verticality based on the individual as a rights holder. More recently still, the emergence of the global governance paradigm recognises the distinct role of international institutions and organisations as juridical actors.[432]

Several classical positivist accounts of international legal theory called into question whether it constituted a legal system at all.[433] This skepticism is continued in a realist trend in modern scholarship, which denies that international law makes a difference to the conduct of States.[434] Some modern positivist approaches acknowledge its potential to exist as law. This approach can be contrasted with a classical natural law approach to international law, believing it to be predicated on the divine law and a natural international order, accessible by right reason, but nonetheless distinct from domestic law. Such conceptions may align with modern natural law theory in seeing it as a basis for overriding contrary domestic law, but are significantly out of favour. In contrast, apologists for international law acknowledge that "almost all nations observe almost all principles

---

[431] Jeremy Waldron, Religious "Foundations of International Law", available at: http://ssrn.com/abstract=1823702, 18

[432] Benedict Kingsbury, Nico Krisch & Richard B. Stewart, "The Emergence of Global Administrative Law", (2005) 68(3-4) Law and Contemporary Problems 15-61

[433] HLA Hart, *The Concept of Law (*n330), 213-232; John Austin, *Lectures on Jurisprudence*, or *The Philosophy of Positive Law*, (1879), two vols., R. Campbell (ed.), (Thoemmes Press reprint, 2002), Lecture 1

[434] Jack Goldsmith and Eric Posner, *The Limits of International Law* (OUP 2005)

of international law and almost all of their obligations almost all of the time".[435] As a result they seek to describe it as a social practice and one that can be seen as legitimate because of fair processes associated with its construction and enforcement.[436] A further perspective sees international law as preserving a hegemonic status quo, with structural biases in favour of certain outcomes over others. Such an approach draws from critical legal studies in domestic legal theory, but assumes a global character with critical actors coming from the Third World and generating TWAIL scholarship. This view of international law argues considerable debt that international law owes to a process of exclusion of the Third World.[437]

In reflecting this range of theories from domestic legal theory, international law nonetheless claims authority over individual domestic legal systems. However, some have argued the nature of the international system ensures that its claim to authority can only be piecemeal in fashion.[438] We can distinguish between authoritative claims of treaties, as positive international law generating explicit obligations, and customary international law. A distinct case for customary international law can also be shown to make authoritative claims.[439] Unlike domestic legal theory therefore there is continued contestation about the nature of international legal obligation.

Regardless of one's views of the nature of international legal obligation, claims to international legal regulation can suffer from a specific defect. The regulation of disparate fields, such as those presently considered, risks being an example of the broader trend of fragmentation in international law. The fragmentation of international law refers the proliferation of different legal regimes and institutions governing inter-state relations.[440] Fragmentation occurs in a number of different ways. First, the diversification of substantive international law and the proliferation of international courts and tribunals "gives rise to a serious risk of conflicting jurisprudence as the same rule of law might be given different interpretations in different cases."[441] Second, new types of specialised law seek to respond to new technical and functional requirements in an increasingly

---

[435] Louis Henkin, *How nations behave: law and foreign policy*, Columbia University Press (1979)

[436] Thomas Franck, *Fairness in international law and institutions* (OUP 1998)

[437] Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005)

[438] Samantha Besson, "The Authority of International Law — Lifting the State Veil"(2009) 31 Sydney Law Review 343

[439] John Finnis, Natural Law and Natural Rights (n336), 231-252

[440] Eyal Benvenisti, "The Conception of International Law as a Legal System", 50 German Yb Int'l L. 393 (2008), 10

[441] Address by H.E. Judge Gilbert Guillaume, President of the International Court of Justice to the United Nations General Assembly, 26 October 2000

globalised world. As a result we can conceive in the different fragments as representing difficult institutional preferences.[442] Because of this nature of international law, lawyers and courts in fields relevant to transition must continue to wrestle with materials at different levels of generality and with different normative force.[443]

Owing to this phenomenon, it becomes increasingly necessary for international law to be mindful of the need to retain consciousness of other fragments of law in integrating disparate elements of international law. As the foremost international juridical actors, states must remain aware of the need for coherence of the international legal system as a whole, for instance when they negotiate new international agreements or engage in customary practice.[444] Similar arguments apply for international organisations, tribunals and domestic courts applying international law.[445] It thus incumbent upon those viewing the relationship between two fragments of related law to acknowledge the need and limits to coherence between them. It is as a result of this phenomenon that international law is no panacea to the coherent regulation and expression of disparate fields in transitions.[446]

Though international law's expression of these fields may remain indeterminate, value preferences in different fields may be envisaged as competing spheres of authority. This competition generates the need for strategic choice between the fields, such as mainstreaming human rights in development or the securitisation of peace-building or development. International law expresses and protects values, but in a particular terminology and form: "International law is what international lawyers make of it."[447] Thus international law operates and should operate as an instrument for advancing particular claims and agendas as well as a relatively autonomous formal technique.[448] We must accept that the purpose and claims of international law are subject to value

---

[442] M. Koskenniemi, 'International Law and Hegemony: A Reconfiguration' (2004) 17 Cambridge Review of International Affairs 205-206

[443] Report of the Study Group of the International Law Commission Fragmentation of InternationaL Law A/CN.4/L.682

[444] Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 Eur J Intl L 265, 271

[445] ibid.

[446] Martti Koskenniemi, "The Politics of International Law 20 Years Later" (2009) 20 European Journal of International Law 17

[447] Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (Cambridge University Press 2005), 615

[448] ibid, 573 589

judgments and can be appropriated by particular agents and interests for their agendas despite being framed in universal terms. It is the process in which international actors and advocates of the above fields must consciously engage.

Whether international actors directly engage in a transitional society is a contingent issue. The content of a state's international legal treaty obligations is also a contingent matter. Nonetheless, general obligations of international law will lay claim to contribute to the regulation of specific aspects of the pursuit of public goods in transitions. The specifics are discussed in Chapter IV. International law's claim may contribute to the content of social norms in transitional societies, where such international law is communicated to the transitional society and accepted as a legitimate source or expression of norms. As a consequence, similar issues of coherence and obfuscation in legal regulation arise. In addition, the specific concern of fragmentation arises in the case of international law. The response in domestic law to legal defects, the rule of law, needs specific application to the international sphere. In addition, the application of the principle of integrity to international actors also requires specific consideration.

VI. The Rule of Law, Integrity and International Law

Where the domestic system is seen as illegitimate, where the domestic rule of law has failed, international actors, through international law, may contribute to renewing the legitimate provision of public goods. In these circumstances, the effectiveness of these actors in providing the goods from the four fields will depend upon their perceived legitimacy in the transitional society. There is a risk that reliance on the precepts of international law through the actions of international organisations and donors may be fragmented or become overly prescriptive and bureaucratic in affecting the substantive decisions of transitional societies. In response it may be possible to partially relate international law and practice to this principles of the rule of law and integrity.

As participants in the re-constitution of a transitional society's political community, international actors purport to promote the growth of the rule of law and civic trust in that society. To promote the rule of law in that society by their conduct, it becomes necessary for international actors engaged in transitional societies, to be bound by the rule of law in such societies. Simon Chesterman contends that the international rule of law is the application of rule of law principles to relations between States and other subjects of international law.[449] Lord Bingham concludes "If

[449] Simon Chesterman, "An International Rule of Law?" (2008) 56(2) American Journal of Comparative Law 331-61, 355

the daunting challenges now facing the world are to be overcome, it must be in important part through the medium of rules, internationally agreed, internationally implemented, and, if necessary, internationally enforced. That is what the rule of law requires in the international order."[450] Jeremy Waldron has argued that if a government has reason to resist the application of international law to itself, it does so not as an individual defending his or her freedom, but as a law-imbued entity which already constrains its conduct with rules of its own. Accordingly, any case that is to be made for resisting the application of international law should be based on legality rather than the repudiation of legality. In this way, Waldron recognises that states are not only subjects, but also sources and officials of international law, subject to law, but also law makers and enforcers. In other words, states are not ends onto themselves, but merely the means by which individuals organise their conduct. The consequence of this position is that States are obliged to act under the Rule of Law in the international arena, not to exploit loopholes and weaknesses, but to devote themselves to upholding and advancing the principles of legality by which they are constituted in their own domestic environments. This should generate a concern for those involved in assessing international law for upholding its integrity.[451]

Ensuring rule of law principles apply in the conduct of international actors in transition is one significant step in contributing to the legitimacy of international contributions to these fields. We have seen that contributing to the rule of law is a stated aim of each field; holding actors in each field to this standard merely reflects that commitment. The re-constituted political community seeks to claim sovereign authority over all citizens on an equal basis and provides mechanisms for resolving disputes within its limits and institutions. International law and policy is therefore aimed at becoming gradually obsolete in the direct determination of national issues within a sovereign state. However, beyond the rule of law in a given political community, the relationship of substantively diverse fields also runs the particular risk of a fragmentation in general international law, owing to the abstract and diffuse level of relationship among the concepts in each field. This must distinctly be addressed.

The task of international actors engaging in supporting transitions is therefore fourfold. First, if they seek to promote the rule of law in a transitional society, to reflect that desire, they should be bound by the rule of law of that society. Second, to respond to risks of incoherence, obfuscation,

---

[450] Tom Bingham, The Rule of Law (n378), 129

[451] Jeremy Waldron, "The Rule of International Law", in Jeremy Waldron, *Torture, Terror, and Trade-offs: Philosophy for the White House*, (OUP 2010) 320-333

and fragmentation, they must seek to interpret their practices with integrity as part of the re-constitution of a sovereign political community in the transitional society. This requires supporting the development of civic trust and the rule of law in international activities in the four fields. Third, we can apply the interpretive obligation of integrity to a state's interpretation of the relevant international law. An approach focused on integrity suggests that the interpretation of international law might achieve greater legitimacy of each separate field. Finally, the actions of a state supporting transition must be interpreted with integrity by reference to their own sovereign political community, as the donor or embassy remains both a part of the transitional society and donor society.

In considering the application of the principle of integrity to international actors, we can appreciated the different dimensions of transition, including exogenous and endogenous, that Elster and others have noted and which were identified as relevant to the circumstances of transition in Chapter II. An international actor involved in providing assistance to a dominantly endogenous transition is therefore primarily concerned with the nature of that society's own justifications for the choices made within their transition and the relation of the interests and values of her assistance to those choices (whether through an international organisation and donor state, etc). In contrast an international actor involved in a dominantly exogenous transition has to reconcile the role of external or international actors in prompting and/or managing the transitional processes in which she presently finds herself. An account of international action in assisting a given transition that seeks to pursue integrity would therefore take account of these and other dimensions of complexity relevant to transition in seeking to situate a specific action that the international actor has to undertake in the broader normative framing of the circumstances of transition. The other dimensions of complexity in transitions discussed in Chapter II, such as the temporal dimensions, nature of the transition, and range of value goals would need to be considered by both domestic and international actors.

Relating these tasks is complex. The relationship of state's interpretation of its political community to international law and policy is an ongoing, general and independent process of interpretation that is broader than the scope of transitions. It would operate regardless of whether a state engages in supporting a political transition in a transitional society or not. The novel claim here is that these interpretive practices should also extend to a transitional state's interpretation of its re-constituted political community where international actors are involved.

It remains to be seen in subsequent chapters how the prism of international law operates as a means to pursue the goals of each field. It remains to evaluate how the interpretive principle of integrity applies to international law concerned with transitions. Acknowledging the role for integrity in interpreting the international law and policy of each field gives us a structure and method of interpretation and evaluation for how that law and policy pursues and formalises the values and goals of each field. It offers us a basis for analysis and reform that seeks to mitigate incoherence, obfuscation and fragmentation.

VII. Conclusion

This chapter has aimed to clarify how the values of four fields of legal and policy practice are expressed through the formal structures and claims of domestic and international law when they operate in the circumstances of transition.

The claims of law to offer authoritative reasons for action were contrasted with the risks inherent in legal regulation and the risks that arise specifically in the circumstances of transition. The chapter demonstrated how the rule of law is claimed as necessary response to the abuse of power through a legal system. The chapter noted that distinct challenges arise in re-building the rule of law through the use of a suite of legal institutions. Such reform efforts necessarily seek to engage with a society's social norms and reflect the long term ambitions of law to change social norms. This realisation should prompt "radical modesty about our capacity to predict the consequences of any major social intervention into a tolerably functioning complex social or natural order".[452]

This chapter demonstrated that law's engagement with social norms may be achieved responsibly through the public and explicit interpretation of the legal system in accordance with the principle of integrity. Coherence, pursued through the practice of integrity, seeks to better foster the conditions of civic trust and the rule of law that exist in the circumstances of transition and operate across the four fields of practice. This process would contribute to the transition of a society to a re-constituted sovereign political community.

The chapter offered a distinct case for the use of international law in transitions. There is an potential role for international law and actors in transitions, echoing the priority examined in Chapter I, but its extent, as a general matter, will vary from society to society. For those international actors who purport to enhance commitment to the rule of law in transitional

---

[452] James C Scott, *Seeing like a State*, (Yale University Press 1998) 288

societies, through engagement in the four fields, the chapter noted that their conduct should also reflect commitment to the rule of law as an example and signal to transitional societies. For international actors, respecting and incorporating respect for integrity in a transitional society gives depth to the stated concern in each field for nationally and locally owned processes. Integrity also offers us a means of evaluation of the coherence and congruence of the international legal regulation of each field of practice.

The theory of transition developed in Chapters II and III does not seek to conclude the contestation that inheres in transitional societies and in particular in transitional justice, peace-building, security sector reform and economic development. Nor does this theory deny the essentially contested nature of the rule of law across all societies. Rather the theory offered seeks to demonstrate that such contestation is valuable when aimed at the re-constitution of a sovereign political community. Identifying the interdependence of each field through civic trust and the rule of law aims to emphasise the mutual contribution of each field to this re-constitution. The principle of integrity when applied to transitions seeks to enable a transitional society to work towards a responsible construction of its political community expressed in law. Such an approach aims to claim the allegiance of the citizens of that society and the respect and tolerance of other member States of the international community.

Chapter IV: The International Legal Framework for Transitions

I. Introduction

Chapter III examined the claims of law in fields in the circumstances of transition. It noted the potential to apply the principle of integrity to the interpretation of a transitional legal system. While the substantive content of domestic legal systems varies, the claims and content of international law are less contingent. Chapter III also identified the potential, where there is international assistance in transitions, to apply the principle of integrity to relevant international legal obligations and international organisations. This chapter examines the content of international law relevant to transition. In particular, it examines the extent to which international law provides coherence in the regulation of transitional justice, security sector reform, development, and peace-building. Following from the account of integrity given in Chapter III, three levels of coherence can be examined in pursuit of integrity: those internal to each field, coherence between each field and the structure of international legal regulation to enable application to each set of circumstances of transition. The chapter concludes that the partially integrated structure regarding these areas reflects the desirability of a contextual approach to their regulation and the capacity to prioritise local priorities and concerns in transitions. Notwithstanding these conditions, this flexibility may also generate concerns of incoherence in specific contexts and through specific interpretations of ambiguous areas of international law. International law relevant to each field is considered in turn.

II. International Law on Transitional Justice

Transitional justice is composed of a variety of values that are pursued through legal institutions. A number of these values are reflected in international law. The duty to ensure effective enjoyment of human rights implies that the state must adopt all necessary legislative and other measures to give effect to the rights guaranteed in international law.[453] A rights framework provides us with a coherent means to consider international law regarding transitional justice.

---

[453] Article 2 (2) ICCPR; Article 2 (c) and (d) CERD; Article 2 (a) CEDAW; Article 4 CRC; Article 2 (1) CAT; Article 1 Afr CHPR; Article 2 ACHR; Article 6 Inter-American Convention on the Prevention and Punishment of Torture; Article I (d) Inter-American Convention on Forced Disappearance; Human Rights Committee: General Comment No 31 on Article 2 of the Covenant CCPR/C/74/CRP.4

A. Freedom from Gross Violations of Human Rights

Freedom from gross violations of human rights is protected through the shield of international legal expression of those rights and through the sword of international criminal law to enforce such rights. However, the structure of international criminal law demonstrates a tension between an individuated freedom from such violations and the mass nature of international crimes.

The Rome Statute of the International Criminal Court is the primary and permanent court of international criminal justice, with the jurisdiction to try those individuals accused of bearing greatest responsible gross violations of human rights.[454] The court operates on the basis of complementarity, admitting cases where a State is unable or unwilling to prosecute itself.[455] Furthermore, the Geneva Conventions and their Additional Protocols provide rules of international humanitarian law, the serious violation of which amounts to the commission of international crimes.[456] Further treaties prohibit specific international crimes, most notably the 1948 Convention on Genocide, the 1984 United Nations Convention against Torture, and the 2006 Convention for the Protection of All Persons from Enforced Disappearance.[457] Finally decisions of international criminal tribunals, such the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY), have declared rules and principles of international criminal law to reflect customary international law. Building on these sources, definitions of international crimes in the categories of genocide, crimes against humanity and war crimes are not identified as not perpetrated in isolation, but rather as mechanisms of social violence. Under Article 2 of the 1948 Genocide Convention, genocide is defined as:

---

[454] Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, entered into force July 1, 2002.

[455] Article 17, Rome Statute of the International Criminal Court (n425)

[456] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, entered into force Oct. 21, 1950. (Geneva Convention 1); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, entered into force Oct. 21, 1950 (Geneva Convention II); Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force Oct. 21, 1950 (Geneva Convention III); Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force Oct. 21, 1950 (Geneva Convention IV). Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, entered into force Dec. 7, 1978; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, entered into force Dec. 7, 1978.

[457] Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force Jan. 12, 1951; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987.

"any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group."[458]

This definition is primarily plural, where *members* of the targeted group are the object of genocide. The ICTR has confirmed the group character of genocide: "the act must be committed against an individual because the individual was a member of a specific group and specifically because he belonged to this group, so that the victim is the group itself, not merely the individual."[459] The International Court of Justice (ICJ) stated that genocide involves "a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity"[460]. The ICJ concluded that the intent required for genocide "must be to destroy at least a substantial part of the particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole."[461] This conclusion is supported by the jurisprudence of the international criminal tribunals.[462] This combination confirms genocide as a crime that is necessarily plural in its intent and commission.

Second, war crimes are serious violations of customary international law or treaty rules in the area of international humanitarian law of armed conflict. War crimes may be perpetrated in the

---

[458] Genocide Convention 1948, (n428) Section 2

[459] *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14 (Trial Chamber), May 16, 2003, para. 410; See also *Prosecutor v Rutaganda,* (Trial Chamber), December 6, 1999, para. 60; *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, Case No. ICTR-99-52-T (Trial Chamber), December 3, 2003, para. 948

[460] *Reservations to the Convention on the Prevention of the Crime of Genocide* (1951) ICJ Reports 15, 23

[461] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro) Judgment 26 February 2007, para 198

[462] ICTR: *Prosecutor v Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 96-97; *Prosecutor v Akayesu*, (Trial Chamber), September 2, 1998, para. 497; *Prosecutor v Semanza*, (Trial Chamber), May 15, 2003, para. 315; ICTY: *Prosecutor v Jelisic*, (Trial Chamber), December 14, 1999, para. 78; *Prosecutor v Jelisic*, (Appeals Chamber), July 5, 2001, para. 48

course of either international or internal armed conflicts.[463] A subset of offences applies in internal armed conflict under Common Article 3 of the Geneva Conventions.[464] In its judgment in *The Prosecutor v Jean-Paul Akayesu,* ICTR Trial Chamber I concluded that Common Article 3 is customary international law, noting that most states' penal codes "have criminalized acts which if committed during internal armed conflict, would constitute violations of Common Article 3."[465]

The application of international humanitarian law presupposes the existence of an armed conflict for its operation.[466] For crimes to constitute war crimes, the ICTY has held that there must be an nexus between the commission of the offences and the armed conflict, such that "the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.'"[467] Similar conclusions were reached in the ICTR.[468] An armed conflict may also involve a plan or policy for the commission of war crimes. Article 8(1) of the Rome Statute confirms the jurisdiction of the Court "in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes." The category of war crimes therefore presupposes the existence of an armed conflict and the prosecution of this category in international criminal law is conscious of the potential for war crimes to be committed as part of a policy or plan. Though varying widely in scale, the requirement of an armed conflict confirms that international criminal responsibility for war crimes attaches in circumstances where international law is legally conscious of the mass nature of the commission of crime.

---

[463] *Prosecutor v Duško Tadic* IT-94-1 "ICTY Trial Chamber Judgment" May 7 1997, para. 573, "ICTY Appeals Chamber, Interlocutory Appeal" Oct. 2 1995 paras. 97-137)

[464] Additional Protocol II to the Geneva Conventions is further relevant to internal armed conflicts, as it develops and supplements Common Article 3 of the Geneva Conventions. Additional Protocol II applies to non-international conflicts in the territory of a State between the armed forces of that State and organized armed groups, who have such control of territory of the State that they can "carry out sustained and concerted military operations".

[465] *Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4-T "ICTR Trial Chamber" Judgment, Sept. 2, 1998, paras. 608-9, 616

[466] *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2 (Trial Chamber), February 26, 2001, para. 22; *Prosecutor v Furundzija*, (Trial Chamber), December 10, 1998, para. 258;

[467] *Prosecutor v Kunarac, Kovac and Vokovic*, (Appeals Chamber), June 12, 2002, para. 58-59; *Prosecutor v. Blaskic,* Case No. IT-95-14 (Trial Chamber), March 3, 2000, para. 69; *Prosecutor v Kordic and Cerkez*, (Trial Chamber), February 26, 2001, para. 32

[468] Akayesu, (Trial Chamber), September 2, 1998, para. 619-621, 625; Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 170

Finally, crimes against humanity means the commission of specific crimes, such as murder, torture or rape, as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack.[469] This definition generates several requirements confirming legal consciousness of the plural nature of a crime against humanity. First, there must be an attack: "An attack may also be nonviolent in nature, like imposing a system of apartheid . . . or exerting pressure on the population to act in a particular manner."[470] Second, the attack must be widespread or systematic.[471] An attack may be rendered widespread by the "cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude."[472] An attack is rendered systematic by the organised nature of the acts and the improbability that they occurred randomly.[473] Third, the attack must be against a civilian population. Finally, those accused must know that their offence is taking place as part of a widespread or systemic attack against civilians. Part of what transforms an individual's act(s) into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct; therefore an accused should be aware of this greater dimension in order to be culpable. Accordingly, actual or constructive knowledge of the broader context of the attack is necessary to satisfy the requisite *mens rea* element of the accused.[474] The construction of the category thus explicitly recognises the existence of background circumstances. This factual requirement confirms that crimes against humanity do not occur in isolation but generates a legal consciousness that specific offences occur in a context of widespread or systematic commission of offences.

These categories all acknowledge the complex context of the commission of their constituent offences. Such categories can be contrasted treaty specific offences, such as the prohibition on torture or enforced disappearance, which express only the individuated nature of a right to be free from the offence and a concomitant duty on the State to prosecute and punish. International criminal law has responded to these complex circumstances by constructing alternative forms of liability. First, international criminal law incorporates the concept of joint criminal enterprise from

---

[469] Rome Statute, (n425) Article 7

[470] *Prosecutor v Clément Kayishema and Obed Ruzindana,* Case No. ICTR-95-1-T "ICTR Trial Chamber Judgement", May 21, 1999, para. 122

[471] *Prosecutor v. Dragoljub Kunarac et al.*, IT-96-23 & 23/1 "ICTY Appeals Chamber Judgement" June 12, 2002 para. 95.

[472] *Prosecutor v Dario Kordic and Mario Cerkez*, IT-95-14/2 "ICTY Trial Chamber Judgement", Feb. 26, 2001 para. 179.

[473] *Prosecutor v Mladen Naletilic and Vinko Martinovic,* IT-98-34 "ICTY Trial Chamber Judgement", March 31, 2003, para. 236;

[474] *Prosecutor v Clément Kayishema and Obed Ruzindana*, paragraphs 133-34;

domestic legal systems, which goes some way to acknowledging the group nature of these offences.[475] Second, command responsibility has grown as a doctrine in international criminal law to respond to the idea that those *most* responsible for the commission of international crimes should be held accountable for their actions or inaction.[476] Liability for command responsibility first presumes the commission of international crimes by subordinates to a commanding officer who enjoyed an effective, if not formal, command and control relationship over the subordinates whether civilian or military and was aware or had reason to be aware that international crimes were about to be or had been committed.[477]

International law thus acknowledges the distinct nature of these crimes. A duty to prosecute these categories of offences is accepted as a matter of conventional international law, as evidenced by widespread ratification of the Rome Statute.[478] In customary international law the duty remains more controversial. The Inter-American Commission on Human Rights has held that the duty to punish flows from the American Convention on Human Rights.[479] Significant jurisprudence of the Inter-American Court confirms this position.[480] An equivalent duty to

---

[475] *Tadic*, (Appeals Chamber), July 15, 1999, para. 195-196, 202-204

[476] Article 28, Rome Statute (n425); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993), Article 7(3); Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994), Article 6(3); Rome Statute, Article 28

[477] *Blaskic*, (Trial Chamber), March 3, 2000, para. 294; *Kordic and Cerkez*, (Trial Chamber), February 26, 2001, para. 427; *Naletilic and Martinovic*, (Trial Chamber), March 31, 2003, para. 72; *Mucic et al.*, (Appeals Chamber), February 20, 2001, para. 222-24

[478] 116 ratifications as of 24 June 2011

[479] Report No 133/99, Case 11.725, *Carmelo Soria Espinoza* (Chile),19 November1999, paras 92-107; Report No. 136/99, *Ignacio Ellacuría S.J et al* (El Salvador), 22 December 1999, paras 189-230; Case 10.247 *Extrajudicial Executions and Forced Disappearances of Persons* (Peru),11 October 2001,para s235-247; Report No. 36/96, Case 10.843, *Héctor Marcial Garay Hermosilla* (Chile), 15 October 1996, para 62-67

[480] *López- Álvarez v. Honduras* [1 February 2006] Judgment, Series C No. 141, 207, 207; *Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela* [5 July 2006] Judgment, Series C No. 150, para. 137 et seq.; *Goiburú et al. v. Paraguay* [22 September 2006] Judgement, Series C No. 153, para. 164; *Vargas-Areco v. Paraguay* [26 September 2006] Judgement, Series C No. 155, para. 153 et seq.; *La Cantuta v. Perú* [29 November 2006] Judgment, Series C No. 162, para. 222.

prosecute is supported by the ECHR.[481] The African Commission on Human and Peoples' Rights has also recognised a duty to prosecute and punish, but with significantly less case law.[482] The ICCPR Human Rights Committee also affirms the duty to prosecute gross violations of human rights in individual petitions.[483] This view is reflected in its state reports.[484] Therefore, these categories, while once radical innovations, are now the canonical legal basis for international criminal law and a duty on States to prosecute such crimes.

The application of this duty to the commission of individual offences remains controversial. and threatens the coherence of international law in this area. Consider the combination of legal consciousness of the mass nature of these crimes with the individual right for each victim to receive justice by placing a duty on the State to prosecute and punish these gross violations of human rights. A literal interpretation of the various treaty requirements may suggest a legal impossibility: that each individual international crime should be prosecuted as a matter of criminal law, despite acknowledging the mass nature of these offences. A cursory examination of the

---

[481] *Sandru and Others v. Romania*, App. No. 22465/03, ECtHR (8 December 2009); *Aksoy v. Turkey* [18 December 1996] Judgement, 21987/93 [1996] ECHR 68, para. 98; *Aydin v. Turkey* [25 September 1997] Judgment, 23178/94 [1997] ECHR 75, para. 103; *Selçuk and Asker v. Turkey* [24 April 1998] Judgement, 23184/94, 23185/94 [1998] ECHR 36, para. 96; *Kurt v. Turkey* 825 May 1998] Judgement, 24276/94 [1998] ECHR 44, para. 140; *Selmouni v. France* [28 July 1999] Judgement, 25803/94 [1999] ECHR 66, para. 79; *Hugh Jordan v. UK* para. 157, 160 ; *Case X and Y v the Netherlands*, Judgment of 26 March 1985, Series A91; *M.C. v Bulgaria*, 4 December 2003, para 153; *Case A. v the United Kingdom*, Judgment of 23 September 1998, Reports of Judgments and Decisions 1998-V I, paras 22, 23; *Case Osman v the United Kingdom*, Judgment of 28 October 1998, Reports 1998-VIII ,para115; *Case Mahmut Kaya v Turkey*, Judgment of 28 March 2000, Reports 2000-III, para 85; *Case Kiliç v Turkey,* Judgment of 28 Mars 2000, Rep ort s 2000-III, para 62

[482] *Case Malawi African Association et al v Mauritania*, Communications 54/91, 61/91, 98/93, 164/97, 196/97, 210/98 (27t h Ordinar y Session, May 2000); Case *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, Communication 155/96 (30th Ordinary Session,October2001).

[483] *Case Almeida de Quinteros et al v Uruguay*, Views of 21 July 1983, CCPR/C/OP/2, para 16 (b); *Case Dermit Barbato v Uruguay,* Views of 21 October 1982, CCPR/C/17/D/84/1981, para 11; *Case Celis Laureano v Peru*, Views of 16 April 1996, CCPR/C/56/D/540/1993, para 10; *Case Sarma v Sri Lanka,* Views of 31 July 2003, CCPR/C/78/D/950/2000, para 11; *Case Nydia Erika Bautista v Colombia,* Views of 13 November 1995, CCPR/C/55/D/563/1993, paras 8.6, 10; Case *José Vicente y Amado Vill afañe Chaparro v Colombia,* Views of 29 July 1997, CCPR/C/60/D/612/1995, para 8.2; *Case Coronel et al v Colombia*, Views of 13 October 2000, CCPR/C/70/D/778/1997, para 10.

[484] Concluding Observations on the Libyan Arab Jamahiriya, 6 November 1998, CCPR/C/79/Add.101, paras 7, 10; Concluding Observations on Mexico, 27 July 1999, CCPR/C/79/Add.109, para 6; Concluding Observations on Algeria, 18 August 1998, CCPR/C/79/Add.95, paras 6, 7, 9; Concluding Observations on Argentina, 3 November 2000, CCPR/CO/ 70/ARG, paras 9, 13; Concluding Observations on the Kyrgyz Republic, 24 July 2000, CCPR/CO/69/KGZ, para 7; Concluding Observations on Guatemala, 27 August 2001,CCPR/CO/72/GTM, para 12 ; Concluding Observations on Venezuela, 26 April 2001, CCPR/CO/ 71/V EN, para 8; Concluding Observations on Hungary, 19 April, 2002, CCPR/CO/ 74/HUN, para 12; Concluding Observations on Colombia, 5 May 1997, CCPR/C/79/Add.76, para 32; Concluding Observations on Argentina, 3 November 2000, CCPR/CO/70/ARG, paras 9, 13

practice of international criminal law shows this to be impossible.[485] Moreover, modern transitional justice theory suggests that prosecutions should not be seen as an adequate response to gross violations of human rights given the complex social and moral questions raised by their perpetration.[486] This theoretical inadequacy is not expressly reflected in international law. Partial engagement with this issue has generated distinct forms of liability in international criminal law. Prosecution of these type of complex offences captures and affirms the rights of a multiplicity of victims within the legal framework of a single trial, despite the considerable legal and logistical complications it brings. The position is also supported by the practice of international criminal tribunals in focusing prosecutions on those most responsible for gross violations of human rights.[487] Beyond these methods, emblematic or symbolic prosecutions from a cross-section of perpetrators has been advocated.[488] However, such an approach may seem an arbitrary use of prosecutorial discretion from both the perspective of the defendant selected and the victims of similarly placed perpetrators who are not indicted.

There therefore appears to be a category of offenders who have committed gross violations of human rights who fall below command positions from whom mere exemplary prosecutions will be drawn. The vast majority of these will escape criminal sanction, despite an outstanding obligation on the State to prosecute them for the commission of offences. While there are complex moral questions about whether and who to prosecute for gross violations of human rights, the duty to prosecute such offences claims a universal and comprehensive approach is the appropriate standard of legal obligation. Reconciling the tension between the seemingly binary nature of the duty to prosecute and the broader complexities of mass crimes is a challenge acknowledged but not completely overcome by present international law. The duty to respect and ensure and the right to remedy provisions of general human rights treaties do not necessarily entail an obligation of criminal prosecution since the rights may also be "ensured" through other mechanisms and

---

[485] William Schabas, 'Justice, Democracy and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems', (1997) 8 Criminal Law Forum 523; William Schabas, 'The Rwanda Case: Sometimes it's Impossible', (n187) 499.

[486] Miriam Aukerman, "Extraordinary Evil, Ordinary Crimes: A Framework for Understanding Transitional Justice," (n219)

[487] UN Security Council, Statute of the Special Court for Sierra Leone, 16 January 2002, available at: http://www.unhcr.org/refworld/docid/3dda29f94.html [accessed 30 May 2011]; Kenneth A Rodman, Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court (n328)

[488] Mark Drumbl, Atrocity, Punishment and International Law (CUP 2007); Mark Osiel, "Why Prosecute?" (2000) 22 Human Rights Quarterly 118–147

such mechanisms may constitute "remedies" within the meaning of these provisions.[489] These other legal rights will now be considered.

B. Truth Regarding Gross Violations of Human Rights

The right to truth regarding gross violations of human rights and its complement, the duty to investigate such violations, are important constituent elements of transitional justice, but suffer from the same structural defect as the freedom from gross violations of human rights and distinct challenges. It is evident that truth is a form of speech and of expression. Article 19(2) of the ICCPR provides for the right *"to seek, receive and impart information"* as part of the right to freedom of expression.[490] The Inter-American Court of Human Rights has affirmed a right of access to information held by public authorities under Article 13 of the American Convention.[491] The right to information is therefore an integral part of freedom of expression. Distinct considerations arise regarding the right to truth for gross violations of human rights. In such cases, States have the duty to investigate allegations of such violations and cooperate with other States and international institutions competent in the investigation and prosecution of these violations.[492] This view is reflected in the jurisprudence of the ICCPR Human Rights Committee.[493] The UN Human Rights Commission affirmed this view.[494] Such an obligation also arises for enforced disappearances.[495]

---

[489] Kai Ambos, "The Legal Framework of Transitional Justice", International conference, Building a Future on Peace and Justice Nuremberg 25-27 2007, 16

[490] Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948); International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

[491] Case of Claude Reyes and others v. Chile. Reparations and Costs Judgement of September 19, 2006. Series C No. 151

[492] 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, C.H.R. res. 2005/35, U.N. Doc. E/CN.4/2005/ L.10/Add.11 (19 April 2005)

[493] *Laureano v Peru HRC* (1996); *Rodriguez v Uruguay HRC* (1998); *Quinteros Almedia v Uruguay HRC* (2003); *Case Hugo Rodríguez v Uruguay,* Views of 19 July 1994, CCPR/C/51/D/322/1988, para 12(3). *Case Blanco v Nicaragua,* Views of 18 August 1994, CCPR/C/51/D/328/ 1988, para 11; General Comment No 6 on Article 6, 30 April 1982, HRI/GEN/1/ Rev7, para 4; Celis Laureano v Per u, Views of 16 April 1996, CCPR/C/56/D/540/1993, para 10; *Sarma v Sri Lanka,* Views of 31 July 2003, CCPR/C/78/D/950/2000, para 11

[494] Resolutions E/CN.4/2003/72, 25 April 2003, para 8; E/CN.4/RES/2003/32 (torture), 23 April2003, para8; E/CN.4/ RES/2003/53(extrajudicial,summary and arbitrary executions),24April 2003, par as 4, 5; E/CN.4/RES/2003/72 (impunity), 25 Apr il 2003, para 8.; E/CN.4/RES/2003/38 (enforced or involuntary disappearances),23April2003, para5(c)

[495] International Convention for the Protection of All Persons from Enforced Disappearance, Human Rights Council, Report to the General Assembly on the First Session of the Human Rights Council, at 32, U.N. Doc. A/HRC/1/L.10 (2006).

Article 3 of the Disappearances Convention obliges State parties to investigate these offences and to bring those responsible to justice. Further provisions provided detailed minimum guidelines for such investigations. In addition, Article 17(3) specifies a requirement for minimum levels of information to held by the State on all persons deprived of their liberty by the State.[496] A similar duty to investigate arises under the Convention against Torture.[497] Furthermore General Assembly Resolutions require an investigation of war crimes and crimes against humanity.[498] The duty to investigate is given significant consideration in the regional jurisprudence. In *Velasquez Rodriguez v Honduras,* the Inter-American Court stated:

> The State is obligated to investigate *every situation* involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction... [499]

In *Barrios Altos,* the Court considered the relationship between the right to truth and the duty to investigate, concluding that "the right to the truth is subsumed in the right of the victim or his next of kin to obtain clarification of the events that violated human rights and the corresponding responsibilities from the competent organs of the State, through the investigation and prosecution that are established in Articles 8 and 25 of the Convention."[500] In *Almonacid v Chile,* the Court confirmed that the duty to investigate entails that the State "must guarantee that the necessary facilities shall be provided by all public institutions to the regular court".[501] In 2010, the Inter-American Court concluded that the right to information contained in Article 13 of the American Convention undergirds a legally enforceable right to the truth for victims and for society as a

---

[496] See also A/RES/57/207, 14 February 2003 on missing persons; Observance by United Nations forces of international humanitarian law United Nations, Secretary-General's Bulletin, ST/SGB/1999/13, 6 August 1999; Article 62 Vienna Declaration and Programme of Action A/CONF.157/23; *Almeida de Quinteros et al v Uruguay*, 21 July 1983, CCPR/C/19/D/107/1981, para 14

[497] Article 12 CAT; Principles on Investigation of Torture, recommended by the General Assembly in December 2000 A/RES/55/89 of 4 December 2000

[498] GA Res 2583 (XXIV) of 1969; Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, Assembly Resolution 3074 (XXVIII) of 1973

[499] *Velasquez Rodriguez Case,* Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), para 176

[500] *Barrios Altos v Peru* - Series C No. 75 [2001] IACHR 5 (14 March 2001)

[501] *Luis Alfredo Almonacid Arellano et al. v. Chile,* Case 12.057, Report No. 44/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 208 (2002)

whole.[502] Further jurisprudence of the Inter-American Court confirms the integral nature of this right to all issues of transitional justice.[503] The duty to investigate is also expressed in the jurisprudence of the European Court of Human Rights. In *Bazorkina v Russia,* the Court found that the protection of the right to life under Article 2 entails "that there should be some form of effective official investigation when individuals have been killed as a result of the use of force ".[504] The Court continued:

> The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility. The investigations required under Article 2 of the Convention must be able to lead to the identification and punishment of those responsible.[505]

The Court also held that Article 3 prohibiting torture, cruel and inhuman treatment had been violated by the distress and anguish suffered by the applicant as a result of the disappearance of her son and her inability to find out what happened to him.[506] A breach of the duty to investigate and the right of a citizen to receive information and truth can thus constitute an act of torture, cruel and inhuman treatment. In *Yaman v Turkey,* the ECHR confirmed that the right to an effective remedy includes the need for an investigation in violations of rights, capable of leading to the

---

[502] *Gomes Lund v Brazil* (2010), paras 197-231

[503] *Bámaca-Velásquez v. Guatemala* [25 November 2000] Judgement, Series C No. 70 (IACHR) para. 201; *Barrios Altos vs. Perú Case* [14 March 2001] Judgment, C Series No. 75 (IACHR) para. 48; *Carpio Nicolle y otros vs. Guatemala Case* [22 November 2004] Judgement, C Series No. 117 (IACHR) para. 128; *Moiwana Community v. Suriname* [15 June 2005] Judgement Series C No. 124 (IACHR) para. 203 et seq.; *"Mapiripán Massacre" v. Colombia* [15 September 2005] Judgement, Series C No. 134 (IACHR), para. 297; *Gómez-Palomino v. Perú* [22 November 2005] Judgement, Series C No. 136 (IACHR) para. 76 et seq.; *Blanco-Romero et al v. Venezuela* [28 November 2005] Judgement, Series C No. 138 (IACHR) para. 95 et seq.; *Pueblo Bello Massacre v. Colombia* [31 January 2006] Judgment, Series C No. 140 (IACHR) para. 219, 266; *Baldeón-García v. Perú* [6 April 2006] Judgement, Series C No. 147 (IACHR) para. 196; *Ituango Massacre v. Colombia* [1 July 2006] Judgement, Series C (IACHR) para. 399; *Ximenes-Lopes v. Brasil* [4 July 2006] Judgment, Series C No. 149 (IACHR) para. 245; *Servellón-García et al. v. Honduras* [21 September 2006] Judgement, Series C No. 152 (IACHR) para. 193; *Miguel Castro-Castro Prison v. Perú* [25 November 25 20069 Judgement, Series C No. 160 (IACHR) para. 440; I/A Court H.R., *Case of Myrna Mack-Chang v. Guatemala.* Judgment of November 25, 2003. Series C No. 101.

[504] *Bazorkina v. Russia*, 69481/01, Council of Europe: European Court of Human Rights, 27 July 2006, available at: http://www.unhcr.org/refworld/docid/44cdf4ef4.html [accessed 2 February 2011]

[505] ibid, para 117

[506] ibid, para 140

identification and punishment of those responsible.[507] A duty to investigate is found across a broad range of ECHR jurisprudence.[508] Despite the increased frequency in transitions, there remains no right or obligation to use truth commission as a means of discharging this right to truth in the international legal framework.

The right to truth is also found in soft law documents. An OHCHR report for the UN Human Rights Commission concludes that the right to the truth about gross human rights violations and serious violations of human rights law is an inalienable and autonomous right, linked to the duty and obligation of the State to protect and guarantee human rights, to conduct effective investigations and to guarantee effective remedy and reparations.[509] This right is closely linked with other rights and has both an individual and a societal dimension and should be considered as a non-derogable right and not be subject to limitations. Furthermore, the Updated Set of principles for the protection and promotion of human rights through action to combat impunity reaffirm the right to know the truth regarding gross human rights violations.[510] The right to truth operates as as a free standing right which enables victims to know the fate of relatives or loved ones, as well as offering some legal truth of the patterns and history of past violence for transitional societies. The duty to investigate placed on the state to ascertain the whereabouts of disappeared persons, and more generally extended to the right to information regarding human rights violations, is a necessary precondition for the duty to prosecute.

However, tensions and a risk of incoherence arise in the international regulation of the right to truth. First, similar to prosecutions, if an individual case is not considered as part of a truth

---

[507] *Abdülsamet Yaman v. Turkey,* no. 32446/96 (Sect. 2) (Eng) – (2.11.04) *Case McCann v the United Kingdom,* Judgment of 27 September 1995, Series A No 324, para 161.; *Cyprus v Turkey* paras 191 and 220(4); *Assenov v Bulgaria*, Judgment of 28 October1998, Reports 1998-VIII, para102.; *Monnat v. Switzerland,* App. No. 73604/01, ECtHR (21 September 2006), sec. 57; *Linkov v. Czech Republic,* App. No. 10504/03, ECtHR (17 December 2006).

[508] *Hugh Jordan v. the United Kingdom* (Application no. 24746/94) Judgment, Strasbourg, 4 May 2001, para. 105-117; *Çiçek v. Turkey* (Application no. 25704/94) Judgment, Strasbourg 27 February 2001, para. 148; *Kaya v. Turkey* (158/1996/777/978) Judgment, Strasbourg, 19 February 1998, 105; *McKerr v. the United Kingdom*, (Application no. 28883/95), Judgment, Strasbourg, 4 May 2001, para. 111-115; *Kelly and Others v. the United Kingdom*, (Application no. 30054/96), Judgment, Strasbourg, 4 May 2001, *Shanaghan v. the United Kingdom*, (Application no. 37715/97) Judgment, Strasbourg, 4 May 2001; *Makaratzis v. Greece* [GC], (Application no. 50385/99), Judgment, Strasbourg, 20 December 2004, para. 73-79; *Finucane v. The United Kingdom* (Application no. 29178/95) Judgment, Strasbourg, 1 July 2003; *Kaya v. Turkey* (158/1996/777/978) Judgment, Strasbourg, 19 February 1998, 105; *Ergi v. Turkey,* (Application no. 66/1997/850/1057), Judgment, Strasbourg, 28 July 1998

[509] Office of the High Commissioner for Human Rights (OHCHR) E/CN.4/2006/91 on the right to truth; *Right to the Truth.* UN Doc. A/H.R.C/5/7, of June 7, 2007 Office of the High Commissioner of the United Nations for Human Rights.

[510] Principles 2, 4, E/CN.4/2005/102/Add.1 (hereinafter Set of Principles)

recovery strategy, then the individualised duty to investigate and right to truth have not been fulfilled. This is exacerbated by a similar recognition of the mass nature of a right to truth for gross violations of human rights in regional jurisprudence.[511] Second, theoretical dissensus regarding the nature of broader truths in this context suggest the need for discretion for each society in establishing its own conception of truth in transitions.[512] The ECHR has identified the need for individual societies to reckon with the truth of a legacy of past gross violations of human rights as an essential element in a flourishing democracy.[513] As a consequence, international law both enables the individual determination of social conceptions of truth, but retains a structure of an right to truth for individual cases of mass offences. This tension mirrors the position for prosecutions, but also valuably enables societies to reach social truths in transitions, as a component of their re-constitution as a sovereign political community. International law therefore tolerates a wide range of social truth determinations in transitions.

C. Reparations

International law regarding reparations for individual victims of gross violations of human remains complex and diffuse. First, it has been noted that it is impossible to find a coherent terminology for all systems or countries regarding reparations.[514] We can first distinguish between reparations inter-State and intra-State.[515] The Draft Articles on State Responsibility of the ILC state that a State responsible for breach of an obligation must make full reparation for the injury caused by its

---

[511] Final report by the Special Rapporteur on the right to restitution, compensation and rehabilitation, 2 July 1993, E/CN.4/Sub.2/1993/8, para 14; Report No. 136/99 , Case 10.488, *Ignacio Ellacuría S.J et al (El Salvador)*, 22 December 1999, para 224; see also Report No. 1/99, Case 10.480, *Lucio Parada Cea et al* (El Salvador), 27 January 1999, para 148; *Bámaca Velásquez Case* , Judgment of 25 November 2000, Series C No. 70, para 197

[512] Tristram Hunt, 'Whose Truth? Objective Truth and a Challenge for History' (2004) 15 CLF 193

[513] *Lehideux and Isorni v France* (1998) 30 EHRR 665; *Giniewski v France* (2007) 45 EHRR 23; *Vajnai v Hungary, Orban v France; Feldek v. Slovakia*, App. No. 29032/95, ECtHR (12 July 2001), sec. 81; *Monnat v. Switzerland,* App. No. 73604/01, ECtHR (21 September 2006), sec. 63; James A. Sweeney, 'Divergence and Diversity in Post-Communist European Human Rights Cases,' (2005) 21 Connecticut Journal of International Law 1–40

[514] International Commission of Jurists, The Right to a Remedy and to Reparation for Gross Human Rights Violations: A Practitioner's Guide, (2006) 103-48. One finds the general term 'reparation' (Article 34 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts), 'compensation' (Article 9(5) ICCPR) 'remedy and compensation' (Article 63 ACHR), 'reparation' or 'just satisfaction' (Article 41 ECHR), 'redress and adequate compensation' (14 CAT), 'just and adequate reparation or satisfaction' (Article 6 CERD), 'compensation' (article 91 1 Add. Prot), 'reparation, including restitution, compensation and rehabilitation' (Article 75 of the Rome Statute of the International Criminal Court), to name only some examples. Ian Brownlie, Principles of Public International Law, (OUP 2003) 441-449

[515] *Case Concerning the Factory at Chorzów* (Jurisdiction), P.C.I.J. Serie s A, No 9 [8 i.e.], 26 July 1927; *Opinion in the Lusitania Cases*, 1 November 1923, Recueil de sentences arbitrales, Volume VII, p 32; *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, 174, 184.

intentionally wrongful action, where "injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."[516] The commentaries to the Draft Articles confirm that the notion of "injury" is to be understood as including any damage caused by that act and can be disaggregated into material and moral damage.[517] In contrast, a victim's legal right to reparation for serious harms suffered is broadly articulated in the UN's 2005 Basic Principles 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.[518] A victim of said violations has the right under international law to: (1) equal and effective access to justice; (2) adequate, effective, and prompt reparation for harm suffered; and (3) access to relevant information concerning violations and reparation mechanisms. Such reparation "should be proportional to the gravity of the violations and the harm suffered," and may take the form of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.[519]

Despite challenges with nomenclature, reparation has been recognised as an umbrella term for different forms of redress.[520] In accordance with the *Chorzów Factory Case*, restitution or *restitutio in integrum* constitutes the general primary objective of reparation in international law: "reparation must, as far as possible, wipe all of the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[521] In the case of gross violations of human rights, many would agree that full restitution may be impossible, especially in cases of the death, disappearance, torture or rape of an individual victim. The primary application of principles of restitution to cases of gross violations of human rights concerns the return of property, including land, to victims, which may have been expropriated by a

---

[516] Article 31(1) Draft ILC Articles on State Responsibility A/56/83

[517] Draft ILC Articles on State Responsibility with Commentaries Yearbook of the International Law Commission, 2001, vol. II, Part Two, 93

[518] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victim s of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law A/RES/60/147

[519] Ibid, para 15

[520] HRC, General Comment 31, para. 16 (defining reparation as "restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.")

[521] *Factory at Chorzow* (Germ. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9 (July 26)

prior regime.[522] The primary mode of reparation therefore for gross violations of human rights is compensation. International human rights covenants provide a right for compensation as a remedy for breach of rights.[523] Many specific treaties also enshrine the customary right to a remedy of compensation.[524] Further specific rights to compensation exist for breaches of international humanitarian law.[525] The ICC may also order that the award to reparation is made through the Trust Fund provided for in Article 79 of the Rome Statute.[526]

In instances of physical and mental harm to individual victims, compensation cannot restore the victim to the situation she was in prior to the violation, nor offer a cash equivalent of the damage suffered. Therefore the compensation is designed to achieve a symbolic effect: to officially recognise the harm and suffering endured by the victim, to acknowledge the State's role in this act, whether active or acquiescence and to offer a solemn commitment to non-repetition. The role of reparations therefore in cases of gross violations of human rights acknowledges the inadequacy and limited scope of any monetary form of reparation, as well as the limited capacity to deliver reparative effects more generally through such legal apparatus.[527]

Beyond a right to monetary compensation, the Inter-American Court affirms a broad and innovative range of remedies as reparations for victims of gross violations of human rights.[528] By

---

[522] *Case Hentrich v France*, Judgment of 22 September 1994, Series A No 296-A, para 71; see also *Case Papamichalopoulos and Others v Greece* (Article 50), Judgment of 31 October 1995, Series A No. 330-B, para38; Case *Brumarescu v Romania*, Judgment of 23 January2001,Reports2001-I,para22; *Case Brok v Czeck Republic*, Views of 15 January 2002, CCPR/C/73/D/774/1997, paras7.4,9; *Case Des Fours Walderode*, Views of 2 November 2001, CCPR/C/73/D/747/1997, paras 8.4, 9.2.

[523] Articles 14(6) and 9(5) of the International Covenant on Civil and Political Rights (ICCPR), Article 10 of the ACHR, Article 5(5) of the ECHR, Article 3 of the Seventh Protocol to the ECHR, and Article 21(2) of the ACHPR

[524] CAT; Article 9 (5) ICCPR, Article 5 (5) ECHR, Article 10 ACHR, Article 16 of the Arab Charter on Human Rights, and Article 85 of the Rome Statute of the International Criminal Court.

[525] Article 68 the Third Geneva Convention, Article 91 of the 1st Additional Protocol to the Geneva Conventions

[526] Press Release: 06.05.201 ICC's Trust Fund for Victims Launches Expression of Interest Supporting Victim Survivors of Sexual and Gender-Based Violence in the Central African Republic

[527] IACHR, *Indigenous Community Yakye Axa v. Paraguay* [17 June 2005] Judgment, Series C No. 125, para. 226; *Jean and Bosico v. República Dominicana* [8 September 2005] Judgment, Series C No. 130, para. 235;

[528] *Palamara-Iribarne v. Chile* [22 November 2005] Judgment, Series C No. 135, para. 234; *García-Asto and Ramírez-Rojas v. Perú* [25 November 2005] Judgment, Series C No. 137, para. 248; *Acevedo- Jaramillo et al. v. Perú* [7 February 2006] Judgment, Series C No. 144, para. 296; *Sawhoyamaxa Indigenous Community v. Paraguay* [29 March 2006] Judgment, Series C No. 146, para. 197; For example search and identification of persons disappeared or killed, delivery of the body: *Juan Humberto Sánchez v. Honduras* [7 June 2003] Judgment, Series C No. 187 (IACHR); Elizabeth Jelin, 'Public Memorialization in Perspective: Truth, Justice and Memory of Past Repression in the Southern Cone of South America' (2007) 1 IJTJ 138

contrast, the ECHR's approach to reparations has been cautious. Arrangements for compensation must strike a fair balance between individual interests and the general interests of the community, which implies that a state should not unduly postpone the adoption of rules that would determine the amount of compensation.[529]

In addition, reparations schemes suffer from the same challenges facing the right to justice and truth, that it may not be possible to provide them to all individuals or communities who have suffered gross violations of human rights in a situation of mass conflict. Despite the broad support for reparations in international law and the potential benefit of their symbolism, international law is largely silent on the issue of reparations *as a process.* The existence of a right to compensation under international law does not imply the existence of an appropriate enforcement mechanism for this right. The Judges of the ICTY stated: "The question then is not so much is there a right to compensation but how can that right be implemented."[530] Neither Article 3 of the Hague Convention (IV) of 1907 nor Article 91 of the Additional Protocol I foresees a mechanism by which an individual could enforce the rights it purported to grant. Victims' right to reparation in the Rome Statute are limited by the procedures and discretion of that court and its prosecutor.[531] As a consequence, international law on reparations is silent on how this process relates to broader processes of socio-economic rights and development processes. Nor does international law necessarily relate formal reparation from the State to acts of reparation by individual perpetrators.

The process of reparations delivery is often cited as a crucial element of restoring the trust of individuals to the State. The mechanisms from international human rights bodies are varied, but often give states a discretion in how to implement remedies beyond direct monetary payments. This is necessarily a fluid understanding of process as an element of reparation, but one that international law may beneficially address, allowing for the specifics of different legal traditions and systems. In this sense the contributions of international law must be viewed as indirect and

---

[529] *Wos´ v. Poland,* App. No. 22860/02, ECtHR (dec.) (1 March 2005), sec. 95; *Kostka v. Poland*, App. No. 29334/06, ECtHR (16 February 2010), sec. 63–64; *Kiladze´ v. Georgia,* App. No. 7975/06, ECtHR (2 February 2010), sec. 71

[530] Victims' Compensation and Participation, Appendix to the Letter from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2000/1063, 12, para. 22.

[531] Article 75 of the Rome Statute in conjunction with Rule 94 of the ICC Rules of Procedure and Evidence127 and Article 82(4) of the Rome Statute provide procedural rights for the victim: he/she has the right to make a request for reparation in the proceedings and the right to appeal any such order for reparation. The victim cannot initiate a criminal case; it is up to the exclusive discretion of the Prosecutor; and he/she will only undertake such initiations if the violations are within the jurisdiction of the Court. If the victim of an armed conflict is harmed by an act constituting a crime within the jurisdiction of the ICC, he/she is able to enforce his/her right to compensation before the Court.

the actual dynamics of reparations arrangements reflect the variety of circumstances that exist in particular states.[532] The diffuse nomenclature involved in reparations suggests their continued use as an instrument rather than generating a coherent set of substantive concepts in international law. Nonetheless, the international legal expression of the range of remedies constituting reparations may enhance credibility and external legitimacy to particular claims for reparation. In particular, non-monetary forms of reparation, such as public apologies and State acknowledge, contribute to the restoration of a sovereign political community under the concept of transition discussed in prior chapters. Legal provision of such remedies legitimises and strengthens these methods of reparation in addition to more traditional compensatory forms. When dealing with widespread or systematic crimes, these forms of reparation assume especial significance.

The right to reparations has developed to enable sophisticated remedies, including compensation from regional human rights tribunals. The present approach suffers from the common defect of mass recipients for mass crimes, but also reflects a distinct concern for the process of reparations as well as the intended outcome. The prioritisation of process of reparation places great stock in the potency of law's capacity for symbolism and force as an element in the transformation of social norms, but also on the continued need for each society to fashion an administrative response that addresses this concern. The existing elements of regional jurisprudence that support processes are not directly focused on building trust or acknowledgment of harm within the process, apart from direct components such as apologies. Nor does international or regional jurisprudence relate reparations to socio-economic, SSR or developmental processes. As a consequence, there is greater scope to pursue the values of reparation in reformed international law, but international law does not prompt such integration at present.

D. Amnesties

There remains tension and incoherence between the duty to prosecute, the right to truth, the right to an effective remedy in international law and the current approach to amnesty for gross violation of human rights. The practice of amnesty as a means of securing peace in a post-conflict or post-authoritarian context is well documented.[533] Article 6(5) of Additional Protocol II to the Geneva Conventions encourages states to provide amnesty in some circumstances at the cessation

---

[532] Falk, Reparations, International Law, and Global Justice, in Pablo De Greiff (ed) The Handbook of Reparations (PUP 2006), 485

[533] Louise Mallinder, Amnesty, Human Rights and Political transitions: Bridging the Peace and Justice Divide (Hart Publishing 2008)

of hostilities.[534] The relevant International Committee of the Red Cross (ICRC) commentary states: "The object of this sub-paragraph is to encourage gestures of reconciliation which can contribute to re-establishing normal relations in the life of a nation which has been divided."[535] However, it does not provide any guidance on the types of amnesties that would be legally admissible or inadmissible in response to internal armed conflicts.[536]

Amnesties continue to be used and proposed in transition, though there is growing consensus that amnesties for gross violations of human rights are impermissible as a matter of international law. This is most clearly evidenced in the position taken by the United Nations, first expressed in its signature to the Lome Accord with regard to Sierra Leone and confirmed as the position of the organisation in subsequent reports of the United Nations Secretary General.[537] However, there is relatively little broader customary international law on the legitimacy of amnesties.[538]

Legal support for the international legal illegitimacy of amnesties for gross violations of human rights can be found most prominently in the Inter-American Court, which has struck down amnesties for gross violations of human rights in a number of cases.[539] Support can also be found in the jurisprudence of the *ad hoc* international criminal tribunals.[540] Further support can be found from the UN Human Rights Commission.[541] Despite these positions, a sufficiently general practice prohibiting amnesty for gross violations of human rights is still crystallising and does not yet

---

[534] "At the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained. "

[535] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Commentary, 1356

[536] Ronald C. Slye, The Legitimacy of Amnesties under International Law and the General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible? 43 VA. J. INT'L L. 173, 191–97 (2002)

[537] *Prosecutor v Kamara* (2004 SCSL) decision on amnesty

[538] Ronald C. Slye, The Legitimacy of Amnesties under International Law and the General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible? 43 VA. J. INT'L L. 173, 191–97 (2002).

[539] Case of *Almonacid-Arellano et al v. Chile.* Judgment of September 26, 2006; Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil, Inter-American Court of Human Rights (IACrtHR), 24 November 2010

[540] *The Prosecutor v. Anto Furundzija*, International Criminal Tribunal for the former Yugoslavia IT-95-17/1-T, Judgement (Trial Chamber, 10 December 1998), para. 155

[541] Resolutions E/CN.4/RES/2003/72, paras 2, 10; E/CN.4/RES/2002/79, paras 2, 11; E/CN.4/ RES/2001/70, para 2; E/CN.4/RES/2000/68, para 4; E/CN.4/RES/1999/34, para 4; E/CN.4/RES/ 1998/53, para 4

embody an unequivocal rule of customary international law.[542] Furthermore, existing legal *dicta* on the impermissibility of such amnesties fail to display any awareness of the tension between the duties to investigate and prosecute and the mass nature of international crimes. The Inter-American Court has stated:

> All amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to *prevent the investigation* and punishment of those responsible for serious human rights violations...

Tension and incoherence may therefore exist between the right to truth and amnesties, to the extent that this right is predicated on the eventual prosecution of such offences. Both the European Court of Human Rights and the Inter-American Court of Human Rights have stressed that the investigation should be *capable* of identifying those responsible for the violations.[543] In *The Citizen 1978 (Pty) Ltd and Others v Robert John McBride,* the South African Constitutional Court held that a grant of amnesty did not make the facts of gross violations of human rights, in this case a murder, untrue.[544] Furthermore, the Inter-American Court has struck down such amnesties as contrary to victims rights' and the duties on the State to investigate and prosecute. However, this position may not sufficiently acknowledge the reality of a limited range of possible prosecutions in transitions. Therefore, while there is no legally endorsed impunity, there is the potential for *de facto* impunity for those offences not prosecuted - which will be the majority of offences committed in the circumstances of mass atrocity and violence. Acknowledging this reality may encourage States and practitioners to develop a response in international law to this tension. In particular, the present position of international law is fragmented from relevant practices of disarmament, demobilisation and reintegration (DDR) and the use of conditional amnesties, involving truth telling or acts of reparations by perpetrators, that may contribute to the goals of transitional justice. At present, opportunities for such coherence remain available in specific societies.

---

[542] Louise Mallinder, Amnesty, Human Rights and Political transitions, (n504) 406

[543] ECtHR: *Case Finucane v the United Kingdom* , Judgment of 1 July 2003, para 69; *Case McCann an d other v the United Kingdom*, Judgment of 27 September 1995, Series A no 324, para 161; *Case Kaya v Turkey*, Judgment of 19 February 1998, Reports1998-I, para86; *Case Assenov v Bulgaria*, Judgment of 28 October 1998, Reports 1998-VIII, para 102; *Case Ogur v Turkey,* Judgment of 20 May 1999, Reports 1999-III, para 88; I/ACtHR: *Case Juan Humberto Sánchez v Honduras*, Judgment of 7 June 2003, Series C No. 99, para 186; *Case Tibi v Ecuador*, Judgment of 7 September 2004, Series C No 114 para 15

[544] *The Citizen 1978 (Pty) Ltd and Others v Robert John McBride Case* CCT 23/10 [2011] ZACC 11 (Decided on 8 April 2011); Therefore the applicant newspaper was entitled to describe Mr. McBride, who was granted amnesty for that murder, as a "murderer."

Reconciling amnesties with the duty to prosecute and right to truth may remain contextual and operate without coherent guidance from international law. While the United Nations will not endorse amnesties for gross violations of human rights, such amnesties remain active components of political discussions in modern transitions. As a consequence, the possibility of a principled use of amnesty coexists with the risk of a self-amnesty incoherent and inconsistent with obligations to seek truth, prosecute and provide reparations. Both remain at the discretion of individual States.

E. Conclusion

Across the the different rights and obligations of transitional justice some broad themes emerge. International law has acknowledged but struggled to respond to the mass scale of international crimes. Limited legal consciousness about their mass nature of these offences is in tension with an individual right to truth, justice and reparation. Acknowledgment of group or social rights to truth and reparations emerges primarily in Inter-American jurisprudence. An acknowledgment of the social dimension of international crimes is implicit in modes of joint and command responsibility in international criminal law, but is limited in the process components of a right to reparation and the social and group aspects of the right to truth. The most significant fragment however remains between the combined rights to truth, justice and reparation and the ongoing permissibility of amnesty for gross violations in international law. Despite some support for prohibiting such amnesties, little customary legal support exists for nuanced alternatives incorporating conditional components of other fields and the capacity to receive partial amnesty or other forms of leniency for compliance with the constitutive rights of transitional justice. Nor does international law in this area explicitly link amnesty or processes of reparation to other relevant fields, notably SSR or development.

III. International Law on Peace-Building

The concept of peace-building and the specific sub-category of peace agreements experience an uncertain status in international law. Peace-building activities appear largely context driven and as such offer few clear areas of crystallising international law and norms.[545] In light of the desirability of under-theorised and constructively ambiguous concepts in peace-building theory, it is possible that minimal international legal regulation may be appropriate. Nonetheless, some general trends and discrete issues can be identified.

---

[545] Carsten Stahn, "Jus Post Bellum: Mapping the Discipline(s)", in Carsten Stahn and Jan Kleffner (eds) Jus Post Bellum: Reflections on a law of transition from conflict to peace, TMC Asser Press/CUP (2008), 93-112

Peace-building seems to find a home in the broader framework of self-determination in international law. The right of self-determination emerged largely in the context of decolonisation, informed and limited by the competing values of the non-disruption of territorial integrity and *uti possidetis*.[546] Beyond the decolonisation context, the application of self-determination has been problematic. It has morphed from a substantive right to be free from colonial rule to a procedural right to participate in political affairs and be entitled to democratic governance. It can now be conceived as a right of "peoples", still a largely undefined term, to take part in decisions affecting their future.[547] Christine Bell takes the view that this form of "hybrid" self-determination informs the peace-enables the use of peace agreements as incompletely theorised agreements, which can be constructively ambiguous, enabling both the pursuit of detailed short term goals and the establishment of long-term constitutional discourses and agendas.[548]

Peace agreements still lack any definition in international law. Some peace agreements appear to be treaties.[549] Armed opposition groups and indigenous peoples are also afforded some international legal personality as subjects of international law.[550] Parties to a conflict that were not states at its onset can have attained that status by the time a peace agreement is reached. However, other agreements signed directly with non-state parties would seem to fall outside the strict definition of a treaty under the Vienna Convention, posing the question as to what legal status, if any, such agreements have.[551] Other peace agreements are constitutional in nature. Peace agreements are drafted in an attempt to use a legal form and appear to evidence an intent to be legally bound. However, these aims are somewhat frustrated at present by the limits of traditional legal categories, and in particular the difficulty of fitting direct agreements between state and non-state parties into those categories.

---

[546] Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (n25), 35-9

[547] Jan Klabbers, "The Right to be Taken Seriously: Self-Determination in International Law" Human Rights Quarterly 28 (2006) 186–206

[548] Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (n25), 163-9

[549] ibid 128

[550] ibid

[551] Christine Bell, "Peace Agreements: Their Nature and Legal Status," (2006) 100 (2) American Journal of International Law 373–412

The primacy of consent in peace agreements reflects the importance of their legitimacy as both representative and democratic.[552] Yet where victims of gross violations of human rights do not have sufficient political clout to influence peace negotiations, the legitimacy of such agreements may be called into question. As a consequence "international lawyers could consider whether standards should exist on who should be at peace talks, drawing on the same notions of legitimacy, accountability, and representation which more internally driven processes use."[553] Furthermore, peace agreements without supervisory or monitoring mechanisms have the potential to lapse into vague elite bargains. International law can play an important role in shaping the postures of parties to a peace agreement in a constructive fashion, by setting minimum sets of standards external to the parties, but also destructively, where parties refuse to acknowledge the need or relevance of such standards.[554]

Beyond peace agreements, the consent of the affected State remains the primary legal basis for peace-building operations generally, whether peace-keepers or interim administration, or merely the engagement of donors and international organisations. In the absence of sovereign consent, Security Council authorisation has been used to secure the implementation of peace-building activities in transitional circumstances. According to Article 24(1) the United Nations Security Council bears primarily responsibility for international peace and security. Under Article 39 of the UN Charter, the United Nations Security Council has employed "a threat to the peace" as a criterion for a wide range of international interventions in fragile states and political transitions, including the authorisation of peace-building operations. As a consequence a wide range of measures, not amounting to armed force, are permissible under Article 41. Such measures may include international territorial administrations, as well as other forms of international peace-building activities. However, the implementation of measures under Article 41 depend upon the will and capabilities of the member States concerned.[555] The use of peacekeepers has been a significant feature of the recent life of the United Nations, yet remains a legally problematic issue, where peacekeepers seek to restore good order and the rule of law, yet remain largely

---

[552] ibid, 209-13

[553] Christine Bell, Peace Agreements and Human Rights (OUP 2000), 317

[554] ibid 313

[555] Bruno Simma (ed.). *The Charter of the United Nations: A Commentary* Vol. I.(OUP 2002) 746

unaccountable to the affected State and society for their actions.[556] The United Nations enjoys a long heritage and engagement for building peace through its peace keeping operations.

Third, one of the UN organs most directly relevant to issues of fragility is the recently established Peacebuilding Commission.[557] In *"In larger freedom: towards development security and human rights for all"*, the Secretary General identified an institutional gap in the United Nations system: "no part of the United Nations system effectively addresses the challenge of helping countries with the transition from war to lasting peace."[558] The demand for such an institution is repeated in the report *A More Secure World.*[559] As a result, the 2005 World Summit outcome resolution of the General Assembly stated:

> Emphasizing the need for a coordinated, coherent and integrated approach to post-conflict peacebuilding and reconciliation with a view to achieving sustainable peace, recognizing the need for a dedicated institutional mechanism to address the special needs of countries emerging from conflict towards recovery, reintegration and reconstruction and to assist them in laying the foundation for sustainable development, and recognizing the vital role of the United Nations in that regard, we decide to establish a Peacebuilding Commission as an intergovernmental advisory body.[560]

The Peace-Building Commission was founded by concurrent resolutions of the Security Council and General Assembly.[561] Its stated purposes are: (a) to bring together all relevant actors to marshal resources and to advise on and propose integrated strategies for post-conflict peace-building and recovery; (b) to focus attention on the reconstruction and institution-building efforts necessary for recovery from conflict and to support the development of integrated strategies in order to lay the foundation for sustainable development; and (c) to provide recommendations and information to improve coordination of all relevant actors within and outside the United Nations, to develop best

---

[556] Annemarie Devereux, "Selective universality? Human rights accountability of the UN in post-conflict operations", in Brett Bowden, Hilary Charlesworth and Jeremy Farrall (eds), *The Role of International Law in Rebuilding Societies after Conflict* (CUP 2009) 198-217

[557] Richard Ponzio, T*he United Nations Peacebuilding Commission: origins and initial practice* (United Nations Institute for Disarmament Research (UNIDIR) 2007)

[558] UN GA Res 59/2005/Add.2 "In larger freedom: towards development security and human rights for all", para 2

[559] *A More Secure World,* (UN 2005) para 225; para 261

[560] 2005 World Summit Outcome Resolution A/RES/60/1, para 97

[561] UN GA Resolution 60/180 and UN SC resolution 1645 (2005) (20 December 2005)

practices, to help to ensure predictable financing for early recovery activities and to extend the period of attention given by the international community to post-conflict recovery.[562]

The advisory role of the Commission is confirmed in its authorising resolution in "post-conflict situations on the agenda of the Security Council with which it is actively seized, in particular where there is a United Nations mandated peacekeeping mission on the ground or under way."[563] This is justified by reference to the primary responsibility of the Council for the maintenance of international peace and security under the UN Charter. Therefore the influence of the Commission "stems entirely from the quality of its recommendations, the relevance of the information it shares, and its ability to generate additional resources for a conflict-affected state whose perceived importance on the international agenda has receded."[564] The appeal of a dedicated body to deal with issues of post-conflict transition to peace and peace building is obvious. Yet the challenge for the Commission remains in adding real value to an already vast system of strategic frameworks for states. The main challenge of the Peace-Building Commission is to maximise its impact on the ground to make the UN peace-building architecture an effective instrument of international collaboration in support of transitions.[565] As an advisory body, the Commission may contribute to better policy for UN missions, but is unlikely to generate further legal norms regarding peace-building. The policy frameworks of the UN and other international organisations are examined in the following chapter.

Peace-building remains fundamentally a political process. Limited legal norms directly impacting on peace-building processes reflect the on-going need for political deliberation and a contextual approach. In the face of ongoing theoretical contestation and ambiguity, and acknowledgment that certain of that contestation is desirable for peace-building, international law offers little concrete regulation for peace-building. The desire for flexibility and a contextual approach to peace processes is understandable and appropriate and is reflected in low level regulation of peace-building in international law at present. Nonetheless, one can question whether international misses an opportunity to identify linkages between issues of peace, justice, including distributive justice, and economic development in these circumstances. The current use of hybrid self-determination enables potential for constructive ambiguity to result in mere ambiguity and vagueness, thus weakening the force and effect of peace-building activities. In particular, issues of

---

[562] ibid section 2

[563] Resolution 60/180 and resolution 1645 (2005) of 20 December 2005

[564] Richard Ponzio, *The United Nations Peacebuilding Commission: origins and initial practice*, (n528) 8

[565] Vincent Chetail, Introduction in Vincent Chetail (ed), Post-Conflict Peacebuilding (n252) 16

second order accountability, for the monitoring of peace agreements and accountability of peace keepers, are notably absent from the current framework. The flexibility of peace building contrasts dramatically with the set of legal obligations in transitional justice. Though not necessarily opposed, the absence of peace-building regulation in international law must also account for a State's obligations in transitional justice to present a coherent account of a State's obligations. An entirely contextual and flexible approach contrasts sharply with stronger prescriptions in international law on transitional justice. This fluid approach of international law may enable coherence in the actions of States and the international community but does not prompt them to pursue it.

IV. International Law on Security Sector Reform

Security sector reform does not find unified or coherent expression in international law. Theoretical contestation and limited involvement of international lawyers in its practice may contribute to this. While such contestation is valuable for enabling each society to conceive of its own security needs and priorities, a number of areas with existing nascent international regulation may benefit from a more coherent approach. Other areas remain wholly without legal regulation. The majority of direct international legal regulation of security sector reform issues is at the level of soft law and is thus not strictly binding on States. However it may be indicative of broad trends in developing normative legal consensus that could reflect customary international law in the future. The general desirability of a broad normative framework of security sector reform in international law is reflected in *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, which provide "[S]tates must take all necessary measures, including legislative and administrative reforms, to ensure that public institutions are organised in a manner that ensures respect for the rule of law and protection of human rights."[566] The UN notes that SSR should be undertaken on the basis of a national decision, a Security Council mandate and/or a General Assembly resolution, the Charter of the United Nations and human rights laws and standards.[567]

Despite theoretical contestation, consensus in SSR theory has developed around a number of components of the concept. A fundamental component for all SSR strategies is democratic civilian

---

[566] Updated Set of principles for the protection and promotion of human rights through action to combat impunity E/CN.4/2005/102/Add.1

[567] *Securing peace and development: the role of the United Nations in supporting security sector reform Report of the Secretary-General* (n261) para 45

oversight over military and police forces.[568] Such oversight can be disaggregated to reflect executive, judicial and legislative components; no hierarchy emerges in limited international legal discussions. The ECHR has concluded that democratic oversight of the security sector is required under its Convention.[569] The Inter-American Commission on Human Rights has also recommended an independent, impartial and effective supervision of military police.[570] The UN Human Rights Commission called upon states to strengthen the rule of law by 'ensuring that the military remains accountable to democratically elected civilian government.'[571] The Human Rights Committee has recommended the primacy and control of civil over military authorities.[572] The Committee against Torture made similar recommendations.[573] However the absence of more detailed norms can be explained by considerable diversity in constitutional arrangements of the separation of powers and formation of parliaments in different legal systems.

A second recognised component of SSR is the need for a publicly accountable security sector. We can disaggregate this concept of accountability by reference to the police and military. Rules of military justice are a discrete area of regulation, with some nascent international norms.[574] The ECHR seeks to ensure the independence of any trial or procedure involving military personnel.[575] The Inter-American Court also requires trial by independent and impartial courts or tribunals.[576] Some offences such as enforced disappearances preclude trial by military tribunal.[577] The

---

[568] *OECD Handbook on Security Sector Reform: Supporting Security and Justice* (n141), 112-124

[569] *Harman and Hewitt v UK* (1992) 14 EHRR 657

[570] Report No. 55/01, Case 11.286 et al, *Aluísio Cavalcant i et al v Brazil*, 16 April 2001, para 168 (6).

[571] Resolution E/CN.4/RES/2000/47, 25 April 2000, para 1 (c) (ix).

[572] Concluding Observations: Romania, 28 July 1999. CCPR/C/79/Add.111. para 9; Concluding Observations: Lesotho, CCPR/C/79/Add. 106, 8 April 1999, para 14; Concluding Observations: El Salvador, CCPR/C/79/Add.34, 18 April 1994, para 8.

