

**Assessing the impact of transitional justice mechanisms**

**in post-conflict societies: Lessons drawn for Libya**

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**Abstract**

Over the course of the last three decades, judicial and non-judicial mechanisms of transitional justice as defined by the UN have been used to address legacies of past grievances and violations in a number of post-conflict societies. This thesis is an exploration of the viability and efficacy of transitional justice mechanisms in providing justice, promoting reconciliation, establishing viable democracies and achieving sustainable peace in the aftermath of conflicts. By assessing the earlier experiments with the application of international and local justice mechanisms, it draws out lessons for the Libyan case. It evaluates the application of three models of transitional justice: retributive justice with the trials at the ICC and national courts; restorative justice; and customary justice mechanisms in transitional societies in general and Libya in particular. Such an evaluation is intended to make the case for transitional justice mechanisms that are reconciliatory and locally relevant.

In the case of Libya, the dissertation assesses the transitional justice mechanisms conducted in post-Gaddafi Libya to date in the light of achieving desired goals of transition. It also explores the application of what it terms customary justice mechanisms used mostly in Libya to achieve reconciliation and lasting peace. The study considers the role of ‘Orf’ in resolving the conflicts and bringing people together again. It combines unique data on local perceptions regarding conflict resolution mechanisms with insights from the literature, to critically examine the viability and efficiency of engaging customary justice mechanisms in Libya in achieving sustainable peace and national reconciliation. The key finding of this exploration is that local justice mechanisms are more effective in fostering such objectives than criminal prosecutions.

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**List of Abbreviations**

TJ Transitional Justice

ICC International Criminal Court

TRC Truth and Reconciliation Commission

ICTY International Criminal Tribunal for the Former Yugoslavia

ICTR International Criminal Tribunal for Rwanda

UN United Nations

DDR Disarmament, Demobilisation and Reintegration

NGO Non-governmental organization

ANC African National Congress

UDHR Universal Declaration of Human Rights

RPF Rwandan Patriotic Front army

HRW Human Rights Watch

IST Iraq Special Tribunal

CPA Coalition Provisional Authority

LRA Lord's Resistance Army

DRC Democratic Republic of the Congo

VORP Victim Offender Reconciliation Program

VOMP Victim-Offender Mediation Programs

IRA Irish Republican Army

FMLN Farabundo Martí National Liberation Front

ONUSAL United Nations Observer Group in El Salvador

AI Amnesty International

RRC Reparation and Rehabilitation Committee

IFP Inkatha Freedom Party

NP National Party

HRVC Human Rights Violations Committee

UNSMIL UN Support Mission in Libya

NTC National Transitional Council

UNSC United Nations Security Council

GNC General National Congress

HOR House of Representatives

GNA Government of National Accord

OHCHR Office of the High Commissioner for Human Rights

LSC Libyan Supreme Court

PIL Political Isolation Law

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**Introduction**

Transitional justice (TJ) has received ever more attention in the last couple of decades within the field of legal philosophy and political theory (Augustinavicius,2010). As a field of study, it is concerned with how societies should move from violent conflicts or oppressive regimes to stable and democratic states that respect human rights and promote the rule of law. Its processes aim to restore the dignity of victims, provide justice, rebuild social confidence, and promote reconciliation and lasting peace, so as to allow transitional societies to go forward. Far from being an issue confined to the academy, however, many states around the world have experienced transitional justice challenges, including modern-day Libya, Syria, Somalia, Iraq, to name but a few. This thesis explores the various transitional justice mechanisms in general, then those available to Libya as it grapples with its legacy of gross human rights violations committed during and after the regime change of 2011. It considers the viability of local justice mechanisms by comparing them with criminal trials and other transitional justice mechanisms that have been used in Libya until now. This introduction will lay the foundation for the thesis by providing the background to the study and presenting the structure of the thesis.

Transitional justice scholars such as Buckley-Zistel (2009) and Mobekk (2006) argue that transitional justice, as a field of study, is based on the assumption that the transition to peace after civil war or dictatorship requires addressing gross human rights violations to curb recurrence of such atrocities in the future. A wide range of judicial and non-judicial mechanisms have been developed to practically address such wrongs. Transitional justice, on the one hand, aims to provide justice by establishing a measure of accountability, to ensure that those who committed atrocities against humanity are punished, and fortify and protect their families from reprisals as long as they are not partners in crime; and identify the victims, to secure the appropriate compensation and help their healing. It is, on the other hand, an approach focused on achieving reconciliation and lasting peace. Therefore, it is not aimed at achieving justice at any cost or focusing on maintaining peace at the expense of victims, but rather it aims to find a balance between peace and justice based on international law. Transitional justice does not, thus, necessarily only mean punitive justice, but other forms of justice such as restorative, compensatory, social justice and equal opportunities in order to boost reconciliation, rebuild the war-torn nations on different grounds to those that caused the conflict, and facilitate a smooth transition to a more democratic and peaceful future.

There are, thus, two underlying values involved: justice and reconciliation. Although they appear to be at opposite ends of the spectrum, the aim in both cases is an end to the cycles of conflict and violations (Anderlini et al.2004). However, a number of normative problems face transitional justice processes, which make achieving its goals a complex task. The search for balance that achieves justice whilst ensuring social reconciliation and stability will remain a major challenge to transitional justice (Fombad,2008). A controversial question facing transitional societies, so far, is how best to deal with the painful legacy of human rights violations, and at the same time maintaining the fragile social harmony that often characterises post-conflict societies (Huyse,2008). The questions, thus, raised by the processes of transitional justice were not only ones of justice: What to do for offenders? What to do for victims and their families? Rather, the questions were about justice and social peace: How to balance competing moral imperatives, reconcile legitimate demands for justice with equally legitimate demands for peace and stability (Arthur,2009).

This normative issue is the main concern of this thesis. It will deal specifically with the question of how to treat perpetrators of violations and the possibility of closure, reconciliation and peace after periods of violence and oppression. It shall try to address the following, among other related questions in the chapters: What form of justice should be adopted in the transitional period to achieve its goals? What ought to be done with perpetrators who committed serious crimes? How can victims be helped for healing? Should priority be given to bringing offenders to justice, thereby combating the culture of impunity? Or is it more important to forget past violations and focus on achieving reconciliation, peace and stability for society’s longer-term recovery? Is it possible to balance the values of justice and peace in transitional periods?

In the immediate aftermath of conflicts, victims and societies are preoccupied with how to reach justice, reconciliation and peace. However, given the unique circumstances of all post-conflict societies, questions and challenges abound. They are confronted with a formidable transition agenda. This raises complex problems of prioritising. Can a legacy of mass violence be addressed if basic needs of physical security, housing and so on remain unanswered? Or if the conflict still continues, will it be peace first or justice instead? What should come first, healing initiatives, prosecution of offenders, or reintegration rituals? When to use justice and reconciliation mechanisms? What is the proper timing to tackle past violations? Timing and sequencing represent an extremely important dimension, but it is difficult. Wrong timing and sequencing may have undesirable effects. For example, the threat of criminal trials may incite suspects to destroy evidence and undermine the peace efforts. Experience suggests that a rushed approach, as regularly supported by national and international policy makers, will almost certainly be counterproductive. Therefore, to get the time as right as possible, decision makers must understand the times and know the forces that influence the transition agenda. It could be argued, thus, that there is need for a comprehensive approach, the conjunction of political, local and cultural forces in the post-conflict societies impact heavily on prioritising and time management (Huyse,2008).

When engaging with these issues of transitional justice, we must first provide an account of the various mechanisms that societies can take to deal with past violations. Secondly, which particular mechanisms are more appropriate to achieve transitional justice objectives needs to be explored. This dissertation will attempt to address these issues in a way that considers the circumstances of transitional societies that impact on achieving such goals.

Early literature in the field of transitional justice was dominated by debates over the meaning of justice and how to achieve it in post-conflict societies (Hoogenboom,2014). One of such discussions is the long-standing question as to whether justice should be punitive or restorative. These two types of justice mechanisms differ in their understanding of what justice should include: Retributive justice is more purely ‘backward-looking’ which is oriented mainly toward punishing the perpetrators who committed serious crimes against humanity, righting past wrongs and countering a culture of impunity for justice to occur. Restorative justice, on the other hand, is more ‘forward-looking’; it primarily focuses on healing of wounds and restoring the dignity of victims through uncovering the truth, apology and making reparations. It aims to promote negotiation, reconciliation, rebuild confidence, restore the relationships between victims and perpetrators, and achieve peace (Eisikovits,2013). While retributivists and human rights advocates argue for the necessity of criminal prosecutions of offenders to prevent impunity, restorativists claim that non-judicial mechanisms of justice such as truth and reconciliation commissions and reparations are better suited for such societies that looking for restoring relations, achieving reconciliation and peacebuilding. What this suggests, then, is that debates over the justice question are interminable (Weinstein,2011; Hoogenboom,2014).

Theoretically, justice is one broad concept underlying a number of possible permutations used in the progression from theory to practice. It is based on moral and ethical principles that include truth, reparation, reconciliation, and according to Western tradition, retribution. The applications of justice take various forms in different societies, they are situational and culturally dependent (Augustinavicius,2010). Kasapas (2008) states that in transitional contexts, cultural patterns, religious beliefs, political and security factors play a decisive role in determining which kind of transitional justice mechanisms are most appropriate and should be implemented to best handle each individual case. Augustinavicius (2010) argues that the retributive justice approach is not equally fitting for the demands of all societies. Due to the unique circumstances and needs of post-conflict societies, the punitive justice model is ill suited and can incur both moral and physical costs for such societies. In addressing this issue, alternative forms of justice have been developed as reaction to the failures of the retributive system.

Restorative and compensatory justice paradigms have been put forward that can work in collaboration with, or in place of retributive justice. The fundamental theoretical pillars of transitional justice, thus, are: retributive justice in the form of punishment through international/local criminal courts; restorative justice seeking to promote reconciliation and restore individual dignity and community relations; and reparative justice represented in the compensation of the oppressed by the oppressor on the basis of equality, in aiming to repair past wrongs (Quinn,2009a; Hoogenboom,2014). Huyse (2008) confirms that due to the uniqueness of each society emerging from a violent conflict, a conviction arose that in most circumstances one mechanism alone would not be adequate. Therefore, a combination of measures and mechanisms such as a truth commission, apologies, reparations, amnesty, lustration, a few token trials, as well as traditional and informal justice mechanisms were used.

This thesis explores the recurring question of how transitional societies should respond to past human rights violations, attempting to provide a more in-depth examination of the candidate models of transitional justice (retributive, restorative, compensatory and local), discussing their characteristics, how they have dealt with the human rights abuses so far, the challenges faced by those mechanisms as well as their merits in obtaining the ultimate goals of transitional justice. This thesis follows up on the debates regarding specific mechanisms such as criminal courts, mainly the International Criminal Court (ICC), truth and reconciliation commissions (TRC’s), reparation, and local justice mechanisms, keeping in mind the possibility that different transitional justice mechanisms may have different ways of dealing with the violations. There is no one mechanism which can a priori guarantee success (Kasapas,2008). There are pros and cons with all transitional mechanisms are influenced by numerous factors in post-conflict societies, that they can have both positive and negative effects upon the objectives of transitional justice processes (Mobekk,2006).

From a theoretical standpoint, this dissertation argues that despite the importance of the punitive justice model, in transitional contexts a greater focus should be placed on restorative, reparative and local approaches over retributive mechanisms. Specifically, while each paradigm draws on a diverse set of ideas regarding justice, I shall argue against criminal justice, contending that restorative, reparative and domestic mechanisms are victim centered, community focused, and do not seek to punish, in stark contrast to the retributive approach which focuses on punishing offenders and usually involves mechanisms that alienate victims. Prosecutions can bring about a measure of justice, but on their own they cannot meet the urgent needs of victims and society as a whole. It will be argued that truth and reconciliation commissions, apologies, compensation, custom and local rituals can play a crucial role in periods of transition in addressing injustices, healing those affected, achieving reconciliation and re-building deeply divided societies (Kasapas,2008; Mihai,2010; Augustinavicius,2010).

Moreover, the thesis also investigates the tension between justice and peace in the context of this phenomenon through a moral examination of the relative weighting that should be given to justice and peace. I will clarify that my main concern is not whether justice or peace is more important, but to show the importance of the role that peace plays in the transitional justice phenomenon. Throughout this thesis, I will argue that peace should be built first; subsequently, justice can be achieved. I will defend the importance of promoting reconciliation and peace in transitional societies. This ought to be a priority after the conflict in order to be able to deal with the unique complexities which arise in and after periods of conflict. I argue that truth and reconciliation commissions, reparations and local mechanisms can be used to achieve political and security interests rather than criminal justice. However, one may argue that amnesty granted by the truth commissions, for example, which implies the cancellation of retributive justice itself, may not be morally justified. In transition, it is always assumed that justice must be pursued. The problem, however, is: what if there is no justice? (McAuliffe,2010). It will be argued that the fragile justice systems in transitional states may make prosecutions difficult task, if not impossible. In addition, according to Mihai (2010) where the atrocities have been committed by both sides, where there are no clear offenders and clear victims, narratives about the past are controversial. Because of the nature and scale of the violations, justice is bound to be imperfect and inappropriate.

In this case, as argued above, other mechanisms for achieving a form of justice are important and viable. These include recognition, apology, reparation, amnesty as well as traditional forms such as local and religious rituals which can be practically justified to deal with the complex reality of post-conflict societies, achieve social utility, prevent the violence, enhance reconciliation, ensure the successful passage to the state of lasting peace (Kasapas,2008) and move forward even if at the expense of formal justice systems. Some of these mechanisms, thus, should be argued to be justice mechanisms in transitional contexts. They should form the base upon which specific punitive mechanisms can be developed for effective practical employment (Augustinavicius,2010) in the future. I draw on the experience of past transitional phases in particular societies to justify these arguments.

It is with these problems just mentioned that this dissertation engages. It contributes to the existing body of knowledge on transitional justice in general, and formal and informal transitional justice mechanisms in Libya in particular. As the transitional justice experience is new to Libya, my contribution to the literature is to develop a necessary discussion on how the country can move forward. This will be achieved by debating the suitability of formal (international and national) transitional justice mechanisms and by providing an analysis of the contributions made by customary justice mechanisms, which are based on local culture, during and after the conflict in the pursuing of transitional justice in post-conflict Libya. Readers will be informed on how the ICC and national courts dealt with gross human rights abuses in post-Gaddafi Libya. The study will also explore the impact of other mechanisms that were used in Libya. It is the seeming inadequacies and failures of both the ICC, national courts, political isolation law and amnesty laws as mechanisms of transitional justice which prompted an exploration of the existence and use of local justice mechanisms in Libya in this study. This study argues that criminal prosecutions and lustration that have dominated Libya after Gaddafi have created a climate of retaliatory justice that contributed to a continuation of the armed conflict in the country. Such mechanisms were ill-suited for Libya’s complex situation in which the state institutions are extremely weak and lacked local legitimacy. It thus positions restorative and customary justice mechanisms as viable options for resolving conflicts and achieving stability. This contribution then goes on to highlight how restorative and customary justice mechanisms could be adapted in Libya to accomplish key goals of accountability, reconciliation, peace and reintegration.

By consideration of a number of theoretical positions, I hope to add new insights to this field of research. The aim is to enrich the ways in which we think about the values of justice, reconciliation and peace and their circumstances in post-conflict societies. The contribution begins with an overview of transitional justice before going on to explore the viability and effectiveness of transitional justice mechanisms conducted in post-Gaddafi Libya; it includes an evaluation of the existing theory and experience in the application of transitional justice in some states and clarifies the lessons to be learnt from such experiments to Libya. Case studies will be used illustratively to lend credibility to this contribution. Real-life examples are meant to justify my arguments and to make them clearer and more persuasive. Furthermore, it examines the fundamental ethical questions that lie at the core of transitional justice about justice, the rule of law, reconciliation, stability, security and democracy, considering the ethical values that societies ought to prioritise in transition periods. I seek to defend reconciliation, stability and peace as key priorities for Libya. Finally, I hope the discussion makes some contribution to promoting further ongoing debate and discussion.

Before outlining the structure of the chapters to come, I would like to say that this dissertation is essentially a theoretical study, meant to create a detailed understanding of the process of political transition which seeks to achieve justice, reconciliation, lasting peace and creation of a civil democratic society after the armed conflict or periods of gross violations of human rights, and that forms an integral part of transitional justice, both as a practice and as a field of study. Stimulating further research is also part of the relevance of this thesis, in providing further research on the most appropriate mechanisms of transitional justice based on challenges that faced by transitional societies. While it is not meant to provide a better form of justice, I anticipate that the thesis will raise concerns about certain issues of transitional justice. I think that these concerns will help to distinguish which justice forms are the most effective for in addressing the urgent needs of victims and post-conflict societies. This leads us first to study the theoretical and conceptual framework for transitional justice that will be examined in Chapter One of this thesis. The introductory text of this thesis will now give details of my chapters. In order to give a clear and cohesive argument this thesis has been divided into five main chapters, followed by the conclusion.