[573] Conclusions and Recommendations: Chile, 26 June 1995, A/50/44, paras 52-61, at 60 c).

[574] International Standard Principles Governing the Administration of Justice Through Military Tribunals, Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux (DCAF 2010)

[575] European Court of Human Rights, Judgment of 1 October 1982, Case of *Piersarck v. Belgium.* 207 Judgment of 9 June 1998, *Case of Incal v. Turkey,* Recueil 1998 - IV; European Court of Human Rights, judgments dated 28 October 1998, *Case of Ciraklar v. Turkey*, and 8 July 1999, case of *Gerger v. Turkey.* European Court of Human Rights, judgment dated 25 February 1997, *Case of Findlay v. United Kingdom*, paragraphs 74 to 77

[576] Inter-American Court of Human Rights, judgment of 29 January 1997, Series C N° 30, *Genie Lacayo v. Nicaragua;* Inter-American Court of Human Rights, judgment of 18 January 1995, *El Amparo Case*, Series C No. 19 (1995) Inter-American Court of Human Rights, *Durand and Ugarte v. Peru*, judgment of 16 August 2000, Series C No. 68,

[577] Enforced Disappearance Convention, A16(2); Inter-American Convention on Enforced Disappearance 1994, article IX

Commission on Human Rights and its Sub-Commission on the Promotion and Protection of Human Rights have adopted several resolutions urging States to exclude gross human rights violations from the jurisdiction of military courts.[578] The ICCPR Human Rights Committee concludes that the use military courts to try gross violations of human rights is incompatible with the articles 2(3) and 14 of the ICCPR.[579] Thus for the trial of gross violations of human rights, the preponderance of international law affirms the need for trial by an independently established judiciary. For the trial of disciplinary offences not amounting to such violations, international law seeks to discretely regulate military and police forces.

In contrast, the accountability of the military during armed conflict is ensured through the application of international humanitarian law, principally the four Geneva Conventions and two Additional Protocols. As a consequence, the obligations to prevent and punish gross violations of human rights, as well as associated rights and remedies will be of relevance to the security forces. We can therefore also integrate international human rights law as a relevant component of the international legal regulation of the security sector more generally. The relationship between these two broad areas of international law, human rights and humanitarian law, is beyond the scope of this paper to consider, with well-documented debates and judicial pronouncements upon their compatibility and interaction.[580] However, international law is largely silent on the peacetime role of the military, offering states discretion in identifying a constitutional role for the military.

In contrast to an autonomous regime governing military operations during armed conflict, a broad suite of guidelines provide best practice standards for police at the level of soft law. Some guidelines seek to provide an overall framework of best practice for law enforcement officials.[581] This includes standards to ensure the minimum and appropriate use of force in law

---

[578] Resolution 1994/67, "Civil Defence Forces", paragraph 2.; Resolution 1994/39, paragraph 21; E/CN.4/Sub.2/2000/ WG.1/CRP1, E/CN.4/Sub.2/2001/WG.1/CRP3 and E/CN.4/Sub.2/ 2002/4.

[579] United Nations document CCPR/C/79/Add.13, 28 December 1992, paragraph 7. 5, paragraph 10. 6; United Nations document CCPR/C/79/Add.15 - A/48/40, 28 December 1992, paragraph 369. 7;United Nations document CCPR/C/79/ Add.66, 24 July 19996, paragraph 10. 8; United Nations document CCPR/SR.1519 and CCPR/C/SR.1521. 9 United Nations document CCPR/SR.1519, paragraph 49. 10 United Nations document CCPR/C/SR.1521, paragraph 6.

[580] Christian Tomuschat, "Human Rights and International Humanitarian Law" (2010) 21(1) EJIL 15

[581] UN Code of Conduct for Law Enforcement Officials; UN Guidelines for the effective implementation of the Code of Conduct for Law Enforcement Officials; UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

enforcement.[582] Others seek to provide standards of behaviour for security sector officials in arresting and dealing with prisoners and detained persons.[583] Other international conventions and soft law instruments instruct security sector actors to specific actions for the prevention and investigation of named offences, such as enforced disappearances, torture and summary executions.[584] Furthermore, cross-cutting norms of human rights law, such as non-discrimination apply to security sector forces, and find particular expression in these guidelines, supplementing conventional human rights law.[585]

Beyond these obligations that accrue to individual members of the security forces, and to the State, security sector reform is also distinctively concerned with security sector governance. The management of the sector can be considered an object of international legal regulation as an aspect of broader concern for governance in international law. International law's concern with governance is reflected in a number of treaties prohibiting offences relating to public sector corruption.[586] Today there exists an armory of international treaties that provide intricate solutions to effectively prohibit, prosecute and punish those who engage in corruption, in addition

---

[582] UN Code of Conduct for Law Enforcement Officials (Article 3), UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Principles 4, 5, 6 and 9-14)

[583] UN Standard Minimum Rules for the Treatment of Prisoners (hereafter referred to as StandardMinimum Rules); UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (hereafter referred to as Body of Principles); UN Rules for the Protection of Juveniles Deprived of their Liberty

[584] UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions; UN Declaration on the Protection of All Persons from Enforced Disappearances; UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; UN International Covenant on Civil and Political Rights; UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

[585] UN Code of Conduct for Law Enforcement Officials (Articles 1,2,5), Beijing Declaration and Platform for Action (paragraph 2.2.4)

[586] Gofur, A Panoptic Study of Corruption (2006) 1(1) Opticon1826 27; See GA Res. 3514 (XXX) (15 December 1975); UN Declaration against Corruption and Bribery in International Commercial Transactions, GA Res. 51/91 (16 December 1996); UN International Code of Conduct for Public Officials, GA Res. 51/59 Annex (12 December 1996); UN Manual on Anti-Corruption Policy (1992); Plan of Action for the Implementation of the Vienna Declaration on Crime and Justice (x 16 of the Vienna Declaration); Lindgren, The Theory History and Practice of the Bribery Extortion Distinction (1993) *141 U. Pa. L. Rev. 1695;* GA Res/55/61 "An effective international legal instrument against corruption"

to recovering their ill-gotten gains.[587] This international legal consensus culminated in the United Nations Convention against Corruption, which purports to provide the basis for a comprehensive and universal international legal prohibition of corruption.[588] Some regulations are specific to the security forces.[589]

In addition, a number of discrete issues have found international legal regulation. In the 1949 Geneva Conventions children were protected as members of the civilian population and therefore, by definition, as non-participants in the armed conflict. Under the Optional Protocol to the Convention on the Rights of the Child regarding children in armed conflict, nobody younger than 18 can be recruited into armed groups. Under Additional Protocols to the four Geneva Conventions of 1949 (1977), 15 is the minimum age for recruitment or use in armed conflict. The prohibition on child soldiers generates a corresponding offence under the Rome Statute of the International Criminal Court.[590] The Special Court for Sierra Leone also considers child recruitment under the age of 15 as a war crime based on customary international law.[591] Furthermore, for issues of disarmament, demobilisation and reintegration (DDR) as a security sector reform practice, each mission-specific mandate for DDR is established through a unique Security Council resolution.

---

[587] *United Nation Convention Against Corruption,* (2003) U.N. Doc A/58/422; The African Union Convention on Preventing and Combating Corruption and Related Offences, 2003; Convention on the Protection of the European Communities' Financial Interests, 1995 OJ (C316/49); Protocol to the Convention, 1996 OJ (C313/2); Second Protocol to the Convention, 1997 OK (C221/12); OAS Inter-American Convention against Corruption (IACAC), March 29 1996, (1999) 35 ILM 724; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, December 19, 1997 (1998) 37 ILM 1; for a view that the combined weight of these conventions renders corruption a crime against humanity see Bantekas, "Corruption as an International Crime and Crime Against Humanity" (2006) 4 JICJ 466-484

[588] See United Nations Office on Drugs and Crime, "Legislative Guide for the Implementation of the United Nations Convention against Corruption" available at http://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf (last visited 03-09-08); Low, What the UN Convention on Anti-Corruption will Mean, Prepared for a Conference of the International Bar Association, International Chamber of Commerce, Organization for Economic Cooperation and Development "The Awakening Giant of Anticorruption Enforcement" London, England 4-5 May 2006; Ravindran, R. Rajesh Babu Babu, "The United Nations Convention Against Corruption: A Critical Overview" (March 1, 2006). Available at SSRN: http://ssrn.com/abstract=891898; Webb, "The United Nations Conventions Against Corruption: Global Achievement or Missed Opportunity?" (2005) 8:1 J. Intl Econ. L. 191 at 221

[589] INTERPOL Code of Conduct and Ethics for Law Enforcement Officers; The Global Standards to Combat Corruption in Police Forces/Services

[590] Article 8(2)(b)(xxvi); Article 8(2)(e)(vii).

[591] *The Prosecutor vs. Brima, Kamara and Kanu* (AFRC Case)

Policy level guidance for DDR and United Nations practices in SSR more generally are considered in the subsequent chapter.[592]

By contrast, international law is completely silent on some areas of security sector reform. There are no norms regarding the interaction of formal security sector actors with traditional or non-formal sources of law or authority. There is little international legal expression of the relationship between police and military forces. Similarly, there are merely emergent soft norms on the civil-military relationship of international actors engaged in transitions. This issue is particularly pronounced in security sector reform, where military actors are more likely to be engaged in support activities.

International legal regulation of security sector reform remains diffuse. The conduct of military forces in armed conflict has long been governed by international humanitarian law. Similarly the obligations of security forces to be held to account for human rights violations in civilian courts reflects a significant component of judicial oversight and accountability of such forces and is supported by extensive case law in international law. The firm support for these components reflects the strong regulation present in transitional justice. This approach is negative in denying States the legality of military jurisdiction for human rights violations in international law, but offers them broader discretion in the positive means by which they may affirm rights to a trial by an impartial and independent judiciary. However, other areas of SSR, such as the interface with police, intelligence and other law and enforcement agencies, remain unregulated. In particular, the operations and role of military forces in peacetime is ill-defined. Regulation of the police and other law enforcement institutions largely occurs at a soft law level, with some customary law regarding democratic oversight of security, and in particular intelligence, institutions. Such an approach to regulation gives little guidance to policymakers and transitional societies in their reform efforts. While reflecting ongoing and healthy conceptual contestation in SSR theory, the technical nature of SSR, and the absence of standards in some discretely technical areas, such as police-military relations, means the fluidity and ambiguity valued in peace-building, may not be as valued here. As a consequence, the field of SSR remains at risk of incoherence in international law and may benefit from greater international legal regulation on technical matters. The systemic nature of SSR across discrete institutions and components of the state, means that its international legal regulation is likely to remain diffuse, but, if appropriately managed, need not reduce to incoherence. The

---

[592] United Nations Department of Peacekeeping Operations (DPKO), Integrated Disarmament, Demobilization and Reintegration Standards (IDDRS) (New York: DPKO, 2006), United Nations, "Disarmament, Demobilization and Reintegration: Report of the Secretary-General," A/60/705 (March 2, 2006)

fluidity and contingency of regulation in both peace-building and SSR means that coherence *can* be achieved in a given transition, but that international law will not play a significant role in orientating parties towards it.

V. International Law on Development

There is little if any consensus or coherence in international law on development.[593] The concept of development, and in particular the idea of a right to development as a matter of international law are contested and controversial concepts. Furthermore, as a general concept, international regulation of development lacks the direct applicability to transitions of the other fields examined. As a consequence of its broad and contested regulation, it is not likely to be a priority in a State's consideration of its international legal obligations in transition. Due to ideological deadlock that dominated UN organs for much of the 20th century, development has not crystallised as a matter of international law. Development was included in the Universal Declaration of Human Rights.[594]

A variety of soft law instruments declared and affirmed a right to development.[595] The most prominent of these is the 1986 Declaration on the Right to Development, which states "development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom."[596] This Declaration was drafted in contentious circumstances, with the United States abstaining and OECD countries arguing against the recognition of an express right to development in international law.[597] The Vienna Declaration on Human Rights 1993 re-affirmed the right "as a universal and inalienable right and an integral part of fundamental human

---

[593] For a variety of views, see Arjun Sengupta, "On the Theory and Practice of the Right to Development" Human Rights Quarterly 24 (2002) 837–889; Phillip Alston, "Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals" Human Rights Quarterly 27 (2005) 755–829; Laure-Hélène Piron, "The Right to Development: A review of the Current State of the Debate" Report for the Department for International Development (DFID) (2002)

[594] Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), Article 28

[595] 1957 General Assembly (GA) Resolution 1161 (XII); 1968 Teheran International Conference on Human Rights; 1969 Declaration on Social Progress and Development; 1977 Commission on Human Rights resolution 4 (XXXIII); 1993 Vienna World Conference on Human Rights Para. 10; Principle 3, Rio Declaration; Article 23, Declaration on the Rights of Indigenous People

[596] Declaration on the Right to Development A/Res/41/128; see further Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (the Protocol of San Salvador), adopted on 14 Nov. 1988

[597] Arjun Sengupta, "On the Theory and Practice of the Right to Development" (2002) 24 Human Rights Quarterly 837–889, 840

rights."[598] In particular, the Declaration noted "the lack of development may not be invoked to justify the abridgement of internationally recognized human rights". In addition, "The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generation." Furthermore, Article 22 of the African Charter on Human and Peoples' Rights states "(1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. (2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development."[599] Weighing these provisions, no enforceable legal right to development can be said to exist in international law. Efforts at the codification of a right to development appear to have run aground and are not supported by extensive secondary practice. The right has largely stood in legal abeyance subsequently, despite significant international interest in development, most notably the Millennium Development Goals.[600] In 1998 an Open-Ended Working Group was created by the UN Commission of Human Rights, and an Independent Expert was called to present analysis and studies regarding the content of this right, followed in 2004 by an High Level Task Force and subsequent reports.

Despite this significant disagreement regarding the status of a right to development, three trends can be identified related to development in international law. First, efforts have been made to integrate development and human rights. If the right to development is the realisation of all human rights, it is a tautology; if it is the realisation of socio-economic rights alone it is a categorisation but remains tautologous: "For all their conceptual sophistication and undoubted importance, these frameworks and checklists appear to the latter to offer little guidance in concrete situations and to gloss over many of the complexities of real world decision making and trade-offs."[601] Others seek merely to base development programming in the values and principles of international human rights law.[602] Such scholarship on the right to development has sought to incorporate rights based approaches to development: "the right to development is more than

---

[598] Article 3, Vienna Declaration on Human Rights, 1993

[599] African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986

[600] Phillip Alston, "Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals" (2005) 27 Human Rights Quarterly 755–829

[601] ibid 802

[602] See the differing treatment of human rights and development compare James Wolfensohn, "Some Reflections on human Rights and Development" in Alston and Robinson (eds) Human Rights and Development: Towards Mutual Reinforcement (OUP 2005) and Amartya Sen, Development as Freedom (Anchor Books, 1999), 227-48

development itself; it implies a human rights approach to development."[603] Furthermore, existing drafting suggests that the right to development would also operate as a *process* right "in which all human rights and fundamental freedoms can be fully realised."[604] Issues of development beyond these rights, such as economic growth and the prioritisation of local ownership and consultation are not necessary elements of the existing international human rights framework. Attempts to house them within the framework of a right to political participation or self-determination rely on emergent legal ideas, not yet fully accepted or realised in international law.[605] In addition, international law must ascertain subjects of such a right: duty bearers from whom the right can be enforced, as well as the broad range of rights holders. For instance, literature on the right to development is largely silent on recommendations for suitable accountability mechanisms to allow rights holders to hold duty holders to account.[606] It also remains unclear how international development organisations would be integrated into such an approach, given that they are not bound by international human rights treaties.[607] As a consequence of these difficulties, the significance and relevance of human rights for development has yet to have a systematic or coherent impact on local level practice.[608]

Second is the general trend in development practice in the incorporation of governance as a primary constitutive element of modern theories of development. Two broad elements have emerged: the democratic legitimacy of government and governance and character of "good" governance. Traditionally, the form of the political regime of each state was considered to be unconstrained by international law.[609] An early exception existed for apartheid regimes.[610]

---

[603] E/CN.4/1995/11, 4 September 1994, para 44

[604] A/55/306

[605] Phillip Alston, "Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals" (n571) 811

[606] *Right to Development* (DFID, 2002) 30

[607] ibd 13

[608] Phillip Alston, "Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals" (n571) 826

[609] ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, ICJ Rep., 1986, para. 261

[610] See International Convention on the Suppression and Punishment of the Crime of Apartheid (1973), 1015 UN Treaty Ser 243 (1976); International Convention on the Elimination of All Forms of Racial Discrimination (1965), art 3, 660 UN Treaty Ser 195 (1969). See also Security Council Res No 288, UN Doc S/RES/288 (1970); Security Council Res No 277, UN Doc S/RES/277 (1970); Security Council Res No 253, UN Doc S/RES/253 (1968); Security Council Res No 232, UN Doc S/RES/232 (1966); Security Council Res No 216, UN Doc S/RES/216 (1965); Security Council Res No 217, UN Doc S/RES/217 (1965); General Assembly Res No 1791, UN Doc A/RES/1791 (1962); General Assembly Res No 1598, UN Doc A/RES/1598 (1961); Security Council Res No 221, UN Doc S/RES/221 (1961).

However, especially since the collapse of the Soviet Union in 1989, scholars have sought to argue that democratic governance is a function of internal self-determination and that a popular entitlement to democratic governance as a feature of the modern international legal system. Jean d'Aspremont noted that "entities which have reached statehood in the last few years thanks to the support or the involvement of the international community have been induced to adopt democratic institutions."[611] In addition, the experience of international territorial administrations has resulted in the creation of democratic states such as Kosovo and Timor-Leste. In giving content to the right to democratic governance, others have sought to incorporate the right to free and fair elections, freedom of speech and association as constitutive elements of a democracy.[612] The scope of the principle of democracy in international law is limited, as the obligation only rests on a restrictive *electoral* and *procedural* understanding of democracy.

Second, the prohibition on corruption, discussed above with reference to security sector reform reflects international law's concern with good governance. This raises the significance of the right to participate in the political affairs of a State.[613] Moreover, the idea of governance and the rule of law raise the issue of the accountability and governance of the relevant donors and international organisations to the affected State and society.[614] Neither effort has resulted in broadly accepted state practice, but rather reflects developing norms. The discrete regulation of anti-corruption is well-developed, but other aspects of good governance, such as institutional reform, remain in the discretion of individual states. Furthermore, the right to democratic governance remains under-invoked, despite the continued use of free and fair elections as an evaluation of transitions. This issue does, however, interface significantly with policy frameworks for transitions and may thus continue to represent a nascent area of international law.

The third major trend is discussion on development as a vector around which other rights and issues, including governance, human rights, and sustainability/climate change can be considered. We could conceive of this set of issues operating on a scale from development as international

---

[611] Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union (1991) 62 British Yearbook of International Law 559, 559-60; Declaration on Yugoslavia (1991) 62 British Yearbook of International Law 559, 560-61.

[612] Gregory Fox, 'The Right to Political Participation in International Law' (1992) 17 Yale Journal of International Law 539; UDHR A21(3);

[613] Thomas Franck "The Emerging Right to Democratic Governance" 1992 American Journal of International Law 46

[614] Karel Wellens, "Fragmentation of International Law and Establishing an Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap" 25 Mich J Int L (2004) 1159; Robert Delonis, "International Financial Standards and Codes: Mandatory Regulation without Representation" 36 NYU J Int'l L & Pol (2004) 563

politics to development as a legal entitlement of poorer states, yet this seems to operate at a higher level of abstraction and disagreement than the self-determination processes in peace-building.[615] According to Arjun Sengupta, this vector has two main characteristics: the coherence with human rights approaches and the interrelatedness of rights.[616] One expression of this is the work of the Working Group on the Right to Development whose work examines criteria for evaluating global partnerships as described by the eighth Millennium Development Goal. Another expression of this idea is the concern to see differentiated treatment of developing nations in the Doha negotiations for the WTO. The most controversial aspect of development as a vector remains whether there is a legally binding obligation to provide international development assistance. This claim is derived from the suggestion that developed nations have a duty to make reparations to former colonies.[617] Donors attitudes continue to offer different justifications for development assistance, such as humanitarianism, enlightened self-interest and international solidarity.[618] While an action taken may be grounded in, and line with, the demands of the right to development, donor countries prefer to keep their commitments on a voluntary basis, seeking to avoid the perception that their approach is based on the right. In abiding by this practice, they are seeking to protect themselves against possible future demands by developing countries.[619] Such resistance means that issues of development may be more profitably considered by examining the legal institutional frameworks of international organisations and bilateral agreements and associated policy frameworks. Furthermore, in considering development as a vector, it remains unclear to see how development as a matter of international law and of donor programming is attuned to the specific circumstances of transition.

The general regulation of development is not directed to specific issues of transition. The right to development may enjoy growing academic interest, but remains strongly resisted by States. Despite references to human rights norms and values in development, the relationship between the two remains largely unrealised. In addition, the application of principles of governance reflect a tension between the transformative enterprise undertaken by donors and international institutions with the extent of their international legal rights or obligations. While the idea of

---

[615] Stephen Marks, "The Human Right to Development: Between Rhetoric and Reality" (2004) 17 Harv. Hum. Rts. J. 137

[616] A. Sengupta, Second Report of the Independent Expert on the Right to Development, Un Doc. E/CN.4/2000/WG.18/CPR.1, para 24

[617] Felix Kirchmeier, "The Right to Development - where do we stand?" Occasional Papers Friedrich Ebert Stiftung No. 22, 3

[618] OECD, *Shaping the 21st Century: The Contribution of Development Cooperation* (OECD 1996) 6

[619] Felix Kirchmeier, The Right to Development - where do we stand? (n588) 3

development remains of significant importance in transitions and global politics, international law fails to formally reflect that significance.

VI. Conclusion: International Law on Transitions as an Example of Fragmentation

We have considered the international legal regulation of four fields relevant to transitional circumstances. Each field demonstrates varying degrees of international legal regulation. As a result, when considered together, these fields are inconsistent as a matter of formal law and therefore largely fail to articulate a coherent foundation for a state's international obligations relevant to transitions. The acknowledged absence of a capacity to pursue truth, accountability or reparation against a significant majority of perpetrators or for a majority of victims remains a blemish on international law's claim to pursue social transformation of societies affected by gross violations of human rights. The law on transitional justice at least enjoys the advantage of partial legal consciousness of this limitation, which may prompt states and tribunals to consider new mechanisms to address this *de facto* impunity. In addition, ongoing tension between the rights of truth, justice and reparation and the provision of amnesty for gross violations remains a major incoherence in international law.

In contrast, the broad fluidity offered in peace-building and security sector reform reflect the desirability of a contextual approach for these sectors. This fragmentation of legal regulation reflect the suitability of discrete regulation of some areas, such as international humanitarian law, but fail to extend to cover issues such as civil-military relations, specific police obligations and democratic oversight of the security sector. While allowing for variation in domestic legal arrangements, such areas also offer the potential for principles of legal regulation. At a further level of abstraction, issues of development have been largely excluded from concrete international legal regulation, to the frustration of significant academic and civil society efforts. The absence of a conflict sensitive consciousness to these nascent legal discussions further inhibits the value of international law to issues of development in transitions. The posture of states in retaining a humanitarian and elective use of development ensures that development aid remains contingent on donor State willingness. Policy frameworks are thus the primary basis for examining the goals and commitments in this area. The absence of development in international law however means that the issue cannot be related to the other fields in international law, except in limited engagement with socio-economic rights.

In addition to these concerns internal to each field, international law does not explicitly link activities across fields, such as reparations and development, or conditional amnesties and reparation, SSR, or development. The broad and discretionary approach of peace building may enable these linkages, but does not create or suggest them explicitly. These tensions and challenges faced in the current relationship between these fields in international law are not merely matters of coordination and the absence of resources. Rather, they represent significant theoretical, moral and philosophical quandaries about how to engage in circumstances of mass violence and the break down of social trust and the rule of law - and whether it is appropriate to provide general regulation in international law. The current approach of the international community and affected States and societies has not yet resolved these dilemmas or offered a understanding of the relationship between them in legal materials and principles.[620] Each area of practice and discourse endures discrete and relational debates that seem unresolvable when based merely on their own set of values, concepts and laws, such as the amnesty issue in transitional justice. Opportunities to explicit link these fields are not taken in international law. As a result, the practice of integrity is not evident in existing international law and these tensions make the job of public officials and those of international organisations more challenging in applying this international law to a given transition. One wonders whether the relationships of these fields, if re-interpreted together and consciously integrated, may re-invigorate this set of principles and norms - and offer new solutions and legal mechanisms for age old problems of transitions.

---

[620] Jean L Cohen, "The Role of International Law in Post-Conflict Constitution-Making: Towards a Jus Post Bellum for "Interim Occupations" (2006–07) 51 New York Law School Law Review 497

Chapter V: International Policies for Transitions

I. Introduction

We have seen the limited role of international law in regulating the content of fields relevant to transition. In particular, we noted that peace-building and security sector reform were significantly under-determined in international law. International law on development struggled to codify a contested concept, and failed to articulate a distinct acknowledgment of the circumstances of transition. In contrast, transitional justice is significantly regulated in international law, but with limited guidance on the design and implementation of relevant institutions to discharge State obligations. As a consequence, international law partially enables responses to transition to vary depending on context and the domestic and international actors involved but does not prompt States and international actors to pursue a coherent response to transitions.

Further normative guidance beyond international law is therefore necessary to provide for coherent international engagement in transitions. In their assistance to transitional societies, international actors also operate on the basis of policy frameworks. This chapter examines the existing approaches of international institutions to engagement in fragile states and transitions in the areas of transitional justice, peace-building, security sector reform and economic development. This chapter seeks to identify common norms and limitations to the approaches pursued by these institutions. It will first examine any legal limitations that exist for these institutions under their constitutive documents. The chapter will then examine frameworks for each relevant field. This chapter concludes by eschewing recommendations for further substantive merger of the approach of international organisations, and rather identifies shared structural components, which offer a basis for a coherent evaluation of institutionally diverse actors.

II. Mandates and Limitations of International Organisations

A. The United Nations

A variety of United Nations organisations operate in fragile states and transitions. The role and mandate of the UN Security Council and UN Peace-Building Commission was considered in Chapter IV. This chapter will also consider those institutions, as well as the role of the United Nations Development Program (UNDP) and the Office of the High Commissioner of Human Rights (OHCHR). OHCHR is mandated to promote and protect the enjoyment and full realisation, by all people, of all rights established in the Charter of the United Nations and in international human rights law and

treaties.[621] The mandate includes preventing human rights violations, promoting international cooperation to protect human rights, and coordinating related activities throughout the UN. UNDP was established as a merger between the UN Special Fund and the Expanded Programme of Technical Assistance to play a central role in financing and coordinating development cooperation in the UN.[622] UNDP was not given a specific mandate but was to be guided by principles of universality, neutrality, and multilateralism. Its activities were to be based on the recipient countries' own development plans.[623] However, the subsequent experience of UNDP did not reflect a role as a primary coordinator of all UN actions, as donor governments never enabled UNDP to fulfilled its coordinating role.[624] In 1994, UNDP renewed its focus within the framework of Human Development.[625] Both organisations therefore align with the UNSC and Peace building commission in offering a broad and human rights based approach to engagement in transitions.

B. The World Bank

The World Bank Group was created in 1944 with the establishment of the International Bank for Reconstruction and Development (IBRD) and was mandated to support post-war reconstruction and development by facilitating capital investment for productive purposes and promoting balance of payments stability and the balanced growth of international trade.[626] The original purposes and context of the Bank therefore inherently relate to transitions. Despite the intensely political nature of transitions, the Bank's Articles of Agreement limit its mandate significantly. Article IV, Section 10 provides:

> "*Political Activity Prohibited*. The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I."

---

[621] High Commissioner for the Promotion and Protection of All Human Rights, G.A. Res. 48/141, U.N. GAOR, 48th Sess., Agenda Item 114(b), ¶ 4, U.N. Doc. A/RES/48/141 (1993)

[622] UN GA Res, The capacity of the United Nations Development System GA resolution 2688 (XXV) (1970)

[623] Dennis Dijkzeul,"The united nations development programme: The development of peace?", (1998) 5(4)International Peacekeeping, 92-119; Craig Murphy, *The UNDP: A Better Way?* (CUP, 2006)

[624] Dennis Dijkzeul, "The united nations development programme: The development of peace?" (n594)

[625] UNDP, Human Development Report 1994 (UNDP 1994)

[626] IBRD Articles of Agreement were drawn up at the United Nations Monetary and Financial Conference, at Bretton Woods, New Hampshire, July 1-22, 1944. The governing document became effective in Dec. 27, 1945 and has been amended twice. The first amendment was done in 1965 and the second in 1989.

Similarly, Article III, Section 5 (b) restricts political considerations in Bank financing by precluding "regard to political or other non-economic influences or considerations."[627] Ibrahim Shihata, the former General Counsel of the Bank, advised "[T]he Bank may, or even should, be able to elaborate on its mission and vision from time to time to meet the changing requirements of the world it serves, from a legal viewpoint the Bank's purposes, and consequently its legal capacity to act, must be based on the provisions of its constituent charter (the Articles of Agreement)."[628] This interpretative approach remains governed by "effectiveness (*effet utile*), reasonableness, good faith and the common interests of the organization and its members as a whole."[629]

The Bank has shifted from a narrow, exclusively economic interpretation of its Articles of Agreement to a broader, more controversial approach, which engages with governance and awareness of national political contexts. Bank legal opinion of its mandate concludes that the Bank should rely on an analysis of *all* the factors that can affect its investments and other activities.[630] In particular, such analysis can extend to include "the degree of political stability in the countries where it operates".[631] Bank legal opinion on human rights and their Articles of Agreement concludes: "It is therefore consistent with the Articles that the decision-making processes of the Bank incorporate human rights and any other relevant input which may have an impact on its economic decisions."[632] However, the Board of the Bank has not endorsed this 2006 opinion, giving it uncertain legal status. Due to the express prohibition on Bank interference in national political affairs, Bank evaluation of human rights and political stability in a country must be non-partisan, non-ideological and neutral.[633] This view of the Articles' political prohibition reflects the understanding of political interference in the context of the evolving international law on sovereignty.

---

[627] ibid

[628] Ibrahim Shihata, "Prohibition of Political Activities in the Bank's Work," (July 11, 1995) (hereinafter "Political Activities") at "Part II: Requirements of Relevant Provisions of the Articles of Agreement."

[629] Ibrahim Shihata, "Interpretation as Practiced at the World Bank" in *World Bank Legal Papers* (Martinus Nijhoff, 2000) at XLIV

[630] Legal Opinion of General Counsel on Human RIghts (on file with author), 4

[631] ibid 4

[632] ibid 5

[633] Legal opinion of General Counsel on Human Rights; World Bank Senior Vice President and Group General Counsel,'Legal Opinion on Peace-building, Security and Relief Issues under the Bank's Policy Framework for Rapid Response to Crises and Emergencies', Annex I in *Toward a New Framework for Rapid Bank Response to Crises and Emergencies*, World Bank Operations Policy and Country Services (World Bank 2007)

Bank legal opinion on peace-building, security, and relief issues notes that activities "such as peace-keeping, disarmament of combatants, negotiation of peace accords, or other political reconciliation processes, and organising and holding elections, would clearly be outside the Bank's legal authority."[634] However, at a member country's request, the Bank may support activities outside its traditional core competencies, such as peace-building, security and relief. The opinion notes that in the past the Bank had engaged for instance in reintegration of disarmed ex-combatants and de-mining operations. The opinion concludes that "there is not always a bright line test to determine those peace-building and security-type activities in which the Bank may legitimate engage."[635] This opinion demonstrates a new flexibility in the Bank's approach.[636] Nonetheless, a constructive interpretation of the World Bank's operations must remain consistent with its Articles of Agreement, its overarching objective of poverty reduction and its stated comparative advantage in specific tasks and operations.[637]

C. Organisation for Economic Co-operation and Development (OECD)

The OECD was founded by its Convention of 1960, to replace the Organisation for European Economic Cooperation formed to implement the Marshall Plan.[638] Its aims are:

> (a) to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;
>
> (b) to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and
>
> (c) to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.[639]

---

[634] World Bank Senior Vice President and Group General Counsel,'Legal Opinion on Peace-building, Security and Relief Issues under the Bank's Policy Framework for Rapid Response to Crises and Emergencies', (n604) para 14

[635] ibid, para 22

[636] World Bank Operations Policy and Country Services, *Toward a New Framework for Rapid Bank Response to Crises and Emergencies* (World Bank 2007); World Bank, 'Rapid Response to Crises and Emergencies', in *The World Bank Operational Manual: Operational Policies*, OP 8.00 (World Bank 2007)

[637] Nicole Ball, "Transforming security sectors: the IMF and World Bank approaches", (2001) 1(1) Conflict, Security & Development 46, 57-8

[638] Convention for the Organisation for Economic Cooperation, Paris 14th December 1960

[639] ibid, Article 1

The OECD may take binding decisions or recommendations by the mutual agreement of its Members and enter into agreements with States and international organisations.[640] No decision shall be binding on any Member until it has complied with the requirements of its own constitutional procedures.[641] The legal foundation of the OECD reflects a traditional, consensual international legal decision procedure. As a consequence, there are no international legal impediments to the OECD's activities within its original purposes.

D. European Union

The foundation of the European Union is well documented. A number of provisions of European Union treaties structure EU policy relevant to transitions. Article 3(5) of the Treaty of European Union (TEU) provides that in its external relations, the EU shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights.[642] Article 18 provides that the High Representative of the Union for Foreign Affairs and Security Policy shall conduct the Union's common foreign and security policy. Article 21 provides that in its foreign affairs the EU shall be guided by democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. Specific tasks authorised in the TEU include "joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation."[643] Title III of the Treaty on the Functioning of the European Union provides for cooperation on third countries and humanitarian aid. The EU has also adopted the Charter of Fundamental Rights of the European Union.[644] The EU has also acceded to the European Convention on Human Rights.[645] The EU therefore presents a legal foundation that explicitly incorporates many aspects relevant to transitions and can be seen as an enabling, rather than restrictive, legal framework. It is now incumbent to examine the policies of these institutions in each of the fields.

---

[640] ibid, Articles 5-6

[641] ibid, Article 6(3)

[642] Article 3(5) TEU

[643] Article 43(1)

[644] Charter of Fundamental Rights of the European Union 2000-12-18 C 364

[645] Article 6 §2 TEU

III. Transitional Justice

The leading proponents of international transitional justice policy are the United Nations and the European Union. The OECD has sought to integrate transitional justice into its existing frameworks on security and justice sector reform. These three institutions share an interest in supporting a full range of transitional justice institutions and significantly overlap on substantive support to transitional justice. The position of the United Nations on transitional justice is established in a 2004 report of the UN Secretary General.[646] The report identifies the normative boundaries for UN work on transitional justice as the UN Charter, international human rights law, international humanitarian law, international criminal law, and international refugee law.[647] The UN report goes on to examine the role of the UN in supporting the International Criminal Court. The processes of truth telling, vetting and reparations are also examined in the report. More detailed guidance on UN policy in these areas can be found in the OHCHR Rule of Law Tools for Post-Conflict States.[648] The OHCHR also submitted an analytical study on transitional justice to the Human Rights Council in 2009, which presents an examination of lessons learned and best practices.[649] A 2010 Guidance Note affirms the normative boundaries of the UN position on transitional justice, i.e. the UN will neither establish nor provide assistance to any tribunal that allows for capital punishment, nor endorse provisions in peace agreements that include amnesties for gross violations of human rights.[650]

A series of European Union framework decisions and guidelines demonstrate EU support for transitional justice, most commonly taking the form of support for international criminal justice, with the framework of the EU's Common Foreign and Security Policy (CFSP), the European Security

---

[646] United Nations Security Council. *Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies* (n213)

[647] ibid, para 10.

[648] OHCHR, Truth commissions (HR/PUB/06/1); Mapping the justice sector (HR/PUB/06/2); Monitoring legal systems (HR/PUB/06/3); Prosecution initiatives (HR/PUB/06/4); Vetting: an operational framework (HR/PUB/06/5); Reparations programmes (HR/PUB/08/1); The legacy of hybrid courts (HR/PUB/08/2); Rule-of-law Tools for Post-conflict States: Amnesties (HR/PUB/09/1); Rule-of-law Tools for Post-conflict States: National Consultations on Transitional Justice (HR/PUB/09/2)

[649] OHCHR, Analytical study of the HRC - Human rights and transitional justice A/HRC/12/18

[650] Guidance Note of the Secretary General, United Nations Approach to Transitional Justice, 2010, 4

and Defence Policy (ESDP) and the Cooperation Policy.[651] Two EU regulations in its Development Cooperation Policy make explicit reference to funding transitional justice.[652] In its democracy and human rights programme, EU support seeks to:

> ii) "strengthen the rule of law, promoting the independence of the judiciary, encouraging and evaluating legal and institutional reforms, and promoting access to justice;
>
> iii) promote and strengthen the International Criminal Court, ad-hoc international criminal tribunals and the processes of transitional justice and truth and reconciliation mechanisms;
>
> iv) support reforms to achieve effective and transparent democratic accountability."[653]

The EU Council Political and Security Committee has recommended formally adopting the 2004 UN report, but with particular emphasis on the need for planned coordination and exit strategies.[654] In addition, the EU Instrument for Stability provides funding to support "international criminal tribunals and ad-hoc national tribunals, truth and reconciliation commissions, and mechanisms for the legal settlement of human rights claims and the assertion and adjudication of property rights, established in accordance with international human rights and rule of law standards."[655] The European Contact Network enables the exchange of information in relation to individuals responsible of crimes of genocide, crimes against humanity and war crimes with a view to facilitating cooperation amongst those interested in investigating and pursuing serious international crimes.[656] Finally, the European Arrest Warrant aims to facilitate traditional extradition procedures between member states including for gross violations of human rights.[657]

---

[651] Agreement between the International Criminal Court and the European Union in cooperation and support (6 December 2005); Decision (2003/335/JHA) by the Council of the EU on the investigation and prosecution of genocide, crimes against humanity and war crimes (8 May 2003); Guidelines promoting compliance with international humanitarian law or the guidelines on torture and other cruel, inhumane and degrading practices.

[652] Regulation no 1889/2006 of the European Parliament and Council, from December 20, 2006 which established a financial instrument for the promotion of global democracy and human rights; The European Parliament and Council regulation of November 15, 2006 which established an Instrument for Stability.

[653] REGULATION (EC) No 1889/2006 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 December 2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide, Article 2(1)(a)

[654] Committee for Civilian Aspects of Crisis Management Political and Security Committee, Transitional Justice and ESDP, Brussels, 19 June 2006 10674/06 para 4; 5

[655] REGULATION (EC) No 1717/2006 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 November 2006 establishing an Instrument for Stability

[656] European Contact Network European Council Decision, 2002/494/JAI, 13th of June 2002.

[657] European Arrest Warrant Official Journal of the European Communities, L 190/1-20, 18th of October 2002

The OECD position on transitional justice policy emerges from its broader work on fragile states and security sector reform considered below. OECD policy recommend transitional justice as part of reform of security and justice institutions in transitions and fragile states.[658] The OECD Handbook on SSR recommends that SSR extend to include transitional justice, such as reconciliation programmes, reparation for victims, public apologies or commemorations.[659] Though the UN position is more explicit on the normative limits of its engagement, these positions reflect significant substantive overlap.

In contrast, transitional justice is not directly addressed in the Operational Guidelines of the World Bank on conflict or emergencies, considered below, despite several instances of support to national transitional justice institutions.[660] Transitional justice was included in a 2006 survey report commissioned by the World Bank on rule of law reform by international organisations.[661] However, the World Bank expresses primary support for transitional justice in the 2011 World Development Report, which identifies transitional justice as a confidence building signal that governments emerging from conflict can employ to signal their intention to move from past violence and their commitment to accountability and rebuilding civic trust.[662] Express acceptance of transitional justice is a significant change for the Bank, but provision in its Operational Guidelines would be welcome.

Beyond these general frameworks, each organisation acknowledges the need for prioritising local context in international engagement in transitional justice. The 2004 UN report notes the contingent nature of transitional justice, in that not all UN missions are mandated to address transitional justice and rule of law activities. The report emphasises that the UN should consider the particular country needs and context in designing its assistance. The 2010 guidance note affirms the need for the UN to be "fully aware of the political context and the potential

---

[658] OECD, *Concepts and Dilemmas of State Building In Fragile Situations: From Fragility to Resilience,* (n171) 29

[659] OECD Handbook on Security Sector Reform: Supporting Security and Justice (n141)

[660] World Bank, Reparation for Especially Vulnerable Victims of the Armed Conflict in Colombia Version – May 25 2007 (on file with author); World Bank, Emergency Project Paper for Proposed Grant to Nepal for Emergency Peace Support Project April 21,2008 Report 43172-NP

[661] Kirsti Samuels "Rule of Law Reform in Post-Conflict Countries Operational Initiatives and Lessons Learnt", (2006) 37 World Bank Social Development Papers, Conflict Prevention and Reconstruction

[662] World Bank, World Development Report 2011, 125, 253; Pablo de Greiff, "Transitional Justice, Security and Development", (2011) World Bank World Development Report 2011 Background Paper, 11

implications of transitional justice mechanisms."[663] The EU contends that in post-conflict settings, a nationally-owned transitional justice and rule of law system is fundamental.[664] Nonetheless the EU position seeks to ensure that serious international crimes should not go unpunished and are prosecuted.[665] The OECD also recommends significant attention be paid to local context in determining donor engagement.[666] In the 2011 World Development Report, the World Bank emphasises that all donor assistance in transitions and fragile states should be adapted to the local political context in each country.[667]

These frameworks also emphasise local ownership of transitional justice processes. The UN report stresses the need for high public participation and understanding of transitional justice processes, particularly among victims.[668] UN OHCHR has developed a specific rule of law tool on national consultations for this purpose.[669] The 2010 guidance note sees the UN's role as "to concentrate on development of national capacity to initiate and lead the process. This involves identification, support for, and empowerment of domestic reform constituencies to develop and implement their own transitional justice and rule of law agenda."[670] Furthermore, the OECD note that civil society should be made aware of its role as an essential component of the justice system. To achieve this, it recommends measures such as information campaigns, surveys of citizens to find out their opinions regarding the needs of the security and justice system, or training of NGOs to monitor the system.[671] The World Banks WDR 2011 report also affirms the need for national ownership and broad social inclusion of all processes in transition, including transitional justice, where those

---

[663] Guidance Note of the Secretary General, United Nations Approach to Transitional Justice, 2010, 4

[664] European Commission, Towards an EU response to situations of fragility - engaging in difficult environments for sustainable development, stability and peace, Brussels, 25.10.2007 COM(2007) 643 final, 9

[665] ibid

[666] OECD, Concepts and Dilemmas of State Building In Fragile Situations: From Fragility to Resilience (n171), 73

[667] World Bank, World Development Report 2011, 246

[668] United Nations Security Council. *Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies* (n213), para 16-17

[669] UN OHCHR Rule-of-law Tools for Post-conflict States: National Consultations on Transitional Justice (HR/PUB/09/2)

[670] Guidance Note of the Secretary General, United Nations Approach to Transitional Justice, 2010, 5

[671] OECD DAC, *OECD DAC Handbook on Security System Reform, Supporting Security and Justice* (Paris: OECD DAC, 2007), 107

processes are used to signal normative change to citizens of that society.[672] The EU also affirms the need for national strategies for transitional justice.[673]

Furthermore, each framework examines the sequencing of transitional justice practice. The 2004 UN report seeks to integrate timing of transitional justice processes with other activities undertaken in transition, such as elections.[674] The 2010 guidance note affirmed that "The nature and timing of such measures should be framed first of all in the context of international legal obligations and taking due account of the national context and the views of the national stakeholders, particularly victims."[675] OECD examination of transitional justice as part of engagement in fragile states and transitions argues:

> "[C}omparative experience suggests that while transitional justice can be delayed for some period, restoration of legitimate governance cannot...where there are conflicts, analysis of comparative peace implementation suggests that prioritising governance, security and the rule of law over transitional justice – at least in terms of sequence."[676]

The EU seems to take the view that transitional justice can be compatible with peace-building and state-building objectives.[677] The World Bank 2011 WDR report noted that inclusion strategies for integrating transitional justice to broader frameworks for emerging from conflict may change over time, as it becomes possible to marginalise consistently abusive groups from power and influence.[678] These institutions seem to disagree about the priority of transitional justice in sequencing engagement in transitions. This approach may enable nuanced consideration of weighing peace and justice in a given transition. However, it also provides no guarantee against the risk of incoherence between the approach of different international institutions.

---

[672] World Bank, World Development Report 2011, 251

[673] Committee for Civilian Aspects of Crisis Management Political and Security Committee, Transitional Justice and ESDP, Brussels, 19 June 2006 10674/06 para 6

[674] United Nations Security Council. *Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies* (n213) para 21.

[675] Guidance Note of the Secretary General, United Nations Approach to Transitional Justice, 2010, 4

[676] OECD, Concepts and Dilemmas of State Building In Fragile Situations: From Fragility to Resilience, (n171) 29

[677] REGULATION (EC) No 1717/2006 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 November 2006 establishing an Instrument for Stability

[678] World Bank, World Development Report 2011, 255

Finally, international policy adds value in the substantive integration of transitional justice with other practices. The 2004 UN report seeks to integrate amnesty and DDR with transitional justice, contending that: "carefully crafted amnesties can help in the return and reintegration of both groups and should be encouraged, although...these can never be permitted to excuse genocide, war crimes, crimes against humanity or gross violations of human rights."[679] The 2009 OHCHR report affirms that transitional justice and DDR can positively reinforce each other, and considers the interaction of DDR with specific transitional justice institutions.[680] The 2010 note provides that due regard should be given to indigenous and informal traditions for administering justice or settling disputes, to help them to continue their vital role and to do so in conformity with international legal standards, a position affirmed in the OECD Handbook.[681] EU policy also considers DDR within transitional justice. The EU Concept Note for support to DDR recognises the need to collaborate with existing international tribunals, stressed the need to counter impunity and protect child soldiers.[682] The EU Instrument for Stability includes "support for civilian measures related to the demobilisation and reintegration of former combatants into civil society, and where appropriate their repatriation, as well as measures to address the situation of child soldiers and female combatants".[683] These frameworks enables transitional justice to cohere with broader processes of peace-building and other contributions to strengthening the rule of law. They thus mitigate some of the fragmentation and tension between amnesties and duties on States regarding transitional justice, but do not specify the nature of this potential integration.

International policy on transitional justice reflects deep concern for local context, ownership, and sequencing in the choice and design of transitional justice processes. This concern means that international organisations do not advocate specific institutions nor specific timing for transitional justice processes at a policy level. Moreover, in sequencing, international policy acknowledges the ongoing contestation between peace and justice in an explicit fashion that may mitigate the risk of incoherent pursuit of both goals. Further, policy offers better substantive integration of transitional

---

[679] United Nations Security Council. *Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies* (n213) para 32.

[680] OHCHR, Analytical study of the HRC - Human rights and transitional justice (n620) para 66

[681] Guidance Note of the Secretary General, United Nations Approach to Transitional Justice, 2010 6; OECD DAC, *OECD DAC Handbook on Security System Reform, Supporting Security and Justice* (Paris: OECD DAC, 2007),

[682] EU Concept for Support to Disarmament, Demobilisation and Reintegration (DDR), passed by the European Commission on the 14th of December 2006 and by the Council of the EU on the 11th of December 2006.

[683] REGULATION (EC) No 1717/2006 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 November 2006 establishing an Instrument for Stability

justice with other relevant fields. In these ways, international policy significantly aligns with and advances international law on transitional justice through a more coherent account, but a contextual approach continues some risk of incoherence.

IV. Security Sector Reform (SSR)

International policy on SSR evidences significant consensus around OECD policy. OECD leadership of SSR policy is evident by the endorsement of its guidelines by the United Nations and the European Union.[684] Each institution shares interest in several SSR activities. The role of the UN includes establishment of an enabling environment; needs assessment and strategic planning; facilitation of national dialogue; provision of technical advice and support to components of the security sector; coordination and resource mobilisation; capacity-building for oversight mechanisms; monitoring, evaluation and review.[685] The OECD Handbook seeks to integrate reforms across defence, intelligence, police and judicial sectors. It also links measures aimed at increasing the effectiveness and efficiency of security forces to concerns of democratic governance. EU policy reflects support in reforming the military, police, intelligence, justice and customs components of the security sector and replicates World Bank competence on supporting financial and expenditure management of the sector.[686]

The OECD has been a leading proponent of international security sector reform policy through the development of a series of guidelines.[687] The 2001 and 2004 Guidelines extend the range of actors involved in SSR beyond the security forces, judicial and penal systems to include an array of stakeholders in government, the legislature, civil society, the media and the business community.[688] Both sets of guidelines emphasise an effective, well-managed and democratically accountable security sector, with controls on security spending and the application of principles of

---

[684] Draft Council Conclusions on a Policy Framework for Security Sector Reform, 9967/06 para 3; ESDP Concept paper, para 4, 14; Concept for European Community Support for Security Sector Reform, 3.2; European Commission, *A Concept for European Community Support for Security Sector Reform*, Communication from the Commission to the Council and the European Parliament (Brussels: European Commission, 2006), 6.

[685] *Securing peace and development: the role of the United Nations in supporting security sector reform Report of the Secretary-Genera*l (n261), para 50

[686] Council of the European Union, EU Concept for ESDP support to Security Sector Reform (SSR) Brussels, 13 October 2005 12566/4/ para 37-41

[687] OECD DAC, *Conflict, Peace and Development Cooperation on the Threshold of the 21st Century* (Paris: OECD DAC, 1997)

[688] OECD DAC, *Conflict, Peace and Development Cooperation* in *The DAC Guidelines: Helping Prevent Violent Conflict*, 119 (Paris: OECD DAC, 2001); OECD DAC, *Security System Reform and Governance*, DAC Guidelines and Reference Series (OECD DAC, 2004)

sound public sector management to the security sector. A 2005 OECD agreement concluded that SSR "to improve democratic governance and civilian control" was ODA-eligible, which proved a key step in convincing donors that supporting such activities was a legitimate development activity.[689] However, a continued gap between the demand for SSR assistance and the capacity of donors to provide such support was confirmed in a survey on SSR implementation.[690] In particular, a lack of conceptual clarity and coherence in programming was apparent in what tended to be an *ad hoc* approach to SSR implementation on the part of the donor community.[691] The OECD addressed this acknowledged gap between SSR policy and practice through the development of a Handbook on Security System Reform.[692] The Handbook seeks to provide comprehensive guidance on donor assistance for SSR.

The need for a coherent but distinct UN approach to SSR was addressed in a 2006 report of the Secretary General. The UNSG report notes that "the absence of a common framework and common policies has an impact on the coherence and quality of United Nations assistance to national partners."[693] The report noted that despite discrete contributions to SSR by different UN agencies, they did not form part of a coordinated UN approach at country or HQ level.[694] The UN Security Council has emphasised that SSR is an essential element of any stabilisation process in post-conflict environments, and underlines that it is inextricably linked with promotion of the rule of law, transitional justice, DDR and the protection of civilians.[695] The Security Council has also stressed the need to seriously consider the promotion of the rule of law and transitional justice, DDR and SSR but also their inter-linkages and resource requirements when the mandates for UN field operations are laid down. This position is also supported in reports presented to the UN

---

[689] OECD DAC, 'Conflict Prevention and Peace-building: What Counts as ODA?' OECD DAC, available at http://www.oecd.org/dataoecd/32/32/34535173.pdf. (accessed 29 September 2011)

[690] OECD DAC, *A Survey of SSR and Donor Policy: Views from non-OECD Countries*, DCD/DAC/CPDC(2004)4 (OECD DAC, 31 August 2004)

[691] Alan Bryden, From Policy to Practice: the OECD's Evolving Role in Security System Reform, Geneva Centre for the Democratic Control of Armed Forces (DCAF) Policy Paper – No22, 4

[692] OECD DAC, *OECD DAC Handbook on Security System Reform, Supporting Security and Justice* (Paris: OECD DAC, 2007)

[693] *Securing peace and development: the role of the United Nations in supporting security sector reform Report of the Secretary-General* (n261), para 42

[694] ibid para 20

[695] Presidential Statement S/PRST/2005/30 (12 July 2005)

General Assembly.[696] In 2002, UNDP Bureau for Crisis Prevention and Recovery introduced the "Justice and Security Sector Reform" (JSSR) concept, the objective of which is to strengthen the ability of the sector as a whole to provide an accountable, equitable and rights-respecting public service, based on a focus on parliamentary governance and human rights.[697] Furthermore, UNDP identifies effective civilian control over the military and other security forces as one of six key norms of democratic governance.[698]

The World Bank originally interpreted the restrictions on political activities in their Articles of Agreement as constraining their involvement in security-related issues.[699] In the early 1990s, the Bank focused on restraining defence expenditure as unproductive expenditures to prevent the exclusion of development resources.[700] By the mid-1990s, this interest shifted to directly supporting DDR programs. The Bank has emerged as a major administrator of demobilisation and reintegration trust funds despite concerns about its ability to engage effectively in post-conflict environments, particularly with activities involving uniformed military personnel.[701] Such an approach thus considers issues of DDR non-political for the purposes of the Bank's Articles of Agreement. Building on this approach by the end of the 1990s, governance had become a legitimate subject for development donors, which enabled programmes on security sector governance.[702] Military spending came to be seen in the context of public financial management, one of the Bank's core competencies.[703] As a consequence, the military sector should be subject to the same general principles of governance as other parts of the public sector.[704]

---

[696] Special Committee on Peacekeeping Operations Report A57 767 (28 March 2003); Report A59 19 (1 March 2005); Report A60 19 (22 March 2006)

[697] UNDP, Justice and Security Sector Reform: BCPR's Programmatic Approach (UNDP 2002)

[698] UNDP, Human Development Report 2002

[699] IBRD, 'Articles of Agreement Article IV: Section 10'; IDA, 'Articles of Agreement: Article V: Section 6';

[700] Nicole Ball, "World Bank/IMF: Financial and Programme Support for SSR", in David Law (ed) *Intergovernmental Organisations and Security Sector Reform* (Geneva Centre for the Democratic Control of Armed Forces 2007), 137

[701] ibid, 142

[702] Deepa Narayan Robert Chambers Meera K. Shah Patti Petesch, Voices of the Poor: Crying Out for Change, OUP 2000; World Development Report 1997

[703] World Bank Senior Vice President and Group General Counsel, 'Legal Opinion on Peace-building, Security and Relief Issues under the Bank's Policy Framework for Rapid Response to Crises and Emergencies', (n604)

[704] Nicole Ball, *World Bank/IMF: Financial and Programme Support for SSR,* (n671) 145

Finally, the EU position on SSR is set out in a series of documents that reflect the approach of discrete EU institutions.[705] EU activities in SSR cover a wide range of countries and practices. The two principal documents are the EU Concept for ESDP support for Security Sector Reform and the Concept for European Community Support for Security Sector Reform, which significantly and explicitly reflect the OECD approach.[706] EU support to SSR will be based on democratic norms and internationally accepted human rights principles and the rule of law, and where applicable international humanitarian law; respect for local ownership; and coherence with other areas of EU external action.[707] EU support for SSR can also be found in the European Security Strategy.[708] Despite this broad array of activities, the paper also stresses that EU activity is contingent and may involve any number of EU institutions.[709] Finally, the EU approach emphasises the continuity between principles of accountability and governance in SSR and in general governance reform.[710]

Each policy framework acknowledges the importance of national context and ownership, with the UN Secretary General going so far as to state: "National ownership is the key to sustainable peace."[711] The 2004 OECD Guidelines emphasise the need to understand the inherently political context for local stakeholders that shapes the opportunities and entry points for SSR.[712] Section 2 of the OECD Handbook notes that local actors have conflicting interests that are not necessarily aligned with those underpinning an SSR process. In-depth knowledge of a given reform context is therefore vital if international actors are to avoid exacerbating domestic divisions and to capitalise

---

[705] European Union's Development Policy Statement, "The European Consensus" on development, adopted by the Council on 22 November 2005, published in Official Journal No C 46 of 24/02/2006, in the European Security Strategy (ESS) adopted by the European Council in December 2003; EU Policy Framework for Security Sector Reform, doc. 9967/06; EU Concept for support to DDR, doc 16387/06;The EU and Africa: Towards a Strategic Partnership, Council of the European Union, (doc. 15702/1/05 Rev 1) adopted by the European Council 15-16 December 2005; COM(2003)615 final; The European Initiative on Democracy and Human Rights is the main tool for EU support to civil society initiatives in this field.

[706] EU Concept for ESDP support to Security Sector Reform (SSR) Brussels, 13 October 2005 12566/4/05; Concept for European Community Support for Security Sector Reform

[707] EU Concept for ESDP support to Security Sector Reform (SSR), para 2

[708] EU Security Strategy, A Secure Europe in a Better World, Brussels, 12 December 2003

[709] EU Concept for ESDP support to Security Sector Reform (SSR), para 6

[710]A Concept for European Community Support for Security Sector Reform, paras 4.2; 5.1

[711] Security Council, 5632nd meeting, 'The Maintenance of International Peace and Security: The Role of the Security Council in Supporting Security Sector Reform'; S/PV.5632 (20 February 2007), 3; *Securing peace and development: the role of the United Nations in supporting security sector reform Report of the Secretary-General* (n261) 39, para 45 (c)

[712] OECD DAC, *Security System Reform and Governance*, DAC Guidelines and Reference Series (OECD DAC, 2004)

on opportunities to put SSR on the domestic agenda.[713] Sections 3 and 4 reinforce the need to appreciate context through local research and consultation. The OECD approach is thus predicated on the need for local ownership, but offers limited donor guidance as to what this entails. The 2006 UNSG report also stresses the highly political and contextual nature of SSR: "the transformation of the security sector is inherently linked to national goals and relationships between different institutions and groups within a country. Security sector reform is, therefore, a highly political process that must be placed in its specific national and regional context."[714] The UNSG also notes the need for national ownership of SSR processes: "Broad national consultation lies at the heart of national ownership." [715] The UN Security Council has noted that SSR "should be a nationally owned process that is rooted in the particular needs and conditions of the country in question."[716] Furthermore national ownership is not static, but evolves over time through participatory engagement.[717] Similarly, the EU predicates its actions on ascertaining local context through a fact finding mission.[718] The EU defines local ownership as "the appropriation by the local authorities of the commonly agreed objectives and principles." The EU also stresses the need for national and local ownership of any successful SSR process.[719] The Community concept paper for SSR affirms the need for local ownership "in line with internationally agreed norms."[720] In addition, it notes that the EU needs to ensure that its support matches the needs and wishes of national stakeholders and is provided within the political context of the overall reform process.[721]

SSR policy also reflects concern for sequencing SSR in transitions. The UNSG report emphasised the need for early practice of SSR: "Early arrangements, for example with regard to the composition

---

[713] Alan Bryden, From Policy to Practice: the OECD's Evolving Role in Security System Reform, 7

[714] Securing peace and development: the role of the United Nations in supporting security sector reform Report of the Secretary-General (n261) para 45 (d)

[715] ibid, para 36

[716] S/PRST/2007/3

[717] Security Council, 5632nd meeting, 'The Maintenance of International Peace and Security: The Role of the Security Council in Supporting Security Sector Reform'; S/PV.5632 (20 February 2007) 3-4

[718] ESDP Concept Paper, para 53

[719] EU Concept for ESDP support to Security Sector Reform (SSR), para 3, 5, 20, 27

[720]A Concept for European Community Support for Security Sector Reform, 4.2

[721] ibid para 5.1

and roles of security forces, can have a significant impact on peace implementation."[722] However, the report goes on to stress the long-term nature of SSR: "In many contexts, it is only after basic stability has been achieved...that substantial political attention and resources can be directed to security sector reform."[723] Section 4 of the OECD Handbook acknowledges that in contexts where security and justice institutions are weak, a long-term approach is vital. This section points to the importance of an inception phase in which donors assess the local circumstances, build credibility through initial quick impact projects but set this within the framework of a long-term commitment. The long term nature of many SSR processes is also acknowledged in the EU position.[724] The EU position also elaborates a temporal aspect to SSR, distinguishing between activities in the immediate post conflict, stabilisation and consolidation periods.[725]

The OECD Handbook provides guidance on the need to integrate SSR within the broader framework of peace building.[726] The UNSC debate on SSR also stressed the importance of recognising "the inter-linkages between SSR and other important factors of stabilisation and reconstruction, such as transitional justice, DDR and small arms and light weapons control".[727] The UNSG report noted that a UN approach to SSR could align with the UN DDR standards.[728] This approach is also reflected in the EU policy.[729] Furthermore, coordination is stressed by each institution. Security sector is a significant task requiring engagement from multiple international actors. The UNSG report also stressed the role of coordination with other organisations involved in SSR.[730] The EU also affirms its commitment to coordination with other international organisations.[731]

---

[722] Securing peace and development: the role of the United Nations in supporting security sector reform Report of the Secretary-General, (n261) para 21; para 45(f)-(g)

[723] ibid, para 27

[724] ESDP Concept Paper, para 19

[725] ibid, para 32-4

[726] OECD Handbook on Security Sector Reform: Supporting Security and Justice (2008) section 6

[727] Security Council, 5632nd meeting, 'The Maintenance of International Peace and Security: The Role of the Security Council in Supporting Security Sector Reform'

[728] Securing peace and development: the role of the United Nations in supporting security sector reform Report of the Secretary-General, (n261) para 53

[729] EU ESDP Concept paper, para 12

[730] Securing peace and development: the role of the United Nations in supporting security sector reform Report of the Secretary-General, (n261) para 34; 45; 63-66

[731] ESDP concept paper para 21; 31; A Concept for European Community Support for Security Sector Reform 11, 12

International SSR policy is currently undergoing significant consolidation. The value of the OECD Handbook and leadership provides the opportunity for shared understandings and coordination in SSR, reflected in the express endorsement of the UN and EU. Despite agreement on its importance, the continued absence of a shared UN SSR framework increases the risk of incoherent practice.[732] If coherent policy practices are to take root and influence donor behaviour, then a sustained, targeted commitment to implementation is required, especially given donor acknowledgment of the long term nature of SSR.

V. Peace-Building and State-Building

The policy frameworks of other fields are specifically designed to operate in transitions and fragile states. Peace-building policy reflects this trend. However, issues of development in transitions and fragile states generate a specific response from international organisations. Such organisations continue to prioritise governance as a necessary component of development. However, the application of governance policy to transitions and fragile states frames issues of governance as state building. The actions of the World Bank are limited by its mandate prohibition on interference in the internal affairs or political character of a State. In contrast, UN, OECD and the EU policy has been explicit in acknowledging that matters of peace-building and state-building are political in nature. However, the consequence of this application has been a merger of peace-building frameworks with state-building as applied governance frameworks with a risk of mitigating clarity and coherence.

The core document for all international organisations is the OECD "Principles for Good Engagement in Fragile States & Situations", which has been incorporated by reference into the policy positions of other international organisations.[733] The document gives specific application for transitions and fragile states to the partnership commitments established in the "Paris Declaration on Aid Effectiveness."[734] The OECD Principles identify two core areas of intervention: (i) supporting the legitimacy and accountability of states by addressing issues of democratic governance, human rights, civil society engagement and peace building; and (ii) strengthening the capability of states to fulfil their core functions is essential to reduce poverty. Priority functions include: ensuring

---

[732] DCAF, United Nations Approaches to Security Sector Reform, 27

[733] The OECD Principles for Good International Engagement in Fragile States and Situations were formally endorsed by ministers and heads of agencies at the Development Assistance Committee's High Level Forum on 3-4 April 2007, available at http://www.oecd.org/document/46/0,3343,en_2649_33693550_35233262_1_1_1_1,00.html

[734] The Paris Declaration and the Accra Agenda for Action available at http://www.oecd.org/dataoecd/11/41/34428351.pdf

security and justice; mobilising revenue; establishing an enabling environment for basic service delivery, strong economic performance and employment generation.[735]

In adopting a view of state-building as the relationship between state and citizen, the OECD recognises that successful state-building will be the product of domestic action, a form of political governance, and the articulation of a set of political processes or accountability mechanisms through which the State and society reconcile their expectations.[736] As a result, state building is not exclusively concerned with poverty alleviation, but rather as support for the state-society contract, seen as a necessary prerequisite and priority in fragile states and transitions.

The understanding of fragility employed by the OECD suggests that fragility arises from "substantial disequilibrium in state-society relations" in states which lack resilience, i.e. the ability to cope with changes in capacity, effectiveness or legitimacy.[737] Therefore the overall priority of state building must be to improve political governance: the articulation of a set of political processes or accountability mechanisms through which the state and society reconcile their expectations of one another. At present, the OECD contends that donors lack an appropriate institutional focus for the institutionalisation of the state-society contract, particularly in post-conflict states.[738] The OECD recognises the need for engagement in five key sectors in engaging with fragile states: security, service provision (in particular, justice and security, healthcare education and water/sanitation), economic growth, corruption and organised crime and taxation. Specifically in the context of post-war fragile states, the OECD identifies three policy objectives: (i) political processes that legitimate the State (ii) the development of the framework of the rule of law, including with respect to economic governance and (iii) the re-establishment of a framework of security, including but not limited to reconstitution of the state security apparatus.[739] OECD policy thus significantly acknowledges the conditions in the circumstances of transition in applying general development theory on governance reform. Such policy thus enables donors to adjust their governance policies to adapt to these conditions.

The application of governance policy to fragile states is also reflected in EU policy. The 2000 Cotonou Agreement signed by the European Community and its Member States and 78 African

---

[735] Principles for Good International Engagement in Fragile States and Situations

[736] ibid, 8

[737] OECD, Concepts and Dilemmas of State Building In Fragile Situations: From Fragility to Resilience, (n171), 16

[738] ibid 24

[739] ibid 33

Caribbean and Pacific (ACP) states reflects an early commitment of the EU to engagement in fragile states.[740] The European Consensus on Development 2005 provided for a shared EU vision on development and identified state fragility as one of the five key challenges of EU development policy.[741] The Consensus adopted a specific position for "transition situations", where the EU seeks to support links between emergency aid, rehabilitation and long-term development, through a focus on rebuilding institutional capacities, essential infrastructure and services and a concern for security.[742] The 2005 Consensus further identified the need for the EU to actively implement the OECD principles.[743] Building on this approach, in the Communication "Towards an EU Response to situations of fragility", the Commission acknowledges that the existing development framework of Country Strategy Papers must systematically address the root causes of conflict, expressions of violence, insecurity and risk of vulnerability in a conflict sensitive fashion.[744] The Communication goes on to consider the relevance of existing finance instruments for application to fragile states, as well as recommending a formal EU endorsement of the OECD principles for engagement in fragile states.[745] In addition, a 2008 Programming Guide Fiche on Fragile Situations identifies state building as the focus of cooperation programmes in fragile situations:

> Activities should aim at increasing the legitimacy of state institutions and will therefore be intimately connected to the political processes through which social/political relations and power relationships within the society are negotiated and managed.[746]

Further instruments add detail to the scope of EU engagement. In the EU Instrument for Stability, the European Council and Parliament acknowledged, "post-crisis stabilisation requires a sustained and flexible engagement from the international community, in particular in the first years after a crisis, on the basis of integrated transition strategies."[747] A review of the EU approach to state fragility identifies that a significant challenge for the EU and donors adopting this approach

---

[740] Article 2 of the Partnership Agreement ACP-EC, Cotonou (23/06/2000) and revised in Luxembourg (25/06/2005). 11; Article 4 of the Partnership Agreement ACP-EC, Cotonou (23/06/2000) and revised in Luxembourg (25/06/2005). 12

[741] The European Consensus, Council of Europe, doc. 14820/05, Brussels, 22 November 2005 (2005 Consensus)

[742] 2005 Consensus, para 21

[743] 2005 Consensus, para 89

[744] Communication "Towards an EU Response to situations of fragility" COM(2007) 643 (25 October 2007), 6

[745] ibid, 12

[746] Programming Guide for Strategy Papers, Integrated transition strategies, October 2008

[747] EU Instrument for Stability Reg No 1717/2006 Preamble 7

generally is to narrow the gap between the theoretical policy framework and the implementation of specific interventions.[748]

Two sections of the Bank's operational guidelines determine its conduct in fragile states and transitions. Early Bank guidelines focused on emergency recovery from natural disasters.[749] These basic principles provided that the Bank should finance productive activities and investment rather than relief and consumption.[750] Subsequently, specific operational guidelines were developed for fragile and transitional states. Operational framework OP 2.30 provides that in relation to conflict, the Bank has three approaches. For those countries vulnerable to conflict, the Bank would employ its usual instruments to minimise potential causes of conflict through the promotion of economic growth and poverty reduction. For countries in conflict, the Bank would continue efforts at poverty reduction and maintenance of socioeconomic assets where possible; provide information on the socio-economic impacts of emergency assistance; analyse the impact of conflict on economic and social development; and prepare for Bank assistance as opportunities arise. Finally, for countries in transition from conflict: to support economic and social recovery and sustainable development through investment and development policy advice, with particular attention to the needs of war-affected groups who are especially vulnerable by reasons of gender, age, or disability. This operational policy tasked the Bank to increase its understanding of the political impact of development assistance. The second innovation of OP 2.30 was the Interim Strategy Note, which committed the Bank's country strategies to be 'closely aligned with the objectives and sequencing of priorities of peace accords and rehabilitation plans agreed to by parties to the conflict'. This clause sought to push country teams to design and implement Bank activities to support a peace-building agenda flowing from a peace agreement. This would have been considered overly political under previous operational policy.[751]

OP 2.30 must be read subject to the Rapid Response Policy of the Bank (OP 8.0). [752] Under this policy, the Bank's assistance may include immediate support in assessing the emergency's impact and developing a recovery strategy; an emergency recovery loan; restructuring operations within

---

[748] Faria, F. and A. Sherriff. 2009. "EU Policies to Address Fragility in Sub-Saharan Africa". Background paper for the European Report on Development 2009, 5

[749] World Bank, Operational Note 10.07

[750] In 1989 Operational Directive 8.50 on "Emergency Recovery Assistance," emphasized emergency recovery after natural disasters. In August 1995, without any major conceptual changes, OD8.5 became Operational Policy 8.5 (OP 8.5).

[751] Edward Bell, "The World Bank in fragile and conflict-affected countries" (Saferworld 2008) 19

[752] World Bank, OP 8.00 - Rapid Response to Crises and Emergencies

the Bank's existing investment portfolio for the country to support recovery activities, redesigning investment projects not yet approved to include recovery activities; and a contingent emergency loan to countries at high risk of natural disasters. Such instruments may be employed to pursue a variety of goals, including rebuilding and restoring physical assets; restoring the means of production and economic activities; preserving or restoring essential services; establishing and/or preserving human, institutional, and/or social capital, including economic reintegration of vulnerable groups; facilitating peace building; assisting with the crucial initial stages of building capacity for longer-term reconstruction, disaster management, and risk reduction; and supporting measures to mitigate or avert the potential effects of imminent emergencies or future emergencies or crises in countries at high risk. The combination of these guidelines also reflects an application of general development policy responsive to the specific conditions that exist in the circumstances of transition.

A number of frameworks under the operational guidelines sought to adopt an approach distinct to peace and state building. The 1997 Framework for Involvement in Post-Conflict Reconstruction recommends moving from a watching brief to a transitional support strategy when resolution of conflict is in sight, as an initial step toward a more comprehensive reconstruction program.[753] This could be followed by urgent but small scale reconstruction activities prior to full post-conflict reconstruction, such as physical reconstruction, economic recovery, institution building and social reintegration. The Framework concluded that the Bank should focus on activities in which it has a comparative advantage such as physical infrastructure, economic management and the emergence competence in issues concerning DDR and displaced persons. On foot of the 1997 Framework, the Bank established a Post-Conflict Fund (PCF) to enhance the World Bank's ability to support countries in transition from conflict to sustainable peace and economic growth, which was administered by a Conflict Prevention and Reconstruction Unit.[754] However, the Low Income Countries under Stress (LICUS) Initiative was launched in 2002, a move which acknowledged prior Bank failures in fragile states: "Past international engagement with these countries has generally failed to yield significant improvements."[755]

Both the Post Conflict Fund and the LICUS trust fund financed projects that promoted economic

---

[753] *Post-Conflict Reconstruction: The Role of the World Bank* (World Bank, *1998),* endorsed by the Executive Directors as A *Framework for World Bank Involvement in Post-Conflict Reconstruction,* May *1998*

[754] ibid

[755] World Bank Independent Evaluation Group, *Engaging with Fragile States An IEG Review of World Bank Support to Low-Income Countries Under Stress* (World Bank 2006) 3

and social recovery, governance, civil society participation and human security. Both were often used as entry points to Bank engagement with states that otherwise had limited or no involvement with the Bank.[756] Both sought to achieve a cross-cutting approach that targeted a number of particularly vulnerable groups in post-conflict circumstances, such as victims of gross violations of human rights, former combatants, and refugees and internally displaced persons. The Funds also sought to coordinate conduct with UN agencies and local NGOS and government agencies relevant to conflict, in a fashion unfamiliar to Bank practices. [757] However, in 2008, it was proposed to consolidate the Bank's strategic response to conflict and fragility and streamline related processes and procedures into a State and Peace Building Fund.[758] This proposal responded to several identified problems in the operation of the existing funds: a considerable overlap in objectives, unnecessarily complex accounting and reporting arrangements and an erratic and unpredictable funding stream from the two Funds.[759] A consolidated structure would place state-building and peace-building at the core of a new trust fund. The 2008 proposal sought to incorporate existing definitions of state-building and peace-building, in addition to stating an overarching goal "to address the need of state and local governance and peace-building in fragile and conflict-prone and affected situations."[760] This broad ambition breaks down into two operational objectives: (i) to support measures to improve governance and institutional performance in countries emerging from, in, or at risk of sliding into crisis and arrears; (ii) to support the reconstruction and development of countries prone to, in, or emerging from conflict. As a result of the State and Peace Building Fund, both the Post Conflict and LICUS Trust Fund were closed to future contributions from 2009 onwards and the Trust Fund Committee transferred to the State and Peace-building Fund.

For the UN, the concept of peace-building arose from the 1993 publication of *Agenda for Peace*, which integrated post-conflict peace-building into other activities, with a view to preventing the recurrence of violence.[761] The report identified peace-building as generating the necessary bridge

---

[756] World Bank, Establishment of a State and Peace Building Fund, Operations Policy and Country Services (March 25 2008), 3

[757] *Fragile States – Good Practice in Country Assistance Strategies Operations Policy and Country Services,* (World Bank 2005)

[758] World Bank, Establishment of a State and Peace Building Fund (n727)

[759] ibid, 6

[760] ibid, 7

[761] An Agenda for Peace (n81) para 21

between conflict and peace and renewal of the efforts of development.[762] The report identified a range of peace-building activities:

> These may include disarming the previously warring parties and the restoration of order, the custody and possible destruction of weapons, repatriating refugees, advisory and training support for security personnel, monitoring elections, advancing efforts to protect human rights, reforming or strengthening governmental institutions and promotion formal and informal processes of political participation.[763]

The *Inventory of Post-Conflict Peace-Building Activities (1996)* surveyed existing and potential peace-building practices for the UN including human rights monitoring, DDR, capacity building and even the promotion of economic liberalisation..[764] In *The causes of conflict and the promotion of durable peace and sustainable development in Africa* the Secretary General placed emphasis on "critical priorities such as encouraging reconciliation and demonstrating respect for human rights; fostering political inclusiveness and promoting national unity; ensuring the safe smooth and early repatriation of refugees and displaced persons; reintegrating ex-combatants into productive society..."[765] Peace-building had become the overarching structure for UN engagement in transitions and fragile states.

In 2000, the Report of the Panel on United Nations Peace Operations issued recommendations for UN peace-building strategy.[766] The report contended that a small percentage of mission's first year budget should be made available for quick impact projects in its area of operations. The report sought to centralise human rights and DDR programs in peace-building operations, through the provision of sufficient international legal experts and prioritising DDR programs in the first phase of operations.[767] These priorities were reflected in the *UN Peacekeeping Operations: Principles and Guidelines 2008*, which reflect the need for the restoration of security, the rule of law and respect for human rights and the emergence of legitimate political institutions and participatory processes of social and economic recovery.[768]

---

[762] UN GA Res 48/935, *Agenda for Development* (6 May 1994), 23

[763] *Agenda for Peace* (n81) para 55

[764] United Nations Department for Economic and Social Information and Policy Analysis *An Inventory of Post-Conflict Peace-Building Activities* (1996)

[765] The causes of conflict and the promotion of durable peace and sustainable development in Africa (Report of the Secretary General, UN GA Res 57/172, 66

[766] The Report of the Panel on United Nations Peace Operations (n111)

[767] ibid, para 84-169

[768] UN Peacekeeping Operations: Principles and Guidelines 2008, available at http://www.peacekeepingbestpractices.unlb.org/pbps/library/capstone_doctrine_eng.pdf

In 2009, the Secretary General issued a report on peace building in the immediate aftermath of conflict.[769] The report identifies that the needs of people at the end of conflict are far greater than the capacity of national and international actors to meet them. As a result, peace-building should focus on establishing security, building confidence in a political process, delivering initial peace dividends and expanding core national capacity.[770] As a result, the report specifies potential UN activities in each of these areas.[771] The 2009 report is also significant because it acknowledges the need for rapid access to verifiable expertise in the immediate aftermath of conflict, such as standing capacities, defined as "experienced staff whose conditions of service require that they can deploy rapidly to meet urgent operational requirements, and can support urgent capacity development needs until regular recruitment is finalized".[772]

Each policy prioritises local context and national ownership in peace and state-building. The OECD principles operate on the basis of two evaluative meta-components: (i) take context as the starting point and (ii) do no harm. The OECD Principles recognise a broad range of conditions which operate in transitional contexts. An appropriate political analysis can therefore adapt the donor response to further the desired outcomes. In addition the application of the "do no harm" approach, adopted generally in development engagements, seeks to mitigate the risks inherent in international engagement.[773] The EU Consensus further acknowledges that implementation of development cooperation is necessarily country or region specific, based on the country's own needs, strategies, priorities and assets.[774] The 2009 Secretary General's report emphasises the need for local ownership in post-conflict situations, despite the fact that such cases are characterised by significant insecurity and political uncertainty. It acknowledges that the end of conflict tends to create high expectations for the delivery of concrete political social and economic dividends, subject to the existence of a basis level of political will commitment and consensus among the main national protagonists, without which most peace building efforts will be futile. The report acknowledges the need for a contextual understanding of the emergence of each state from conflict. As a result, it recommends that "post conflict peace building should begin with an

---

[769] Report of the Secretary-General on Peacebuilding in the Immediate Aftermath of Conflict UN GA Res 63/881-UN SC Res 2009/304; The immediate aftermath of conflict was defined as the first two years after the main conflict in a country has ended.

[770] ibid, para 3

[771] ibid, para 17

[772] ibid, para 63

[773] Mary Anderson, *Do No Harm: How Aid Can Support Peace - or War* (Lynne Rienner Publishers, 1999)

[774] 2005 EU Consensus, para 57

assessment of existing capacities and needs in the typical priority areas at the national and subnational levels using agreed common assessment tools. The results of such assessments should then inform decisions on the design of support and the deployment of international resources and expertise."[775] The World Bank also emphasises that "fragile states cannot be assisted through a uniform approach", facing different challenges in the political environment, state capacity and accountability and reform orientation.[776]

Each framework acknowledges the long term nature of peace and state building processes. The OECD recognises that a key goal must be the hand over of externally provided public services to "resumption of public responsibility for services in the longer term."[777] A 2002 World Bank report asserted that engagement in state building must operate with a long term focus in fragile states and identify prominent links between political security and development sectors. The Bank acknowledges that " Emergency operations do not address long-term economic issues...The duration of emergency operations should be realistically linked to the issues being addressed."[778] State building has a necessarily long-term focus on an evolutionary and continuous process and can therefore be contrasted with the related practice of peace-building which has the shorter focus of beginning the process of stability and enabling state building to (re)commence. Despite this admirable and significant goal, there remains a strong discrepancy between long-term structural policy aimed at addressing the root causes of conflict and medium/short term early warning and crises management.[779]

Furthermore, each framework aims at substantive coherence across peace and state building activities. The OECD Principles emphasise a "whole of government" approach for donor states and the desire for policy coherence.[780] The 1995 *Supplement to an Agenda for Peace* emphasised the need for integrated action by multifunctional peace keeping operations and resumed responsibility by other programmes funds, offices and agencies upon restoration of normal conditions.[781] The

---

[775] Report of the Secretary-General on Peace building in the Immediate Aftermath of Conflict (n740), para 46

[776] *Fragile States – Good Practice in Country Assistance Strategies Operations Policy and Country Services,* (World Bank 2005)

[777] OECD, Service Delivery in Fragile Situations: Key Concepts, Findings and Lessons (OECD 2008), 9

[778] World Bank, OP 8.0, para 6

[779] Fraser Cameron, "The European Union and Conflict Prevention", Background Paper Prepared for the Project *European Action on Small Arms and Light Weapons and Explosive Remnants of War,* 4

[780] Principles for Good International Engagement in Fragile States and Situations

[781] Supplement to Agenda for Peace (n254) para 54

Brahimi report stressed the need to promote more coherent strategies "to reassemble the foundations of peace and provide the tools for building on those foundations something that is more than just the absence of war."[782] In *The Role of the UNDP in crisis and post-conflict situations*, the UNDP Executive Board specified the specific modes of engagement for UNDP in fragile states, including the need for improved coherence and predictability in UNDP activities.[783] Coherence required greater coordination between UNDP activities in different fragile states, but also coherence between the specific engagement in fragile states and the broader poverty eradication efforts in those states. The report considered DDR as one of those activities, as well as the regeneration of community decision making procedures and more generalised support for governance and restoration of the rule of law. Finally, the Bank acknowledges that in regards to the linkages between peace security and development, harmonisation and coherence across international organisations, rather than a direct expansion of the Bank's core competences, has been the driving force for a more unified approach.[784] In acknowledging the importance of peace building as a goal in fragile states, the Bank also acknowledges the tacit implication of international organisations engaging in peace building – that "all economic and development activities...can potentially be selected or designed to contribute to peace-building goals."[785]

Each organisation shares a desire for coordination in peace and state building. The supplement to *Agenda to Peace* acknowledged that if UN efforts are to succeed, it would require careful coordination and integration of all relevant actors inside and outside the institution.[786] The 2009 UNSG report acknowledges the different comparative advantages enjoyed by the relevant international development organizations, such as the UNDP, World Bank and IMF. Furthermore, close partnerships between international actors may be required as challenging political environments would exacerbate uncoordinated engagement. The 1997 Bank Framework also made several operational recommendations that stress coordination with UN agencies and other stakeholders in the reconstruction process as early as possible. The Bank's focus on its comparative advantage will encourage it to generate greater expertise in the application of its specific skill set to fragile situations.

---

[782] The Report of the Panel on United Nations Peace Operations (n111), 3

[783] UNDP, *The Role of the UNDP in crisis and post-conflict situations* DP/2001/4

[784] ibid, 7

[785] ibid, 8

[786] Supplement to Agenda to Peace, (n254) para 81-96

Each framework offers a distinct response to the conditions that operate in the circumstances of transition under the rubric of "fragility". In overlapping frameworks of peace and state building, the approach of international organisations shares a number of similar priorities, concerns and programmes in transitions. The difference in foundation to these approaches reflects diverse institutional mandates and limitations evident across each field. In the absence of significant change to institutional mandates and coordination, examining stated common challenges and priorities of these diverse frameworks provides us with a coherent means of evaluation.

VI. Beyond Policy Overlaps: Common Themes and Challenges

Existing strategic frameworks share an interest in several activities across transitional justice, SSR and combined peace and state building frameworks, despite diverse institutional foundations. However, at a normative level, a number of tensions arise. Combined frameworks just examined demonstrate some lack of clarity in the conceptual distinction between state and peace building. It is difficult to ascertain where one ends and the other begins. While it may be unreasonable to expect an absolute distinction between concepts that share a number of components, some value would be added by explicit policy on the interdependent relationship and processes of peace and state building. Second, divergence on the sequencing of transitional justice arises from concern that it may be a destabilising process. Consequently, there is a risk of considering transitional justice solely as a combative process, whereas it can and has also been designed in a fashion that seeks to restore the social compact, similar to peace and state building. Finally, due to emphasis on local context and ownership, the substantive relationship between these fields at a policy level remains contingent and is not determined at a universal level within their respective policy frameworks. As a consequence, there remains a need for some means of assessing the choices of international organisations in prioritising the multiple goals that they all purport to pursue under international law and policy. In particular, there is a need for a means to compare the choices made across a range of transitions. Before addressing this concern in the following chapters, we can evaluate the concern for local context and ownership and coordination expressed across all policy frameworks examined.

VII. Context and Local Ownership

Each field prioritises supporting local context and ownership, which presents a challenge in balancing such ownership with international support for universal standards and avoid tension between these ideas. In transitional environments in particular, national actors often lack

adequate resources and international support becomes necessary.[787] Local ownership takes root comparatively recently in policies of international organisations.[788]

Simon Chesterman argues that local ownership has moved far from the literal meaning of ownership, 'in the sense of rights of possession either of property or a formal stake in an organisation, such as shares in a corporation'.[789] Instead local ownership is taken to incorporate concerns for representation and participation of local actors in decision making processes. In practice local ownership is often more of a rhetorical device than a guide to donor officials engaged in state-building processes and security sector reform.[790] Policy in each field expresses the desirability of local ownership, but not generated specific and shared understandings of what that entails. Some observers also note that it was used defensively to avoid the appearance of paternalism and neo-colonialism, which makes the strong support for the concept all the more understandable. There are no clear guidelines on how to act and on how to operationalise the idea of ownership.[791] Sidestepping clear definitions also makes it almost impossible to measure UN effectiveness while simultaneously evading the weight of accountability.[792]

One danger of adopting a context specific approach is that there is less accountability in the implementation of specific provisions that meet the parameters of the stated framework. In particular, it is unclear how far the issue of local ownership will operate in circumstances of low bureaucratic capacity and with the potential for the recipient government to have been involved in gross violations of human rights. Concern for local context in each approach emerges from the desire to avoid imposing one size fits all solutions, drawing on lessons learned from past comparative experience. It often appears that international institutions are "fighting the last war",

---

[787] Security Council, 5632nd meeting, 'The Maintenance of International Peace and Security: The Role of the Security Council in Supporting Security Sector Reform', 2

[788] 'Development Partnerships in the New Global Context', adopted by the OECD's Development and Assistance Committee (DAC) in May 1995; OECD DAC's manifesto, 'Shaping the 21st Century' (1996); James Wolfensohn, Proposal for a Comprehensive Development Framework (1999)

[789] Simon Chesterman, Ownership in Theory and in Practice: Transfer of Authority in UN Statebuilding Operations (2007) 1(1) Journal of Intervention and State Building 4

[790] Eric Scheye and Gordon Peake, "Unknotting Local Ownership", in Ebnöther, Anja and Philipp Flüri (eds.), *After Intervention: Public Security Management in Post-Conflict Societies: From Intervention to Sustainable Local Ownership* (Vienna: Geneva Centre for the Democratic Control of Armed Forces and Austrian National Defense Academy, 2005)

[791] Nina Wilén, "Capacity-building or Capacity-taking? Legitimizing Concepts in Peace and Development Operations", (2009) 16(3) International Peacekeeping 337,, 344

[792] ibid, 348

in that they seek to employ lessons learned from prior engagement to a new transition, with limited assessment as to whether that particular lesson has direct relevance to the new transition. Moreover, a concern for local context requires significant knowledge of country history, politics, language, culture and customs. The frameworks adopted do not comprehensively respond to this information barrier. Finally, while always necessarily incomplete, policy on local context may nevertheless draw on the structural rather than substantive conditions on which these fields are based, which are discussed in Chapter II and III. Developing knowledge of local context could therefore be generated through the application of these structural conditions to a given transition.

This tension therefore places considerable pressure on the coherence of international engagement, which purports to respect local ownership and context, while also operating in a society on the basis of the inadequacy of that ownership and challenges of that context. Chapters III and IV contended that the duty of international actors was to act with integrity. Some have argued that the above norms, interests and demands that govern behaviour in the international system have created a number of irreconcilable tension.[793] Robert Engell describes this tension between words, decisions and actions of international organisations as "organised hypocrisy".[794] Engell argues that the decoupling of words, decisions and actions diminishes the effectiveness of international organisations' contribution to state building. This critique describing these inconsistencies as natural organisational responses to the inherently complex and contradictory demands of the international system.[795]

Local ownership and context could become more functional if there was some sort of common framework for its understanding in different sub-disciplines that would facilitate particular guidelines from case to case.[796] The emphasis on national context and ownership limit the coherence of comparison between transitional societies. Emphasis on national ownership processes are also in tension with concern for sufficiently inclusive and participatory processes. Policy would therefore benefit from an adequate conception of the relationship between international and national actors that covers these fields and the variety of circumstances experienced in transition and across fields.

---

[793] Robert Egnell, "The organised hypocrisy of international state-building", (2010) 10(4) Conflict, Security & Development, 465-491, 468

[794] ibid, 469, Nils Brunsson, T*he Organisation of Hypocrisy: Talk, Decisions and Actions in Organisations* (Abstrakt Forlag, 2002).

[795] Robert Egnell, The organised hypocrisy of international state-building', (n764) 472

[796] Nina Wilén, Nina 'Capacity-building or Capacity-taking? Legitimizing Concepts in Peace and Development Operations', (n762) 340

VIII. Coordination

International organisations have sought to coordinate and harmonise their engagement with fragile states across each field.[797] A working group of multilateral development banks recommended a uniform and objectively ascertainable definition of fragile states and greater information sharing between multilateral institutions to enable this, as well as coordination on technical, internal aspects of measurement and management of engagements in fragile states.[798] As a result, a partnership framework has developed between the World Bank, European Union and UNDP that seeks to achieve these goals.[799] The framework acknowledges the differences in mandate and role in both organisations, the need for flexible integration in the joint engagement of both organisations to fragile and post-conflict states.[800]

One example of this collaboration is the joint WB-EU-UNDP Post-Conflict Needs Assessment (PCNA).[801] The PCNA is seeks as a "key entry point for conceptualising, negotiating and financing post-conflict recovery strategies." It is technical in its desire to provide an objective and accurate assessment of the needs of the country, but also political in representing a process among national and international actors attempting to elaborate a development agenda for future peace and stability. The assessment methodology identifies the following goals in post-conflict recovery: (i) political stability (ii) security and respect for human rights (iii) reduction of exclusion and social healing (iv) access to services and (v) adequate standard of living. The PCNA seeks to strike a balance between the immediate political objectives specified in a ceasefire agreement or other peace accord, a generalised concern for security, equality justice and development and longer term development and human rights objectives.

The PCNA framework provides the information for a Transitional Results Framework methodology, which seeks to establish the key goals specified in the PCNA and map the implementation of these objectives. In a *Joint Guidance Note in Integrated Recovery Planning using Post Conflict Needs Assessments and Transitional Results Frameworks,* the UN and the World Bank identified failures in

---

[797] Report of the MDB Working Group: Towards a More Harmonized Approach to MDB Engagement in Fragile Situations (2007)

[798] ibid, 3, 6-7

[799] United Nations-World Bank Partnership Framework for Crisis and Post-Crisis Situations, Signed at UNHQ, 24 October 2008

[800] ibid, 2

[801] Practical Guide to Multilateral Needs Assessment in Post-Conflict Situations, A Joint Project of The United Nations Development Programme, World Bank, United Nations Development Group, August 2004

the operations of the PCNA-TRF frameworks up to 2006.[802] Failures included the lack of an overall agreed vision setting the strategic direction for conflict transformation and peace building; insufficient realism in the timelines for key recovery outcomes and notably inadequate links between priorities in the political and security arena and the economic and social arena.[803] The guidance note sought to remedy these defects by adjusting the planning and pre-assessment phases of the framework to prioritise the development of a core narrative to articulate peace-building objectives. The note emphasises the need to treat political and security issues as an integral part of national planning and budgetary processes, rather than through separate fora.[804]

In practice, however, joint planning and assessment tools continue not to reach their full potential. Among the recognised shortcomings is a lack of real integration of economic, security, humanitarian,and political programs—and thus a focus on economic or technical development issues to the detriment of attention to political and security concerns, as well as a near complete neglect of transitional justice.[805] As a consequence of continual institutional diversity and political, legal and technical challenges to complete coordination or integration, it is important to set appropriate expectations for international coordination. However, it may be possible to achieve closer coordination in the measurement and evaluation of areas of common concern. This would generate the need for shared framework for institutionally diverse actors especially shared means of assessment, examined in the next chapter.

IX. Conclusion

International organisations have travelled a great length in 20 years to adapt their engagements in fragile states to the radical challenges facing such societies. However, the international system has not adequately kept pace with the emerging analysis of fragility, in particular, recognition of the repetitive and inter-linked nature of conflict. The expansion in international assistance efforts has led to overlaps and discontinuities between humanitarian, development, security, and political initiatives.[806] Each organisation seeks to pursue its comparative advantage when engaging in transitions and fragile states. Such a concern goes a long way to explain the difference in emphasis among these organisations' approaches. While these institutions have made efforts to integrate

---

[802] Joint Guidance Note in Integrated Recovery Planning using Post Conflict Needs Assessments and Transitional Results Framework, UN Development Group/World Bank, September 2007

[803] ibid, 3

[804] ibid, 14

[805] World Bank, World Development Report 2011, 192-3

[806] ibid 181

substantively diverse fields, and have sought to ensure institutional coordination, it remains inevitable that different disciplines bring with them different goals, planning time frames, decision-making processes, funding streams, and risk calculi.[807]

As a consequence, substantive coherence between these fields remains elusive. The practice of the principle of integrity remains difficult. The current understanding between donors appears to be moving towards convergence but the need remains for conscious initiative aimed at the principle and process of integrity, which is not a natural consequence of shared activities of international organisations. The policies examined in this chapter offer a temporal aspect of transitions and fragility not evident in international law. Furthermore, they display a major concern for legitimacy through appreciation of local context and ownership, beyond that inherent in application of general international legal obligations.

Arising from examination of these policy frameworks, it appears that the following structural concerns should be examined. First, no systemic means of evaluating the responsiveness of the international actor to concerns regarding its own conduct in executing the policies of each field exists. Second, no explicit means exists for balancing the competing priorities supported by international organisations in transitions and fragile states. Third, no means exists of integrating local context and ownership that guides, structures or informs the balance between the need for detailed country information and context with the need for rapid information and decision making. Finally, few institutional structures exist that reflect a commitment to coordination framework for policies among international organisations beyond mere rhetorical support. The remaining chapters of this thesis examine these concerns.

---

[807] ibid 185

Chapter VI: Measurement and Methodology: Indicators in Transitions

I. Introduction

In Chapter VI, we identified the desire stated in the policies of international organisations for coherence and coordination in their activities, but limited effectiveness in achieving this to date. The chapter concluding by noting the potential of shared means of assessment of international activities as one means of more coherent engagement. This potential has been noted by recent policy initiatives relevant to transitions. In 2011 an International Dialogue on Peace and State Building, involving 40 development partners, international organisations and governments experiencing conflict and/or fragility, met in Monrovia. They proposed the development of "a set of indicators that will allow us to demonstrate measurable progress against the objectives both at the global and the country level. These indicators will combine both objective measures, and measures to understand the views and perceptions of people on results achieved".[808] In addition, the World Bank World Development Report 2011 identifies the need to "demonstrate successes and to create a feed- back loop on areas that are lagging."[809] In providing sample indicators for transitions, it recommends "A mix of indicators that measure citizen perceptions and security, justice, and employment out- comes to monitor progress can help address both areas."[810]

More generally, the global economic crisis of 2008 has accelerated concern for the efficient and effective use of foreign aid. Calls for "aid effectiveness" respond to tales of waste, duplication and corruption in the use of foreign aid. The desire for effective aid calls into question its fundamental purpose: what difference do donors, international organisations, and non-governmental organisations make to the societies which they target? In the case of engagement in fragile states and transitions the risks and consequences of failure are significantly heightened. Nonetheless, it is only in the recent past that international organisations have become distinctly concerned with the measurement and assessment of the goals they purport to pursue in fields across transitions. One mechanism that international actors have employed to evaluate the success or otherwise of their programs in each field is the technology of indicators. The burgeoning production and use of indicators has not been accompanied by systematic study of and reflection on the implications,

---

[808] Monrovia Declaration, June 2011

[809] World Bank, World Development Report 2011, 259

[810] ibid

possibilities and pitfalls of this practice.[811] This chapter demonstrates the risks and complexities of such an approach.

This chapter seeks to establish and critique the existing strategies for assessment in transitional justice, peace-building, security sector reform and economic development. The chapter will first examine the nature of indicators as a technology and methodology, before examining its application to the four fields of this thesis. In particular, the chapter will interrogate whether indicators offer an opportunity for feedback and accountability to members of a transitional society. The chapter will then establish shared areas of concern that are suitable for measurement, such as civic trust, the rule of law and human rights, across each field and evaluate whether the present approach adopted for these shared areas reflects their independence for a number of areas of practice. The present absence of a shared means of assessment reflects the absence of integrity in international engagement in transitions and means that interdependent fields cannot join in measuring their success or failure in contributing to shared goals. Finally, the chapter will conclude by identifying inherent limitations in the assessment of projects in transition and exacerbating factors in project design and international practices will be identified.

II. Indicators

Indicators are variously defined but can be taken to mean a named, ranked representation of past or projected performance by different units that uses numerical data to simplify a more complex social phenomenon, drawing on scientific expertise and methodology.[812] Such representations can be used to compare particular units of analysis and to evaluate their performance. Several authors agree that effective indicators require a clear conceptual basis for the object of measurement.[813] The choice of indicator does not necessarily follow obviously from an objective, for which it is a mere proxy. Rather, a clear concept may enable the appropriate identification of proxies which may be then measured by indicators. It follows that an indicator

---

[811] Kevin Davis, Benedict Kingsbury, Sally Engle Merry, "Indicators as a Technology of Global Governance", available at: http://ssrn.com/abstract=1583431, 1

[812] Davis, Kingsbury, Merry, "Indicators as a Technology of Global Governance" 2; See also USAID, *Handbook of Democracy and Governance Program Indicators* (U.S. Agency for International Development, 1998). Clifford Cobb and Craig Rixford, "Lessons Learned from the History of Social Indicators" (Redefining Progress, San Francisco, 1998), available at www.rprogress.org/publications/1998/SocIndHist.pdf (last checked on 24th June 2009), 1

[813] Clifford Cobb and Craig Rixford, "Lessons Learned from the History of Social Indicators"; Todd Landman, "Map-Making and Analysis of the Main International Initiatives on Developing Indicators on Democracy and Good Governance", Thursday, 24 July 2003

should rarely be used on its own to assess the object of measurement, but in conjunction with subjective and contextual understanding of the original concept.[814]

There is currently considerable confusion over the purpose, methodology, terminology and typology of indicators. Critical assessment of indicators can operate around a number of axises: (1) *validity* (i.e. does the indicator measure what it purports to measure?), (2) *reliability* (i.e. can the indicator be produced by different people using the same coding rules and source material?), (3) *measurement bias* (i.e. are there problems with systematic measurement error?), (4) *lack of transparency* in the production of the indicator, (5) *representativeness* (i.e. for survey data, what is the nature of the sample of individuals?), (6) *variance truncation* (i.e. the degree to which scales force observations into indistinguishable groupings), (7) *information bias* (i.e. what kinds of sources of information are being used?), and (8) *aggregation problems* (i.e. for combined scores, to what degree are aggregation rules logically inconsistent or overcomplicated).[815]

For each of these components, indicators depend on simplification. They are often numerical representations of complex phenomena intended to render these more simple and comparable with other complex phenomena. The transformation of knowledge into numerical representations as indicators strips this knowledge of meaning and context.[816] Moreover, the choice of data source is entirely contextual and contingent. No data source can be taken without consideration of the incentives motivating its generation.[817] To the degree indicators "can be made to look similar and ...compared at an abstract level," they tend to lose their efficacy as accurate and adequate measures over time.[818]

Despite these methodological concerns, indicators can be categorised in a variety of ways. Indicators can be classified according to whether they are aimed at measuring the performance of an obligation bearer ('input indicators'), the process of policy implementation ('process indicators')

---

[814] Vera Institute of Justice, *Measuring Progress toward Safety and Justice: A Global Guide to the Design of Performance Indicators across the Justice Sector* (2003), 3

[815] Landman, "Map-Making and Analysis of the Main International Initiatives on Developing Indicators on Democracy and Good Governance", (n784) para 26

[816] Davis Kingsbury Merry "Indicators as a Technology of Global Governance" (n782) 4

[817] Vera Institute of Justice, *Global Guide to Performance Indicators* (2003), 7

[818] Ann Jannete Rosga and Margaret Satterthwaite, "Trust in Indicators: Measuring Human Rights" 27(2) Berkeley Journal of International Law, 31

or the level of progress achieved ('outcome indicators').[819] The UN employs both *objective/ quantitative* indicators, such as voter turnout, socio-economic performance, or the ratification of human rights treaties, and *subjective/qualitative* indicators based on expert or mass opinion surveys.[820] This typology references the approach taken by some international organisations in the fields examined below and broadly aligns with the distinction between quantitative and qualitative analysis.

Wariness about indicators as a technology relates to their simplification of complex and contextual information and perceptions. The desire for objectification and universalisation inherent in indicators seems in tension with the desire to prioritise local context and ownership dominant in the policy frameworks of international organisations. In assessing the use of indicators in each field, we can assess whether the methods of universalisation and objectification inherent in indicators outweigh the complexity, specificity and context of information and knowledge in each field. In particular, it remains to be seen whether the use of indicators is a valuable technique in the circumstances of transition.

III. Transitional Justice Indicators

Empirical research through indicators may enable challenge the existing assumptions of transitional justice policy.[821] Despite the recent proliferation of transitional justice institutions, there has been little systematic examination of their effectiveness and their contribution to their stated goals. Stover and Weinstein note that most international aid agencies and their national counterparts forgo collecting and analysing population data prior to launching social reconstruction projects because they lack the appropriate expertise, or consider data collection too time-consuming, or fear it will cause friction among former belligerents.[822] Examination of the efficacy of transitional justice mechanisms can examine both how effectively they respond to a past legacy of gross violations of human rights, but also how they contribute to the development

---

[819] Landman, Map-Making and Analysis of the Main International Initiatives on Developing Indicators on Democracy and Good Governance, (n784) para 23-24

[820] OHCHR, Report of the United Nations High Commissioner for Human Rights E/2011/90, para 3

[821] Neil Kritz, "Policy Implications of Empirical Research on Transitional Justice", in Van Der Merwe, Baxter, Chapman, *Assessing Transitional Justice: Challenges for Empirical Research* (2009, USIP) 15

[822] Eric Stover and Harvey M. Weinstein, 'Conclusion: A Common Objective, a Universe of Alternatives,' in Eric Stover and Harvey M. Weinstein (eds), My Neighbor, *My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, (Cambridge University Press, 2005), 326

of a society that can prevent the recurrence of such violence.[823] Some existing empirical work has led to scepticism about the contribution of transitional justice to its stated goals.[824]

It is first necessary to establish what information is available regarding existing transitional justice processes. David Backer notes that there is an identifiable population of countries that have experienced transitions.[825] Despite evident disparities, Backer notes a key common feature to these countries: "experience of initiating a transition that could in principle permit or induce increased scrutiny of past injustices."[826] This common feature reflects a particular expression of the general circumstances of transition offered in Chapter III. Backer argues that only cross-national comparative analysis can establish whether the motivations and mechanics of a particular state are typical or unusual. In particular, many prior transitions have benefited from the observation of the experiences of other countries that they perceived as similarly situated.[827] Empirical research on transitional justice can now benefit from the rigorous work offered in two online databases, regarding the issuance of amnesties in transitions and a broader database on transitional justice mechanisms employed across a wide range of case studies.[828] A number of other datasets also provide a useful basis for analysis.[829] Other studies examine the effect of discrete transitional justice institutions, such as trials or truth commissions, or within specific regions, such as Latin America.[830] Though going some way to addressing the need for empirical research, existing studies do not provide comprehensive data on the effects of transitional justice institutions and

---

[823] Van Der Merwe, Baxter, Chapman, Assessing Transitional Justice: Challenges for Empirical Research (2009, USIP), 5

[824] David Mendeloff, "Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?" (2004) 6 International Studies Review 355–380

[825] David Backer, Cross-National Comparative Analysis, in Van Der Merwe, Baxter, Chapman, Assessing Transitional Justice: Challenges for Empirical Research (2009, USIP) 23

[826] ibid 27

[827] ibid 49

[828] Amnesty Database, University of Ulster, Leigh Payne's Transitional Justice database, available at https://sites.google.com/site/transitionaljusticedatabase/home

[829] Nils Petter Gleditsch, Peter Wallensteen, Mikael Eriksson, Margareta Sollenberg and HÅvard Strand, "Armed Conflict 1946-2001: A New Dataset" (2002) 39 Journal of Peace Research 615; Helga Malmin Binningsbø, Jon Elster & Scott Gates, "Civil War and Transitional Justice, 1946-2003: A Dataset"; Oskar N.T. Thoms, James Ron, Roland Paris, "The Effect of Transitional Justice Mechanisms" CIPS April 2008

[830] Kathryn Sikkink and Carrie Booth Walling, "The Impact of Human Rights Trials in Latin America" (2007) 44 Journal of Peace Research 427; Caspar Fithen, "The Legacy of Four Vetting Programs: An Empirical Review", ICTJ February 2009; Priscilla B. Hayner, "Fifteen Truth Commissions--1974 to 1994", (1994) 16(4) Human Rights Quarterly 597-655; Eric Brahm, "Uncovering the Truth: Examining Truth Commission Success and Impact", (2007) 8 International Studies Perspectives 16–35

mechanisms, with significant evidence on a narrow range of cases.[831] Further research and mechanisms are required to enable conclusions regarding the empirical effects of transitional justice. As a result, there may be space for the development of specific transitional justice indicators.

Three basic issues arise in comparative research design for transitional justice that inform the generation of any potential indicators.[832] The first is what is the object of measurement and comparison. Each type of transitional justice institution seeks to make a contribution to some value goal. Identifying the contribution, for instance, of a truth commission to attitudes to prior gross violations of human rights, would directly evaluate the success of achieving its goals. Significant dissensus persists regarding the consequences of institutional design choices of transitional justice institutions: "a great deal is known about the literal mechanics of transitional justice processes, but far less is understood about the resulting implications."[833]

Transitional justice policy overlaps significantly with existing areas of measurement in other fields, examined below. Concepts such as the rule of law, human rights, and the governance of State institutions are all relevant to transitional justice, which purports to contribute to the enhancement of each of these areas. It may be plausible that transitional justice empirical research could engage with these means of evaluation and relevant indicators, but would also need to be able to identify the distinct contribution caused by transitional justice institutions.[834] Transitional justice also employs distinct concepts and ideas, as examined in prior chapters. There have been virtually no studies that systematically have attempted to examine or measure the contribution of trials to reconciliation and social reconstruction.[835] Such research would be challenged by the contested nature of reconciliation, coexistence and forgiveness. What is notable is the lack of data and lack of interest in data on civic trust as an expression of the achievement of these goals in particular, but also as part of the purported contribution of transitional justice to transitional societies. Furthermore, research would also be needed to understand the impacts of local justice initiatives based on custom or ritual that may be happening in place of or alongside formal transitional justice processes. The development of transitional justice indicators would

---

[831] Most notably South Africa and Latin American transitions

[832] David Backer, Cross-National Comparative Analysis, (n796)

[833] ibid 51

[834] Neil Kritz, Policy Implications of Empirical Research on Transitional Justice (n792) 16

[835] Laurel Fletcher and Harvey Weinstein, "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation" (2002) 24(3) Human Rights Quarterly 573-639, 585

therefore require both disaggregating existing indicators on areas of shared measurement, such as rule of law, for transitional justice institutions. In addition, specific indicators may need to be developed for areas of discrete concern to transitional justice, such as reconciliation or forgiveness.

The second basic challenge is when to compare the efficacy of transitional justice measures. A monitoring and evaluation framework of empirical research distinguishes between three types of research, each with different timing and objectives: (i) formative evaluation; (ii) process monitoring and evaluation; and (iii) outcome monitoring and evaluation.[836] None of these areas are currently the subject of transitional justice indicators. Determining whether a transitional justice process has induced any changes depends fundamentally on establishing the state of affairs that prevailed before the process began.[837] A primary difficulty in establishing transitional justice data is that a lack of longitudinal data prevents establishing a baseline to know individual perceptions before transitional justice programs, thereby limiting our ability to assess their impact. Systematically collected data are also virtually nonexistent outside of the South African context.[838] Researchers therefore have an important role to play in capturing baseline attitudes at the very beginning of the transition, that is, before a transitional justice mechanism is chosen rather than after the fact. Given the proximity of the moment of transition, with potential security concerns, this remains a particularly challenging task. The collection of baseline data at the beginning of a transition may be extremely useful for research purposes but is likely to be at the end of political institutional and financial priorities.[839] Given the absence of longitudinal data on prior transitions, evaluating the impact of prior mechanisms is challenging. Victim and community perception surveys early in transition cycles are an important contribution to establishing base line opinions, but would benefit from systematic continuation throughout the transition and operation of a given mechanism.[840] If transitional justice policy remains contingent and determined without regard to such perceptions, there is little incentive for donors to finance systematic approaches.

---

[836] Phoung. Pham and Patrick. Vinck, "Empirical Research and the Development and Assessment of Transitional Justice Mechanisms", (2007) 1 International Journal of Transitional Justice, 231–248, 236

[837] David Backer, Cross-National Comparative Analysis, (n796) 52

[838] Henry Brahm, "Uncovering the Truth: Examining Truth Commission Success and Impact" (2007) 8 International Studies Perspectives 16-35, 20

[839] Victoria Baxter "Critical Challenges for the Development of the Transitional Justice Research Field", in Van Der Merwe, Baxter, Chapman, *Assessing Transitional Justice: Challenges for Empirical Research* (2009, USIP), 325

[840] ICTJ, Iraqi Voices: Attitudes Toward Transitional Justice and Social Reconstruction (2004); UNDP, Public Perceptions on Transitional Justice: Report on Transitional Justice Opinion Polling Survey Conducted in April-May 2007 in Kosovo

The third basic challenge is how to measure case studies. Particular effort should be devoted to establishing clear causal links among variables that are amenable to analysis.[841] To make general claims regarding these assumptions, there is a need to find ways of disaggregating the different contextual factors and different transitional justice components at play in any particular case. If this task can be achieved, empirical research could guide policy as to the appropriate institution or mechanism for transitional justice in a specific transition.

Some transitional justice outcomes are inherently difficult to measure, such as reconciliation, justice and healing. It is also difficult to properly compare transitional justice across countries since it often varies greatly by mandate, structure and implementation. In addition, this process requires particular sensitivity as it includes assessing the behaviours, perceptions and attitudes of victims and survivors of gross violations of human rights. Hugo Van der Merwe cautions that particular sensitivity is needed in considering comparative studies due to the continually contested nature of justice concepts across states and across practitioners and academics: "delivering justice usually means different things to different people. it is therefore a highly emotive debate among people speaking different conceptual languages".[842] Van Der Merwe also suggests that the form of justice offered by a transitional mechanism may be evaluated by comparison to both international standards of justice and local understandings and contexts of justice.[843] Finally, histories of external intervention also impact transitional justice initiatives and need to be considered at all phases of the process. The paradox is that the need for the rule of law is greatest in countries in which colonialism and foreign intervention has been problematic, and these are countries in which transitional justice is likely to be implemented with international involvement.[844]

The claims of transitional justice to contribute to peace, justice and reconciliation appear at this point to represent hopes for a happy ending and not-evidence based policies.[845] Oskar Thoms, James Ron and Roland Paris recognize that an ethic of conviction based on moral behaviour or legal obligations and a pragmatic, outcome-orientated ethic of responsibility motivate existing

---

[841] David Backer, Cross-National Comparative Analysis (n796) 60

[842] Hugo Van der Merwe, Delivering Justice during Transition: Research Challenges in Van Der Merwe, Baxter, Chapman, Assessing Transitional Justice: Challenges for Empirical Research (2009, USIP, 138

[843] ibid, 136

[844] Laurel Fletcher, Harvey Weinstein & Jamie Rowen, Context, Timing and the Dynamics of Transitional Justice (n806) 220

[845] ibid 163-220

practice and research on transitional justice.[846] The claims of law to achieve changes in social norms, and in behaviours attitudes and perceptions remain untested in the majority of prior transitions and thus continue to operate as a working hypothesis that relies significantly on assumptions drawn from peacetime assumptions regarding the effect of law on social change.

Empirical research has the potential to identify whether given transitional justice mechanisms are more appropriate than others in specific transitions. The lack of longitudinal data regarding prior transitional justice endeavours should caution us about prescribing repetition of the form, process or content of any transitional justice institution to a new transition. The difficulties in obtaining such data from the early moments of transition are a shared problem faced across all fields in transition. Due to its need to examine issues of human rights, the rule of law and civic trust, empirical analysis of transitional justice needs to be considered in conjunction with similar work in other fields. Moreover, because it has not embarked on this systematic project, transitional justice could benefit from lessons in other fields as well as examining whether it is valuable to gather such data and use it as a basis for the distribution of finance for its institutions.

IV. Peace Indicators

The use of peace indicators is less contested than transitional justice. Some indicators measure international security as the absence of inter-state war and violence.[847] State security can also be measured by its level of violence and militarisation. Though there are measurement problems with internal levels of violence, such as underreporting, issues of militarisation and existence of armed conflict are more objectively verifiable than many of the contested concepts of transitional justice. The Global Peace Index provides indicators for a thicker, positive concept of international peace.[848] The GPI comprises 24 indicators in three fields: the level of ongoing domestic and international conflict; the level of militarisation; and the level of safety and security in a society. The Global Peace Index therefore to some extent overlaps with the subsequent measurement of the state of

---

[846] Thoms, Ron and Roland Paris, The Effects of Transitional Justice Mechanisms (n800) 16

[847] The Correlates of War Project measure inter-, extra- and intra-state war in the 1816–1997 period. Uppsala Conflict Data Program (UCDP), the Center for International Development and Conflict Management at the University of Maryland (CIDCM) and the Conflict Barometer of the Heidelberg Institute on International Conflict Research (HIIK). The International Institute for Strategic Studies, Chart of Conflict; CIDCM's International Crisis Behavior (ICB) Project

[848] Ursula C. Schroeder, Measuring Security Sector Governance – A Guide to Relevant Indicators, DCAF Occasional Paper – No20, 15

human security around the world.[849] A significant number of further datasets provide information on the status of peace and stability from 1946 to present.[850]

Analysis of peace-building centred around peace agreements is facilitated by an online database providing details of such agreements.[851] However, systematic research remains limited on the implementation and causality of such agreements in building peace and discharging the substantive obligations in each agreement. Similar to transitional justice, there remains a challenge in proving the causes of compliance with peace agreements, removed from the variety of factors that operate upon domestic actors in the circumstances of transition. Further analysis of peace building measures may seek to incorporate reduction in human rights violations as proxy for the creation of sustainable peace. However, such incorporation must again be subject to identifying the causal relationship between peace building activities and any such reduction in violations. The same logic applies for any contribution of peace building to improvements in the rule of law or civic trust in the transition of a given society.

While such databases and concerns surround the general evaluation of the conditions of peace in a given society, they fail to reflect distinct evaluation of discrete peace-building processes undertaken by national and international actors. A UN guidebook on Monitoring Peace Consolidation noted that efforts to devise effective United Nations system transitional strategies are hindered by a lack of clarity as to the elements of a consolidated peace, the absence of a system-wide country monitoring methodology, benchmarking problems, and limited planning capacity within the United Nations system to support sequencing and transition of peace operations. As a consequence, reliable indicators of the stability of peace and efforts at consolidation remain in their infancy.[852] Conceptual contestation regarding the meaning of peace building contributes to a lack of discrete indicators.[853] The guidebook seeks to provide a framework for the establishment of such indicators but acknowledges that they will remain context specific in the absence of consensus about universal indicators.

---

[849] ibid 41

[850] Joakim Kreutz, 2010, "How and When Armed Conflicts End: Introducing the UCDP Conflict Termination Dataset" (2010) 47(2) Journal of Peace Research 243-250; Lotta Harbom, and Peter Wallensteen, "Armed Conflicts, 1946-2008", (2009) 46(4) *Journal of Peace Research*

[851] University of Ulster Peace Agreements Database

[852] United Nations, Monitoring Peace Consolidation: UN Practitioners' Guide to Benchmarking (2010), 2

[853] Charles T. Call, Knowing Peace When You See It, (UNDP, 2007), http://www.undp.org/cpr/content/economic_recovery/ Background_3.pdf.

The measurement and assessment of peace itself is developing through the Global Peace Index and reflects the overlapping concern between peace and security in theory, international law and policy examined previously. The absence of any agreement on measurement for the distinct contribution of the contested concept and practice of peace-building however shares the status of the measurement of transitional justice as being within its infancy. This is all the more surprising given the priority placed on peace and state building in international policy frameworks examined Chapter VI. However both fields can look to the experience other fields in transition in evaluating how to develop criteria of assessment.

V. Security Indicators

Although considerable international resources have focused on security sector reform in recent years, there remains little systematic evidence regarding consequences and processes of reform. David Law maintains that there is "no overarching systems on performance measurement for SSR.[854] Security systems have many constituent parts and each sub-sector differs significantly in its purpose, functioning and orientation. It is thus hard to track and evaluate changes, especially as one sub-sector may be affected by several others.[855] Moreover, contestation regarding SSR means that there is limited consensus on the objects of measurement. Knowledge about the state of security sectors worldwide is widely dispersed among different databases with several indicators covering different aspects of security in the world.[856] As a consequence, Ursula Schroeder proposes that security sector reform indicators be gathered to measure both the level of security provided in a given society and the framework and mechanisms in place to achieve such security.[857]

The level of security can be examined by reference to narrow and broad conceptions of security. As identified in Chapter III, national security paradigms would focus on state provision of security. We have examined the measurement of negative conceptions of peace as the absence of violence or armed conflict above. Such indicators are also relevant for the proposed examination of security in given societies. However, further indicators can provide guidance on risks of insecurity. The

---

[854] David Law, (ed). *Inter-Governmental Organisations and Security Sector Reform*, (DCAF Publication 2008) 240

[855] Simon Rynn with Duncan Hiscock *Evaluating for security and justice challenges and opportunities for improved monitoring and evaluation of security system reform programmes* (Saferworld 2009) ii

[856] Ursula C. Schroeder, Measuring Security Sector Governance – A Guide to Relevant Indicators, (n819) 5

[857] ibid 14

militarisation of societies and the military build-up indicate the potential for military involvement in society. Several databases consider the level of militarisation in a state.[858]

Further relevant indicators may include the measurement of country crime rates. The largest survey measuring global crime rates, the UN Survey of Crime Trends and Operations of Criminal Justice Systems, is conducted by the UN Office on Drugs and Crime (UNODC).[859] Further crime rate data exists for European states.[860] Such data remains of contested reliability, as official reporting of crime may not reflect actual crime levels. Furthermore, the lack of shared definitions and methodologies for crime internationally limit the possibility for cross-national comparative studies. In addition, the Failed States Index provides data across 12 indicators on risk of state failure, including levels of delegitimation, criminalisation and deterioration of a state's institutions, laws and services.[861] The Worldwide Governance Indicators also measure "political stability and absence of violence", which perceptions of instability.[862] Freedom House's Political Terror Scale maps national levels of political violence and terror, based on the yearly country reports of Amnesty International and the US State Department country reports on human rights practices.[863] Furthermore, a variety of development indicators could also be employed to assess "freedom from want objectives" to assess a human security conception.[864] Finally, the University of Maryland's Peace and Conflict Instability Ledger assesses the risk of instability in a state over time and according to a range of economic, social and political indicators.[865] LIke with peace indicators, with

---

[858] The Bonn International Center for Conversion's Militarization Index, last updated in May 2005, combines data on military expenditures, average weapon system holdings, armed forces personnel and employment in arms production. It is also known under the name of BIC3D (Disarmament, Demilitarization and Demobilization Index).The International Institute for Strategic Studies *Military Balance* annually assesses the military capabilities and defence economics of 170 countries worldwide. The military expenditure database produced by SIPRI (the Stockholm International Peace Research Institute) covers a similar range of countries and provides an open-source time series of military expenditures since 1988. Finally, the Small Arms Survey, based at the Graduate Institute of International and Development Studies in Switzerland, has provided a quantitative measurement since 1999 of global small-arms and light-weapons issues, including the production, diversion (theft), destruction, transfer and transparency of small- arms and light-weapons stockpiles.

[859] http://www.unodc.org/unodc/en/data-and-analysis/United-Nations-Surveys-on-Crime-Trends-and-the-Operations-of-Criminal-Justice-Systems.html

[860] European Sourcebook of Crime, available at http://www.europeansourcebook.org/,

[861] Failed State Index, available at http://www.foreignpolicy.com/failedstates

[862] Worldwide Governance Indicators available at http://info.worldbank.org/governance/wgi/index.asp

[863] Political Terror Scale, available at http://www.politicalterrorscale.org/about.php

[864] The UNDP Human Development Index, the World Bank World Development Indicators database and the WHO Statistical Information System

[865] http://www.cidcm.umd.edu/pc/; see also Bertelsmann Transformation Index

which there is some overlap, security indicators are converging and may provide general guidance on aspects of the social and security environment. However, they do not directly enable assessment of the impact of SSR programming.

The second indicator set focuses on the quality of security sector governance.[866] Previous chapters identified that in SSR theory the governance of a security sector can be assessed first with reference to its democratic oversight and civilian control. Democratic oversight can be examined as a component of the general measurement of democracy within a given society.[867] Indicators that assess the civilian oversight of the security sector are negative measures of military involvement in domestic politics.[868] Second, the governance of the security sector can be evaluated by reference to its compliance with the rule of law, in particular with reference to norms of accountability. Unfortunately, there are no specific indexes that measure the accountability regimes and civilian control of security sectors around the world. Currently, the ability to measure specifically the security sector governance remains incomplete. Instead, several indicator sets assess the existence and quality of accountability regimes more generally, considered as part of governance indicators below. As a consequence, while general guidance may be provided on norms relevant to SSR, the difficulty remains in linking the assessment of individual programmes to general indicators, whether of security or security sector governance.

The limitations of available indicators to measure security sector governance are significant. Wide variations in data sources and geographical coverage of the discussed indices complicate the integration of different indicators into more comprehensive measures of security sector governance. No indicator set provides for non-state actors in security sector governance, despite the increased relevance of armed non-state security actors. Moreover, most available indicators remain limited to the general political and legal institutions of states and do not focus specifically on the security sector. Furthermore, assessment of SSR has largely focused on objective measurements, to the neglect of public perceptions of security. Bocco, de Martino and Luethold suggest that understanding how the public views the security sector and its activities is important for good governance because public perception surveys assess the quality of governance and can evaluate the direction of future reforms. They suggest that public perception surveys are also a

---

[866] Ursula C. Schroeder, Measuring Security Sector Governance – A Guide to Relevant Indicators, (n819)

[867] ibid 25

[868] Bonn International Center for Conversion (BICC) Militarization Index; Political Risk Services 'military in politics' indicator; The Worldwide Governance Indicators have integrated the Political Risk Services 'military in politics' indicator into their measurement of 'voice and accountability'

step towards greater inclusiveness in the management and oversight of security issues and a means for establishing public accountability of the security sector.[869]

Though offering some general guidance on levels of security between states, current assessment of security fails to acknowledge the place of SSR programming. Concern for coherence was a feature of SSR policy examined in Chapter VI. As a result, the current approach to disparate measurement of SSR programming fails to provide a coherent analysis of the efficacy of SSR engagement. Contested SSR policy exacerbates the challenges in achieving coherent assessment, but existing SSR assessment benefits from its focus on objective areas of measurement. Assessment of SSR continues the trend from transitional justice and peace building in creating a difficulty in disaggregating the impact of discrete SSR projects, as against the general trends in security and security sector governance.

VI. Development Indicators

By comparison to nascent efforts at assessment of other fields, development practices have long employed statistical analysis in assessing policy decisions and programming. Criticisms of existing approaches are long standing.[870] For instance, GDP suffers from two major weaknesses: (a) being a monetary aggregate, it pays little or no attention to distributional issues and to elements of human activity or well-being for which no direct or indirect market valuation is available; (b) it is measuring productive flows and, as such, ignores the impact of productive activities on stocks, including stocks of natural resources.[871] The United Nations human development index (HDI) that combines GDP with measures of health (proxied by life expectancy) and educational achievement.[872] Recently, Joseph Stigilitz and Amartya Sen have proposed an alternative set of indicators as part of the Commission on the measurement of economic performance and social progress, created in 2008 on French government's initiative.[873]

---

[869] Ricardo Bocco, Luigi de Martino, Arnold Luethold, *Palestinian Public Perceptions of Security Sector Governance: Summary report,* (Geneva Centre for the Democratic Control of Armed Forces and the Graduate Institute of Development Studies (IUED) 14 October 2005)

[870] Commission on the Measurement of Economic Performance and social Progress, Survey of Existing Approaches to Measure Socio-Economic Progress

[871] ibid, 1

[872] United Nations Human Development Index, available at http://hdr.undp.org/en/statistics/

[873] Report by the Commission on the Measurement of Economic Performance and Social Progress, available at www.stiglitz-sen-fitoussi.fr (accessed 29 September 2011)

However, as considered regarding peace-building, specific indicators assessing processes of development donor engagement in transitions and fragile states remain under developed. Indicators on fragility, such as the Failed State Index, do include subsets for economic decline. However, such approaches do not reflect the policy priority placed on state building within in the international policy frameworks for engagement in transitions and fragile states. As a consequence, an appropriate area of focus may be governance indicators, considered as part of a shared framework below. Again, such indicators reflect a general approach not tailored to fragility or transition, but rather reflecting concern for how governance standards, in particular the rule of law, impact on development practices.

VII. Indicators for Shared Framework

Measurement of the above fields remains nascent, but demonstrates common challenges and concerns, most notably the tension between overlapping interest in objects of measurement and difficulties in disaggregating such objects to show a causal link between a given project in a given field and an improvement in the goal of that project and field. Without baseline information, it is difficult to attribute program success or failure to the programs themselves, as opposed to the environment in which they operate.[874] Policy in each field examined in Chapter V has also stressed the desire for coherence and coordination from international and domestic actors internal and external to each field. The practice of integrity discussed in Chapter III identified the need to combine components of each field to provide a coherent and comprehensive framework. Gathering data for indicators is complicated and time consuming, especially so in fragile and transitional environments, where it may represent a priority amid the intense public demands placed on governments and the international community. A coordinated and consolidated approach to data gathering, which reflects the conceptual and policy interdependence and overlap between these fields may provide a more efficient and effective means of measuring the baseline data for each field and the contribution of each field to the shared structural goals of enhancing civic trust, the rule of law and the protection of human rights in transitional societies. In this way shared indicators may reflect the practice and process of integrity. We can therefore consider existing attempts to measure these objects and seek to apply those forms of measurement to transitions and fragile states to generate shared transitional indicators.

---

[874] Nancy Birdsall, "Seven Deadly Sins: Reflections on Donor Failings" in William Easterly (ed) Reinventing Foreign Aid (OUP 2008), 528

A. Civic Trust

There is currently no generic format for an indicator of social capital, such as civic trust. Attempts to measure social capital through indicators have been widely criticised because concepts, such as 'trust' and 'networks', are vague and ambiguous. Like human capital, social capital is difficult to measure directly; for empirical purposes the use of proxy indicators is necessary. Measuring trust reflects this challenge. At least two broad approaches have been taken: the first, to conduct a census of groups and group memberships in a given society, and the second, to use survey data on levels of trust and civic engagement.

Robert Putnam has tried to measure social capital by counting groups in civil society.[875] However, negative externalities can result from interpersonal interactions, as demonstrated by certain interests groups or, in extreme cases, malevolent groups such as the Mafia in Italy or the Interahamwe in Rwanda. In such situations, social capital benefits members of the association, but not necessarily nonmembers or the community at large.[876] Group affiliation can therefore produce a negative externality which we can think of as the radius of distrust.[877] As the many examples of civil conflict around the world testify, trust is more easily destroyed than (re)built.[878] Social capital is thus not always a positive attribute and is often used to exclude others. The strong social capital associated with many ethnic groups indicates that strong ties that supply resources can also be used to restrict outsiders or limit individual members' freedom.[879]

Trust can also be ascertained from a question in a social survey such as the World Values Survey or the General Social Survey in the USA. Measuring trust requires asking respondents about their expectations about and experiences with behaviour requiring trust. Key questions relate to the extent to which households received or would receive assistance from members of their community or network in case of various emergencies (loss of income, illness).[880] However limitations to trust literature soon emerge. Trust literature that relies on survey data is silent on the extent to which people's trust in others is an idiosyncratic disposition or a belief or a response

---

[875] Robert D. Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton University Press, 1993).

[876] Francis Fukyama, *Social Capital and Civil Society* (1999 on file with author), 6

[877] ibid

[878] Christiaan Grootaert and Thierry van Bastelaer, Understanding and Measuring Social Capital: A Synthesis of Findings and Recommendation from the Social Capital Initiative, *Social Capital Initiative Working Paper No. 24,* 7-8

[879] ibid

[880] Christiaan Grootaert and Thierry van Bastelaer, Understanding and Measuring Social Capital: (n849) 23

to actual trustworthiness. Without some measure of trustworthiness we have no idea of whether the level of trust reflects the level of actual trustworthiness.[881] Stephen Knack and Philip Keefer use data from the World Values Surveys for a sample of 29 countries to get direct measures of trust and civic cooperation.[882] Contrary to Putnam's suggestions, the authors found no relation between either horizontal networks and trust and civic norms, nor between associational activity and economic performance.

Moreover, the trust to be measured for present purposes is not necessarily inter personal trust, but rather *civic* trust, i.e trust in government and trust in "everyone else", the unknown citizen body. The OECD Better Life Index suggests that high voter turnout is another measure of public trust in government and of citizens' participation in the political process.[883] Voter participation is currently the best existing means to measuring civic and political engagement for several reasons (high quality data, cross-country comparability). However, this measure is far from ideal, in particular because of institutional differences in electoral systems. It secondly suggests use of a consultation on rule-making indicator, describes the extent to which formal consultation processes are built-into the regulatory law-making process, as a further indicator of civic trust.

One further recent example is the Edelman Trust Barometer.[884] The survey consisted of 30-minute telephone interviews. The 2011 Edelman Trust Barometer survey sampled 5,075 informed publics in two age groups (25- 34 and 35-64) in 23 countries. All informed publics met the following criteria: college-educated; household income in the top quartile for their age in their country; read or watch business/news media at least several times a week; follow public policy issues in the news at least several times a week. The Edelman survey separately assesses trust in government, media, business and NGOS. While these criteria may not be appropriate for use in measuring trust in transitions for the purposes of multiple fields of international engagement, it identifies a survey structure that offers more guidance than the World Value Survey and targets civic trust in particular. As a result, there is potential to develop assessment of civic trust in each field. The population sampled for assessing civic trust in transitions could be across socially divided groups,

---

[881] John Ermisch, Diego Gambetta, Heather Laurie, Thomas Siedler, and S. C. Noah Uhrig, "Measuring people's trust"(2009) 172 4 *J. R. Statist. Soc.* A 749–769

[882] Stephen Knack and Phillip Keefer, "Does Social Capital have an Economic Payoff? A Country Investigation" Working Paper No 197, Center for Institutional Reform and the Informal Sector

[883] http://www.oecdbetterlifeindex.org/

[884] http://www.edelman.com/trust/2011/

age, gender, and income brackets and could specifically identify the perceptions of victims and survivors.

The World Bank study has concluded that knowledge and ability to measure social capital and its impacts has sufficiently advanced to make systematic analysis of social capital possible in the context of poverty analysis and macroeconomic analysis.[885] More sophisticated and targeted use of surveys to reflect the civic nature of the trust measured, as well as sensitivity to the potential causes of mistrust in a transitional society or fragile state may enable effective assessment of levels of civic trust in these environments. The combination of surveys with statistical data on public participation in elections and consultation may contribute to systemic understandings of trust.

B. The Rule of Law

Each field shares an interest in contributing to the rule of law in a transitional society and fragile state. Several large indexes provide comprehensive measures of the rule of law. The Worldwide Governance Indicators, the Bertelsmann Transformation Index and the Economist Democracy Index all focus on the rule of law as one of their core indicators for governance and democracy. The Polity IV dataset models the institutional characteristics of political regimes between 1800 and 2011.[886] Further examples include Transparency International's Corruption Perceptions Index, the Open Budget Index, the International Country Risk Guide and the Global Integrity Index. Data sources vary across indicator sets. By one estimate, there are now some 140 user-accessible sets of governance indicators, comprising thousands of individual indicators.[887] In many cases, relevant quantitative data are difficult to obtain.[888] Despite recognition of relevance of rule of law to a variety of fields in transition, there exists no global evaluation framework that provides a sufficiently reliable measure of the justice in a country. Rule of law indicators are most prominently examined within the context of governance reform and assessment of good governance. Governance reform also reflects a non contextual approach to the state building priority examined in Chapter VI.

Early work on good governance sought to investigate its effect on economic performance. The starting point for consideration of governance indicators is the seminal 1999 World Bank paper,

---

[885] Christiaan Grootaert and Thierry van Bastelaer, Understanding and Measuring Social Capital (n849) 28

[886] Polity IV, http://www.systemicpeace.org/polity/polity4.htm

[887] Christiane Arndt and Charles Oman, *Use and Abuses of Governance Indicators* (OECD 2006) 30

[888] Kevin Davis, "What do Rule of Law Variables Tell Us About the Rule of Law?" (2004-2005) 26 Mich. J. Int'l L. 160-1

"Governance Matters".[889] The article covered over 150 countries and consisted of a database asking a variety for their views on governance with an emphasis on corruption. The surveys took in experts (academics), firm managers (business people not necessarily inside the target country), and citizens in target countries. The authors recognised that the data were inherently subjective but felt that given the general difficulties in obtaining objective data regarding governance and corruption, there were few alternatives to the use of subjective data.[890] The data gathered were grouped into six clusters, "voice and accountability", "political stability", "government effectiveness", "regulatory quality", "rule of law" (which includes variables measuring respect for property rights), and "control of corruption". Among those clusters the rule of law is defined as "capturing perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence."[891] The authors concluded that the legal system, in particular the judicial system, was an entry point for international aid to assist developing countries into the governance system. By enhancing these legal sectors, governance would be made better across the board and specifically corruption would be reduced. It led to technical assistance projects. However, in response to criticism of their approach, in the 2003 paper "*Rethinking Governance: Empirical Lessons Challenge Orthodoxy*", Daniel Kaufmann acknowledged that the interplay between the elites vested interests and the politics of a country were hitherto underrepresented in policy design. The author maintains that there is a "large direct causal effect from better governance to better development outcomes."[892]

However, scepticism regarding the effect of the rule of law on social change, especially development, has a long lineage.[893] Such scepticism may include queries about legal reform where

---

[889] Daniel Kaufmann, "Governance Matters" (with A. Kraay and P. Zoido Lobaton) *Policy Research Working Paper 2196*, The World Bank: Washington D.C., October 1999, available at http://www.worldbank.org/wbi/governance/pubs/govmatters.html (last checked 24th June 2009)

[890] Daniel Kaufmann and Aart Kraay On Measuring Governance: Framing Issues for Debate, *Issues paper for January 11th, 2007 Roundtable on Measuring Governance Hosted by the World Bank Institute and the Development Economics Vice-Presidency of The World Bank, 5*

[891] Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi,The Worldwide Governance Indicators: Methodology and Analytical Issues, 4

[892] Daniel Kaufmann et al, "Rethinking Governance: Empirical Lessons Challenge Orthodoxy," Chapter in *Global Competitiveness Report 2002-03*, World Economic Forum, March 2003, available at http://www.worldbank.org/wbi/governance/pubs/rethink_gov.html., 17

[893] Friedrich Engels, "Speech at the Graveside of Karl Marx", in Robert C. Tucker (ed) *The Marx-Engels Reader* (1972) 603; David Trubek and Marc Galanter, Scholars in Self-Estrangement: Some Reflections On the Crisis in Law and Development Studies in the United States (n370)

a variable, includes both legal and non-legal factors.[894] More critical claims challenges the causative relationship between a given legal reform and its impact on development.[895] The variable in question may not refer exclusively to aspects of the legal system. There are some variables – the recurring examples in this context are crime rates - that describe the products of interaction between both legal and non-legal factors. These types of variables are of limited use as guides to legal reform unless it is clear how they respond to purely legal reforms.[896]

Similar concerns arose in the World Bank's Doing Business reports, which sought to investigate "the scope and manner of regulations that enhance business activity and those that constrain it".[897] Its general conclusions were that regulation in poor countries is cumbersome to all aspects of business activity; that the heritage of a legal system mattered, with common law countries regulating less than those in the civil law tradition, and that regulation can become outdated in developing countries where it is not frequently updated. The reports' broadest conclusion is that: "Heavier regulation of business activities generally brings bad outcomes, while clearly defined and well-protected property rights enhance prosperity".[898] The Doing Business project's measures represent a clear improvement upon preexisting measures.[899] However, the process by which legal norms are selected for inclusion in the DB database is opaque, and as a result it is not clear whether all relevant legal norms have been captured.[900] Second, the Doing Business project measures do not include any measures of the degree of certainty with which information about those norms or practices is held.[901] Kevin Davis and Kruse conclude "our strong sense is that the short-comings detailed above, in both the analyses and the underlying data, render the empirical foundations of the DB project too unsound for its findings to be used as the basis for widespread legal reforms."[902]

---

[894] Kevin Davis, What do Rule of Law Variables Tell Us About the Rule of Law? (n859)

[895] ibid 147

[896] ibid

[897] World Bank, Doing Business Report 2004, viii

[898] ibid 83

[899] Kevin E. Davis and Michael B. Kruse "Taking the Measure of Law: The Case of the Doing Business Project" (2007) 32(4) Law & Social Inquiry 1104

[900] ibid 1105

[901] ibid

[902] ibid 1115

The broadest concern regarding assessment of the rule of law through indicators are the sources of data used. The World Governance Indicators, based on the Governance Matters approach, use a mixture of surveys from experts, commercial rating agencies and citizens of the target country. Specific concerns exist about the interdependence of a variety of expert sources in the WGI.[903] More generally however, expert assessment is cheaper than public surveys and can be tailored towards cross country comparison and may be natural respondents for complex areas of assessment.[904] Nonetheless such views may disagree about the object of measurement, or are based on another's expert assessment. These views may also be subject to biases, if drawn exclusively from a business community, etc. Some authors thus take the view that many of these measures are offering expert opinion on the general state of the economy and not on the nature and quality of good governance.[905] As a consequence, rule of law indicators may be a function of non-legal variables, yet remain a basis for proposing legal reforms. Information based on expert opinion reflects a subject assessment of a legal reform and cannot be considered a direct consequence of the reform itself. However, the authors of the WGI retort that perceptions matter in their own right, since firms and individuals take actions based on their perceptions.[906] The issue therefore becomes not whether to assess rule of law based on perceptions, but on *whose* perceptions.

Governments can and do often dismiss external expert assessments of governance as uninformed pontification by outsiders. But it is much harder for governments to dismiss the views of their own citizens, or of firms operating in their country, when these point to failures of governance.[907] Some generic concerns arise from the use of public surveys, such as sampling design to issues of non-response bias. The WGI authors suggest that there is a strong correlation between expert and public surveys.[908] They conclude that neither type of respondent is clearly superior for all purposes, we think it important to continue to rely on a diversity of data sources in both dimensions of our taxonomy of governance indicators.[909] Virtually all indicators of governance rely

---

[903] Christiane Arndt and Charles Oman, Use and Abuses of Governance Indicators (n849), 66

[904] Daniel Kaufmann and Aart Kraay, "Governance Indicators: Where Are We, Where Should We Be Going?" 23(1) World Bank Research Observer (OUP 2008) 1, 16

[905] Todd Landman; Map-Making and Analysis of the Main International Initiatives on Developing Indicators on Democracy and Good Governance, (n784) 30

[906] World Bank, *Governance Matters VIII: Governance Indicators 1996-2008* 3

[907] Daniel Kaufmann and Aart Kraay, Governance Indicators: Where Are We, Where Should We Be Going? (n875) 20

[908] ibid 21

[909] ibid 24

on the judgments or perceptions of respondents in one way or another, and so we suggest that this distinction is largely artificial.[910] In terms of the validity and reliability of data on the rule of law, the choice between expert and public surveys seems a false dichotomy.

However, beyond the statistical analysis of these indicators, there is a difference in the *legitimacy* of generating a broad public perception of the rule of law and reflecting a national rule of law indicator based on the perception of business actors and non-national experts. This difference raises a general concern regarding the accountability and transparency of indicators as a tool of measurement, but also one that is particularly pronounced in transitions, where one of the existence conditions is a breakdown in the rule of law based on gross violations of human rights. The nature and extent of that breakdown, and its relationship to civic trust, is contingent and will vary from country to country. As a result, the specific contours of the rule of law in a given transition will be determined by the behaviours, attitudes and *perceptions* of members of that transitional society. This theory of transition, and the stated goals of each field relevant to transition, are based on changing these perceptions, attitudes, and behaviours. It is therefore the case that the perceptions of citizens should assume priority over those of experts, and business communities. The lack of priority given to citizens' perceptions of the rule of law in the WGI, reflects its general purposes, and ultimate goal of achieving economic growth. To apply the WGI data and methodology to transitional environments, and to generate rule of law data specific to transitions and fragile states, may suggest the need to re-orientate the weighing between citizen perception and expert and business views.

The coarse-grained nature of the data employed in these cross-country statistical studies provide very little traction on which design features of given classes of legal institutions that are causally related to particular development outcomes are of particular importance.[911] Such reforms, and evaluation of their progress, need to be informed by much more detailed and country-specific diagnostic data that can identify the relevant constraints on governance in particular country circumstances. WGI is seen by its authors as complementary to a large number of other efforts to construct more detailed measures of governance, often just for a single country.[912] As a result, efforts to measure the rule of law in transitional environments through indicators must be supplemented and examined in conjunction with detailed country analysis. The process of applying

---

[910] ibid 31

[911] Kevin Davis and Michael Treblicock, "The Relationship between law and development: the optimists versus the sceptics" (2009) 51(1) American Journal of Comparative Law 57

[912] World Bank, Governance Matters VIII, 6

this approach to transitions and fragile states suggests the need for indicators to prioritise citizen perception of the rule of law to enable the shared use of rule of law indicators across fields relevant to transitions.

C. Human Rights

Measurement of transitional justice, peace-building, security sector reform and economic development all include examination of the enforcement and protection of human rights in a given society. Concern for human rights measurement arises from the United Nations Charter reporting architecture and from treaty obligations, which represent the normative framework for human rights indicators. In particular, quantitative indicators are explicitly required by the provisions of certain human rights treaties.[913] There is also significant academic interest in the measurement of human rights.[914] Chapter 5 of the Human Development Report 2000 marks the start of the modern approach to human rights indicators.[915] The OHCHR position is set out in a series of reports, which define human rights indicators as specific information on the state of an event, activity or an outcome that can be related to human rights norms and standards; that address and reflect the human rights concerns and principles; and that are used to assess and monitor promotion and protection of human rights.[916] Furthermore, global sets of indicators now incorporate concern for human rights measurement. The World Bank's Worldwide Governance Indicators measure political rights in the 'voice and accountability' dimension.[917] The Economist Index of Democracy also includes civil liberties and political rights into its 'voice and accountability' indicator.[918] Freedom House provides numerical ratings of the state of political rights and civil liberties around the world.[919] Human rights indicators are therefore a burgeoning area of analysis.

---

[913] Article 12, 14 ICCPR, Article 10 CEDAW

[914] For a survey see Todd Landman, Measuring Human Rights: Principle, Practice, and Policy Human Rights Quarterly 26 (2004) 906–931; Russel Lawrence Barsh, Measuring Human Rights: Problems of Methodology and Purpose, Human Rights Quarterly, Vol. 15, No. 1 (Feb., 1993); Steven C. Poe, C. Neal Tate, Linda Camp Keith , Repression of the Human Right to Personal Integrity Revisited: A Global Cross-National Study Covering the Years 1976-1993, International Studies Quarterly, Vol. 43, No. 2 (Jun., 1999), pp. 291-313

[915] UNDP, Human Development Report 2000, available at hdr.undp.org/en/media/hdr_2000_ch5.pdf

[916] ibid, 3

[917] http://info.worldbank.org/governance/wgi/index.asp

[918] http://www.eiu.com/public/topical_report.aspx?campaignid=demo2010

[919] http://www.freedomhouse.org/template.cfm?page=15

The UN approach to human rights indicators involves a number of recommendations that can be applied to measurement of human rights in transitions.[920] First, there is a need to anchor indicators identified for a human right in the normative content of that right, as enumerated in the relevant articles of the treaties and related general comments of the committees.[921] In view of the indivisibility and interdependence of the human rights, there should be an attempt to have a common approach to identifying indicators for both civil and political rights, as well as the economic, social and cultural rights.[922] We can also distinguish between purely substantive rights, such as the right to life, those with a progressive realisation, and procedural rights, such as the right to a fair trial. Secondly, it is necessary to reflect cross-cutting human rights norms or principles, such as non-discrimination and equality, indivisibility, universality, accountability, participation and empowerment) in the choice of indicators.[923] Indicators for these principles may not relate to specific rights, but focus on the process of human rights compliance. Anti-discrimination and equality norms could also be disaggregated along a wide variety of grounds.

This approach to human rights indicators reflects the conceptual complexity of human rights, but also seeks to achieve some objective and integrated means of assessment. As a consequence, the integrated measurement of human rights could provide a basis for assessment of human rights compliance across diverse fields in transitions, but would require distinct assessment of causation by these fields to human rights. A number of data sources are employed for a generalised but integrated assessment of human rights.[924] Quantitative indicators derived from events-based data usually present the incidence of human rights violations in terms of the number of victims.[925] These violations are identified and determined by applying human rights standards as codified in the various treaties. The HURIDOCS network of human rights organisations has developed Events Standard Formats for the documentation and communication of information on human rights

---

[920] OHCHR, Report on Indicators for Monitoring Compliance with International Human Rights Instruments HRI/MC/2006/7; Report on Indicators for Promoting and Monitoring Implementation of Human Rights HRI/MC/2008/3; OHCHR, Report of the United Nations High Commissioner for Human Rights E/2011/90

[921] OHCHR, Report of the United Nations High Commissioner for Human Rights E/2011/90, para 12

[922] Report on Indicators for Promoting and Monitoring Implementation of Human Rights HRI/MC/2008/3, para 42

[923] Ibid, para 10-11

[924] Available at www.jus.uio.no/forskning/grupper/humrdev/Project-Indicators/Workshop06/Background/Malhotra&Fasel.pdf

[925] For instance, an indicator based on events-based data could be the "reported number of persons arbitrarily executed". It would capture the number of persons killed by an agent of the State or any other person acting under Government authority or with its complicity, tolerance, or acquiescence, but without any or due judicial process. Similarly there could be an indicator on the reported number of starvation deaths due to crop failure.

violations.[926] The human rights dimension of indicators derived from *events-based data* is far more concrete as it is explicitly linked to human rights violations. Yet indicators derived from *event-based data* suffer from some obvious shortcomings, similar to those experienced in general crime statistics, i.e. limited reportage of violations.[927]

Socio-economic and other administrative statistics refer to aggregated data sets and indicators based on objective quantitative or qualitative information related to standards of living and other facets of life. The United Nations Handbook on social indicators provides a comprehensive list of fields in outlining the scope of socio-economic statistics.[928] Socio-economic statistics do not formally count events or acts of human rights violations or the number of victims of these violations. In comparison to other categories of initiatives there is a vast amount of information being collected through administrative efforts of State agencies at the national level and by the inter-governmental agencies at the international level on a variety of socio-economic statistics, as well as statistics related to justice and rule of law issues. Additional use of such information for monitoring human rights may be possible. Furthermore, household perception and opinion surveys aim at polling a representative sample of individuals on their personal views on a given issue. Finally, data based on expert judgements covers initiatives that involve assessments essentially of qualitative nature that can be translated into quantitative form.

From such data, information specific to each field could be identified. Quantitative analyses, carried out in the frameworks of official "truth and reconciliation" commissions have also contributed to the development of standardised documentation tools to support collection of information using this method. Similarly for peace building, a general concern for a reduction in the commission of human rights would be a relevant consideration, but would require disaggregation for specific peace-building processes. Furthermore, a monitoring of human rights could identify the impact of and compliance with any human rights focused provisions of a peace agreement in transition. Human rights data could also identify the compliance and promotion of

---

[926] See HURIDOCS "Events Standard Formats, A Tool for Documenting Human Rights Violations", 2nd Revised Ediation, J. Dueck, M. Guzman, B. Verstappen., HURIDOCS, 2001.

[927] Problems of over-estimation are also possible. In general, it would be desirable to have error margins or confidence intervals specified for such statistics, to facilitate their use as valid and reliable indicators.

[928] Handbook on social indicators, Department of international economic and social affairs, Statistical Office, United Nations, pp. 15-17, 1989. ST/ESA/STAT/SER.F/49. The list includes: population composition and change; human settlements, housing and geographical distribution of population; health and health services, impairment and disability, nutrition; learning and educational services; economic activity and population not economically active; socio-economic groups and social mobility; income, consumption and wealth; social security and welfare services; leisure, culture and communications; time use; public order and safety; natural environment; and political activities.

human rights by the security forces through disaggregation. It could also incorporate measurement of justice sector performance in fulfilling the procedural rights to a fair trial and access to justice.

The relationship between human rights measurement and development is more complex. Measurement of human rights is particularly pronounced for socio-economic rights in identifying the extent to which progressively realisable rights are breached in particular States. As a consequence, "civil and political rights researchers were convinced that they needed what they thought ESC advocates already had: measurement tools that would enable cross-national comparisons."[929] However, social and economic indicators were designed to measure relative levels of human development and not the compliance with and fulfilment of ESC rights.[930] Difficulties in methodology therefore led to difficulties in measuring both categories of rights. Margaret Satterthwaite and Ann Janette Rosga are critical of the use of indicators by U.N. bodies for monitoring State compliance with human rights treaties.[931] The authors note that a lack of a clear distinction between compliance with treaty obligations and the progressive realisation/ enjoyment of rights was as a severe constraint in developing indicators. As a consequence of challenges gathering subjective data and a concern for the legitimacy of the process, it appeared that quantitative data was privileged over qualitative information when designing and applying indicators.[932] Despite these difficulties, indicators have become an integral part of ESCR rights and the processes of the ICESCR. Nonetheless, little to no work has been done on the use of human rights indicators in development projects.[933] UNDP recognise the relationship between human development indicators and human rights indicators:

> Human development indicators and human rights indicators have three common features. They both share the goal of producing information that will give policy signals on how to better realize human freedoms—such as freedom from want, freedom from fear and freedom from discrimination. They both rely on measures of outcomes and inputs to tell the story...they both use measures of averages and disaggregations, the global and the local, to reveal information at many different levels.[934]

However, there are also significant differences between development and human rights. Though overlapping, as we have seen, these ideas also remain conceptually distinct. At a tangible level,

---

[929] Ann Jannete Rosga and Margaret Satterthwaite, Trust in Indicators: Measuring Human Rights (n789) 13

[930] ibid, 15

[931] ibid

[932] ibid, 30-31

[933] Filmer-Wilson, Summary Report of Material Collated Regarding Practical Guidance to Implementing Rights-Based Approaches, Human Rights Analyses for Poverty Reduction and Human Rights Benchmarks from Development Acts and other Relevant Communities

[934] UNDP, Human Development Report 2000, 91

measurement of human rights is distinct in bringing "additional attention to the policies and practices of legal and administrative entities and the conduct of public officials".[935] As a consequence, human rights indicators will provide additional data on processes of justice and emphasis on disaggregation along grounds of discrimination and equality.[936]

The desirability of specific but integrated use of human rights measurement has been acknowledged in surveys of human rights based approaches of donors.[937] Moreover, the use of indicators does not replace the normative analysis of a human rights situation. Data gathered for indicators need to be analysed in the context of the normative framework for human rights.[938] Human rights indicators therefore provide a significant component of the most promising bases of shared assessment of interdependent fields in transitions, but one that also radically shifts the process of international engagement with human rights issues. The application of human rights assessment to transitions requires some distinct analysis of the causation of institutions in each field to human rights compliance, but the integrated approach to human rights assessment greatly facilitates this in comparison to existing approaches of civic trust and the rule of law.