Chapter One of the dissertation will begin by clarifying the origins of the phenomenon of transitional justice and its theoretical and conceptual framework. It investigates the concept of transitional justice and the difficulties associated with its definitions. The main concern will be that the definitions of the concept do not explain what form of justice transitional justice should take. The discussion is not meant to propose a definition of transitional justice. It merely attempts to investigate how transition affects justice. This question has raised the major debates about certain issues of transitional justice: peace versus justice; democracy v. justice; amnesty and impunity; and transitional justice and the rule of law. Such issues are explained, by showing why they are potentially problematic. I argue that the tension between the objectives of transitional justice is controversial. The primary goal of transitional justice is to achieve justice, end impunity and establish the rule of law in the context of democratic governance (Binder,2013). However, over the last three decades, the objectives of transitional justice have expanded to include the ideas of reconciliation, amnesty, healing and closure to allow transitional societies to move toward achieving lasting peace, democracy, respecting of human rights (Cobban,2006).

Clarifying the possible tensions between the political and moral goals that post-conflict societies seek to achieve provides a better understanding of the nature of transitional justice. I argue that post-conflict societies often face exceptional circumstances affecting their choice of the mechanisms of achieving those goals. The practice of transitional justice mechanisms is examined with particular reference to approaches that are most used in post-conflict societies. Unfortunately, the formal international responses may be out of synch with what people in a particular context desire. For instance, in northern Uganda, the religious leaders resisted the ICC indictments and they preferred to use traditional (local) methods of dispute resolution in the hope of achieving reconciliation and peace in that war-torn region (Cobban,2006). In order to better understand this subject and its impact on post-conflict societies, this will be thoroughly addressed in Chapter Five of this thesis. There is no doubt that trials have important beneﬁts, but closure and reconciliation likely are not among them (Weinstein,2011). As will be shown throughout the following chapters, this thesis takes on this last point of view. Chapter Two, in particular, shall try to put forth a defence of this argument.

Chapter Two examines the problems of using criminal prosecutions in transitional contexts in reasonable depth. In the aftermath of conflicts, people need to learn how to live together and to trust each other again. It has been argued, however, that criminal proceedings are not suitable to move post-conflict societies towards reconciliation and social healing. The high likelihood that courts have been ‘tainted’ under the previous regime, their negative impact on reconciliation, and the lack of evidence have made critics argue against prosecutions and in favour of alternative mechanisms such as truth and reconciliation commissions. The example of South Africa has been celebrated by human rights activists as a successful non-judicial mechanism to truth-seeking, deliberation and social healing (Mihai,2010). I offer a theoretical account of how trials can affect transitional justice objectives. I shall provide a critical discussion of the different theoretical positions that recognise the role criminal trials can play in transition. Taking the call for justice and the rule of law seriously, of course, is very important, but I shall argue that it is also important to take into consideration the potential risks of trials to other goals of transitional justice processes. I will argue that because of certain conditions faced by post-conflict societies, trials would undermine stability, peace and threaten consolidation of democracy. Post-conflict societies must focus on the construction of an effective judicial system and institutions rather than insisting on trials of offenders.

Chapter Three and Chapter Four of the thesis are an attempt to explore the meaning of restorative justice through the variety of practices and traditions that it involves. The assessing of the effectiveness of restorative justice mechanisms in achieving the goals of their supporters, such as satisfying victims, reintegration of offenders and preventing re-offending, is indispensable, especially given the claims of restorative justice advocates about what these mechanisms or practices can accomplish in transitional contexts. Chapter Three outlines the main features of restorative justice and explores how it differs from the criminal justice approach response to offences. It looks at how restorative justice aims to meet the needs of victims, offenders and community by involving all parties in the process of how to deal with the effects of crime. It will be argued that there are several ways to apply restorative justice. In Chapter Three I mainly focus on victim-offender mediation and reconciliation procedures. Even though I argue in favour of restorative justice traditions, there are still good reasons for doubting whether it is practical to use such traditional procedures in the aftermath of conflicts. There has been a lot of criticism, which point to limitations and dangers in the practices of restorative justice, especially the lack of due process. Such doubts and worries are examined in section two of the chapter.

Chapter Four shifts to examine truth commissions, apology and reparations as restorative mechanisms. It goes on to explore the implications of using such mechanisms for post-conflict societies. The basis of my analysis of the truth commissions will be the South Africa experiment. Emerging from the apartheid system and violent conflicts, South Africa became an important source of academic inquiry on the questions about justice, reconciliation and democracy. By following these steps, these chapters hope to contribute to the arguments in favour of reconciliation and stability. The claim these chapters will advance is that restorative justice practices are highly likely to help transitional societies to face conflict problems, achieve lasting peace and transition to democracy. I shall try to put forth a defence of the need to engage in restorative processes. My position will be constructed in response to the sceptics who place special emphasis on the necessity to achieve justice by criminal trials. The argument in favour restorative justice practices tries to highlight the positive potential implications of such practices in transitional contexts. Drawing on the case of South Africa in Chapter Four, it evaluates what truth and reconciliation commissions can achieve, explaining why societies do choose this measure over other mechanisms of transitional justice to deal with a painful past.

Chapters Five examines the existence and appropriateness of customary justice practices as transitional justice mechanisms. It considers forms of local informal justice in Rwanda, Uganda and Mozambique. I will argue that these mechanisms can play a crucial role in disputes resolution. They have been supported and used as a vitally important method with which to deal with legacies of the past, access some form of justice, achieve reconciliation and sustainable peace. However, their legitimacy, capacity and applicability to past crimes in transitional contexts need to be evaluated. So far, there has been little research of the pros and cons of such mechanisms. A greater focus, thus, on what role local justice mechanisms can play in transitional societies is decisive(Mobekk,2006). This has stimulated this thesis to outline some informal justice mechanisms and how they are used in addressing past violations. Case studies that have been chosen will illustrate how informal justice can deal effectively with public needs with a view to pushing the society on the path to national reconciliation, peace, reconstruction and democracy.

Chapter Six critically examines Libya’s experience with transitional justice. As with any study, there are limitations to the scope of this contribution. The scope of this chapter will focus on Libyan experiment from 2011 to the present. It evaluates the situation in Libya as it stands at the time of this thesis’s submission, July 2019, and provide analysis and recommendations based on the impact of transitional justice practices in Libya yet. Because of the novelty of transitional justice in Libya, studies on the subject are very few. Wherever possible, this chapter supports its arguments with academic literature. However, it relies greatly on articles found in the news media and reports from various non-governmental organisations. I will reference existing transitional justice theories, practices and experiences that are the most relevant to the discussion. Since the aim of this chapter is to explore how Libya should move forward, it is important to clarify what transitional mechanisms are relevant and applicable in Libya. To do so, the chapter focuses on three mechanisms of transitional justice: retributive justice; restorative justice; and local justice in Libya. Combining knowledge of local perceptions in Libya with insights into experiences with local justice mechanisms in achieving reconciliation and peace in other countries as discussed in Chapter Five, we then conclude on the role Libya’s customary justice systems could play in reconciliation and peacebuilding.

The conclusion will recapitulate the major arguments and the eventual conclusions. It will outline an answer to the main research question of this thesis; What kind of justice is the most appropriate and should be taken in the transitional period to achieve its goals? The main contribution that this dissertation hopes to provide the reader with a good understanding of the field of transitional justice, in theory and in practice.

**Chapter One: Philosophical issues surrounding the concept of transitional justice**

**Introduction**

This introductory chapter of the thesis starts by looking at the theoretical and conceptual framework for transitional justice. It focuses on the distinctive conceptual contents of transitional justice. This chapter seeks to explore the appearance of the term of ‘transitional justice’, its contents, and when and how those contents emerged. It will, therefore, outline an answer to the following questions: What does transitional justice mean? What are the origins of the field of transitional justice? Why should transitional justice be applied? How can transitional justice be achieved? According to Arthur (2009) the concept was invented as a response to political dilemmas faced by human rights activists in what they understood to be ‘transitional’ contexts. But is the field of transitional justice simply part of the human rights movement, or is it really new? This examination of the origins of the concept of transitional justice strongly suggests that it is a distinct field. By examining the notion of ‘transitional justice’, I will argue that, transitional justice is a complex concept. It is unclear what actually ought to be understood and captured by the concept ‘transitional justice’ itself: it remains a rather a vague concept lacking a precise definition. Despite the widespread use of the concept, it raises many questions. It must be asked whether it involves a ‘transition to justice’, ‘transition to peace’ or ‘transition to democracy’, and what initial normative objective transitional justice serves. Therefore, this contribution proposes to discuss the whole issue of transitional justice, what it entails and its dilemmas (Fombad,2008).

This account will help answer some very basic questions in this dissertation about why transitional justice has resonated very strongly in transitional contexts. For this purpose, this chapter comprises four main parts followed by the conclusion. Part One provides the historical background of this phenomenon and gives a brief overview of its emergence. Part Two provides several definitions of transitional justice, then clarifies its main objectives. Part Three will introduce current transitional justice mechanisms in general. Part Four will be dedicated to the challenges and dilemmas of transitional justice; it endeavours to investigate the main issues surrounding the concept, explaining the key criticisms. These investigations of the concept of transitional justice serve as an important starting point for this project.

**1.1. A brief history of transitional justice phenomenon**

Many researchers disagree in determining the emergence of the concept and practices of transitional justice. Historically, the evolution of the concept of transitional justice has moved through various stages (Buckley-Zistel,2009). Although the concept effectively emerged after the Second World War, the question of how to deal with widespread human rights abuses committed in transitional periods is traceable back to ancient times, where such serious violations were frequently dealt with through the provision of amnesty. The roots for transitional justice can be found, for example, in ancient Athens (400 BC), where the punishment of political acts committed against the Athenian tyrants was forbidden after their defeat. It was believed that in the aftermath of war it was not fitting to follow up former wrongs in order to foster peace (Binder,2013; Elster,2004).

In the modern age, through the different applications of the concept of transitional justice three distinct stages in the field can be determined (Mihai,2010). The first phase of the now widespread phenomenon of transitional justice started with the accountability mechanisms and punishments attempted by the German Supreme Court in Leipzig in 1920 and ends with the Holocaust trials (Mihai,2010). Buckley-Zistel (2009) stated that after the Second World War, transitional justice was concerned with concepts of criminalization, retribution and international criminal courts, in particular the Nuremberg trials. For Teitel (2003), the Nuremberg Tribunal is an important moment in the first stage, as well as the Tokyo Tribunals, to prevent the repetition of serious crimes such as Holocaust, genocide and war crimes through retribution. At this stage, the focus was primarily on achieving justice.

The second phase began in the late 1970s, and emerged clearly in the late 1980s and early 1990s. It came as a response to political changes that took place after the demise of the Soviet Union. The variety of approaches and mechanisms of transitional justice were used during this period from criminal prosecutions to amnesty, lustration, reparations, and heavily focused on truth commissions, in particular in Latin America. Rather than focus on perpetrators and punish them for their actions, attention has recently been broadened to include victims and their concerns. This stage of transitional justice covers the transition from authoritarian regimes to democratisation and radical economic reforms (Buckley-Zistel,2009; Mihai,2010).

The third phase began with the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993, and the International Criminal Tribunal (ICTR) for Rwanda in 1994. After that the Rome Statute for the International Criminal Court (ICC) was issued in 1998. Because of intensifying political instability and violence, transitional justice as a paradigm of dealing with massive human rights violations became at this phase a truly global phenomenon and concern. Trials like those of Charles Taylor, Saddam Hussein, and Slobodan Milosevic, the recent annulment of the 1986 amnesty for the military oppressors in Argentina, and Gacaca courts in Rwanda mark a wider agreement on the necessity of sooner or later engaging in some form of justice. The establishment of all these tribunals shows the keenness of the international community and domestic communities to punish perpetrators of massive violations. This stage of transitional justice was marked by the call for fighting impunity, the rule of law, as well as a shift towards a human rights-centred discourse (Buckley-Zistel,2009; Mihai,2010).

This short historical description shows that the concept of transitional justice is not a timeless paradigm but an ever developing concept; it is closely connected with world-historic and political change (Buckley-Zistel,2009). According to Buckley-Zistel et al. (2014) the challenge thus is to detect how those historical and political experiences can influence the practice of transitional justice. Responding to this challenge can be achieved by understanding the dynamics at work in processes associated with the notion of transitional justice.

**2.1. Transitional justice – a conceptual investigation**

The different experiences of transitional justice in many societies have resulted in several definitions of this concept. The term is frequently used in the literature, but to date there is no unified concept of transitional justice; it remains a relative concept according to the social, economic and political conditions of each country. The following section aims to examine and evaluate several definitions of transitional justice offered by some of organisations, scholars and governments.

**2.1.1. Definition of transitional justice**

While a variety of definitions of the transitional justice term have been suggested, this thesis will adopt the definition contained in the report of Secretary-General of the United Nations, Kofi Annan (2004, p.4) regarding ‘the rule of law and transitional justice in conflict societies and post-conflict’ submitted to the Security Council on the basis that it is the most authoritative. And I believe that the UN’s definition captures a more complete and clear picture of what transitional justice is about, and its main mechanisms. It states that transitional justice is “The full set 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 secure accountability, serve justice and to achieve reconciliation. These may include both judicial and non-judicial mechanisms, at times with differing levels of international involvement and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.”

Nevertheless, it could be acknowledged that there are competing definitions which are narrower and broader. According to the definition provided by Teitel (2003, p.69), transitional justice is “the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.” For Kerr and Mobekk (2007, p.3), the concept of transitional justice has been used to “denote the range of judicial and non-judicial mechanisms aimed at dealing with a legacy of large-scale abuses of human rights and/or violations of international humanitarian law.” This definition is close to that of the international criminal tribunal for former Yugoslavia (2009) which defines transitional justice as “The set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs and various kinds of institutional reforms.” A further definition is given by Anderlini et al. (2004, p.1) who argue that “Transitional justice refers to the short-term and often temporary judicial and non-judicial mechanisms and processes that address the legacy of human rights abuses and violence during a society’s transition away from conflict or authoritarian rule.”

**2.1.2. Transitional justice objectives**

According to Anderlini et al. (2004) and Fombad (2008) a transitional justice programme usually aims to achieve the following goals:

• Investigating past human rights violations and identify those responsible for them;

• Accountability for offenders;

• Providing justice to victims and recognition of their dignity;

• Addressing and attempting to heal divisions in society that arise as a result of conflicts and violations;

• Bringing closure and healing the wounds of victims and society, particularly through truth-telling, creating an accurate historical record, and providing reparations to victims;

• Halting ongoing human rights abuses, and ensuring that such violations are not repeated in the future;

• Reforming institutions and restoring confidence in them to promote human rights, the rule of law and democratisation;

• Promoting individual and national reconciliation; and

• Enhancing co-existence and lasting peace.

On a broad general level, the primary objectives of transitional justice are: justice, deter reoccurrence, reconciliation, democracy, economic development and sustainable peace (Mobekk,2006). This thesis is an attempt to embark on critically examining these issues. It will, however, particularly focus on those which I believe are most important, namely, the questions of justice, reconciliation and peace as a means to exploring the concept of transitional justice.

The question that should be asked is: To what extent any transitional justice mechanism on its own is able to achieve these goals can be questioned (Mobekk,2006). Answers to this question will be provided in the following chapters. There are diverse mechanisms, both judicial and non-judicial that have been tried for achieving these objectives (Fombad,2008). There was optimism that judicial mechanisms (tribunals) would be the answer to war crimes and be a mean of redress for victims. Alongside these judicial means of addressing human rights violations grew a discourse on the virtues of non-retributive mechanisms of justice such as truth commissions versus that of criminal accountability. Major current approaches or strategies to transitional justice will be dealt with below.

**3.1. Transitional justice mechanisms**

What does transitional justice look like? in order to better understand the concept of transitional justice, it is important to clarify its practical measures or approaches. Moreover, the research question of this thesis – as aforementioned – lays emphasis on what kind of justice should be sought in transitional periods, what is the most appropriate mechanism to achieve transitional justice goals, which makes it important to understand the different mechanisms and their characteristics. Because of the fragility of the institutions of transitional societies, violations will not be dealt with as they might in normal times. In such cases, different approaches are used. Based on the definition given by the UN above, the concept of transitional justice consists of a variety of mechanisms and tools, both judicial and non-judicial. They include criminal prosecutions, truth seeking initiatives, reparation programmes, reconciliation efforts, lustration, institutional reform as well as memorialisation efforts (Binder,2013).

The choice which is made in a particular societal situation will vary in accordance with the local and cultural context and may also include local and customary ways to achieve justice and reconciliation. The Gacaca courts in Rwanda perhaps are the most ‘prominent’ examples of the latter (more on this in Chapter Five) (Binder,2013). It is important here to refer to the fact that as there are many transitional justice mechanisms, this dissertation cannot address and analyse them all. The following chapters will address transitional justice mechanisms which are most used in post-conflict societies individually, by examining their theory, their practice and their effects. It is important to keep in mind, while investigating such mechanisms, the question of which are more appropriate – according to circumstances of post-conflict societies – to transitional justice to achieve its objectives.

**3.1.1. Criminal prosecutions of perpetrators**

Criminal prosecution of offenders is a first and perhaps most obvious way of dealing with past abuses, including major violations of international humanitarian and human rights law. Those responsible for committing serious crimes, must obviously be prosecuted in accordance with international standards of what constitutes a fair trial. However, there are political, logistical, financial or institutional constraints that – as we will see in Chapter Two – sometimes make criminal trials difficult – if not impossible – in transitional societies. Prosecutions of all offenders might simply overburden state structures that are just emerging from armed conflict and political violence. Thus, at times, considerations such as the large numbers of perpetrators, weak or inefficient judicial structures, corruption, a government lacking the necessary stability and support, may make it impossible to take a strict stand on prosecution (Binder,2013).