D. Conclusion

There has been some acknowledgement of the need for shared assessment of areas of shared concern, such as the relationship between governance, corruption and human rights.[939] However, systematic understanding of the relationship identified in Chapter II has not been replicated in assessment and indicators examined here. While this approach reflects a fragmented approach in international law, it is more surprising in light of greater substantive integration identified in the policy frameworks of the major international organisations examined in Chapter V. These frameworks are reflected to the extent that peace and security assessment share a number of indicators in assessing thicker conceptions of both concepts and in integrated human rights assessment.

---

[935] Ibid

[936] Ibid

[937] Emilie Filmer-Wilson, Summary Report of Material Collated Regarding Practical Guidance to Implementing Rights-Based Approaches, Human Rights Analyses for Poverty Reduction and Human Rights Benchmarks from Development Actors and other Relevant Communities, 31 March 2005

[938] OHCHR, Report of the United Nations High Commissioner for Human Rights E/2011/90 para 18

[939] Daniel Kaufmann, 'Human Rights and Governance: The Empirical Challenge' in Phillip Alston and Mary Robinson, *Human Rights and Development: Towards Mutual Reinforcement* (OUP 2005)

This section has argued that the assessment of fields in transition can reflect the desire for coherence and coordination in international policy identified in Chapter V and the interdependence of those fields established in Chapter II through assessment and indicators based on their interdependent components, namely civic trust, the rule of law, and human rights. At present, indicators for these areas present significant limitations. The challenge for each object of measurement is to ensure a disaggregation for each field of practice, something that has yet not been comprehensively attempted. Moreover, no systematic empirical consideration is given to the relationship between civic trust, human rights, and the rule of law. These limitations make it difficult to use indicators as a means to assess performance of international engagement as part of the process of integrity. Given that the fields of transitional justice and peace building remain in the infancy of developing their mechanisms of assessment, it is prudent to examine whether statistical assessment and indicators are the appropriate approach in light of these difficulties.

VIII. Indicators and the Limits of Measurement

A. The Politics of Indicators

The above section identified areas of potential common assessment that could be disaggregated for each field relevant to transition. In applying indicators to policies for transition and fragile states, concerns inherent in the indicators technology are amplified. Each theory and its equivalent expression in policy documents of international organisations privileges local context and ownership in determining the configuration and content of programmes in fields relevant to transition. These approaches mitigate the tension in international legal regulation of these areas which struggle to adjust individuated sets of rights and duties to the circumstances of transition, in particular, the occurrence of mass numbers of human rights violations.

Respecting local context and ownership also reflects the stated desire to ensure the re-constitution of a political community as the ultimate goal to which each field purports to contribute. As a result, each transition would seemingly be examined by reference to the decisions that that political community make, as expressed in their legal system and thus enable the pursuit of integrity. Chapters II and III articulated the responsibility of integrity as a basis for making and assessing the decisions and actions of given political communities. The use of integrity emphasised the essentially and intensely political nature of activities in transitional societies. Given that these concepts acknowledge varying degrees of contestation regarding their meaning and use, integrating such contestation as a valuable component of their measurement may be preferable to seeking to eliminate contestation by preference to narrow definitions and measurement.

The role of indicators and statistical assessment of transitions is in stark contrast to that approach. The use of statistical information in general, and indicators in particular, shifts the power dynamics of decision-making. Indicators replace judgments on the basis of values or politics with apparently more rational decision-making on the basis of statistical information. Individuals and countries are made responsible for their own behaviour as they seek to comply with the measures of performance articulated in an indicator.[940] The burden of assessment rests on the indicator itself, with its agreed-upon standards and means of measurement.[941]

Self-assessment by a transitional society could reflect an expression and component of a state re-constituting itself as a sovereign political community, if the process is undertaken in good faith. It could represent an opportunity for a state to seek to deliberate on objective criteria and narrow areas of contestation as a society seeks to move from transition to re-constitution as a sovereign political community. An indicator provides a transition from ambiguity to certainty, theory to fact, complex variation and context to truthful, comparable numbers.[942] However, above we identified that indicators, as technologies of knowledge developed in the economic domain, move uneasily into newer fields, such as transitional justice, peace building and security sector reform, promising greater specificity of human rights and definitions of compliance yet importing new ambiguities in the definition of indicators and the kinds of data they use.[943] Combining the desire for objectivity and statistical methodology with the intensely political aspects of fields in transitions brings with it significant risks that impact on any potential principle and process of integrity.

Foremost among these risks is the concern that indicators may mask inherently political issues and choices as technical exercises. Each area of indicators examined, and the broader introduction of the concept emphasised that the act of measurement and use of indicators requires the exercise of judgment. Issues of transitional justice, governance, development, and the rule of law remain intensely political and would otherwise be openly contested in the public sphere. Chapters II and III noted the need for *public* deliberation for the process of integrity to have any purported effect on changing behaviours attitudes and perceptions in transitional societies. The effect of the use of

---

[940] Sally Engle Merry "Measuring the World: Indicators, Human Rights, and Global Governance" (2009), 5

[941] ibid, 8

[942] ibid, 9-10

[943] ibid 9-11

indicators may thus be to close off spaces for participation and democratic contestation.[944] Ignoring local context, and attempting to provide the universal, hinders the centrality of context identified in Chapters II and III, and reflected in the policy documents of Chapter V: "The more ambitious and meticulous the plan, the less is left, theoretically, to chance and to local initiative and experience."[945]

Moreover, the act of measurement, and purposes to which it is put, are also intensely political.[946] It is not the case that indicators are an apolitical alternative to political public deliberation, rather they represent a technical mechanism for engagement in political issues. The consequence of this may be to obscure the political aspects of those technical choices and mechanisms. Political debates about compliance shift to arguments about how to form an indicator, what should be measured, and what each measurement should represent, as reflected in this chapter.[947] Such debates are far removed from broadly based political discussions that may involve diverse sectors of society. The technology of indicators has effects on who contests the exercise of global authority and how this contestation is performed.[948]

The process of objectification inherent in indicators makes broader trends in activities designed to achieve change in behaviours perceptions and attitudes of individuals and broader social changes tangible but obfuscated. James C. Scott argues that society must be remade before it can be the object of quantification.[949] Categories of people and things must be defined. Measures must be interchangeable. Scott states administrative man is content with the gross simplification because he believes that the real world is mostly empty, i.e. most of the facts of the real world have no great relevance to the situation that he is facing. This approach has led to a hierarchy of relevance in determining the factors for governance – i.e. what "matters". The process of measurement bears a similar structure to positivist conceptions of legal theory that seek to exclude non legal considerations from relevance in ascertaining the content of a legal system: "the formal order

---

[944] Ann Jannete Rosga and Margaret Satterthwaite, Trust in Indicators: Measuring Human Rights (n789) 48

[945] James C Scott, *Seeing like a State* (Yale University Press 1998) 347

[946] Cobb and Rixford, (n784) 17

[947] Davis Kingsbury Merry "Indicators as a Technology of Global Governance" (n782) 9

[948] ibid, 13

[949] James C Scott, Seeing like a State, (n916) 22

encoded by social engineering designs inevitably leaves out elements that are essential to their actual functioning."[950]

It seems that despite suggestions of self application, which would be reasonably limited to state officials and engaged civil society actors, the use of indicators is primarily for the benefit of international actors, and takes highly contested and political issues and translates them into technical rhetoric to the benefit of such international actors. All of these concerns inhere generally in the measurement and use of indicators as a technology of international policy. However, these inherent limitations in empiricism are significantly exacerbated in transitional societies. In the case of transitions, this is all the more evident, given the existence of formal rules despite the breakdown of civic trust and the rule of law that leads to the commission of gross violations of human rights. As a consequence, efforts in transition are designed to replace a social order "so manifestly unjust and oppressive that almost any new order might seem preferable."[951]

Transitions represent those situations when society's engagement with a legal system and formal system more generally have broken down, where social norms struggle to exist across social groups, where norms of coexistence and civic trust and under severe threat and pressure. A purely formal approach that seeks to prioritise technical mechanisms to achieve social change goes against understandings of the conditions that operate in the circumstances of transition. It diminishes the public nature of social change, thereby not engaging with citizens at a level that attempts to make itself intelligible to them. In this way, the use of indicators fails to offer individual citizens an effective use of feedback in the programs and pursuit of goals in each field, thereby diminishing its contribution to the rule of law. In this way, it inhibits the thicker process of engagement that the principle and process of integrity is designed to pursue.

B. The Consequences of Indicators

If we value each transition, and seek to respect the choices made by each society as reflecting their own struggle with their past and effort to move towards re-constituting a sovereign political community, the value in ranking these nations against one another and distributing aid accordingly is deeply questionable. If Society A exerts every possible effort over a period of time to pursue the goals and institutions supported by the international community, but remains below Society B, whose position is better, but whose effort is minimal or inert, what set of incentives does it create

---

[950] ibid, 351

[951] ibid, 352

for these societies? For instance, countries that by historical measures are succeeding beyond measure, such as Burkina Faso, Mali and Uganda, could be characterised as "off-track" on such measures as education and infant mortality in UN Human Development Reports, and unless they experienced further acceleration would not meet the Millennium Development Goals by 2015. Burkino Faso's rate of change of universal primary schooling was to go from 35% to an estimated 59% by 2015. This would roughly match South Korea's rate of progress in the two decades prior to the Korean war, the fastest on record.[952]

The incentive to demonstrate success according to given indicators may become greater than any incentive to substantively ensure the fulfilment of the object of measurement themselves. This is particularly true where States adjust their practices to improve their standing according to indicators, without a necessary substantive improvement in the original object of measurement. For instance, Davis and Kruse highlight one of the inherent risks in the use of indicators as the basis for the distribution of aid in considering the World Bank's *Doing Business* reports:

> "Once it becomes clear that donors and investors are using the DB indicators to allocate material benefits across countries, governments will have an incentive to manipulate the indicators, particularly if, as we suggest above, the DB indicators do not measure all of the legal norms that meaningfully affect the business environment."...The inherent limitations of both the data and analytical tools used in the DB project mean that their recommendations for reform have too weak an empirical foundation to be trusted by either lawmakers or those in a position to influence them. Similarly, given the limited basis for believing that they are positively related to development outcomes, especially after lawmakers have been given incentives to manipulate them, the indicators created by the DB project seem inappropriate for use as benchmarks.[953]

Distributing aid and financing projects on the basis of cross country comparison of indicators is thus significantly misplaced and a practice best avoided in transitional justice, peace-building and security sector reform who have not yet used indicators as the basis of financing decisions. This practice goes against basic assumptions about indicators identified in the introduction. A 2005 expert group on indicators stressed that indicators are to be used only in the early stages of the process of compliance assessment and are not for either ranking or for shaming. They emphasised using indicators to compare a country's performance *over time* rather than against that of other countries and that they are intended to improve processes of reporting by states parties and monitoring by treaty bodies.[954]

---

[952] Nancy Birdsall, Seven Deadly Sins: Reflections on Donor Failings in in William Easterly (ed) Reinventing Foreign Aid (n845) 522

[953] Kevin E. Davis and Michael B. Kruse "Taking the Measure of Law: The Case of the Doing Business Project" (n870) 1116-7

[954] Report of Turku Expert Meeting on Human Rights Indicators, 10-13 March 2005 in Turku/Åbo Finland, 8

IX. Conclusion

Transitions are highly contingent events and thus difficult to model with complete precision. Transitional justice and peace building practice have not begun the process of assessment through indicators in earnest. There is a realistic prospect of developing insights about transitional justice processes that are generally consistent with a range of experiences across countries.[955] However, such processes will have to contend with contestation and uncertainty about concepts distinct to transitional justice such as reconciliation and truth. Similarly in peace building there is some appreciation of the range of outcomes that need to be examined, as evidenced by broad indicators such as the Global Peace Index. Uncertainty arises in identifying the content of peace building activities, due to ongoing conceptual contestation about that field. In contrast, measurement of security sector reform is disparate but covers a significant proportion of security conditions in societies. Challenges arise in examining specific aspects of security sector governance, as well as attributing changes in security levels to specific SSR programmes. Though enjoying broad general statistics, assessment of development is not applied to the specific policies pursued in transitions and fragile states. The range of variables in transitional society are significant across each field. This range generates significant challenges in identifying causal relationships between individual projects and the stated goal of that project or the field of which it is a part. The problems of attribution and causation are inherent in the measurement of social phenomena.

Despite this ongoing challenge, this chapter has identified a number of overlaps in the objects of measurement between the four fields examined. In particular, an overlap in institutional performance considered relevant to all four fields, focusing on justice and security sector institutions, reflects institutional interdependence acknowledged within the policy frameworks examined in Chapter V. As a consequence, this chapter proposed the shared examination of civic trust, the rule of law, and human rights for the purposes of each field. Moreover, discrete limitations in methods employed in the practice of indicators, such as highly subjective concepts (trust, reconciliation, the rule of law) and challenges common to measurement in all fields (disaggregation of common objects of measurement for discrete fields) suggests the continued need for methodological experimentation. While a shared framework may go some way to mitigate these challenges, the process of simplification in indicators remains "an inelegant attempt to simplify an otherwise complicated and inclusive social reality...The ongoing reality is experienced as a whole, not in separate pieces."[956] The current politics and risk of incentive

---

[955] David Backer, Cross-National Comparative Analysis, (n796) 58

[956] Gearoid Miller, "Assessing Local Experiences of Truth-Telling in Sierra Leone: Getting to 'Why' through a Qualitative Case Study Analysis", (2010) 4 International Journal of Transitional Justice 477–496, 495

structures around indicators suggest that they do not provide a sufficiently effective form of feedback or accountability from international organisations to transitional societies to warrant the shift from contestable and political dialogue and deliberation to a purely technocratic approach. The role of indicators is best seen therefore as secondary and supplementary, especially in transitional societies.

It remains deeply questionable whether the existing approach to indicators, and their general nature as a technology of measurement, provides effective feedback and accountability to members of transitional societies or basis for more coherent and coordinated international policy as part of the principle and process of integrity. This chapter has suggested that significant priority be given to the perceptions of citizens of such societies in any specific application of indicators to transitions and fragile states. Moreover, the challenges in gathering such data in transitions cause an understandable lowering of expectations for attaining comprehensive data. As a result, international actors may benefit from humility regarding the use of indicators as a basis of policy engagement in transitions and fragile states. Such humility should not be a point of despondency for such actors. Ultimately, humility is also consistent with the theory of transitions articulated in Chapters II and III and with integrity. It reflects the reality that members of transitional societies know such societies best, can best and most legitimately articulate their preferences and values, and best pursue their goals. Humility about international support to such processes offers a recognition that a genuinely mutual approach between international actors and transitional societies may better achieve the re-constitution of a sovereign political community, and the tolerance and respect of that community by international actors.

Chapter VII: *Jus Post Bellum* - Integrity in Transitions

I. Introduction

International law and policy is stretched to breaking point in the circumstances of transition. In Chapters II and III we noted the conditions under which such law and policy operates. We examined the need to pursue integrity in transitions. We then proceeded to examine the substance of that law and policy applied to transitions. In Chapter IV, we identified the risk of fragmentation and incoherence between the fields of practice and discourse of transitional justice, peace-building and development in international law. We noted that while provision of context is a necessary element of these fields, that they also failed to regulate other areas of law where general standards could be applied. Moreover, international law formalised underlying tensions in these fields, due to their multitude of value goals and the lack of an explicitly shared framework between them. Chapter V examined the policy frameworks under which international organisations engage in fragile states. We noted the absence of an evaluative framework that reflects the emphasis on local context and ownership, as well as the absence of any metric for prioritising values and goals in transitions. Finally, in Chapter VI we examined the use of indicators as a technology for feedback and accountability to members of transitional society and identified inherent risks in that process.

In Chapter III, we also saw the ethical obligation on international actors in transition to interpret their activities with integrity. While the application of integrity is specific to the donor organisation and country of transition, the obligations, policies, and techniques identified in prior chapters are nonetheless common features. This chapter therefore seeks to interpret these obligations, policies and techniques examined in prior chapters with integrity to offer a common evaluative framework for their assessment and proposals for reform. This chapter will identify a gap in ethical frameworks for the cessation of conflict and transitions more generally: *jus post bellum.* This will be seen as the application of integrity to transitions. It will introduce the concept, its historical lineage, identify the range of legal and policy situations it could conceivably cover. The chapter will then identify general interpretive principles which reflect identified weaknesses or points of tension in existing international law, policy and techniques. The chapter concludes with identifying potential uses of *jus post bellum* as a basis for reform of international law and the policies of international organisations operating in transitions.

II. *Jus Post Bellum*

International law and international relations have been long concerned with armed conflict.[957] A classical approach to international law identifies clear distinctions between the laws of peace and the laws of war or armed conflict.[958] The modern legal system builds on long standing distinctions relevant to the transition from armed conflict to peace. This approach generates the distinctions between the legitimate use of force in international law (*jus ad bellum)* and the application of international humanitarian law (IHL) governing armed conflict (*jus in bello*).[959] This distinction has also been of crucial importance in modern conceptions of the "just war" tradition.[960] In international law, the UN Charter limits the legitimate use of force by States to their self-defence and to those instances where force is authorised by the Security Council.[961] Similarly, the application of IHL principles presumes the existence of an armed conflict as a necessary condition and that these principles cease to be applicable on "general close of military operations".[962] The ICTY has concluded that the temporal scope of international humanitarian law extends beyond actual hostilities.[963] Existing categories in the just war theory thus exist in international legal regulation.

The term *jus post bellum* challenges the dualistic conception of international law and the just war doctrine that privileges *jus ad bellum* and *jus in bello*.[964] Just as the rules of international

---

[957] Gary Bass, "Jus Post Bellum" (2004) 32(4) Philosophy & Public Affairs 384-412; Inger Osterdahl and Esther van Zadel, "What Will Jus Post Bellum Mean? Of Old Wine and New Bottles" (2009) 14(2) Journal of Conflict & Security Law 175–207

[958] Georg Schwarzenberger, "Jus Pacis, ac belli?" (1943) 37 American Journal of International Law 460

[959] Protocol Additional to the Geneva Conventions of 12 August 1949 (Preamble); Serena K Sharma, "Reconsidering the Jus Ad Bellum/Jus in Bello Distinction" in Kleffner and Stahn (eds) *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace,* 9-30

[960] Michael Walzer, Just and Unjust Wars (3rd ed) (Basic Books, 2000), 21-22; JT Johnson, Just War Tradition and the Restraint of War: A Moral and Historical Inquiry (Princeton University Press 1981)

[961] Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945.

[962] Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, *entered into force* Oct. 21, 1950, Article 6; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3,*entered into force* Dec. 7, 1978, Article 3

[963] *Prosecutor v. Tadic,* Case No. IT-94-1 (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995 para 69

[964] Carsten Stahn, "Jus ad bellum, jus in bello, jus post bellum?Rethinking the Conception of the Law of Armed Force" (2006) 17 European Journal of International Law 943

humanitarian law apply to the use of force and the conduct of armed conflict, so too should those rules extend to the termination of war regardless of the original justice or the manner in which the hostilities were conducted. Such a category would provide an interpretive and evaluative framework for present international law for fields relevant to transitions.

Some classical scholars of international law have indeed recognised the need for legal principles to govern the cessation of conflict and restoration of peace.[965] Immanuel Kant introduced the notion of 'right after war' ('Recht nach dem Krieg'), the object of which is to constrain the nations mutually to pass from this state of war and to found a common constitution establishing perpetual peace."[966] Kant argued that the end of war should be viewed as an opportunity to finalise not just the particular conflict but also to contribute to and strengthen the peace and justice of the international system more broadly.[967] Modern just war theorists have also made the moral case for *jus post bellum*.[968] Brian Orend has called for a new Geneva Convention dealing exclusively with issues concerned with *jus post bellum*.[969] It follows logically that war has three phases and each are in need of regulation - if not, then the just war theory and international law's regulation of war are radically incomplete. Second, there is the empirical reality evidenced in recent conflicts, that a just post war settlement has been notoriously difficult to achieve.[970] Kirsten Boon argues that the transformative approaches to peace-building in recent years have demonstrated in the inadequacy of the current state of international law by not covering a vast array of the activities undertaken under its auspices.[971] Modern international law has failed to build on the insights of these authors to complete the regulation of transitions from conflict. International law has not fully articulated an explicit *jus post bellum*, in the manner that governs the legitimate use of force in international law or the law governing the conduct of armed conflict.

---

[965] St Augustine, Concerning the City of God against the Pagans (Penguin 1984), 866; F Suarez, The Three Theological Virtues, Disputation XIII; Francisco de Vitoria, De Indis et de iure belli relectiones; H Grotius, De Jure Belli ac Pacis, Book III

[966] Immanuel Kant, The Science of Right was published in 1796, as the first part of his Metaphysics of Morals, 53

[967] Immanuel Kant, Perpetual Peace and other Essays trans. T Humphrey (Hackett Publishing 1983)

[968] Brian Orend, "Kant's Just War Theory" (1999) Journal of the History of Philosophy 323-53

[969] Brian Orend, "Jus Post Bellum: The Perspective of a Just-War Theorist" (2007) 20 Leiden Journal of International Law, 571, 575-7; see further Brian Orend, "Justice After War" (2002) 16(1) Ethics & International Affairs

[970] Indeed, we can recall that the the absence of regulation of post-conflict affairs enables victors' justice, such as the punitive regime of sanctions in the Treaty of Versailles, which could contribute to the re-emergence of conflict.

[971] Kristen E. Boon, "Obligations of the New Occupier: The Contours of a Jus Post Bellum", (2008) 31 Loyola International &. Comparative Law Review 101

The current fragments of international law seem to offer competing justifications for transitions, for both the affected State, society, and the international community.

The policies of international organisations purport to comprehensively address the supporting role of such organisations to transitions, though we identified significant tensions in Chapter VI. Furthermore, it is possible to discern at least four political postures for the engagement of the international community and third States in States reckoning with a legacy of past abuses. First, States may engage due to special responsibilities arising from shared history or culture or broader obligation to help the vulnerable.[972] Second, States have also engaged in fragile states to project and transmit cosmopolitan values.[973] Other positions are more conservative and focus on the duties of a State to ensure its own self defence or to intervene only to restore self-determination in the affected State, views which privileges local actors and sees international actors in a supporting role only.[974] Moreover, it is clear that international organisations and donors are not the only actors relevant to transitions, with NGOs, INGOS, business, and private military companies also potentially engaged in a given transition. To comprehensively evaluate transitions, an approach broader than the policy framework of a given international organisation is needed. Existing interest in *jus post bellum* thus has a long heritage, and recently revived among theorists, but little concrete relationship to modern international law and policy.

III. Preliminaries: Capturing the Range of Transitions

Before directly addressing the framework approach for *jus post bellum* a number of distinctions must be established, which engage existing proposals with the theory of transition constructed in Chapters III and IV. One strand of the just war tradition would suggest that justice after war consists of putting right whatever was the original cause of war. Gary Bass contends that when the victorious state fails to assist in reconstruction in post-genocidal states, it calls into question its claim to have waged a just war of humanitarian intervention, for it has failed to finish what it began in waging the war.[975] The link between the just cause for armed conflict and the need for a

---

[972] Jennifer Welsh and Stefano Recchia, "The Imperative to Rebuild: Assessing the Normative Case for Postconflict Reconstruction" (2008) 23(2) Ethics and International Affairs 121-146

[973] This approach sees the transition to peace is an opportune transformational moment that Western states have a special responsibility to seize, yet also raises questions about imperial approaches to international law. In addition, an exclusively secular cosmopolitanism relegates local traditions, values and priorities through using an alternative set of concepts.

[974] Jennifer Welsh and Stefano Recchia, "The Imperative to Rebuild: Assessing the Normative Case for Postconflict Reconstruction" (n943) 129-34

[975] Gary Bass, Jus Post Bellum (n928) 401

just transition can be seen to extend to exclude punitive post-conflict settlements. Yet this is at odds with the current international legal approach which, although it provides for some minor overlap between the legitimate use of force and the conduct of armed conflict, retains an emphasis on the general applicability of *jus in bello* rules.[976]

Moreover, international law relevant to transition does not apply merely to those who justly engaged in conflict, but rather to all who do so - and indeed has greatest purchase on those who breach its obligations through the enforcement of international criminal law and other forms of responsibility. It would seem to be perverse that those who unjustly engage in armed conflict are "rewarded" by the absence of regulation governing their conduct in armed conflict and the post-conflict period. Thus international law in this area must be generally applicable, regardless of the competing levels of justice in the original cause for armed conflict. Second, the application of norms of *jus post bellum* extend to engagement by those not involved in the armed conflict but who do become involved in the transitional period, i.e. international donors and other international organisations. The general application of these norms is logically independent of the context of the parties engaging in post-conflict circumstances: if a State does indeed engage, it ought adopt the *jus post bellum* regime. International law has few occasions to address this issue directly, but has considered the question of whether the justice of the cause of conflict has an impact on the application of *jus in bello* rules. The answer has been a clear negative. *Jus in bello* rules, such as international humanitarian law, apply in any event. This argument logically extends to the application of *jus post bellum* principles. As the International Military Tribunal held analogously regarding the law of occupation: "international law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject."[977]

A second clarification is the "post" of *just post bellum.* It is seldom the case that a clear and uniform shift from conflict to peace can be discerned. Yet this issue is also generally present in transitions. For instance, transitional justice has contended with the issue of justice in the context of ongoing conflict, in the cases of Colombia and Afghanistan, but has adapted the concept of

---

[976] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3,*entered into force* Dec. 7, 1978, Article 1(4)

[977] *USA v List* (1948) 11 NMT 1230, 1247

"transition" to be a dynamic and flexible *process*, rather than a set date in history.[978] Similarly, several authors argue that peace-building processes, which also reflect this concern with transition should also be considered in a dynamic rather than historical fashion, reflecting the complex variables that inform these periods.[979] In donor policies there may be a clear delineation between engagement in fragile states and the more general sphere of economic development, but the emphasis on local context in the determination of shifting between these frameworks also suggests the transition to consolidated peace and security as a process. Moreover, we have seen that the policy frameworks of international organisations engage in fragile states generally. Engagement in these areas may therefore take place prior to the outbreak of armed conflict as defined by international humanitarian law, but may nonetheless raise issues relevant to transitions. The range of variables caused by these preliminary issues means that the application of *jus post bellum* is necessarily dynamic in nature, perhaps a problem for the binary nature of positive law. As it is unclear when night ends and day begins, the period of dawn is a gradual period that is difficult to ascertain.[980] So too with transitions and *jus post bellum.* Such a position reflects the dynamic understanding of the circumstances of transition described in Chapter II.

The final contingency is that a variety of substantive fields of international and comparative law are involved in transitions beyond those fields examined in this thesis. Issues such as asylum and migration, constitutionalism, elections and election monitoring, also operate in the context of transitions. The combination and sequencing of these fields differs from one society to the next. A *jus post bellum* framework is thus contingent in three respects. First it comes into effect if an actor engages in transition and does not address whether actors should so engage. Second it defines "post" as reflecting a general theory of transitions constructed in Chapters II and III. In this way, transitions represent a process rather than a defined or uni-directional point in time. Finally, the framework reflects a contingent combination and sequencing of diverse substantive fields.

IV. Legal Frameworks and an Evaluative Approach

Any proposed framework must cover the range of foundations for international legal engagement in transitions. First, many past international engagements in transitional circumstances have been on the basis of the consent of the affected State, which has acknowledged its own inability to administer the full range of issues relevant to transitions. Consent is a necessary and sufficient

---

[978] Lisa J. Laplante and Kimberly Theidon, Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz (2007) 28 Michigan Journal of International Law *49*

[979] Christine Bell, On the Law of Peace: Peace Agreements and the Lex Pacificatoria (n25)

[980] Brian Orend, "Jus Post Bellum: The Perspective of a Just-War Theorist" (n940) 574

condition for international action and a concept that we find throughout the international system. However, Simon Chesterman contends that it is inaccurate to state that occupying forces, interim administrations and indeed engagement in fragile states generally depends on consent. If it were possible for such a State to give effective consent and express this through its political organs, then the engagement of the international community would be unnecessary.[981]

Second, international engagement in transitional circumstances can be authorised by United Nations Security Council resolution. The only requirements or limitations on Security Council action are that they must be *intra vires* and act in good faith, respecting *jus cogens* norms.[982] Security Council resolutions have been used to authorise international criminal tribunals, peace-keepers, election monitors, civilian observation missions, or full international territorial administrations, such as in Kosovo and Timor-Leste. Kristen Boon suggests that the Security Council makes laws "of exceptions" and that therefore it is unrealistic to expect it to consistently and impartially intervene where the interests of its permanent members are involved.[983] Simon Chesterman argues that the existing approach is both inadequate and irrelevant. It is inadequate because despite the vast sums of money that have been spent on international engagement in the circumstances of transition, the fragmentation and lack of coordination in the current approach has resulted in a tragedy of the commons.[984] The current approach risks irrelevance because it fails in his view to strike a sufficient balance between the capacity of international organisations to achieve the highest standards of service while in occupation and the need to develop long term capacity of local actors to do so.[985]

Fourth, the law of occupation governs the situation where one State occupies the territory of another after the cessation of armed conflict. In so doing, the original intention behind this area of law was to enable the occupying State to pursue two objectives.[986] The occupier was to administer territory in a conservative fashion, only enforcing legal changes where necessary to maintain peace and security. Secondly, the occupier was to promote local capacity for autonomous self-

---

[981] Simon Chesterman, *You the People: The United Nations, Transitional Administration, and State-Building* (n125) 239

[982] Larissa Van Den Herik, "The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual", (2007) 20 Leiden Journal of International Law 797–807

[983] Kristen Boon, "Obligations of the New Occupier: The Contours of a Jus Post Bellum" (2008) 101 31 Loy. L.A. Int'l & Comp. L. Rev. 118-9

[984] Simon Chesterman, *You the People*, (n125) 244-9

[985] ibid, 247

[986] Carsten Stahn, *The Law and Practice of International Territorial Administration* (CUP 2008), 18

government. The original regime was designed to be palliative, such that major issues of change or re-distribution of land or legal rights would take place in a peace agreement which would end the occupation and regularise the situation. This was the situation envisaged under the Hague Regulations 1907, which remain the principal basis for the international law of occupation.[987] In addition, the Fourth Geneva Convention sought to provide minimum standards for civilians in circumstances of occupation. Nonetheless, these provisions fail to capture the existing reality of practice in this area and have failed to do so for some time. As far back as 1945, Allied occupations of Germany and Japan eschewed the conservationist approach to occupation and can be more accurately characterised as transformative occupations, outside 1907 regulations.[988] Recalling the transformative activities of the Allies considered in Chapter II, we can see that the disregard of the laws of occupation coincide with the emergence of the modern international legal system.

Beyond this fundamental shift in approach, the laws of occupation also have a number of contingent deficiencies. Existing provisions fail to capture the range of institutional actors, the type of competences and subject matter that exists presently in international law and human rights which are relevant and directly applicable in a post conflict period. The threshold for application of the laws of occupation are akin to those governing international humanitarian law, i.e. effective, factual control and can therefore be satisfied not only by occupying armed forces as originally envisaged, but also but complex peace operations including peacekeepers who are not currently covered. This lacuna is not an absolute legal black hole however, as we can note that UN administrations and indeed all actors remain theoretically bound by the *jus cogens* set of norms in these instances.

Substantively, the laws of occupation are primarily concerned with the protection of individuals and maintaining the legislative *status quo* in the occupied territory. The protection of individuals has given rise to a number of substantive rights in the treaty regime of both the Hague Regulations and the Fourth Geneva Convention.[989] Yet the protection of individuals is arguably in tension with the other overall objective of maintaining the legislative status quo. In particular it appears to be the case that legislation which may engender future violence or discrimination may be removed;

---

[987] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

[988] Simon Chesterman, *You the People*, (n125) 25-37; Romulus Picotti, "Legal Problems of Occupied Nations After Occupation" (1966) 33 Mil. L. Rev. 25

[989] Prohibition on forced labour/deportation GCIV 49;51; destruction of individual property GCIV53; duty on occupying power to preserve food and medical supplies A55

but no provision appears to have been made in these frameworks for the introduction of further legislation designed to deal with a past legacy of gross violations of human rights. Therefore there is a tension between the existing obligation in occupation to return to the *status quo ante* and the broader ambition of human rights law across fields in transitions to use international law as a transformative force. Finally, trusteeship was governed by Chapter XII of the Charter of the United Nations and was drafted with a view to overseeing and administering the process of decolonization from empire that occurred in the mid-twentieth century.[990] Given the political sensitivities that arose during this process and those that remain extant, use of any legal mechanism from the law of trusteeship does not seem viable. Indeed, use of the rhetoric or concepts from this area in transitional circumstances may engender accusations of neo-colonialist attitudes and agendas.[991]

Thus, the legal framework for *jus post bellum* is complex. It involves the use of both the domestic law of the affected State, international law and potentially the domestic law of occupying States or peace-keeping States. Within international law, a framework that accords with States' existing legal obligations would incorporate elements of human rights law, international humanitarian law, and refugee law, to name but a few. The application of *jus post bellum* norms and principles must therefore cover a variety of factual and legal circumstances, from full occupation by a belligerent state, through a variety of Security Council authorisations, through to the legitimate consent of an affected population to the presence of donor States and INGOs on their territory. It may be useful to think of the strength of these principles as working along a spectrum from occupation and territorial administration at one end to minimal international monitoring and engagement at the other. A challenge for theorists and law makers is to reconcile the need for this flexibility with a contingent application of the relevant legal principles and rules.

V. A New Approach: Organising Principles of an Evaluative Framework

Jus post bellum has primarily been considered as part of the moral framework of just war theory. David Kennedy argues against greater use of formal law in international affairs, contending that it generates perverse and unintended consequences in the conduct of international relations and pursuit of international value goals.[992] Calls for a further Geneva Convention on *jus post*

---

[990] Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945, Chapter XIII

[991] BS Chimni, "International Institutions Today: An Imperial Global State in the Making" (2004) 15(1) European Journal of International Law 1-37

[992] David Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (Princeton University Press, 2005), 3-36

bellum issues may represent a suitable end point for the development of this area, but would require considerable political will, interest and coordination among States, and significant re-orientation in the design and practices of international organisations. Despite some interest in institutional coordination, it is suggested that this goal is not plausible in the short term. However, the absence of a conventional *jus post bellum* does not preclude the interpretation of existing international law and policy in a customary *jus post bellum* framework.

Chapters IV and V sought to identify the existing customary law obligations and policy approaches of international organisations to this area. We identified considerable substantive diversity and fragmentation, with risks of tension between transformative goals and respect for local ownership, between peace and justice, between peace and state building, and with regard to sequencing. A purely substantive interpretation of customary *jus post bellum* can acknowledge these tensions, but, without more, and without state practice, cannot resolve them. However, a further role of a holistic *jus post bellum* may be to provide "not only substantive legal rules and principles governing transitions from conflict to peace, but also rules on their interplay and relationship in case of conflict."[993]

Constructing *jus post bellum* as the application of integrity in transitions offers a solution to this problem. A purely substantive or formal framework doesn't speak to how an official of an international organisation or transitional government is to act in transition, facing the need to pursue public goods in the future. A purely legalistic or formalistic approach does less to alter the behaviours attitudes and perceptions of such individuals than an approach that says that process matters: that the ends and the means are mutually re-enforcing. Acknowledging that integrity is both a principle to be pursued and a process by which it other goals can be reached and reconciled contributes significantly to re-enforcing behaviours perceptions and attitudes.

An approach that operates from integrity through the manifestations of organising principles offers a method of interpreting the practices of substantively diverse fields across structural commitments in each field. Each field purports to contribute to the restoration of civic trust and the rule of law as contributions to the re-constitution of a sovereign political community. These principles seeks to contribute to one or more aspects of that overall goal in transitions. Furthermore, an approach that acknowledges organising principles deeper than the substantive laws and policies reflects a commitment of the framework to the practice of integrity. A common evaluative framework for the actions of international actors would thus enable their contribution

---

[993] Carsten Stahn, "Jus Post Bellum: Mapping the Disciplines", in Carsten Stahn and Jann Kleffner (eds) *Jus Post Bellum Towards a Law of Transition from Conflict to Peace* (TMC Asser Press, 2008) 105

to the re-constitution of a sovereign political community predicated on principled, rather than pragmatic, engagement.

However, a framework build on broad principles can be criticised as being too vague and therefore not legally enforceable: "more like guidelines for effective peace building than enforceable legal rules, and the fact that states will not accept such a *jus post bellum* framework."[994] An interpretive framework build on existing State obligations and international policy mitigates this criticism, but also compels States and international organisations to respond to and justify incoherence in their practices, between their stated normative commitments in existing obligation and policy, and the absence of a coherent and consistent approach to those commitments. Moreover, the examination of the principles in this chapter concludes with concrete policy recommendations that seek to align with existing obligations but diminish incoherence and tension between fields and structural approaches. The following principles therefore reflect the pursuit of integrity in transitions in light of the existing international law, policies and practices relevant to transitions.

A. Accountability

Accountability implies that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of those standards, and to impose sanctions if they determine that those responsibilities have not been met.[995] Accountability is inherently linked to the idea of the rule of law, that no individual is beyond the regulation and enforcement of the law.[996] Nonetheless, accountability is a malleable term with no legal definition and no settled theoretical meaning. We can consider the issue of accountability as working at a domestic level, an international level, involving criminal responsibility, civil, State and organisational responsibility - yet there is little systemic consideration of the relevant differences and discrepancies between these levels of accountability. The Peace Building Commission of the United Nations has noted that a comprehensive approach to accountability includes judicial accountability, non-judicial accountability and restorative approaches to justice (truth commissions, reparations and institutional reform).[997] Accountability is also seen as an important

---

[994] Inger Osterdahl and Esther van Zade, "What Will Jus Post Bellum Mean? Of New Wine and Old Bottles", (n928) 204

[995] Ruth W. Grant & Bob Keohane, "Accountability and Abuses of Power in World Politics" (2005) 99(1) Am. Pol. Sci. Rev. 29

[996] Gerhard Hafner, "Accountability of International Organisations" 97 ASIL Proceedings (2003) 236

[997] Peacebuilding Commission—Working Group on Lessons Learned, Concept Note on Justice in Times of Transition (February 2008)

principle in existing *jus post bellum* proposals.[998] In chapter VI, we examined the efforts of international actors to provide proactive accountability and monitoring for their projects through the use of indicators. However, little resources are dedicated to reactive monitoring, such as individual complaints mechanisms.

Holding individuals accountable under the law seems one area of relative consensus across different accounts of the rule of law and thus the goals of fields relevant to transition. The idea of accountability is often primarily expressed in the context of criminal law, but can also relate to parliamentary oversight, as well the public accountability of governments. Accountability draws together elements of predictability, congruence and equal application of laws that exist in diverse conceptions. By virtue of their commitment to contributing to restoring the rule of law in transitions, international actors are also committed to the pursuit of accountability.

In the context of transition, respect for a State's consent and sovereignty suggests that international actors render themselves accountable to the population they purport to assist. While international staff operate with actual or effective immunity from local laws, there is an ongoing contradiction between how internationals behave and how nationals are told that they must act.[999] Concern for accountability arises in each field. Accountability for gross violations of human rights is of both intrinsic and instrumental important for transitional justice, in both its potential to provide justice to victims and capacity to contribute to the restoration of the rule of law and the non-recurrence of rights violations.[1000] An accountable security sector is acknowledged as a primary goal in SSR.[1001] The accountability of individuals for the commission of international crimes is mirrored by State responsibility for such offences.[1002] In turn, consideration of State responsibility for international crimes raises the issue of individual and institutional accountability of donor States and international organisations. In addition to those elements, we could also consider that accountability extends to the anti-corruption elements in development as well as the monitoring and compliance with peace agreements.

---

[998] Brian Orend, "The Perspective of a Just-War Theorist", (n940) 571–59

[999] Simon Chesterman, Ownership in Theory and in Practice: Transfer of Authority in UN Statebuilding Operations (n790) 20

[1000] UN Secretary-General,'The rule of law and transitional justice in conflict and post-conflict societies' (United Nations Security Council, 2004) (n214) 4

[1001] *OECD Handbook on Security Sector Reform: Supporting Security and Justice* (2008)

[1002] Andre Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law', 2003 International and Comparative Law Quarterly 615-640

For international law and policy to pursue integrity, international actors who seek to support the process of transition from conflict to peace must be held to the standards which they wish to impose. The present, largely fragmented, approach to accountability in international law neglects this challenge. Accountability of donors and international organisations can be considered in three categories: (i) internal accountability; (ii) liability for unlawful acts and (iii) legal responsibility for breach of international obligations.[1003] These forms are limited by the State and institutional immunities, often provided for in Status of Forces/Mission Agreements or memoranda of association between donor States or international organisations and transitional States. The multilateral international organisations examined in prior chapters enjoy broad immunities.[1004] For instance, the international privileges and immunities of the UN are guaranteed by a 1946 Convention.[1005] Article II, section 2 of the Convention states that the United Nations "shall enjoy immunity from every form of legal process except insofar as . . . it has expressly waived its immunity". The UN Secretary General has "the right and the duty to waive immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations."

The 2004 UN SG report acknowledges the need for accountability within international interventions and missions.[1006] The applicable standard of conduct for all UN personnel is now in the document "We Are United Nations Peacekeeping Personnel".[1007] A 2008 UN GA resolution strongly urges States to take all appropriate measures, including assuming extraterritorial jurisdiction of crimes committed when serving on UN missions, to ensure that such crimes do not go unpunished, but without prejudice to the privileges and immunities of such persons and the United Nations under international law, and in accordance with international human rights standards, including due process.[1008]

[1003] ILA, Accountability of International Organisations: Final Report of the Berlin Conference (2004) 1 International Organisations Law Review 221, 226

[1004] Supplementary Protocol No. 2 to the Convention on the OECD, Paris 14 December 1960

[1005] Convention on the Privileges and Immunities of the United Nations Adopted by UNGA 1946

[1006] SG bulletin on special measures for protection from sexual exploitation and sexual abuse (ST/SGB/2003/13

[1007] http://cdu.unlb.org/UNStandardsofConduct/WeAreUnitedNationsPeacekeepingPersonnel.aspx

[1008] UN GA, Criminal accountability of United Nations officials and experts on mission A/RES/62/63

The primary area of concern for UN accountability has been sexual exploitation and abuse.[1009] The UN has attempted to address the issue by adopting both preventive and investigative measures.[1010] A UN GA resolution calls for the establishment of a Sexual Exploitation and Abuse Victim Assistance Mechanism (SEA/VAM) in every country in which the UN operates, which seeks to provide victims with access to relevant services.[1011] Despite UN efforts at coordination, each country develops its own SEA/VAM. When allegations of misconduct involving military and police personnel are substantiated, the UN may repatriate the individuals concerned and ban them from future peacekeeping operations.

However, a significant gap in accountability arises for military members of national contingents from troop contributing countries in UN missions, despite significant chances to the UN Model Memorandum of Understanding.[1012] MOUs are generally concluded as binding bilateral agreements between the UN and the troop contributing countries, "to specify United Nations standards of conduct for personnel provided by the Government' to a given peacekeeping mission."[1013] As a result of the lack of a direct formal relationship between the UN and such military members, the UN does not have the authority to promulgate legally binding and enforceable rules addressed directly to them without the approval and cooperation of their home countries. The primary avenue of redress remains a trial in the troop contributing country. The practical difficulties of mounting a trial that is perhaps thousands of miles from the scene of the alleged crime are significant. A feeling of impunity can seep into the consciousness of the peacekeeping soldiers concerned to the serious detriment of the local population.[1014] One proposal to mitigate this risk of impunity is the use of courts martial in the transitional State.[1015]

[1009] Marco Odello, "Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers" (2010) 15(2) Journal of Conflict & Security Law (2010) 347–391

[1010] Secretary-General's bulletin *Status, basic rights and duties of United Nations staff members* [ST/SGB/2002/13]; Secretary-General's Bulletin on *Special measures for protection from sexual exploitation and sexual abuse* [ST/SGB/2003/13]; UN ACTION TO COUNTER SEXUAL EXPLOITATION AND ABUSE AND OTHER FORMS OF MISCONDUCT IN PEACEKEEPING AND SPECIAL POLITICAL MISSIONS Fact Sheet

[1011] United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel UNGA Res 62/21

[1012] Zsuzsanna Deen-Racsmany, The Amended UN Model Memorandum of Understanding: A New Incentive for States to Discipline and Prosecute Military Members of National Peacekeeping Contingents? Journal of Conflict & Security Law (2011), 1–35

[1013] Model MOU, article 3

[1014] P Rowe, 'United Nations Peacekeepers and Human Rights Violations: The Role of Military Discipline' (2010) 51 Harvard Intl L J Online 69, 79

[1015] R Murphy, 'An Assessment of UN Efforts to Address Sexual Misconduct by Peacekeeping Personnel' (2006) 13 Intl Peacekeeping 531, 542

This would be an exercise of extraterritorial jurisdiction by troop contributing States and would require a clear relationship to the legal system of the transitional State.[1016] Further proposals envisage a convention on Criminal Accountability on UN Officials and Experts on Mission.[1017] The combination of efforts of the UN in recent years affirms its commitment to replicating the accountability it calls for in transitional societies with the accountability of its officials, despite broader concerns about binding international organisations and member States to extraterritorial application of human rights norms.[1018]

Institutional accountability among international development organisations is exemplified by the World Bank Inspection Panel, designed to address the concerns of people who might be affected by Bank projects and to ensure that the Bank adheres to its operational policies and procedures in the design, preparation, and implementation of such projects.[1019] An investigation by the Panel can be requested by any group of private individuals who believe they have been or might be harmed by a Bank-supported project, and who believe that the harm stems from Management's failure to abide by Bank policies and procedures.[1020] The Inspection Panel facilitates the involvement of NGOs in an institution once hostile to such participation.[1021] However, limitations on knowledge of and access to the Inspection Panel compromise the participatory nature of the Panel process from the outset.[1022] Although the Panel has made efforts to include human rights considerations in some cases, the absence of human rights from the Resolution creating the Inspection Panel, significantly limits the Panel's mission.[1023]

[1016] Zsuzsanna Deen-Racsmany, The Amended UN Model Memorandum of Understanding: A New Incentive for States to Discipline and Prosecute Military Members of National Peacekeeping Contingents? Journal of Conflict & Security Law (2011), 33

[1017] UNGA, Note by the SG, 'Report of the Group of Legal Experts on Ensuring the Accountability of United Nations Staff and Experts on Mission with Respect to Criminal Acts Committed in Peacekeeping Operations' (16 August 2006) UN Doc A/60/980 24, para 84(g).

[1018] Nissan v Attorney General 1 All ER (1969) 629; Behrami v France Appl No. 71412/01; Saramati v France, Germany and Norway, Appl No. 78166/01

[1019] The World Bank Inspection Panel, Accountability at the World Bank: The Inspection Panel at 15 Years (World Bank 2009)

[1020] IBRD Resolution 93-10 and IDA Resolution 93-6, "The World Bank Inspection Panel," was adopted by the Bank's Board of Executive Directors on September 22, 1993.

[1021] Laurence Boisson de Chazournes, Romano Cesare and Ruth Mackensie, eds. International Organizations and International Dispute Settlement: Trends and Prospects (Transnational Publishers 2002)

[1022] Laurence Boisson de Chazournes, "Compliance with International Standards: The Contribution of the World Bank Inspection Panel." in G. Alfredsson (ed) *The Inspection Panel of the World Bank: A Different Complaints Procedure* (Springer Publishing 2001), 83

[1023] Sigrun Skogly, The Human Rights Obligations of the World Bank and the IMF. (Cavendish Publishing 2003)

General concern for the accountability of international organisations has led the International Law Commission to note that there is a "widely perceived need to improve methods for settling" disputes about the responsibility of international organisations.[1024] The International Law Commission's Draft Articles on the Responsibility of International Organisations propose new rules which could greatly expand liability of international organisations.[1025] In particular the proposals include responsibility for omissions, joint, parallel and indirect liability for states in assisting international organisations, and an "aggravated responsibility" regime, which enables any state or international organisation to demand cessation of a violation of a *jus cogens* norm or *erga omnes* obligation. Several organisations have argued against the creation of general rules on the basis that international institutions range greatly in size, function, and mandate. Many international organisations examined operate on the basis of consensus or decision procedures among States. Therefore, developing accountability of these institutions may create double liability or discourage States from contributing financially or using the forum of that international organisation.[1026]

A further area of limited accountability is the regulation of NGOs, which varies widely from State to State without any general framework. Initiatives such as codes of conducts and certification schemes are positive developments. However, without a compliance mechanism, the temptation for a NGO to default on the commitments made under a self-regulation initiative is strong.[1027] For self-regulation to be effective it needs wide support across NGOs. However the development of a set of common principles or framework alone is rarely enough to change the practices of organisations or provide a credible signal of quality.[1028] Moreover, in circumstances of low levels of civic trust, a code of conduct with compliance mechanism may be insufficient. A CSO umbrella group/association which has legitimacy within the sector can play a valuable role coordinating and leading the process of developing a self-regulatory initiative. In the absence of such a body, efforts

---

[1024] U.N. GAOR, 54th Sess., Supp. No. 10 at para. 478, U.N.Doc. A/57/10 (2002) ; International Law Association's Committee on the Accountability of International Organizations. INT'L LAW ASS'N, COMM. ON THE ACCOUNTABILITY OF INT'L ORGS., FINAL REPORT ON THE ACCOUNTABILITY OF INTERNATIONAL ORGANIZATIONS; Richard Stewart, Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance, at 16 (2008); Gerhard Hafner, Accountability of International Organizations, (2003) 97 AM. SOC'Y INT'L L. PROC. 236

[1025] *See* Rep. of the Int'l Law Comm'n, *Draft Articles on Responsibility of International Organizations*, 61st sess, May 4–June 5, July 6–Aug. 7, U.N. Doc. A/64/10; U.N. GAOR 64th Sess., Supp. No. 10, art. 2, (2009), *available at* http://untreaty.un.org/ilc/reports/2009/ 2009report.htm [hereinafter *Draft Articles on IO Responsibility*].

[1026] An internationally wrongful act may create direct liability, in the form of joint or parallel responsibility, between an IO and its Member States.

[1027] Jeannet Lingán, Amy Cavender, Thomas Palmer, and Beris Gwynne, "Responding to development effectiveness in the global South", One World Trust / World Vision Briefing Paper Number 126, June 2010, 1

[1028] Robert Lloyd, Virginia Calvo, Christina Laybourn, "Ensuring credibility and effectiveness: Designing compliance systems in CSO self-regulation" Briefing paper number 127, July 2010, 3-4

at developing self-regulation may become fragmented. Finally, actions of private military companies in transitions also generate significant concerns of accountability in transitional societies.[1029]

Accountability is thus fragmented across a wide range of general institutional structures and areas relevant to transitions. The precise institutional forum for accountability presently varies considerably depending on the institution in question. At present, it may involve litigation or internal processes in the donor or organisation state, far away from the transitional society. International law and policy affirms the priority of accountability among the goals for transitional societies. A consequence of this commitment is to promote systematic avenues for individual and institutional accountability, to get the transitional society in the habit of seeing examples of accountability in action. This commitment is not coherently reflected in the concern of international organisations for their own conduct. It is a case of "do as we say, and not as we do."

A consolidated accountability mechanism for international actors and institutions engaged in transitional societies and fragile states could pursue shared concern for coherent accountability. Such a mechanism would depend on high levels of transparency, cooperation and publicity among international actors. Such a mechanism, agreed among donor States, international organisations, with potential involvement for INGOs and private military actors, could identify priority areas of accountability, both individual and institutional, in the operations of these institutions. Areas of concern for individual conduct could include sexual offences, as highlighted by UN efforts, but could also include corruption offences, as international organisations seek to promote accountability for human rights and good governance. Institutional accountability could extend the approach of the World Bank's Inspection Panel to a shared forum for bilateral donors, based on commonly agreed principles of conduct for engagement in transitions, based on the policy frameworks examined Chapter VI. International institutions could join this mechanism by mutual consent, and within the memoranda of understanding signed with the transitional State authorising their actions in the state or, where relevant, the authorising Security Council resolution. Assent to this consolidated accountability mechanism could form a pre-requisite for troop contributions for peace-keeping and peace-building missions, as well as for authorising donor activity. In this way, it could form a mechanism of mutual accountability between donor States and the transitional State. Such a mechanism could respond to concerns of remoteness of UN and Inspection Panel procedures by being based in the transitional country, offering an opportunity to combine state from international and local institutions.

[1029] Zoe Salzman, "Private Military Contractors and the Taint of a Mercenary Reputation", (2008) 40 N.Y.U. J. INT'L L. & POL. 853

Transitional societies haemorrhage for want of accountability and restoration of the rule of law. The commitment of international organisations to accountability is significant in the policy frameworks examined, yet their conduct and frameworks risk "organised hypocrisy" if they cannot practice what they preach. The challenges of limited institutional capacity and resources in transitions can be ameliorated by pooling the resources of the range of actors concerned for transitions into consolidated mechanisms, including a consolidated accountability mechanism for individual and institutional conduct. A consolidated approach, based on a consensually agreed framework, eschews the difficulties of diverse institutional frameworks and offers tangible coherence and greater access and participation for members of a transitional society.

B. Proportionality

In considering the policy frameworks of international organisations, we noted that they struggle to provide a clear sense of priority among the various goals, such as truth, peace, security, etc that they seek to assist in individual transitions. This ambiguity was in part due to the emphasis on local ownership, but left the policy frameworks with no metric to evaluate the legitimacy of particular priorities between these goals. Proportionality may provide one option for such a metric. There is little doubt that proportionality can be accepted as a general principle of international law and comparative constitutionalism.[1030] Its relevance to *jus post bellum* arises as it derives from the "just war" doctrine. It is mentioned in passing in *jus post bellum* proposals.[1031] Originating in Germany, proportionality has found use in both common law and civil law systems, as well as in some international courts and tribunals, most notable the European Court of Human Rights. Proportionality performs a balancing or reconciling function between an individual right and a competing right or compelling interest of the public or common good, seeking to balance the infringement of a right against the least restrictive competing alternative.

Proportionality arises in the just war tradition as a constraint on the extent of countermeasures for a harm committed against a State.[1032] Recourse of force is assessed against the wrongs

---

[1030] Alec Stone Sweet and Jud Mathews, *Proportionality Balancing and Global* Constitutionalism, 47 COLUM. J. TRANSNAT'L L. 73 (2008)

[1031] Brian Orend, The Perspective of a Just-War Theorist", (n940), 580

[1032] Caroline 1837, where U.S. Secretary of State Webster stated: "It will be for the British to show that the local authorities of Canada, even supposing the necessity of the moment... did nothing unreasonable or excessive; since the [countermeasure], justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."; Naulilaa Arbitration Award (Portugal v. Germany), 2 R. Int'l Arb. Awards (1949), 1011 ff

committed, and the measures deployed as countermeasures must be proportionate in turn.[1033] The need for proportionality is explicitly found in Article 67 of Geneva Convention IV. Further, Part IV of Protocol I explicitly codifies proportionality as part of *jus in bello* with regard to international armed conflict.[1034] Proportionality is also found in ICJ jurisprudence, where the Court considered the proportionality of countermeasures for the use of force.[1035] The Court concluded that American mining of Nicaraguan ports and bombing of oil installations could not have been proportionate to the Nicaraguan complicity, despite uncertainty about its nature.[1036]

Proportionality thus arises in two areas of just war theory: the justified use of force in self-defence, and the nature of the conduct of hostilities. Proportionality has also been used as a criterion for assessing the legitimacy of non-military counter-measures.[1037] A breach of proportionality means actions cannot be justified as self-defence or legitimate use of force and may result in individual or State liability for war crimes.[1038] Debate continues about the application of proportionality to IHL, in particular regarding issues of "similar military advantage", "concrete and direct military advantage anticipated" and "direct participation in hostilities".[1039] The proposed extension of this theory, through the construction of jus post *bellum,* thus provides a basis to incorporate this principle.

[1033] Enzo Cannizzaro, "The Role of Proportionality in The Law of International Counter Measures" (2001) 12 European Journal of International Law 889 ; David Rodin, "Two Emerging of Jus Post Bellum: War Termination and the Liability of Soldiers for Crimes of Aggression", in Jus Post Bellum: Towards a Law of Transition from Conflict to Peace, 66-67

[1034] Noam Neuman, "Applying the Rule of Proportionality : Force Protection and Cumulative Assessment in International Law and Morality" (2004) 7 Yearbook of International Humanitarian Law 79-112

[1035] *Military and Paramilitary Activities* (Nicar. v. U.S.), Merits, 1986, I.C.J. 14 (June 27); *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8), para. 78; *Military and Paramilitary Activities* (Nicar. v. U.S.), Merits, 1986, I.C.J. 14 (June 27)

[1036] *Military and Paramilitary Activities* (Nicar. v. U.S.), Merits, 1986, I.C.J. 14 (June 27), para 237

[1037] Thomas Franck, "On Proportionality of Countermeasures in International Law" (2008) 102 AM. J. INT'L L. 715; W. Michael Reisman & Douglas L. Stevick, "The Applicability of International Law Standards to United Nations Economic Sanctions Programmes" (1998) 9 European Journal of International Law 86; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory; Gabcikovo-Nagymaros*

[1038] 1991 ICLQ 482; 2003 *Oil Platforms* case; *Krupreskic; Galic*

[1039] HCJ 769/02 *The Public Committee against Torture in Israel v. The Government of Israel* [Dec. 14, 2006] (unpublished), para. 16; William J. Fenrick ; Neuman, ?; J.G. Gardam, "Proportionality and force in international law" (1993) 87 American Journal of International Law 391, 394-395; M.C. Bonafede, "Here, there, and everywhere: assessing the proportionality doctrine and US uses of force in response to terrorism after the September 11 attacks", (2002) 88 Cornell LR 155, 163-164; Georg Nolte, "Thin or Thick? The Principle of Proportionality and International Humanitarian Law" 2010 4(2) Law Ethics and Human Rights 245

Proportionality is also central to modern judicial assessment of the infringement of international human rights.[1040] Nuanced use of proportionality arises from extensive ECHR jurisprudence, where the principle interacts with the Court's doctrine of the margin of appreciation.[1041] In explaining the prevalence of proportionality in rights determination, Georg Nolte notes that the claim to universality of international human rights requires some uniformity in determining such rights.[1042] Proportionality also features in the jurisprudence of the WTO system and the European Court of Justice.[1043] The practice of proportionality in various institutions authorised to render second opinions as to the compliance with authorising standards is gradually narrowing the range of indeterminacy inherent in the term proportionality.[1044] The principle suggests that any intrusive measures aimed at redressing a wrongdoing or an undesirable situation ought to be proportional to that wrongdoing or the seriousness of the situation.[1045] The challenge arises in considering the application of proportionality in international law and international affairs to the case of transitional circumstances. A number of discrete examples exist and writers have identified further potential uses of conception. In her *jus post bellum* framework, Kirsten Boon suggests that proportionality would have a potential role to respond "to the need to create a measure and process regulating the extent and nature of legal interventionism by international actors."[1046] Recchia suggests two consequences of proportionality in *jus post bellum*:

> First, higher degrees of paternalism will be justified over those societies that have been most adversely affected by violent conflict and where the state's institutional apparatus has all but collapsed. Second, since any obstacles to political order and self-rule in the aftermath of violent conflict are inherently political, they can be gradually overcome with the help of various confidence-building measures and external assistance aimed at institutional

---

[1040] Article 4(2) International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

[1041] *Dudgeon v. United Kingdom*, Appl. No. 7525/76, Council of Europe: European Court of Human Rights, 22 October 1981; *Refah Partisi (The Welfare Party) and Others v. Turkey*, 41340/98, 41342/98, 41343/98, 41344/98, Council of Europe: European Court of Human Rights, 13 February 2004

[1042] Georg Nolte, "Thin or Thick? The Principle of Proportionality and International Humanitarian Law" (n1010) 247

[1043] Decision by the Arbitrators, Brazil—Export Financing Programme for Aircraft, Recourse to Arbitration by Brazil under Article 4.11 of the SCM Agreement, WT/DS46/ARB (adopted Aug. 28, 2000); Marc-Andre Eissen, *The Principle of Proportionality in the Case-Law of the European Court of Human Rights, in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 125, 127 (Ronald St. John Macdonald, Frank Matscher, & Herbert Petzold eds., 1993)

[1044] Thomas Franck "Proportionality in International Law" (2010) 4(2) Law & Ethics of Human Rights 231, 242

[1045] Jennifer Welsh and Stefano Recchia, "Just War and Unjust Reconstruction," (n943) 172

[1046] Kristen Boon, "Legislative Reform in Post-Conflict Zones" (2005) 50 McGill Law Journal / Revue De Droit de McGill, 3, 41

reconstruction...As a postwar society becomes progressively capable of managing its own affairs and protecting basic human rights, international interference should be accordingly reduced.[1047]

We can consider the application of proportionality to each field. Kai Ambos considers the principle relevant to the determination of institutions and pursuit of value goals inherent in the practice and exercise of transitional justice, for instance the legitimacy of amnesties in a given transition.[1048] Ambos suggests that one must first examine any proposed measure to identify whether it is appropriate for its stated objective. Second, the measure must also be *necessary* or *indispensable* to achieve the said objective, i.e., there must not exist other measures, which would be less intrusive. Finally, the *proportionality stricto sensu* must be examined. At this stage, a balancing of the quantity and quality (gravity) of the acts to be covered by the measure (justice aspect) and the objective(s) to be achieved (peace aspect) must be undertaken; in other words, a "balance between the extent of the departure from full prosecution, i.e., the quality of the measures taken, and the severity of the factors necessitating a deviation".[1049]. This approach could be extended to an evaluation of the priority given to the various goals in transitional justice, justice, reparation, truth, and acknowledgment.

By invoking transitional justice's relationship with amnesty, a proportionality approach would also offer a platform for evaluating the goals and claims of transitional justice by comparison to the other fields of transition, such as peace-building. Further, proportionality could be used internally to each field. For instance in SSR proportionality could evaluate the design of programs between goals of an effective, sustainable, democratically accountable security sector, as well as the choice of security paradigms and priorities among them, such as national security and the multiple components of human security. This approach would require a coherent articulation of the priorities and principles that international actors seek to bring to bear in supporting each field in transition through the international legal and policy frameworks examined in prior chapters. For instance, proportionality could also be employed in evaluating and clarifying the claims of peace and state building as distinct concepts and practices. Finally we can consider the application of proportionality to the overall nature of international institutional engagement in a given transition. Kirsten Boon identified that the extent of state collapse in transitions, and extent of human rights violations may suggest a deeper intervention, whereas a modern legal system, a functioning civil

---

[1047] Jennifer Welsh and Stefano Recchia, "Just War and Unjust Reconstruction," (n943) 172

[1048] Kai Ambos, The legal framework of Transitional Justice (n460) 34

[1049] ibid 35

society, a history of a democratic, elected governance, and respect for human rights and universal norms.[1050] In considering its application to the use of force, Ruth Wedgewood distinguished between strategic and tactical use of proportionality.[1051] This distinction can be applied by analogy to evaluate both the strategic and tactical decisions of international engagement in transitions, such as the nature of the mission deployed (military force, donor, etc) as well as the sovereign function exercises.[1052] The 2011 World Development Report identified five factors to be considering in tailoring international engagement to a given transition.[1053]

Two primary concerns arise from the application of proportionality to transitions. The use of proportionality in IHL raised concern about second guessing tactical military decisions. Second guessing issues arise also in this case of proportionality, where evaluations of decisions and priorities made at a time of intense public diplomatic and bureaucratic pressure are evaluated at leisure by commentators, academics and comparative experience. However, these processes are already underway. Extensive academic and diplomatic commentary, monitoring and evaluation practices, as well as NGO, media and civil society advocacy in each transition, across a range of issues and priorities reflect this trend. Second, concern regarding the use of proportionality suggests that the principle represents the judicialisation of an area of conduct, rendering it justiciable, where once it may have been a purely political matter. With the technical and potentially elite or remote force of law in general, and a de-legitimatised legal system in transition, this process may inhibit the creation of civil trust or pursuit of the rule of law in each field. Moreover, the circumstances of transition are predicated on the existing of low capacity in State institutions, including courts. Why propose burdening such institutions with further obligations and tests? There will paradigmatically remain comparatively limited judicial resources in transitions. The proposals for consolidated accountability structures for international actors seek to contribute to building such structures.

Concern about the legal burden of proportionality is misplaced, as the principle is not the exclusive purview of those legal institutions. Proportionality could equally be explicitly considered in the voluminous policy frameworks, literature and projects of international organisations, as well as the

---

[1050] Kristen Boon, "Legislative Reform in Post-Conflict Zones" (n1017) 39

[1051] Ruth Wedgewood, "Proportionality and Necessity in American National Security Decision Making" ASIL 1992 Proceedings Vol. 86, (APRIL 1-4, 1992) 58-67

[1052] Figure 1

[1053] World Bank, World Development Report 2011, 248-9

actions of government organs and non-state actors relevant to transitions. A purely legal and formal interpretation of proportionality is not the only approach that can be taken. Mattias Kumm has argued that instead of attempting to make sense of authoritative legal materials, the focus of courts engaged in proportionality analysis is the assessment whether a public action can be demonstratively justified by reasons that are appropriate in a liberal democracy. Call this the turn from legal interpretation to public reason oriented justification.[1054] Proportionality based judicial review contends that law's claim to legitimate authority is plausible only if the law is demonstratively justifiable to those burdened by it in terms that free and equals can accept.[1055] The proportionality test merely provides a structure for the demonstrable justification of an act in terms of reasons that are appropriate in a liberal democracy.[1056] It is important not to overstate the case for proportionality. The proportionality test provides a method for the assessment of competing values, including rights: it does not settle those balancing acts itself. It provides little more than a structure for the assessment of public reasons. It lacks the legalism characteristic even of "common law constitutionalism.[1057] Proportionality and integrity are both often associated with legal institutions, principally courts. However, there is nothing in either principle that confines them to this role. Indeed, they can be seen as public responsibilities of individual citizens to contribute to a community of principle. In this way, proportionality could make a contribution to the re-constitution of a sovereign political community predicated on equal respect for individual citizens, the ultimate goal of fields in transitions.

Thomas Franck once concluded that "proportionality is rather like beauty, but not because it's so indeterminately in the eye of the beholder, but, rather, as an example of an indeterminate principle, if applied in practice through second opinions rendered by legitimate institutions, becoming gradually empowered to provide persuasive answers to difficult questions and, thereby, case by case, building the objective determinacy of the principle."[1058] Balancing priorities, values and challenges in transitions is inherently and intensely political and competitive. Proportionality is a valuable means of assessment of transitions because it provide a common means of evaluating the choices made in balancing competing interests in a wide variety of contingent areas. A

[1054] Mattias Kumm, "The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review" (2010) 4(2) Law & Ethics of Human Rights 142

[1055] ibid 143

[1056] ibid 150

[1057] ibid, 158

[1058] Thomas Franck Proportionality in International Law (n1015), 242

common means of evaluation does not resolve these balancing acts, but enables greater comparison between diverse areas and compels principled justification of the choices made. In that way, it contributes to the pursuit of a publicly reasoned foundation to transition, to the pursuit of the use of integrity in decision making and practices in transitions.

C. Stewardship

In prior chapters we identified that fields in transition display a significant paradox. On the one hand, they seek to change the behaviours, attitudes and perceptions of citizens of a transitional societies in accordance with a variety of value goals. On the other hand, local ownership and context of each transitional society has featured as a significant priority of theory, international law and policy. We need some mechanism of evaluating how given societies, international organisations and fields reflect the combination of transformation and respecting local ownership and context.

Respecting local context and ownership is seen as significantly enhancing the legitimacy and efficacy of international engagement in transitional societies. Just war theorists have also identified the need to respect local ownership and context in a *jus post bellum.*[1059] Moreover, local ownership can reflect expressions of self-determination, a right to democratic governance, and the re-constitution of a sovereign political community.[1060] As a result, we can consider local ownership as both a process of international engagement and a desired outcome. However, critics of the use of local ownership argue that the term is too vague to be meaningful and that the concept is naive and impracticable, as there would be no need for international involvement, if the "local owners" had not failed in the first place.[1061] We identified in Chapter VI that local ownership is often a rhetorical device, with little concrete meaning. Some attempts have been made to give local ownership some content. Simon Chesterman identifies six senses of 'ownership': (i) responsiveness; (ii) consultation; (iii) participation; (iv) accountability; (v) control; (vi)

[1059] Gary Bass, Jus Post Bellum, (n928) 392-3

[1060] Kristen Boon, "Legislative Reform in Post-Conflict Zones" (n1017) 37; Annika S Hansen and Sharon Wiharta, "From Intervention to Local Ownership: Rebuilding a Just and Sustainable Rule of Law after Conflict" in Carsten Stahn and Jann Kleffner (eds) *Jus Post Bellum Towards a Law of Transition from Conflict to Peace* (TMC Asser Press, 2008), 135

[1061] Annika S Hansen and Sharon Wiharta, From Intervention to Local Ownership: Rebuilding a Just and Sustainable Rule of Law after Conflict (n1037), 133

sovereignty.[1062] Local ownership may also reflect degrees of authority that local actors exercise.[1063] Despite these attempts, tension between a transformative international engagement and local preferences remains in several areas.

The primary paradox relates to the circumstances of transition. International actors are engaged in transitions because of the diminished capacity and legitimacy of the State of a transitional society to provide public goods. Nevertheless, the engagement of such international actors seeks to respect the local ownership of that society, whose government has recently proven itself incapable of delivering said public goods. Clearly, support for the *status quo* is unwarranted. However, as international actors begin identifying and engaging with local actors, it may radically affect the future political development of a territory.[1064] International actors compromise state sovereignty, to greater and lesser extents, by violating a State's right to self-governance, but do so with the aim of making it sovereign with regard to other states and its own society through the re-constitution of a sovereign political community. How can international engagement respond to the circumstances of transition and also respect local ownership?

Second, identification of local owners across divided State and private institutions of a transitional society is complex. In particular, many actors may be resistant to reform in given areas, such as political leaders seeking to avoid individual criminal accountability, civil servants opposed to governance reform or state building, or military and police against SSR. Such resistance to reform may be institutional as well as personal.[1065] Among local actors we can distinguish between (i) the population in its various organisation forms, i.e. the citizen, civil society, and the business community (ii) the authorities, the political leadership, the civil service and local government mechanisms and (iii) members of the security sector.[1066] Further, the international approach may rely on a flawed assumption that there is a distinction between the political sphere and the non-

---

[1062] Simon Chesterman, Ownership in Theory and in Practice: Transfer of Authority in UN Statebuilding Operations (n790) 10

[1063] Annika S Hansen, From Intervention to Local Ownership: Rebuilding a Just and Sustainable Rule of Law after Conflict, 137

[1064] Simon Chesterman Ownership in Theory and in Practice (n790) 18-19

[1065] Eric Scheye and Gordon Peake, Unknotting Local Ownership, (n761)

[1066] Annika Hansen, From Intervention to Local Ownership 138

political sphere, i.e that civil society is necessarily non-political, which cannot said, without more, to be the case.[1067] However, typically ownership is invoked to refer to entire populations.[1068]

Third, it is unclear how local ownership operates when "owners", however identified, deeply disagree about public goods.[1069] Such disagreement is reflected in the circumstances of transition, but also in our expectations for consolidated democracy, in the circumstances of justice and of politics. Such disagreement reflects the heart of political decision making and priorities in a transitional society in the fashion Mark Malloch Brown suggested, "choosing, for instance, whether girls' education should be a bigger budget priority than clean water".[1070] One example is the distinction between local, especially traditional, sources of law and international models and frameworks. Tension between international and traditional sources may exist between international and national actors, as well as between different sets of national actors. Finally, a concern for local ownership will reflect disagreement about the appropriate time and form of exit of international engagement. In the absence of a clearly defined goal and endpoint, international actors run the risk of accusations that their temporary and benevolent presence are disingenuous amid concerns of neocolonialism.[1071] Concerns for the temporary nature of international engagement can be contrasted with the long term nature of the goals of fields relevant to transition.

These concerns operate across the range of fields relevant to transition. For *jus post bellum* to capture this range, it needs coherent principle for international engagement, but one that also acknowledges that local ownership is fundamentally concerned with the actions and interests of local actors, and so places emphasis on their conduct. Past practice of international engagement, includes territorial administrations, international financial institutions, donors, private military actors and NGOs. These institutions reveal a wide and diverse engagement with aspects of a State's sovereignty, such as taxation, policing, natural resources, provision of aid, security, or the exploitation of natural resources. It is possible therefore to consider this range of activities across a

---

[1067] B Pouligny, "Peacekeepers and Local Social Actors: The Need for Dynamic, Cross-Cultural Analysis" (1999) 5 Global Governance 403

[1068] Simon Chesterman, Ownership in Theory and in Practice (n790) 18-19

[1069] Eric Scheye and Gordon Peake, Unknotting Local Ownership, (n761) 241

[1070] Mark Malloch Brown, 'Foreword', in C. Lopes and T. Theisohn (eds) Ownership, Leadership and Transformation: Can We Do Better for Capacity Development?. (UNDP 2003), x

[1071] Simon Chesterman, Ownership in Theory and in Practice (n790); Annika S Hansen, From Intervention to Local Ownership: Rebuilding a Just and Sustainable Rule of Law after Conflict

spectrum. Figure 1 illustrates this below. To reflect this diversity, any principle must be content neutral. Moreover, the majority of international actors in transition will operate on diverse legal bases. A majority may operate the consent of the State or territorial authority involved. A further group of international actors may be authorised by Security Council resolution to administer core governance functions of a state or territorial unit. Any evaluation of this diversely founded international engagement must therefore be origin neutral. To comprehensively evaluate the nature of international engagement in transitions, we need a conception that acknowledges the tension between transformative goals and local ownership, is neutral as to the origin and content of international activities and reflects the reality that international actors operate with severely incomplete information regarding local political economy.

This chapter proposes stewardship as that concept. With its foundation in Christian theology, it may make an uncomfortable and controversial foundation for modern international law.[1072] However stewardship has found relevance as a concept in a number of discrete legal areas, that are responsive to the concerns regarding local ownership and context. First, the stewardship of mankind for the environment and global natural resources forms one of the organising principles of international environmental law and the law of the sea.[1073] Paul Collier acknowledged the relevance of a stewardship conception of natural resources in fragile states.[1074] Collier's approach acknowledges the need for something more than resource preservation for fragile states, suggesting that international actors involved in resource wealth have an obligation as custodians to enhance and grow the wealth and economy of that society rather than merely preserve its existing status.[1075] This has led Collier and other academics, lawyers, and practitioners, to draft a Natural Resource Charter, a "set of principles for governments and societies on how to best harness the opportunities created by natural resources for development."[1076]

Second, in response to the 2008 economic crisis, UK regulatory authority the Financial Reporting Council drafted a stewardship code aimed at enhancing "the quality of engagement between institutional investors and companies to help improve long-term returns to shareholders

---

[1072] Genesis 1: 26; Matthew 25:14-30; Luke 19:12-28

[1073] 1982 Law of the Sea Convention 21 I.L.M. 1245 (1982); G.A. Res. 2749 (XXV), ¶ 1, U.N. Doc. A/RES/25/2749 (Dec. 12, 1970).

[1074] Paul Collier, Plundered Planet (OUP 2010) 32-3

[1075] ibid, 25-30

[1076] http://www.naturalresourcecharter.org/

and the efficient exercise of governance responsibilities."[1077] The Code recommends institutional investors to publicly disclose their policy on how they will discharge their stewardship responsibilities; have a robust policy on managing conflicts of interest in relation to stewardship and this policy should be publicly disclosed; monitor their investee companies; and be willing to act collectively with other investors where appropriate.[1078] Similar thinking informs the recent EU green paper on corporate governance.[1079] The approach to stewardship from corporate governance reflects the need for heightened communication between investors and shareholders given the failures of communication and information that contributed to the financial crisis.

Third, a number of analogous pre-cursors exist in the practice of international actors regarding mandated territories and trusteeships. The League of Nations oversaw the operation of a number mandate territories, where the well-being of such territories formed "a sacred trust of civilisation". The United Nations Trusteeship Council continued this trend but the laudable aim of immediate decolonisation overtook any minimum benchmarks for governance, despite the goal "to promote the political, economic, social, and educational advancement of the inhabitants of the Trust territories, and their progressive development towards self-government or independence".[1080] Furthermore, in the recent past the United Nations has operated a number of international territorial administrations.[1081] Political and social circumstances of affected states were matters of key concern for such missions, in contrast to the trusteeship system. These administrations shared a relationship with the affected territories and people intended to be one of trust and fiduciary in nature.[1082] As a consequence, actors holding territory in trust had a dual legal obligation to both the authorising body and the affected people of the territory, but one that could be disaggregated by the nature of the sovereign function exercised.

These examples illustrate a range of components relevant to stewardship. Before applying these components to international engagement in transitions, we need to identify why stewardship is a relevant characteristic in the evaluation of international actors. Stewardship is predicated on a conception of sovereignty acknowledges that sovereignty is functional and designed for the equal

---

[1077] Financial Reporting Council, UK Stewardship Code, July 2010

[1078] ibid, 4

[1079] European Commission, Green paper: The EU corporate governance framework Brussels, 5.4.2011 COM(2011) 164

[1080] Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945, Article 76

[1081] Simon Chesterman, You the People, (n125) 48-99

[1082] ibid, 11-44;

benefit and protection of the individual citizens of that society.[1083] In a sovereign political community, the State are stewards for the ultimate objects of value, individual citizens.[1084] International activities in transitions may range from the exercise of full sovereign functions to monitoring and advocacy. In exercising these functions, international actors profess to contribute to that State's resumption of legitimate sovereign authority based on a stewardship conception of sovereignty. A stewardship conception of international engagement, therefore, may legitimately evaluate processes by which international actors seek to enable equal dignity and respect for all individual citizens of in the reconstitution of that transitional society into a sovereign political community, so that a given society deserves respect and tolerance for its decisions. As a consequence, the focus of stewardship need not be on particular substantive outcomes and priorities. If a transitional society professes a commitment to the goals of each field relevant to transition, the priority and outcomes among these goals are legitimately the concern of all members of that transitional society. Rather an appropriate focus of stewardship is on the processes by which the transitional societies re-constitutes themselves with the assistance of international actors. A commitment to these processes by a transitional society, as expressed in State institutions, reflects the conditions under which the substantive decisions of that society warrant the respect and tolerance of the international community.

Processes of international activities can be evaluated for publicity, transparency, use of vires, predictability, and clarity. These are virtues we associate with the rule of law. Processes can also be evaluated by reference to norms of inclusiveness, representativeness, and non-discrimination, cross cutting norms of international human rights law. The combination of these features provides a basis for evaluating the initialisation, operation and conclusion of international processes. In examination of processes of international engagement, we can draw on the diverse use of stewardship identified.

First, the approach of stewardship regarding natural resources can be extended to human resources. In particular, concern for inter-generational and long term enhancement can be extended to all public goods pursued by international engagement. In fragile states, there is an urgent need to achieve substantial improvements in social provision and begin processes for the achievement of long term goals. However realistically, the public service ethos in government

---

[1083] Anne Peters, Humanity as the A and Ω of Sovereignty (2009) 20(3) European Journal of International Law 513–544

[1084] Jeremy Waldron, A Religious View of the Foundations of International Law, available at: http://ssrn.com/abstract=1823702, 47

ministries cannot be restored in short term.[1085] Concern for local ownership creates difficulties for international actors seeking to adopt processes that would enable equal respect for all citizens. The legitimacy of international processes depends on inclusion and representation of all stakeholders.[1086] For international actors, this requires substantial information about the socio-economic and political conditions in the recipient country, and the willingness to defend their position against external pressure.[1087]

International actors and transitional States share an overlapping desire to serve the citizens of a transitional society, but do so in an environment of mutual distrust and lack of information about the motives and interests of the other. Among international actors, a competitive posture may ensue, with limited tangible coordination, especially at a political level. Commitment mechanisms could be designed to overcome these postures and pursue the stated shared goals. One component of this is ensuring the independence of key executing State agencies, through independent third party monitoring, international execution of State functions, etc.[1088] For avoiding unnecessary competition among donors, pooling funds can also be an effective way to pool risks. Recent practice of multi-donor trust funds (MDTFs) shows some promise in this regard, but has also generated criticisms of slow procedures and governance and limited use in fragile states. Increasing international acknowledgment of the substantive interdependence of fields relevant to transition could see an increase in the use of such mechanisms to mitigate common risks to international actors engaged in transitions.[1089] MDTFs could be used to share fiduciary responsibility for public goods between international and representative national actors in collegial decision-making bodies.[1090] Such bodies could provide members with one vote for international and domestic actors, but shift towards greater domestic membership based on service and governance performance. The overall result would be frequent deliberation and negotiation between domestic and international representatives to achieve sufficiently large majorities in support of specific policies. Stefano Recchia gives the example of the Bosnian constitutional court

---

[1085] Tessa Bold, Paul Collier and Andrew Zeitlin, "The Provision of Social Services in Fragile States: Independent Service Authorities as a New Modality", 6

[1086] World Bank, World Development Report 2011, 12

[1087] Carsten Hefeker and Katharina Michaelowa, "Can Process Conditionality Enhance Aid Effectiveness? The Role of Bureaucratic Interest and Public Pressure" (2005) 122(1-2) Public Choice January 2005 159-175, 174

[1088] World Bank, World Development Report 2011, 251

[1089] ibid 279

[1090] Jennifer Welsh Stefano Recchia, Just and Unjust Postwar Reconstruction: How Much External Interference Can Be Justified? (n943) 181

composed of six national judges across the ethnic divide and 3 international judges.[1091] Mechanisms such as these rely on process conditionality, limiting the distribution of aid to the willingness of a transitional government to demonstrate a commitment to inclusive and participatory processes and mitigating mutual distrust between donor and State. The US Millennium Challenge Account embodies this process approach to conditionality. This approach requires country partner to identify its own priorities for removing constraints to economic growth and poverty reduction, and to propose specific programs based on those priorities. In establishing such priorities, MCC asks country governments during the compact proposal process to undertake public consultations and to make use of local institutions, both to talk about national development strategies and to gather the varied local perspectives and information needed to design sustainable programs.[1092]

A further proposal to resolve the tension in international engagement in State functions is an Independent Service Authority.[1093] An Independent Service Authority (ISA) is a public agency outside the civil service, implementing government policy in the delivery of basic services. An ISA would allocate public funds to service providers in such as way as to achieve objectives set by the ministries, but imposing yardstick competition on recipients. The core function of the ISA would be to monitor the performance of these service providers. The ISA would be managed by a board: as a public agency a majority of this board would be appointed by government, but it would also initially include both donors and local civil society, and be designed specifically for each type of service. Such an approach mitigates the lack of donor coordination in financing NGOs, as well as a lack of NGO accountability, caused by limited monitoring of NGO activity. NGO provision fundamentally detracts from the ability of the state to gain credibility and authority with citizens.[1094] Further proposals suggest that parties to a conflict or peace process could provide a compact for service delivery, allowing the ISA and service delivery to proceed.[1095] This range of models illustrate the potential for new mechanisms of aid in fragile states and transitions, that reflect the conditions of mutual distrust, the desire to enhance local ownership and the challenges in doing so.

[1091] ibid 182

[1092] US Millennium Challenge Corporation, MCC's Approach to Country Ownership document, 8

[1093] Paul Collier, The Bottom Billion (OUP 2006), 118-120

[1094] Tessa Bold, Paul Collier and Andrew Zeitlin, "The Provision of Social Services in Fragile States: Independent Service Authorities as a New Modality", 9

[1095] Stig Jarle Hansen, "Independent Service Authority and Compact for Service Delivery in Fragile States and Post-Conflict Settings", NIRB Working Paper 2008: 119, 3

Second, the UK Stewardship Code illustrated the need for heightened modes of communication with stakeholder groups. For international engagement in transitional societies, such communication is a vital precondition for any attempt to change behaviours, attitudes and perceptions. From Chapter III, we can see that public communication is a vital component of integrity. This need generates a burden of consultation, inclusion, and collaboration on the stewards; reflecting the high need for communication in the corporate governance conception of stewardship. Some of these are basic, such as ensuring that all relevant material is available in local languages and that there is a functional media to share information about the transition process (if necessary, this may involve establishing a radio network).[1096] No one can be persuaded to support new initiatives if they do not know they exist, or if their intent and content have been distorted in reporting. Traditional consultation mechanisms and new technologies also offer the potential to mobilize broader citizen input into debates.[1097] Communication with transitional societies will vary from country to country, but may profitably include dedicated radio stations and distribution of radios, communication via text message on cellphones, public workshops and consultations.

Stewardship enables a differentiated evaluation of institutionally diverse actors. International engagement in transitions should operate on the basis of decision procedures that reflect equal respect for all citizens and inter-dependence between public goods and, as a consequence, be constitutive of integrity for that political community. The proposals in this section illustrate the capacity of international actors to acknowledge their distinct role in public goods provision in transitions in managing risk in pursuit of public goods, the need to respect local ownership and sovereignty and the desirability of consistent and dedicated public communication.

VI. Conclusion

This chapter has sought to give expression to integrity in a tangilble fashion relevant and applied to transitions through proposals for a *jus post bellum* that is responsive to limitations and tensions in existing international law and policy. In so doing, it does not seek to raise the already great expectations for international law and policies in transitions. Rather, it argues for a greater legal and policy consciousness of the need and potential for integrity in the interpretation of these fields. The development of a more coherent *jus post bellum,* based on the principles of accountability, proportionality, and stewardship, would not necessarily resolve the problems of

---

[1096] Simon Chesterman, Ownership in Theory and in Practice:(n790) 21

[1097] World Bank, World Development Report 2011, 252

transition but rather could enable coherent, explicit and public consideration of the array of issues significant in transitional circumstances for both individual States and societies.

International law is so difficult to get enacted that it must be used sparingly.[1098] As a result, this chapter has proposed the use of a *jus post bellum* based on existing international law and policy. Where policy recommendations have been made, they have been for new interpretive practices, design of mechanisms or codes of conduct. This approach to *jus post bellum* seeks to respond to deficiencies in existing international law and policy not only to enhance the contribution of international actors to civic trust and rule of law in transitional societies, but also to the overall development of international rule of law and to more effective international responses to circumstances of transition. In this way, it seeks to identify the tangible value added by an approach that pursues the principle and process of integrity through concrete manifestations in the *jus post bellum* framework.

[1098] Paul Collier, "Law and Codes for the Resource Curse", (2008) 11 Yale Hum. Rts. & Dev. L.J. 9, 26

Figure 1: Jus Post Bellum: The Spectrum of Sovereign Functions

Type	Monitoring	Fin. Assistance	Service Delivery	Military Power	**Executive Power**	**Legislative Power**	**Judicial Power**
NGO	X	X					
INGO	X	X					
Donor Assistance	X	X					
Direct Donor Support	X	X	X	X			
Corporation		X	X				
Private Mil. Company		X	X	X			
Int. Financial Institutions	X	X	X				
Occupation	X	X	X	X	X	X	X
Int. Territorial Administration	X	X	X	X	X	X	X
Colonial Protectorate		X	X	X	X	X	X

Chapter VIII: Nepal's Transition: The Role of International Law and Policy

I. Introduction

Nepal's transition demonstrates the tensions that arise from the nature of international law and concern for local context and ownership in the policies of international organisations. This transition has been fitful, with limited progress across key areas, particularly in the practice of transitional justice and security sector reform. 2011 is proving to be a significant year for Nepal. On January 15th, the United Nations Mission in Nepal (UNMIN) ceased operations.[1099] One week later, the Maoist party handed over a division of its People's Liberation Army (PLA) to the State in a symbolic gesture towards the integration of the PLA into the Nepalese Army.[1100] Between January 25-27th Nepal underwent the UN process of Universal Periodic Review (UPR) of Human Rights in Nepal.[1101] In August and September of this year, efforts to pursue transitional justice were significantly undermined by the government proposal for an amnesty and withdrawal of cases related to the armed conflict.[1102] These events provide an opportunity to critically review recent international engagement in Nepal and reconsider core concepts in range of programs across the fields of transitional justice, peace-building, security sector reform, and development. This assessment of international activities is based on secondary literature and a series of interviews conducted in May and June 2010 with relevant practitioners.[1103]

This chapter examines the extent to which integrity has been pursued as a principle and process in Nepal through the principles of accountability, stewardship, and proportionality in the use of international law and policies of international organisations in Nepal. In addition, it asks whether greater coherence and clarity could be achieved in these fields by recognising their shared principles in across each of the four fields considered or whether the present flexible approach

---

[1099] Karin Landgren, Representative of the Secretary-General in Nepal Karin Landgren's remarks (farewell reception organized by UCPN-Maoist, 16 January 2011)

[1100] "Nepal govt takes formal control of Maoist army", *The Times of India* Jan 22, 2011

[1101] "The UN expresses full support to Nepal on the eve of the Universal Periodic Review", Thursday, 20 January 2011, Press Statement

[1102] Maoist's commitment on peace process, constitution drafting and the government, Thursday August 25th 2011, Nepal Everest News

[1103] I conducted 30 interviews with international organisations, donors, local and international NGOs, government officials, and civil society actors. The interviews were tailored to the programs and projects of interviewees and also examined broader structural challenges facing Nepal.

remains preferable. In so doing, lessons from the Nepalese case address broader concerns relating international practices of integrity in transitions.

The article proceeds as follows. Section II identifies the historical context in which international actors engage in Nepal. Section III considers some of the proposed causes of conflict in Nepal, including economic under-development and exclusion. Section IV describes the circumstances of the peace process, its national ownership and a key limitation of the peace agreement that has contributed to current challenges in its implementation. Section V considers the primary proposals and practices in each field. Section VI argues that an integrated consideration of accountability provides evidence of limited and piecemeal support for the norm across the fields. Section VII argues that international actors in Nepal have made significant use of practices under a stewardship conception, in response to limited conflict sensitivity in their practices during the armed conflict. Section VIII assesses the proportionality of international priorities in recent engagement. Section IX concludes.

II. A Brief History of Nepal

The starting point for considering Nepal's transition is in 1951, when the first claim was made for a Nepalese constituent assembly to broaden the nature of politics and governance.[1104] The 1959 Constitution vested political power in the King and the Prime Minister alone, with cursory and diluted powers given to the legislature.[1105] The 1962 Constitution replaced this concentration of power with the "Panchayat" system, which effectively excluded a legislature and ensured that the Prime Minister was beholden to the King. This system gave rise to significant public criticism, generating the need for concessionary constitutional reforms in 1980, devolving some powers to a national legislature and ensuring the appointment of the Prime Minister and his cabinet from the said legislature.[1106] The new system was often criticised for being unrepresentative, corrupt, and generating massive inequality between urban and rural areas and for concentrating power in urban state agencies.[1107] Challenges to this system emerged in the People's Movement of 1990, in which tens of thousands of protestors from across the political spectrum marched on Kathmandu.

[1104] "The Interim Constitution 1951" Last visited 9 February 2011, http://countrystudies.us/nepal/48.htm

[1105] Article 10, the Royal Constitution of Nepal, 1959, available at www.undp.org.np/constitutionbuilding/constitutionnepal/.../1959%20Constitution%20English.pdf

[1106] John Whelpton, *A History of Nepal* (Cambridge University Press, 2007) 107-12

[1107] Deepak Thapa, *A Kingdom Under Siege: Nepal's Maoist Insurgency*, 1996 to 2004 (London: Zed Books, 2007), 55

Nepalese security forces responded with force and violence. This moment of national unity prompted efforts at constitutional change, which eventually gave rise to the 1990 Constitution.[1108] The 1990 movement is significant as the first modern instance of a call for accountability for human rights abuse in Nepal. In response, the government formed a commission to investigate the loss of life and property during the People's Movement.[1109] The commission concluded that 45 people had been killed and 23,000 injured during the 50-day movement, but its report was never published and no prosecutions followed from its findings, demonstrating the absence of serious accountability for these offences.[1110] In an effort to enhance international prestige and legitimacy, Nepal ratified the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in 1991.[1111] One human rights lawyer indicated that the failure of successive governments to provide accountability for this period of violations fostered a culture of impunity and a politics of appeasement that remains in Nepal with no effective investigations, trials and political interference with processes that examine the past. As a result, the events of 1990 represent a lost opportunity to reckon with past abuses and dramatically affect the course of rule of law in Nepal.[1112] Instead, scepticism about transitional justice, political accountability, and the inconsequential use of commissions remain the context for considering these issues as they arose in the armed conflict in Nepal.[1113]

III. The Armed Conflict

In the new but ineffective constitutional order of 1990, Stephen Mikesell noted that both Peru and Nepal "have large rural indigenous populations subordinated to small ruling elites from whom they are divided by racism or caste-ism and regionalism."[1114] Presciently he noted: "If respected as a cry

---

[1108] Ram Narayan Kumar, *The Constitutional Monarchy and the Maoists of Nepal: Some Problems of Persuasion by Naming*, Contemporary Issues and Ideas in Social Sciences, July 2005, 18

[1109] International Center for Transitional Justice, *Nepali Voices: Perceptions of Truth, Justice, Reconciliation and Reparation and the Transition in Nepal*, March 2008, 17

[1110] Asia Foundation, *Impunity in Nepal: An Exploratory Study* (1999), p9; Interview with Dr. Gopal Krishna Siwakoti, INHURED (8th June 2010)

[1111] Accession on 14 May 1991 http://www1.umn.edu/humanrts/research/ratification-nepal.html Nepal had previously ratified the four Geneva Conventions on 7 February 1964.

[1112] Interview with Dr. Gopal Krishna Siwakoti, INHURED (8th June 2010)

[1113] Interview with Fred Rawski, OHCHR (16th June 2010)

[1114] R. Andrew Nickson, *Democratization and Growth of Communism in Nepal : A Peruvian Scenario in the Making* (1992) Journal of Commonwealth and Comparative Politics 30(3) 358 – 386; Stephen Mikesell, *Paradoxical Support of Nepal's Left for Comrade Gonzalo*, Himal, Mar/April 1993

for recognition, autonomous development and substantial change, they could evolve into a positive force; if ignored or suppressed, they could lead to sectarianism and violence."[1115] In this context, the Community Party of Nepal (Maoist) (hereinafter Maoists) emerged in 1995 as a result of a complex set of political splits and alliances within the Community Party of Nepal between 1949 and 1995.[1116] From September 1995, the Maoists planned to initiate a "People's War", culminating in the forty point demands issued to the government on 4 February 1996 and attacks on government installations later that month.[1117] The demands bemoan the failure of economic development in Nepal since the 1990 movement, and concern nationality and people's democracy and livelihood.

Official responses to the Maoist crisis have provided a variety of reasons for the conflict. In 1999 the High Level Committee to Provide Suggestions to Solve the Maoist Problem suggested that the crisis was not a failure of democracy, but rather a failure to assert the system of democracy across the entire country. In contrast, the Integrated Internal Security and Development Program identified the following causes to the Maoist conflict: the denial of access to resources, failure of the government to provide citizens' basic needs, youth disenfranchisement and the absence of local level leadership; the exclusion of certain regions from the political process and the absence of local consultation and participation in development design and implementation. An April 1997 Report of the Dhami Commission issued recommendations akin to Maoist demands for socio-economic change and the need for negotiations.[1118]

No definitive conclusion on the causes of the conflict can yet be reached, though issues of social exclusion, inequality and political dysfunction remain the stated bases of the Maoist cause.[1119] These concerns are also reflected in academic analysis.[1120] Some authors contend that tensions

---

[1115] ibid.

[1116] Deepak Thapa, A Kingdom Under Siege : Nepal's Maoist Insurgency, 1996 to 2004, (n1078) 44

[1117] The 40 point demands are available at http://www.satp.org/satporgtp/countries/nepal/document/papers/40points.htm (Last visited 28 January 2011)

[1118] Deepak Thapa, A Kingdom Under Siege : Nepal's Maoist Insurgency, 1996 to 2004, (n1078) 72-5

[1119] International Crisis Group, "Nepal's New Political Landscape", Asia Report N°156 – 3 July 2008, 2-6

[1120] Quy-Toan Do and Lakshmi Iyer, Poverty, "Social Divisions and Conflict in Nepal" World Bank Policy Research Working Paper 4228, May 2007; Magnus Hatlebakk, "Explaining Maoist Control and Level of Civil Conflict in Nepal", CMI Working Paper 2009 No 10; Arjun Karki, "Socio-economic and Political Justice in Nepal: A Civil Society Perspective", Building a Future on Peace and Justice Nuremberg, 25 – 27 June 2007

between castes and ethnicities also contributed to the conflict.[1121] In addition, it is difficult to measure the cost of the conflict in Nepal in human, economic or social terms, due to the absence of verifiable and comprehensive information. Nonetheless, it is generally agreed that 13,000 were killed or disappeared during the conflict.[1122] There is little reliable data in Nepal on sexual offences, resulting in little consideration of such offences in proposals around Nepal's transition, despite the suggestion in comparative experience that such offences typically occur in modern internal armed conflicts.[1123] The People's War represents a period of sustained violence, fear and acute economic hardship in Nepal, demonstrating the potential link between economic grievance and armed conflict. The widespread use of development aid and projects during the People's War affirms the possibility of international actors being inert or non-responsive to conflict or transitional circumstances.[1124]

IV. The Peace Negotiations and Comprehensive Peace Agreement

The peace process in Nepal remained nationally owned despite support from concerned regional and international actors. Attempts had been made since 2001 to bring the Maoists to the negotiating table and cease hostilities, with little progress, despite a ceasefire and peace talks in 2003. In 2005, King Gyanendra perpetrated a coup, dissolving parliament and arresting leaders of the mainstream political parties. The King concluded that the government was unable to successfully conclude negotiations with the Maoists or achieve a decisive military victory, declaring that "only a strong, authoritarian government can deliver peace."[1125] The King's seizure of power and the resultant human rights violations mobilised the political spectrum in opposition to the Palace, thus making negotiations and dialogue between the Maoists and the political parties possible, resulting in a 12-point agreement.[1126] This agreement and strong civil society resistance to the King's authoritarian rule resulted in the second People's Movement of mass protests and demonstrations, with widespread public participation in April 2006. Negotiations between the Maoists

---

[1121] Bishwa Nath Tiwari, "An Assessment of the Causes of Conflict in Nepal", A Paper to be presented at the Second Annual Himalayan Policy Research Conference Nepal Study Centre, Madison 11 October 2007

[1122] INSEC, No. of Victims Killed by State and Maoist in Connection with the "People's War" http://www.insec.org.np/pics/1247467500.pdf

[1123] Asia Foundation, Preliminary Mapping of Gender Based Violence, July 2010

[1124] Francesca Bonino and Antonio Donini, "Aid and Violence: Development Policies and Conflict in Nepal", June 2009, Feinstein International Center

[1125] International Crisis Group "*Nepal: Responding to the Royal Coup*" ICG Asia Briefing n°36, 24 February 2005 1-12

[1126] Astri Suhrke, CMI, "UN Support for Peacebuilding: Nepal as the Exceptional Case", WP 2009:7, 14

and the political parties took place in Nepal and India between May and November, with the Comprehensive Peace Agreement (CPA) signed on the 21 November 2006.

The CPA provided *inter alia* for elections of a Constituent Assembly, management of arms and armed forces, and mechanisms for the settlement of disputes, including the establishment of a Truth and Reconciliation Commission (TRC) to investigate serious human rights violations by both sides.[1127] The CPA was thus concerned with issues of security, constitutionalism and transitional justice. This choice of broad drafting and a perceived lack of expected difficulties may have enabled initial consensus, but masked significant disagreement on these issues.[1128]

As a result of the stated political need for for a UN ceasefire monitoring mission, UNMIN was established on 23 January 2007 by United Nations Security Council Resolution 1740, as a "focused mission of limited duration", with a mandate to monitor the management of arms and armed personnel of the Nepali Army and the Maoists and to provide technical assistance to the Election Commission in the planning, preparation and conduct of the election of a Constituent Assembly.[1129] UNMIN can be seen as successful in its role in ensuring a free and fair election and in enabling the platform for the Constituent Assembly to debate Nepal's future.[1130] UNMIN ceased operations on 15 January 2011. However, UNMIN's role will not be the focus of this paper. Other UN organs such as UNDP and OHCHR coexisted with a wide range of international donors, an increasing presence of international NGOs and Nepal's vibrant civil society in development, security and transitional justice. It is to these fields and the role of international law and policy that we now turn.

V. The Areas

A. Transitional Justice

The primary transitional justice proposals are for the establishment of the TRC, a Disappearance Commission, as well as a system of payments to conflict victims. At the time of writing, both Commissions remain tabled in the Constituent Assembly, with civil society actors commenting on

---

[1127] Comprehensive Peace Agreement, available at mofa.gov.np/nepalpeaceprocess/November%2021.doc (Last Checked 28 January 2011); Article 33(s) of the Interim Constitution of Nepal 2007 also stipulated for a Truth and Reconciliation Commission to be constituted

[1128] ibd.

[1129] UN SC Res 1740 UNMIN (2007)

[1130] Astri Suhrke, "Virtues of a Narrow Mission: The UN Peace Operation in Nepal" (2011) 17 Global Governance 37-55

April 2010 drafts.[1131] The influence of international law in the proposals is complex. The call for a disappearance commission can be traced back to the 40 point demands of the Maoists in 1996 and could therefore be seen as purely domestic in origin, but is certainly bolstered by intervening international developments in this area, most notably the Convention on Enforced Disappearances.[1132] During the conflict, relatives of disappeared persons rallied for accountability and information about their loved ones, supported by international actors and domestic NGOs.[1133] After it was clear that the whereabouts these persons would not be made available within sixty days as required in the CPA, the commitment to a disappearance commission was affirmed in the Interim Constitution.[1134] On foot of the 2007 Supreme Court decision on disappearances, pressure for the rapid establishment of a commission increased.[1135] In *Rajendra Dhakal v. Home Ministry,* the Nepalese Supreme Court ordered that disappearances be criminalised in line with the international convention, as a crime against humanity and that the government create a Commission of Inquiry into Disappeared Persons.[1136] In considering the nature of State obligations, the Court turned to international and comparative law. The Court noted that the International Convention for the Protection of All Persons from Enforced Disappearance reinforced pre-existing values and heritage of human rights law, such as the specialist human rights jurisprudence of the Inter-American Court of Human Rights in the landmark decisions of *Velasquez Rodriguez v Honduras* and *Trujillo Oroza v Bolivia*, as well as the decision of the European Court of Human Rights in *Kurt v Turkey*.[1137] On this basis it concluded that non-ratification of the Convention does not negate State responsibility with respect to disappeared persons. However, present draft legislation fails to comply with the Supreme Court decision in this respect.[1138] Some relevant NGOs

---

[1131] Advocacy Forum submission on TRC Bill 29 April 2010

[1132] International Convention for the Protection of All Persons from Enforced Disappearance Doc.A/61/488. C.N. 737.2008; Probe commission on disappearance urged 02/06/2008 Kantipur; Rights group calls for prompt action on enforced disappearance 29/08/2007 Nepal News

[1133] "UK, Advocacy Forum demand truth about disappearance", *Kantipur* 30/08/2007; Accountability Watch Committee, Advocacy Forum Nepal, Amnesty International *et al*, Nepal: Joint Memorandum on the Disappearances of Persons (Crime and Punishment) Bill 30 August 2009

[1134] Interim Constitution, Article 33; Warisha Farasat and Priscilla Hayner, *Negotiating Peace in Nepal: Implications for Justice*, ICTJ (June 2009), 20

[1135] Interview with Ari Bassin, International Center for Transitional Justice (10th June 2010)

[1136] *Rajendra Dhakal v. Home Ministry, Supreme Court Judgment, 1 June 2007,* available at www.supremecourt.gov.np/nja/disappearance_Case.pdf; Kishor Uprety, "Against Enforced Disappearance: the Political Detainees' Case before the Nepal Supreme Court", *Chinese Journal of International Law* (2008), Vol. 7, No. 2, 429–457

[1137] Velasquez Rodriguez Case, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988); Trujillo Oroza v. Bolivia. 2002 Inter-Am. Ct. H.R. (ser. C) No. 92 (Feb. 27, 2002); *Kurt v. Turkey*, Appl. No. 15/1997/799/1002

[1138] Interview with Govinda Bandi Sharma, ICJ (25th May 2010)

take the view that the Disappearance Commission should be first among the proposed commissions, given the urgency of identifying the whereabouts of the disappeared, the fact that many cases are already sufficiently documented to be heard before a commission, and the greater political commitment of the Maoists to this issue.[1139]

The origins and intention of the proposal for TRC are less clear than for disappearances, with calls for a TRC not originating primarily in domestic civil society, but the result of elite and international influence on the peace process. Some political parties saw it as a means to address past violations in the long term, others as a means of reconciliation or amnesty.[1140] One examination of negotiations around the justice provisions of the CPA concluded that recovering the truth or providing justice for victims was of marginal importance to the negotiators.[1141] Drafts of the TRC Bill contain a process for amnesty for certain crimes, whereby the government filter those who had been deemed ineligible for amnesty, before forwarding the remainder to the Attorney General's office for prosecution.[1142] This approach is unashamedly political in its interference with a legal process and runs the risk of impunity for serious crimes after such offences have been excluded on the face of the legislation.[1143] Some international observers noted that language regarding reconciliation between victim and perpetrator had maintained a sense of forced reconciliation from earlier drafts.[1144] A risk therefore exists that the TRC is used not as a platform for accountability and truth, but in consolidating impunity.

In addition, no clear view has emerged as to the sequencing or relationship between the two commissions. Given the focus on disappearances in that dedicated commission, it would be reasonable to expect a complementary weight given to other gross violations of human rights in the Truth and Reconciliation Commission, but it is unclear how instances of multiple offences would be addressed. Therefore it is possible that victims may have to testify twice before both

---

[1139] Interview with Dr. Gopal Krishna Siwakoti, INHURED (8th June 2010); Interview with Jamunda Poudel, CVICT (17th June 2010); Interview with Govinda Bandi Sharma, ICJ (25th May 2010)

[1140] Warisha Farasat and Priscilla Hayner, Negotiating Peace in Nepal: Implications for Justice, ICTJ (n1106)

[1141] ibid.

[1142] Section 25, draft Bill Made for making provisions relating to Truth and Reconciliation Commission, 9 December 2009, on file with author; Amnesty International, Reconciliation Does not Mean Impunity, A Memorandum on the Truth and Reconciliation Commission Bill, ASA 31/006/2007

[1143] Interview with Dr. Gopal Krishna Siwakoti, INHURED (8th June 2010); Interview with Govinda Bandi Sharma (25th May 2010)

[1144] Interview with Ari Bassin, International Center for Transitional Justice (10th June 2010)

commissions at the risk of re-traumatisation. Any role for the National Human Rights Commission also remains largely unaddressed.[1145] Concerns about the process surrounding the commissions have drawn different opinions from domestic and international actors. Some are critical of the perfunctory consultations for both commissions.[1146] The Maoists sought to establish Disappearance Commission by government ordinance when in power in 2008, which has since lapsed absent parliamentary approval. Some human rights groups opposed this move, citing deficiencies in the substance of the ordinance and the lack of parliamentary scrutiny of its provisions.[1147] Others took the view that this imperfect bill would nonetheless have represented a step forward given the urgent need to ascertain the whereabouts of the disappeared and the seeming political support for its establishment.[1148] In the absence of effective international law supporting rights of inclusion and consultation in transitional justice processes, concerned actors must default to a pragmatic approach. A focus on ensuring a legitimate process for the establishment of a Commission and appointment of Commissioners, drawing from comparative experience, has been limited to date and should be encouraged.

In comparison to the nascent development of both Commissions and weak commitment to accountability, significant progress has been made in the distribution of funds to victims of gross violations of human rights. The primary existing form of payments are an interim scheme from the Government of Nepal supported through an Emergency Peace Support project by the World Bank.[1149] The interim scheme arose after a government request to fill a critical financial gap in CPA obligations. As a result the World Bank undertook this project at the request of the Government of Nepal to deploy its technical expertise, rather than at a policy or political level, as prohibited by its mandate.[1150] The Bank was therefore not in a position to consider issues of the identification of victims, the standard of evidence required, or the quantum of the payments, but rather limited by the government request to technical aspects of its distribution and delivery.[1151] Some relevant

---

[1145] Interview with Bishal Khanal, Secretary, National Human Rights Commission, (2nd June 2010)

[1146]Interview with Ari Bassin, International Center for Transitional Justice (10th June 2010); Advocacy Forum; INSEC, Comments and Suggestions on draft Bill made for making provisions relating to Truth and Reconciliation Commission, 2, 7

[1147] Accountability Watch Committee, Advocacy Forum Nepal, Amnesty International *et al*, Nepal: Joint Memorandum on the Disappearances of Persons (Crime and Punishment) Bill 30 August 2009

[1148] Interview with Rhoderick Chalmers, International Crisis Group (16th June 2010)

[1149] World Bank Emergency Peace Support Project (PE-P110762) 21 April 2008

[1150] IBRD Articles of Agreement, Article 4(10) prohibiting political activity

[1151] Interview with Jasmine Rajbhandary, World Bank (4th June 2010)

NGOS gave anecdotal evidence of limited access to payments for victims in remote areas who are unaware of processes.[1152] Others provided accounts of political parties cadres fraudulently received the funds on behalf of a third party.[1153] Furthermore the process of its distribution often remains partisan; local district officials listing further eligible persons when political pressure had been exerted.[1154] In response to such evidence, the Bank continues to inform the Ministry of Peace and Reconciliation of such complaints, in addition to the significant media attention surrounding the project.[1155] Anecdotal accounts of political interference contrast with internal Bank data of good results of payments across 19 districts, but neither account can be independently verified in the absence of systemic external monitoring or evaluation.

This project, originally designed to support both victims and combatants, has since been restructured.[1156] Payments to Maoist combatants became problematic after a video of "Prachenda", the Maoist leader, emerged suggesting fraudulent swelling of the Maoist ranks to take advantage of such schemes.[1157] The World Bank has sought to address concerns with the impact of such a mechanism through an independent review, a conflict filter developed with International Alert, and accountability plan and individual grievance procedure in the revised project document.[1158] While the government and the World Bank stressed that issues of acknowledgment and apology are not foreclosed by the payments, stressing their interim nature, other groups see parallels with the transitional justice concept of reparations and seek to apply international principles concerning the right to reparations to this interim scheme.[1159] However one categorises the system of payments, its limitations are clear. There is presently no relief for victims of torture or sexual offences, although the relevant task force has stated that victims of torture and illegal detention are next to receive relief.[1160] In responding to these criticisms, the

---

[1152] Interview with Jitendra Bohara, Advocacy Forum; Interview with Jamunda Poudel, CVICT (17th June 2010)

[1153] ibid; ICG, "Nepal: Peace and Justice", Asia Report N°184 – 14 January 2010

[1154] Interview with Fred Rawski, UN OHCHR (16th June 2010)

[1155] Interview with Jasmine Rajbhandary, World Bank (4th June 2010)

[1156] World Bank, "Restructuring paper on a Proposed Project Restructuring of Nepal Emergency Peace Support Project", 22 April 2010, Report No: 54421-NP

[1157] "UN mired in deepening Nepal row" 16 May 2009, http://news.bbc.co.uk/2/hi/south_asia/8047931.stm

[1158] Interview with Jasmine Rajbhandary, World Bank (4th June 2010); Interview with Rebecca Crozier, International Alert (3rd June 2010)

[1159] Interview with Dr. Gopal Krishna Siwakoti, INHURED (8th June 2010)

[1160] Interview with Ari Bassin, International Center for Transitional Justice (10th June 2010); Interview with Jasmine Rajbhandary,, World Bank (4th June 2010)

Bank contended that an interim scheme of payments did not preclude a comprehensive scheme in line with international best practice, but also suggesting that there was a trade off between doing everything perfectly and doing it quickly.[1161]

At the time of writing a further significant reparations project had been announced between IOM and UN OHCHR, designed to map, coordinate, and collate existing forms of payments to victims and offer methodologies and support to the establishment of a comprehensive reparations scheme by the government.[1162] The provision of services is anticipated as the most difficult component given that the state does not provide the vast majority of services to most of the country.[1163] Services are likely to take prominence in the future, responding to the need to engage in comprehensive needs assessment of victims for reparations processes at a grassroots level, and mindful of the need for psychosocial support and avoidance of re-victimisation.[1164] In a positive step, the IOM and World Bank projects are to be linked through a series of consultations between these organisations, given the potential for overlap between the systems of payments.[1165] Further coordination will be required with the National Human Rights Commission scheme of compensation, as it remains was unclear whether receipt of such compensation stood as a bar to the subsequent payment of interim relief or reparations.[1166] Even on this coordinated framework, issues of State acknowledgement of responsibility in granting payments remain unaddressed and may ultimately depend on recommendations issued by the proposed Commissions.[1167] In addition, the processes of distribution, under-determined by international law and policy and without broad reference to comparative experience, remain at risk of being partisan and fractured across regions.

At the time of writing, discussions are ongoing regarding a government proposal to to withdraw all criminal cases relating to the conflict, cancelling court decisions and granting general amnesty to all the convicted. The Maoist Party's Commitments and Proposal to Government, Peace Process

---

[1161] Interview with Jasmine Rajbhandary, World Bank (4th June 2010)

[1162]" Fairness and Efficiency in Reparations to Conflict-Affected Persons" Project Submitted 24 February 2010. See also Interview with Fred Rawski, OHCHR (16th June 2010)

[1163] ibid

[1164] Interview with Jamunda Poudel, CVICT (17th June 2010)

[1165] Interview with Fred Rawski, OHCHR (16th June 2010)

[1166] Interview with Bishal Khanal, National Human Rights Commission, (2nd June 2010); It may be the case that these NHRC cases are closed to TRC and Discom for awards or may be that they get remainder or full amount.

[1167] Interview with Govinda Bandi Sharma (25th May 2010)

and Constitution,' proposes "to draw back all the legal action those are on the trial from the Maoists leaders and the cadres imposed by the state, and apologize for the imposed actions".[1168] Section 29 of the State Cases Act permits withdrawal of criminal charges in relation to any of the crimes under domestic and international law, though its application to gross violations of human rights leaves the Government of Nepal in breach of its international legal obligations under several treaties, including the ICCPR.[1169] Civil society activists argued that the proposal would" terminate the objectives of all transitional justice mechanisms like Truth and Reconciliation Commission and Disappearance Commission."[1170] The agreement between UCPN-M and UDMF, if applied, would contravene Nepal's obligations under international law and would violate Supreme Court directives.[1171] The emergence of an explicit proposal for amnesty affirms the absence of any strong commitment to accountability in justice among Nepal's political elites and makes it a challenging environment to pursue justice for civil society actors and international organisations alike.

Uneven consideration of related issues and institutions in transitional justice proposals has led one international analyst to conclude that the process of transitional justice in Nepal is doing "more harm than good".[1172] It is clear from victim perception reports and media coverage that these transitional justice institutions and issues must bear the weight of high expectations from victims and civil society, perhaps seen as the solution to many disparate problems and explaining present government inertia. There is a real risk that victims become disenfranchised and traumatised by constant engagement with transitional justice, a rights discourse but limited tangible progress.[1173] The risk of an amnesty for international crimes calls into question whether even imperfect institutions will be established. Limited and fragmented interest in accountability and non-inclusive or consultative processes may exacerbate this risk.

B. Peace-Building

The use of peace-building in Nepal reflects international policy frameworks in incorporating practices in other discrete fields. Significant attention has been placed on constitution drafting as a

---

[1168] "Maoist's commitment on peace process, constitution drafting and the government", Thursday August 25th 2011, Nepal Everest News

[1169] OHCHR, "Remedies and Rights Revoked: Case Withdrawals for Serious Crimes in Nepal", June 2011, 23

[1170] Accountability committee press release 27 August 2011, on file with author

[1171] Joint Letter Advocacy Forum, ICJ, Amnesty International and Human Rights Watch, 1 September 2011

[1172] Interview with Rene Hansen, Danida Hugou (18th June 2010)

[1173] Interview with Rhoderick Chalmers, International Crisis Group (16th June 2010)

peace-building exercise, involving training of CA members and increasing civil society awareness and participation in consultation and lobbying processes. In addition, discrete attention has been paid to de-mining action as a necessary component of concluding the armed conflict, with Nepal recently declared a land mine free country. Further processes seek to engage young males at risk of disenfranchisement or cadre membership in the transitional period. Support for transitional justice processes have largely been financed or presented as falling within a peace-building framework. Peace-building frameworks thus provide international organisations with broad discretion for a range of activities, as facilitated by the policies and open international law identified in Chapters IV and V. However, such framework approaches do not generate distinctive concerns or priorities beyond the incorporation of discrete fields under the peace-building auspices.

For instance, the UN Peace-Building Strategy for Nepal "serves as the vehicle to integrate the comparative development, human rights, political and humanitarian strengths of the UN (both in-country and at a global-level) to support Nepal in achieving tangible results not only in the peace process over the next two years but also against the long-term social, political and economic transformation agenda imbedded in the CPA".[1174] The strategy paper explicitly draws on a number of UN policy frameworks identified in Chapter V and places emphasis on national ownership despite the absence of an "overarching multiparty national strategy has emerged to direct implementation of Nepal's long-term transformation". Nonetheless, the critical goals identified in the strategy paper reflect priorities considered in the other fields examined in this chapter.

C. Security Sector Reform

Despite ambiguous commitments on SSR in the CPA, the subsequent politicisation and fragmentation of security sector issues from broader debates have limited progress in this area. Under the 2007 Interim Constitution, the Council of Ministers shall "control, mobilize and manage" the Nepalese Army.[1175] While drafting a new permanent Constitution, one may hope that consensus would develop around a national security framework, enabling an integrated assessment of priorities and discussion of implementation.[1176] Nepal remains without an express

---

[1174] UN Peace-Building Strategy for Nepal 2011-12, June 2011, 2

[1175] Article 144, Interim Constitution 2007

[1176] Shobhakar Budhathoki, "Mainstreaming the Security Sector Reform Agenda in Nepal", in Rajan Bhattarai and Rosy Cave (eds) *Changing Security Dynamics in Nepal* (Nepal Institute for Policy Studies) 39

unifying concept or agreed national interest and thus it remains challenging to determine the nature, priorities, and proper mandate of the security sector.[1177]

In the absence of systemic consideration of security, issues have been considered discretely, reflecting discrete regulation in international law and policy. Two early security sector reform efforts have enjoyed some success. Arms monitoring has been a task successfully discharged by UNMIN, offering some deterrence to both sides for breaching the ceasefire agreement and a channel of communication that fostered joint responsibility.[1178] Great emphasis and cost was placed on the monitoring of arms as a necessary milestone in the peace process and stabilisation of relations between the Maoists and other political parties. Nonetheless, some have criticised the high priority and expense of this issue, given the nature of the Maoist weapons. Several weapons were stolen from the Nepalese Army, others were "home-made" and could be re-created or re-acquired. Once it became clear that the cantonments would remain for more than a matter of months, their management became an issue. Emphasis on this issue may reflect the difference between context in Nepal and international best practice and demonstrates the limitations of adaption of solutions to prior cases by international actors.[1179]

A second relative success has been the the disarmament, demobilisation and reintegration (DDR) of child soldiers from the Maoist forces. To avoid the suggestion that the Maoists were the defeated party in the conflict, this process is often referred to as the disqualification of combatants. The issue of child soldiers is well comparatively regulated in international law.[1180] The Maoists had recruited and abducted minors throughout the conflict.[1181] As a result of the verification process, 4008 combatants were verified as disqualified including 2973 minors and 1035 recruits who joined the Maoist army personnel after May 25th 2006 were found not eligible to remain in the cantonments and were recommended to be immediately and orderly discharged and rehabilitated back to communities. However, by the time of discharge, most were eighteen or older. In their eyes, their forcible separation from the PLA and Maoist party was unnecessary and

---

[1177] ibid; Interview with Dr. Duman Thapa, Aspect (28th May 2010)

[1178] Astri Suhrke, "Virtues of a Narrow Mission: The UN Peace Operation in Nepal" (n1102) 44

[1179] Interview with Izumi Wakugawa, Aspect (28 May 2010)

[1180] Article 8(2)(b)(xxvi), Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, *entered into force* July 1, 2002; Article 77, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3, *entered into force* Dec. 7, 1978.

[1181] Human Rights Watch "Children in the Ranks: The Maoists' Use of Child Soldiers in Nepal", (Human Rights Watch, February 2007)

offensive.[1182] Moreover, combatants became annoyed in early presentations, as ministry officials had just baldly enumerated the options with no context or acknowledgement of their audience's history.[1183] All relevant parties can thus learn from the experience of the disqualification process. Some observers see political movement on child soldiers as a short term political tactic, rather than as a response to international law or pressure.[1184] Others were critical of international DDR practices that deny the opportunity for collective disarmament, which may be appropriate in the case of minors and be facilitated through collective agriculture or construction projects, especially where such minors have no affiliation or affinity to a village or family network.[1185]

Despite these successes, a number of issues remain unresolved in Nepal's security sector. One concern is the integration of Maoists into the Nepalese Army. The numbers of Maoists are not sufficient overwhelm the already vast Nepali army.[1186] Seemingly technical questions do need resolution, such as whether the integration is done individually into existing battalions or the creation of new units, and how to determine rank alignment, best resolved with reference to a national security framework.[1187] However integration has shifted from a minor issue in need of a technical solution to a major political obstacle. This can be explained by the unexpected success of the Maoists in the 2008 elections. Neither domestic political parties or international observers expected a Maoist electoral victory given their violence against the population of Nepal. In the wake of the elections, other political parties sought to block Maoist consolidation through integration of their militia into the armed forces.[1188] The peace process treated both parties as equals, and the resolution of integration issues has become concerned maintaining the posture that neither side "lost" the conflict.[1189]

The Nepalese Army proposed a solution on integration to Prime Minister Nepal on 15 January 2011 and on 29 March suggests integration of Maoist combatants into a new Nepalese Army

---

[1182] International Crisis Group, From Two Armies to One, Asia Report No 211 (18 August 2011) 20

[1183] ibid

[1184] Interview with Rebecca Crozier, International Alert (3rd June 2010)

[1185] Interview with Izumi Wakugawa, Aspect (28th May 2010)

[1186] Ameet Dhakal, "The cost of superficiality", myrepublica.com, 10 January 2009

[1187] Interview with Simon Arthy, DFID (17th June 2010)

[1188] Interview with Dr. Duman Thapa, Aspect (29th May 2010); International Crisis Group, Nepal's Election: A Peaceful Revolution? Asia Report N°155 – 3 July 2008

[1189] International Crisis Group, From Two Armies to One (n1157) 3

directorate, the Office of the Director General of Security and National Development. 35 per cent of the personnel would be drawn from among former Maoist army combatants, 35 per cent from the NA, and 15 per cent each from the Nepal Police and the Armed Police Force (APF). Its mandate would include development work, disaster management, industrial security and wildlife protection. There are suggestions that this proposal may find support among the Maoists, but specifics remain unclear.[1190] In particular, discussions on the mandate of any new proposed force remain contentious, and call into question the nature of security to be served in Nepal. In addition, alignment of rank and distribution of leadership positions remain highly contentious.[1191]

A political consensus in support of reform of the security sector and governance institutions has not yet developed.[1192] The drafting of a new constitution for Nepal ensures that many security challenges are dependent on resolution of issues of federalism and provisions regarding the armed forces. Broader analysis of SSR in Nepal among domestic experts shows that Nepal's security policy has yet to emerge and a clear security structure in the country still needs to be developed. It has been found that some of the security agencies do not have a legal basis for their establishment and operation.[1193]This contingency creates space for reform, as existing legislation will no longer fit the re-configured State and will need to be replaced. However, constitutional reform itself is predicated on the issue of army integration.[1194]

Nonetheless, democratic oversight of the security sector and individual accountability remain issues of concern whatever the constitutional outcome. In July 2010, the Committee for the Democratization of the Nepal Army submitted a plan to the Prime Minister proposing democratisation based on civilian supremacy and control of the government. As of November 2010, the plan has not been made public or approved by the Council of Ministers or Parliament, and the precise timeline remains unknown.[1195] Further existing proposals allow parliamentary

---

[1190] ibid

[1191] ibid 16-17

[1192] Nepal Peace and Development Strategy 2010-2015 (Donors January 2011) Nepal Peace and Development Strategy 2010-2015 (January 2011) available at http://www.un.org.np/report/nepal-peace-and-development-strategy-2010-2015 52

[1193] Hari Phuyal, "Security Related Laws, Policy and Mechanisms in Nepal: An Overview", in Hari Phuyal and Marlene Urscheler (eds.) *The Security Sector Legislation of the Federal Democratic Republic of Nepal: Commentaries*, (DCAF 2009) 9

[1194] International Crisis Group, Nepal: From Two Armies to One, (n1157)

[1195] Nepal Peace and Development Strategy (n1168) 55

oversight to be enhanced on logistics and training, but says that details of military strategy and operations should be kept secret, which contradicts international standards for information sharing and accountability for decision-making in democratically controlled armed forces.[1196]

Broader discussions about democratisation and the appropriate size and role of Nepal's armed forces remain absent due to limited civil society engagement on SSR. Few NGOS and civil society groups are involved in security reform. Some interviewees acknowledged the significance of the issue, but concluded that it remained a process that will be taken an elite political level.[1197] While the issue remains politically fraught and partially contingent on resolution of the formation of government standoff in Nepal, donor activities in the area have not created an incentive or pressure to negotiate. For instance, by funding education and health sectors, donors subsidise the current stalemate in the security sector, which the Nepalese government finances.[1198] It appears that the effect of donor posture is that "we will fund you indefinitely to support whatever process is ongoing".[1199] In addition, donors who fund the unreformed security sector are not a target of public criticism by some NGOs, in turn dependent on donor funding. Domestic political circumstances thus remain the exclusive determinate of this issue, sidelining nascent international policy frameworks on security sector reform and confirming issues of security as elite political processes.

Political sensitivities, limited civil society interest, and the absence of tangible donor pressure for negotiations through financial incentives do little to mitigate the existing political stalemate on security sector issues. The absence of coherent international law on security sector reform reinforces this posture by failing to provide normative guidance to international or domestic actors, except on discrete issues such as child soldiers. The elite nature of security discussions preclude greater accountability through public processes.

D. Development

A number of foreign states have enjoyed long and considerable influence on development in Nepal, offering a wide variety of policies without sustained success. Vast resources have been expended on development attempts in Nepal with an estimated $11 billion dollars has been spent

---

[1196] International Crisis Group, Nepal's Fitful Peace Process, Asia Briefing No 120 (7 April 2011) 17

[1197] Interview with Izumi Wakugawa, Aspect (28th May 2010)

[1198] Interview with Rhoderick Chalmers, International Crisis Group (16th June 2010)

[1199] ibid

on development over the past 50 years.[1200] As a result, Nepal can be described as a state chronically dependent on international aid.[1201] Given this dependence, the nature of donor conduct is especially significant in Nepal. While engagement has shifted significantly over its 50 year existence, at heart the issue remains a challenge for donors who sustain the function of the State, its limited economic advance and enhanced governance, but regrettably also indirectly enable its corruption and patronage.[1202]

The donor peace and development plan 2010-2015, set out in January 2011 identified five proposals for donor development priorities to consolidate peace in the coming five years: (i) A clearer and more coordinated division of labour and geographic focus for development partners, determined through a mapping exercise and a code of conduct; (ii) A commitment to working with the government as a group to plan and coordinate support to federalism (iii) Greater transparency on development partners' spending and results. (iv) A commitment to mainstreaming conflict-sensitive development approaches in all new programmes (v) A commitment to assess all new programmes in terms of their impact on traditionally excluded communities, to achieve greater workforce diversity, and to increase opportunities for members of disadvantaged communities to build careers in development.[1203] However the strategy document went on to identify that it is not possible to make specific recommendations with regard to priorities for external development support in the future because these will be defined by the country's prevailing context and government priorities.[1204] Consideration of aid effectiveness in post-conflict Nepal demonstrates the continued need for a distinct donor response to transitional circumstances. External evaluations reveal that there has been moderate progress towards improved aid effectiveness over the last decade despite the constrained context. However the evaluation finds that specific implementation of the Paris Declaration principles has been weak.

Despite this emphasis on state accountability and good governance, there remains less donor interest in ensuring reciprocal donor accountability and aid efficiency.[1205] In 2009, the UN Resident Coordinator's Office, in collaboration with donor partners, launched the Donor Transparency

---

[1200] International Alert, Donor Aid Strategies in Post-Peace Settlement Environments (December 2010)

[1201] ibid; Interview with Rhoderick Chalmers, International Crisis Group (16th June 2010)

[1202] Interview with Horst Ammann (15th June 2010); Inclusive Development of the Economy Project

[1203] Nepal Peace and Development Strategy (n1168) 74

[1204] ibid, 76

[1205] Interview with Ashish Thapa, Transparency International Interview (4th June 2010)

Initiative in six pilot districts of Nepal to strengthen donor transparency and accountability at central and local levels. It is hoped that over the course of the pilot lessons learned will generate the basis for a draft code of conduct.[1206] The process has generated concern that there is weak information and coordination from field offices to central donors.

Such an initiative is responsive to criticisms of donor engagement during the armed conflict. Donors were slow to acknowledge the early stages of the conflict in their programming, many treating the enterprise as "business as usual".[1207] Though others considered the Maoist a counter-terrorism issue after 9/11, most notably USAID, the actions of the Maoists were widely considered a minor insurgency for much of their armed campaign.[1208] However, the situation changed in 2005 when the Royal Coup prompted the realisation of the fundamental significance of the conflict on the continued suitability and viability of donor projects and development. Donors spoke about the complicity of development assistance as a cause of conflict, and began exploring opportunities to use the assistance they provided to Nepal for mitigating conflict.[1209] As a result, there has been significant re-consideration of the entire conflict period and the role and reactions of development within it.[1210] The Peace and Development Strategy 2010-2015 seeks to enhance donors contribution to linking development activities to the consolidation of the peace process.[1211]

Many donors have identified governance as the key area in ensuring Nepal's development, with two primary forms.[1212] First, a number of donors engaged in state-building of the formal institutions of Nepal, in particular the legal sector, which remains limited in capacity and enforcement of judicial decisions.[1213] Despite some progress made by the Commission for the

---

[1206] Nepal Peace and Development Strategy (n1168)

[1207] Francesca Bonino and Antonio Donini; Aid and Violence: Development Policies and Conflict in Nepal, June 2009, Feinstein International Center, 21

[1208] Interview with Marcus Brand, UNDP (15th June 2010); get ICG and other sources

[1209] Lindsay Alexander, Canan Gündüz, DB Subedi, "What role for business in "post-conflict" economic recovery? Perspectives from Nepal", International Alert, March 2009; International Alert, Donor Aid Strategies in Post-Peace Settlement Environments, December 2006

[1210] EED, FES, GTZ, MISEREOR, SEQUA, Joint Assessment of Selected Sectors of Development Work in Nepal and its Impact on Conflict and Peace

[1211] Nepal Peace and Development Strategy 2010-2015 (January 2011) (n1168)

[1212] International Crisis Group, Nepal Backgrounder: Ceasefire - Soft Landing or Strategic Pause? (10 April 2003, ICG) *ICG Asia Report N°50*, 5

[1213] Interview with Bishnu Adikhari, USAID (9th June 2010)

Investigation of Abuse of Authority (CIAA) in investigating allegations of corruption, the abuse of state resources is widely believed to be still common. This is compounded by the absence of public prosecutors who have experience or skills to deal with 'white-collar crime', i.e., fraud and corruption.[1214] Corruption in Nepal remains a serious problem evidenced in the global Corruption Perception Index from a ranking of 138 in 2008 to 147 out of 178 countries in 2010.[1215] Nepal has signed and ratified the UN Convention against Corruption (UNCAC) in 2011.[1216] Some analysts take the view that the legitimacy of political actors is not compromised by their participation in networks of political, bureaucratic and financial interests and their electoral survival depends more on their complicity in these networks than in pushing for systemic reform.[1217]

Second, donors seek to support mediation practices. Currently forms of alternative dispute resolution (ADR) and mediation currently only exist under a Supreme Court rule, are little used, and would benefit from additional legislation and support from the legal sector.[1218] Some mediation projects are designed as transitional measures with conflict issues in mind, while others are designed to increase the efficiency of the courts.[1219] However, such projects remain disparate with no national strategic coordination. As a result the content of such projects and their interface with conflict or political issues remains diffuse across the country. Few mappings or analyses of the broader range of formal and informal justice providers have been conducted and donors appear largely unaware of the historic and contemporary links between the country's judicial system and ongoing conflict dynamics. As a result, there is little consideration of how these programmes might contribute, either positively or negatively, to conflict prevention and peacebuilding efforts. Rather than changing the local power dynamics, therefore, many new IJMs fall into the same patterns of inequality and simply provide another forum through which often-abusive power can be played out.[1220]

[1214] Nepal Peace and Development strategy, (n1168) 52

[1215] http://www.transparency.org/policy_research/surveys_indices/cpi/2010

[1216] http://www.unodc.org/unodc/en/treaties/CAC/signatories.html

[1217] International Crisis Group, Nepal's Fitful Peace Process, (n1172)

[1218] Interview with Mamiko Nakada, JICA (26th June 2010)

[1219] Interview with Claudia Maier, GTZ (7th June 2010); In a 2004 project by GTZ, the districts were selected as GTZ was already working in the broader area but also because they were in the Maoist heartland; Interview with Bishnu Adikhari, USAID (9th June 2010)

[1220] Katrina M. Aitken, "Justice should be blind, but is the international community's support to informal justice mechanisms in Nepal given blindly?" Saferworld November 2010, 15

Similarly, local level governance remains particularly in need of attention and at risk of corruption. Local bodies are now nominally headed by civil servants who have little will or ability to challenge local political dynamics. This means that the all-party mechanisms they head are essentially a means for political parties to divide up the spoils of local government budgets with no accountability.[1221] Evaluation of donor effectiveness notes that an important reason for not being able to meet the raised expectations is the challenge of improving governance. The absence of local bodies has adversely affected the implementation of development activities at the local level effectively.[1222] However, more immediate concerns than governance and human rights remain pressing in Nepal. Chronic poverty causes deep-seated economic insecurity among some groups, as people are unable to afford food, shelter or medicine. Such extreme poverty, where it occurs, needs to be addressed first before higher needs can be confronted.[1223] The range of development practices undertaken by international actors in Nepal remain vast. Recent approaches are mindful of the limitations in donor actions during the armed conflict.

Consideration of initiatives in each of these fields reveals broad areas of practice structured under the Comprehensive Peace Agreement, but without a coherent mechanism for considering the relationship between them. The role of the State as coordinator in chief in a nationally owned peace process is called into question given the limited support for transitional justice and security sector reform processes in particular. The principles of the *jus post bellum* framework introduced in Chapter VII offer a basis for evaluating international engagement across these four fields and activities.

VI. *Jus Post Bellum*: Accountability

Despite proposals for transitional justice institutions, accountability is not a priority in Nepal. Impunity for human rights violations remains the norm.[1224] As noted in Chapter VII, accountability takes a number of forms. First, some international observers have noted the absence of provisions for dedicated and integrated monitoring of the implementation of the CPA.[1225] This choice of broad drafting and a perceived lack of expected difficulties may have enabled initial consensus, but

---

[1221] ICG, Nepal's Fitful Peace Process (n1172)

[1222] Paris Declaration Evaluation Phase II Nepal Country Study, 11

[1223] Saferworld etc, "Security and Justice in Nepal: District Findings" (March 2010), ii

[1224] Human Rights Watch, *Indifference to Duty*, December 2010, 2

[1225] Interview with Sarah Levit-Shore, Carter Centre, (7th June 2010); Interview with Rene Hansen, Danida Hugou(18th June 2010); Ian Martin, "The Peace Process in Nepal: is it failing?" New School, New York 6 November 2009

masked significant disagreement on these issues.[1226] Though UNMIN may have sought to achieve this role, the absence of such a dedicated mechanism greatly increases the risk that peace-building frameworks may be open ended or interpreted only in the interests of political elites.

Second, there are no major initiatives for prosecutions for gross violations of human rights. The absence of political interest in criminal accountability is reflected in the absence of the criminalisation of torture and enforced disappearance.[1227] In 2005, CAT urged Nepal to adopt legislation to ensure the appropriate criminalisation of torture.[1228] In 2010, OHCHR noted that draft legislation on disappearances fell short of international standards.[1229] In October 2008, the UN Human Rights Committee found Nepal in violation of several provisions of the Covenant in relation to an individual case of an alleged enforced disappearance. It recommended that Nepal conduct a thorough investigation into the fate of the victim, and prosecute, try and punish those responsible.[1230]

Torture has long been widespread in Nepal and forms part of the backdrop of State use of power as an element of the armed conflict and a feature of interrogation.[1231] Unlike the case of enforced disappearances, there is no concentrated political commitment to investigate or prohibit torture. Maoist conceptions of sacrifice includes the idea that combatants (and latterly civilians) sideline their rights for the cause.[1232] While many would agree that torture has decreased since the ceasefire, all interviewed on the subject agreed that it persisted in interrogations.[1233] The current legislation, the Torture Compensation Act (TCA), provides for compensation for victims of torture, but its implementation has been extremely limited with only 42 judgments where compensation was successfully ordered. In addition, NGO CVICT provides anecdotal evidence of pressure on victims and lawyers to withdraw accusations of torture before trial, resulting in infrequent use of

---

[1226] ibid.

[1227] 19.5% of detainees visited by Advocacy Forum between 2008 and 2009 alleged that they had been tortured. Coalition against Torture, Criminalise Torture (2009), Appendix C

[1228] CA T/C/NPL/CO/2, paras. 12 and 21

[1229] A/HRC/13/73, para. 32

[1230] Views of the Human Rights Committee (CCPR/C/94/D/1469/2006). For follow-up status, see CCPR, Official Records of the General Assembly Sixty-Fourth Session, Supplement No 40 (A/64/40), Vol. I, para. 219

[1231] Coalition against Torture, Criminalise Torture (2009)

[1232] Interview with Govinda Bandi Sharma, International Commission of Jurists (ICJ) (25th May 2010)

[1233] Interview with Jamunda Poudel, CVICT (17th June 2010)

the Act and exacerbating the problems caused by lack of widespread expertise in filing torture cases.[1234] In *Ghimire & Dahal v. Nepal,* the Supreme Court called for the criminalisation of torture in line with the Convention against Torture, as the Interim Constitution required the state "to ensure the effective implementation of the fundamental rights ... and to frame laws to punish the perpetrators of torture and compensate the victims."[1235] The Nepalese government has drafted a criminalisation law but none of the relevant civil society groups have been consulted or commented upon the draft.[1236]

The use of and level of interest in torture can be contrasted with that of enforced disappearances in Nepal. Disappearances were undertaken for overtly political reasons, different from the broader practice of torture as a method of law enforcement.[1237] In *Rajendra Dhakal v. Home Ministry,* the Nepalese Supreme Court ordered that disappearances be criminalised in line with the international convention, as a crime against humanity and that the government create a Commission of Inquiry into Disappeared Persons.[1238]

The issue of enforced disappearances affirms the potential of international law to provide support for domestic judicial decisions and political pressure. In contrast, the issue of torture reflects a broader systemic absence of political and legal accountability in Nepal, and the difficulty in effecting change in domestic law and its enforcement despite the presence of a clear international standard in the absence of political will. The application of transitional justice ideas to Nepal occurs against the backdrop of a broader context of impunity and a persistent history in the past twenty years of limited political accountability. Some donors have therefore identified that the real danger in establishing transitional justice institutions is in perpetuating this impunity, which many claim was in place as part of the political culture since 1990, where the issues of human rights have

---

[1234] ibid

[1235] *Ghimire & Dahal v. Nepal*. Supreme Court Judgment, 17 December, 2007

[1236] There is also model legislation drafted by Advocacy Forum, which has been forwarded to the relevant drafting committee of the government; Coalition against Torture, Criminalise Torture (2009), Appendix A

[1237] More than 1300 people remain unaccounted for in Nepal according to ICRC last update 30.08.2010; Interview with Jamunda Poudel, CVICT (17th June 2010); Interview with Govinda Bandi Sharma, International Commission of Jurists (ICJ) (25th May 2010)

[1238] *Rajendra Dhakal v. Home Ministry, Supreme Court Judgment, 1 June 2007,* available at www.supremecourt.gov.np/nja/disappearance_Case.pdf; Kishor Uprety, "Against Enforced Disappearance: the Political Detainees' Case before the Nepal Supreme Court", (2008) 7(2) Chinese Journal of International Law 429–457

not been resolved from that period.[1239] One domestic actor close to the negotiations of the Comprehensive Peace Agreement contended that the transitional justice provisions of the peace agreement "are there to keep domestic and international constituencies happy but do not reflect political priorities."[1240] Some human rights lawyers express skepticism about the potential for effective accountability where those who committed or were responsible for gross violations of human rights are now re-styled as peacemakers.[1241] As a result some concluded that the TRC could "be bogus in Nepal",[1242] seen as a means to placate and silence victims and accountability advocates. Given the history of investigative commissions in Nepal, some fear that the most likely outcome is that Nepal will have the commission its hearings and report and then not implement its findings.[1243]

A central driver of impunity is failure on the part of the police to rigorously investigate cases, and in many instances, to investigate at all. Police routinely refuse to accept complaints from relatives of victims and to register First Information Reports (FIRs, the initial complaints to police which formally initiate investigations).[1244] In public perception surveys, the public and often representatives from the police and justice sectors complained of political parties or powerful people interfering in the free and fair workings of the security and justice sectors.[1245]

Addressing human rights violations and impunity systematically is necessarily a long term enterprise. In turn reform of state institutions is also partially contingent on the outcome of the constitution drafting process. Nevertheless, some symbolic measures, such as reform of criminal laws regarding torture and enforced disappearance in line with clear international and comparative standards provide examples of areas where international assistance to accountability may prove valuable. The UN project on the mapping of human rights violations related to the armed conflict offers a significant milestone in gathering necessary components for the pursuit of criminal accountability in Nepal.

[1239] Interview with Rene Hansen, Danida Hugou (18th June 2010); Interview with Bishnu Adikhari, USAID (9th June 2010)

[1240] Interview with Dr. Duman Thapa, Aspect (29th May 2010)

[1241] Interview with Dr. Gopal Krishna Siwakoti, INHURED (8th June 2010)

[1242] ibid.

[1243] ibid.

[1244] Human Rights Watch, *Indifference to Duty* (n1201) 2

[1245] Saferworld etc, Security and Justice in Nepal: District Findings (March 2010) (i)

The third issue that has proved challenging regarding accountability is accountability of public officials for human rights violations. Vetting did not feature explicitly in the Comprehensive Peace Agreement. One party close to the negotiations noted that there was broad consensus that those combatants who wanted to be part of the Nepalese Army would have to follow standard norms, but without any agreement as to what those norms should be.[1246] One human rights lawyer believes that vetting should have formed a much more significant part of the drafting of the peace agreement, especially given the priority of army integration. He suggests that donors and international actors were not especially motivated or interested in pushing for the inclusion of such a mechanism in stronger language in the CPA.[1247] Many civil society actors agreed that political space for discussions of vetting or other forms of accountability for security sector personnel is negligible at best. The National Human Rights Commission (NHRC) does have the power to recommend vetting in cases of gross violations of human rights but would see that as a last resort where other remedies have been exhausted.[1248] Past exclusion from the armed forces has been *ad hoc* and often the result of a closed or confidential discussion among relevant actors rather than a public discourse or event.[1249] The application of accountability standards to US and UK training of Nepalese armed forces is viewed seen primarily as an issue of military diplomacy, rather than international law.[1250] Nepali army proposals for army integration include an human rights vetting as a criterion for Maoist entry into the army, based on assessment by the NHRC, the UN, and the records of the army and police.[1251] Such proposals will be strongly resisted by Maoists, and reflects the resistance of the Nepali Army to impose such standards for deployment to UN peacekeeping operations.[1252] If these proposals are put into operation, they may set a precedent for similar actions to be taken against NA personnel and possibly even political leaders.[1253] The perception remains that vetting is too sensitive an issue for immediate reform and if pursued at present may derail other reform efforts. It cannot be seen as plausible to simultaneously persuade the Nepalese Army to align with democratic controls and integration with Maoists while

---

[1246] Interview with Dr. Duman Thapa, Aspect (28th May 2010)

[1247] Interview with Govinda Bandi Sharma Interview (25th May 2010)

[1248] Interview with Bishal Khanal, National Human Rights Commission, (2nd June 2010)

[1249] Interview with Fred Rawski, OHCHR (16th June 2010)

[1250] Interview with Dr. Duman Thapa, Aspect (28th May 2010)

[1251] International Crisis Group, Nepal: From Two Armies to One, (n1157)

[1252] ibid, 21

[1253] ibid, 16-17

simultaneously engaging in vetting.[1254] Vetting may thus more suitably form an outcome of the recommendations issued by the proposed commissions.[1255]

One avenue of accountability that has been discussed would be to provide stricter human rights eligibility criteria for United Nations peace-keeping missions. The Nepalese Army takes great pride in serving on these missions. Nepal is a country that contributes troops where there is also a UN presence, enabling some criticism but also the desire to maintain a close relationship.[1256] This relationship also excludes defences of ignorance or lack of awareness and training on legal rights on the part of the armed forces, as the Nepalese Army is well exposed to international teaching and training on human rights in the security sector.[1257] Remarkably, there is no general standard on the appropriate standard for those representing the UN in peacekeeping from the Department of Peace-Keeping Operations.[1258] One possible concern is that a strict policy would see a drop off in the already limited number of troop contributions to UN missions from concerned States.[1259] The current position however strains the credibility of the institution and dilutes the force and effectiveness of its role in security, often a key feature of the said missions. It may be that some diminution of troop contributions is a nettle worth grasping for a greater overall effectiveness of UN missions. Examples of better practice emerge from bilateral donors. Both Australian and US authorities (in February and June 2010, respectively) refused a visa to Agni Sapkota, a Central Committee member of the UCPN-M, on whose orders Lama was allegedly killed.[1260]

In addition, accountability of donor conduct in Nepal provides a strong example of a commitment to systemic accountability. One strong positive feature of international engagement is the use of Basic Operating Guidelines (BOGs), which provided a common set of criteria for international interaction with conflict issues and to ensure neutrality and impartiality in dealing with parties to the conflict, to communicate with such parties, and to ensure transparency and accountability.[1261]

[1254] Interview with Dr. Duman Thapa, Aspect (29th May 2010)

[1255] Interview with Fred Rawski, OHCHR (16th June 2010)

[1256] Interview with Fred Rawski, OHCHR (16th June 2010)

[1257] International Crisis Group, Nepal: Peace and Justice. *Asia Report N°184, 14 January 2010,* 15

[1258] Daily Press Briefing by the Office of the Spokesperson for the Secretary-General", 4 December 2009

[1259] ICG, Nepal: Peace and Justice (n1236) 23-5

[1260] Human Rights Watch, *Indifference to Duty* (n1201) 13

[1261] Interview with Claudia Maier, GTZ (7th June 2010); Interview with Mamiko Nakada, JICA (26th June 2010)

The Basic Operating Guidelines among donors were signed during the wartime and were originally intended to apply towards the Maoists only but the subsequent realisation has been that they should apply more generally to avoid politicisation of development in a post-conflict environment.[1262] For instance, conflict parties in districts often sought donations from donors: the standards provided for in the BOGS offer a clear rule to prohibit that. BOGS served to ensure donors impartiality, to emphasise inclusion of marginalised groups and to enable greater transparent and civil society participation.[1263] Many international actors agreed that the BOGS were crucial during the conflict for work at a district level, though their efficacy varied depending on the security risks in that area.[1264] Donor accountability and increased information coordination form part of an international response that partially acknowledges the responsibility of donors for financially sustaining the State during the armed conflict and potentially exacerbating the conflict through development programs.

Pursuing accountability in Nepal remains a challenging task and is likely to do so for some time yet. The approach of international actors demonstrates concern for accountability for their own conduct, through the BOGs standards. International efforts also demonstrate the potential for international vetting practices to provide a starting point for broader discussions and proposals for human rights vetting of the domestic public sector to pursue accountability. Mapping practices for human rights violations also provide a basis for future accountability projects and represent a useful use of international resources in an environment where the domestic government remains opposed to pursuing accountability. Beyond such measures, a coherent account of accountability cannot avoid the reality of continued state indifference to the norm. A coherent account acknowledges the discrete areas of concern for accountability in each field, but also enables us to note the need for some publicly acknowledged and visible mechanism regardless of content area within state institutions and apparatus that provides an example of effective accountability and therefore generates tension with the broad lack of accountability in other areas. Systemic analysis of accountability as a component of *jus post bellum* and as a manifestation of integrity reveals the importance of an approach to accountability that re-enforces the norm across diverse fields.

[1262] ibid

[1263] Interview with FLC (12th June 2010)

[1264] Interview with Claudia Maier, GTZ (7th June 2010); Interview with Madhu Sharma, SDC (14th June 2010)

VII. *Jus Post Bellum*: Stewardship

A stewardship framework in Nepal is evident in the existing and proposed mechanisms that are implicitly responsive to failings of prior frameworks of development aid during People's War. These approaches also reflect trends towards new models of management of development aid in fragile states discussed in Chapter VI. Donors and the government have acknowledged the limitations of mutual accountability on their approach to date.[1265]

A number of mechanisms reflect a stewardship conception of engagement. First, a domestic trust fund mechanism reflects the integration of government and donor practices on aid delivery. Under the Nepal Peace Trust Fund, potential implementing agencies are requested to submit a concept note on the prospective projects, which is reviewed by the core cluster prior to its approval by the Technical Committee. If the concept notes are approved, these agencies develop detailed project documents based on the approved concept note across a number of sectors relevant to transitions. The Board of the Trust Fund is governed by high ranking government officials, representative of political parties, and representatives of the UN and donors. National ownership of the process is reflected in the composition of the trust fund board. Though the presence of some international actors reflects a degree of independent oversight, greater independent assessment of the NPTF could also enhance its credibility.

Second, the United Nations Peace Fund for Nepal (UNPFN) was established in March 2007, at the request of donors and to compliment the NPTF. The UNPFN was established to mobilise resources for activities of clear, short-term relevance to the peace process where these are not possible to be funded or implemented through the NPTF or other existing mechanisms.[1266] In accordance with its terms of reference, the UNPFN focuses on five main priority areas: (i) Cantonments/Reintegration (ii) Elections/Governance (iii) Recovery/Quick Impact Projects (iv) Security (v) Rights and Reconciliation.[1267] The UNPFN operates within the same overall governance framework as the Government's NPTF and the Board of that trust fund in consultation an advisory group of donors. The UNPFN also evidences concern for dedicated public communication regarding its practices as an additional component of the stewardship conception identified in Chapter VII. In 2010, the

---

[1265] Joint Evaluation of the Paris Declaration Phase II 2010 — Nepal Country Evaluation, in Nepal Peace and Development Strategy 2010-2015, (n1168) 77

[1266] http://mdtf.undp.org/factsheet/fund/NPF00

[1267] ibid

MDTF Office officially launched the MDTF Office GATEWAY.[1268] The website provides real-time data from the MDTF Office accounting system, with a maximum of two-hour delay, on financial information on donor contributions, programme budgets and transfers to Participating Organizations. The gateway provides valuable transparency and clarity on practices under the fund, but is of limited value as a public engagement tool due to limited internet penetration. A dedicated public outreach campaign for the trust fund projects could contribute to enhancing public awareness of this mechanism.