Therefore, international support may be needed. The intervention of the international community is particularly crucial when states are unwilling or unable to conduct investigations. Examples of international or mixed tribunals – which will be further detailed in Chapter Two – include: the Nuremberg trials after the Second World War, although these were qualified as “victors’ justice”; the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR). The International Criminal Court (ICC) which entered into force in (2002). Hybrid courts with international and national involvement such as the Special Court for Sierra Leone; Extraordinary Chambers in the Courts of Cambodia. International community assistance includes, for example: the investigation of mass crimes, the preservation of evidence, and exhumations (Binder,2013). However, likewise, international community intervention – as will be discussed in Chapter Two – has been widely criticised.

**3.1.2. Truth and reconciliation commissions (TRCs)**

Truth and reconciliation commissions seem to be a most popular mechanism of transitional societies to deal with past violations. More than 30 truth commissions have been established worldwide so far. Perhaps best known is the truth and reconciliation commission in South Africa (more on this in Chapter Four). Other examples are found in Chile, El Salvador, Argentina, Peru, Guatemala, East Timor, Morocco, Liberia, Sierra Leone and Ghana. Truth commissions have the primary purpose of investigating and reporting of past human rights violations. They document patterns of past violence which usually includes: the organization of public hearings, statements from victims and witnesses, and maintaining the archives and the like. A truth commission may be established regardless of whether criminal trials are conducted to investigate the past wrongdoing. These commissions primarily focus on restorative justice mechanisms where their main aim is reconciliation and closure, which may not be reached by the use of retributive justice. While the purpose of prosecution is punishment of the perpetrators and achieving justice, truth commissions focus on victims to rehabilitate and compensate them. What is more, they may contribute to identifying the root causes of a conflict and building a historical record of past violations in order to prevent recurrence, healing the wounds between different groups within one society (Binder,2013).

**3.1.3. Reparations for victims**

Victims’ reparations are considered an important tool of transitional justice. They can contribute to repairing the material and moral damages of past violations. They may encompass a diversity of measures – as will be explained in Chapter Four – such as financial compensation, official apologies, assurances of non-repetition of the offence, return of property, as well as psychological aid to victims and memorialisation efforts. Reparation programmes have been established in many countries such as Argentina and Chile to cope with the gross violations committed during the military dictatorships. In many transitional contexts, where justice is absent or incomplete, reparations may be the most appropriate mechanism to address harms suffered by victims. Reparation is a tangible and desirable mechanism to help restore the victims’ dignity, foster healing, closure and rehabilitative as well as do play an important part in national reconciliation. However, although the impact of reparations is important, they should not be seen as independent mechanisms on their own, where reparations often derive from the truth and reconciliation commissions (Robins,2011; Binder,2013).

**3.1.4. Memorialisation efforts**

Memory is the way in which truth is assimilated into both individual and collective narrative. However, the literature of transitional justice focuses on collective memory rather than individual memories. Memorialisation could include reports of truth commissions, museums and national memorials to preserve the public memory of victims and raise moral consciousness of past abuses in order to build a bulwark against its recurrence. It is considered as part of the politics of a transitional process. For families of the missing, a memorial can be a space for mourning and remembrance, but it can also promote social repair through recognition, and have the potential to be restorative. As part of a reparative process, a memorial can endorse and institutionalise those narratives of victims and witnesses regarding the past (Robins,2011; Binder,2013).

**3.1.5. Institutional reform**

Since institutional reforms are increasingly concerned with the building and development of fair and stable democratic institutions to foster the rule of law and ensure that violations are not repeated, a welcome broadening of the approach to transitional justice is conceivable. Increasingly today, transitions are viewed from a more future oriented perspective which focuses on institutional reforms. These involve: constitutional and legal reforms; security and police system reforms; free elections; vetting and lustration; as well as disarmament, demobilisation and reintegration (DDR) programmes that often take place with the help of the UN forces, help ex-combatants in rejoining society as part of peacemaking efforts, for instance, in Sierra Leone (Binder,2013).

These processes are very important components of transitional justice (Binder,2013). Mobekk (2006) argues that reforming these institutions is essential for lasting peace and stability. Therefore, it could be argued that if this process of transitional justice can start early, then the chances for success may be increased. However, there are many factors complicating such a process in transitional contexts. In transitional societies which are in need of reconstruction and reform, and at the same time are experiencing insecurity and instability, there have been arguments against vetting out a majority of the previous regime personnel, for example the security forces (police or military officers).

Critically, changing institutions is not sufficient to guarantee successful transitional justice processes; Mobekk (2006) confirms that it is crucial that trust in the institutions that have been reformed be built. However, improving trust in state institutions that have for many years not had the trust of the public, but have rather violated their rights, is not an easy task. Systematic vetting and lustration of the state sectors, not based on political affiliation which can lead to feelings of unfairness subsequently fuelling destabilisation, but on assessment of individuals’ participation in human rights violations, is a critical first step in enhancing and rebuilding people’s trust in the state and its institutions.

**3.1.6. Vetting and lustration**

Vetting and lustration have been less focused upon as transitional justice mechanisms, than the other formerly discussed mechanisms. Although the International Centre for Transitional Justice defines it as a transitional justice mechanism, as does the Secretary-General’s Report on the Rule of Law, some analysts ignore this process altogether, or only refer to it in passing (Mobekk,2006). Vetting and lustration refer to the process of carefully examining the background of the personnel of prior regime, and based on this information either removing them from their jobs in the governance and security institutions by forced retirement or dismissal, or denying them from work in these sectors via selected criteria that must be met by new candidates to these positions. These mechanisms have been put to use in transitional societies to ensure accountability for violators who responsible for human rights violations, and as a way to hinder them from becoming part of the institutions that have been reformed of the judiciary, military forces, police services, intelligence services and the governance sector (Mobekk,2006; Binder,2013).

Vetting and lustration have been applied in multiple post-conflict societies (Mobekk,2006). For example, in East Germany after the end of communism, abusers were removed from public positions. Another example, the removal of corrupt court officials involved in crimes of the fallen Tunisian regime. Also, candidates for the 2009/10 Afghan elections were vetted (Binder,2013). In post-conflict societies such screening is imperative for stability and sustainable peace. Moreover, removing or excluding perpetrators of past crimes can help to reform state institutions. The continued presence of former offenders within the security and government structures can increase the risk of a resumption of the previous human rights violations, whilst emphasising the impunity.

However, these mechanisms have also been criticised. In many cases, complete vetting or lustration would weaken rather than strengthen reforms. As a result of conflict, there is a lack of capacity in post-conflict societies; further eroding capacity by vetting out of people who have experience, skills and training in the military, security and intelligence services replacing them with newly-trained people can create problems. For instance, the issue of the lack of human resources was raised both in Haiti and Timor-Leste. In Haiti the vetting was conducted in relation to the establishment of the new police force. A new police force was created with the assistance of the international community and the UN intervention in 1994. However, it was felt that due to the deteriorating security situation and the extensive inexperience of the new police force there was a need not only to ensure that the new recruits were quickly trained, but also that previous experienced officers should be part of the new force. Therefore,1,500 former military officers became part of the new police force. This was part of the reason why the new Haitian National Police overtime became increasingly corrupt and began to commit human rights abuses, which has negatively affected the processes of transitional justice (Mobekk,2006).

In Timor-Leste vetting was also conducted in regard to the police forces. In this case, however, the international community was much more reluctant to include Timorese officers who were part of the Indonesian police service, so as not to adversely affect the new police force internally, and also in view of its external relations to the population. However, it was found that the Timorese had little opposition to the inclusion of those officers in the new police force of Timor-Leste, they were not seen as collaborators with the Indonesian occupation force, but on the contrary, they were viewed as people who had in secret worked for the independence for Timor-Leste within the system (Mobekk,2006).

This issue has also been emphasised in Iraq, where concern has been expressed that the disbanding of the army and de-ba’athification could create a vacuum of capabilities, and lead to a shortage of human resources and skills needed to rebuild the country. This argument is based on the logic that it takes substantial time to train and equip new security forces so to be able to deal with the transition problems, whereas if previously experienced personnel are included in the reformed institutions they can be deployed much faster (Mobekk,2006).

According to Mobekk (2006) vetting and lustration mechanisms are not by themselves a solution to past violations, it can solely be part of the solution, and more extensive reforms are needed. It should be, in short, viewed as part of a long-term strategy of transitional justice.

**3.1.7. Traditional (local) justice mechanisms**

This section mentions another kind of mechanisms which are brought into practice at the local community level. Traditional justice procedures involve religious leaders, elders, local officials or other respected community members. One of the most known local mechanism is ‘Mato Oput’ of the Acholi in Northern Uganda, and local ‘Gacaca’ system in Rwanda (more on this in Chapter Five). Traditional justice systems are increasingly used in some countries as complementary or alternative processes to international or national strategies. These mechanisms are likely to directly reach the majority of people of such communities (Anderlini et al.2004). In addition, according to Anderlini et al. (2004, p.7) local justice mechanisms “may lessen the burden on the formal system, offer familiarity and legitimacy to the population and contribute to reconciliation and reconstruction.” Internationally, they have therefore been increasingly promoted as a means of community-based disputes resolution (Mobekk,2005; Huyse,2008). In the last few years, the UN acknowledged the importance of the role traditional justice systems can play in times of transition, particularly in a reconciliation and peace-building operation (Mobekk,2005). It is of importance, thus, to introduce in this thesis the possibility of using local justice mechanisms as a tool for dealing with past violations of human rights and solving post-conflict societies problems.

In short, there is a generally broad reliance on different approaches of transitional justice in the aftermath of virtually every period of repression or violence. These different mechanisms should not be seen as alternatives for one another. Rather they work in different ways. Criminal courts base their existence on retributive justice. Truth and reconciliation commissions are based on restorative justice principles. Traditional mechanisms are based on a particular community’s culture. Although these various mechanisms have been substantially supported by the international community, they have not been without problems. The primary problem perhaps being that the expectations of a new era of justice and end to impunity are not always realisable (Mobekk,2006; Binder,2013). Binder (2013) argues that given the variety of transitional justice initiatives, transitional justice processes face important challenges. The next section reviews the key dilemmas of the concept of ‘transitional justice’ as part of a broader understanding of this project.

**4.1. Challenges and dilemmas of transitional justice**

The implementation of transitional justice faces enormous challenges (Fombad,2008). The main challenge is the tension between the key aims of transitional justice and how they can be achieved. This section addresses below the most important issues which I concern with in this thesis. Due to space constraints, this contribution will be limited to five major debates in the scholarship about: the meaning and importance of ‘transition’; peace versus justice; amnesty and impunity; transitional justice and the rule of law; and democracy versus justice.

**4.1.1. The meaning and importance of ‘transition’**

Ohlin (2007) states that although the phrase ‘transitional justice’ has received considerable attention in literature, it is still an ambiguous concept and its precise meaning remains unclear. This may be because this phrase includes two words: ‘justice’, which is the greatest of moral values, meant to evoke a universal, normative goal; and ‘transitional’, which refers to a particular period that stands in contrast to the universal goal. However, which transition, and why does it matter for justice? (Arthur,2009), how does transition affect justice? is it simply ordinary justice? Or is it itself a combination of other forms of justice as they apply to a particular context?

Corradetti (2013 a & b) argues that a fundamental problem is that ‘transitional justice’ means a justice that is in the service of the transition. This suggests that justice is substantially circumscribed by the transitional term. Therefore, it is limiting the possibilities of justice. Nevertheless, this thesis does not aim to provide a better form of justice. Specifically, it is merely an attempt to investigate how transition can affect justice. One criticism of much of the literature on the concept of transitional justice is that while the justice question has been discussed widely, the question of transition has not received the same attention. Therefore, the primary concern of the field of transitional justice should be: how the transition question has shaped justice theories. The questions that need to be asked are: What form does justice take in transitional period? Is transitional justice a new kind of justice that exists alongside other forms of justice? Is it different from other kinds of justice during non-transitional moments? To answer these, Bengoetxea (2013) argues that the transitional justice concept has been used to describe a time of change which marks the ‘transition’ from one situation to another. Transition means regime change, from dictatorship to democracy which was previously called ‘democratic transition’. People have started using the term ‘transitional justice’ to name this new multi-disciplinary field, but transitional justice can also be understood as transition from a violent to a peaceful society.

Therefore, it could be argued that the transitional term has led to restrictions on justice through a general consensus that appropriate forms of justice are those that help transitional societies to achieve democracy (Hoogenboom,2014). It is also necessary to achieve other aims from transitional justice processes such as helping victims recover, restoring their rights, engaging in reconciliation and promoting peace in order to bring about social progress. However, this raises a potential criticism that we will assess throughout the thesis: that transitional justice theory, by imposing a definite purpose for transitional justice mechanisms (which is achieving democracy), eliminates the possibility of justice. It could therefore be proposed that justice should not be limited by the transition to liberal democracy. Important socio-economic rights should be considered prior to democracy (Hoogenboom,2014).

Indeed, many working in the field of transitional justice have rejected this narrow meaning of the concept of transitional justice. They emphasize that basic needs must be satisfied. Therefore, ‘transition’ should be taken to imply the rectification of injustices through comprehensive social and economic reforms, which are fundamentally different from the limited aims of prosecutions (Arthur,2009).

Laplante (2008) points out that the socio-economic injustices of victims in post-conflict societies have received very little attention in the current literature of transitional justice; this is thus considered a problematic issue. She emphasises that the focus of the report of the UN on retributive justice through prosecutions tends to focus on civil and political rights, while ignoring the economic and social factors which may have initially caused the conflict. Such an approach may not adequately solve the problem. By ignoring economic and social rights, the transitional justice literature often fails to focus on their potential to seriously undermine peace. Therefore, Laplante suggests that the international community must broaden its understanding of justice to include focusing on economic, social and cultural rights in parallel with civil and political rights. She argues that the lack of focus on socio-economic injustices may negatively affect achieving justice. These criticisms are an important reminder that justice in response to massive atrocities should be expanded to take into account economic, social and cultural rights alongside civil and political rights.

Hoogenboom (2014) argues that liberal democracy is not a moral necessity, but justice is considered an absolute and moral value. Therefore, it has been a constant value which exists in all periods. Justice seeks to know the truth and holds perpetrators to account. It is merely periods experienced by particular communities which are transitional. Justice, thus, must remain an open concept to respond to the various problems that may be faced by post-conflict societies. On these grounds it might be argued that it is necessary to broaden our focus and adopt a more holistic conception of what justice means. It is thus important to focus on other forms of justice such as restorative justice and compensatory justice, not only focus on punitive justice. For example, Aiken (2013) argues that transitional justice should not be viewed in a narrow sense, which only aims to achieve justice and democracy, but also to promote reconciliation and lasting peace. He examines the experiences of transitional justice and reconciliation in South Africa and Northern Ireland. It is concluded that transitional justice processes cannot only provide truth and justice in post-conflict societies, but it also can help to foster dialogue between conflicting groups. Moreover, it can also achieve structural reform which can help to reduce inequality between divided communities.

**4.1.2. Peace versus justice**

This section considers the key concern of this thesis which is a significant tension between achieving justice and peace as goals of transitional justice (Eisikovits,2013). In many contexts we intuitively distinguish between justice and peace: it may be unjust to let the robber take my sandwich, but it will keep peace and avoid conflict. But in the field of transitional justice, it seems that it involves both questions of peace and of justice. So how are these two related? Is a concern with peace itself part of transitional justice, or is it an external concern that must be weighed against (transitional) justice? What role, if any, does peace play in that phenomenon? Transitional justice has become part of the peacebuilding process after conflict, where it is viewed as essential to reconciliation and reconstruction of transitional societies. The debate on transitional justice has often been posited as one of ‘peace versus justice’, or judicial versus non-judicial means for addressing past wrongs, where criminal accountability has often been argued to promote a returning of conflict and destabilisation, while truth commissions have been purported to boost reconciliation and peace (Mobekk,2006). According to Eisikovits (2013) the relationship between justice and peace in post-conflict societies is controversial. It will be argued that achieving the balance between justice and peace in transition periods is a complicated task. It is believed that the most important problem of the transitional justice is the conflict or tension between the desire to achieve calm and peace after the war and the desire to prosecute human rights violators to achieve justice (Eisikovits,2009). Sandoval (2011) argues that after conflicts or democratic transitions there is often inconsistency between achieving political and moral aims.

Ramsbotham et al. (2005) define conflict resolution as the process of addressing the reasons for conflict in order to achieve peace. This includes all efforts surrounding the transition from a conflict situation to a stability, which makes it involves the concepts of reconciliation, peacebuilding and reconstruction. Therefore, when considering peacebuilding as a goal of transitional justice processes beside justice, the field according to Ramsbotham et al. (2005) and Eisikovits (2013) absolutely faces the main dilemma of ‘peace versus justice’. It arises from the contradiction between the responsibility of the international community to seek justice and try violators of human rights, and peace-agreements that grant promises of amnesty versus truth. This dilemma questions whether there can be peace without justice. According to Herman et al. (2012) the debate over the problem of the tension between justice and peace has received more and more attention in the literature of transitional justice. The main focus is on whether justice or peace should be prioritized in transitional societies to solve conflict problems.

Sandoval (2011) and Herman et al. (2012) argue that it appears that advocates of promoting justice emphasise that accountability and punishment for past abuses ought to be a priority for normative reasons. They argue that punishing wrongdoers helps to enhance the rule of law, deter future abuses, and respect for human rights that are crucial to transitional states. Thus, they maintain that there can be no peace without justice. Others believe that the most important factor is promoting stability and peace by reconciliation. They claim that states in such periods face exceptional circumstances that require amnesty and forgiveness to allow the communities to move forward, even at the expense of justice. They are concerned that the promotion of accountability can disrupt peace. For those who support this view, peace must be achieved first, claiming that there can be no justice without peace.

There are difficulties in solving the tension between the international legal imperative of punishment for perpetrators and the pragmatic demand of amnesty and reconciliation that is required by transitional contexts in order to achieve stability. These difficulties refer to the need to find justice formulas which are viewed as satisfactory by those who have suffered and those who have committed the atrocities in order to achieve peace. The problem, however, is how to find a middle point between punitive justice and impunity. Between these two approaches there can be multiple possibilities of transitional justice formulas. These depend on relations between actors, but all of these formulas are vulnerable to criticism because they may lead to sacrifice of important moral and legal values. This is the fundamental problem of transitional justice (Uprimny&Saffon,2006).

Eisikovits (2013) emphasises that there is a significant tension between justice and social utility. Transitional justice processes often involve contradictory demands. On the one hand, it involves negotiations between actors which imply they are willing to accept the transition. On the other hand, there can be legal demands of justice and restoring the rights and dignity of victims that rely on standards of international law. The former tends to call for reconciliation and peace, while the latter calls for accountability of perpetrators of atrocious crimes. Therefore, the problem is: how can a balance between justice and peace be achieved? In order to accept a peace agreement, in fact, between two conflicting groups, attractive incentives for perpetrators of massive violations should be provided such as amnesty and forgiveness. But amnesty and forgiveness seem to require abandoning the search for retributive justice. Therefore, it can be argued that the demands of stability and peace may negatively affect the morally important demands of punitive justice. For instance, in South Africa, it was morally questionable to retain officials from the apartheid era without subjecting them to any form of accountability, but when the new government of Nelson Mandela applied the national reconciliation programme, with its amnesty-for-truth arrangement, the democratic state and stability were successfully established. Therefore, sacrificing retributive justice seemed to be the price of creating a successful democracy. Ramsbotham et al. (2005) claim that this dilemma, in fact, is relevant to some transitional justice mechanisms such as truth and reconciliation commissions which may give conditional amnesty – we will come back to this issue in the section on amnesty and impunity below – to members of previous government or rebel leaders in order to achieve peace.

While in ordinary times peace and justice may go hand-in-hand, in transition times a balance is required when members of the former regime may have enough power to endanger the transition or return to authoritarian rule if full accountability is pursued. Because of this, politics in transitional periods, more so than justice, is the dominant paradigm, it becomes an argument for the sacrifice of justice and the rule of law for its antithesis, impunity, in the interests of stability and lasting peace (McAuliffe,2010). Former Argentine President Alfonsin summarizes this dilemma as follows (McAuliffe,2010, p.132) “Our common sense seems to support both positions; that a voluntarily committed act is deserving of punishment, and that the social consequences of applying this punishment must be considered. It would be irrational to impose a punishment when the consequences of doing so, far from preventing future crimes, may cause greater social harm than that caused by the crime itself or by the absence of punishment.” Therefore, it could be argued that the primary reason for abandoning criminal prosecutions is the typical ‘peace versus justice’ debate where the transitional societies cannot survive the destabilising effects of prosecuting the armed and previous leaders who lead even human rights activists and democrats to acquiesce to limited punishments, and truth commissions and amnesty.

 In short, because of these hard constraints arising out of negotiated transitions where justice is a bargaining chip (impunity for justice), pursuit of justice becomes unfeasible. For instance, the Chilean dictator Augusto Pinochet’s warning (McAuliffe,2010, p.132) “Touch one hair on the head of my soldiers, and you lose your new democracy.” It could be argued, then, that their trade-off of justice for peace is decisive in order to move forward. The cost of denying justice may be very high, but it may be a price ultimately worth paying given the difficult circumstances and exigencies of transition, where criminal prosecutions can risk questionable conclusions (more on this in Chapter Two) in transition periods.

From the discussion above, it can be argued that although the importance of achieving justice for victims, but peace building is not less important. Why it is important? I argue that peace is a necessary process to manage conflict and address its effects which lead to instability and fragility security situation. Peace building allows rebuilding state institutions, promoting trust between individuals and the governments, and enhancing judicial systems to be able to achieve justice. In fact, peace itself is an essential and prerequisite for establishing justice and the rule of law in transitional societies. Therefore, it can be argued that, the achievement of peace must be paramount. The deferment of peace in post-conflict societies means the absence of justice for victims. Until the fighting stopped, there are few options to move forward on the issue of accountability for violations.

**4.1.3. Amnesty and impunity**

According to Gates et al. (2007) a number of post-conflict states have decided to ignore their past rather than to confront it and granted amnesty in order to achieve reconciliation and lasting peace. Although amnesty laws emerged around the world during the few past decades, they have most vividly been demonstrated in the work of TRC of South Africa, which – as will be explored in Chapter Four – granted amnesty to political perpetrators who disclosed the truth of their actions. This approach moved amnesty from being tool to prevent accountability to being mechanism to incentivise offender testimony and further truth recovery. This section concludes by arguing like Mallinder & McEvoy (2011) that it is inaccurate to characterize amnesty as equating to impunity and punishment as equating to accountability. Mallinder&McEvoy (2011) argue that a broader understanding of the meaning of the myriad forms of accountability speaks directly to the capacity for amnesty to play crucial role in post-conﬂict justice and peacemaking.

As is discussed in more detail below, amnesties are laws or policies designed to remove sanctions of offenders (Mallinder&McEvoy,2011). Van Zyl (1999, p.648) defines amnesty as “any measure that immunizes a person who has committed serious crimes from criminal and civil liability.” Aghedo (2013) stated that the term amnesty refers to pardon from punishment for criminal offenses. By the terms of the pardon charges against the person are dropped. He argues that any effort, such as the amnesty programme, aimed at bringing peace to the troubled societies is desirable and praiseworthy. Peace-building is vital for post-conflict societies. However, the initial hope that the programme would bring about sustainable peace may be faltering owing to the numerous challenges confronting it. A discussion of some of these challenges is appropriate here. To the extent that amnesty contributes to achieving peace and reconciliation, amnesty comes with a price. One important cost of pardon is that expectations of retribution and justice are unsatisfied. Mallinder&McEvoy (2011) argue that amnesty is often all too easily dismissed as the absence of accountability, the very embodiment of impunity. Anti-impunity campaigners such as Human Rights Watch argue that amnesty laws risk undermining both individual accountability of offenders and the rule of law. Therefore, the international law forbids the granting of the amnesty to perpetrators of crimes against humanity (Aghedo,2013). According to Pensky (2008) the chief role of international criminal law, and the ICC (more on this in chapter two), is to end impunity for violators of the worst of human rights abuses. However, Mallinder & McEvoy (2011) argue that rather than preventing perpetrators from being held to account, amnesty policies themselves are increasingly a constituent part of more holistic accountability processes.

In addition, Gates et al. (2007) argue that amnesty guarantees may help offenders with ‘wrong-doing’ during the conflict to avoid prosecution and thereby be able to continue the war. They may also increase the risk of private justice and revenge and distort the process of reconciliation. Aghedo (2013) argues that such challenges have thrown the amnesty programme into crisis, and that the fragile peace brought about by amnesty is faltering by the day as security and development continue to elude societies in transition. Therefore, it can be argued that owing to the numerous social, economic, political and security challenges that face the amnesty programme, there is a strong need for it to be seriously repaired, expanded, and de-politicized. There is, according to Aghedo (2013), an urgent need for the Disarmament, Demobilisation and Reintegration (DDR) processes. In addition, the grievances of those who have suffered enormous physical and psychological damage need to be re-examined and the people compensated. Added to these, there is a need for infrastructural development of post-conflict societies, not the ‘quick fixes’ which only produce a fragile ‘peace of the graveyard’. Non-governmental organizations (NGOs) and civil society groups also should be involved in strategizing sustainable peace and development. The vital role of such civil society organizations groups in peace-building and conflict management cannot be overstressed. Civil society groups are familiar with the terrain; they work directly with the locals, and are abreast of their aspirations. A full and proper implementation of these programmes would have been a more effective peace-building and long-term stability tool.

Van Zyl (1999) argues that any attempt to deal with past violations of human rights is likely to be both complex and contested. For example, the nature of South Africa's transition, which will be thoroughly addressed in chapter four of this thesis, combined with the inability of its criminal justice system to deal successfully with those responsible for gross abuses of human rights, made it necessary to develop a more creative approach to deal with a legacy of violations. The truth and reconciliation commission of South Africa (TRC) can be characterised as representing a ‘third way’ in dealing with the past and attempting to institutionalize justice. This is because it steered a middle path between an uncompromising insistence on prosecuting criminals on the one hand, and a defeatist acceptance of amnesty and impunity on the other. Drawing on the TRC experience, it could be argued that transitional societies emerging from periods of violent conflicts and systematic human rights abuses are unable, for a combination of practical and political reasons (as we will discuss in Chapter Two) to prosecute all offenders. For this reason, instead of focusing on criminal trials, more expansive and creative strategies for dealing with the past violations should be considered and used in order to address the needs of victims and society as a whole.

In fact, due to difficult circumstances that could hamper the democratic transition, amnesty –as mentioned above – had become an urgent necessity for the launching of the new democracy in South Africa. The African National Congress (ANC) faced a massive dilemma. Without an amnesty agreement, the negotiations would collapse, and the conflicts would return. Hostility and opposition from the security forces would have made it impossible to hold successful elections, where generals of the South African police delivered a veiled warning to the ANC that they would not support the electoral process if it led to the setting up of a government that intended to prosecute and imprison the police members. The two sides of the South African conflict realized that if a viable and lasting solution to the conflict was to be achieved, amnesty would have to be granted and both parties would have to be accommodated in the new order. The amnesty agreement occurred and added onto the end of the interim Constitution which stated that gross violations of human rights, fear, guilt and revenge can be addressed on the basis that there is a need for understanding and reparation but not for vengeance in order to achieve reconciliation, peace and reconstruction. Therefore, the agreement to grant amnesty to those who responsible for gross violations must be understood in this context (Van Zyl,1999).

Both the previous government and the ANC accepted the amnesty deal. On the one hand, the former government and its security forces were reassured that they would not be prosecuted if they handed over power. On the other hand, amnesty was acceptable of the ANC for several reasons. First, the old regime would not be granting itself amnesty. The ANC believed that only a new legitimate government had the right to forgive the crimes of the previous regime. Second, it permitted the new government to grant amnesty according to a set of preconditions such as full disclosure of the crimes and recognition (Van Zyl,1999).

Several historical and political factors influenced and shaped South Africa's amnesty agreement which enabled the country's transition to democracy and peace. However, amnesty is controversial. In fact, the amnesty agreement has been severely criticized, particularly by victims and their families who have called for the criminal prosecution of offenders. Those opposed to amnesty base their arguments on the assumption that it would be both preferable and possible to prosecute offenders (Van Zyl,1999). In the next chapter, I will consider whether prosecution constituted an appropriate mechanism for dealing with the past crimes in transitional contexts.

**4.1.4. Transitional justice and the rule of law**

The dominant scholarly assumptions are that transitional justice and the rule of law are mutually-reinforcing phenomena, and that transitional justice is a pre-condition for establishing a rule of law in post-conflict societies. This link is obvious in the UN Secretary-General’s 2004 Rule of Law and Transitional Justice Report, where the concepts are seen as inextricably linked. This nexus between rule of law and criminal prosecutions and punishment becomes all the more apparent when a massive scale of human rights abuses is committed by political leaders or during violent conflicts (McAuliffe,2010). Accountability is a fundamental tenet of the rule of law. Nothing could be more in keeping with the rule of law than accountability for breaches of international or domestic criminal law, given that criminality is for the most part constituted by ordinary crimes prohibited in national legislation such as murder, disappearances and rapes, or crimes prohibited under international criminal law like genocide, war crimes, torture and crimes against humanity to which commit to prosecute the perpetrators. Holding violators accountable for their actions makes clear to all members of society that all people are under the law’s authority, and that there are no prerogatives attaching to individuals merely because of status or position. An individual’s accountability for crimes and breaches of the law uphold the regularity and adherence to settled law that the rule of law requires, whereas failure of enforcement vitiates its authority and negatively affects the prospect of habitual lawfulness (McAuliffe,2010).

This necessarily implies that trials abide by the law. The rule of law requires that courts are subject to the rules that bind them in the exercise of their powers, and they must lead the way in following the law if there is to be a rule of law. However, the imperfect conditions of transitional societies invariably give rise to difficult dilemmas over justice with imperfect solutions (McAuliffe,2010). According to Elster (2004) the requirements of criminal justice are routinely violated out of transitional necessity. In many cases, criminal accountability is suspended so as not to imperil the transition, or the process is replaced in the pursuit of idealized transitional dividends through, for example, truth commissions and reparations.

More precisely, the experience of transitional justice in many post-conflict societies that have successfully mediated and moved from conflict or repression to stability and peace has often been partly – and sometimes totally – contradictory to what is normally understood as the rule of law. The main reasons for this are as follows. Firstly, it is thought – as aforementioned – because of the circumstances of post-conflict societies, that full accountability would imperil the transition by fuelling revenge from the prior regime members or armed groups, and so criminal justice is either compromised or abandoned outright. Secondly, is that when criminal justice is pursued, other goals linked to the construction of a liberal democratic state such as rehabilitation and deterrence take precedence over the fair trial that demonstrates the rule of law and applicability of national judicial institutions. The main argument is that justice in transition is epiphenomenal, where transitional responses to the crimes of the past are the product of political or institutional constraints. The conception of justice in transition is partial, what is appropriate depends on conditions on the ground, not on ordinary application of law as found in constitutions or international legal obligations. Law is an instrument to transform society and foster justice, but criminal justice is purely backward-looking to past repression. Adherence to strict legality may not be conducive to the achievement of certain objectives and meeting urgent needs of transitional societies, and it sometimes limits the transformative potential (McAuliffe,2010).

This position can be difficult to adopt. However, arguments that distinctive conceptions of justice in times of political transition are justified by the aspiration to transform communities, and can even vindicate the rule of law, give more options for transitional justice policy-makers. This has become even more the case as knowledge in the field becomes unmoored from the accountability arguments. Theorists in the field of transitional justice have tended to embrace a variety of mechanisms which are considered to facilitate a number of goals beyond criminal accountability to encompass: truth-telling, reparations, rehabilitation and restoring social relationships. In fact, ‘transitional justice’ is such that it is now best described loosely as that an ever-widening variety of mechanisms, practices and concerns that arise following a period of conflict or repression, and that are aimed at confronting and addressing past violations of human rights. However, recent literature in the area increasingly criticises generalized assumptions that such mechanisms can help restore the rule of law or heal society. The processes of transitional justice affect victims, perpetrators and society as a whole. Advocates and policy-makers in designing these strategies and mechanisms have overlooked the impact on the justice system in the transitional societies that these programmes bypass. Rule of law issues such as the importance of bolstering the legitimacy of national justice systems after their inevitable weakening during war or repression, equality before the law and the exemplary purpose of de-politicized trials have returned to the fore, and practitioners are alert to the dangers of revising the criminal principles of justice even in the pursuit of the most laudable transitional imperatives and goals (McAuliffe,2010).

To sum up, one of the great ironies of post-conflict societies is that it most needs the rule of law but is in the weakest position to develop it. The revolution of transition means disorder and legal instability. While advocates of trials argue that states should be willing to take risks to ensure accountability, others argue – as will be discussed in Chapter Two – that most transitional societies have simply not had the power, popular support, legal tools or conditions necessary to prosecute effectively. Therefore, transitional societies initially eschew the rule of law to gradually create the conditions where it can thrive. Here law is neglected so as not to endanger the transition, and instead focusing on the building of the democratic state, economics and lasting peace through restorative justice mechanisms. In other words, when transitional justice is understood as non-ideal and compromised, but symbolic, the imperative of criminal accountability diminishes as more immediately appealing transitional goals take precedence. In fact, it is even welcomed as such. Ultimately, successful transitions such as Argentina, Spain and South Africa have opted out of any accountability and punishment for the violations, resulting in building the modern democratic states, notwithstanding the moral and legal contradiction of amnesty and impunity (McAuliffe,2010). In the following chapters, I will argue for the same conclusion as Teitel (2000, p.59), who emphasises that “punishment’s waiver can advance transitional aims.” In transition periods, transitional imperatives can be used to justify non-adherence to the law long after conflict or repression has ended. The omission of a legal act may help create the conditions where justice and the rule of law can thrive (McAuliffe,2010).

**4.1.5. Democracy versus justice**

Sceptics hold that transitional justice processes would endanger democratic transition by pitting political adversaries against one another. The argument focuses on the practical obstacles that hinder institutional efforts to correct past state-sponsored violations. Most arguments against criminal proceedings – as we will explain in Chapter Two – warn elites of the potential for instability that usually accompanies such processes. Fragile state institutions are not in a position to hold their enemies, who may still be in power, accountable; therefore, justice is the price that post-conflict societies have to pay for peace. It has been argued that unless backed by a blanket amnesty, neither trials nor truth commissions can advance the cause of peace and reform. In short, there are strong political limitations and limited financial and institutional resources, and these are sufficient reasons why the ghosts of the past should not be awakened. In transitional contexts, revenge-thirsty victims must be silenced and the success of democratisation should take precedence over punishing the previous regime members, who are resentful and unsupportive of the newly established democracy, if the state is to move forward. This is especially important in transitional societies where power was transferred conditionally, in exchange for amnesty (Mihai,2010).