Third, under the auspices of the UN Peace Building Commission, Nepal has received funds from the UN Peace Building Fund (PBF). The PBF in Nepal sits within the framework of the United Nations Peace Fund for Nepal (UNPFN). The Nepal PBF Priority Plan was approved in September 2008 and identified three priority areas, complementing the priority areas identified in the UNPFN Terms of Reference: Strengthening State Capacity for Sustaining Peace, Community Recovery, and Conflict Prevention and Reconciliation. The annual report of the PBF noted several key challenges for the use of these funds in Nepal.[1269] In particular, the political context is cited as a major impediment for the implementation of new national policies on transitional justice and the establishment of new State institutions. In addition, coordination across disciplines and institutions in some projects has caused challenges in agreeing on modes and priorities of implementation.[1270] In Nepal, with significant political changes since 2006, it has been difficult for all three mechanisms to implement strategies that would have a definitive effect on the peace process, owing especially to ongoing lack of political consensus on a number of issues in the CPA. As a result, these mechanisms focused on activities for which early political consensus was achieved, such as the elections in 2008, the maintenance of the cantonments, interim payments to the conflict-affected, de-mining and infrastructure reconstruction.[1271]

Concern for stewardship is evident across discrete fields, albeit with mixed results. Regarding transitional justice, the absence of concern for the process of engagement on these issues reflects the broader absence of a systematic stewardship approach. Limited public awareness regarding transitional justice proposals reflects this, as well as limited consultation on existing proposed mechanisms. The absence of any use of process conditionality for funding these mechanisms

---

[1268] Multi-Donor Trust Fund Portal available at http://mdtf.undp.org (accessed 29 September 2011)

[1269] Fourth Consolidated Annual Progress Report on Activities Implemented under the Peacebuilding Fund (PBF) Report of the Administrative Agent of the Peacebuilding Fund for the Period 1 January to 31 December 2010, 90

[1270] ibid 91

[1271] Donor Peace and Development Strategy (n1168) 89

demonstrates a shift in approach between broad donor funding in the above trust fund mechanisms and a more delicate political approach regarding transitional justice processes. Concern for stewardship also extends in part to the security sector. Proposals exist among international actors for a Independent Police Service Commission and independent complaints handling mechanism.[1272] This would contribute to limiting the influence of political actors on personnel decisions within the security sector.[1273] Further proposals in this area extend to dedicated communication mechanisms regarding security forces, community policing and the operations of the security and justice sectors.[1274] In the area of peace and state building, the use of trust fund mechanisms identified above combines with concern for dedicated communication. The 2010-2015 Donor Peace and Development Strategy acknowledges the need for dedicated communication strategies to manage risk in peace and state building:

> Information vacuums are quickly filled, but not always by accurate information from well-intentioned sources...Unrealistic or unrealized expectations are potential threats to peace. When there is progress, clear communication can help to maintain momentum, build confidence and highlight successes that can be expanded and built upon....Well-placed strategic and coordinated communication activities can help to manage expectations, alter perceptions, build public trust, and rebuild citizen–state relations; these will avoid the risk of citizens having little understanding of what is happening around the peace process and of the commitments made to them. Development partners also have a role to play. Their communications tend to be around *ad hoc* project announcements. Citizens often have little understanding of the wider role of development partners.[1275]

The strategy document thus proposes an inclusive National Peace Communication Strategy that informs the general public on peace-building gains, the peace process, and other developmental issues that impact men's and women's lives. This would allow for a robust, inclusive public debate that would feed into policy-making and help counter the ability of extreme groups or spoilers to undermine the transition process. It could also help to build a sense of national purpose and common goals.[1276] Further increases in transparency and accountability in development partner programmes could be achieved through social accountability mechanisms, such as the use of

---

[1272] Donor Peace and Development Strategy (n1168) 24; Saferworld, *Security and Justice in Nepal: District Findings* (March 2010)

[1273] Saferworld, *Security and Justice in Nepal: District Findings* (March 2010) 40

[1274] ibid

[1275] Donor Peace and Development Strategy (n1168) 45

[1276] ibid, 46

public hearings, social audits that enable broad inclusion and participation.[1277] In addition to coherent and dedicated forms of communication from donors and the State, the strategy document also noted that despite a wide variety of data and analysis gathered by discrete international actors, a key weakness of the present system is that information on changes to operational space is not systematically collected nor assessed for the benefit of all development actors, both government and non-government.[1278]

An analysis of the nature of international engagement evidences the absence of effective concern in international law for shaping public processes around issues of transition, such as representation or consultation with civil society. The peace process in Nepal was ultimately the purview of political elites, limiting the role of an active civil society that undertook the Peoples' Movements in 1990 and 2006. Monitoring of the peace agreement and consultation in transitional justice and security sector reform have been perfunctory in Nepal. While many international actors are limited by mandate to engage solely with the government, stronger international legal requirements of process or greater emphasis on process in comparative case studies may contribute to a broader, more inclusive or victim-centred process.[1279] One donor went so far as to say that "the system supported by donors is rewarding human rights perpetrators rather than punishing them".[1280] Greater public consultation and involvement may not ultimately lead to radically different substantive outcomes, but can contribute to raising public legitimacy and awareness of the relevant institutions. However, the choice of the government of Nepal and donors to adopt trust fund mechanisms and be mindful of the need for dedicated communication strategies must be commended. The responsibility of donors to address systemic challenges of international engagement was emphasised by their altered response to the post-conflict period. The stewardship of both state and donors is required ultimately to enhance domestic governance reform remain, vital to increase public engagement and trust with the State.[1281] Systemic concern for stewardship reveals that building trust and public engagement is a critical issue across all fields of the *jus post bellum* to enhance the contribution of any field its goals, such as truth, security, etc, and to facilitate the pursuit and process of integrity.

[1277] Ibid, 83

[1278] Donor Development Strategy, 46

[1279] Interview with Simon Arthy, DFID (17th June 2010); Interview with Shiva Hari Dahal, National Peace Campaign (3rd June 2010)

[1280] Interview with anonymous donor, attribution on file with author

[1281] International Alert Interview, Rebecca Crozier, 3rd June 2010

VIII. *Jus Post Bellum*: Proportionality

The peace process has been an elite discussion in Nepal, leading to a tendency for absolute positions on issues in each field: mitigating accountability, creating an impasse in SSR, and limiting the role of international assistance on the most contentious issues. The potential for greater process conditionality and use of trust fund mechanisms for transitional justice and SSR in particular may reflect a less restrictive alternative for the support of Nepal's transition in these areas by international actors. A shift in donor and international posture may enable the use of greater public consultation and dedicated communication strategies. The challenge remains enabling donor coordination and alignment on this approach so that a government does not merely exclude the donor who seeks to pursue a more proportionate and conditional approach from their considerations. Therefore an approach involving conditions within existing trust fund mechanisms may be suitable.

Similarly, major political sensitivities exist regarding issues of justice and human rights in Nepal. However, in balancing those concerns with international assistance to SSR, greater insistence on human rights standards may be possible for engagement in UN peacekeeping or bilateral training desired by the Nepalese Army. If donors seek to reflect concern for the legitimacy of the processes of peace and state building and the protection of human rights in Nepal, then greater process conditionality and enforcement of human rights standards would strike a balance between respecting a national peace process and pursuing the goals of justice, peace and protection of human rights. The imbalances in priorities in Nepal are obvious, from the absolutist position against effective accountability. Systemic consideration of the issues to be balanced however reveals the potential to adopt less restrictive alternative, by the combination of components of each field, such as combining transitional justice and SSR, or peace-building. In this way, proportionality offers a basis of criticism and justification not evident on examination of the fields discretely. It thus contributes to effective justification of the full range of fields in transition and thereby contributes to the pursuit of integrity.

IX. Conclusion

Nepal's peace process is at a crossroads.[1282] A number of other commitments contained in the Comprehensive Peace Agreement and the interim constitution have yet to be addressed and hold

[1282] UNSG Report on the quest of Nepal for United Nations assistance in support of its peace process UN SC Res 2010/658 (23 December 2010) para 34

the seeds of fresh confrontation if expectations remain unmet. [1283] The experience of Nepal demonstrates that effective use of international law in the circumstances of transition depends on alignment with both domestic and international political interests and coherent international engagement. Consideration of *jus post bellum* principles demonstrates that if international actors have an earnest commitment to upholding the values they profess to promote for others in Nepal, then greater efforts should be placed on ensuring their own compliance with these standards whether through international regulation or more responsive policy frameworks. In this way these actors can pursue the principle and process of integrity in a meaningful way with tangible institutional reforms and designs. International actors have acknowledged this necessity in the use of BOGS standards, trust funds, and limited vetting for Nepalese human rights abuses, but opportunities remain for greater consideration of these principles across the fields considered. Such an approach would not solve Nepal's problems, but may enable greater integrity in consideration of the array of issues significant in its transition.

[1283] ibid, para 36

Chapter IX: Timor-Leste: A Case Study on the Role of International Law and Policy in the Circumstances of Transition

I. Introduction

In 2012, a decade will pass since Timor-Leste won her independence.[1284] Parliamentary elections will also provide a crucial test for the stability of this fledgling democracy.[1285] Timor-Leste has reached a new stage, where there is an intensified focus on measures needed to sustain stability, deepen democracy and the rule of law, reduce poverty and strengthen institutions.[1286] These events offer an opportunity to examine over a decade of international engagement in Timor-Leste and, in particular, recent efforts to consolidate the nation's transition. Ongoing challenges relate not only to political and practical limitations, but also the nature of international engagement in international law and policy. This chapter scrutinises recent international activities in Timor-Leste to evaluate whether they have contributed to advancing their stated goals in the fields of transitional justice, peace-building, security sector reform and development through examination of the *jus post bellum* principles, and thereby the extent to which integrity has been pursued in Timor-Leste.

This chapter will proceed as follows. Section II describes the history of Timor-Leste's transition to democracy. Section III examines renewed violence between 2006 and 2008 that sets the context for present international engagement. Section IV identifies the lessons learned in transitional justice from Timor-Leste's experience under the Commission for Reception, Truth and Reconciliation (CAVR), serious crimes process, recent proposals for reparations, and ongoing challenges to criminal accountability in Timor-Leste. Section V considers the peace-building initiatives undertaken since 2006, noting land reform and community reconciliation as key peace-building issues. Section VI notes challenges facing security sector reform in Timor-Leste, in particular, limited political will and muddled international strategy. Section VII identifies governance reform as a challenge pronounced in Timor-Leste's economic development due to the country's resource wealth. Section VIII examines the need for broader accountability in the practices of Timorese governance and support of donors and international organisations. Section IX evaluates the existing but limited use of stewardship conceptions in international assistance to

---

[1284] Independence Restored May 20, 2002

[1285] UNSC 10179 "Upcoming Elections Among Critical Tests of Timor-Leste's Resiliency" (22 February 2011)

[1286] UNSC Debate on UNMIT and Timor-Leste 23 February 2010 S/PV.6276, 3

Timor-Leste, in particular limited communication to the population from fiduciary mechanisms. Section X considers the weight of relevant priorities in pursuing transitional justice within Timor-Leste, but without support from other fields or broader regional backing. Finally, Section XI concludes by noting the need for greater process and contextual understanding in the international activities in Timor-Leste.

II. History of the Conflict and Transition in Timor-Leste

In 1974, the Portuguese colony of East Timor experienced a period of rapid decolonisation caused by political transition in Portugal.[1287] The uncertainty and instability of this period created a power vacuum that contributed to civil war and subsequently to Indonesian invasion and occupation.[1288] During this 1975 invasion and subsequent occupation, it is estimated that approximately 100,000 Timorese were killed, after the deployment of 30,000 Indonesian troops to the island.[1289] Gross violations of human rights during invasion and occupation included indiscriminate killings, executions, rape and forced marriages and enforced disappearances.[1290] Furthermore, between 1979 and 1981, the island experienced widespread famine after an Indonesian scorched earth policy.[1291] The situation was exacerbated by the absence of sustained international support.[1292]

The transition in East Timor was the result of both significant domestic political activity and broader geopolitical shifts.[1293] As a result of shifts in Indonesian politics, in 1999 the Indonesian government offered the Timorese people a referendum on special autonomy or sovereign independence. Following a popular consultation with the Timorese people, a UN mission, UNAMET, was deployed to prepare for polling.[1294] The referendum resulted in 98% turn out, with

---

[1287] Commission for Reception, Truth and Reconciliation in East Timor (CAVR), *Chega!* (2005 CAVR) 13-23

[1288] ibid 61-81; Brandon Mark, "Acknowledging Our International Criminals: Henry Kissinger and East Timor" (2003) 32(1) Denv. J. Int'l & Pol'y 1

[1289] Sarah Stavetig, How Many Persons in East Timor Went Missing During the Indonesian Occupation: Results from Indirect Estimates in William Binchy (ed), Timor-Leste: Challenges for Justice and Human Rights in the Shadow of the Past (Clarus Press 2009)

[1290] CAVR *Chega!* (n1257) Chapter 7

[1291] ibid Chapter 3, 83-92

[1292] Joseph Nevins, "The Making of "Ground Zero" in East Timor in 1999: An Analysis of International Complicity in Indonesia's Crimes", (2002) 42(4) Asian Survey 623-641; Nicholas J. Wheeler and Tim Dunne, "East Timor and the New Humanitarian Interventionism, International Affairs" (2001) 77(4) Royal Institute of International Affairs 805-827

[1293] CAVR *Chega!* (n1257) Part 3

[1294] UNSC Res 1246 "On the situation in East Timor" 15 September 1999

78% voting for independence.[1295] However, in September 1999, the Indonesian military and militia engaged in extensive burning, looting, and pillaging of East Timor. As a result, 300,000 refugees fled into West Timor and 100-200,000 were internally displaced. UNAMET were forced to leave the territory.[1296] 70% of private homes public buildings and essential services were destroyed. 1,000 were killed during this period.[1297] The UN Security Council called for a multinational force to restore peace and security to East Timor, to protect and support the United Nations mission there, and to facilitate humanitarian assistance operations until such time as a United Nations peacekeeping force could be approved and deployed in the area. A multinational peacekeeping force INTERFET was deployed between 1999 and 2000.[1298]

A further UN mission, the UN Transitional Authority for East Timor (UNTAET), was authorised in October 1999 and was given overall responsibility for the administration of East Timor and empowered to exercise all legislative and executive authority, including administration of justice, which resulted in sovereign independence in May 2002, with the coming into force of the Constitution of Timor-Leste.[1299] A number of follow up missions followed.[1300] Between April and September 2003, Timor-Leste affirmed their commitment to international law by acceding to a number of international conventions.[1301] In recent years, Timor-Leste established its armed forces, legal system, restored relative peace and security on the territory and initiated a broad range of transitional justice projects. In addition, elements of the initial UN and international efforts have been seen as largely successful, such as the management of the humanitarian emergency,

---

[1295] BBC, "Timor chooses independence" (4 September 1999) http://news.bbc.co.uk/2/hi/asia-pacific/438145.stm

[1296] CAVR *Chega!* (n1257) Part 3 145

[1297] ibid 145

[1298] Michael Kelly et al, "Legal aspects of Australia's involvement in the International Force for East Timor", (2001) 841 International Review of the Red Cross

[1299] UN Security Council resolution 1272 UNTAET (25 October 1999); William Binchy, "The Constitution of Timor-Leste in Comparative Perspective" in William Binchy (ed) *Timor-Leste: Challenges for Justice and Human Rights in the Shadow of the Past* (Clarus Press 2009)

[1300] UNMISET UNSC Res 1410 17 May 2002; UN Office in Timor Leste UNOTIL UNSC Res 1599 of 28 April 2005; UN Integrated Mission in Timor-Leste (UNMIT) UNSC Res 1704 of 25 August 2006

[1301] International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol thereto, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC) and the Optional Protocol of CRC on the sale of children, child prostitution and child pornography. Treaties become binding national law upon ratification by Timor's national parliament Law no. 6/2010 on International Treaties, Article 9; Internal law contrary to international law applied in the internal legal system of East Timor shall be invalid. Section 9, Constitution of Timor-Leste

including refugees, IDPs and reintegration issues; the restoration of basic standards of security and reconstruction of basic infrastructure and establishment of a democratically elected government.[1302] The work of these earlier missions will not be the focus of this chapter. A context of renewed violence prompted a broader re-appraisal of international engagement in Timor-Leste.

III. The Context: Renewed Violence and Insecurity

Between 2006 and 2008, political violence returned to Timor-Leste. In January 2006, soldiers submitted a petition to the government, citing poor service conditions, lack of opportunity for promotion, and abusive discrimination by eastern officers against western soldiers and officers.[1303] By February talks had broken down and 40% of the armed forces had deserted their posts. In April, protests had turned violent, when civilians and petitioners attacked the government palace. In the absence of effective or willing police action, then Prime Minister Alkatiri deployed remaining army forces onto city streets to quash the violence.[1304] Violent skirmishes continued in May, leading to the breakdown of the police and the army and the emergence of armed violence from gangs and armed groups. The violence caused a humanitarian emergency, with approximately 70,000 IDPs in camps in Dili with another 80,000 people having fled to back to their districts.[1305]

Divisions within the security forces have been identifying as leading to these events. Analysts contend that social conflict between east (*firaku)* and west (*kaladi)* was a contributing factor.[1306] The divide also represented an expression of long standing political and personal grievances grievances in the Revolutionary Front for the Liberation of East Timor (FRETILIN) and FALINTIL (Forcas Armados de Libertacao Nacional de Timor-Leste), the armed wing of the Timorese independence struggle.[1307] International analysis of the conflict also identifies an economic downturn, a swelling of youth population and unemployment, and limited individual safety as contributing factors to the conflict.[1308]

[1302] James De Shaw Rae, Peace-Building and Transitional Justice in East Timor (First Forum Press 2009) 211-230

[1303] International Crisis Group, "Timor-Leste: Security Sector Reform Crisis Group" Asia Report N°143, 17 January 2008 2

[1304] ibid

[1305] UNSC S/2006/628

[1306] Andrew Harrington, "Ethnicity, Violence, & Land and Property Disputes in Timor-Leste" (on file with author), 16

[1307] International Crisis Group, "Resolving Timor-Leste's Crisis" Asia Report No 120 1-6

[1308] Richard Curtain, "Crisis in Timor Leste Looking Beyond The Surface Reality for Causes and Solutions" SSGM Working papers 5-7; GTZ Interview 26th June 2010

These events prompted the return of international peacekeeping missions from Australia, New Zealand and the United Nations.[1309] The Timorese government requested that the UN Security Council establish a United Nations police force in Timor-Leste to maintain law and order until the national police could undergo re-organisation and restructuring. The Security Council established the United Nations Integrated Mission in Timor-Leste (UNMIT) with a mandate to assist the country in overcoming the consequences and underling causes of the crisis. In addition, the violence prompted a commission of inquiry established under the auspices of the UN High Commissioner for Human Rights (OHCHR).[1310] The commission examined the responsibility of the relevant State and international institutions for these events and identified that weak State institutions and rule of law were causes for the outbreak of violence in a context of the continued settlement of political disputes through violence.[1311]

Despite this renewed international presence, in 2008 security sector deserters remained a serious threat to the security of Timor-Leste until their surrender after an attempted assassination of President Ramos-Horta.[1312] Prime Minister Gusmão and parliament imposed a state of siege throughout the country, which brought together the police and army under a "Joint Command".[1313] It was during this period that a number of key challenges became particularly evident. The difficulties in establishing a credible and accountable security sector, political ambivalence regarding accountability and the rule of law, social and community grievances, and obstacles in securing employment and economic development all aligned to create an environment of social frustration, political manipulation and violence. The 2006-8 crisis served to emphasise limitations and unrealistic expectations in the work of prior international activities and analysis.[1314] It is in this context of renewed fragility and violence that this chapter considers present efforts in the areas of transitional justice, peace-building, security sector reform and development.

[1309] The status of the Australian led ISF is established by a 25 May 2006 exchange of letters between Timor-Leste and Australia, a Status of Forces Agreement concluded by the two governments the next day and a memorandum of understanding (MoU) between Timor- Leste, the UN and Australia, 26 January 2007.

[1310] UN SC Res 2006/822 "report of the Independent Special Commission of Inquiry for Timor-Leste" (17 October 2006)

[1311] ibid

[1312] International Crisis Group *"Timor-Leste: No Time for Complacency Crisis Group" Asia Briefing N°87, 9 February 2009, 2-4*

[1313] ibid 4-5

[1314] International Crisis Group, Resolving Timor-Leste's Crisis, (n1277), 1

IV. Transitional Justice

Timor-Leste has engaged in a programme of transitional justice institutions in a context of limited political will, legal capacity and high expectations of the local society and affected victims and survivors. The case remains a strong example of the benefits of an integrated and contextual approach to truth seeking and social reconciliation amid radical limits in legal and professional capacity, but also serves as a caution about the inevitable raising of expectations across transitional justice, which follows from truth seeking.

A number of preliminary inquiries found broad evidence of systemic and widespread gross violations of human rights by Indonesian forces and militias during 1999 violence, but their recommendations had limited impact on subsequent initiatives.[1315] The proposal to establish an extensive truth seeking mechanism for Timor-Leste was domestic in origin.[1316] The Commission for Reception, Truth and Reconciliation (CAVR) was charged with investigating and reporting on the human rights violations committed in connection with the political conflict between 1974 and 1999 and with achieving community reconciliation and reintegration of people who committed minor acts of violence during 1999.[1317] The Commission examined issues of forced displacement and famine, a discrete series of massacres and killing and disappearances of the Timorese population, political imprisonment and torture, the role of women and children in the conflict, as well as the Timorese political parties, the Indonesian military, the Timorese resistance (FRETILIN/ FALINTIL) and the responsibility of international actors. A primary innovation of the CAVR was to collaborate with existing indigenous and traditional forms of dispute resolution.[1318] The Community Reconciliation Process (CRP) envisaged a process whereby a person responsible for "non-serious" crimes could apply for a hearing conducted under customary law known as *adat*.[1319] Serious political crimes could not form the subject of a CRP. Admission to the process was conditional upon a full confession and assumption of responsibility for crimes and assurance of no further use of political violence. The CAVR Statements Committee considered such statements, excluding "in principle, serious criminal offences, in particular murder, torture and sexual

---

[1315] Komnas HAM was initially established by Presidential Decree No. 50/1993. In 1999 the decree was revoked by the issuance of Law No. 39/1999 on Human Rights; UN-OHCHR Report

[1316] Arising from a national congress of the East Timorese National Resistance Council (CNRT)

[1317] UNTAET Reg 2001/10 "On the Establishment of the Commission for the Reception Truth Reconciliation"

[1318] The conflict settlement process, known as nahe biti, which means 'roll out a mat', is a mediation process involving traditional authorities. Both sides are heard and a compensation payment is then fixed. The resolution of the dispute is sealed by a ceremony in which both parties sit down together with the mediator on a raffia mat.

[1319] Andrew Harrington, "Institutions and the East Timorese Experience" 2006 ETLJ 7

offences".[1320] All statements were forwarded to the Office of the Prosecutor General, who could exercise exclusive jurisdiction over the deponent or return the statement to the CAVR to allow the case to proceed by CRP.[1321] A representative community group formed each panel. At the hearing the deponent reads his statement publicly, followed by an opportunity for victims and community members to express their opinions. A Community Reconciliation Agreement (CRA) could then be made that required the perpetrator to undertake an act of reconciliation, thereby acquiring immunity from prosecution.

The CAVR and CRP encouraged wide community participation, reflecting largely community oriented conceptions of justice and reconciliation in Timor-Leste. The CRP program received over 1500 statements from deponents, 1371 of which were successfully completed through CRP hearings. The CAVR estimates that 40,000 people attended CRPs.[1322] The CAVR process emphasised the centrality of the traditional system to Timorese communities as a legitimate method of dispute resolution. By not assuming the traditional system to be a monolithic body of immutable norms, but instead acknowledging it as diverse norms, the CAVR increased the legitimacy of its processes in social understandings, and linked these understandings to the formal system by rooting itself in legislation. The process and the findings of the CAVR thus advanced the truth and understanding of the conflict and occupation in Timor-Leste and provided an interface between traditional and formal systems of justice.

The final report of the CAVR, *'Chega!'*, was released in December 2005.[1323] The CAVR recommended *inter alia* reparations for victims, a follow up institution, and reconciliation with Indonesia on the basis of official acknowledgement of the state's responsibility for gross violations of human rights. *Chega* also acknowledged the need for a human rights focused civil society and

---

[1320] UNTAET Reg 2001/10 On the Establishment of the Commission for the Reception Truth Reconciliation, s23

[1321] ibid s24

[1322] CAVR, *Chega!*, (n1257) Chapter 1.5.126; Fausto Belo Ximenes, "The Unique Contribution Of The Community-Based Reconciliation Process In East Timor", (JSMP 28 May 2004)

[1323] 7,669 victim statements, reporting 85,164 human rights violations, were recorded; 1,541 perpetrator statements were taken and 1,371 perpetrators engaged in hearings of community reconciliation; public victims hearings were held in each of the 65 sub-districts; eight national public hearings were held in Dili to publicise key themes; over 1,000 interviews to strengthen information were conducted; six healing workshops were held; death-toll research that incorporated a graveyard census and a survey of 1,322 households across the territory was undertaken; and, large-scale 'community mapping' exercises to produce local profiles of violations were carried out

security services.[1324] Recommendations included those aimed at the international community, Portugal, Indonesia and placing human rights at the centre of issues internal to Timor-Leste.

Some studies of the CAVR indicated that the process had made a "marked difference" in the lives of both victims and deponents following their participation in the CRP hearing.[1325] Others surveyed referred to the CRP as an 'incomplete' process, as an expectation arose that investigations of serious crimes would flow from where reconciliation has left off, especially for those who had suffered from multiple crimes or whose family members remained disappeared.[1326] Marginal participation from political leadership in this process and political reconciliation limited the effectiveness of the commission.[1327] However, several participants requested the continuation of the CRP to encourage greater participation and support across communities and political leadership.[1328]

A second truth telling initiative was established in 2005. The governments of Timor-Leste and Indonesia established the Commission for Truth and Friendship (CTF) to "establish the conclusive truth in regard to the events prior to and immediately after the popular consultation in 1999, with a view to further promoting reconciliation and friendship, and ensuring the non-recurrence of similar events".[1329] The result was a bilateral commission mandated to seek the "conclusive truth" but precluded from recommending further prosecutions, and with power to recommend amnesties. The CTF report acknowledged crimes against humanity in Timor-Leste in 1999 and emphasised the 'institutional' responsibility of pro-autonomy militias and Indonesian forces.[1330] This approach confirms that these violations were deliberate policies of the Indonesian government and military. The CTF report did not recommend amnesty, but closer cooperation between Indonesia and Timor-Leste, a commission for disappeared persons, and a program of

---

[1324] CAVR, *Chega!*, (n1257), Part 11, 5-23

[1325] Lia Kent "Unfulfilled Expectations: Community Views on CAVR's Community Reconciliation Process" (JSMP 2004) 12

[1326] ibid 15; 24; 42

[1327] D. Babo-Soares, "Nahe Biti: The Philosophy and Process of Grassroots Reconciliation (and Justice) in East Timor", (2004) 5(1) The Asia Pacific Journal of Anthropology 15-33, 17

[1328] Spencer Zifcak, "Restorative Justice in East Timor: An Evaluation of the Community Reconciliation Process of the CAVR" (Asia Foundation 2005) 29

[1329] Commission for Truth and Friendship (CTF) Terms of Reference (TOR), March 9, 2005

[1330] Commission for Truth and Friendship, *Per Memoriam ad Spem: Final Report of the Commission of Truth and Friendship* (2008)

reparations, including official acknowledgment of responsibility from Indonesia. The CTF process has added value by providing analysis of existing transitional justice reports in Timor-Leste and engaging with cases of the Serious Crimes Unit (SCU).[1331] However, by examining the events of 1999 in isolation, the CTF was unable to address the causes or context of that period of violence.

Timorese parliamentary scrutiny of the reports of these two commissions has been limited to date to the recommendations. In 2010, parliamentary discussions have recently extend to include consideration of draft legislation for a follow-up institution recommended in *Chega.*[1332] The emergence of this legislation was due to the commitment of civil society actors and international support.[1333] Delays in establishing this institution have been a source of frustration to victims, but may be explained by the renewed violence and subsequent parliamentary elections.[1334] However, further discussion of the legislation has been postponed until existing legislation on veterans be discussed prior to further consideration of the draft laws.[1335] The proposed Institute of Memory is mandated "to promote, facilitate and monitor the implementation of the recommendations made by the CAVR and of the CTF".[1336] Its functions include engaging directly in and providing technical support on the implementation of the recommendations, supporting the government on matters of disappearances, and advising the government on reparations policy. The potential to provide tangible solace to the families of the disappeared and benefits for a scheme of reparations are valuable.[1337] While this proposal is a welcome development, some members of civil society are concerned that the institution will not be independent, as it is proposed under the administrative supervision of the Timorese Minister for Social Solidarity.[1338] The CAVR process has raised social and victim expectations for justice and further transitional justice activities in Timor-Leste.[1339] The

---

[1331] ICTJ, "An Unfinished Truth: An Analysis of the Commission on Truth and Friendship's Final Report on the 1999 Atrocities in East TImor" (ICTJ 2009)

[1332] Interview with Pat Walsh, Post-CAVR Secretariat, 29th June 2010

[1333] A key actor in the emergence of the recent transitional justice developments is Suri Renegaard, a bishop from Norway, who facilitated international dialogue on transitional justice in Timor-Leste. Cite

[1334] Interview with Pat Walsh (n1302); Amnesty International, "We Cry for Justice: Impunity Persists 10 Years on in Timor-Leste" (2009)

[1335] S/2011/32 Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 21 September 2010 to 7 January 2011)

[1336] Article 4 draft legislation (on file with author)

[1337] JSMP Interview 1st July 2010

[1338] Article 2 draft legislation; Charles Scheiner Interview 2nd July 2010; Lao Hamutuk Comments 6 July 2010

[1339] Lia Kent "Unfulfilled Expectations: Community Views on CAVR's Community Reconciliation Process" (n1295) 45

formation and operation of the proposed follow up institution is thus crucial element maintaining the legitimacy of the existing processes, and an acknowledgment of the expectations of victims and civil society alike.

The second major area of transitional justice in Timor-Leste is prosecutions. The CIET inquiry recommended an *ad hoc* international criminal tribunal. However, after assurances from Indonesia, it was decided that prosecutions would proceed in the Indonesian and Timorese courts.[1340] Indonesia instituted an *ad hoc* Human Rights Court, but despite significant evidence, the prosecution failed to present a credible account of violence as crimes against humanity.[1341] Only 6 out of 18 defendants were convicted and all eventually acquitted.[1342] The trials have been subject to sustained international criticism and are largely perceived as a failure and an exercise in bad faith.[1343]

Prosecutions in Timor-Leste were also problematic. In 2000 UNTAET created special panels within the Timorese courts for trying serious crimes, each consisting of two international judges and one national judge and with exclusive jurisdiction to try genocide, war crimes, crimes against humanity, and torture committed at any time, and murder and sexual offences committed between January 1 and October 25, 1999.[1344] In addition, a Serious Crimes Unit (SCU) was established to establish accountability among those responsible for the commission of such crimes, but was dependent on Indonesian cooperation to obtain the majority of Indonesian defendants. Though the SCU indicted 391 individuals, only 81 were convicted.[1345] The serious crimes process operated in challenging circumstances, often lacking basic facilities. Indigenous legal capacity was extremely low and language barriers and a lack of familiarity with applicable law stymied international officials.[1346] All

---

[1340] To facilitate prosecutions in both Indonesia and Timor-Leste, UNTAET and Indonesia signed a Memorandum of Understanding (MOU) that provided a range of mutual assistance measures and required both parties to enforce arrest warrants and transfer people requested for the purposes of prosecution

[1341] ICTJ, Intended to Fail: The Trials Before the Ad Hoc Human Rights Court in Jakarta (2003) 100

[1342] Human RIghts Watch "Justice Denied for East Timor," available at www.hrw.org/backgrounder/asia/timor/etimor1202bg.htm, and Amnesty International "Indonesia/ Timor-Leste: International Responsibility for Justice," April 14, 2003, available at www.amnesty.org/en/library/info/ASA03/001/2003.

[1343] Susan Harris Rimmer, "Beloved Madam, The Indonesian ad hoc Human rights Court", in William Binchy (ed) Timor-Leste: Challenges for Justice and Human Rights in the Shadow of the Past (Clarus Press 2009) 451-3

[1344] Regulation on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, June 6, 2000, UNTAET/REG/2000/15

[1345] ICTJ, The Serious Crimes Process in Retrospect (2006) 154

[1346] ibid

these limitations greatly hindered the delivery of justice for complex violations of human rights. One commentator described the process as "a series of ad hoc responses to a crisis situation."[1347] In these circumstances, those convictions of low level offenders that were concluded are impressive, but remain necessarily partial justice.

In analysing efforts at prosecutions in Timor-Leste, a UN Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste concluded that ongoing support for mechanisms similar to the SCU would be necessary in both Timor-Leste and Indonesia, and the question of an international *ad hoc* tribunal should be re-considered. [1348] Furthermore, *Chega* recommended the renewal of the Special Panels process to cover international crimes from 1975-1999.[1349] However, the UN Secretary General has noted "the re-establishment of the prosecutorial component of the now-defunct SCU would not be practically feasible at the present time."[1350] Some members of civil society advocate for the establishment of an international criminal tribunal, believing this may provide some support to Indonesian transitional justice.[1351] If this was the stated goal, then perhaps greater coordination with Indonesian NGOs would enhance the process. The relevance and significance of Indonesia as a geo-political actor within Western strategic interest means that regional powers remain unlikely to argue unequivocally for its establishment. In these circumstances, uneven political commitment from Timorese politicians to the process was foreseeable.

Nonetheless, the re-establishment of the investigative arm of the SCU was recommended in the Secretary-General's report on justice and reconciliation for Timor-Leste and mandated by the the UN Security Council resolution 1704.[1352] In 2008, UNMIT and the Prosecutor-General signed a Memorandum of Understanding providing for UNMIT's Serious Crimes Investigation Team (SCIT) to support the Office of the Prosecutor-General in conducting investigations into crimes committed in

---

[1347] Caitlin Reiger, "Hybrid attempts at accountability in Timor-Leste" in Naomi Roht-Arriaza and Javier Mariezcurrena, Ed., Transitional Justice in the Twenty-First Century, Beyond Truth versus Justice. Cambridge, New York: Cambridge University Press. Pg. 143-170. 150

[1348] Letter dated 24 June 2005 from the Secretary-General addressed to the President of the Security Council S/2005/45

[1349] CAVR, Chega (n1257) Part 11:24-25

[1350] Report of the Secretary-General on justice and reconciliation for Timor-Leste S/2006/580

[1351] Interview with Charles Scheiner 2nd July 2010

[1352] UN SC RES 1704 (2006)

1999.[1353] As of 7 January 2011, 184 investigations out of 396 outstanding cases had been concluded and the UN has confirmed the need to increase resources to the SCIT to complete all investigations by 2012. In its operations, the SCIT has suffering from a lack of resources, limited coordination between the SCIT staff and domestic prosecutors, and a limited expertise of the domestic legal sector. Fundamentally, the SCIT process has been challenged by limited political support.[1354] One NGO views the SCI process as a valuable truth seeking exercise, but of limited prosecutorial value.[1355] However, it is questionable whether it is appropriate to interact with victims in an investigative process nominally designed to result in domestic prosecutions if the prospects for such prosecutions are speculative at best.[1356] The prospects of further effective prosecutions for 1999 era crimes, let alone 1974-1999 era crimes, remains bleak. The SCIT process has met significant challenges in managing expectations of further prosecutions, given its limited mandate.

Third, reparations for gross violations of human rights has been a long standing issue in Timor-Leste. The Timor-Leste constitution guarantees the valorisation of the Timorese resistance against the Indonesian occupation.[1357] Both CAVR and CTF recommended a scheme of reparations for victims of gross violations of human rights.[1358] Many victims surveyed felt that the independence of Timor-Leste was due to the suffering and strength of victims of 1975-1999 and thus those victims should be recognised and acknowledged, especially as many suffered economic hardship as a result of the human rights violated they suffered.[1359] Victims surveyed identified that an aspect of justice could be served if they were given assistance in meeting their basic needs.[1360] In one further survey, 61% of victims identified economic support as the highest priority.[1361] Almost one third of families prioritised recognition of their sacrifice, again with economic support as the most commonly understood recognition. Demands for reparations are thus widespread but diverse.

[1353] ibid para 4(i)

[1354] ICTJ, "Impunity in Timor-Leste: Can The Serious Crimes Investigation Team Make a Difference?" (June 2010)

[1355] JSMP Interview 1st July 2010

[1356] ICTJ, "Impunity in Timor-Leste: Can The Serious Crimes Investigation Team Make a Difference?" (June 2010)

[1357] Article 11(3), Constitution of Timor-Leste

[1358] CAVR, *Chega* (n1257) Part 11, 35-44; CTF, *Per Memoriam ad Spem* 294

[1359] ICTJ, Unfulfilled Expectations: Victims' perceptions of justice and reparations in Timor-Leste, 16

[1360] ibid, 17

[1361] Simon Robins, Needs of the Families of the Missing in Timor-Leste, (February 2010) 6

A number of schemes of payment are already in place for veterans of the liberation struggle, those who suffered during the 2006-8 crisis, and particularly vulnerable members of Timorese society.[1362] Such payments are to be commended but have also heightened the sense of neglect among victims of the 1975–1999 conflict and lack of the crucial aspect of acknowledgment and focus on restoring trust distinct to reparations programs. In 2010, the Timorese parliament considered a reparations policy.[1363] The policy acknowledges the right of victims to reparation in national and international law, as well as in the recommendations of both commissions, and emphasises the collective suffering of the Timorese people and the reparative element of the traditional Timorese conception of justice. The scheme is to be administered by the Institute of Memory, discussed above. The scheme defines victims as "A person who suffered harm, including physical or mental injury, emotional suffering, substantial economic loss, or who has been prevented from exercising his or her rights, as the result of a human rights violation that took place within the context of the political conflicts in East Timor between 25 April 1974 and 25 October 1999."[1364] Individual reparations shall include provision of health and rehabilitation services, including mental health services, as well as education subsidies for children. Collective reparations extend to "communities which have suffered a high degree of devastation as a result of the conflict".[1365] The scheme provides for a range of commemorative and memorialisation components and other forms of symbolic reparation.[1366] Community or collective reparations extend to include projects on community infrastructure, livelihood projects and projects paying for the tribute to victims at a community level.[1367]

Unlike countries where conflict was geographically or socially limited, a higher percentage of the Timorese population have direct experience of some form of violation between 1974 and present day. Therefore the *process* of reparations distribution, the acknowledgment of State responsibility from as wide a range of states as possible, and the distinct trauma support offered by the scheme will all be crucial determinants of its success and impact. Some NGOs have noted that trauma has not been a significant feature of discussions on reparations or transitional justice processes so

---

[1362] UNMIT HRTJS, Report on Human Rights Developments in Timor-Leste 1 July 2008 to 30 June 2009, 15

[1363] Amnesty International, We Cry for Justice (n1303)

[1364] Draft Framework of National Reparations Policy, 15 June 2010, on file with author

[1365] ibid Article 6

[1366] ibid Article 9

[1367] ibid

far.[1368] Despite the recommendations of CAVR and CTF, it remains implausible that Indonesia would finance a reparations scheme and do so with an acknowledgment of past wrongs.[1369] The concern to maintain good relations with Indonesia that has impacted on prosecutorial efforts would also operate here for Indonesia and perhaps those States found responsible in *Chega!* Some take the view that the international communities long standing development assistance to Timor-Leste constitutes a form of reparation for their inaction during Timor-Leste's occupation by Indonesia. However, such aid fails to capture the crucial element of *acknowledgement* of responsibility for a wrong committed, a point strongly resisted by the international community.[1370] However, the UN Secretary General recommended that the international community provide funding for a Solidarity Fund for a reparations scheme for Timor-Leste, which could serve for this purpose.[1371] There thus remains the potential for an effective reparations scheme, including acknowledgment from relevant actors.

Transitional justice in Timor-Leste highlights the benefits of innovative and contextual approach to truth seeking and a means of community and social reconciliation. The CAVR has served as a public and tangible process of truth telling and the incorporation of local justice traditions in pursuit of truth. The effectiveness of the truth telling exercise, coupled with the limited value of the CTF process, provided a necessary first step towards a full reckoning of a past legacy of gross violations of human rights. Notwithstanding its considerable challenges and limitations, the serious crimes regime in East Timor completed a number of investigations, indictments, and convictions. However, the absence of accountability among those who bear greatest responsibility, mostly Indonesian militants and State officials who remain outside the territory of Timor Leste, significantly inhibits prosecutions as a means to achieve the goals of justice and the restoration of the rule of law. As a result, the value of the SCIT process is questionable given the cost of re-traumatisation and raised expectations of victims. Discussions of further prosecutions seem unlikely at present. Prime Minister Xanana Gusmao and President Jose Ramos-Horta have argued that genuine legal redress for what their country experienced under Indonesian occupation is impossible given that their neighbour is unwilling to let members of its army stand trial and there

---

[1368] Interview with Ba Futuru 30th June 2010

[1369] Interview with JSMP 1st July 2010

[1370] Leigh-Ashley Lipscomb, "Beyond the Truth: Can Reparations Move Peace and Justice Forward in Timor-Leste?" AsiaPacific Issues (No. 93, March 2010), 5

[1371] Report of the Secretary-General on justice and reconciliation for Timor-Leste S/2006/580

is no sign the UN or any world power will pressure Indonesia to reconsider its stance.[1372] As a result, Timor-Leste's leaders have focused on turning their wealthier former occupier into a political and economic ally, as evidenced by Indonesian support for Timor-Leste's bid to join the Association of Southeast Asian Nations (ASEAN).[1373] The greatest prospect of tangible transitional justice in Timor-Leste therefore lies in the reparations scheme proposed. Though the scheme is broad and potentially benefits a wide range of victims, the element of acknowledgment from the full range of actors identified in *Chega* remains absent. Civil society and NGO activities may be fruitful in seeking to ensure states that bear some responsibility as identified in that report acknowledge such responsibility in their funding of the reparations scheme.

V. Peace-Building

The establishment of the UN mission UNMIT affirmed the need for a broad overall peace building framework with international support. The 2006-8 crisis and the re-emergence of community violence prompted the international community to re-engage with issues of peace-building in Timor-Leste. While such violence was variously characterised as an east-west division, the UN Commission of Inquiry concluded that "east-west phenomenon was manipulated during the crisis by groups with specific political interests."[1374]

One notable feature of recent international support to peace efforts has been disparate support to community dispute resolution. Several NGOs and community groups identified a desire to continue a process analogous to the CRP, discussed above. Such panels were well perceived among many surveyed, but their coverage across the country was limited.[1375] In light of this original limitation and the renewed need for community reconciliation after the 2006-8 crisis, further community reconciliation mechanisms may remain an appropriate peace-building measure, and the means to introduce a permanent interface between traditional systems and the formal legal system. Thus mindful of the highly contextual nature of Timorese community violence, some international peace-building activities have otherwise engaged with the customary systems of justice.[1376]

[1372] Timor-Leste: Occupation-era crimes forgiven, not forgotten, 31 August 2011 (IRIN)

[1373] ibid

[1374] Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste (2 October 2006), 20

[1375] Spencer Zifcak, "Restorative Justice in East Timor: An Evaluation of the Community Reconciliation Process of the CAVR" (Asia Foundation 2005) 29

[1376] See Caritas Dili Pilot Traditional justice program

Such processes are more time consuming for external actors but may offer an effective means of discussing the issues of affected communities.[1377] 90% of those surveyed by Asia Foundation preferred community leaders taking primary responsibility for law and order, expressing the view that local justice was fair and respected human rights including womens' rights.[1378] Overall 75% preferred local justice to formal justice and suggested sexual cases should got to formal courts.[1379] Recent examples of the use of traditional dispute mechanisms have been community initiated.[1380] The 'Simu Malu' is a traditional dialogue process used to arbitrate local disputes, emphasising mutual acceptance. It provides a forum for parties to the conflict to express their grievances and concerns, and to understand and mutually commit to accept each other's positions and interests in order to eventually restore relationships and foster stability in the community.[1381] A recent example involved members of the martial arts groups and other concerned community members publicly exchanging views, which culminated in official statements being prepared and read aloud by each group, then exchanged as a formal declaration of truce.

In addition, OECD review of donor engagement in Timor Leste highlighted the continued need for an inclusive peace process, which is supported by appropriate conflict resolution mechanisms, and for ongoing attention to justice (including both formal and informal mechanisms) to address grievances and past injustices.[1382] Traditional and non-formal dispute resolution mechanisms have not been resourced or legitimised so that their full potential remains largely untested.[1383] Comparative experience suggests it may be possible and offer a more legitimate means of engagement with community dispute resolution as a vital component of local level peace-building. International or State engagement with a diverse range of custom therefore needs to be dynamic, allowing for a wide range of practices, but seeking to interface them with the formal system.[1384] At

---

[1377] Interview with Caritas Dili 7th July 2010

[1378] Asia Foundation, Law and Justice in East Timor Asia Foundation community perception survey (2004)

[1379] ibid

[1380] UNMIT Press Release 15 September 2011

[1381] Ibid

[1382] OECD, Monitoring the Principles for Good International Engagement in Fragile States and Situations (2010), 24

[1383] USAID Conflict Vulnerability Assessment 2006, 18-19

[1384] Interview with GTZ 29th June 2010

present international law or policy does not address this issue of legal pluralism or profess much willingness to support customary or traditional sources of peace-building.

The second major feature of peace-building in Timor-Leste is land ownership and distribution. Land disputes are often described as the most common of all disputes in Timor-Leste.[1385] Timor-Leste is still without a legal basis for determining ownership of land.[1386] During Indonesian occupation, the settlement of Indonesians and relocation of indigenous Timorese disrupted existing ownership.[1387] During the Portuguese era some 3000 titles were issued, and during the Indonesian era some 47000 titles were issued.[1388] After the scorched earth policy of the Indonesian violence in 1999, housing was in short supply, with 80% rendered uninhabitable.[1389] In addition, formal records were destroyed in 1999.[1390] Migration management actors were primarily concerned with effecting return of citizens, but not with the ownership of property or other issues on their return.[1391] An estimated 50 percent of housing in Dili was occupied illegally.[1392] In this context, the United Nations Transitional Administration in East Timor (UNTAET) established a process of Temporary Use Agreements, which provided for short term leasing of land, to allow legal occupation by incoming occupants.

The Timorese government has promulgated three laws governing matters of land and property.[1393] However, Timorese claimants may remain with up to five bases for a land claim: 1. Those occupying land since 1999 (Temporary occupation under UNTAET regulations); 2. Those occupying

---

[1385] Asia Foundation, Perception of Law and Justice (2002), 11

[1386] International Crisis Group, Managing Land Conflict in Timor-Leste Asia Report No 110 9 September 2010

[1387] Pedro Xavier Sousa, East Timor, Land Management – a Long Way to Go, but we have started, (on file with author) 3

[1388] ibid 4

[1389] Scott Leckie. "Legal and Protection Policy Research Series. Housing, Land, and Property Rights in Post-Conflict Societies: Proposals for a New United Nations Institutional and Policy Framework." PPLA/2005/01 (March 2005)

[1390] Daniel Fitzpatrick. Land Policy in Post-Conflict Circumstances: Some Lessons from East Timor. Archived in East Timor Law Journal (2001)

[1391] Dolan et.al "Evaluation of UNHCR's repatriation and reintegration programme in East Timor,1999- 2003." United Nations High Commissioner for Refugees Evaluation and Policy Analysis Unit EPAU/2004/02 (Feb. 2004)

[1392] Neven Knezevic. Timor-Leste: Background Paper on Human Rights, Refugees and Asylum Seekers. Commissioned by United Nations High Commissioner for Refugees, Protection Information Section (DIP) (February, 2005)

[1393] Law 1/2003, 10 March, "Juridical Regime of Immovable Property – Part 1. Ownership of Immovable Property; Decree-law19/2004, 29 December, "JuridicalRegime of Immovable Property- Official Allocation and Lease of State Property"; Law 12/2005, 2 September "Juridical Regime of Immovable Property– Part II: Leases between Private Parties".

since 1999 under subsequent Timorese legislation; 3. Those with Indonesian title; 4. Those with Portuguese title; and 5. Those with a traditional-based land title.[1394] The failure to enact a land and property system aligned with traditional claims and capable of resolving disputes resulted in large-scale inequalities in land resource access.[1395] Some interviewees described land use and ownership as a a major issue at village level.[1396] This view also finds support in international assessment.[1397] The significant internal displacement of the 1999 and 2006-8 periods placed significant strain on available housing and land ownership and reflected broader displacement of ownership and use akin to the Indonesian invasion and Portuguese colonisation.[1398]At present, land disputes have not spilled into land conflicts, despite the absence of any land administration for the past 10 years since independence. While an immediate short term fix is problematic, there remains pressure on the State to open lands to private investment.[1399] Land is a long term development issue rather than an immediate trigger of conflict, but one that draft legislation and relevant international and domestic actors must soon address.[1400] Emergent international principles of land restitution for refugees may also assist this become a peace-building priority.[1401] After public consultation, a draft land law for Timor-Leste has been prepared. This law aims to define the procedures and regulations that will recognise and confer the first real estate rights in Timor-Leste. The law also aims to clarify the legal status of assets and to promote the distribution of property among Timorese citizens. The 2011 Strategic Development Plan for Timor Leste notes that the government will establish an independent body to administer the law and regulate land and property rights.[1402]

Specific peace-building challenges emerge in Timor-Leste at a micro level, often distinct from elite violence and politics. The need for a contextual response creates problems for a general formalist approach favoured by international actors. However the experience of the CRP showed this

---

[1394] JSMP, Land and Law Report (27 September 2005) 8

[1395] Interview with Andrew Harrington 9th July 2010; Article

[1396] Caritas Dili; Lao Hamutuk, Land Justice V11(1-2) Bulletin Feb 2010

[1397] S/2010/85, para 28

[1398] Belun, Reducing Community Tensions Through Housing (April 2009)

[1399] Interview with Cillian Nolan, ICG 12th July 2010

[1400] ibid

[1401] "The Pinheiro Principles" United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons Centre on Housing Rights and Evictions (August 2005)

[1402] Government of Timor-Leste, Timor-Leste Strategic Development Plan 2011-2030, 179

approach may be ultimately more effective. Potential support for community reconciliation processes for the 2006-8 could form part of a standing interface between formal and traditional systems. Limited clarity in international policies on the relationship between customary and formal processes and between peace-building and state-building fail to realise the potential in this area.

VI. Security Sector Reform

A. Introduction

Timor-Leste emphasises the present limitations in policing, training and accountability in international SSR law and policy. Successive UN missions were tasked with supporting the Timorese combatants transformation into an armed force and establishing a credible police service (PNTL).[1403] The UN handover to the PNTL took 18 months and concluded in 2003. The Timorese government assumed responsibility for security in 2004.[1404] However, in February 2005, U.N. Secretary-General Kofi Annan noted that major problems within the East Timor police force remained a cause for concern, and that "reports of police misconduct, including excessive use of force, assaults, negligent use of firearms and various human rights abuses, have increased since May 2004." He continued that "lack of transparency and a slow-paced investigation mechanism have contributed to a poor level of police accountability."[1405] Difficulties also arose with the army. Resentment of international engagement in this process can be traced a mishandling of FANTIL in year one of UNTAET, where the liberators of Timor-Leste were treated merely as part of the security problem and subjected to poor standards of treatment and living in the assigned cantonments. This treatment was mirrored in the actions of international donors and evidenced in the absence of equitable distribution of resources across the security sector.[1406] The absence of a coherent approach may have contributed to the lack of foresight to see the potential for violence and division among the armed groups in Timor-Leste.[1407] The 2006 crisis provides evidence that the chosen approach did not effectively provide State security. Early decisions were made in a

---

[1403] United Nations Security Council Resolution (UNSCR) 1599, S/RES/1599, April 28 2005; UNSCR 1543, S/RES/1543, May 14, 2004; UNSCR 1480, S/RES/1480, May 19, 2003; UNSCR 1473, S/RES/1473, April 4, 2003; UNSCR 1410, S/RES/1410, May 17, 2002; UNSCR 1338, S/RES/1338, January 31, 2001.

[1404] "Timor-Leste making steady progress towards self-sufficiency, but continued international assistance needed, Security Council Told," U.N. Press Release SC/8172, August 24, 2004.

[1405] United Nations, "Progress Report of the Secretary-General on the United Nations Mission of Support in East Timor," U.N. Document S/2005/99, February 18, 2005.

[1406] Interview with Charles Scheiner, Lao Hamatuk 2nd July 2010

[1407] Interview with Clemens Loos 1st July 2010

spirit of political and practical expediency rather than with a view to the long-term development of East Timor and may have contributed to exacerbating old divisions.[1408]

Mindful of these shortcomings, the UN re-affirmed the need for comprehensive SSR, giving UNMIT responsibility for assisting the Timorese government.[1409] In particular, the mission was granted full executive policing authority ("overall command and control") throughout the country. The "supplemental arrangement" of 1 December 2006 between the UN and the Timorese government defined the UN role on SSR. It contains two elements: a screening and mentoring process for reconstituting the police, and a Reform Restructuring and Rebuilding (RRR) plan for "institutional development and strengthening". This plan was also to determine the benchmarks and criteria based on vetting, training and mentoring.[1410] The supplemental arrangement has been criticised as it "seeks to be an operational document that sets and prioritises goals, assigns responsibility to units, lists performance measures and gives high priority to community policing, while lacking definition and implementation detail on that concept."[1411] Moreover, it has no legal status or penalties for non-compliance. A stipulation of the Arrangement was that the government would enact all necessary legislation to support its implementation. No such action was ever taken.[1412] A December 2008 ruling by the Timorese Court of Appeal held it was "non-binding ... an instrument of a merely political and administrative nature".[1413] More recently, a joint UNMIT police and national police working group are seeking to ensure mutual agreement on capacity-building objectives, modalities and training content, which will provide for new arrangements which differ, by mutual agreement, from the relevant provisions of the 2006 supplemental policing arrangement.[1414] UNMIT support on SSR operates across a number of areas under the supplemental agreement.

[1408] Edward Rees. "The UN's failure to integrate Falintil veterans may cause East Timor to fail." Online Opinion Australia. (Tuesday, September 2003)

[1409] Security Council Resolution 1704 (25 August 2006)

[1410] International Crisis Group, TImor-Leste: Security Sector Reform Asia Report No 143 (17 January 2008)

[1411] ibid 7

[1412] International Crisis Group, Handing Back Responsibility to Timor-Leste's Police Force, Asia Report No 180 (3 December 2009)

[1413] Court of Appeal decision in relation to case no. 95/CO/ 2008/TR, dated 9 December 2008; Bu V. E. Wilson, "Timor-Leste: the curious case of the fake policemen", 2009 ETLJ 2

[1414] Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 21 September 2010 to 7 January 2011) S/2011/32

B. Strategic Framework

Beyond the legal foundation for UN SSR engagement, a number of challenges merit consideration. The UN Commission of Inquiry noted that "Timor-Leste does not have a national security framework" and that its absence contributed significantly to the emergence and growth of the crisis.[1415] The May 2004 Organic Decree-Law of the National Police of Timor-Leste was the legal instrument governing the structure and role of PNTL and specifies the role of the police in relation to the army, Falantil-FDTL, in internal and external security. As a result of social group factionalism, April and May 2006 witnessed the complete breakdown of the PNTL chain of command and numerous breaches of the existing Organic law regarding PNTL during the 2006 crisis.[1416] The May 2004 decree on the organic structure of the army was superseded by decree 15/2006, promulgated in November 2006. The articles from the 2004 decree that were not revoked related to the creation and conduct of various bodies during a crisis, catastrophe or public disaster. In addition, significant challenges remain in the implementation of its provisions.[1417]

UNMIT was tasked with generating a comprehensive review of the Timorese security sector as the basis for reform after the 2006 crisis. However the review encountered serious difficulties due to limited political interest from the Timorese government in this approach.[1418]

Despite the absence of a comprehensive review by the UN, notable progress was made in the overarching legislative and policy framework for the security sector, particularly with the promulgation of the national security, national defence and internal security laws in April 2009.[1419] In 2010, four pieces of primary legislation and national security policy were passed into law.[1420] However, this suite of legislation denotes a discrete division of security in Timor-Leste's legal framework in the absence of a comprehensive coordinating strategic policy. For instance the Internal Security Act reflects the priority for military style policing.[1421] Article 9 of the National Security Law provides for the integration and collaboration of military and police forces on

---

[1415] Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste (2 October 2006), para 137, 221

[1416] ibid, para 158; 165

[1417] Interview with Nelson Belo 8th July 2010

[1418] Interview with Cillian Nolan, ICG 12th July 2010

[1419] S/2010/522

[1420] UNMIT SSRU Nathan Dalton Interview 7th July 2010

[1421] Articles 18-19, Law on Internal Security Law 4/2010 21 April; Article 9, Law on National Security

missions deemed of public interest.[1422] The stated objective of the law was to provide the PNTL with greater operational capability and a more efficient chain of command. While the act goes some way towards addressing the fragmentation of the security sector it neither identifies an explicit relationship between the army and the police, nor simplify the number of special units and divisions within the police force.

Conceptions of a national security policy for F-FDTL can be found in the policy document "Force 2020", which provides for an increased in troop deployment and the use of significant military hardware for future Timorese battalions. With Force 2020 for informal guidance (since it is not yet authorised by law), there have been recent legislative developments relating to the army, including a regime used to promote 203 members on 23 November 2007, a code of military discipline, an organic law for the defence ministry, amendments to the organic defence forces law and a conscription law. A new organic law for F-FDTL, a draft law on military programming and a draft law on military procurement are under preparation.[1423] In the absence of a National Security Policy and requisite legislation clearly stipulating the roles and responsibilities of security institutions, the development of F-FDTL as a professional and accountable defence force remains a challenge. [1424] Article 12 of the National Security Law provides that there shall be a national security policy, which prompts a requirement for the government to consider an overarching policy framework in this area. In addition further subsidiary legislation, regulations and policies are still required. In 2009, the UN Security Council reaffirmed the need to enhance civilian oversight and accountability mechanisms of both the PNTL and F-FDTL and to delineate the role of these institutions clearly.[1425]

The emergent legal framework for the security sector is crystallising into a national security strategy that seeks to offer an integrated system between the army and the police. Such approach would vary from international policy of a clear delineation of duty between the two organs, but may be justified through economies of scale and the practical reality of close collaboration and coordination in crisis situations. It also reflects a bottom up practice based on the integration of fragmentary legislation rather than from a unified policy informing the subsequent and subsidiary legislation. There may be merits to this approach, though it lacks the participatory character that informs other bottom up approaches in the other relevant fields. What is notable is that

---

[1422] Article 9, Law on National Security

[1423] S/2011/32

[1424] S/2010/85, 15

[1425] UN SC Resolution 1867

international law is unable to assist in generating a comprehensive framework. Even at a policy level, divergence in understandings of security sector reform enable wide discretion among applicable frameworks.

C. Handover

In May 2009, the UN and the government agreed to a phased handover of policing responsibility based on district-by-district assessment of police "readiness". As of 14 January 2010, a total of 3,155 PNTL officers were registered out of an authorised strength of 3,172. The national police has resumed primary policing responsibilities in 10 districts and six units.[1426] 199 officers (including 11 women) have yet to be finally certified owing to pending criminal or disciplinary issues. In a letter dated 28 December 2010 addressed to Prime Minister and Minister for Defence and Security Gusmão, the Secretary of State for Security communicated his decision to certify the 199 officers, stating that those officers would not be exempt from any criminal or disciplinary liabilities if found guilty at the outcome of proceedings.[1427] As a result, some NGOs express the strong concern that screening has not been a reliable process and that as a result it is not possible to say that any effective vetting has taken place.[1428] In explaining the ineffectiveness of the present approach, civil society actors offer the view that there is a risk of greater security unrest if there was a strong vetting process.[1429] One commentator was moved to state that "No one refers to it as a serious vetting process".[1430] As a result, the key roles of restoring trust and building capacity in investigation and intelligence in the security sector were not met.[1431] Others note that the overall certification was a failure and could be challenged legally and revoked as it was technically an illegal agreement unconfirmed by parliament.[1432] The challenges faced by the monitoring and handover process reflect the need for local ownership of SSR processes, identified in Chapter VI. Ownership of the process would generate sufficient will to address the key political challenges that would be involved in a strong vetting process.

[1426] S/2011/32

[1427] S/2011/32

[1428] Interview with JSMP 1st July 2010; Interview with Nelson Belo 8th July 2010; Interview with Nelson Belo 8th July 2010

[1429] Interview with JSMP 1st July 2010

[1430] Interview with Cillian Nolan, ICG 12th July 2010

[1431] Interview with Nelson Belo 8th July 2010

[1432] Gordon Peake Interview 7th July 2010

D. Community Policing

In contrast to the militaristic approach to security that seems to predominate in Timor-Leste, UNPOL and some donors have used on community policing as a means of reforming the sector. The UNPOL mission has a unit dedicated to supporting community policing efforts. Community policing is also provided for in the 2010 legislative framework for the security forces at an abstract level.[1433] The model of community policing is complicated by the fact that community structures are flexible, as discussed above.[1434] In developing community policing projects, one key donor insight is that community capacity and leadership in each districts are the key distinguishing factors.[1435] Community policing can be presented as in the self-interest of the PNTL as it would enhance the perception of the organisation in the community and would engender an effective means of keeping the peace.[1436] A community policing model offers the community an opportunity to address through dialogue fears regarding security sector and which cases will go to the formal justice system and which will remain in community processes. Donors have seized this opportunity to raise awareness on the capacity of individuals to use the police in domestic violence cases where the community provisions may not be so favourable.[1437] However, the primary challenge is convincing the security leadership. A number of actors acknowledge that generating higher level understanding or buy in of community policing is next goal.[1438] Very few community representatives have the opportunity to meet any police officers above the level of community policing officers and the subdistrict commanders.[1439] This process must account for the relative independence of district commanders as key reform actors, but also their varied standing in their districts, depending on social and historical factors. [1440] The security sector also suffers from tight family relationships impacting on its independence and impartiality.[1441] There is the continued need to build trust back after 2006 and enable community policing to offer a forum where police

---

[1433] Article 9, National Security Law

[1434] Interview with Silas Everrett, Asia Foundation 8th July 2010

[1435] Interview with NZAid 29th July 2010

[1436] Interview with Liam Chinn, Asia Foundation 14th July 2010

[1437] Interview with NZAid 29th July 2010

[1438] ibid, Interview with Liam Chinn, Asia Foundation 14th July 2010

[1439] S/2010/85, 14

[1440] Interview with Silas Everrett, Asia Foundation 8th July 2010

[1441] Interview with Nelson Belo 8th July 2010

and community can discuss community issues.[1442] As a result, community policing suffers from a lot of rhetoric and less implementation.

It remains too early in project to tell full results of international engagement in community policing.[1443] One NGO distinguished between the emergence of community policing in rural areas as the interface of the State with traditional forms of justice and more fraught policing engagement with Dili, with a higher State existence, but often where the public perception of policing remains the UNPOL presence. In addition, the challenges of community policing must be considered in the broader context of an effective and functioning justice system. There is little value in using the police as the gatekeeper to the formal system of justice if that is unable to cope with a caseload of disputes. The potential remains for a coherent overarching approach of community policing that integrates formal and traditional sources of authority.

E. Conclusion

Security sector reform has proved elusive both in the concepts employed by the UN and donors and the preferences of the Timorese government. The absence of any international legal regulation of this field exacerbates the difficulty. Some attribute the absence of a deeper process to the international community's failure to appreciate how the experience of Indonesian occupation shaped the default understanding of Timorese security, rendering it incorrect to consider the new nation a blank slate. Others have identified the absence of leadership in the strategic reform of the security sector as a key political challenge that undermines the significant legal reforms that the sector has already seen.[1444]

The present international approach has found significant political obstacles to international involvement and challenges in practice due to the variation of country supplying police to UNPOL and the short term nature of their deployment.[1445] In 2011, the UN Secretary General identified a continuing need for a United Nations police presence to support the further institutional development and capacity-building of the national police.[1446] However, further complex reforms

---

[1442] Interview with NZAid 29th July 2010

[1443] Interview with Silas Everrett, Asia Foundation 8th July 2010

[1444] Interview with Antonio Victor, AusAid 2nd July 2010

[1445] Interview with Cillian Nolan 12 July 2010

[1446] Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 21 September 2010 to 7 January 2011) S/2011/32

of state institutions cannot be done without the political consent of those directly involved.[1447] The suite of legislation promulgated in 2010 demonstrates the plausibility of a government led SSR process in the circumstances of transition, despite an uneasy relationship with international assistance.

VII. Development

Timor-Leste has not experienced sustained economic growth since independence. The absence of basic infrastructure and services has frustrated broader international efforts to develop growth. The task of development facing the Timorese governments and successive UN missions was and remains immense. Early UN missions had a significant challenge in balancing crisis management and humanitarian assistance with the need to strategise about economic development and restoring governance and political self-government to the Timorese people.[1448] Public expectations of rapid Timorese development in perception surveys found "widespread expectations existed that the government would address a range of social and economic needs."[1449] An absence of economic development curtailed the effect of transitional justice, with some CRP participants noting hearings were not enough to lead to reconciliation while they continue to live in abject poverty.[1450] Ongoing economic challenges also contributed to the 2006-8 violence, as the abysmal economic situation removed incentives to abstain from violence.[1451] However, government policies since 2007 of cash transfers to vulnerable groups, the subsidising of food prices, and job creation through infrastructure development have have improved poverty levels.[1452] Government data estimate economic growth at 12.2 percent in 2009, with average per capita incomes in the non-oil economy increasing from US$ 398 per year in 2007 to US$ 499 in 2008 and US$ 599 in 2009.[1453]

Timor-Leste's is driven by oil revenues and significantly benefits from being a nation with significant oil in her territorial seas. Timor Leste faces a wide range of development challenges,

---

[1447] International Crisis Group, Handing Back Responsibility to Timor-Leste's Police Force, Asia Report No 180 (3 December 2009)

[1448] James De Shaw Rae, Peace-Building and Transitional Justice in East Timor (n1272) 225-228

[1449] ICTJ, Crying without Tears: In Pursuit of Justice and Reconciliation in Timor-Leste: Community Perspectives and Expectations (2003) 18

[1450] Lia Kent "Unfulfilled Expectations: Community Views on CAVR's Community Reconciliation Process" (n1295), 26

[1451] Andrew Harrington, "Ethnicity, Violence, & Land and Property Disputes in Timor-Leste", 40

[1452] UNDP, Timor-Leste Human Development Report 2011, 5; 17

[1453] available at dne.mof.gov.tl (visited 22nd October 2011)

beyond the scope of this chapter. As a new country, Timor-Leste faces the immense challenge of building state institutions. The primary challenge for Timor-Leste is in ensuring an effective system of governance that enables a transparent and equitable distribution of wealth and implementation of projects designed to achieve sustainable economic growth. The role of the Timorese Petroleum Fund is considered below.

Beyond the management of oil revenues, the effective implementation of development policies across the nation depends on viable governance structures. UNMIT has a mandate to enhance a culture of democratic governance and facilitate political dialogue among Timorese stakeholders.[1454] Building a State and culture of governance, especially in the justice sector, remain daunting challenges in a country with a "minimally functioning judicial system."[1455] Several early international approaches to governance reform appear to have fallen into the view that newly independent Timor-Leste was a "blank slate" in developing norms and mechanisms of governance. The statistics evidence a significant challenge facing the formal justice sector with an estimated backlog of 5,000 cases.[1456] Causal factors for this weakness include:

> "the vacuum left after the Indonesian withdrawal in 1999; a certain level of ad hoc planning and distribution of resources during the initial establishment phase; the lack of experienced Timorese legal actors; difficulties associated with the recruitment and use of international personnel; cumbersome language issues; and, as with other sectors, limited resources."[1457]

A 2009 needs assessment of the justice sector noted the challenge in completing the substantive legal framework, in Portuguese and Tetum, and avoiding the wholesale import of foreign legislation, as well as enhancing the drafting skills of the legislature.[1458] There is a need for more judges rendering justice in more places in Timor- Leste and the establishment of further district courts and legal services.[1459] These priorities are reflected in the Ministry of Justice's Justice Sector

---

[1454] UN SC Res 1704 (25 August 2006)

[1455] Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste (2 October 2006), para 176

[1456] S/2010/522, para 38

[1457] Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste (2 October 2006) p65

[1458] ICNA, Justice Sector of Timor-Leste, 25-29

[1459] ibid, 30-34

Strategic Plan 2011-2030.[1460] These difficulties and the ongoing use of the traditional system combined with limited strategy in international engagement in building a judicial sector.[1461] Access to the legal sector is limited by the limited number of jurists and the concentration of lawyers in urban areas, with 80% of legal aid provided in Dili, where only 20% of the population reside.[1462] The lack of a legal framework regulating customary mechanisms meant that there was no oversight of the extent to which they upheld due process guarantees. There was also concern that traditional mechanisms did not fully respect gender equality.[1463] The Ministry of Justice, supported by the UN, launched a process of nationwide consultation to develop a legal framework linking customary justice mechanisms and the formal justice system.[1464] International law has not responded to this challenge of legal pluralism, yet a number of international actors have focused on governance reform identifying "severe capacity gaps, adversely affecting the effective functioning of democracy".[1465] An international framework responsive to legal pluralism in developing governance may be a more suitable influence. The effect of the serious crimes process in this regard was limited: "Unless the international involvement is spread throughout the judicial system ... the involvement of international colleagues should not be assumed to automatically result in a transfer of skills to the national level."[1466]

Moreover, the extent to which development assistance is reinforcing state-society relations remain unclear. OECD evaluation of donor engagement offers a general view that the way international technical assistance is currently provided sometimes undermines broader capacity development aims.[1467] For instance, evaluation of World Bank engagement between 2000-2010 notes that the Bank did not have a clear needs assessment, a strategic vision, or a realistic strategy that could have guided its actions to bolster capacity in Timor-Leste in a more effective way. The evaluation contended that had better Timorese governance structures "the government would have been in a

---

[1460] Government of Timor-Leste, Timor-Leste Strategic Development Plan 2011-2030

[1461] Dominik Zaum, Building the Rule of law after Conflict: UNTAET and Judicial Institution Building in East Timor, in William Binchy (ed) Timor-Leste: Challenges for Justice and Human Rights in the Shadow of the Past (Clarus Press 2009), 188

[1462] Avocats Sans Frontieres, Access to Legal Aid in Timor-Leste: Survey Report (November 2006)

[1463] Strohmeyer, Hansjoerg --- "Policing the Peace: Post-Conflict Judicial System Reconstruction in East Timor" [2001] UNSWLawJl 16; (2001) 24(1) University of New South Wales Law Journal 171

[1464] ICNA, Justice Sector of Timor-Leste, 64-66;

[1465] UNDP Strategic Plan 2009-13; Interview with Antonio Victor, AusAid 2nd July 2010

[1466] Caitlin Reiger, "Hybrid attempts at accountability in Timor-Leste" (n1317) 162

[1467] OECD, Monitoring the Principles for Good International Engagement in Fragile States and Situations (2010) 9

better position to tackle the unemployment and the deficiencies that helped brew the civil strife of 2006."[1468] In particular, the Bank's efforts at building local governance by supporting the creation of democratically-elected village development councils were largely unsuccessful, due to inadequate understanding of the political dynamics in the country.[1469] Overall, the outcome for WBG support for governance reform was rated as moderately unsatisfactory.[1470]

A summary Strategic Development Plan, From Conflict to Prosperity, was released in April 2010. This was the basis for community consultations in all 65 sub-districts across Timor-Leste. The feedback from those consultations has been incorporated into the Strategic Development Plan. The full Strategic Development Plan was released in July 2011 and emphasises that "building trust in our institutions of government is a major focus of the plan."[1471] The Strategic Development Plan covers three key areas: social capital, infrastructure development and economic development. The Plan is notable in shifting the emphasis of development to include the enhancement of social capital, built on the integration of peace-building and state-building with development.[1472] Regarding the justice sector, it notes:

> "Today, the Timorese justice system is still too underdeveloped to serve our entire population and substantial efforts will need to be made to meet the growing demand of the Timorese people to apply the rule of law. Currently, a substantial proportion of conflicts are addressed through traditional justice mechanisms, which can involve the violation of fundamental rights, particularly with regard to women and children."[1473]

The Strategic Development Plan outlines key objectives of the Timorese government in the improvement of good governance and the justice sector to enable and guide the State's role in pursuing development. The acknowledgment from donors of shortcomings in their assistance thus far provides a sound foundation for re-engaging with Timorese development as it seeks to consolidate its state-building practices and shift out of a transitional or fragile framework. However, the context of prior fragility also serves as a reminder of the need to address the risks

---

[1468] IEG World Bank, Evaluation of World Bank Group Program, Timor Leste Country Program Evaluation 2000-2010, 107

[1469] ibid 50

[1470] ibid x

[1471] Government of Timor-Leste, Timor-Leste Strategic Development Plan 2011-2030, 10

[1472] ibid, 14

[1473] ibid, 177

and structural challenges that face Timor-Leste and international actors seeking to assist its transition.

The fields considered thus far have been examined individually, as they have been reflected in literature and analysis on Timor-Leste and largely reflecting domestic discussions and reform processes themselves. The following sections consider the principles of *jus post bellum* in an integrated fashion and look to identify areas in each field where there is an uneven or inconsistent application of these principles with a view to providing a novel basis of reform.

VIII. *Jus Post Bellum*: Accountability

Systemic consideration of accountability remains a key challenge in Timor-Leste for the government, civil society and concerned international actors. The re-emergence of violence in 2006 and 2008 has raised the need for renewed accountability mechanisms and threatened the success of prior transitional justice institution in fostering broader cultural norms of accountability.

First, prosecutions featured in the response to the 2006-8 crisis. The UN Independent Special Commission of Inquiry recommended a number of named persons be prosecuted for the 2006 violence. Despite concerns about its functionality and independence, the Commission recommended that these prosecutions be undertaken in domestic courts, but noted the need for "measures ... to strengthen the ability of the domestic system to handle high-profile cases involving political actors in a manner that will be considered credible by the population."[1474] As of 7 January 2010, final judgements had been rendered in seven cases, resulting in nine convictions and 43 acquittals, while four cases had been closed.[1475] The majority of acquittals were due to lack of evidence. Some NGOs took the view that the 2006 crimes are more divisive for current population than 1974-99 crimes, given that they reflect active political tensions in Timor-Leste.[1476] In 2010, 24 defendants accused of involvement in the 2008 attacks against the President and the Prime Minister were convicted and 4 acquitted. The trials were monitored by civil society organisations and UNMIT, and were seen to have generally upheld human rights standards for fair trial.[1477]

[1474] Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste (2 October 2006), para 179

[1475] S/2011/32

[1476] Interview with JSMP 1st July 2010

[1477] S/2010/522

Key challenges to the pursuit of accountability in Timor-Leste remain amnesties, commutations, and pardons. A draft amnesty has been considered for all crimes from 1974-99.[1478] In June 2009 the President attempted to introduce an amnesty for offences during 2006-8, but faced significant international and domestic opposition.[1479] The primary challenge as regards legal impunity is not amnesty however but rather the widespread use of presidential pardons. In 2007, the Timorese Court of Appeal ruled on the legitimacy of the use of Presidential pardons as promulgated in a law "On Truth and Measures of Clemency for Diverse Offences".[1480] The legislation sought to provide "clemency measures only to offences committed between 20 April 2006 and 30 April 2007, excluding from its scope any offences committed before said period". The Court concluded that such a law was unconstitutional in that: "It is manifest that such provisions would result in an unequal handling of individuals who face similar circumstances, without there being any serious, legitimate and reasonable grounds to do so."[1481] However, in a Presidential Decree issued on 20 May 2008, 94 of Timor-Leste's 179 prisoners received a pardon or partial commutation of sentence. The Decree specified that release was to be granted at the decision of the court of competent jurisdiction based on independent evaluation of the circumstances relevant to each case. As of 30 June 2008, 20 persons had been conditionally or unconditionally released as a result of the pardons.[1482] No one is currently in jail for any offence related to the 2006 crisis. UNMIT have advocated for a guidelines system for pardons, that represents a trade off between the need to preserve executive discretion and sovereignty in this matter, but also seek to constitutionalise the process.[1483] Commutations of sentences are also an issue. In 2010, the President granted commutations of the sentences to 23 of the 24 persons convicted for the 2008 violence.[1484]

[1478] Speech of Prime Minister - Indonesia August 13 2009; See E/CN.4/2005/115, 12 for an earlier suggestion of an amnesty

[1479] Interview with Clemens Loos 1st July 2010

[1480] Case No. 02/ACC/2007

[1481] ibid

[1482] UNMIT Report on human rights developments in Timor-Leste, The security sector and access to justice, 1 September 2007 – 30 June 2008, para. 45-46.