It could be argued, thus, if amnesty serve the cause of democratisation better, it should be formally implemented and guaranteed (Mihai,2010). I will argue that there is no justice without democracy, and there is no democracy without peace. While I do not want to deny the importance of accountability for perpetrators, the main argument here is that whereas trials seek to achieve justice and may end up destabilising post-conflict equilibria, there are other priorities the post-conflict societies should focus on: peace, a constitution, and the reform of the major institutions and economy.

In the aftermath of conflict and oppression, the promulgation of a democratic constitution and reforming laws and structures related are an important part of democratisation, but not the only one. In addition, the creation of a public culture supportive of the institutions and the values they embody is an equally important goal. In order to avoid a lapse into further injustice, citizens’ emotions need to be socialised so that they are responsive to primary democratic values. Such legal reforms affirm the equal respect and concern owed to all citizens, where many new constitutions contain emphatic declarations of principles that denounce a past of injustice and arbitrary practices in order to achieve a hopefully peaceful democratic future. Thus, it can be argued that, there a positive correlation between publicly perceived institutional legitimacy and stability (Mihai,2010).

In view of the above, the main claim of this discussion is that carefully orchestrated transitional justice processes can serve the cause of democracy. Firstly, by providing victims with a forum of representation wherein their previously silenced voices can be safely expressed. Victims and all citizens need to be given a voice within public institutions. Only by taking the past seriously and respecting the rights of victims through the legislation reforms, can citizens develop a sense of allegiance to the new institutions, and their perception of institutional legitimacy be strengthened, which will affect positively the quality of the future democracy. Secondly, creating a public venue for people to express their emotions can help prevent these emotions from being expressed in abusive ways – excessive revenge, extra-judicial killings, abusive purges, and so on – which will promote stability and lasting peace (Mihai,2010).

I argue that this participation of victims and the public – as will be explained in the following chapters – can be only achieved by restorative, compensatory and domestic mechanisms such as truth commissions rather than punitive justice. A good understanding of the circumstances of post-conflict societies would make such programs imperative. Once stability and democracy are achieved, looking back into the past would achieve nothing for the future of the state. In other words, once the bloodshed has stopped, there is no need for deterrence mechanisms. Even if we agree that deterrence is important, it is unlikely that main offenders of violations would be deterred by threats of prosecution once they have unleashed their forces against their enemies (Mihai,2010). This argument will structure the theoretical contribution this dissertation seeks to make.

Having outlined these conclusions, it is time to take the next step in the exploration of the effectiveness of the criminal prosecutions in transitional contexts. An account of the conditions and limitations to formal justice system will provide the background for my arguments against criminal trials and in favour restorative, compensatory and local mechanisms.

**Conclusion**

The chapter has discussed the notion of transitional justice. It was argued that transitional justice is an exceptional and temporary mechanism designed to investigate massive atrocities in transitional periods such as serious crimes against humanity, genocide and war crimes. The ultimate aim is to know the truth, punish those responsible for human rights abuses, help victims to recover and then achieve national reconciliation and lasting peace. It has also given an overview of the most used transitional justice approaches in post-conflict societies of the last decades. They are based primarily on several pillars, including: prosecutions, reconciliation efforts, lustration, truth commissions, institutional reform, reparations and memorialization. Moreover, it has tried to explain the difference between retributive justice and restorative justice mechanisms. It has been argued, thus, that given the variety of transitional justice mechanisms, the transitional justice processes face many dilemmas and challenges such as ‘peace versus justice’, ‘impunity and amnesty’, etc.

What this chapter has tried to show from the discussion above, is that in many transitions, there exist limitations where other social goals conflict with justice and require a careful balancing. It is here submitted that the better way to conceive of the compromises of justice and the rule of law in transition is that they are necessary and sometimes unavoidable (McAuliffe,2010, p.152) “Since the rule of law is just one of the virtues the law should possess, it is to be expected that it possesses no more than prima facie force. It always has to be balanced against competing claims and other values … A lesser degree of conformity is often to be preferred precisely because it helps realisation of other goals.” This point is not merely academic, it goes to the core of the dilemma in the use of transitional justice mechanisms to achieve the goals of transition. The constraints and normative aims of transitional justice relating to the reinstauration of democracy, justice and peace, during a time of transition, helped to shape the emerging field of transitional justice.

Transitional societies respond differently to violations of human rights depending on prevailing circumstances. More precisely, it has argued that the nature of many transitions is such that only limited opportunities for justice exist as will discuss in next chapter. Therefore, substitute mechanisms appeared in this accountability vacuum, but recently are no longer considered ‘second-best’ alternatives. They are considered to advance a nation-building project best-suited to contemporary conditions. These alternative measures have often emerged from local needs and cultures, and they are usually the product of consultation with the affected community. The most famous alternative mechanism is the truth and reconciliation commission. Holistic and integrated programmes of truth-seeking, reparations, customary justice, vetting, institutional reform, reconstruction are interlaced and sequenced in a context-appropriate way most suited for the transition to reconciliation and sustainable peace. Thus, the ultimate goal is reconciliation and peace, not justice. This proliferation of transitional justice mechanisms constitutes a recognition of the fact that no one mechanism can achieve all the goals of transition, and all mechanisms, even trials, will need to be complemented by others (McAuliffe,2010).

Having established this discussion as a plausible starting point, the thesis will turn to a consideration of the kinds of justice that were used in a period of transition. The following chapters investigate the dominant paradigms of justice in transitional contexts, and assess its contribution to an evolving discussion about the objectives of transitional justice and the mechanisms best suited to achieving them. The intention in discussing these is to better understand the contexts in which transitional justice mechanisms operated as well as the specific moral, political, and legal challenges they faced. The configuration of my argument that leads to choosing restorative, reparative and local justice as the best mechanisms to transitional societies, begins with a critical assessment of the retributive justice model represented in criminal prosecutions and then moves on to evaluate other candidate models of transitional justice.

**Chapter Two: Criminal prosecutions in transitional contexts**

**Introduction**

Having clarified the concept of transitional justice and introduced many of the strategies or mechanisms that are used to strive for transitional justice objectives in the previous chapter, Chapter Two turns to examine the effectiveness of the criminal trials in transitional contexts, especially the ICC, as the main instruments of punitive justice. The question that this chapter aims to answer is: why can retributive justice be problematic in transitional societies? To do so, this chapter is divided into four sections. The first section addresses criminal tribunals forms in transitional contexts. The second section clarifies the justifications for using criminal prosecutions. The third section examines criticism of prosecutions as a key mechanism of the transitional justice; it endeavours to discuss the dilemma of the use of criminal trials in transitional societies. The chapter concludes by proposing candidate models of transitional justice as alternatives to retributive justice such as restorative justice, truth commissions, reparations, and local justice which shall be discussed in the succeeding chapters.

In Chapter One, I argued that transitional justice involves temporary judicial and non-judicial measures to investigate massive atrocities in transitional periods such as human rights abuses, genocide and war crimes. Transitional justice is concerned with how post-conflict societies ought to move from political instability, armed conflict and human rights abuse to stable democratic states which foster justice and the rule of law. However, communities in a post-conflict situation are faced with great challenges to achieve its aims. One of the problems faced by transitional societies is how to deal with offenders. Undoubtedly, this is no easy task. While the various measures of transitional justice aim to achieve important goals, including improving security, peace-building, uncovering the truth, restoring victims’ dignity, disarming and building confidence between warring groups, these mechanisms are primarily concerned with accountability for past atrocities and achieving justice (Sottas,2008).

However, Bloomfield et al. (2003) have argued that in many cases, it will be impossible to address all problems simultaneously. Prosecutions and justice in transitional societies agenda depend on cultural, political and security conditions. There may be other more urgent needs than achieving justice through criminal courts. Therefore, the main question is whether to abandon accountability concerns in favour of security – and development – related concerns. This question lies at the heart of an ongoing debate about the appropriate mechanisms of transitional justice in post-conflict societies.

As mentioned in the introduction of the thesis, an important debate in the field has arisen between two types of justice, which are punitive and restorative justice (Philpott,2012). It is mainly centred on whether we ought to punish those who committed human rights abuses; or should the past violations be forgotten in favour of reconciliation, lasting peace and moving forward. Punitive justice aims at legal accountability for serious crimes by international and local courts that punish individuals or governments involved in past injustices and grave violations against humanity; and where accountability is sought in order to prevent impunity. Restorative justice, by contrast – which will be discussed in the next chapter – aims at restoring community relations. Philpott (2006) confirms the fact that reconciliation emphasises the restoration of right relationship, where he defines right relationship in the political realm as the characteristics of “respected citizenship defined by human rights, the rule of law within political communities, and respect for international law between political communities.” (Philpott,2012, p.5). In addition, it requires reform of state institutions to promote the rule of law.

According to Bloomfield et al. (2003) many practitioners in the field argue that achieving democracy, restoring social trust and building peace demands that ‘justice be done’. This justice has many faces: It can be retributive justice based on criminal prosecutions; it can be restorative justice based on mediation, truth telling and reconciliation; it can be compensatory justice based on reparations. The main focus, especially in the Western states, is on retributive justice. The central point of this view is the idea that wrongdoers should be punished and pay a price.

However, the application of retributive justice is becoming more and more complicated when it comes to post-conflict societies where they have consisted of diverse cultures, religions and ethnicities. In this chapter I describe the circumstances of justice in transitional societies. It examines the possibility and the efficacy of implementing criminal prosecutions in transitional societies. It is concerned with whether criminal trials are the fitting response to past human rights violations. Does the retributive approach restore social confidence-building and serve justice and peace in transitional contexts? I argue that retributive justice is ineligible as a paradigm of transitional justice in post-conflict societies. I claim that the challenges and the unique circumstances which face such communities often make the implementation of legal punishment fraught with problems and sometimes not even possible.

As Murphy (2015) argues, using a retributive justice paradigm to respond to wrongdoing in transitional contexts is a mistake. If retributive justice is to be applied in such societies, problems emerge relating to institutional structures of the judicial system such as fair criminal courts and good prisons administration, and the security services (military, police, intelligence agencies, and others that are encompassed within the notion of security sector) to protect civilians. So, I will argue that the rationale for the justifiability of legal punishment that is offered by theories of retributive justice is not compelling (more on this to follow), and it will need to be different, given the variation of circumstances in the transitional contexts. Before examining the shortcomings of criminal trials, the following section shall provide the historical background of criminal trials in transitional societies.

**2.1. Criminal prosecutions as the main mechanism of transitional justice**

**2.1.1. Preface**

Prosecution in criminal tribunals is characteristic of the retributive justice paradigm. It is often linked to a western approach of addressing past wrongs, where the criminal courts are the primary tools for dealing with a violent past and punishment is crucial. The tribunals work at an international and domestic level or a combination of the two (Mobekk,2005). Despite the challenges faced by the transitional contexts, prosecution of at least some offenders increasingly has become a main part of transitions in post-conflict societies (Stromseth,2009). So far, many transitional societies such as South Africa, East Timor, Rwanda and Sierra Leone have demanded criminal prosecutions in order to not allow impunity (Mobekk,2005).

Gooley (2012) reported that the post-World War II era saw the expansion and application of new laws of international human rights, and protections in response to mass atrocities to ensure that they never happened again. Nuremberg was the first system developed to achieve these goals. The Nuremberg trials and the Universal Declaration of Human Rights (UDHR) played a big role in developing these protections, as well as developing a legal system for how perpetrators would be punished for what they have done in order to achieve justice for the victims, and to promote the rule of law. It set a new standard for international prosecutions of state officials who committed human rights abuses.

In short, the retributive justice paradigm has been the cornerstone of the international community’s approach for dealing with gross violations since the Second World War (1945). This section addresses the conditions of the domestic courts in transitional societies, and the creation of the various hybrid tribunals and the ICC. After this has been discussed, the subsequent section examines the dominant justifications for using criminal trials.

**2.1.2. Local Tribunals**

Holding domestic trials to deal with past crimes and massive violations of human rights in post-conflict societies has been extremely rare. For instance, in Greece in 1974, national courts prosecuted some of the military generals. Also, in Argentina in 1985, leaders and army officers were brought before the local tribunals, but after two years the trials stopped due to heavy pressure from the army. Another example is the prosecution of the *genocidaires* in Rwandan before domestic courts in Kigali in 1997 (Bloomfield et al.2003).

I will now explain why local tribunals are rare in transitional societies. According to Mobekk (2005) the local judicial system may have stopped working during the conflict, or it may have been entirely corrupt, even before the conflict, and supporting human rights abuse committed by previous regime officials. It is questionable whether transitional societies at the end of the conflict are immediately capable of conducting the investigations and fair prosecutions. This is not only due to corruption, but also because trials staff (judges, prosecutors) might no longer exist, courtrooms might have been destroyed, and evidence might have disappeared.

Nouwen (2006) also argues that although local tribunals usually fit with the domestic culture, they are not appropriate to prosecute wrongdoers in cases of complex international crimes. Local courts often do not meet the international human rights standards of fair trial. In addition, in post-conflict societies local prosecutions often lack legitimacy because the judicial institutions are not perceived as fair, independent and impartial. These legal institutions and human resources in transitional societies frequently have been damaged by the conflicts.

Nevertheless, Mobekk (2005) says that despite domestic trials having been criticised for conducting emergency justice, this should not be an argument for never using local prosecutions. He argues that the main problem that needs to be addressed is the case of the judicial system in transitional societies. Mobekk (2005) confirms that regardless of whether or not domestic trials are chosen as a mechanism of dealing with past abuses, the reform of the judicial system ought to be at the top of the agenda and a priority in post-conflict societies because the rule of law is the solid foundation of security and stability. However, it can be argued that after the periods of conflict the judicial system often needs extensive reform. It will take a long time and extensive resources which affects the ability to hold local trials.

Gooley (2012) stated that given the absence of effective local judiciaries in most war-torn societies, international judicial institutions – which will be mentioned in the following part of this section – often intervene, especially the ICC. International tribunals, quite conversely of domestic courts, have capacity, high budget and experienced judges. Mobekk (2005) confirms that the international community plays an important role in developing the judicial system in order to achieve a stable transition to democracy, and supporting states to conduct fair trials in local courts to deal with past atrocities. The next part turns to provide some examples of international tribunals in post-conflict societies.

**2.1.3. International Tribunals**

For centuries state’s courts could only prosecute offenders for crimes that were committed within the borders of that state. However, since the 1950s a consensus has emerged on the commitment to try those responsible for gross human rights abuses by international tribunals which work outside the state where the violations were committed. The UN treaties and the principle of universal jurisdiction contain the legal foundations of such an obligation. International courts – as will be demonstrated below – take the following forms: ad-hoc courts, national courts based on universal jurisdiction which allows domestic courts to prosecute wrongdoers of serious crimes regardless of their nationality or the location of the crime, and the ICC. The international tribunals are permanent courts judging by international laws and conventions (Bloomfield et al.2003).

Early examples of international tribunals include the Nuremberg (1945–1949) court in Germany after World War II which held to address the terrible violations of the Holocaust and the prosecution of the officials in the Nazi state. In 1946, the Military court for the Far East created in Tokyo to prosecute Japan's military, political and economic leadership who were indicted for crimes against the peace. In 1990s, the UN created the ad-hoc international criminal tribunal for the former Yugoslavia (ICTY) at The Hague in (1993), and the ad-hoc international criminal tribunal for Rwanda (ICTR) in (1994) which became located in Arusha, Tanzania in 1995. These special courts were assigned international criminal responsibility for the prosecution of those responsible for violations during periods of war and genocide (Eisikovits,2009). However, these courts often face accusations of inefficacy. This is because the ad-hoc courts lack their own coercive power. For example, the ICTY for the former Yugoslavia could not capture important war criminals as long as the Serbian government who had supported the Bosnian Serb leaders remained in power. The local justice was biased, corrupt, inadequate and ineffective. The main complaint against the ICTY and the ICTR has been that these courts do not work in the places where the crimes occurred. This fact creates a disconnect between the victims who suffered from conflict periods and the courtrooms where their issues are addressed (Eisikovits,2009).

The attempt to address such critiques has resulted in the creation of ‘hybrid tribunals’. Since 1993 this new type of court characterized by a mix of national and international strategies, more specifically hybrid staff and hybrid applicable law, has been established in some countries. Mixed courts, for example, can be found in Cambodia (2003), Sierra Leone (2002), East Timor (1999–2005), Kosovo (2000), Bosnia Herzegovina (2005), and Lebanon (2007). They have been welcomed with great expectations. Such tribunals hold a good deal of promise and offer an approach that may address some of the concerns about both international and local justice. They are thought to avoid the shortcomings of purely local and purely international tribunals such as the international courts for the former Yugoslavia (ICTY) and Rwanda (ICTR). Hybrid tribunals model are thus assumed to combine the strengths of the purely international courts with the benefits of purely domestic trials of international crimes (Nouwen,2006). Mobekk (2005) reported that these forms of tribunals can be conducted with or without the direct aid of the international community. They can consist completely of local judges, or they can include international judges. They can use local law only or they can apply UN laws, international human rights law and conventions. He added that this hybrid solution is cheaper than the purely international tribunals and can be valuable because of the inherent domestic ownership of such a model. In addition, mixed tribunals can have also positive effect in that the population changes their view about accountability when they recognise that their own government taking control of the process.

Stromseth (2009) also stated that hybrid tribunals can have impacts on the local judicial system. They may be most able to build local capacity by increasing the experience of judges, prosecutors, lawyers and other staff who work in local courts, for example, by offering training and educational workshops for local judges, investigators and defence counsel which will help strengthen local capacity for justice in permanent ways. For instance, in Sierra Leone’s Special Court, the workshops offered all across the country where a young team of Sierra Leonean outreach officers explained to population the meaning of justice, respect for human rights and the rule of law. This task has not been easy, because many Sierra Leoneans resent the fact that direct wrongdoers are not prosecuted. But for all these challenges, some studies indicate that this outreach program has been vital in involving the Sierra Leoneans in the work of the court and in addressing critically important issues of justice and accountability, while other research suggests that the impact of the outreach program on the long-term needs to be evaluated, particularly in light of the vast local needs for Sierra Leone. Given the enormous challenges faced by post-conflict societies, and the limited nature of international justice, these courts should work harder to engage a public who often are deeply skeptical of justice institutions based on past bitter local experience.

Eisikovits (2009) argues that the main criticism that has been levelled against such courts is their alleged Western bias. For instance, the Sierra Leone tribunal which convicted former Liberian leader Charles Taylor of inciting war crimes, was funded by the United States, United Kingdom, Canada, and the Netherlands. Stromseth (2009) says that it is essential to understand and grapple with the criticisms of a skeptical local population if courts hope to build rather than undermine audiences’ trust in justice institutions. Designing meaningful outreach programs which respond creatively to local conditions, give more attention to the local complex needs and hopes of the people who suffered from atrocities, and that use media in culturally appropriate ways, ought to be a key priority in the next decades.

Such courts gave impetus to the creation of the ICC as a complement to ad hoc tribunals. One hundred and sixty countries attended the UN-sponsored conference on 17 July (1998) in (Rome, Italy) to draft a treaty establishing the ICC. 120 countries ratified the Rome Statute, while some countries voted against it (including China, Russia, Iraq, Libya and the United States). The court was established on 1 July (2002) by The Hague Convention and is based in The Hague, the Netherlands. It adopted as a permanent mechanism the punishment of offenders who have committed serious crimes against humanity, and for the pacific settlement of international conflicts (Bloomfield et al.2003; Gooley,2012). Stromseth (2009) reported that the ICC added an important new actor capable of affecting local justice systems to promote their capacity to do their own investigations. However, whether the ICC will take a more proactive role to providing international assistance to local trials is not yet clear.

Eisikovits (2009) argues, however, that the authority of the court is residuary, it acts only if states unable or unwilling to do its investigations. The ICC intervened in many states involve ongoing conflicts. Although, there are difficulties in collecting evidence and enforcing arrest warrants in conflict societies, the ICC officials have claimed that the intervention has increased deterrence. However, it can be argued that the ICC prosecutions often have exacerbated the struggles when they were meant to bring justice and peace. This will be discussed further in the section addressing some of the shortcomings of criminal trials in transitional contexts, specifically the ICC prosecutions. Yet, the ICC intervened in Uganda, the Democratic Republic of Congo, the Central African Republic, Sudan and Libya. Gegout (2013) argues that in spite of the fact that the ICC was created to end serious crimes in the international community, and to promote peace and justice, it meanwhile experiences several issues such as limited resources, institutional restrictions and criticism. Only in Africa, the ICC has issued prosecutions against suspected criminals. Furthermore, the ICC does lack transparency when deciding upon cases in Africa and in coming towards a decision. The support of state and institutional power determines the ability of the ICC for peace and justice. Considering the limitations of the ICC, it has to be unbiased in delivering justice without being influenced by the political and state control. It should promote peace and local justice and the state has to play its role in ensuring progress of conflict victims. In short, the ICC has to work without political influences, dependence and bias. Legitimacy should be ensured.

Meernik et al. (2010) stated that neither domestic trials nor international tribunals have been found to leave a significant impact on human rights and peace. He claims that a powerful impact by these institutions which live up to the promise envisioned by their supporters is missing. Stromseth (2009) argues that while international and hybrid tribunals seek to enhance justice and the rule of law in transitional societies, these courts face many limitations and challenges in achieving justice and building local capacity. International and hybrid courts inevitably provide only partial justice. They can only focus on a limited number of offenders and their jurisdiction is restricted to a limited time. These trials often leave a ‘justice gap’ which may undermine the confidence of people in the fairness or adequacy of justice systems. Transitional societies thus will often need other mechanisms beside criminal prosecutions, like truth and reconciliation commissions which more focus on the victims, rehabilitation, and recommend crucial reforms. These legal mechanisms remain a significant aspect of scenarios in the aftermath of conflict. They fuel an ongoing debate about the need to achieve reconciliation and peace for transitional societies, against the demands of the victims for justice of gross human rights abuses.

Nouwen (2006) also argues that the international courts face the difficulty of not being tailored to local circumstances. The problem arises if the justice done at the international level is not considered as justice according to local standards. She claims that criminal prosecutions by international courts such as the ICTY, ICTR and the ICC are considered to lack legitimacy because victims who directly affected by the crimes lack ‘ownership’ of the trials. The trials take place in faraway tribunals where judges and lawyers as key actors are not familiar with the societies culture where those crimes occurred. As a result, many of the potentially positive effects of the prosecutions do not reach the victims. Because of the drawbacks of the local, ad hoc courts and the ICC, he argues that hybrid tribunals are more legitimate, impartial and independent by doing local justice while upholding international law, and thus achieving international justice; building local capacity; providing ownership; trying more wrongdoers in less time and at lower costs.

However, literature ascribing great expectations to the hybrid courts model is based on a risky assumption. These expectations of hybrid tribunals are only valid if they follow from the defining features of the model. Based on an examination of the mixed courts model, however, it appears that being composed of both local and international staff (judges, lawyers, and other staff in the trials) is the only defining commonality. It is highly questionable whether all of the expectations of the hybrid courts model can be based on this one feature. Therefore, it can be argued that hybrid courts alone can never be adequate to achieve those objectives. As there is no one ideal model that fits all societies, the design of future courts ought to consider the different circumstances and challenges under which the courts have to operate to pursue the different goals of transitional justice. If courts created in a specific context to prosecute who responsible for international crimes, be they international or mixed, may have chance to achieve part of the great promise set for them (Nouwen,2006).

From the discussion above, it can be argued that the key challenge of international, local and mixed courts is their efficiency in transitional contexts. In cases where trials may not be possible to achieve reconciliation, to satisfy victims, to establish the rule of law, and ultimately to foster lasting peace, alternatives are mechanisms of restorative justice that include mediation, reconciliation, truth-telling, apology, reparations and local justice practices as candidate models of transitional justice as mentioned above. Restorative justice practices – mediation and reconciliation – are discussed in Chapter Three. Truth commissions, apology, reparations and domestic mechanisms are the subjects of Chapter Four and Chapter Five.

**2.2. The justifications for prosecutions**

Prosecutions have been the main tool of the late twentieth century to address human rights abuses. I ought to clarify that I am here talking of all forms of courts have mentioned above, the ICC, ad-hoc courts, hybrid courts, and local courts. I consider that post-conflict criminal prosecutions have similar aims and thus similar mechanisms (Davidovic,2016). Although, there is a general consensus concerning the importance of using criminal trials, there is little agreement over the effectiveness of such proceedings (Hoogenboom,2014). Utilizing criminal trials as mechanisms of transitional justice have been justified for many reasons (Minow,1998). Philosophers distinguish between consequentialist and retributivist justifications for using criminal prosecutions. While consequentialist justifications focus on how criminal prosecutions can change behaviour of both the offenders, as well as other would-be perpetrators, retributivist arguments focus on the restoration of justice (Hoogenboom,2014).

According to Drumbl (2007) and Hoogenboom (2014) arguments made for using criminal trials in post-conflict societies where there have been accusations of atrocities against humanity, are based on: First, accountability and punishment for offenders which prevents impunity and limits the desire for personal revenge. Davidovic (2016) argues that the primary aim of criminal trials is ending impunity for serious crimes with an eye to establishing the rule of law. Therefore, it can be argued that, the proper way to understand the aims of criminal trials in post-conflict societies is by looking at retributivist theories of retribution. The various theories of retributive justice assume that a basic principle of justice and the rule of law is that perpetrators ought to be punished for their actions, and justice must be proportionate with the wrong an individual committed. The basic retributive motivation is that violators must be punished simply because their acts require retribution (Hoogenboom,2014). According to retributivists, a fitting way to punish perpetrators is to make them pay for what they have done. They assert that offenders who break the law should suffer in return in order to achieve justice. As Elster, (2006, p.38) argues “the idea that wrongdoers deserve to be punished for their acts, irrespective of the consequences of punishing them, is one that probably has a wider appeal in the population at large than among criminal law scholars.” He emphasises that punishment has appeal especially among victims of massive violations.

However, one thing that theorists disagree about is whether retribution is merely revenge. On the one hand, some argue that retributive justice is merely revenge. Minow (1998, p.12), for example, argues that “Retribution can be understood as vengeance curbed by the intervention of someone other than the victim and by principles of proportionality and individual rights. Retribution motivates punishment out of fairness to those who have been wronged and reflects a belief that wrongdoers deserve blame and punishment in direct proportion to harm inflicted.” She states that retribution is an act of vengeance, so it is appropriate that retributive justice be known in transitional contexts as a legal and acceptable way to revenge by the state. Similarly, Govier (2002) claims that retributive justice is based on the concept of revenge. She stated that the retaliation to be a moral case, it has been argued that the vengeance can be created a moral balance looks like justice. Theoretically, the victims believe that the accountability and punishment of the perpetrator mark the end of justice. Govier (2002) argues, however, that the indirect nature of vengeance may only achieve limited justice for the victims. This is because the implementation of the revenge by the state leads to the loss of the victims of their agency.

On the other hand, others maintain that retributive justice differs from vengeance. It does not involve pleasure at the suffering of perpetrators, but it is solely to punish them at wrongs. Moreover, some argue that retributive justice helps restore a balance between perpetrator and victim. Hampton (1991), for example, argues that punitive justice restores the moral equality between victim and offender. From Hampton’s perspective, retribution at its core expresses an ideal, and commitment to this ideal carries an internal limitation on punishment. It theoretically differs from revenge. This ideal is the equality between all individuals. Punishment helps society to correct the perpetrators' wrongs; through retribution also society restores the victims' dignity by inflicting visible defeat on the offenders. Hampton (1988, p.125) argues that the punishment is “a commitment to asserting moral truth in the face of its denial.”, and that the purpose of punishment is to reassert the moral truth and to abolish a false claim about the proportional values of perpetrator and victim, i.e. nullify false moral status (hierarchical relationship between the offender and the victim). By nullifying the evidence of the offender’s superiority, the punishment is an attempt to restore the individuals' moral value.

Drumbl (2007, p.61) also argues that “the infliction of punishment rectifies the moral balance insofar as punishment is what the perpetrator deserves. Punishment, therefore, is to be proportionate to the nature and extent of the crime.” The principle of ‘An eye for an eye, tooth for tooth’ expresses the retributivist view; wrongdoers who committed violations are to be punished and to suffer a similar level of pain. It serves to limit vengeance (Townsend,1997). Therefore, contrary to Minow and Govier, it can be argued that a retributivist justification is more than impulse for revenge. A retributivist insists that there is a moral commitment to harming perpetrators and making them suffer. It helps to promote the justice, and to provide closure to victims and their parents on the past. Finally, the theories of retributive justice emphasise that the task of achieving justice is legally and socially enforceable by the state only; where the state should give people what they deserve. Such theories consider that the state is democratically authorised to respond to mass atrocities and to punish the perpetrators in order to enforce communal norms and achieve justice (Murphy,2015).

My aim from this debate is to show that the explanations of the theories of retributive justice of why the state should punish are not compelling for societies in transition. It can be argued that the state can be efficient in achieving justice, the rule of law and closure for victims by punishment of perpetrators in stable, safe and democratic contexts. But in post-conflict societies where citizens do not enjoy equal rights and liberties, the effectiveness of the state to bring about justice is in doubt. In such contexts it may be that only citizens who have a lower social or political status in the society than others will be punished. This is because of the circumstances of judicial and political institutions where the state is complicit in the prevalent corruption and injustice of such societies. Therefore, the function of trials will not be the same as in stable democratic contexts. The debate suggests that the case for the justifiability of trials and retribution in the circumstances of transition will not be easy to satisfy. The justifiability of punishment in transitional societies relies on reforms (judicial system, security services, and fighting corruption) that the new government is or is not undertaking. There are compelling reasons to think that trials and punishment are not efficient ways to deal with past wrongs. Since the state has been involved in the wrongdoing, it cannot be morally impartial in giving an appropriate punishment to offenders. In this case the state is not the moral model of a society’s values, thus, the rationale for the justifiability of punishment by the state which is offered by theories of retributive justice is unconvincing. The discussion highlights the need to find alternative mechanisms for dealing with past wrongs in transitional contexts such as truth commissions or lustration. These responses may be more appropriate to dealing with past wrongdoing by a state whose authority must be re-established (Murphy,2015).

In addition to retribution, Drumbl (2007) stated that criminal prosecutions and punishment of the perpetrators by the state brings justice and rebuild the trust of public in the judicial system by achieving equality between governments and individuals before the law, which confirms the legitimacy of the state and democracy. They also foster human rights, and restore the dignity and rights of the victims through uncovering the truth and reparations for past crimes as part of a peaceful co-existence in the future. Moreover, some transitional justice experts like Rachel&Eirin (2007) also argue that judicial prosecutions can play an important role in reducing the possibility of conflict recurrence by enhancing lasting peace and reconciliation between conflicting parties. As Osiel (1997) suggests, criminal trials would positively help rebuilding post-conflict societies through increasing parties' reliance on such legal institutions to peacefully resolve the conflicts. According Bloomfield et al. (2003) retributive justice supporters argue that there is no peace and no reconciliation without criminal justice. Hoogenboom (2014) argues, however, previous criminal trials such as the tribunals for the former Yugoslavia and Rwanda were largely considered ineffective in achieving reconciliation.

Further argument, according to Kim&Sikkink (2010) and Davidovic (2016) the justification for criminal trials has not been merely retributive; the aim has not been only to punish offenders, but also to use accountability and punishment to deter future atrocities. Drumbl (2007) argues that in terms of mass human rights abuses, prosecutions would contribute to deterrence against the commission of future human rights abuses. This justification is based on the belief that the threat of retribution will create a hostile world for offenders, which will make potential offenders give weight to the threat of prosecutions and punishments. However, so far there is not enough evidence that domestic and ad hoc courts can prevent future crimes. Also, there is still the problem of identifying and bringing those responsible for past crimes before the tribunals.

Therefore, Elster (2006) argues that because of the ineffectiveness of the local and ad hoc tribunals in post-conflict societies, there must be an outside actor such as an international agent who can declare such threats in order to deter potential perpetrators. Currently, this task is carried out by the ICC which tends to the internationalisation of individual responsibility for international crimes and prevents impunity. According to the ICC transitional justice is the prosecution and punishment of violators who committed serious crimes of international concern, such as war crimes, crimes against humanity and genocide, which cannot be fought at the local level. As Kofi Annan, UN Secretary-General (2003) stated: “In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through till the end. We ask you … to do yours in our struggle to ensure that no ruler, no State, no junta and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished.” Based on this, the ICC aims to achieve justice for all, to address the shortcomings of local courts, to take over when local courts are unwilling or unable to do its investigations, to end impunity, to deter individuals and governments from committing crimes in the future, and more importantly, it helps to end conflicts and to build peace. However, Drumbl (2007) points out that there are doubts about the efficiency of the ICC and other criminal trials in deterring international crimes, as evidenced by the occurrence of the worst human rights abuses such as the Kosovo ethnic cleansing (1998) while the ICTY still had jurisdiction.

In this section I have attempted to clarify what role criminal trials play in post-conflict societies. I understand the reasons why some scholars defend the necessity of using criminal courts. But, it can be argued that in periods of transition these mechanisms do not work correctly due to the unique circumstances that faced by post-conflict societies. There may also be legitimate arguments that other problems are more important than seeking justice through criminal prosecutions. Sceptics have raised four objections for utilizing criminal trials in dealing with past abuses in transitional contexts. These objections are: Retributive justice tends to ignore the feelings and needs of victims; retributive justice is not possible in post-conflict societies due to political and security circumstances; the lack of human resources and material hurdles can hamper the delivery of adequate justice; criminal trials may obstruct reconciliation initiatives (Bloomfield et al.2003). This section raises the following questions: What are the conditions that can obstruct criminal trials in transitional contexts? Under what circumstances can accountability and punishment hinder reconciliation efforts? What are the alternative mechanisms that can be used in such contexts to achieve transitional justice aims? These questions will be answered in the next sections.