[1483] Interview with Clemens Loos 1st July 2010

[1484] ibid

Confidence in the Timorese justice system thus remains undermined by perceived impunity.[1485] It remains to be seen whether prosecutions can form part of any future justice strategy in Timor-Leste, given the difficulties of geo-politics, obtaining defendants and challenges in ensuring effective prosecutions in country. The viability of 1974-1999 prosecutions depends on the future transition, if any, in Indonesia. A broader concern is how justifications of limited accountability for this period are extended as an excuse for a more impunity for offences during 2006-8 crisis. Some believe that the polite elite ignore the legal system when it suits them to do so.[1486] The perceived impunity for 1974-1999 may be contributing to fostering impunity for 2006-8 era offences. The combination of impunity for these sets of offences risks the suggestion that political violence remains viable in Timor-Leste. Expectations for foreign States to support prosecutions are unrealistic if the Timorese government and civil society are not fully in favour of such an approach.

Second, peace keeping and police accountability remains an ongoing challenge in Timor-Leste. The general framework of accountability for UN peacekeepers and personnel is identified in Chapter VII. In the Timorese case, peacekeepers were criticised for poor discipline and harassment of Timorese citizens, including sexual exploitation of women, boys, and prostitutes.[1487] However, UN missions in Timor Leste also represent one of the few instances where the UN has waived its immunity for the prosecution of its personnel based on sexual violations, and has contributed significantly to enhancing international policies in this area.[1488] In addition to the general challenges of accountability for UN officials, there are significant limits to the approach of bilateral security sectors to accountability. For instance, the bilateral peace keeping and policing force, the ISF, has not clearly communicated to Timorese people how to make and track a complaint. Local NGOs allege that soldiers receiving complaints often do not pass them up the chain of command. and that the ISF has no clear compensation process for personal injury, only property damage.[1489] The standard challenges faced by UN personnel, including UNPOL, combine with institutional challenges for ISF forces in providing any mechanisms of accountability for law enforcement officials in Timor-Leste. The potential for an integrated accountability mechanism identified in Chapter VII could mitigate these shortcomings.

[1485] S/2010/85; Jeff Kingston, Human Rights, Justice and Reconciliation in Timor-Leste in William Binchy (ed) Timor-Leste: Challenges for Justice and Human Rights in the Shadow of the Past (Clarus Press 2009 538

[1486] Interview with Charles Scheiner, Lao Hamatuk 2nd July 2010

[1487] Lindsay Murdoch, UN Turns Blind Eye to Use of Timor Brothels, The Age 7 May 2007

[1488] Frederick Rawski, "To Waive or Not to Waive: Immunity and Accountability in UN Peacekeeping Operations" (2002) 18 Conn J In'tl L 103

[1489] Lao Hamutuk Letter to International Security Forces 8 March 2010

Third, despite operating in a situation of renewed fragility, donors have not opted to pursue any shared accountability framework or basic standards of engagement for their activities in Timor-Leste. Unlike the case of Nepal, this represents a missed opportunity to engage with Timorese society and provide evidence of an example of functioning bureaucratic accountability. The rapid shift from a conflict situation to a fragile or transitional one across 2006 to 2008 means that this opportunity has passed. However, to the extent that donors remain present in Timor Leste after the withdrawal of UNMIT, a code of conduct and a consolidated accountability mechanism, within the Timorese courts, may provide a further means to demonstrate effective accountability.

Viewing accountability as a systematic norm in Timor-Leste reveals a consistent pattern of neglect, ambivalence and disregard for the principle in the conduct of the Timorese government and relevant international actors. A number of potential accountability mechanisms are possible and may offer an opportunity for international actors to affirm their commitment to the norm, most notably shared accountability mechanisms for ISF and UNPOL forces and donor institutional accountability mechanisms. However, the pursuit of accountability in Timor operates in the shadow of international pragmatism regarding transitional justice and international criminal accountability for Indonesia. As a result, measures designed to address accountability within Timorese territory may always seem partial and secondary unless a sufficient acknowledgment and justification of limited accountability is publicly communicated. The absence of systemic accountability the consistency and legitimacy of international engagement that follows from an explicit pursuit of integrity.

IX. *Jus Post Bellum*: Stewardship

There has been limited use of international engagement that reflects the stewardship approach in Timor-Leste. The use of a trust fund mechanism for the management of oil revenues remains the most notable and commendable example of the need to manage risk in line with the principle outlined in Chapter VII.

In transitional justice, there has been limited acknowledgment of the need for a distinctive approach to international engagement. The CAVR operated on the basis of extensive public engagement consultation and outreach, and is contrasted with the more limited approach of the SCU and prosecution strategy. In addition, the operations of the SCIT remain limited by their public outreach program. International financial support for the proposed reparations policy could

acknowledge the need for heightened communication in building trust with relevant social groups, and be made contingent upon the use of a reparations communication and outreach policy.

Second, the supplemental agreement between the UN and Timorese government failed to reflect a stewardship approach. The mentoring component of UNMIT's role in SSR could have potentially reflected the need for a distinct stewardship approach to manage risk and make the public aware of the process by integrating the operations of national and international law enforcement officials. Mentoring is one of the key tasks assigned to UNMIT in the supplementary arrangement, but perhaps the least successful in this field. UNPOL officials in mentoring positions had no general framework or guidance as to what or how to mentor.[1490] There has been a failure to generate training based on identified needs, whether through design flaw or the inability of the mission to respond to requested training needs, where identified at the initiative.[1491] One study concluded "there was no coherent, structured strategy, no comprehensive pedagogy, and no uniform, measurable methods of testing the skills learned by the Timorese police, let alone cogent agreement on what those professional skills were in any substantive sense".[1492] One interviewee described "UNPOL presence is often merely as a taxi driver or to provide IT or telecom assistance - not really doing the function assigned to them."[1493]

More fundamentally, the mentoring process has been significantly hindered by limited language skills of UNPOL staff, who were often on six month placements and therefore had no incentive to learn the language. Longer term engagement seems required to combat this.[1494] No cultural indoctrination or historical overview provided for UNPOL staff, or more pressingly a knowledge of the operating legal framework in which they seek to mentor. The national diversity of the UN police would not be problematic if standardised training and procedures and a feedback system allowed them to function as a cohesive unit.[1495] A unified approach could acknowledge that foreign law enforcement officials perform a sovereign function of the Timorese State and must necessarily be mindful of the risk of contributing to impunity and failing to enhance the

---

[1490] Interview with Nelson Belo 8th July 2010

[1491] International Crisis Group, TImor-Leste: Security Sector Reform Asia Report No 143 (17 January 2008)

[1492] Ludovic Hood, "Missed Opportunities: The United Nations, Police Service and Defence Force Development in Timor- Leste, 1999-2004", *Civil Wars*, vol. 8, no. 2 (June 2006), pp. 143-162.

[1493] Interview with Nelson Belo 8th July 2010

[1494] Gordon Peake Interview 7th July 2010

[1495] International Crisis Group, TImor-Leste: Security Sector Reform Asia Report No 143 (17 January 2008)

effectiveness of the security sector. An agreed and coherent mechanism of mentoring may also have provided guidance as to the appropriate outcomes and benchmarks for the transfer of this function back to Timorese officials.

The final area relevant to a stewardship conception in Timor Leste is the use of trust fund mechanisms. In October 2005, the Timorese government consulted on the concept of establishing a Petroleum Fund, which would receive revenues from petroleum and manage them in a sustainable way. The Petroleum Fund Act was passed in 2005. At the end of 2010, the balance in the Petroleum Fund was $6,904 million.[1496] Public expenditure continued to drive the expansion of the economy in 2010. With the benefit of petroleum revenues, the amount of the 2011 State budget proposal has quadrupled from that of the 2006 budget.[1497] A number of mechanisms are in place to manage risk and guarantee a fiduciary relationship regarding withdrawals from the Fund, its savings policy, reporting obligations, oversight and transparency.[1498] Timor-Leste has also established a Sustainable Income Benchmark for withdrawals from the Petroleum Fund, in order to maintain the fund for future generations. Furthermore, Timor Leste has also entered into the Extractive Industry Transparency Initiative, discussed in Chapter VII, which demonstrates a new form of accountability in the management of oil and gas revenues.Timor-Leste has complied with all the indicators contained in the EITI Validation Guide and that additionally, the process is consistent with the EITI's Principles and Criteria.[1499] The Petroleum Fund has also been audited by international CPAs from the beginning. Transparency in the oil and gas sector is well in place in Timor-Leste, reflecting the stewardship conception of Chapter VII.[1500]

However, beyond the Petroleum Fund, the impact of trust fund mechanisms has been limited. The World Bank was trustee and co-manager (with ADB) of the Trust Fund for East Timor (TFET) established in 1999. As a multi donor fund, TFET minimised bilateral funding when the local capacity for its management was critically limited. Several outside assessments have shared the view that TFET was an efficient funding mechanism as it used uniform procedures for project processing and implementation.[1501] Additional funding has been provided through the Post

---

[1496] http://www.laohamutuk.org/Oil/PetFund/05PFIndex.htm

[1497] S/2011/32

[1498] 2011 TLHDR, 71; Petroleum Fund Law, No. 9/2005

[1499] Validation of the Extractive Industries Transparency Initiative in Timor Leste (March 2010) 18

[1500] ibid, 19

[1501] IEG World Bank, Evaluation of World Bank Group Program, Timor Leste Country Program Evaluation 2000-2010

Conflict Funding and LICUS Fund of the World Bank, discussed in Chapter VI. The use of other trust funds, such as the TSP/CSP framework of the World Bank, as co-financing mechanisms, limited the number of counterparts for government engagement.[1502] According to one assessment, approximately 82 percent of the aid was bilateral and around 16 percent went through the World Bank Trust Fund for East Timor and these other mechanisms.[1503] However, La'o Hamutuk argued that the Bank's non-consultative approach regarding the establishment of the fund, and its organisational reluctance to improve its knowledge of, and engagement with, Timorese civil society, has been ongoing over the life of the TFET.[1504] so thFurther recent trust fund mechanisms include the use of the US Millennium Challenge Account for improving anti-corruption in Timor-Leste.[1505]As a result, trust fund mechanisms remain under-utilised across the majority of donor assistance. In addition, the use of public communication strategies in each of these areas has been limited, with such communication required under EITI standards, but a notable limitation of World Bank use of trust funds.

While the use of trust funds is broadly encouraging, the government has previously raised concerns over the use of ex ante forms of conditionality under multi-donor trust funds. The government's preferred approach is one based on partnership, where shared aims and mutual obligations define the relationship. This suggests that approaches to partnership could be further strengthened.[1506] In addition, the disbursement of funds from the Petroleum Fund and other trust fund mechanisms may have benefited from the equivalent of an Independent Service Authority, discussed in Chapter VII, to ensure the effective implementation and governance of proposed projects, especially in light of extremely low levels of bureaucratic capacity that persist within Timor-Leste. Nonetheless, the approach of the government and international organisations broadly reflects concern for a stewardship approach in cross cutting financial instruments. The application of this attitude to funding and processes for transitional justice mechanisms would be an welcome extension of this concern. The benefits to a stewardship are evident from Timor-Leste's reputation for its Petroleum Fund. A desire to extend this practice to other fields becomes evident from consideration of stewardship as a principle of *jus pos bellum* and a manifestation of integrity.

[1502] ibid 129

[1503] Scanteam, *Review of Development Co-Operation in Timor-Leste*.

[1504] Lao Hamutuk, Community Empowerment Project, (2002) 3(7) Bulletin (2/2)

[1505] USAID, Millennium Challenge Account Threshold Program September 22 2010

[1506] OECD, Monitoring the Principles for Good International Engagement in Fragile States and Situations (2010)

X. *Jus Post* Bellum: Proportionality

The weight given to each field in Timor-Leste seeks to address the perceived causes of 2006-8 conflict, insecurity and acute socio-economic hardship. However these priorities may be closer to absolute positions than is necessary. High levels of domestic ownership have characterised SSR processes with ambivalence regarding the role of UNMIT under the supplemental agreement. International assistance to policing in the absence of clear mentoring standards or tangible objectives remains questionable. Mentoring of standards agreed between the UN and the Timorese government may better balance the need for local ownership with effective assistance.

Second, domestic priority for reconciliation over accountability reflects a broader political reality that trials of Indonesians are unlikely in the absence of a significant change of attitude and priorities of the international community. Within these priorities, the use of the SCIT remains puzzling. This operation may be disproportionate because of its risk of causing harm to victims through re-traumatisation and raised expectations, despite potential pursuit of accountability and concrete truth recovery processes. In addition, the use of a reparations policy is a welcome addition to a transitional justice framework in Timor-Leste, but the absence of an acknowledgment component raises the risk that it is merely a form of development cash transfer, without the distinguishing characteristics associated with reparations. If the international community seeks to support this policy distinctly, those members named as having some culpability in the *Chega* report, may wish to acknowledge their ambivalence or acceptance of Indonesian occupation. This acknowledgment or Indonesian acknowledgment itself remain unlikely, but may be a means to strike an appropriate balance between friendly relations for Timor and its neighbours and international allies, and the need for distinct accountability through acknowledgment reparations programs.

Finally, the nature of international engagement in Timor Leste has been often pragmatic and in search of expedient solutions in circumstances of extremely low bureaucratic capacity, especially in the legal sector, even by standards expected in fragile states. In this environment, limited and *ad hoc* engagement with traditional justice mechanisms is an opportunity missed to strike a better balance between local ownership and international concern. The lack of a legal framework for engagement with traditional justice and governance mechanisms is a stumbling block, but could be overcome by anthropological needs assessments or analysis to inform project design. In this way, donors could address the criticism that the balance between local ownership and transformative goals is disproportionately weighted in favour of formal state institutions, thus diminishing local

ownership to mean only state ownership. The priorities pursued in Timor-Leste reflect broader political realities, but also demonstrate the dangers of inherently pragmatic approaches to transitions, that make particular choices and institutional designs more difficult to justify and ultimately damage their legitimacy. A more explicitly proportionate response may offer a basis for remedying this risk and contributing to the allegiance of citizens to the re-constitution of a sovereign political community through the principle and process of integrity.

XI. Conclusion

Timor-Leste has begun to take its due place in the region, formalising its application for membership in the Association of South-East Asian Nations (ASEAN), while also cooperating with other friends in Asia and the Pacific region and the Lusophone community.[1507] The next 18 months will test the extent to which the current political and security climate could withstand forthcoming elections. Frequent shifts in government and international posture from crisis management to medium and long term national planning have presented challenges to a shared vision and coherent path for international assistance and national priorities.[1508]

Timor-Leste's approach to transition sought to achieve the maximum benefit from limited political will, legal capacity and high expectations of the local society and affected victims and survivors. Despite the possibility that "total solutions will always be elusive, partial gains can be made."[1509] The follow up institution to the CAVR discussed in 2010 may represent the best hope for tangible benefits to victims and survivors, and greater consideration of the truth commission reports. Issues of acknowledgment of responsibility for gross violations should be a key focus of advocacy in this process. In the absence of systemic community perception data, this remains conjecture. However, at a normative level, the case of Timor-Leste raises the question of whether it is possible to re-constitute a political community founded on human rights and respect for individual citizens, but ignore or mitigate dealing with the past in a fashion that involves criminal law or acknowledgment of foreign commission of gross violations of human rights. Current attempts at reform, to develop anti corruption, to address recent political violence, offer only a limited acknowledgement of the relationship of these events with events in the past. Unless these are

---

[1507] Upcoming Elections among Critical Tests of Timor-Leste's Resiliency, Top United Nations official says in briefing to the Security Council, SC/10179, 22 February 2011

[1508] OECD Report on TL compliance with principles for engagement in fragile states, 8

[1509] Patrick Burgess, Burgess, Patrick A New Approach to Restorative Justice - East Timor's Community Reconciliation Processes In Naomi Roht-Arriaza and Javier Mariezcurrena, (eds), *Transitional Justice in the Twenty-First Century, Beyond Truth versus Justice*. Cambridge University Press 2006) 176 - 205

fundamentally addressed, the valuable attempts to grow and change may falter.[1510] In particular, the *jus post bellum* analysis identified the systemic ambivalence regarding high level accountability of individuals or institutions. International actors in their own conduct have not prioritised this norm. The potential remains for donors to do so through consolidated institutional accountability mechanisms.

Second, Timor-Leste reminds us that in circumstances of legal pluralism, any rule of law or governance reform program must necessarily engage and interface between both elements of this dynamic. The formal and traditional systems link first around issues of land where competing claims will need to be prioritised to defuse land as a conflict issue. In addition, a community policing concept for security sector reform would enable the PNTL to operate as the legitimate face of the formal system and remain an actor in the traditional system. The continuation of a process analogous to the Community Reconciliation Process may have been an appropriate peace-building measure after the 2006-8 crisis and for introducing a permanent interface between the traditional systems and formal system. The absence of any international legal pronouncement on the nature of domestic law enables the use of traditional and formal legal systems under the broad ranging auspices of self-determination - but this is so broad a category as to be rendered meaningless. Greater anthropological and comparative analysis may enable donors to more constructively engage with both systems.

The stewardship conception of the *jus post bellum* approach acknowledges the risk involved in governance management in the circumstances of transition, and the approach of Timor Leste's use of trust funds is to be commended in reflecting this risk, though it could be enhanced with greater and systemic public communications. The integration of a stewardship approach to mentoring would be a welcome addition. Reform international law and policy can address more appropriate standards for mentoring and training from UNPOL, as well as the appropriate standards for peacekeepers. A unified approach that is mindful of the need for effective engagement with local police and communities, by reference to minimum language and 2-3 tours of service may go some way to alleviating the frustration and apathy surrounding the mentoring process. The absence of clear and internationally agreed security sector norms more generally may have contributed to the absence of a strategic policy for Timor-Leste. In addition, the potential to engage stewardship through traditional dispute resolution and governance structures is a further potential area of

[1510] Pat Walsh Interview (29th June 2010)

reform identified under a *jus post bellum* conception not necessarily evident in considering these fields individually.

The case of Timor-Leste demonstrates the challenges faced by fledgling nations and the limits of even maximalist international assistance by the United Nations. The task faced by Timorese governments and UN administrations and missions was immense and for their successes both actors must be commended. Yet the record also demonstrates significant challenges, and difficulties in managing the expectations of Timorese politicians and citizens. Consideration of the principles of *jus post bellum* reveals that an incoherent approach to accountability may risk impunity across the legal system. A lack of concern for stewardship in international assistance limits the effectiveness of SSR mentoring and the efficiency of international aid. Finally the political context of limited accountability for Indonesia risks a disproportionate emphasis on political reconciliation at the expense of opportunities for tangible acknowledgment and justice. Incoherence in each of these areas risks greater ineffectiveness in international assistance and in consolidating the transition of Timor-Leste. The proposals under the *jus post bellum* framework are designed to contribute to remedying these risks and pursuing integrity in the challenging circumstances of transition.

Chapter X: Conclusion

I. Introduction

This thesis has assessed whether whether an account of international engagement in transitions consistent with the principle of integrity is possible and desirable. These concluding comments distill the answers to that question offered in each chapter and identify appropriate expectations and suitable reforms to international engagement. This thesis has evaluated existing approaches of States and international organisations to assist transitional societies in the pursuit of justice, peace, security and development. Chapter I identified the relevance of transitions in global international affairs. It highlighted the pressing need for international engagement in transitions, dissatisfaction with the current approach of such engagement, and the limited finance to do so. The chapter raised the question of whether a principled and coherent approach to international engagement is possible and desirable. It proposed to examine this question by reference to the fields of transitional justice, peace-building, security sector reform and development. It noted that this relationship was not addressed in current literature, but that bi-directional relationships between these fields, peace and justice, security and development, etc, were recognised as interdependent. The chapter asked whether a broader interdependent relationship between these fields could be identified.

The chapter also examined the history of fields relevant to transitions. In providing illustrations of transitions from antiquity to present day, the chapter noted the contemporaneity of fields relevant to transitions and the potential for coherent frameworks for considering their relationships. The just war tradition, the emergence of a limited concept of sovereignty, the punitive approach of the Treaty of Versailles and Allied activities in the post World War II era all provide early examples of this potential. However, the continued dominance of a pragmatic perspective to international affairs inhibits this potential. The chapter argued that since the 1990s the trend in international engagement has been towards consensus, but has not yet produced coherence. As a result, the chapter asked the question of the limits to "successful" transitions and of international engagement to support such events. It raises the question of the conditions under which this history of activities operated and the distinct role that could be played by international actors.

The subsequent chapters answered the questions posed in Chapter I. Chapter II offered a new theoretical account of the conditions in which diverse fields operate in transitions. It identified the conditions which necessarily operate in all societies experiencing transition. This chapter built the

circumstances of transition by analogy to the circumstances of justice and politics as a basis for a coherent understanding of transitions. These circumstances drew on the common factors present in transitional societies and in particular the principal tension between high expectations and demands for public goods and low levels of civic trust and capacity to achieve them in the aftermath of gross violations of human rights and breakdown of the rule of law. The circumstances therefore made the novel identification of civic trust and the rule of law as the necessary conditions for the achievement of any of the goals of the four fields examined. In this way, and by reference to the social conventional nature of norms of civic trust, the chapter argued for the interdependence of these fields. However, the chapter also noted that the abstract and conventional nature of this interdependence meant that there remained significant risks of incoherence, overlap and tension in the practical implementation of these fields in pursuit of their goals. Chapter II thus identified common factors and conditions in the complexity of transitions and provided a means of framing the tensions and risks inherent in the pursuit of justice, peace, security and development in a new and principled fashion.

Chapter III argued that law is a necessary part of any response to transitions. The chapter examined the further risks that come with the use of law and a legal system to achieve goals such as peace and justice in the circumstances of transition. It noted the risks that are inherent in legal regulation, and the heritage of the rule of law that has been employed to mitigate those risks. It then applied the rule of law to the circumstances of transition in a fashion not addressed in existing literature or policy. The paradox of the use of law in those circumstances became apparent: that a State is faced with no choice but to use law to re-build trust in the legal system, through the rule of law. The insufficiency and perhaps impossibility of this approach soon became apparent. The chapter then provided a new and additional basis for a citizen's trust in the legal system and confidence in the rule of law: the principle of integrity. The use of integrity provided a new basis for considering the stated goals of each field of transitions coherently to make a contribution to civic trust and the rule of law in the re-constitution of a sovereign political community: a community of principle. Integrity added the requirement that such a community be one founded on equal concern for individual citizens of that society. In addition, the need for an express and sustained public commitment to this principle by public interpreters, primarily law applying officials, was introduced. The chapter then argued for coherence in the the threefold nature of this principle for international actors who seek to assist transitional societies. This approach acknowledged the implicit connections between national and international actors in achieving social change in transitions. In particular, it noted the need for international law applying officials to consider with integrity the legal framework of the transitional society, the legal

framework of their donor state or international organisation, as well as their obligation to create, promote and uphold the international rule of law. This new application of integrity to international law does not therefore presume a directly analogous political community at the international level in the international community, but rather respects the disaggregated, debated and nascent nature of global community in international affairs.

The theoretical framework in these two chapters is new, undoubtedly complex, and yet still insufficiently detailed to determine a substantive outcome in a given society. However, this framework offered a principled mechanism for evaluating the substance of international law and policy to assist transitional societies. It recognised the potential for differences in values and priorities among donor states, the international community, and such societies. The introduction of integrity to analysis of transitions called for principled compromises rather than compromised principles in the actions of international actors and the decisions of the transitional societies themselves. As a result, a framework built on integrity seeks to assess the coherence of each individual field, its constituent goals and activities, and the substantive relationship between fields. The introduction of integrity offers a new basis for considering coherence in international engagement and identifies the risk of incoherence to generate hypocrisy and illegitimacy in the activities of international actors who fail to acknowledge this responsibility.

This risk of hypocrisy and illegitimacy was most evident in the international legal regulation of these fields examined in Chapter IV. The chapter provided strong evidence that existing international law risks incoherence with damaging consequences. Despite substantive interdependence and no clear priority in their importance or sequencing, transitional justice is by far the most legally regulated of these fields in international law. Tensions between the pursuit of truth, justice and reparation and the ongoing use of amnesty in transitions reflect a structural tension in international law between conflict transformative goals of peace and justice. The tension also serves as an example of the broader contest between transformative values in each field and the desire to respect local ownership and context, as a function of self-determination and State sovereignty in international law. The present tension missed an opportunity to integrate transitional justice more closely with related processes, such as DDR and SSR, through international legal provision or regulation of conditional amnesties, involving those components. The nature of regulation in peace building prioritises flexibility and the context in each State. In this way, vague legal regulation respected the values of self-determination and non-interference in the internal affairs of individual States. It also integrated international supervision of peace and security through the UN Security Council, despite the *ad hoc* and selective nature of the

engagement of that primary UN organ in transitions and fragile States. The chapter noted that the desire for context should not be considered an overriding priority, in light of the content of the fields and potential for integration and overlap. Regulation of security sector reform was also limited, but in a disparate fashion that suggested that further technical issues, such as civil military and police-military relations, may be profitably regulated in coming years. The consequence of this combination of discrete areas of international law results in their present fragmentation and fails to articulate the conceptual and stated policy interdependence of each field. As a result, the legal framework does not enable express acknowledgement in international law of their interdependence and achievement of the ultimate goal of political community. Rather, international law *may* enable the contingent achievement of this interdependence, but does not prompt states to pursue it. In so doing, it affirms the primacy of policy frameworks and flexibility in the engagement of States and the international community in transitional societies. This affirmation reflects the continued pragmatism of such engagement and reflects the risk of incoherence, hypocrisy and illegitimacy under present international legal regulation.

The need for coherence was also reflected in Chapter V, which examined these policy frameworks in earnest. It considered the mandates and institutional frameworks of the United Nations, World Bank, European Union and OECD and then the operational frameworks employed by each institution in the relevant fields. Policy frameworks integrate the four fields examined in a number of respects. The policy frameworks were a substantive advance on international law in asserting the interdependence and substantive coherence of these four fields. The policy frameworks acknowledged the potential for transitional justice to cohere with other processes, such as DDR and SSR within the framework of OECD, UN and the EU. A major integration of the fields is the merger of peace building with the broad frameworks for engagement of development institutions, through shared peace and state building processes, focused on "fragile states". The focus on state building reflects a contextual application of the broader priority given to governance in general development frameworks of these institutions and acknowledges the centrality of States in the provision of public goods. Examination of these frameworks reveals shared concern across diverse substantive areas for prioritising local context and local ownership in the engagement of each organisation. However, limited policies articulating the meaning of local ownership fail to mitigate the risk of tension between transformative goals and respect for local context and priorities. In addition, these organisations also profess a desire to achieve coordination in their activities in each field. Emergent coordination frameworks suggest the need for shared evaluation as a platform for shared policies and programmes. The approach in the policy frameworks clearly identified that coherence is possible among the activities of international organisations. This coherence was seen

as an important reflection of the interdependence and overlap of fields relevant to transitions in these policies and the potential to pursue integrity as a result.

The primacy of policy frameworks as the normative and operational hubs of these fields in transitions affirmed the relevance and necessity of evaluating the implementation of these policies, to determine the effectiveness of a given donor or field mission, as well as the coherence of the policies themselves to achieve their stated goal. Chapter VI focused on indicators as a method and technology to assess and evaluate such policies, and hold donors and international organisations accountable to the standards they purport to achieve. The chapter argued that if these fields are interdependent and share a number of normative assumptions, this would be reflected in the shared measurement of interdependent and shared goals. However, this was not yet reflected systematically in the activities of international actors. Two primary challenges were identified in this chapter. First, the difficulty of proving a causal link between a given institution in a transitional society and change in the stated goal of that institution is significant and exacerbated by the challenges of gathering empirical data in a transitional or fragile environment. Owing to this nascent status, Chapter VI proposes the novel systemic and inter-field use of shared objects of measurement for evaluation: civic trust, the rule of law, and human rights. This new shared process of evaluation would require significant disaggregation and expansion beyond the present use of indicators, primarily for development and governance purposes, but would be less significant than the creation of multiple and competitive processes of evaluation of shared and interdependent goals across diverse fields. This process may also provide a practical basis for greater collaboration and coordination across these fields. Second, the politics and incentives of indicators made them a questionable basis for the distribution of international assistance: this in turn affirmed the primacy of an examination of the policies and politics of each transition.

In response to the deficiencies identified in Chapters V and VI, Chapter VII offered new principles for interpreting the practice of international law and policy in each field in transitions in a *jus post bellum* framework as manifestations of the principle of integrity. This framework mitigates the tension between local ownership and context and the global and cosmopolitan ambitions of international law and policy. This thesis does suggest legal reform, primarily in interpretation, with discrete substantive reforms flowing from a broad interpretive approach. However, the thesis has largely eschewed recommending significant substantive legal reforms. First, as Paul Collier noted, international law is notoriously difficult to create. An ambitious new legal framework, such as a fifth Geneva Convention on transitions, may satisfy the calls for coherence in this thesis, but seems unrealistic in the short or medium terms. Further, trends in the development of international law,

in particular the rapid development of transitional justice and security sector reform provide evidence of a broadly coherent trend and approach to a customary evolution of these areas. Moreover, a evaluative framework rooted in integrity is concerned not only with the outcome of greater coherence, but also the process undertaken by law applying officials in achieving it. Concern for process and interpretation does not necessarily arise from further legal regulation alone.

Three principles were offered as responses to structural deficiencies noted in the substantive international law and policies examined Chapters IV and V. The proposal for a consolidated accountability mechanism acknowledged the diverse institutional structures under which States and international organisations operated in transitions, but sought to address the lack of consistency between their shared concern for promoting accountability of the transitional society and their lack of accountability to the society they seek to assist. A consolidated structure would prioritise the efficacy of pursuing accountability for that transitional society, by operating in country, and by the consent of that fragile State, thereby contributing to its rule of law development. The proposal for a stewardship framework for international engagement reflects the conception of sovereignty on which the goals of each field are predicated, i.e. that the performance of sovereign functions is for the benefit of the ultimate objects of value in a State, its individual citizens. The application of this principle to the circumstances of transition, and for the activities of international actors calls for the use of mechanisms that acknowledge the limited capacity of the State organs of a transitional society to perform these sovereign functions and the limited trust that citizens have in those organs - but that the ultimate goal is the resumption of performance of those functions by the same State. As a result, consolidated trust fund mechanisms and service delivery mechanisms, such as the Independent Service Authority, were proposed. These mechanisms were proposed to be representative of State and society actors, with diminished international involvement based on improved performance in the delivery of public goods. The final principle of the *jus post bellum* framework offered is proportionality. While proportionality provides no determinative guidance for resolving value disputes, it does articulate a mechanism that enables consistent comparison between substantive diversely areas. In this regard, the use of proportionality across different areas can engender coherence in the relative weight and value given to each goal in society. The application of this principle to the circumstances of transition, reflects the argument for integrity as the legitimate concern of all public interpreters and law applying officials and ultimately all citizens. Public and express use of proportionality in the activities undertaken by the transitional government and international actors

in transitional societies would therefore contribute to building the coherence of such engagement and the integrity of such processes.

The use of these principles enables more explicit integrity in interpretation. These principles acknowledge multiple and competing justifications inherent in diverse fields of the *jus post bellum* and thus not only enable the dynamic pursuit of diverse policy positions, but also contribute to the re-constitution of sovereign political communities from transitional societies. In this way, the principles of the proposed *jus post bellum* inhibits the dark side of humanitarianism and existing deficiencies in international law and policy engagement. The *jus post bellum* framework offers a tangible and operational basis for the pursuit of greater coherence and integrity in international assistance to transitions.

The cases of Nepal and Timor-Leste affirm the potential for new insights and greater coherence through the use of the *jus post bellum* principles. Systematic consideration of accountability revealed gaps in support for the norm in UN peacekeeping recruiting standards in Nepal and the broad absence of institutional accountability of international organisations in Timor-Leste. A stewardship conception acknowledged existing use of trust fund mechanisms, but the limits of the present approach with little dedicated public communication or systemic use of such trust funds. A proportionality analysis of the fields in both States revealed a tendency towards absolute positions on transitional justice issues. The use of these principles offer perspectives on these case studies not evident from an examination of a single field and generate solutions that address systemic concerns regarding international assistance in transitions in the pursuit of integrity.

II. Integrity in Transitions

This thesis is not (merely) a high minded call to the pursuit of principles, integrity and values in such engagement. It has argued that on the present approach and attitudes of States and international organisations, on their stated goals, it is even in the pragmatic self-interest of these groups to act with integrity. An argument from integrity compels States and international institutions to stick or twist: to justify their conduct in light of their stated values, norms and goals, or reveal those values in truth to be in their self-interest. Limited interest in integrity in the international sphere is not isolated, but reflects the scandals and failings of modern Western politics that have brought the global economy to its calamitous state in late 2011. To propose renewed focus on processes of integrity in international affairs will ultimately require changes to

political culture in the political communities of donor states, and ultimately, their citizens: "we cannot expect our politicians to create a politics better than we are."[1511]

The most common criticism of this virtue of integrity is that it is utopian. It is impossible for one judge, one public interpreter, to gather the full legal system, the political values and history of a society, consider and reconcile them all and then make a decision on a given narrow and discrete issue. The impossibility of this process is exacerbated in transitions, with the intense demands from the public, overwhelming range of emotions from all sides, and minimal capacity and trust in one another to achieve common and public goods. This criticism is often levelled at the metaphor of a judicial Hercules first employed by Ronald Dworkin as necessary to fully achieve the process of integrity. It is contrasted with the "ordinary" approach to interpretation of legal and moral issues, case by case, severely limited by time, subject matter and other concerns. Dworkin compares this ordinary approach to that of an engineer building a bridge who similarly works case by case, etc. However both presuppose "a vast domain of justification...that we tend to take that structure as much for granted as the engineer takes most of what she knows for granted, but that we might be forced to reexamine the structure from time to time."[1512] The pursuit of integrity is therefore a process of reasoning:

> it aims, in the interpretive spirit, to lay principle over practice to show the best route to a better future, keeping the right faith with the past. It is, finally, a fraternal attitude, an expression of how we are united in community though divided in project, interest, and conviction. That is, anyway, what law is for us: for the people we want to be and the community we aim to have."[1513]

The process of integrity is evident across the areas considered in each chapter as the basis for coherence and its desirability. We saw tangible expressions of this in Chapter VII with three institutional and interpretive approaches proposed - accountability, stewardship and proportionality. We saw the tangible effects of that approach in the case studies - an integrated consideration of accountability in Nepal and Timor-Leste showing the potential increased role of donors and international actors in promoting domestic accountability. We saw the potential for stewardship in the trust fund mechanisms employed in both nations in some areas but not all. We saw the potential for more proportionate relationships between each of the fields pursued,

---

[1511] Stephen Carter, Integrity, (Harper Collins 1996) 227

[1512] Ronald Dworkin, Justice in Robes, (HUP 2006) 56

[1513] Ronald Dworkin, Law's Empire, (Hart Publishing 1988) 413

especially increased integration between SSR and transitional justice and broader mechanisms of social reconciliation that can balance between a justice and peace component in a contextual fashion. We saw it in the need for heightened communication to try to achieve the public use of integrity in stewardship. We saw practical suggestions and proposals to make integrity a tangible component of reformed international policy and practice.

III. Expectations for Transitions

Nonetheless, laws, policy frameworks, indicators and theories can have a dulling effect on one's expectations of transitions. Field interviews, conducted in a calm long after hostilities have ceased, can give a false and diminished sense of the trauma, uncertainty and suffering experienced in Nepal and Timor-Leste, among many other transitions. A focus on legal and institutional processes doubtless contributes to this distance from the immediate concerns and experiences of individual men, women and children in transitional societies. This feeling of distance is mirrored in those laws, frameworks and policies, that place emphasis on local context and ownership, but fail to achieve any explicit sense of the immense harm, suffering, fear and frustration in transitional societies. As David Kennedy has noted "It is not that forms disappoint or arguments fail to persuade, but that people get hurt and no one notices or feels responsible."[1514]

That issues of transition involve deep questions of morality, ethics and spirituality are beyond question. The political nature of the theory examined and expounded in Chapters II and III may seem cold and impersonal, focused on civic relationships alone. It makes little express acknowledgement or provision for the range of feelings and motivations that exist in transitional societies and in those who seek to assist them, in good faith and in self-interest. My personal experiences of transitions are minimal. In consequence of this, the focus of this work has been on the stated aims of those already involved: past and present transitions, and the States and international organisations that seek to assist them. Concern for the publicly stated goals, statements and commitments of these societies and groups is only one tangible but crude way to examine and assist. We have examined international law and policies that presume to address the diverse and unimaginable experience of those who endure gross violations of human rights, armed conflict or authoritarian rule. Rousseau noted that in the move from a state of nature to a State, "the voice of duty takes the place of physical impulses and right of appetite", so that man "is forced to act on different principles, and to consult his reason before listening to his

---

[1514] David Kennedy, The Last Treatise: Project and Person [2006] German Law Journal 990

inclinations."[1515] So, in noting the shared structural concern of fields in transitions in Chapter III to contribute to the re-constitution of a sovereign political community, this thesis privileges public reason over social emotions, and may risk further raising the expectation of changing social behaviours, attitudes and perceptions through the use of law, international law, and international policy.

Yet the opposition of law and social norms, between reason and emotion, that is inherent in the positivist approach to legal scholarship, may ultimately be an acutely unhelpful distinction in the circumstances of transition. The examination of law in this thesis has been concerned with coherence. Not merely internal coherence, that is, the lack of a contradiction or tension in the international legal and policy frameworks. This has been a significant feature, but not the fundamental one. The ultimate examination of coherence has been through the prism of integrity. Integrity has been the basis by which this thesis sought to evaluate the role and relevance of international law, policies, and activities in the diverse context of societies in transitions. The call to a responsible interpretation of moral and legal questions that arise in transitions cannot be divorced from consideration of the personal and ethical questions that also arise.

At its most fundamental level, this thesis has been concerned with equality. In Chapter III we identified that these fields of transitions seek to contribute to a particular relationship between state and citizen and between citizens themselves. The relationship is not novel, but reflects the implicit liberal heritage of these fields and international law more generally: a relationship of equal concern between State and citizen, and citizen to citizen. This thesis also sought to pursue equality in the treatment of transitional societies by the international community of States - that an appropriate expectation for transitional societies, and for the aid and assistance of the international community was not the romantic aim of turning these societies into utopias. The paternalism inherent in that view failed to see those societies as objects of respect. Rather, an appropriate goal is to enable those societies to act responsibly, with integrity, in their own choices: to make political decisions, pursue public goods, and reckon with their past, in a manner of their choosing, but also in a fashion that sees each citizen of that society as worthy of equal respect and concern.

In that way, these fields, and international intervention are guilty as charged of "liberal interventionism". Yet the heart of such endeavours, when considered with integrity, and not

---

[1515] Jean-Jacques Rousseau, The Social Contract, book 1, sec 8

merely with pragmatism, is not to clone a given liberal democracy, but to ensure that a society, which has reached the circumstances of transition, re-constitutes itself as a sovereign political community in a responsible fashion, one worthy of its self-respect, through the respect and trust of its citizens, and worthy of the respect of other societies in nations and States. Concern with coherence and integrity is founded on the deep commitment of that principle to the fundamental equality of all individuals, all citizens, as being of equal worth and respect in political community. That equal worth concern and respect are blatantly and egregiously violated in transitions is evident from any of the cases used to illustrate this thesis. Respect for individual citizens after the commission of such crimes concerns the profound need to acknowledge the choices of victims and survivors in a sovereign community that recognises them as the ultimate objects of value and the only legitimate persons to determine the fate of that society:

> "The crux of the matter is, of course, the question of forgiveness. Forgetting is something that time alone takes care of, but forgiveness is an act of volition, and only the sufferer is qualified to make the decision."[1516]

Pursuing integrity responds to a past legacy of gross violations of humsan rights, in a fashion that promotes a sovereign political community predicated on equal concern for each citizen: not merely in formal legal change, but by using law to respond in respectful acknowledgment of the fundamental failure of a society to prevent such crimes, an approach based on integrity narrows the range of distrust in social norms and asks each citizen to treat one another responsibly - by the same standard with which they are treated by the transitional State and the international donors and organisations - by the same ethical standards by which we hope to treat one another. It is with this in mind that we can finally set an appropriate expectation for the role of international law and international policy in transitional societies: not to determine outright how a society reckons with its past, nor to provide templates, road maps or frameworks for settling its future, but to affirm the necessary responsibility for *any* transition to a sovereign political community of pursuing integrity, based on civic trust and the rule of law:

> "Civilisation ... does not expect that you can make war impossible. It does expect that your juridical action will put the forces of international law, its precepts, its prohibitions and, most of all, its sanctions, on the side of peace, so that men and women of good will, in all countries, may have "leave to live by no man's leave, underneath the law."[1517]

[1516] Simon Wiesenthal, The Sunflower, (Shocken Books, 1998) 98

[1517] Second Day, Wednesday, 11/21/1945, Part 04, in Trial of the Major War Criminals before the International Military Tribunal. Volume II. Proceedings: 11/14/1945-11/30/1945. [Official text in the English language.] Nuremberg: IMT, 1947, 98-102.

Bibliography

Books

Abu-Nimer M (ed) *Reconciliation, Justice and Coexistence: Theory and Practice (Lexington Books 2001)*

Anderson M, *Do No Harm: How Aid Can Support Peace - or War* (Lynne Rienner Publishers, 1999)

Anghie A, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005)

Aristotle, *The Politics,* available at http://www.gutenberg.org/ebooks/6762

_____, *The Constitution of Athens,* Ch XXXIX, available at http://www.gutenberg.org/ebooks/26095

Alfredsson G (ed) *The Inspection Panel of the World Bank: A Different Complaints Procedure* (Springer Publishing 2001), 83

Alston P and Robinson M, *Human Rights and Development: Towards Mutual Reinforcement* (OUP 2005)

Arndt C and Oman C, *Use and Abuses of Governance Indicators* (OECD 2006)

Arndt HW, *Economic Development: The History of an Idea* (University of Chicago Press 1989)

St Augustine, *Concerning the City of God against the Pagans* (Penguin 1984)

Austin J, *The Province of Jurisprudence Determined* (1832) W.E. Rumble (ed), (Cambridge University Press 1995)

Axelrod R, *The Evolution of Cooperation* (Basic Books, 2006)

Baier A, *Moral Prejudices: Essays on Ethics* (HUP 1995)

Bass G, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press 2002)

Bassiouni MC (ed.), *Post-Conflict Justice* (Transnational, 2002)

Behrman G, *The Most Noble Adventure: The Marshall Plan and the Time When America Helped Save Europe*, (Free Press 2007)

Bell C, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (OUP 2008)

____, *Peace Agreements and Human Rights* (OUP 2000)

Bennis W, *On Becoming a Leader* (Addision-Wesley 1989)

Bhattarai R and Cave R (eds) *Changing Security Dynamics in Nepal* (Nepal Institute for Policy Studies)

Bingham T, *The Rule of Law* (Allen Lane 2010)

Binchy W (ed), Timor-Leste: Challenges for Justice and Human Rights in the Shadow of the Past (Clarus Press 2009)

Boister N and Cryer R, *The Tokyo International Military Tribunal - A Reappraisal* (OUP 2008)

Boisson de Chazournes L, Cesare R and Mackensie R, (eds.) *International Organizations and International Dispute Settlement: Trends and Prospects* (Transnational Publishers 2002)

Boraine A, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* (OUP 2006)

Borer TA (ed) *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies*, (University of Notre Dame Press, 2006)

Born H, eta al (eds.) H*andbook for Parliamentarians No 5, Oversight of the Security Sector: Principles, Mechanisms and Practices*, IPU/DCAF, Geneva, Belgrade, 2003

Bowden B, Charlesworth H and Farrall J (eds), *The Role of International Law in Rebuilding Societies after Conflict* (CUP 2009)

Brown G, Langer A, and Stewart F, *A Typology of Post-Conflict Environments: An Overview* (UNDP 2007)

Brunsson N, T*he Organisation of Hypocrisy: Talk, Decisions and Actions in Organisations* (Abstrakt Forlag, 2002).

Bueno de Mesquita B & Root H (Eds.), G*overning for prosperity* (Yale University Press 2000)

Caplan R, *International Governance of War Torn Territories* (OUP 2006)

Carothers T, *Promoting the Rule of Law Abroad: In Search of Knowledge* (Carnegie Endowment for International Peace 2006)

Carter S, *Integrity*, (Harper Collins 1996)

Chetail V (ed), *Post-Conflict Peacebuilding* (OUP 2009)

Chesterman S, *You the People: The United Nations, Transitional Administration and State-Building* (OUP 2004)

Collier P, *Breaking the Conflict Trap: Civil War and Development Policy* (World Bank 2003)

_____, *Plundered Planet* (OUP 2010)

_____, *Development and Conflict*, Center for the Study of African Economies, Department of Economics, Oxford University, October 2004.

Colombatto E (ed) *The Elgar Companion To The Economics Of Property Rights* (Elgar 2006);

Commission on the Measurement of Economic Performance and social Progress, *Survey of Existing Approaches to Measure Socio-Economic Progress* (2011)

Commission on Human Security, *Human Security Now* (2003)

Cutter Patel A, de Greiff P and Waldor L, *Disarming the Past: Transitional Justice and Ex-combatants* (Social Science Research Council 2009)

de Greiff P (ed) *The Handbook of Reparations*, (OUP 2006)

Decaux E, *International Standard Principles Governing the Administration of Justice Through Military Tribunals*, Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, (DCAF 2010)

De Shaw Rae J, Peace-Building and Transitional Justice in East Timor (First Forum Press 2009)

De Soto H, *The Mystery of Capital* (Black Swan 2000)

Dobbins J, *The UN's Role in Nation Building* (Rand 2006)

Drobak J (ed), *Norms and the Law* (Cambridge, CUP, 2006)

Drumbl M, *Atrocity, Punishment and International Law* (CUP 2007);

Dueck J, Guzman M, and Verstappen B, *Events Standard Formats, A Tool for Documenting Human Rights Violations* (HURIDOCS, 2001)

Duthie R and De Greiff P, (eds) *Transitional Justice and Development: Making Connections* (SSRC 2009)

Dworkin R, *Justice in Robes*, (HUP 2006)

_____, *Law's Empire*, (Harvard University Press (Belknap), 1986)

_____, *A Matter of Principle* (OUP 1985)

_____, *Justice for Hedgehogs* (Belknap Harvard, 2011)

Easterly W, *The Elusive Quest for Growth: Economists' Adventures and Misadventures in the Tropics* (MIT Press 2001)

Easterly W, (ed) *Reinventing Foreign Aid* (OUP 2008)

Ebnöther, A and Philipp F (eds.), *After Intervention: Public Security Management in Post-Conflict Societies: From Intervention to Sustainable Local Ownership* (Vienna: Geneva Centre for the Democratic Control of Armed Forces and Austrian National Defense Academy, 2005)

The Encyclopedia of Genocide and Crimes Against Humanity (Macmillan Reference USA, 2004)

Elster J, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge University Press 2004)

Escobar A, *Encountering development: the making and unmaking of the Third World* (Princeton University Press 1995)

Finnis J, *Natural Law and Natural Rights*, (Oxford University Press, 1980)

Franck T, *Fairness in international law and institutions* (OUP 1998)

Fuller L, *The Morality of Law,* (Yale University Press 1969)

Galtung J, *Peace, War and Defense—Essays in Peace Research, Vol. 2* (Christian Eljers, 1975)

Ghani A and Lockhart C, *Fixing Failed States: A Framework for Rebuilding a Fractured World* (OUP 2009)

Giddens A, *Modernity and Self Identity: Self and Society in the Late Modern Age* (Polity Press, 1993)

Goldsmith J and Posner E, *The Limits of International Law* (OUP 2005)

Grotius H, *De Jure Belli ac Pacis*

Harrell P, *Rwanda's gamble: gacaca and a new model of transitional justice* (iUniverse 2003)

Hart HLA, *The Concept of Law,* (OUP, 1994)

Hayner P, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (Routledge 2010)

Henkin L, *How nations behave: law and foreign policy*, Columbia University Press (1979)

Hurwitz A (ed.) *Civil War and the Rule of Law* (Boulder, Lynne Rienner Publishers, 2008)

International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: A Practitioner's Guide,* (2006)

James A, *Peacekeeping in International Politics* (Palgrave Macmillan 1990)

Johnson JT, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (Princeton University Press 1981)

Johnstone I, *Peace Operations Literature Review*, (Center on International Cooperation 2005)

Kant I, *Perpetual Peace and other Essays* trans. T Humphrey (Hackett Publishing 1983)

Kennedy D, *The Dark Side of Virtue: Reassessing International Humanitarianism* (Princeton University Press, 2005)

Keynes JM, *The Economic Consequences of Peace* (1919) available at http://www.gutenberg.org/ebooks/15776

Klein L and Pomer M (eds) *The New Russia: Transition Gone Awry* (Stanford University Press 2001)

Klein N, *The Shock Doctrine: The Rise of Disaster Capitalism* (Metropolitan Books 2007)

Koskenniemi M, From Apology to Utopia: The Structure of International Legal Argument (Cambridge University Press 2005)

Kritz N, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (USIP 1995)

Law D, (ed) *Inter-Governmental Organisations and Security Sector Reform*, (DCAF Publication 2008)

Ledrarch JP, *Building Peace - Sustainable Reconciliation in Divided Societies* (USIP 1997)

Lewis D, *Convention: A Philosophical Study* (Harvard University Press, 1969)

Locke J, Two Treaties on Government, (first published 1689, CUP 2004)

Lopes C and Theisohn T (eds) *Ownership, Leadership and Transformation: Can We Do Better for Capacity Development?*. (UNDP 2003)

Luckham R and Cawthra G, *Governing Insecurity* (Zed Books 2004);

Luhmann N, *Trust and Power: Two Works by Niklas Luhmann* (Wiley 1979)

David M. Malone (ed), The UN Security Council: From the Cold War to the 21st Century (Lynne Rienner 2004)

Mallinder L, *Amnesty, Human Rights and Political transitions: Bridging the Peace and Justice Divide* (Hart Publishing 2008)

Mani R, *Beyond Retribution: Seeking Justice in the Shadows of War* (Polity 2002)

Mayer-Rieckh A and de Greiff P, *Justice as Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council and the International Center for Transitional Justice, 2007)

Miligram S, *Obedience to Authority* (Harper Perennial, 1974)

Murphy C, *The UNDP: A Better Way?* (CUP, 2006)

Narayan D, Chambers R, Shah Patti Petesch M, *Voices of the Poor: Crying Out for Change*, (OUP 2000)

North D, Wallis JJ, and Weingast B, *Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History* (CUP 2009)

Archdiocese of Sao Paulo, *Brasil: Nunca Mais/Torture in Brasil: A Shocking Report on the Pervasive Use of Torture by Brazilian Military Governments 1964-1979* ed Joan Dassin, trans. Jaime Wright (University of Texas Press, 1986)

Nunca Mas: The report of the Argentine National Commission of the Disappeared (Farrar, Straus and Giroux, 1986)

Nussbaum M, Creating Capabilities: The Human Development Approach (Harvard University Press 2011);

OECD Handbook on Security Sector Reform: Supporting Security and Justice (OECD 2008)

Orford A, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press, 2003)

DA Orr, *Treason and the State: Law, Politics, and Ideology in the English Civil War* (Cambridge University Press 2002) 28

Mark Ostwald, *From popular sovereignty to the sovereignty of law: law, society and politics in fifth century Athens* (University of California Press 1986)

Phuyal H and Urscheler M (eds.) *The Security Sector Legislation of the Federal Democratic Republic of Nepal: Commentaries*, (DCAF 2009)

Pillay S and Lekha Sriram C, *Peace versus Justice?: The Dilemmas of Transitional Justice in Africa*, (James Currey 2011)

Pogge T (eds), *Global Ethics: Seminal Essays*, (Paragon House 2008)

Posner E, *Law and Social Norms,* (HUP, 2002)

Power S, *A Problem from Hell: America and the Age of Genocide* (Harper Perennial 2003)

Putnam R, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton University Press, 1993)

Ramm J, Defining National Security: the non-military aspects Pew Project on America's Task in a Changed World (Council on Foreign Relations 1993)

Rawls J, *A Theory of Justice,* (OUP, 1999);

———, *The Law of Peoples* (HUP 2001)

Raz J, *Practical Reason and Norms* (Hutchinson, 1975)

____, *The Authority of Law,* (OUP, 1979)

Geoffrey Robertson, *The Tyrannicide Brief: The Story of the Man who sent Charles I to the Scaffold* (Vintage Books 2006)

Roht Arriaza N and Mariezcurrena J, (eds) *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (CUP 2006)

Rostow WW, *The Stages of Economic Growth: A Non-Communist Manifesto* (Cambridge University Press 1960)

Rotberg R (ed) *When States Fail: Causes and Consequences* (Princeton University Press 2004)

Rotberg R and Thompson D (eds) *Truth v Justice: The Morality of Truth Commissions* (Princeton University Press 2000)

Rouquié A, *The Military and the State in Latin America,* (Berkeley, CA: University of California Press, 1987)

Rousseau J, *The Social Contract*, book 1, sec 8

Rynn S and Hiscock D *Evaluating for security and justice challenges and opportunities for improved monitoring and evaluation of security system reform programmes* (Saferworld 2009)

Sands P, *Lawless World: America and the Making and Breaking of Global Rules* (Allen Lane 2005)

Scott J, *Seeing like a State* (Yale University Press 1998)

Scott Z, *Literature Review on State-Building* (GSDRC 2007)

Searle J, *Speech Acts* (Cambridge University Press, 1969)

Seldon A, *Trust: How we lost it and how to get it back* (Biteback Publishing, 2009)

Sen A and Nussbaum M, *The Quality of Life* (Clarendon Press 1993)

Sen A, *Development as Freedom* (Anchor Books, 1999)

____, *The Idea of Justice*, (Allen Lane 2009)

Sigrun Skogly, The Human Rights Obligations of the World Bank and the IMF. (Cavendish Publishing 2003)

Simma B (ed.). *The Charter of the United Nations: A Commentary* Vol. I.(OUP 2002)

Smith D, *Towards a Strategic Framework for Peace-Building: Getting Their Acts Together. Overview Report of the Joint Utstein Study of Peace-building*, (Royal Norwegian Ministry of Foreign Affairs 2004)

Stahn C and Kleffner J (eds) J*us Post Bellum: Towards a Law of Transition from Conflict to Peace* (TMC Asser Press 2008)

Stahn C, *The Law and Practice of International Territorial Administration* (CUP 2008)

Stepan A, *Rethinking Military Politics: Brazil and the Southern Cone*, (Princeton, NJ: Princeton University Press, 1988)

Stigilitz J, *The Three Trillion Dollar War: The Truth Cost of the Iraq Conflict* (WW Norton 2008)

Henry L. Stimson Diaries, vol. 48, 26 August-3 September 1944

St. John Macdonald R et al, THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS (1993)

Stover E and Weinstein H (eds), My Neighbor, *My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, (Cambridge University Press, 2005)

Suarez F, *The Three Theological Virtues*, Disputation XIII

Tadjbakhsh S, & Chenoy A, *Human Security: Concepts and Implications* , (Routledge, 2006)

Teitel R, *Transitional Justice* (OUP 2000)

Thapa D, *A Kingdom Under Siege: Nepal's Maoist Insurgency*, 1996 to 2004 (London: Zed Books, 2007), 55

Thompson EP, *Whigs and Hunters* (Pantheon Books 1975)

Trebilcock M and Daniels R, *Rule of law reform and development: charting the fragile path of progress* (Edward Elgar Publishing 2008)

Trubek D and Santos A (eds), *The New Law and Economic Development: A Critical Reappraisal,* (CUP 2006)

Tucker R, (ed) *The Marx-Engels Reader* (1972)

UNDP, *South Africa: The Challenge of Sustainable Development* (UNDP 2003)
UNDP, Human Development Report 1994 (UNDP 1994)

USAID, *Handbook of Democracy and Governance Program Indicators* (U.S. Agency for International Development, 1998).

Uvin P, *Aiding Violence: The Development Enterprise in Rwanda* (Kumarian Press 1998)

Van Der Merwe H, Baxter V, Chapman M, *Assessing Transitional Justice: Challenges for Empirical Research* (2009, USIP)

Vera Institute of Justice, *Measuring Progress toward Safety and Justice: A Global Guide to the Design of Performance Indicators across the Justice Sector* (2003)

Vera Institute of Justice, *Global Guide to Performance Indicators* (2003)

de Vitoria F, *De Indis et de iure belli relectiones*

Waldron J, *Law and Disagreement* (OUP 2001)

_____, *Torture, Terror, and Trade-offs: Philosophy for the White House*, (OUP 2010)

Walzer M, *Just and Unjust Wars* (3rd ed) (Basic Books, 2000), 21-22

Walzer M, *Regicide and Revolution: Speeches at the Trial of Louis XVI* (Columbia University Press 1993)

Warren M (ed) *Democracy and Trust* (CUP 1999)

Watson CA, *U.S. national security: a reference handbook (ABC-CLIO*, 2008)

Weber M, *The Protestant Ethic and the Spirit of Capitalism* (Routledge Classics 1930 Reprinted 2006)

_____, *The Theory of Social and Economic Organization* (Free Press 1964)

Welsh J (ed) *Humanitarian Intervention and International Relations.* (Oxford University Press, 2004)

World Bank, World Development Report 2011 (World Bank 2011)

Whelpton J, *A History of Nepal* (Cambridge University Press, 2007)

Wiesenthal S, *The Sunflower*, (Shocken Books, 1998)

World Bank, *World Development Report: The State in a Changing World* (World Bank 1997)

World Bank, *Review of World Bank Conditionality,* (World Bank 2005)

The World Bank Inspection Panel, *Accountability at the World Bank: The Inspection Panel at 15 Years* (World Bank 2009)

Woodhouse and Ramsbotham O (eds) *Peacekeeping and Conflict Resolution* (Frank Cass & Co Ltd, 2000)

Articles

Allen J, "Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission" (1999) 49 University of Toronto Law Review 315

Alston P, "Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals" (2005) 27 Human Rights Quarterly 755–829

Arthur P, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice' (2009) 31 Human Rights Quarterly 321

Arrow K "Gifts and Exchanges", (1972) 1(4) Philosophy and Public Affairs 343, 357

Aukerman M, "Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice" (2002) 39 Harvard Human Rights Journal 39

Babu Babu R, "The United Nations Convention Against Corruption: A Critical Overview" (March 1, 2006). Available at SSRN: http://ssrn.com/abstract=891898;

Babo-Soares D, "Nahe Biti: The Philosophy and Process of Grassroots Reconciliation (and Justice) in East Timor", (2004) 5(1) The Asia Pacific Journal of Anthropology 15-33

Bantekas, "Corruption as an International Crime and Crime Against Humanity" (2006) 4 JICJ 466-484

Barnett M, Kim H, O'Donnell M, and Sitea L, "Peacebuilding: What Is in a Name?" (2007) 13 Global Governance 35–58

Barnett M, "The New United Nations Politics of Peace: From Juridical Sovereignty to Empirical Sovereignty", (1995) *Global Governance* 1(1) 79-97

_____, "Building a Republican Peace Stabilizing States after War" (2006) 30(4) International Security 87-112

Barsh RL, "Measuring Human Rights: Problems of Methodology and Purpose", (1993) 15(1) Human Rights Quarterly

Bardhan P, "Corruption and Development: A Review of the Issues" (1997) 35(3) Journal of Economic Literature 1320-1346;

Bass G, "Jus Post Bellum" (2004) 32(4) Philosophy & Public Affairs 384-412;

Bell C, Campbell C and Ní Aoláin F, "Transitional justice: (re)conceptualising the field", (2007) 3(2) International Journal of Law in Context 81–88

Bell C, "Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'" (2009) 3 The International Journal of Transitional Justice 5–27, 13

———, "Peace Agreements: Their Nature and Legal Status," (2006) 100 (2) American Journal of International Law 373–412

Bell E, "The World Bank in fragile and conflict-affected countries" (Saferworld 2008) 19

Benvenisti E, "The Conception of International Law as a Legal System", 50 German Yb Int'l L. 393 (2008), 10

Besson S, "The Authority of International Law — Lifting the State Veil"(2009) 31 Sydney Law Review 343

Bicchieri et al, "Trustworthiness is a social norm, but trusting is not" (2011) 10(2) Politics, Philosophy & Economics 173

Bold T, Collier P and Zeitlin A, "The Provision of Social Services in Fragile States: Independent Service Authorities as a New Modality", 6

Bonafede M.C., "Here, there, and everywhere: assessing the proportionality doctrine and US uses of force in response to terrorism after the September 11 attacks", (2002) 88 Cornell LR 155, 163-164;

Boon K, "Obligations of the New Occupier: The Contours of a Jus Post Bellum", (2008) 31 Loyola International &. Comparative Law Review 101

———, "Legislative Reform in Post-Conflict Zones" (2005) 50 McGill Law Journal / Revue De Droit de McGill, 3, 41

Boraine A, "Transitional Justice: A Holistic Interpretation"(2006) 60(1) Journal of Int. Affairs 17

Brahm E, "Uncovering the Truth: Examining Truth Commission Success and Impact", (2007) 8 International Studies Perspectives 16–35

Brahm H, "Uncovering the Truth: Examining Truth Commission Success and Impact" (2007) 8 International Studies Perspectives 16-35

Bryden A, From Policy to Practice: the OECD's Evolving Role in Security System Reform, Geneva Centre for the Democratic Control of Armed Forces (DCAF) Policy Paper – No22, 4

Call C, Knowing Peace When You See It, (UNDP, 2007), http://www.undp.org/cpr/content/economic_recovery/Background_3.pdf.

Call C and Cousens E, "Ending Wars and Building Peace: International Responses to War-Torn Societies", (2008) 9 International Studies Perspectives 2008 1–21

Cameron F, "The European Union and Conflict Prevention", Background Paper Prepared for the Project *European Action on Small Arms and Light Weapons and Explosive Remnants of War,* 4

Cannizzaro E, "The Role of Proportionality in The Law of International Counter Measures" (2001) 12 European Journal of International Law 88

Carothers T, "The End of the Transition Paradigm" (2002) 13(1) Journal of Democracy 5-21

Chauvet, L & Collier, P & Hoeffler, A The Cost of Failing States and the Limits of Sovereignty (UNU-WIDER 2007)

Chesterman S, "Ownership in Theory and in Practice: Transfer of Authority in UN Statebuilding Operations" (2007) 1(1) Journal of Intervention and State Building 4

_____, "An International Rule of Law?" (2008) 56(2) American Journal of Comparative Law 331-61

Chimni BS, "International Institutions Today: An Imperial Global State in the Making" (2004) 15(1) European Journal of International Law 1-37

Chuter D, "Understanding Security Sector Reform", 4(2) (2006) Journal of Security Sector Management, 7

Cobb C and Rixford C, "Lessons Learned from the History of Social Indicators" (Redefining Progress, San Francisco, 1998), available at www.rprogress.org/publications/1998/SocIndHist.pdf (last checked on 24th June 2009), 1

Cockayne J, "The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals" (2005) 28 Fordham Int'l L.J. 616

Cohen J, "The Role of International Law in Post-Conflict Constitution-Making: Towards a Jus Post Bellum for "Interim Occupations" (2006–07) 51 New York Law School Law Review 497

Collier P, "Law and Codes for the Resource Curse", (2008) 11 Yale Hum. Rts. & Dev. L.J. 9, 26

———, Post-Conflict Recovery: How Should Policies be Distinctive? (2007), 2

_____, On the Economic Consequences of Civil War, *Oxford Economic Papers* 1999

Collier P, Hoeffler A and Rohner D, "Beyond Greed and Grievance: Feasibility and Civil War", CSAE, Oxford (2007) Helping Hand – Aid to Failing States, CSAE, Oxford. available at http://users.ox.ac.uk/%7Eeconpco/research/pdfs/HelpingHand-AidtoFailingStates.pdf (accessed 28 September 2011)

Cooter R, "Expressive Law and Economics" (1998) 27 J Legal Stud 585, 594-5

Crenzel E, "Argentina's National Commission on the Disappearance of Persons: Contributions to Transitional Justice" (2008) 2(2) IJTJ 173-191

Davis K and Kruse M "Taking the Measure of Law: The Case of the Doing Business Project"

Davis K and Treblicock M, "The Relationship between law and development: the optimists versus the sceptics" (2009) 51(1) American Journal of Comparative Law 57

Davis K, Kingsbury B, Engle Merry S, "Indicators as a Technology of Global Governance", available at: http://ssrn.com/abstract=1583431, 1

Davis K, "What do Rule of Law Variables Tell Us About the Rule of Law?" (2004-2005) 26 Mich. J. Int'l L. 160-1

de Greiff P, "Transitional Justice, Security and Development", (2011) World Bank World Development Report 2011 Background Paper

_____, Theorising Transitional Justice, 29 (on file with author) (parenthesis own)

Deen-Racsmany Z, The Amended UN Model Memorandum of Understanding: A New Incentive for States to Discipline and Prosecute Military Members of National Peacekeeping Contingents? Journal of Conflict & Security Law (2011), 1–35

_____, "Prosecutor v. Taylor : The Status of the Special Court for Sierra Leone and Its Implications for Immunity" (2005) 18 Leiden Journal of International Law 299–322

Delonis R, "International Financial Standards and Codes: Mandatory Regulation without Representation" 36 NYU J Int'l L & Pol (2004) 563

Dijkzeul D,"The united nations development programme: The development of peace?", (1998) 5(4)International Peacekeeping, 92-119

Dolan et.al "Evaluation of UNHCR's repatriation and reintegration programme in East Timor,1999- 2003." United Nations High Commissioner for Refugees Evaluation and Policy Analysis Unit EPAU/2004/02 (Feb. 2004)

Doyle M, "The John W. Holmes Lecture: Building Peace", (2007) 13 Global Governance 1–15

Drumbl M, Accountability for Property Crimes and Environmental War Crimes: Prosecution, Litigation, and Development, ICTJ 2009

Duthie R, "Toward a Development-sensitive Approach to Transitional Justice" (2008) 2 (3) The International Journal of Transitional Justice 292-309

Dworkin R, "Hart's Postscript and the Character of Political Philosophy" (2004) 24(1) Oxford Journal of Legal Studies 1-37

_____, "Hard Cases" (1975) 88 Harvard Law Review 1057

Egnell R, "The organised hypocrisy of international state-building", (2010) 10(4) Conflict, Security & Development, 465-491

Ermisch J, Gambetta D, Laurie H, Siedler T, and Noah Uhrig SC, "Measuring people's trust"(2009) 172 4 J. R. Statist. Soc. A 749–769

Faria, F. and Sherriff A "EU Policies to Address Fragility in Sub-Saharan Africa". Background paper for the European Report on Development 2009, 5

Fierens J, "Gacaca Courts: Between Fantasy and Reality" (2005) 3 Journal of International Criminal Justice 896-919

Fletcher L and Weinstein H, "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation" (2002) 24(3) Human Rights Quarterly 573-639

Floyd R, "Human Security and the Copenhagen School's Securitization Approach: Conceptualizing Human Security as a Securitizing Move" (2007) 5 Human Security Journal 38

Fithen C, "The Legacy of Four Vetting Programs: An Empirical Review", ICTJ February 2009

Fitzpatrick D. Land Policy in Post-Conflict Circumstances: Some Lessons from East Timor. Archived in East Timor Law Journal (2001)

Fischer S, "Socialist Economy Reform: Lessons of the First Three Years", (1993) 83(2) The American Economic Review 390-393

Fox G, 'The Right to Political Participation in International Law' (1992) 17 Yale Journal of International Law 539; UDHR A21(3);

Franck T, "On Proportionality of Countermeasures in International Law" (2008) 102 AM. J. INT'L L. 715;

_____, "Proportionality in International Law" (2010) 4(2) Law & Ethics of Human Rights 231, 242

_____, "The Emerging Right to Democratic Governance" 1992 American Journal of International Law 46

Gallie WB, 'Essentially Contested Concepts' (1955-1956) 56 Proceedings of the Aristotelian Society 167;

Gardam J.G., "Proportionality and force in international law" (1993) 87 American Journal of International Law 391,

Glasius M, "What is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court's First Investigations (2009) 31 Human Rights Quarterly 496-520

Gleditsch N et al, "Armed Conflict 1946-2001: A New Dataset" (2002) 39 Journal of Peace Research 615

Gofur, "A Panoptic Study of Corruption" (2006) 1(1) Opticon 1826;

Gordon R and Sylvester J, "Deconstructing Development" (2004) 22(1) Wisconsin International Law Journal 2

Grant R & Keohane B, "Accountability and Abuses of Power in World Politics" (2005) 99(1) Am. Pol. Sci. Rev. 29

Grootaert C and van Bastelaer T, Understanding and Measuring Social Capital: A Synthesis of Findings and Recommendation from the Social Capital Initiative, *Social Capital Initiative Working Paper No. 24,* 7-8

Hafner G, "Accountability of International Organisations" 97 ASIL Proceedings (2003) 236

Hänggi H, Conceptualising Security Sector Reform and Reconstruction, DCAF Yearbook 2004, 13

Harrington A, "Ethnicity, Violence, & Land and Property Disputes in Timor-Leste" (on file with author), 16
————, "Institutions and the East Timorese Experience" 2006 ETLJ 7

Hansen SJ, "Independent Service Authority and Compact for Service Delivery in Fragile States and Post-Conflict Settings", NIRB Working Paper 2008: 119, 3

Harbom L and Wallensteen P, "Armed Conflicts, 1946-2008", (2009) 46(4) *Journal of Peace Research*

Hayner P, "Fifteen Truth Commissions--1974 to 1994", (1994) 16(4) Human Rights Quarterly 597-655

Heathershaw J, "Unpacking the Liberal Peace: The Dividing and Merging of Peacebuilding Discourses", (2008) 36 Millennium - Journal of International Studies 597

Hefeker C and Michaelowa K, "Can Process Conditionality Enhance Aid Effectiveness? The Role of Bureaucratic Interest and Public Pressure" (2005) 122(1-2) Public Choice January 2005 159-175, 174

Hendrickson D, "A Review of Security-Sector Reform", (1999) The Conflict, Security & Development Group Working Papers Number 1

Hohe T, "Justice without judiciary in East Timor" (2003) 3(3) Conflict, Security & Development 335 — 357

Hood L, "Missed Opportunities: The United Nations, Police Service and Defence Force Development in Timor- Leste, 1999-2004", *Civil Wars*, vol. 8, no. 2 (June 2006), pp. 143-162.

Horwitz M, "The Rule of Law: An Unqualified Human Good?" (1977) 86 Yale Law Journal 561 [349]

Hunt T, 'Whose Truth? Objective Truth and a Challenge for History' (2004) 15 CLF 193

Ignatieff M, "Articles of faith," Index on Censorship, (1996) 25(5) 172 110- 122

Jelin E, 'Public Memorialization in Perspective: Truth, Justice and Memory of Past Repression in the Southern Cone of South America' (2007) 1 IJTJ 138

Kaplan S, "Identity in Fragile States: Social cohesion and state building" (2009) 52(4) Development 466–472

Kaufmann D and Kraay A, "Governance Indicators: Where Are We, Where Should We Be Going?" 23(1) World Bank Research Observer (OUP 2008) 1

Kaufmann D, "Governance Matters" (with A. Kraay and P. Zoido Lobaton) *Policy Research Working Paper 2196*, The World Bank: Washington D.C., October 1999, available at http://www.worldbank.org/wbi/governance/pubs/govmatters.html (last checked 24th June 2009)

_____, "Rethinking Governance Matters: Empirical Lessons Challenge Orthodoxy" (March 2003).

Kelly M et al, "Legal aspects of Australia's involvement in the International Force for East Timor", (2001) 841 International Review of the Red Cross

Kennedy D, "The Last Treatise: Project and Person" [2006] German Law Journal 990

_____, "When Renewal Repeats: Thinking Against The Box" (2000) 32 N.Y.U. J. INT'L L. & POL. 335

Kingsbury, Krisch N & Stewart R, "The Emergence of Global Administrative Law", (2005) 68(3-4) Law and Contemporary Problems 15-61

King, G and Murray C. "Rethinking Human Security" 116(4) Political Science Quarterly 585-61

Klabbers J, "The Right to be Taken Seriously: Self-Determination in International Law" (2006) 28 Human Rights Quarterly 186–206

Knack S and Keefer P, "Does Social Capital have an Economic Payoff? A Country Investigation" Working Paper No 197, Center for Institutional Reform and the Informal Sector

Koskenniemi M, "The Politics of International Law 20 Years Later" (2009) 20 European Journal of International Law 17

_____, 'International Law and Hegemony: A Reconfiguration' (2004) 17 Cambridge Review of International Affairs 205-206

Kreutz J, "How and When Armed Conflicts End: Introducing the UCDP Conflict Termination Dataset" (2010) 47(2) Journal of Peace Research 243-250

Kumm M, "The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review" (2010) 4(2) Law & Ethics of Human Rights 142

Landman T, Measuring Human Rights: Principle, Practice, and Policy (2004 26 Human Rights Quarterly 906–931

Laplante L and Theidon K, "Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz" (2007) 28 Michigan Journal of International Law *49*

Latané, B & Darley J, "Group Inhibition of Bystander Intervention in Emergencies, (1968) 10 Journal of Personality and Social Psychology 215

Leckie S. "Legal and Protection Policy Research Series. Housing, Land, and Property Rights in Post-Conflict Societies: Proposals for a New United Nations Institutional and Policy Framework." PPLA/2005/01 (March 2005)

Lipton D and Sachs J, "Privatization in Eastern Europe: The Case of Poland", Brookings Papers on Economic Activity 1990, No. 2 (1990)

Lindgren, The Theory History and Practice of the Bribery Extortion Distinction (1993) 141 U. Pa. L. Rev. 1695

Lipscomb LA, "Beyond the Truth: Can Reparations Move Peace and Justice Forward in Timor-Leste?" AsiaPacific Issues (No. 93, March 2010), 5

Luckham R, "The international community and state reconstruction in war-torn societies", (2004) 4(3) Conflict, Security & Development, 481-507

Mark B, "Acknowledging Our International Criminals: Henry Kissinger and East Timor" (2003) 32(1) Denv. J. Int'l & Pol'y 1

Engle Merry S "Measuring the World: Indicators, Human Rights, and Global Governance" (2009), 5

Mani R "Editorial-Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development" (2008) 2 (3) The International Journal of Transitional Justice 253-265;

Marks S, "The Human Right to Development: Between Rhetoric and Reality" (2004) 17 Harv. Hum. Rts. J. 137

Marmor, "How Law is Like Chess" (2006) 12 *Legal Theory* 347, 354

Mendeloff D, "Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?" (2004) 6 International Studies Review 355–380

Miller G, "Assessing Local Experiences of Truth-Telling in Sierra Leone: Getting to 'Why' through a Qualitative Case Study Analysis", (2010) 4 International Journal of Transitional Justice 477–496, 495

Miller Z, "Effects of Invisibility: In Search of the 'Economic' in Transitional Justice" (2008) 2 (3) The International Journal of Transitional Justice 266-291

Mikesell S, "Paradoxical Support of Nepal's Left for Comrade Gonzalo", Himal, Mar/April 1993

Murphy C, "Political Reconciliation, the Rule of Law, and Genocide" (2007) 12(7) The European Legacy 853-65

Murphy R, 'An Assessment of UN Efforts to Address Sexual Misconduct by Peacekeeping Personnel' (2006) 13 Intl Peacekeeping 531, 542

Nevins J, "The Making of "Ground Zero" in East Timor in 1999: An Analysis of International Complicity in Indonesia's Crimes", (2002) 42(4) Asian Survey 623-641;

Nickson RA, "Democratization and Growth of Communism in Nepal : A Peruvian Scenario in the Making" (1992) Journal of Commonwealth and Comparative Politics 30(3) 358 – 386

Nino C, "The Duty to Punish Past Abuses of Human Rights Put into Context" (1991) 100 Yale Law Journal 2619

Nollkaemper A, 'Concurrence between Individual Responsibility and State Responsibility in International Law', 2003 International and Comparative Law Quarterly 615-640

Nolte G, "Thin or Thick? The Principle of Proportionality and International Humanitarian Law" 2010 4(2) Law Ethics and Human Rights 245

Neuman N, "Applying the Rule of Proportionality : Force Protection and Cumulative Assessment in International Law and Morality" (2004) 7 Yearbook of International Humanitarian Law 79-112

OECD, Concepts and Dilemmas of State Building In Fragile Situations: From Fragility to Resilience, (2008) 9(3) Journal on Development 2008 17-21

Odello M, "Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers" (2010) 15(2) Journal of Conflict & Security Law (2010) 347–391

Orend B, "Kant's Just War Theory" (1999) Journal of the History of Philosophy 323-53

———, "Jus Post Bellum: The Perspective of a Just-War Theorist" (2007) 20 Leiden Journal of International Law, 571, 575-7;

_____, "Justice After War" (2002) 16(1) Ethics & International Affairs

Osiel M, "Why Prosecute?" (2000) 22 Human Rights Quarterly 118–147

Osterdahl I and van Zadel E, "What Will Jus Post Bellum Mean? Of Old Wine and New Bottles" (2009) 14(2) Journal of Conflict & Security Law 175–207

Paris R, "Broadening the Study of Peace Operations", (2000) 2(3) International Studies Review 27

_____, "Peacebuilding and the limits of liberal internationalism" (1997) 22(2) International Security 54

_____, "Human Security: Paradigm Shift or Hot Air?" (2001) 26(2) International Security 87-102

Patterson D, "Dworkin on the Semantics of Legal and Political Concepts" (2006) 26(3) Oxford J Legal Studies 545-557

Peskin V, "Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Program" (2005) 3 Journal of International Criminal Justice 950

Peters A, "Humanity as the A and Ω of Sovereignty" (2009) 20(3) European Journal of International Law 513–544

Pham P and Vinck P, "Empirical Research and the Development and Assessment of Transitional Justice Mechanisms", (2007) 1 International Journal of Transitional Justice, 231–248

Picotti R, "Legal Problems of Occupied Nations After Occupation" (1966) 33 Mil. L. Rev. 25

Poe S, Tate C, Camp Keith L, "Repression of the Human Right to Personal Integrity Revisited: A Global Cross-National Study Covering the Years 1976-1993", (1999) 43(2) International Studies Quarterly 291-313

Posner E and Vermeule A, "Transitional Justice as Ordinary Justice" 117 Harvard Law Review 761

Pouligny B, "Peacekeepers and Local Social Actors: The Need for Dynamic, Cross-Cultural Analysis" (1999) 5 Global Governance 403

Pugh M "Peacekeeping and Critical theory," (2004) 11(1) International Peacekeeping 39-58

Rachlinski J "The Limits of Social Norms', 74 Chicago-Kent L. Rev. 1537, 1539-42

Radin M, "Reconsidering the Rule of Law" (1989) 69 B.U. L. REV. 781

Rawski F, "To Waive or Not to Waive: Immunity and Accountability in UN Peacekeeping Operations" (2002) 18 Conn J In'tl L 103

Reisman M & Stevick D, "The Applicability of International Law Standards to United Nations Economic Sanctions Programmes" (1998) 9 European Journal of International Law 86

Robins S, Needs of the Families of the Missing in Timor-Leste, (February 2010) 6

Rodman K, "Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court" (2009) 22 Leiden Journal of International Law, 99–126

Roht-Arriaza N, "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law", (1990) 78 California Law Review 4

Rosga AJ and Satterthwaite M, "Trust in Indicators: Measuring Human Rights" 27(2) Berkeley Journal of International Law 31

Roe P, "The value of positive security", (2008) 34 Review of International Studies 777, 783

Rowe P, 'United Nations Peacekeepers and Human Rights Violations: The Role of Military Discipline' (2010) 51 Harvard Intl L J Online 69

Salzman Z, "Private Military Contractors and the Taint of a Mercenary Reputation", (2008) 40 N.Y.U. J. INT'L L. & POL. 853

Samuels K "Rule of Law Reform in Post-Conflict Countries Operational Initiatives and Lessons Learnt", (2006) 37 World Bank Social Development Papers, Conflict Prevention and Reconstruction

Schabas W, 'Justice, Democracy and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems', (1997) 8 Criminal Law Forum 523

Scheye, E and Peake G, 'To arrest insecurity: time for a revised security sector reform agenda', (2005)5(3) Conflict, Security & Development, 295 — 327

Schroeder U, "Measuring Security Sector Governance – A Guide to Relevant Indicators", DCAF Occasional Paper – No20

Schwarzenberger G, "Jus Pacis, ac belli?" (1943) 37 American Journal of International Law 460

Schwartz A, "Patriotism or Integrity? Constitutional Community in Divided Societies" (2011) Oxford Journal of Legal Studies 1–24

Sengupta A, "On the Theory and Practice of the Right to Development" (2002) 24 Human Rights Quarterly 837–889

Shihata I, "Prohibition of Political Activities in the Bank's Work," (July 11, 1995) (hereinafter "Political Activities") at "Part II: Requirements of Relevant Provisions of the Articles of Agreement."

———, "Interpretation as Practiced at the World Bank" in *World Bank Legal Papers* (Martinus Nijhoff, 2000) at XLIV

Sikkink K and Booth Walling C, "The Impact of Human Rights Trials in Latin America" (2007) 44 Journal of Peace Research 427

Simma B, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 Eur J Intl L 265, 271
Slye R, "The Legitimacy of Amnesties under International Law and the General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?" (2002) 43 VA. J. INT'L L. 173, 191–97

Sousa PX, East Timor, Land Management – a Long Way to Go, but we have started, (on file with author) 3

Stahn C, "Jus ad bellum, jus in bello, jus post bellum?Rethinking the Conception of the Law of Armed Force" (2006) 17 European Journal of International Law 943

_____, 'The Geometry of Transitional Justice: Choices of Institutional Design', (2005) 18 Leiden Journal of International Law 425.

Stone Sweet A and Mathews A, "Proportionality Balancing and Global Constitutionalism", (2008) 47 COLUM. J. TRANSNAT'L L. 73

Strohmeyer, H --- "Policing the Peace: Post-Conflict Judicial System Reconstruction in East Timor" [2001] UNSWLawJl 16; (2001) 24(1) University of New South Wales Law Journal 171

Suhrke A, "Virtues of a Narrow Mission: The UN Peace Operation in Nepal" (2011) 17 Global Governance 37-55

Sunstein C, "On the Expressive Function of Law" (1996) 114 U Pa L Rev 2021

Sweeney J, 'Divergence and Diversity in Post-Communist European Human Rights Cases,' (2005) 21 Connecticut Journal of International Law 1–40

Teitel R, 'Human Rights in Transition: Transitional Justice Genealogy', (2003) 16 Harvard Human Rights Journal 69

Tomuschat C, "Human Rights and International Humanitarian Law" (2010) 21(1) EJIL 15

Trubek D and Galanter M, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' (1974) 4 Wisconsin Law Review 1062

Trubek T, "Max Weber on Law and the Rise of Capitalism" (1972) 1972 Wisconsin Law Review 720

Uprety J, "Against Enforced Disappearance: the Political Detainees' Case before the Nepal Supreme Court", (2008) 7(2) Chinese Journal of International Law 429–457

Uslaner E, "The Moral Foundations of Trust" Available at SSRN: http://ssrn.com/abstract=824504 (accessed 27 September 2011)

Van Den Herik L, "The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual", (2007) 20 Leiden Journal of International Law 797–807

Van Zyl P, "Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission" (1999) 52 J Int'l Aff 647

Waldron J, Religious Foundations of International Law, available at: http://ssrn.com/abstract=1823702, 20

_____, "Legislation and the Rule of Law" (2007) 1 Legisprudence 91

_____, "The Circumstances of Integrity"(1997) 3 Legal Theory 1

_____, "Is the Rule of Law an Essentially Contested Concept (in Florida)?" (2002) 21(2) Law and Philosophy 137-16

Webb, "The United Nations Conventions Against Corruption: Global Achievement or Missed Opportunity?" (2005) 8:1 J. Intl Econ. L. 191 at 221

Wedgewood R, "Proportionality and Necessity in American National Security Decision Making" ASIL 1992 Proceedings Vol. 86, (APRIL 1-4, 1992) 58-67

Wellens K, "Fragmentation of International Law and Establishing an Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap" 25 Mich J Int L (2004) 1159

Welsh J and Recchia S, "The Imperative to Rebuild: Assessing the Normative Case for Postconflict Reconstruction" (2008) 23(2) Ethics and International Affairs 121-146

Werner W, "Self-Determination and Civil War" (2001) 6(2) Journal of Conflict and Security Law 171-190

Wheeler N and Dunne T, "East Timor and the New Humanitarian Interventionism, International Affairs" (2001) 77(4) Royal Institute of International Affairs 805-827

Wierda M, Hayner P and van Zyl P, *Exploring the Relationship between the Special Court and the Truth and Reconciliation Commission of Sierra Leone,* (ICTJ 2002)

Wilén N, "Capacity-building or Capacity-taking? Legitimizing Concepts in Peace and Development Operations", (2009) 16(3) International Peacekeeping 337

Wilson BVE, "Timor-Leste: the curious case of the fake policemen", 2009 ETLJ 2

Wolfson S, "Refugees and Transitional Justice" (2005) 24(4) Refugee Survey Quarterly, 55-9

Ximenes FB, "The Unique Contribution Of The Community-Based Reconciliation Process In East Timor", (JSMP 28 May 2004)

Zalaquett J, "Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations" (1992) 43 Hastings L.J. 1425;

Case Law

Domestic Law:

Brown v Board of Education 1954 347 U.S.483 (Supreme Court)
Nissan v Attorney General 1 All ER (1969) 629
Harman and Hewitt v UK (1992) 14 EHRR 657
HCJ 769/02 *The Public Committee against Torture in Israel v. The Government of Israel* [Dec. 14, 2006] (unpublished)
Rajendra Dhakal v. Home Ministry, Supreme Court Judgment, 1 June 2007, available at www.supremecourt.gov.np/nja/disappearance_Case.pdf;
Ghimire & Dahal v. Nepal. Supreme Court Judgment, 17 December, 2007
The Citizen 1978 (Pty) Ltd and Others v Robert John McBride Case CCT 23/10 [2011] ZACC 11 (Decided on 8 April 2011);
Court of Appeal decision in relation to case no. 95/CO/ 2008/TR, dated 9 December 2008;

Human Rights Committee

Case Dermit Barbato v Uruguay, Views of 21 October 1982, CCPR/C/17/D/84/1981
Almeida de Quinteros et al v Uruguay, 21 July 1983, CCPR/C/19/D/107/1981
Case Hugo Rodríguez v Uruguay, Views of 19 July 1994, CCPR/C/51/D/322/1988
Case Blanco v Nicaragua, Views of 18 August 1994, CCPR/C/51/D/328/ 1988
Celis Laureano v Per u, Views of 16 April 1996, CCPR/C/56/D/540/1993
Case Celis Laureano v Peru, Views of 16 April 1996, CCPR/C/56/D/540/1993
Case Nydia Erika Bautista v Colombia, Views of 13 November 1995, CCPR/C/55/D/563/1993
Case Hentrich v France, Judgment of 22 September 1994, Series A No 296-A, para 71;
Case *José Vicente y Amado Vill afañe Chaparro v Colombia,* Views of 29 July 1997, CCPR/C/60/D/612/1995
Case Papamichalopoulos and Others v Greece (Article 50), Judgment of 31 October 1995, Series A No. 330-B,
Laureano v Peru HRC (1996);
Case Coronel et al v Colombia, Views of 13 October 2000, CCPR/C/70/D/778/1997
Case Brok v Czeck Republic, Views of 15 January 2002, CCPR/C/73/D/774/1997,
Case Des Fours Walderode, Views of 2 November 2001, CCPR/C/73/D/747/1997
Rodriguez v Uruguay HRC (1998)
Report No. 136/99 , Case 10.488, *Ignacio Ellacuría S.J et al (El Salvador)*, 22 December 1999
Report No. 1/99, Case 10.480, *Lucio Parada Cea et al* (El Salvador), 27 January 1999
Sarma v Sri Lanka, Views of 31 July 2003, CCPR/C/78/D/950/2000
Report No. 55/01, Case 11.286 et al, *Aluísio Cavalcant i et al v Brazil*, 16 April 2001
Case *Brumarescu v Romania*, Judgment of 23 January2001,Reports2001
Quinteros Almedia v Uruguay HRC (2003)

General Comment No 6 on Article 6, 30 April 1982, HRI/GEN/1/Rev7, para 4;

International Law:

Opinion in the Lusitania Cases, 1 November 1923, Recueil de sentences arbitrales, Volume VII, p 32
Case Concerning the Factory at Chorzów (Jurisdiction), P.C.I.J. Serie s A, No 9 [8 i.e.], 26 July 1927
Naulilaa Arbitration Award (Portugal v. Germany), 2 R. Int'l Arb. Awards (1949), 1011 ff
Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949
Reservations to the Convention on the Prevention of the Crime of Genocide (1951) ICJ Reports 15, 23
International Court of Justice, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, ICJ Rep., 1986
The Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8)
GabčÃ-kovo-Nagymaros Project (Hungary/Slovakia) ICJ 1998
2003 *Oil Platforms* case
Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory ICJ Rep 2004
Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) Judgment 26 February 2007, para 198

The Prosecutor vs. Brima, Kamara and Kanu (AFRC Case)
The *Prosecutor v Kamara* (2004 SCSL) decision on amnesty

Decision by the Arbitrators, Brazil—Export Financing Programme for Aircraft, Recourse to Arbitration by Brazil under Article 4.11 of the SCM Agreement, WT/DS46/ARB (adopted Aug. 28, 2000);

Case Malawi African Association et al v Mauritania, Communications 54/91, 61/91, 98/93, 164/97, 196/97, 210/98 (27th Ordinary Session, May 2000)

Case *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, Communication 155/96 (30th Ordinary Session,October2001).

Second Day, Wednesday, 11/21/1945, Part 04, in Trial of the Major War Criminals before the International Military Tribunal. Volume II. Proceedings: 11/14/1945-11/30/1945. [Official text in the English language.] Nuremberg: IMT, 1947, 98-102.

USA v List (1948) 11 NMT 1230, 1247

International Criminal Tribunal for Rwanda

Prosecutor v Jean-Paul Akayesu, Case No. ICTR-96-4-T "ICTR Trial Chamber" Judgement, Sept. 2, 1998
Prosecutor v Edouard Karamara Case Nos. ICTR-98-44-AR72.5, ICTR-98-44-AR72.6 "Decision on Jurisdictional Appeals: Joint Criminal Enterprise" 10 April 2006
Prosecutor v Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T "ICTR Trial Chamber Judgement", May 21, 1999
Prosecutor v Alfred Musema ICTR-96-13 "ICTR, Trial Chamber Judgement", Jan. 27, 2000, para. 285
Prosecutor v George Rutaganda, ICTR-96-3, "ICTR Trial Chamber Judgement", Dec. 6, 1999
Prosecutor v Laurent Semanza, Case No. ICTR-97-20-T "ICTR Trial Chamber Judgement", May 15, 2003,

International Criminal Tribunal for the former Yugoslavia

Prosecutor v Zlatko Aleksovski, IT-95-14/1 "ICTY Trial Chamber Judgment", June 25, 1999
Prosecutor v Tihomir Blaskic, IT-95-14-T "ICTY Trial Chamber Judgement", March 3, 2000
Prosecutor v Radoslav Brdanin IT-99-36 "ICTY Appeals Chamber Judgement" 3 April 2007
Prosecutor v. Dražen Erdemovic, Case No. IT-96-22 "ICTY Appeals Chamber Judgement" 7 Oct 1997.
Prosecutor v. Dražen Erdemovic, Case No. IT-96-22 "ICTY Joint Separate Opinion of Judge McDonald and Judge Vohrah" 7 Oct 1997.
Prosecutor v Anto Furundzija, IT-95-17/1 "ICTY Trial Chamber Judgment", Dec. 10, 1998,
Prosecutor v Sefer Halilović, IT-01-48 "ICTY Trial Chamber Judgement" 16 Nov 2005
Prosecutor v Dario Kordic and Mario Cerkez, IT-95-14/2 "ICTY Trial Chamber Judgement", Feb. 26, 2001
Prosecutor v Milorad Krnojelac IT-97-25 "ICTY Trial Chamber Judgement", March 15, 2002
Prosecutor v. Radislav Krstic, Case No. IT-98-33-T "ICTY Trial Chamber Judgement", Aug. 2, 2001
Prosecutor v. Dragoljub Kunarac et al., IT-96-23 & 23/1 "ICTY Appeals Chamber Judgement" June 12, 2002
Prosecutor v Mirjan Kupreskic et al., IT-95-16 "ICTY Trial Chamber Judgement", Jan. 14, 2000, paragraphs 547-49
Prosecutor v Miroslav Kvočka, IT-98-30/1 "ICTY Trial Chamber Judgement", Nov. 2, 2001
_____ "ICTY Appeals Chamber Judgement" 28 Feb 2005
Prosecutor v Zdravko Mucic et al., IT-96-21 "ICTY Appeals Chamber Judgement", Feb. 20, 2001,
Prosecutor v Mladen Naletilic and Vinko Martinovic, IT-98-34 "ICTY Trial Chamber", March 31, 2003
Prosecutor v Duško Tadic IT-94-1 "ICTY Trial Chamber Judgement" May 7 1997
_____, "ICTY Appeals Chamber, Interlocutory Appeal" Oct. 2 1995
_____ "ICTY Appeals Chamber Judgement", July 15, 1999
Prosecutor v Mitar Vasiljevic, IT-98-32-T "ICTY Trial Chamber Judgement", Nov. 29, 2002

European Court of Human Rights:

Dudgeon v. United Kingdom, Appl. No. 7525/76, Council of Europe: European Court of Human Rights, 22 October 1981

Judgment of 1 October 1982, Case of *Piersarck v. Belgium*
Case X and Y v the Netherlands, Judgment of 26 March 1985, Series A91;
Case McCann an d other v the United Kingdom, Judgment of 27 September 1995, Series A no 324
Aksoy v. Turkey [18 December 1996] Judgement, 21987/93 [1996] ECHR 68
judgment dated 25 February 1997, *Case of Findlay v. United Kingdom*
Aydin v. Turkey [25 September 1997] Judgment, 23178/94 [1997] ECHR 75
Lehideux and Isorni v France (1998) 30 EHRR 665;
Case Kaya v Turkey, Judgment of 19 February 1998, Reports1998-I
Judgment of 9 June 1998, *Case of Incal v. Turkey,* Recueil 1998
Case Assenov v Bulgaria, Judgment of 28 October 1998, Reports 1998-VIII, para 102;
Selçuk and Asker v. Turkey [24 April 1998] Judgement, 23184/94, 23185/94 [1998] ECHR 36
Case A. v the United Kingdom, Judgment of 23 September 1998, Reports of Judgments and Decisions 1998-V I
Case Osman v the United Kingdom, Judgment of 28 October 1998, Reports 1998-VIII
Case Ogur v Turkey, Judgment of 20 May 1999, Reports 1999-III, para 88;
Kurt v. Turkey 825 May 1998] Judgement, 24276/94 [1998] ECHR 44
Ergi v. Turkey, (Application no. 66/1997/850/1057), Judgment, Strasbourg, 28 July 1998
Selmouni v. France [28 July 1999] Judgement, 25803/94 [1999] ECHR 66
28 October 1998, *Case of Ciraklar v. Turkey*, and 8 July 1999, case of *Gerger v. Turkey*
Case Mahmut Kaya v Turkey, Judgment of 28 March 2000, Reports 2000-III
Case Kiliç v Turkey, Judgment of 28 Mars 2000, Rep ort s 2000-III, para 62
Çiçek v. Turkey (Application no. 25704/94) Judgment, Strasbourg 27 February 2001
Hugh Jordan v. the United Kingdom (Application no. 24746/94) Judgment, Strasbourg, 4 May 2001
Shanaghan v. the United Kingdom, (Application no. 37715/97) Judgment, Strasbourg, 4 May 2001;
McKerr v. the United Kingdom, (Application no. 28883/95), Judgment, Strasbourg, 4 May 2001
Kelly and Others v. the United Kingdom, (Application no. 30054/96), Judgment, Strasbourg, 4 May 2001
Vajnai v Hungary, Orban v France; Feldek v. Slovakia, App. No. 29032/95, ECtHR (12 July 2001)
Case Finucane v the United Kingdom , Judgment of 1 July 2003
Abdülsamet Yaman v. Turkey, no. 32446/96 (Sect. 2) (Eng) – (2.11.04)
Refah Partisi (The Welfare Party) and Others v. Turkey, 41340/98, 41342/98, 41343/98, 41344/98, Council of Europe: European Court of Human Rights, 13 February 2004
Makaratzis v. Greece [GC], (Application no. 50385/99), Judgment, Strasbourg, 20 December 2004,
Wos´ v. Poland, App. No. 22860/02, ECtHR (dec.) (1 March 2005)
Bazorkina v. Russia, 69481/01, Council of Europe: European Court of Human Rights, 27 July 2006, available at: http://www.unhcr.org/refworld/docid/44cdf4ef4.html [accessed 2 February 2011]
Monnat v. Switzerland, App. No. 73604/01, ECtHR (21 September 2006)
Linkov v. Czech Republic, App. No. 10504/03, ECtHR (17 December 2006)
Giniewski v France (2007) 45 EHRR 23
Sandru and Others v. Romania, App. No. 22465/03, ECtHR (8 December 2009)
Kiladze´ v. Georgia, App. No. 7975/06, ECtHR (2 February 2010)
Kostka v. Poland, App. No. 29334/06, ECtHR (16 February 2010)

Inter American Court of Human Rights

Velasquez Rodriguez Case, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), para 176
Inter-American Court of Human Rights, judgment of 18 January 1995, *El Amparo Case*, Series C No. 19 (1995)
Report No. 36/96, Case 10.843, *Héctor Marcial Garay Hermosilla* (Chile), 15 October 1996
Bámaca Velásquez Case , Judgment of 25 November 2000, Series C No. 70, para 197
judgment of 29 January 1997, Series C N° 30, *Genie Lacayo v. Nicaragua*
Report No 133/99, Case 11.725, *Carmelo Soria Espinoza* (Chile),19 November1999, paras 92-107; Report No. 136/99, *Ignacio Ellacuría S.J et al* (El Salvador), 22 December 1999
Durand and Ugarte v. Peru, judgment of 16 August 2000, Series C No. 68,
Case 10.247 *Extrajudicial Executions and Forced Disappearances of Persons* (Peru),11 October 2001
Bámaca-Velásquez v. Guatemala [25 November 2000] Judgement, Series C No. 70 (IACHR) para. 201;
Barrios Altos v Peru - Series C No. 75 [2001] IACHR 5 (14 March 2001)
Luis Alfredo Almonacid Arellano et al. v. Chile, Case 12.057, Report No. 44/02, Inter-Am. C.H.R., Doc. 5
Juan Humberto Sánchez v. Honduras [7 June 2003] Judgment, Series C No. 187 (IACHR)

Trujillo Oroza v. Bolivia. 2002 Inter-Am. Ct. H.R. (ser. C) No. 92 (Feb. 27, 2002)
Case of Myrna Mack-Chang v. Guatemala. Judgment of November 25, 2003. Series C No. 101.
Case Tibi v Ecuador, Judgment of 7 September 2004, Series C No 114 para 15
Carpio Nicolle y otros vs. Guatemala Case [22 November 2004] Judgement, C Series No. 117 (IACHR)
Moiwana Community v. Suriname [15 June 2005] Judgement Series C No. 124 (IACHR)
Indigenous Community Yakye Axa v. Paraguay [17 June 2005] Judgment, Series C No. 125
Jean and Bosico v. República Dominicana [8 September 2005] Judgment, Series C No. 130
"Mapiripán Massacre" v. Colombia [15 September 2005] Judgement, Series C No. 134 (IACHR),
Montero-Aranguren et al. Palamara-Iribarne v. Chile [22 November 2005] Judgment, Series C No. 135
Gómez-Palomino v. Perú [22 November 2005] Judgement, Series C No. 136 (IACHR)
García-Asto and Ramírez-Rojas v. Perú [25 November 2005] Judgment, Series C No. 137
B*lanco-Romero et al v. Venezuela* [28 November 2005] Judgement, Series C No. 138 (IACHR)
Pueblo Bello Massacre v. Colombia [31 January 2006] Judgment, Series C No. 140 (IACHR);
López- Álvarez v. Honduras [1 February 2006] Judgment, Series C No. 141, 207, 207
Acevedo- Jaramillo et al. v. Perú [7 February 2006] Judgment, Series C No. 144
Sawhoyamaxa Indigenous Community v. Paraguay [29 March 2006] Judgment, Series C No. 146,
Baldeón-García v. Perú [6 April 2006] Judgement, Series C No. 147 (IACHR)
Ituango Massacre v. Colombia [1 July 2006] Judgement, Series C (IACHR)
Ximenes-Lopes v. Brasil [4 July 2006] Judgment, Series C No. 149 (IACHR)
(Detention Center of Catia) v. Venezuela [5 July 2006] Judgment, Series C No. 150
Case of Claude Reyes and others v. Chile. Reparations and Costs Judgement of September 19, 2006. Series C No. 151
Servellón-García et al. v. Honduras [21 September 2006] Judgement, Series C No. 152 (IACHR)
Goiburú et al. v. Paraguay [22 September 2006] Judgement, Series C No. 153
Case of *Almonacid-Arellano et al v. Chile.* Judgment of September 26, 2006;
Vargas-Areco v. Paraguay [26 September 2006] Judgement, Series C No. 155
Miguel Castro-Castro Prison v. Perú [25 November 25 2006] Judgement, Series C No. 160 (IACHR)
La Cantuta v. Perú [29 November 2006] Judgment, Series C No. 162
Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil, Inter-American Court of Human Rights (IACrtHR), 24 November 2010

Newspapers

Orlando Letelier, 'The Chicago Boys in Chile' August 28 1976 The Nation

Richard Falk. "Humanitarian Intervention: Elite and Critical Perspectives." *Global Dialogue* 2005

Edward Rees. "The UN's failure to integrate Falintil veterans may cause East Timor to fail." Online Opinion Australia. (Tuesday, September 2003)

Lindsay Murdoch, UN Turns Blind Eye to Use of Timor Brothels, The Age 7 May 2007

BBC, "Timor chooses independence" (4 September 1999) http://news.bbc.co.uk/2/hi/asia-pacific/438145.stm

Timor-Leste: Occupation-era crimes forgiven, not forgotten, 31 August 2011 (IRIN)

"Maoist's commitment on peace process, constitution drafting and the government", Thursday August 25th 2011, Nepal Everest News

"Nepal govt takes formal control of Maoist army", *The Times of India* Jan 22, 2011

"The UN expresses full support to Nepal on the eve of the Universal Periodic Review", Thursday, 20 January 2011, Press Statement

Maoist's commitment on peace process, constitution drafting and the government, Thursday August 25th 2011, Nepal Everest News

Probe commission on disappearance urged 02/06/2008 Kantipur; Rights group calls for prompt action on enforced disappearance 29/08/2007 Nepal News

UK, Advocacy Forum demand truth about disappearance", *Kantipur* 30/08/2007;

David Cameron, Why we're right to ringfence the aid budget, *The Guardian,* (11 June 2011)

Galbraith JK , Shock without Therapy, 13(15) The American Prospect (26 August 2002)

Robert Gates, Helping Others Defend Themselves *Foreign Affairs* May/June 2010

David Kaye, "Wanted: Qaddafi & Co" *Foreign Affairs* (19 May 2011)

Steve Negus, "Mubarak's Trial and Errors" *Foreign Affairs* (2nd August 2011);

Shashank Joshi, "Libya need not repeat others' mistakes", *The Guardian,* (24 August 2011); Bruce Rutherford, Now Comes the Hard Part *Foreign Policy* (10 February 2011)

Gerald Helman and Steven Ratner, "Saving Failed States," *Foreign Policy*, No. 89 (Winter, 1992-1993), 3-20;

UN News Agency, UN chief reiterates need to accelerate efforts to achieve global anti-poverty goals, (22 August 2011); United Nations, Millenium Development Goals Report 2010 (UN 2010)

Interviews

Interview with Govinda Bandi Sharma Interview (25th May 2010)
Interview with Mamiko Nakada, JICA (26th May 2010)
Interview with Izumi Wakugawa, Aspect (28th May 2010)
Interview with Dr. Duman Thapa, Aspect (29th May 2010)
Interview with Bishal Khanal, National Human Rights Commission, (2nd June 2010)
Interview with International Alert, Rebecca Crozier, 3rd June 2010
Interview with Shiva Hari Dahal, National Peace Campaign (3rd June 2010)
Interview with Ashish Thapa, Transparency International Interview (4th June 2010)
Interview with Jasmine Rajbhandary, World Bank (4th June 2010)
Interview with Claudia Maier, GTZ (7th June 2010)
Interview with Sarah Levit-Shore, Carter Centre, (7th June 2010)
Interview with Dr. Gopal Krishna Siwakoti, INHURED (8th June 2010)
Interview with Bishnu Adikhari, USAID (9th June 2010)
Interview with Ari Bassin, International Center for Transitional Justice (10th June 2010)
Interview with FLC (12th June 2010)
Interview with Madhu Sharma, SDC (14th June 2010)
Interview with Marcus Brand, UNDP (15th June 2010)
Interview with Horst Ammann (15th June 2010)
Interview with Rhoderick Chalmers, International Crisis Group (16th June 2010)
Interview with Fred Rawski, OHCHR (16th June 2010)
Interview with Jamunda Poudel, CVICT (17th June 2010)
Interview with Simon Arthy, DFID (17th June 2010)
Interview with Rene Hansen, Danida Hugou(18th June 2010);

Interview with anonymous donor, attribution on file with author

GTZ Interview 26th June 2010
Interview with Pat Walsh, Post-CAVR Secretariat, 29th June 2010
Interview with NZAid 29th June 2010
Interview with Ba Futuru 30th June 2010

JSMP Interview 1st July 2010
Interview with Clemens Loos 1st July 2010
Charles Scheiner Interview 2nd July 2010
Interview with Antonio Victor, AusAid 2nd July 2010
Interview with Caritas Dili 7th July 2010
Gordon Peake Interview 7th July 2010
UNMIT SSRU Nathan Dalton Interview 7th July 2010
Interview with Silas Everrett, Asia Foundation 8th July 2010
Interview with Nelson Belo 8th July 2010
Interview with Cillian Nolan, ICG 12th July 2010
Interview with Liam Chinn, Asia Foundation 14th July 2010

Websites

Accession on 14 May 1991 http://www1.umn.edu/humanrts/research/ratification-nepal.html Nepal had previously ratified the four Geneva Conventions on 7 February 1964.

African Transitional Justice Research Network, Trends in Literature Review, available at http://www.transitionaljustice.org.za/~atjrnor/index.php?option=com_content&task=view&id=326&Itemid=53 (accessed 28 September 2011)

Amnesty Database, University of Ulster

Comprehensive Peace Agreement, available at mofa.gov.np/nepalpeaceprocess/November%2021.doc (Last Checked 28 January 2011)

http://www.cidcm.umd.edu/pc/; see also Bertelsmann Transformation Index

dne.mof.gov.tl (visited 22nd October 2011)

Ameet Dhakal, "The cost of superficiality", myrepublica.com, 10 January 2009

European Sourcebook of Crime, available at http://www.europeansourcebook.org/,

Edelman Truth Barometer http://www.edelman.com/trust/2011/

http://www.eiu.com/public/topical_report.aspx?campaignid=demo2010

The 40 point demands are available at http://www.satp.org/satporgtp/countries/nepal/document/papers/40points.htm (Last visited 28 January 2011)

Failed State Index, available at http://www.foreignpolicy.com/failedstates

http://www.freedomhouse.org/template.cfm?page=15

Freedom Charter (1955) available at www.anc.org.za

Green, Leslie, Obligation and Authority, available at http://plato.stanford.edu/entries/legal-obligation,

Leigh Payne's Transitional Justice database, available at https://sites.google.com/site/transitionaljusticedatabase/home

Human Rights Watch, Our History, available at http://www.hrw.org/en/node/75134 (accessed 27 September 2011)

http://info.worldbank.org/governance/wgi/index.asp

International Center for Transitional Justice, Syria: UN and Arab League Must Act Swiftly to Address Crimes <http://ictj.org/news/syria-un-and-arab-league-must-act-swiftly-address-crimes> (accessed 1 August 2011)

International Center for Transitional Justice, Regions and Countries, available at http://ictj.org/our-work/regions-and-countries (accessed on 27 September 2011)

"The Interim Constitution 1951" Last visited 9 February 2011, http://countrystudies.us/nepal/48.htm

http://www.naturalresourcecharter.org/

Nepal Peace and Development Strategy 2010-2015 (Donors January 2011) Nepal Peace and Development Strategy 2010-2015 (January 2011) available at http://www.un.org.np/report/nepal-peace-and-development-strategy-2010-2015 52

http://www.oecdbetterlifeindex.org/

OECD, Development aid rose in 2009 and most donors will meet 2010 aid targets, 14th October 2010, available at <http://www.oecd.org/document/11/0,3746,en_2649_37413_44981579_1_1_1_37413,00.html> (accessed 27 September 2011)

Multi-Donor Trust Fund Portal available at http://mdtf.undp.org (accessed 29 September 2011)

Political Terror Scale, available at http://www.politicalterrorscale.org/about.php

Polity IV, http://www.systemicpeace.org/polity/polity4.htm

The Royal Constitution of Nepal, 1959, available at www.undp.org.np/constitutionbuilding/constitutionnepal/.../1959%20Constitution%20English.pdf

Report by the Commission on the Measurement of Economic Performance and Social Progress, available at www.stiglitz-sen-fitoussi.fr (accessed 29 September 2011)

UNDP, Human Development Reports, available at http://hdr.undp.org/en/ (accessed 27 September 2011)

United Nations Human Development Index, available at http://hdr.undp.org/en/statistics/

http://www.unodc.org/unodc/en/data-and-analysis/United-Nations-Surveys-on-Crime-Trends-and-the-Operations-of-Criminal-Justice-Systems.html

World Bank, Aid Flows, available at www.aidflows.org (accessed 26 September 2011)

Worldwide Governance Indicators available at http://info.worldbank.org/governance/wgi/index.asp

UN Documents

Security Council Res No 288, UN Doc S/RES/288 (1970); Security Council Res No 277, UN Doc S/RES/277 (1970); Security Council Res No 253, UN Doc S/RES/253 (1968); Security Council Res No 232, UN Doc S/RES/232 (1966); Security Council Res No 216, UN Doc S/RES/216 (1965); Security Council Res No 217, UN Doc S/RES/217 (1965); General Assembly Res No 1791, UN Doc A/RES/1791 (1962); General Assembly Res No 1598, UN Doc A/RES/1598 (1961); Security Council Res No 221, UN Doc S/RES/221 (1961).

See GA Res. 3514 (XXX) (15 December 1975);
UN GA Res, The capacity of the United Nations Development System GA resolution 2688 (XXV) (1970)
UN GA Res S-6/3201 Declaration on the Establishment of a New International Economic Order (1 May 1974)
UN GA Res 41/128 Declaration on the Right to Development (4 December 1986)

Handbook on social indicators, Department of international economic and social affairs, Statistical Office, United Nations, pp. 15-17, 1989. ST/ESA/STAT/SER.F/49.

United Nations document CCPR/C/79/Add.15 - A/48/40, 28 December 1992
United Nations document CCPR/C/79/Add.13, 28 December 1992
UN SG Report, An Agenda for Peace A/47/277 - S/24111 (17 June 1992)
UN GA Resolution, World Conference on Human Rights 48/121 (20 December 1993)
UN SC Res 808 Tribunal for the former Yugoslavia (22 February 1993)
High Commissioner for the Promotion and Protection of All Human Rights, G.A. Res. 48/141, U.N. GAOR, 48th Sess., Agenda Item 114(b), ¶ 4, U.N. Doc. A/RES/48/141 (1993)
[732] UN GA Res 48/935, *Agenda for Development* (6 May 1994), 23
E/CN.4/1995/11, 4 September 1994
Supplement to the Agenda for Peace UN GA Res 50/60; UN SC Res 1995/1, para 49
UN International Code of Conduct for Public Officials, GA Res. 51/59 Annex (12 December 1996);
UN Declaration against Corruption and Bribery in International Commercial Transactions, GA Res. 51/91 (16 December 1996);
United Nations Department for Economic and Social Information and Policy Analysis *An Inventory of Post-Conflict Peace-Building Activities* (1996)
United Nations document CCPR/C/79/Add.66, 24 July 1996,
Concluding Observations on Colombia, 5 May 1997, CCPR/C/79/Add.76
Concluding Observations on Algeria, 18 August 1998, CCPR/C/79/Add.95
Concluding Observations on the Libyan Arab Jamahiriya, 6 November 1998, CCPR/C/79/Add.101
Concluding Observations on Mexico, 27 July 1999, CCPR/C/79/Add.109
Concluding Observations: Romania, 28 July 1999. CCPR/C/79/Add.111.
Concluding Observations: Lesotho, CCPR/C/79/Add. 106, 8 April 1999
Concluding Observations: El Salvador, CCPR/C/79/Add.34, 18 April 1994
[543] Conclusions and Recommendations: Chile, 26 June 1995, A/50/44, paras 52-61, at 60 c).
UNSC Res 1246 "On the situation in East Timor" 15 September 1999
UN Security Council resolution 1272 UNTAET (25 October 1999)
Concluding Observations on Argentina, 3 November 2000, CCPR/CO/70/ARG
Concluding Observations on Argentina, 3 November 2000, CCPR/CO/70/ARG
Concluding Observations on the Kyrgyz Republic, 24 July 2000, CCPR/CO/69/KGZ
The Report of the Panel on United Nations Peace Operations (The "Brahimi Report") UN SC Res 2000/809
UNDP, Human Development Report 2000, 91
Regulation on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, June 6, 2000, UNTAET/REG/2000/15
[1287] UNTAET Reg 2001/10 "On the Establishment of the Commission for the Reception Truth Reconciliation"

Concluding Observations on Guatemala, 27 August 2001,CCPR/CO/72/GTM
Concluding Observations on Venezuela, 26 April 2001, CCPR/CO/ 71/V EN
Concluding Observations on Hungary, 19 April, 2002, CCPR/CO/74/HUN
UNMISET UNSC Res 1410 17 May 2002;

[994] U.N. GAOR, 54th Sess., Supp. No. 10 at para. 478, U.N.Doc. A/57/10 (2002)

Secretary-General's bulletin *Status, basic rights and duties of United Nations staff members* [ST/SGB/2002/13];
Secretary-General's Bulletin on *Special measures for protection from sexual exploitation and sexual abuse* [ST/SGB/2003/13]; UN ACTION TO COUNTER SEXUAL EXPLOITATION AND ABUSE AND OTHER FORMS OF MISCONDUCT IN PEACEKEEPING AND SPECIAL POLITICAL MISSIONS Fact Sheet

[973] ILA, Accountability of International Organisations: Final Report of the Berlin Conference (2004) 1 International Organisations Law Review 221, 226
"Timor-Leste making steady progress towards self-sufficiency, but continued international assistance needed, Security Council Told," U.N. Press Release SC/8172, August 24, 2004.
UN Secretary-General,'The rule of law and transitional justice in conflict and post-conflict societies' (United Nations Security Council, 2004) S/2004/616;

United Nations, "Progress Report of the Secretary-General on the United Nations Mission of Support in East Timor," U.N. Document S/2005/99, February 18, 2005.
Neven Knezevic. Timor-Leste: Background Paper on Human Rights, Refugees and Asylum Seekers. Commissioned by United Nations High Commissioner for Refugees, Protection Information Section (DIP) (February, 2005)
"The Pinheiro Principles" United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons Centre on Housing Rights and Evictions (August 2005)
UN GA Res 60/18 The Peace-Building Commission (30 December 2005)
UN GA Res 60/1 The World Summit Outcome (24 October 2005), paras 138-139
Updated Set of principles for the protection and promotion of human rights through action to combat impunity E/CN. 4/2005/102/Add.1
Letter dated 24 June 2005 from the Secretary-General addressed to the President of the Security Council S/2005/45
UN Office in Timor Leste UNOTIL UNSC Res 1599 of 28 April 2005;
UN Integrated Mission in Timor-Leste (UNMIT) UNSC Res 1704 of 25 August 2006
UNSC S/2006/628
Report of the Secretary-General on justice and reconciliation for Timor-Leste **S/2006/580**
UN S**C RES 1704 (2006)**
UN SC Res 2006/822 "report of the Independent Special Commission of Inquiry for Timor-Leste" (17 October 2006)
Upcoming Elections among Critical Tests of Timor-Leste's Resiliency, Top United Nations official says in briefing to the United Nations Department of Peacekeeping Operations (DPKO), Integrated Disarmament, Demobilization and Reintegration Standards (IDDRS) (New York: DPKO, 2006), United Nations, "Disarmament, Demobilization and Reintegration: Report of the Secretary-General," A/60/705 (March 2, 2006)

See United Nations Office on Drugs and Crime, "Legislative Guide for the Implementation of the United Nations Convention against Corruption" available at http://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf (last visited 03-09-08);

UN Peacebuilding Commission, Statement by the Assistant Secretary-General for Peacebuilding Support to the Hiroshima Peacebuilding Centre, 15th September 2007

UNDP, Public Perceptions on Transitional Justice: Report on Transitional Justice Opinion Polling Survey Conducted in April-May 2007 in Kosovo

UN Peacekeeping Operations: Principles and Guidelines, (UNDPKO 2008) 18

Securing peace and development: the role of the United Nations in supporting security sector reform Report of the Secretary-General UN GA Res 62/659 UN SC Res 2008/39

Report of the Study Group of the International Law Commission Fragmentation of InternationaL Law A/CN.4/L.682

UN Code of Conduct for Law Enforcement Officials; UN Guidelines for the effective implementation of the Code of Conduct for Law Enforcement Officials; UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

UN Code of Conduct for Law Enforcement Officials (Article 3), UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Principles 4, 5, 6 and 9-14)

UN Standard Minimum Rules for the Treatment of Prisoners (hereafter referred to as StandardMinimum Rules); UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (hereafter referred to as Body of Principles); UN Rules for the Protection of Juveniles Deprived of their Liberty

Resolutions E/CN.4/RES/2003/72, paras 2, 10; E/CN.4/RES/2002/79, paras 2, 11; E/CN.4/ RES/2001/70, para 2; E/CN.4/ RES/2000/68, para 4; E/CN.4/RES/1999/34, para 4; E/CN.4/RES/ 1998/53, para 4

UN GA Res 59/2005/Add.2 "In larger freedom: towards development security and human rights for all", para 2

2005 World Summit Outcome Resolution A/RES/60/1, para 97

UN GA Resolution 60/180 and UN SC resolution 1645 (2005) (20 December 2005)
Resolution 60/180 and resolution 1645 (2005) of 20 December 2005

[586] A. Sengupta, Second Report of the Independent Expert on the Right to Development, Un Doc. E/CN.4/2000/WG.18/CPR.1, para 24

[618] OHCHR, Truth commissions (HR/PUB/06/1); Mapping the justice sector (HR/PUB/06/2); Monitoring legal systems (HR/PUB/06/3); Prosecution initiatives (HR/PUB/06/4); Vetting: an operational framework (HR/PUB/06/5); Reparations programmes (HR/PUB/08/1); The legacy of hybrid courts (HR/PUB/08/2); Rule-of-law Tools for Post-conflict States: Amnesties (HR/PUB/09/1); Rule-of-law Tools for Post-conflict States: National Consultations on Transitional Justice (HR/PUB/09/2)
OHCHR, Analytical study of the HRC - Human rights and transitional justice A/HRC/12/18
UN OHCHR Rule-of-law Tools for Post-conflict States: National Consultations on Transitional Justice (HR/PUB/09/2)
Guidance Note of the Secretary General, United Nations Approach to Transitional Justice, 2010, 5

Presidential Statement S/PRST/2005/30 (12 July 2005)
Special Committee on Peacekeeping Operations Report A57 767 (28 March 2003); Report A59 19 (1 March 2005); Report A60 19 (22 March 2006)
[667] UNDP, Justice and Security Sector Reform: BCPR's Programmatic Approach (UNDP 2002)
[668] UNDP, Human Development Report 2002
[681] Security Council, 5632nd meeting, 'The Maintenance of International Peace and Security: The Role of the Security Council in Supporting Security Sector Reform'; S/PV.5632 (20 February 2007), 3; *Securing peace and development: the role of the United Nations in supporting security sector reform Report of the Secretary-General* (n261) 39, para 45 (c)
[686] S/PRST/2007/3
[687] Security Council, 5632nd meeting, 'The Maintenance of International Peace and Security: The Role of the Security Council in Supporting Security Sector Reform'; S/PV.5632 (20 February 2007) 3-4
[735] The causes of conflict and the promotion of durable peace and sustainable development in Africa (Report of the Secretary General, UN GA Res 57/172, 66
[738] UN Peacekeeping Operations: Principles and Guidelines 2008, available at http://www.peacekeepingbestpractices.unlb.org/pbps/library/capstone_doctrine_eng.pdf
[739] Report of the Secretary-General on Peacebuilding in the Immediate Aftermath of Conflict UN GA Res 63/881-UN SC Res 2009/304
[753] UNDP, *The Role of the UNDP in crisis and post-conflict situations* DP/2001/4
[757] Security Council, 5632nd meeting, 'The Maintenance of International Peace and Security: The Role of the Security Council in Supporting Security Sector Reform', 2
[769] United Nations-World Bank Partnership Framework for Crisis and Post-Crisis Situations, Signed at UNHQ, 24 October 2008
[771] Practical Guide to Multilateral Needs Assessment in Post-Conflict Situations, A Joint Project of
The United Nations Development Programme, World Bank, United Nations Development Group, August 2004
[772] Joint Guidance Note in Integrated Recovery Planning using Post Conflict Needs Assessments and Transitional Results Framework, UN Development Group/World Bank, September 2007

UNGA, Note by the SG, 'Report of the Group of Legal Experts on Ensuring the Accountability of United Nations Staff and Experts on Mission with Respect to Criminal Acts Committed in Peacekeeping Operations' (16 August 2006) UN Doc A/60/980 24, para 84(g).

[1200] Views of the Human Rights Committee (CCPR/C/94/D/1469/2006). For follow-up status, see CCPR, Official Records of the General Assembly Sixty-Fourth Session, Supplement No 40 (A/64/40), Vol. I, para. 219
[1099] UN SC Res 1740 UNMIN (2007)

[967] Peacebuilding Commission—Working Group on Lessons Learned, Concept Note on Justice in Times of Transition (February 2008)

UNMIT Report on human rights developments in Timor-Leste, The security sector and access to justice, 1 September 2007 – 30 June 2008, para. 45-46.
UNMIT HRTJS, Report on Human Rights Developments in Timor-Leste 1 July 2008 to 30 June 2009, 15

UN SC Res 1674 Protections of Civilians in Armed Conflict; UN GA Res 63/67 Implementing the Responsibility to Protect(12 January 2009)

UNSC Debate on UNMIT and Timor-Leste 23 February 2010 S/PV.6276, 3
S/2010/85
S/2010/522

United Nations, Monitoring Peace Consolidation: UN Practitioners' Guide to Benchmarking (2010), 2

OHCHR, Report on Indicators for Monitoring Compliance with International Human Rights Instruments HRI/MC/2006/7; Report on Indicators for Promoting and Monitoring Implementation of Human Rights HRI/MC/2008/3; OHCHR, Report of the United Nations High Commissioner for Human Rights E/2011/90
[891] OHCHR, Report of the United Nations High Commissioner for Human Rights E/2011/90, para 12
[892] Report on Indicators for Promoting and Monitoring Implementation of Human Rights HRI/MC/2008/3, para 42

Rep. of the Int'l Law Comm'n, *Draft Articles on Responsibility of International Organizations*, 61st sess, May 4–June 5, July 6–Aug. 7, U.N. Doc. A/64/10; U.N. GAOR 64th Sess., Supp. No. 10, art. 2, (2009), *available at* http://untreaty.un.org/ilc/reports/2009/ 2009report.htm [hereinafter *Draft Articles on IO Responsibility*].

UNSG Report on the quest of Nepal for United Nations assistance in support of its peace process UN SC Res 2010/658 (23 December 2010)

S/2011/32 Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 21 September 2010 to 7 January 2011)
Security Council, SC/10179, 22 February 2011
UNSC 10179 "Upcoming Elections Among Critical Tests of Timor-Leste's Resiliency" (22 February 2011)

UN SC Res 1970 The Situation in Libya (26 February 2011)

Karin Landgren, Representative of the Secretary-General in Nepal Karin Landgren's remarks (farewell reception organized by UCPN-Maoist, 16 January 2011)

OHCHR, Report of the United Nations High Commissioner for Human Rights E/2011/90
UN Peace-Building Strategy for Nepal 2011-12, June 2011
UNDP, Timor-Leste Human Development Report 2011, 5; 17
UNMIT Press Release 15 September 2011

Resolutions E/CN.4/2003/72, 25 April 2003, para 8; E/CN.4/RES/2003/32 (torture), 23 April2003, para8; E/CN.4/RES/2003/53(extrajudicial,summary and arbitrary executions),24April 2003, par as 4, 5; E/CN.4/RES/2003/72 (impunity), 25 Apr il 2003, para 8.; E/CN.4/RES/2003/38 (enforced or involuntary disappearances),23April2003, para5(c)
Principles on Investigation of Torture, recommended by the General Assembly in December 2000 A/RES/55/89 of 4 December 2000
[468] GA Res 2583 (XXIV) of 1969; Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, Assembly Resolution 3074 (XXVIII) of 1973

[479] Office of the High Commissioner for Human Rights (OHCHR) E/CN.4/2006/91 on the right to truth; *Right to the Truth.* UN Doc. A/H.R.C/5/7, of June 7, 2007 Office of the High Commissioner of the United Nations for Human Rights.
[480] Principles 2, 4, E/CN.4/2005/102/Add.1 (hereinafter Set of Principles)

Draft ILC Articles on State Responsibility A/56/83
Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victim s of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law A/RES/60/147

[274] United Nations Development Programme, Human Development Report (UNDP 1994)
[288] OHCHR, *Vetting: an operational framework* (HR/PUB/06/5), 3-5
[548] Resolution 1994/67, "Civil Defence Forces", paragraph 2.; Resolution 1994/39, paragraph 21; E/CN.4/Sub.2/2000/WG.1/CRP1, E/CN.4/Sub.2/2001/WG.1/CRP3 and E/CN.4/Sub.2/ 2002/4.

International Organisation Documents:

Right to Development (DFID, 2002) 30

[1049] European Commission, Green paper: The EU corporate governance framework Brussels, 5.4.2011 COM(2011) 164

[1062] US Millennium Challenge Corporation, MCC's Approach to Country Ownership document, 8

[1353] USAID Conflict Vulnerability Assessment 2006, 18-19

The European Union

European Contact Network European Council Decision, 2002/494/JAI, 13th of June 2002.

European Arrest Warrant Official Journal of the European Communities, L 190/1-20, 18th of October 2002

Decision (2003/335/JHA) by the Council of the EU on the investigation and prosecution of genocide, crimes against humanity and war crimes (8 May 2003);

Agreement between the International Criminal Court and the European Union in cooperation and support (6 December 2005);

Council of the European Union, EU Concept for ESDP support to Security Sector Reform (SSR) Brussels, 13 October 2005 12566/4/

The EU and Africa: Towards a Strategic Partnership, Council of the European Union, (doc. 15702/1/05 Rev 1) adopted by the European Council 15-16 December 2005; COM(2003)615 final
EU Concept for ESDP support to Security Sector Reform (SSR) Brussels, 13 October 2005 12566/4/05;

Partnership Agreement ACP-EC, Cotonou (23/06/2000) and revised in Luxembourg (25/06/2005). 11; Article 4 of the

The European Consensus, Council of Europe, doc. 14820/05, Brussels, 22 November 2005

Draft Council Conclusions on a Policy Framework for Security Sector Reform, 9967/06

Committee for Civilian Aspects of Crisis Management Political and Security Committee, Transitional Justice and ESDP, Brussels, 19 June 2006 10674/06

REGULATION (EC) No 1717/2006 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 November 2006 establishing an Instrument for Stability

Regulation no 1889/2006 of the European Parliament and Council, from December 20, 2006 which established a financial instrument for the promotion of global democracy and human rights

European Union's Development Policy Statement, "The European Consensus" on development, adopted by the Council on 22 November 2005, published in Official Journal No C 46 of 24/02/2006,

EU Policy Framework for Security Sector Reform, doc. 9967/06;

EU Concept for Support to Disarmament, Demobilisation and Reintegration (DDR), passed by the European Commission on the 14th of December 2006 and by the Council of the EU on the 11th of December 2006.

European Commission, Towards an EU response to situations of fragility - engaging in difficult environments for sustainable development, stability and peace, Brussels, 25.10.2007 COM(2007) 643 final

Communication "Towards an EU Response to situations of fragility" COM(2007) 643 (25 October 2007)

Programming Guide for Strategy Papers, Integrated transition strategies, October 2008

OECD:

'Development Partnerships in the New Global Context', adopted by the OECD's Development and Assistance Committee (DAC) in May 1995

OECD DAC's manifesto, 'Shaping the 21st Century' (1996)

OECD, *Shaping the 21st Century: The Contribution of Development Cooperation* (OECD 1996)

OECD DAC, *Conflict, Peace and Development Cooperation on the Threshold of the 21st Century* (Paris: OECD DAC, 1997)

OECD DAC, *Conflict, Peace and Development Cooperation* in *The DAC Guidelines: Helping Prevent Violent Conflict*, 119 (Paris: OECD DAC, 2001);

OECD DAC, *A Survey of SSR and Donor Policy: Views from non-OECD Countries*, DCD/DAC/CPDC(2004)4 (OECD DAC, 31 August 2004)

OECD Development Assistance Committee, *Security System Reform and Governance: Policy and Good Practice*, Paris: OECD, 2004

OECD DAC, *Security System Reform and Governance*, DAC Guidelines and Reference Series (OECD DAC, 2004)

Principles for Good International Engagement in Fragile States and Situations

OECD DAC, *OECD DAC Handbook on Security System Reform, Supporting Security and Justice* (Paris: OECD DAC, 2007), 107

OECD DAC, *OECD DAC Handbook on Security System Reform, Supporting Security and Justice* (Paris: OECD DAC, 2007)

The OECD Principles for Good International Engagement in Fragile States and Situations were formally endorsed by ministers and heads of agencies at the Development Assistance Committee's High Level Forum on 3-4 April 2007, available at http://www.oecd.org/document/46/0,3343,en_2649_33693550_35233262_1_1_1_1,00.html

Principles for Good International Engagement in Fragile States and Situations

The Paris Declaration and the Accra Agenda for Action available at http://www.oecd.org/dataoecd/11/41/34428351.pdf

OECD, Service Delivery in Fragile Situations: Key Concepts, Findings and Lessons (OECD 2008)

OECD Handbook on Security Sector Reform: Supporting Security and Justice (2008)

OECD, Monitoring the Principles for Good International Engagement in Fragile States and Situations (2010)

OECD DAC, 'Conflict Prevention and Peace-building: What Counts as ODA?' OECD DAC, available at http://www.oecd.org/dataoecd/32/32/34535173.pdf. (accessed 29 September 2011)

World Bank:

IBRD Resolution 93-10 and IDA Resolution 93-6, "The World Bank Inspection Panel," was adopted by the Bank's Board of Executive Directors on September 22, 1993.

Post-Conflict Reconstruction: The Role of the World Bank (World Bank, *1998),* endorsed by the Executive Directors as A *Framework for World Bank Involvement in Post-Conflict Reconstruction,* May *1998*

World Bank, OP 8.00 - Rapid Response to Crises and Emergencies

Fragile States – Good Practice in Country Assistance Strategies Operations Policy and Country Services, (World Bank 2005)

World Bank Independent Evaluation Group, *Engaging with Fragile States An IEG Review of World Bank Support to Low-Income Countries Under Stress* (World Bank 2006)

World Bank Operations Policy and Country Services, *Toward a New Framework for Rapid Bank Response to Crises and Emergencies* (World Bank 2007)

World Bank, 'Rapid Response to Crises and Emergencies', in *The World Bank Operational Manual: Operational Policies*, OP 8.00 (World Bank 2007)

Legal opinion of General Counsel on Human Rights; World Bank Senior Vice President and Group General Counsel,'Legal Opinion on Peace-building, Security and Relief Issues under the Bank's Policy Framework for Rapid Response to Crises and Emergencies', Annex I in *Toward a New Framework for Rapid Bank Response to Crises and Emergencies*, World Bank Operations Policy and Country Services (World Bank 2007)

World Bank Emergency Peace Support Project (PE-P110762) 21 April 2008

World Bank, Reparation for Especially Vulnerable Victims of the Armed Conflict in Colombia Version – May 25 2007 (on file with author); World Bank, Emergency Project Paper for Proposed Grant to Nepal for Emergency Peace Support Project April 21,2008 Report 43172-NP

World Bank, Establishment of a State and Peace Building Fund, Operations Policy and Country Services (March 25 2008)

World Bank, "Restructuring paper on a Proposed Project Restructuring of Nepal Emergency Peace Support Project", 22 April 2010, Report No: 54421-NP

World Bank, *Governance Matters VIII: Governance Indicators 1996-2008*

IEG World Bank, Evaluation of World Bank Group Program, Timor Leste Country Program Evaluation 2000-2010

Others:

Report of the MDB Working Group: Towards a More Harmonized Approach to MDB Engagement in Fragile Situations (2007)

Financial Reporting Council, UK Stewardship Code, July 2010

[496] Press Release: 06.05.201 ICC's Trust Fund for Victims Launches Expression of Interest Supporting Victim Survivors of Sexual and Gender-Based Violence in the Central African Republic

[559] INTERPOL Code of Conduct and Ethics for Law Enforcement Officers; The Global Standards to Combat Corruption in Police Forces/Services

ICNA, Justice Sector of Timor-Leste

[587] Felix Kirchmeier, "The Right to Development - where do we stand?" Occasional Papers Friedrich Ebert Stiftung No. 22, 3

Scanteam, *Review of Development Co-Operation in Timor-Leste.*

USAID, Millennium Challenge Account Threshold Program September 22 2010

Validation of the Extractive Industries Transparency Initiative in Timor Leste (March 2010) 18

NGO Reports:

Accountability Watch Committee, Advocacy Forum Nepal, Amnesty International *et al*, Nepal: Joint Memorandum on the Disappearances of Persons (Crime and Punishment) Bill 30 August 2009

Advocacy Forum; INSEC, Comments and Suggestions on draft Bill made for making provisions relating to Truth and Reconciliation Commission

Advocacy Forum submission on TRC Bill 29 April 2010

Advocacy Forum, ICJ, Amnesty International and Human Rights Watch, 1 September 2011

Asia Foundation, *Impunity in Nepal: An Exploratory Study* (1999)

Asia Foundation, Preliminary Mapping of Gender Based Violence, July 2010

Aitken K, "Justice should be blind, but is the international community's support to informal justice mechanisms in Nepal given blindly?" Saferworld November 2010

Alexander, L, Gündüz C, Subedi DB, "What role for business in "post-conflict" economic recovery? Perspectives from Nepal", International Alert, March 2009;

Amnesty International, Reconciliation Does not Mean Impunity, A Memorandum on the Truth and Reconciliation Commission Bill, ASA 31/006/2007

Amnesty International, "We Cry for Justice: Impunity Persists 10 Years on in Timor-Leste" (2009)
Amnesty International "Indonesia/ Timor-Leste: International Responsibility for Justice," April 14, 2003, available at www.amnesty.org/en/library/info/ASA03/001/2003. Human RIghts Watch "Justice Denied for East Timor," available at www.hrw.org/backgrounder/asia/timor/etimor1202bg.htm

Asia Foundation, Law and Justice in East Timor Asia Foundation community perception survey (2004)

_____ and Spencer Zifcak, "Restorative Justice in East Timor: An Evaluation of the Community Reconciliation Process of the CAVR" (Asia Foundation 2005) 29

Asia Foundation, Perception of Law and Justice (2002)

Avocats Sans Frontieres, Access to Legal Aid in Timor-Leste: Survey Report (November 2006)

Bonino F and Donini A, "Aid and Violence: Development Policies and Conflict in Nepal", June 2009, Feinstein International Center

Belun, Reducing Community Tensions Through Housing (April 2009)

Curtain R, "Crisis in Timor Leste Looking Beyond The Surface Reality for Causes and Solutions" SSGM Working papers 5-7

Coalition against Torture, Criminalise Torture (2009)

Do Q and Iyer L, Poverty, "Social Divisions and Conflict in Nepal" World Bank Policy Research Working Paper 4228, May 2007

EED, FES, GTZ, MISEREOR, SEQUA, Joint Assessment of Selected Sectors of Development Work in Nepal and its Impact on Conflict and Peace

Farasat W and Hayner P, Negotiating Peace in Nepal: Implications for Justice, ICTJ (June 2009)

Human Rights Watch, *Indifference to Duty*, December 2010, 2

Hatlebakk M, "Explaining Maoist Control and Level of Civil Conflict in Nepal", CMI Working Paper 2009 No 10;

Human Rights Watch "Children in the Ranks: The Maoists' Use of Child Soldiers in Nepal", (Human Rights Watch, February 2007)

INSEC, No. of Victims Killed by State and Maoist in Connection with the "People's War" http://www.insec.org.np/pics/1247467500.pdf

International Alert, Donor Aid Strategies in Post-Peace Settlement Environments (December 2010)

International Center for Transitional Justice, Nepali Voices: Perceptions of Truth, Justice, Reconciliation and Reparation and the Transition in Nepal, March 2008

_____, Iraqi Voices: Attitudes Toward Transitional Justice and Social Reconstruction (2004);

International Crisis Group, Nepal Backgrounder: Ceasefire - Soft Landing or Strategic Pause? (10 April 2003, ICG) Asia Report N°50, 5

_____ "Nepal: Responding to the Royal Coup" ICG Asia Briefing n°36, 24 February 2005 1-12

_____, Nepal's Election: A Peaceful Revolution? Asia Report N°155 – 3 July 2008

_____, "Nepal's New Political Landscape", Asia Report N°156 – 3 July 2008,

_____, "Nepal: Peace and Justice", Asia Report N°184 – 14 January 2010

_____, Nepal's Fitful Peace Process, Asia Briefing No 120 (7 April 2011) 17

_____, Aid and Conflict in Afghanistan Asia Report No. 210 (4 August 2011)

_____, From Two Armies to One, Asia Report No 211 (18 August 2011)

_____*"Timor-Leste: No Time for Complacency Crisis Group" Asia Briefing N°87, 9 February 2009, 2-4*
_____, "Resolving Timor-Leste's Crisis" Asia Report No 120 1-6
_____, "Timor-Leste: Security Sector Reform Crisis Group" Asia Report N°143, 17 January 2008 2
_____ Handing Back Responsibility to Timor-Leste's Police Force, Asia Report No 180 (3 December 2009)
_____, Managing Land Conflict in Timor-Leste Asia Report No 110 9 September 2010

ICTJ, Crying without Tears: In Pursuit of Justice and Reconciliation in Timor-Leste: Community Perspectives and Expectations (2003) 18
ICTJ, "An Unfinished Truth: An Analysis of the Commission on Truth and Friendship's Final Report on the 1999 Atrocities in East Timor" (ICTJ 2009)
ICTJ, Intended to Fail: The Trials Before the Ad Hoc Human Rights Court in Jakarta (2003) 100
ICTJ, The Serious Crimes Process in Retrospect (2006) 154
ICTJ, "Impunity in Timor-Leste: Can The Serious Crimes Investigation Team Make a Difference?" (June 2010)
ICTJ, Unfulfilled Expectations: Victims' perceptions of justice and reparations in Timor-Leste, 16

JSMP, Land and Law Report (27 September 2005) 8

Kent L "Unfulfilled Expectations: Community Views on CAVR's Community Reconciliation Process" (JSMP 2004)

Lao Hamutuk, Community Empowerment Project, (2002) 3(7) Bulletin (2/2)
Lao Hamutuk Letter to International Security Forces 8 March 2010
http://www.laohamutuk.org/Oil/PetFund/05PFIndex.htm

Lingán J, Cavender A, Palmer T, and Gwynne B, "Responding to development effectiveness in the global South", One World Trust / World Vision Briefing Paper Number 126, June 2010, 1

Lloyd R, Calvo V, Laybourn C, "Ensuring credibility and effectiveness: Designing compliance systems in CSO self-regulation" Briefing paper number 127, July 2010, 3-4

Patel A, Transitional Justice, DDR, and Security Sector Reform (ICTJ Research Brief February 2010)

Saferworld, *Security and Justice in Nepal: District Findings* (March 2010)

Suhrke A, CMI, "UN Support for Peacebuilding: Nepal as the Exceptional Case", WP 2009:7, 14

Witte E, Beyond "Peace versus Justice": The Relationship Between DDR and the Prosecution of International Crime (ICTJ Research Brief February 2010)

Laws:

25 Edward III, st. 5, c. 2

Treaty of Versailles, available at <http://www.firstworldwar.com/source/versailles.htm> (accessed 27 September 2011), Articles 159-213

Statement on Atrocities Joint Four-Nation Declaration October 1943, available at <http://www.ibiblio.org/pha/policy/1943/431000a.html> (accessed 27 September 2011)

Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945.

Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946)

Convention on the Privileges and Immunities of the United Nations Adopted by UNGA 1946

[596] IBRD Articles of Agreement were drawn up at the United Nations Monetary and Financial Conference, at Bretton Woods, New Hampshire, July 1-22, 1944. The governing document became effective in Dec. 27, 1945 and has been amended twice. The first amendment was done in 1965 and the second in 1989.

Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948)

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, entered into force Oct. 21, 1950. (Geneva Convention 1)

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, entered into force Oct. 21, 1950 (Geneva Convention II)

Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force Oct. 21, 1950 (Geneva Convention III)

Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force Oct. 21, 1950 (Geneva Convention IV)

Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force Jan. 12, 1951;

1957 General Assembly (GA) Resolution 1161 (XII)

Convention for the Organisation for Economic Cooperation, Paris 14th December 1960

Supplementary Protocol No. 2 to the Convention on the OECD, Paris 14 December 1960

1968 Teheran International Conference on Human Rights; 1969 Declaration on Social Progress and Development;

International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976

International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3,entered into force Jan. 3, 1976.

1977 Commission on Human Rights resolution 4 (XXXIII);

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3,*entered into force* Dec. 7, 1978
Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, entered into force Dec. 7, 1978.

1982 Law of the Sea Convention 21 I.L.M. 1245 (1982); G.A. Res. 2749 (XXV), ¶ 1, U.N. Doc. A/RES/25/2749 (Dec. 12, 1970).

Declaration on the Right to Development A/Res/41/128 (1986)

African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987.

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (the Protocol of San Salvador), adopted on 14 Nov. 1988

1993 Vienna World Conference on Human Rights

Vienna Declaration on Human Rights, 1993

Rio Declaration; Article 23

Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993)

Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994)

Convention on the Protection of the European Communities' Financial Interests, 1995 OJ (C316/49)

Protocol to the Convention, 1996 OJ (C313/2)

Second Protocol to the Convention, 1997 OK (C221/12)

OAS Inter-American Convention against Corruption (IACAC), March 29 1996, (1999) 35 ILM 724

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, December 19, 1997 (1998) 37 ILM 1

UN Security Council, Statute of the Special Court for Sierra Leone, 16 January 2002, available at: http://www.unhcr.org/refworld/docid/3dda29f94.html [accessed 30 May 2011];

Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, *entered into force* July 1, 2002

SG bulletin on special measures for protection from sexual exploitation and sexual abuse (ST/SGB/2003/13 http://cdu.unlb.org/UNStandardsofConduct/WeAreUnitedNationsPeacekeepingPersonnel.aspx

United Nation Convention Against Corruption, (2003) U.N. Doc A/58/422

The African Union Convention on Preventing and Combating Corruption and Related Offences, 2003

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, C.H.R. res. 2005/35, U.N. Doc. E/CN.4/2005/ L.10/Add.11 (19 April 2005)

International Convention for the Protection of All Persons from Enforced Disappearance Doc.A/61/488. C.N.737.2008;

Petroleum Fund Law, No. 9/2005

Commission for Reception, Truth and Reconciliation in East Timor (CAVR), *Chega!* (2005 CAVR)

Commission for Truth and Friendship (CTF) Terms of Reference (TOR), March 9, 2005
Commission for Truth and Friendship, *Per Memoriam ad Spem: Final Report of the Commission of Truth and Friendship* (2008)

Law 1/2003, 10 March, "Juridical Regime of Immovable Property – Part 1. Ownership of Immovable Property; Decree-law19/2004, 29 December, "JuridicalRegime of Immovable Property- Official Allocation and Lease of State Property"; Law 12/2005, 2 September "Juridical Regime of Immovable Property– Part II: Leases between Private Parties".
Government of Timor-Leste, Timor-Leste Strategic Development Plan 2011-2030

Dili Declaration: A New Vision for Peace-Building and State-Building available at http://www.oecd.org/dataoecd/12/30/44927821.pdf

Monrovia Declaration, June 2011

Conference Papers:

Ambos K, "The Legal Framework of Transitional Justice", International conference, Building a Future on Peace and Justice Nuremberg 25-27 2007

Nicole Ball and Dylan Hendrickson, Trends in Security Sector Reform (SSR): Policy and Research, Workshop on "New Directions in Security Sector Reform" Peace, Conflict and Development Program Initiative International Development Research Centre (IDRC) Ottawa, Canada, 3-4 November 2005, 3

Michael Barnett, 'The Peace-builder's Contract: How External State-building Reinforces Weak Statehood', RPPS Working Paper, available at http://state-building.org/resources/Barnett_Zeurcher_RPPS_October2006.pdf

Filmer-Wilson, Summary Report of Material Collated Regarding Practical Guidance to Implementing Rights-Based Approaches, Human Rights Analyses for Poverty Reduction and Human Rights Benchmarks from Development Acts and other Relevant Communities 31 March 2005

Address by H.E. Judge Gilbert Guillaume, President of the International Court of Justice to the United Nations General Assembly, 26 October 2000

Arjun Karki, "Socio-economic and Political Justice in Nepal: A Civil Society Perspective", Building a Future on Peace and Justice Nuremberg, 25 – 27 June 2007

Daniel Kaufmann and Aart Kraay On Measuring Governance: Framing Issues for Debate, Issues paper for January 11th, 2007 Roundtable on Measuring Governance Hosted by the World Bank Institute and the Development Economics Vice-Presidency of The World Bank, 5

Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi,The Worldwide Governance Indicators: Methodology and Analytical Issues, 4

Daniel Kaufmann et al, "Rethinking Governance: Empirical Lessons Challenge Orthodoxy," Chapter in *Global Competitiveness Report 2002-03*, World Economic Forum, March 2003, available at http://www.worldbank.org/wbi/governance/pubs/rethink_gov.html., 17

Khan, M 'State Failure in Developing Countries and Strategies of Institutional Reform', draft of paper for the World bank ASCDE Conference, Oslo, 24-26 June.

Todd Landman, "Map-Making and Analysis of the Main International Initiatives on Developing Indicators on Democracy and Good Governance", Thursday, 24 July 2003

Low, What the UN Convention on Anti-Corruption will Mean, Prepared for a Conference of the International Bar Association, International Chamber of Commerce, Organization for Economic Cooperation and Development "The Awakening Giant of Anticorruption Enforcement" London, England 4-5 May 2006;

Michael Lund, What Kind of Peace is Being Built? Taking Stock of Post-Conflict Peace-building and Charting Future Directions, Discussion paper prepared for the International Development Research Center, Ottawa, 2003, 27

Ian Martin, "The Peace Process in Nepal: is it failing?" New School, New York 6 November 2009

Helga Malmin Binningsbø, Jon Elster & Scott Gates, "Civil War and Transitional Justice, 1946-2003: A Dataset";

Oskar N.T. Thoms, James Ron, Roland Paris, "The Effect of Transitional Justice Mechanisms" CIPS April 2008

Bishwa Nath Tiwari, "An Assessment of the Causes of Conflict in Nepal", A Paper to be presented at the Second Annual Himalayan Policy Research Conference Nepal Study Centre, Madison 11 October 2007

Report of Turku Expert Meeting on Human Rights Indicators, 10-13 March 2005 in Turku/Åbo Finland, 8

Bocco R, Luigi de Martino, Arnold Luethold, *Palestinian Public Perceptions of Security Sector Governance: Summary report,* (Geneva Centre for the Democratic Control of Armed Forces and the Graduate Institute of Development Studies (IUED) 14 October 2005)
[527] Richard Ponzio, T*he United Nations Peacebuilding Commission: origins and initial practice* (United Nations Institute
[277] Caroline Thomas, Global governance, development and human security the challenge of poverty and inequality. (Pluto Press 2000) Sabina Alkire, "A Conceptual Framework for Human Security", Centre for Research on Inequality, Human Security, and Ethnicity (CRISE), Working Paper 2, London: University of Oxford, 2003, #15
for Disarmament Research (UNIDIR) 2007)

Hutchful E and Luckham R, "Civil-Military Relations in Africa," Draft Framework Paper for the African Center for Strategic Studies;

[846] Francis Fukyama, *Social Capital and Civil Society* (1999 on file with author), 6
[116] DFID, *Poverty and the Security* Sector, 1999, http://www.dfid.gov.uk/pubs/files/poverty-security.pdf. See also Clare Short, "Security Sector Reform and the Elimination of Poverty," Speech at the Centre for Defence Studies, King's College, London, March 9., 1999.

Dylan Hendrickson, A Review of Security-Sector Reform, (1999) The Conflict, Security & Development Group Working Papers Number 1,

Daniel. Kaufmann, Aartay. Kraay, and Pablo. Zoido-Lobaton, *Governance Matters* (World Bank Policy Research Working Paper 2196) (October, 1999)

Paris Declaration Evaluation Phase II Nepal Country Study, 11

SIDA, Reconciliation - Theory and Practice for Development Cooperation, 13-20

Frances Stewart, *Development & Security*, CRISE Working Paper, May 2004;

Fourth Consolidated Annual Progress Report on Activities Implemented under the Peacebuilding Fund (PBF)
Report of the Administrative Agent of the Peacebuilding Fund for the Period 1 January to 31 December 2010, 90

Kumar RM, *The Constitutional Monarchy and the Maoists of Nepal: Some Problems of Persuasion by Naming*, Contemporary Issues and Ideas in Social Sciences, July 2005, 18