According to Bloomfield et al. (2003) retributive justice in post-conflict societies is, at best, plagued by some drawbacks and, at worst, may hamper reconciliation, peace and democracy. The end of a period of violent conflict requires rebuilding political, judicial and security institutions, healing victims, providing reparations etc. However, dealing with offenders by means of criminal trials, is the main challenge in such societies. Criminal prosecutions are not adapted to the complexities that arise during and after the conflicts. The political, material and legal limitations may make punitive justice almost impracticable. Even under normal conditions criminal justice operation has some shortcomings. The most important is: trials are perpetrator-oriented. Prosecutions may lead to re-victimization if trials do not give the victims the attention they need to be healed from the pains and injustices they suffered, and if prosecutions do not meet victims’ expectations due to the lack of evidence and inadequate justice. This may result in renewed trauma and abasement.

Hoogenboom (2014) argues that criminal trials grounded in retributive justice are the centrepiece of the international community’s response to past human rights abuses and violent conflicts. However, the victims need recognition of the wrongs done to them. Therefore, it can be argued that justice is most effective when it works with other mechanisms that reflect the needs and wishes of the victims. In response to the unimportance of the victim in the criminal justice process, the international community has adopted the restorative and reparative mechanisms. These mechanisms will be discussed in the following chapters. What the next section seeks to do is to explore in detail some of the criminal trials' shortcomings in transitional contexts.

**2.3. A critique of criminal prosecutions in transitional societies**

Despite the moral importance of prosecutions, they are surely not beyond criticism. Is there a role of criminal trials in transitional contexts? According to Bovens (2007) accountability is holding the officials of the previous political regime who committed human rights violations to account. However, numerous objections have been raised against the use of trials in post-conflict societies. In exceptional periods of political transition or violent conflicts, criminal trials are more likely to face distinct challenges which may affect their ability to achieve their objectives. According to Thoms et al. (2010) there is limited evidence that accountability meets their aims. Yet, there are few studies looking at the impact of the accountability approach on achieving peace, human rights and democracy. Many of the results are nevertheless still questionable, despite the fact that most of the studies say that the trials helped specific countries. Other studies see this approach as ineffective and sometimes harmful. As Stromseth (2009) argues, far less clear is the effect of these criminal tribunals on the ground in post-conflict societies. Do criminal trials influence confidence in fair justice in transitional societies? Do international criminal tribunals and hybrid tribunals contribute in any enduring way to fostering local capacity for justice and the rule of law? Despite the considerable resources and expertise provided to such tribunals over the years, their tangible domestic effects are very little. Therefore, the main challenge is developing better strategies to strengthen criminal tribunals’ contribution to justice and the rule of law in post-conflict societies. This section discusses the most important criticisms of the application of legal accountability in transitional societies.

Outright accountability and punishment of those responsible for past abuses may not be an appropriate response in every context (Bloomfield et al.2003). After the periods of conflicts which were marked by atrocities, questions about what forms of accountability, or what the best way to face the past are often complex. Different groups may disagree over how difficult it is to achieve justice in transitional contexts. It can be argued that the ultimate impact of international and hybrid tribunals will be uncertain if their task is fostering justice and the rule of law domestically in transitional societies. I assume this because of the fragile peace settlements, the lack of resources, and the weakness of local judicial systems. In addition, the complex international or hybrid criminal tribunals inevitably require a long time, and a lot of money and expertise. Moreover, if these courts ignore local perceptions about justice, they may undermine public trust in fair justice rather than helping to boost justice and the rule of law. Ideally, international and hybrid tribunals (and local courts as well) seek to promote justice and the rule of law by conveying three crucial messages: First, holding wrongdoers accountable for what they have done proves that their actions are unacceptable and universally condemned. Second, criminal prosecutions confirm that offenders cannot presume on impunity for crimes against humanity, war crimes and genocide. Third, criminal trials aim to reassure the public that justice can be fair, both in terms of due process, and in terms of equitable treatment of similar actions regardless of who committed them. Therefore, if trials are viewed as biased, or if direct wrongdoers face no accountability of any kind, or big fish go without trial while lesser perpetrators are held accountable, those proceedings may send counterproductive messages that justice is not fair, the failure to pursue accountability at all, the continuing of impunity which may affect negatively public trust of justice institutions (Stromseth,2009).

Therefore, it can be argued that the application of criminal trials in post-conflict societies has always been controversial. There are enormous challenges in achieving meaningful accountability in transitional societies. I claim criminal prosecution in transitional contexts has some drawbacks. I will focus on both substantive and technical concerns. Although, the technical concerns such as the deplorable state of the legal class in war torn societies, the lack of resources, the ability of some wrongdoers to destroy evidence, the unwillingness of the international community to provide material assistance, etc, are certainly significant hurdles but they do not challenge the fundamental rationale for using criminal prosecutions. Whereas the substantive concerns may call into question the legitimacy and fairness of the criminal tribunals as tools of political transition (Eisikovits,2009). Some of the main criticisms of such trials are the following:

**2.3.1. Prosecutions as “Victor’s justice”**

The concept of “Victor’s Justice” emerged after the Second World War because of the victory of the allied countries such as the United States, Russia, the United Kingdom and France over the Nazis order that led by Germany. The victor countries instituted the Nuremberg criminal tribunal against the Nazis order and the Tokyo military tribunal for war criminals (1945-1946). Nuremberg was the first trial for war criminals before the international military court and the judges were from the victor countries. From that moment the International Community created special criminal courts to try war criminals and violators of human rights of the ex-political officials. The last century witnessed violent armed conflicts in many places such as Bosnia and Kosovo, Rwanda, Sierra Leone and Democratic Republic Congo. The importance of transitional justice is that post-conflict societies have set up international and national tribunals e.g. East Timor court, the court for the Former Yugoslavia, Rwanda court, the tribunal for Serra-Leone, the court for Cambodia, and the permanent ICC. The main aim of these tribunals is to prosecute human rights violators and war crimes suspects from both sides (victors and losers) (Call,2004).

Peskin (2005) argues that this concern with achieving balance in criminal trials between victors and losers is an outgrowth of the critique of “victor’s justice” which still taints these prosecutions after armed disputes. While the principle of the universality of human rights that emerged after the World War II is based on the principle that all offenders ought to punish regardless of which side they belong to, where there is no moral or legal foundation for fortifying the victors of governments or individuals from trials, the Nuremberg and Tokyo tribunals, for example, have been considered victor courts because they tried the Axis countries for crimes committed during the war, but did not try the allied countries which bombed civilian targets in Europe and Japan.

It is important to note that while there may be serious evidence of atrocities committed by the winning and the losing side of armed conflicts, local courts and the ICC have so far only tried the losers of the conflict, i.e. it is as though the criminal courts are repeating the experience of the Nuremburg and the Tokyo trials. In some cases, the crimes committed by the victors were worse atrocities than the violations committed by the losers. For instance, in the aftermath of the Rwandan genocide 1994 (more on this in Chapter Five), Tutsis are viewed as the principal victims, with was around 800,000 dead. However, due to the lack of international monitoring of the Rwandan Patriotic Front army (RPF) that was led by Tutsis, there was not a clear understanding of the possible role of the RPF leadership, including the Rwandan president, Paul Kagame, in the systematic murder crimes during and after the 1994 genocide committed against Hutus. Nevertheless, there is significant evidence that RPF soldiers were responsible for the murder of more than 30,000 Hutu civilians during 1994 genocide. Although these crimes against Hutus do not constitute genocide, they seem to constitute serious abuses of the international humanitarian law. The government of Rwanda does not deny those crimes against Hutus, but the government officials confirm that most of those crimes were vengeance killings committed by soldiers alone when they knew that their families killed in the genocide (Peskin,2005). Despite evidence of violations of RPF during the genocide time, the international community has not forced Rwanda to either try these offenders domestically or cooperate with the ICTR’s investigations. In 1995, ICTR investigators arrived at Rwanda in order to carry out the task of investigating the genocide, but the question of investigating RPF atrocities was not an easy task. Those investigators required time to build an international court from scratch. This is because of the ICTR’s chronic administrative problems, and the lack of adequate international community support, which have slowed the pace of criminal trials for years to come (Peskin,2005).

According to Peskin (2005) governments often seek to hamper the courts to avoid reproach from tribunals and the international community. Governments can obstruct the action of courts in various ways. First, states can claim that they are providing the required cooperation while in fact they are not committed and play little role. Second, states can seek to justify their lack of ability to arrest suspects due to instability if they handed the suspects over to the courts, or due to the tribunal’s own shortcomings. Third, states can seek to delay the tribunals and try to persuade the international community by legal arguments to forego certain investigations. As shown by the case of Rwanda, the government could effectively hold witnesses as hostages and hamper achieving justice. For example, in June 2002, the Rwandan government put travel restrictions that blocked Tutsi genocide survivors who selected as witnesses to testify at the Arusha and Tanzania courts. The question of blocking Tutsis from travelling highlights the “Victor’s Justice” issue.

The government’s decision to prevent witnesses from travelling was one of the most damaging acts that obstructed courts' investigations. However, the government of Rwanda received little criticism. Given the lack of media attention regarding this case that might have turned it into an international issue, this crisis received very little international attention and made it easier for Western policymakers to downplay the issue of the RPF indictments. In addition, American diplomats expressed concern that the trial of RPF could potentially destabilise Rwanda. Further, both Washington and London had an interest in supporting the Rwandan regime led by Kagame, and getting its cooperation on issues of more importance to these western governments, such as Rwanda’s withdrawal from the regional conflict that has occurred in the Congo since 1998. The lack of international attention on the ICTR’s problems led to slow the government response to the witness crisis. The position of the Security Council was negative where it declined to rebuke Rwanda, and it did not do more than to remind Rwanda of its commitment to cooperate. The passivity of the UN emphasises the important role that the international community can play in limiting the governments' attempts to hamper the trials and undermine bringing justice (Peskin,2005).

Another example is the case of Iraq. After the invasion of Iraq in 20 March of 2003 by a US-led coalition, Saddam Hussein was removed from power as Iraq’s leader. Three years later he was sentenced to death by hanging in 5 November of 2006. The verdict was issued by Chief Judge Ra’uf Abdel Rahman who had replaced Judge Rizgar Amin. According to media reports, Saddam Hussein was executed in the first day of an important Islamic holiday, Eid ul-Adha, on 30 December of 2006 at Camp Justice, the US military base in the northern of Baghdad. The act has been criticised by a number of governments and rights groups such as Human Rights Watch (HRW) organisation and described as unfair. It is considered by those groups as a ‘political show’ and ‘vengeful action’ (RT News,2016).

According to Rizgar Amin, former chief judge, “The trial was, to a larger extent, of a political nature. Ruling circles as well as various political forces had impact on it.” (RT News,2016). He reported that the Iraq Special Tribunal (IST) had been established in 2003 by the Coalition Provisional Authority (CPA) which was created by the US occupying forces. The US’s role has been instrumental in financing the trial. They provided it with everything, even the expenses of the Iraqi Governing Council. As a result of the dependence of the trial on the US-led occupation authority, many international law experts questioned its fairness and legitimacy. Amin said the execution was obviously a breach of the article 290 of Iraq’s Criminal Procedure Code, which stipulates that the death penalty cannot be carried out on the official holidays and vacations that are related to the religion of an accused. He added “To my utmost regret, I must admit that the trial of Saddam Hussein had been victor’s justice, rather than manifestation of principles it used to serve. A thirst for revenge dominated the hearings.” (RT News,2016). As Teitel (2005) also argues, the trial of Saddam Hussein would have been neither national nor international, but an ‘occupation court’ which questioned its fairness and legitimacy, and its ability to establish justice and the rule of law. The selection of judges by the US occupation forces would seem to make the case of Iraq as “victor’s justice”. So, from the situations above, it can be argued that the main drawback of justice applied by the international and national courts is that it has interpreted as the “victor’s justice”.

In short, there is no guarantee that the special international courts such as the IST and Rwanda ICTR or the ICC will have the ability and the political courage to prosecute offenders of the victor side of armed conflicts. Governments, as mentioned above, can block criminal courts from achieving the balance in the implementation of justice by employing different ways. The jury is still out on whether criminal courts are “victor’s justice” because of the conflicts of courts with the governments such as the Rwanda case. As Peskin (2005) confirmed, the ICTR has faced many obstacles as it has been prevented from doing its investigations into the role of RPF soldiers in killing of Hutu civilians. If criminal prosecutions are to have any chance of deterring future violations and restoring the social relationships between community members as it often claims it can, it needs to be independent to prosecute all individuals who committed crimes against humanity. Trying the losers while leaving the victors will affect the effectiveness and impartial of legal accountability. The tribunal’s failure to prosecute the victors may, indeed, enhance impunity by knowing that violators will not be punished as long as they won in conflict. The failure to punish wrongdoers also can fuel the conflict because the losers feel injustice due to the denial and neglect of the atrocities they suffered.

**2.3.2. Do prosecutions serve reconciliation?**

The view that criminal prosecutions can play an important role in achieving transitional justice goals has recently been subject of widespread criticism. This critique is rooted in the belief that criminal trials undermine reconciliation. This belief has led some experts to argue that post-conflict societies ought to either give up criminal trials or should use them for achieving other general aims of transitional justice such as reconciliation (Davidovic,2016). However, since reconciliation as a final goal of transitional justice has been referred to as repentance from the wrongdoers and pardon from the victims, truth, compromise, reintegration, acceptance, mercy and peace, some argue like The UN Human Rights Committee, that it is not fair to go early to reconciliation because forgiveness and amnesty create a climate of impunity and deny the rights of victims, which can increase instability and insecurity. They thus argue that criminal prosecutions can boost the rule of law, respect human rights and ultimately serve reconciliation (Mobekk,2005).

Davidovic (2016) also argues that criminal trials aimed at establishing justice and the rule of law would not have to be at odds with reconciliation efforts. On the contrary, she confirms that the lack of criminal prosecutions may lead to vengeful actions. As Minow (1998, p.40) argues, “The emphasis on individual responsibility offers an avenue away from the cycles of blame that lead to revenge, recrimination, and ethnic and national conflicts.” According to Mobekk (2005) since the nineties and until the present day, the local populations in many post-conflict societies have demanded justice in the form of prosecutions. They believe that there cannot be reconciliation without having some criminal trials against the wrongdoers. In short, for the proponents of retributive justice, prosecutions play a crucial role in achieving reconciliation. There are three key arguments as to how accountability might advance reconciliation. The first is that accountability prevents the acts of private revenge and breaks the cycles of violence. Second, that it breaks the circle of impunity. Third, that courts fulfill a moral obligation to the victims and foster social trust. Many scholars argue that the victims cannot forget if the offenders are not punished (Kasapas,2008).

However, Teitel (2005) argues that despite the lofty goals of criminal trials, the contribution to achieving reconciliation remains largely aspirational. Thoms et al.(2010) have also argued that through the cases that went through the transition we see that the criminal courts did not serve the goal of reconciliation: for example, the ICTY, which was established to deal with war crimes that took place during the conflicts in the Balkans in the 1990’s precisely in order to achieve reconciliation and peace-making. It still, however, remains a difficult mission (Teitel,2005). Bloomfield et al. (2003) confirm that in many transitional contexts such as Spain in the 1970s, Cambodia in the 1980s and Mozambique in the 1990s, civil and political leaders opted not to bring offenders to tribunal due to the fear that prosecutions may obstruct reconciliation efforts. This is due to the fact that political and social climate is not yet suited to prosecute who are responsible for the past abuses, and the criminal justice system is ineffective. Emergency justice through hasty trials can add injustice and inequality. Therefore, the discontent of such trials because that they may become a hurdle to reconciliation initiatives. In addition, criminal tribunals may conflict with the culture of the societies. Desmond Tutu, Chair of the South African TRC, argues that while the African view of justice is aimed at the healing of violations and seeking to rehabilitate both the victims and the offenders, retributive justice may make reintegration of both the victims and the perpetrators into the community much harder. The crucial challenge of retributive justice is to achieve a balance between the moral imperatives and political limitations. Thus, despite the strong arguments in favour of legal punishment, it can be argued that accountability in politically and morally fragile transitional societies may, according to Thoms et al.(2010) and Herman et al.(2012), reduce the chances of negotiation, hamper reconciliation efforts, fuel the conflicts and destabilise society (more on this in next section), especially when actors - as discussed in chapter one - are strong and able to prevent such compromises for fear of just punishment for their past actions.

**2.3.3. Prosecutions as destabilising**

Another critique is that international, local and mixed courts, may lead to instability because offenders or their supporters seek to prevent prosecutions. They may threaten a return to armed conflict. And the new government is weak and unable to manage such problems. Bloomfield et al.(2003) stated that policymakers in Latin American, for example, throughout the 1980s and 1990s refused prosecutions. This refusal to prosecute former military leaders seems to be based on the argument that legal punishment may affect negatively a fragile peace settlement. This is because former military leaders may respond to the threat of criminal trial by trying to change the path of events with a coup or armed conflict. For instance, Julio M. Sanguinetti, President of Uruguay, rejected retributive justice based on the following argument: “What is more just? To consolidate the peace of a country where human rights are guaranteed today, or to seek retroactive justice that could compromise that peace?” (Montalbano,1987). He added “It is a choice of values. I believe human rights trials would have been incompatible with peace and institutional stability.” (Montalbano,1987). In fact, the general attitude has been that prosecutions may undermine peace and young democracies by returning to military dictatorship. Moreover, the lustration policy of governmental and managerial staff in the previous regime can also lead to destabilising. It may cripple the vital political and economic development of post-conflict societies. As can be seen now, tragic mistakes were made after the war in Iraq. Besides the criminal trials, there were radical purges for de-Baathification which resulted in a real security vacuum and collapse of state institutions such as the army, police and Iraqi parliament. Therefore, it may be argued that disbanded the ruling Ba’ath party and the Iraqi military sacrificed present security and stability to the demands of justice (Teitel, 2005).

In all transitional societies where peace is a fragile commodity there has been an assumption that justice ought to be done for achieving peace. This view has frequently been supported by the international community. It encourages local and international trials to prosecute offenders as a part of peace building strategies. Prosecutions, however, have been viewed as retributive without an ability to establish reconciliation and peace of any form (Mobekk,2005). Questions have been raised about the potential for interference by the ICC in peace-making: the ICC prosecutions might work against local amnesty and reconciliation measures, producing a serious clash of interests (Bloomfield et al.2003).

Gegout (2013, p.801), for example, argues that “The ICC is considered by some researchers and practitioners a potentially counterproductive actor in peace negotiations.” Kersten (2014b) points out that the starting point of the ICC role is always misplaced since the ICC's role mostly starts after the conflict had concluded. The few instances where the ICC intervened while the conflict still continued include cases of the Democratic Republic of Congo, Central African Republic, Uganda, Darfur, Libya and Mali. Intervention at the start, when a conflict erupts, is more favoured by many concerned. It was noticed that the ICC is not concerned with the root causes of conflicts, but only with the fact that conflict did happen. With reference to Libyan case in point, the conflict did not end when Muammar Gaddafi of Libya were brought to justice as we will see in Chapter Six. The ICC intervention is not addressing the root causes, conflicts will unlikely be resolved. In most cases the ICC would target one of the belligerent parties, which gives a wrong message that the other party is ‘good or not evil’. Kersten (2014b) argues that targeting one party to the conflict by the ICC gives some sort of legitimacy to the untargeted party, which could have a significant impact on conflict resolution efforts.

It can be argued that it is clear that the international community focuses on judicial measures to prosecute offenders without considering whether the primary course of action is to restore peace in post-conflict states. It is thus more justice-orientated than leaning towards the establishment of peace. This approach is rather risky because the majority of failing states that commit serious violations are the true government of those states. While supporters of this approach say that prosecutions for past abuses is a crucial underpinning of a stable democratic state which must not be ignored, some scholars have questioned these claims on the basis that digging up the past and knowing the criminals will fuel the conflict, threaten reconciliation and lead to instability of the community. But, Lekha Sriram (2007) says this idea does not mean that accountability is not part of peace building projects, it suffers from some of the shortcomings. The critique of peace-making in post-conflict societies has yet to address their shortcomings. Societies that have experienced internal civil war or suffered significant violations of human rights such as genocide, war crimes, disappearances and extrajudicial execution. These violations may have been committed by state officials, individuals and militias, many of them may still have political or economic power. When victims and actors call for achieving juridical justice, this call for justice may lead to a renewal of the conflict and undermine peace building: the ‘peace versus justice’ dilemma as discussed in Chapter One.

**2.3.4. Prosecutions and the lack of evidence**

Criminal trials may lead to re-victimization if trials do not meet victims’ expectations because of inadequate evidence. The result of prosecutions must be guilty or not guilty. However, during transitional periods the behaviour of wrongdoers often falls into a grey area where criminal tribunals cannot reach clear verdicts. Courtrooms are not usually able to deal with such complexities. The material and human resources in transitional contexts are usually inadequate and thus cannot support formal criminal trials. The most important problem is that evidence may have been destroyed by the old order officials. In collecting evidence, courts often rely on the cooperation of security agencies such as police and military, which may still reflect in their culture the spirit of the previous regime. These agencies often include the same individuals who are responsible for some of the past massive violations. Therefore, they may obstruct the court's work by destroying evidence, particularly where criminal trials require a very high burden of proof, which leads to an acquittal of well-known offenders. Consequently, such arbitrary justice will seriously damage the trust of victims in the judicial system (Bloomfield et al.2003). Moreover, the judicial system in transitional societies may be in a state of shock or inability. The infrastructure of the post-conflict societies may be badly damaged or the judiciary itself might be ineffective, which delays the prosecutions. The saying that the delay of justice is the denial of justice is surely very applicable, for instance, in the cases of Ethiopia and Rwanda. The absence of legal experience in Ethiopia and Rwanda in prosecuting human rights abuses was a serious obstacle. In Ethiopia, there was a serious delay in the trials. Almost all suspects have now been in the prison since 1991 and will undoubtedly stay so for years to come. Eventually, some will be acquitted for lack of evidence after long years of remand. Similarly, in the case of Rwanda. By the end of 2000, six years after the genocide, many suspects have been put in the jail. However, some individuals were judged in 2001. Others were acquitted (Bloomfield et al.2003).

**2.3.5. The deterrent effects of criminal prosecutions**

Another criticism is that supporters of criminal accountability claim that human rights trials and punishing the previous regime officials who committed serious crimes will deter others from committing the same mistakes in the future. Roht-Arriaza (1995) argues that trials are both legally and ethically desirable because they are useful and functional in deterring future violations. The question is: Does prosecuting actually deter future violations?

According to Kim & Sikkink (2010) mass violations of human rights are among the most pressing international problems facing policymakers today. Prosecutions have been the major mechanism of the late twentieth century designed to diminish such violations. They argue that the main justification for such trials has not been only to punish offenders, but also to use accountability to deter future wrongs. As President Alfonsin said the justification for the trials in Argentina was “not mainly punishment, but prevention: to avoid that this could happen again.” (Kim & Sikkink,2010, p.940). The Deputy Prosecutor of the ICC, Fatou Bensouda, in her interview at The Hague, November 10 (2008), also said that “to deter other people from committing crimes.” was a principle goal of the court (Kim & Sikkink,2010, p.940). Therefore, the deterrence hypothesis states that the increased use of criminal prosecutions can be a valuable tool to contribute to lessening repression.

However, it could be argued that achieving this aim by using accountability and punishment in transitional societies is questionable. So far, at least, deterrence has not been convincingly proved. There is lack of evidence in favour of deterrent punishments. As Mendeloff (2004) argues, although there are many claims about the positive effects of prosecutions, in particular, the possibility to diminish abuses, there is little solid evidence to support those claims. Kim & Sikkink (2010) reported that in the twentieth century, many more people were killed by their own governments than the combat deaths of all the wars combined. Unfortunately, the early years of the twenty-first century give no indication that this trend is abating. To support my argument, I provide some examples below. This section aims to explore whether prosecuting violators can decrease human rights abuses. It examines the effects and effectiveness of prosecuting human rights violations in local, hybrid courts, and international courts, particularly, the ICC. Knowledge about their effects, according to Kim & Sikkink (2010), could inform choices that policymakers are currently making around the world about whether or not to use human rights trials.

What has changed dramatically in the field of international human rights is the probability of individual sanctions of state officials. Before, the 1970s, there was an almost zero likelihood that state officials would be held accountable for past violations. Citizens could have used local courts to hold their past leaders accountable, but the continuing power of those leaders and the doctrines granting immunity to heads of state and state officials from prosecution prevented accountability. However, in the 1980s and 1990s, likelihood of punishment for past violations has increased from almost zero to some positive number in many states (Kim&Sikkink,2010).

A contrary argument, nevertheless, comes from the literature that suggests that more enforcement of human rights law and prosecutions can be counterproductive and actually lead to more violations (Kim&Sikkink,2010). In contrast to many scholars like Méndez (1997) and Kim&Sikkink (2010) who support the argument that prosecutions can practically deter criminals, others like Huntington (1993), Snyder&Vinjamuri (2004) and Landman&Krasner (2003) believe that trials do not have a deterrent effect. Moreover, they argue that in some circumstances, they would undermine efforts to create new democracies, prolong conflict and lead to an increase in atrocities. For instance, after the ICTY indicted Milosevic for violations in Bosnia, he committed further crimes in Kosovo (Blumstein et al.1978). Landman & Krasner (2003, p.51) emphasise that “a universal jurisdiction prosecution may cause more harm than the original crime it purports to address.” They argue that countries that insist on prosecutions rather than call for amnesty and reconciliation can seriously exacerbate conflict, resulting in more deaths.

It could be argued that the ICC interventions raised conflicts instead of preventing impunity and deterring of violators. Ku&Nzelibe (2006) argue that there was tension between the ICC’s pursuit of criminal justice and war-torn societies’ desire for peace and stability. The insensitivity of the ICC to urgent local needs has led to the continuation of conflicts and has thwarted reconciliation efforts and peace-building. This is because rebels will not sign peace agreements if they fear they will be held accountable for their actions. As evidenced by experiences of Congo and Uganda, the sentencing of the warlords in the democratic republic of Congo did not bring peace. On the contrary, it led to more conflicts and revenge attacks by Thomas Lubanga’s army. Similarly, in Uganda, where the ICC went against the desires of the tribal leaders not to issue warrants of arrest for the Lord's Resistance Army (LRA) leaders (Lekha Sriram,2007). They were highly unlikely to hand themselves over to be tried by The Hague. The fears that had led to warnings by local communities were realised when the LRA increased its attacks on civilians. This proved that the ICC had insisted on trial the LRA at the expense of the local communities' desire to achieve peace (Lekha Sriram,2007). Therefore, it could be argued that prosecutions in transitional contexts may be led to increase revenge actions instead of the deterrence of wrongdoers because of the fear those of the trials and punishment.

**2.3.6. Prosecutions as justice externally imposed**

While some argue that the intervention of the international community such as the ICC often is considered an imposition of justice from the outside and prejudicial to the sovereignty of the state, and it may lead to a continuation of violence. Others argue that the international community should intervene to protect civilians from repressive regimes. In fact, the purpose of putting the international law is to respect sovereignty in order to reduce tensions that may lead to conflicts. However, in 2001 there was explicit call to revise the concept of sovereignty to legitimize international intervention for a ‘responsibility to protect’ that has led a document by the International Commission on intervention and state sovereignty being put forward. This document explains that when a state committed massive human rights abuses or cannot protect its own citizens, the international community would then be responsible for the protection of citizens in this state (Philpott,2003).

Of course, in some cases, there is a moral argument for outside intervention, for example, when governments committed serious crimes such as genocide, but the international community’s intervention by force may incur very serious costs. Thus, it can be argued that, although there is a moral responsibility to protect civilians and punish perpetrators of massive violations, the military enforcement or judicial procedures to protect the human rights would significantly limit national sovereignty (Philpott,2003), which seems to have become restricted by institutions such as the European Union, the United Nations’s practices through their intervention to impose sanctions, and to prosecute those responsible for human rights violations by the ICC.

 As Rabkin (2000) argues, each state has the right to self-determination, and respect for the sovereignty of states is a key rule for the relations between independent states in order to avoid a lot of unnecessary conflicts. Therefore, sovereignty is the prerequisite of peace and stability. For example, perhaps South Africa, Chile and Argentina would be better off if officials of previous human rights abuses were punished. But all these states decided that achieving peace, democracy and reconciliation were more important because they believed that prosecutions may plunge a country into civil war. I acknowledge, however, that these are controversial issues.

As Macdonald (2013) says, the implementation of national strategies for transitional justice often takes a period of time, all the way to national reconciliation, through accountability and transparency at the individual and institutional level. The implementation of these principles and foundations are through the international and local courts and mixed criminal courts (international and local) based on local laws and international laws. Nations agree that perpetrators ought to be normally brought to justice by domestic tribunals. However, during conflicts, local institutions may be unwilling or unable to act because either national courts may have collapsed, and the evidence have been destroyed, such as the cases of Sierra Leone and Rwanda, or because of the lack of political will to prosecute previous regime officials such as the case of the former Yugoslavia. Or the desire of the societies to achieve reconciliation and peace such as the cases of South Africa, Cambodia and Spain.

Clark (2012) stated that if states fail to conduct their own investigations, then the international community will have permission to act. In other words, if states in transition are unable or unwilling to prosecute those accused of crimes relating to human rights then it is resorting to international courts, mainly the ICC, to ensure that justice is done. The international community has indisputably affirmed its position regarding fighting impunity for serious international crimes, promoting the rule of law and rebuilding trust in those institutions responsible for providing justice and security. However, because of the ICC’s limitations, those high hopes were not fulfilled.

According to Gegout (2013) the ICC has been widely criticised, yet it faces many problems. A number of factors hamper the ICC: it has very limited resources and few staff. It faces institutional restrictions where it does not have a warrant, and it has no police force of its own to arrest suspects. In addition, it is manipulated by states due to its reliance upon police forces in these states, which often affects the ICC’s work when these states refuse to cooperate with it. For instance, the ICC investigators were unable to conduct investigations into Sudanese president Omar al-Bashir for war crimes in Darfur due to the Sudanese government refusing to cooperate with the ICC. Furthermore, for some offenders and victims alike the ICC lacks legitimacy and credibility. The main problem for the ICC’s legitimacy is that the ICC would violate the national sovereignty of the states. It is believed that the direct intervention of the ICC often is an imposition of Western values on local communities, i.e. it is imposing justice from the outside and it often imposed on only weak states by the international community in order to impose its will, as evidenced by the intervention of the ICC in some African countries. These inadequacies therefore make the task of the ICC un-transferrable.

To solve this problem, the Rome Statute of the International Criminal Court (2002) added the principle of complementarity to the ICC’s jurisdiction. It requires the ICC not to take over the proper authority of the state by making its investigations, because of the fear of violating the principle of state sovereignty. The ICC is of the firm opinion that a state has to be unwilling or unable to carry out its own investigations in order for the ICC to be permitted to act (Clark, 2012; Kersten,2014d). However, states unwilling to prosecute crimes against humanity may not be any more willing to let the ICC intervene. The ICC has been the target of more criticisms that it unfairly targets weak states, in particular, African states, which tarnished to some extent the image of the court for its supporters. For example, the issuance of arrest warrants against named individuals: Muammar Gaddafi in 2011, Joseph Kony in 2004, and Omar al-Bashir in 2005 (Gegout,2013; Kersten,2014d). Therefore, some have questioned, for example the Africa Union, about whether the ICC is focused on only the African leaders (Eisikovite,2009). Consequently, I suggest that to avoid the shortcomings in the ICC, the international community should foster local courts to undertake its investigations internally through encouraging national capacities. It should also reform the local justice system in post-conflict societies.

Although we cannot deny a significant demand of local population for accountability in most, if not all, post-conflict societies, accountability is often formulated by external actors such as the ICC. Therefore, accountability may be considered as a mechanism imposed on transitional societies by the international community. It may lead to domination of Western forms of governance and institutions. As a result, accountability will be familiar to Western court systems. However, legal accountability may not function well in other political and legal cultures for a number of reasons: First, the judicial systems in most post-conflict societies may have collapsed due to the violent conflict or violations. For example, at the end of the conflict in Sierra Leone, a part of the Supreme Court building was burned, and local courts were inappropriate to deal with complex crimes such as genocide, war crimes and human rights abuses. Further, in the 1970s there was a lack of legal culture. As a result, most people tended not to use formal tribunals but rather tribal and customary law, i.e. they preferred traditional justice, or have simply known no other form of justice. In addition, when judges and lawyers seek to achieve justice by enforcing the rule of law, in many cases, they become targets of arbitrary violence by the state or others which may lead to their killing or exile (Lekha Sriram, 2007). In the IST for Saddam Hussein and his lieutenants as an example, the lawyers’ security was insufficient which put the court’s verdict into question. Khamis al-Obeidi, Saddam Hussein’s defense counsel was kidnapped and killed in Baghdad in 21 June of 2006. Lawyers representing other defendants were either abducted, murdered or forced to flee the Iraq to protect themselves (RT News,2016).

Second, sometimes accountability is truly an external imposition. As Lekha Sriram (2007) argues in some instances, the actors of the international community pursue criminal prosecutions despite the strong objections of societies or individuals. There are many states that have objected to the intervention of the ICC, arguing that it is external impositions that may hamper national reconciliation initiatives and peace building. For example, in Uganda, the tribal leaders have raised concerns that the indictments of the LRA– Lord's Resistance Army –by the ICC will only increase the violations of LRA, obstruct local justice mechanisms (‘Mato Oput’ ritual, tribe, custom, religion) – which will be discussed in Chapter Five – and undermine amnesties and peace. While the affected societies have sought to end the conflict and restore political, social and economic stability, the ICC has sought to apply criminal justice against local wishes and needs. Hence, it can be argued that in such instances an emphasis on legal justice and western-style trials may be culturally unsuitable due to the fact that the formal judicial system was never an important part of people’s lives. The potential solution to the objections of the intervention of the international community is to allow traditional justice measures to deal with offenders who responsible for serious violations. As Mobekk (2005) argues that traditional measures are mechanisms for solving conflicts at the local level, where tribal leaders deal with perpetrators and resolves conflicts. Recently, traditional mechanisms to address past violations have been increasingly promoted by the UN in order to achieve lasting peace. The main advantage of traditional mechanisms is that they are entirely owned by the local community. It is not imposed from the outside and they decide how to deal with the wrongdoers without external intervention. Local mechanisms thus would be more eligible for boost national reconciliation and stability.

**2.3.7. The cost of prosecutions**

In addition to the foregoing, some have argued that the application of criminal justice by the international tribunals, especially the ICC, are very expensive, unpopular, time-consuming and inaccessible. The opponents of the ICC intervention, for example, argue that it is using a lot of money to do its investigations and prosecute wrongdoers. Such resources could be better spent on rebuilding the economy, developing the local justice systems, and reconstruction by providing schools, housing, health care, etc (Cobban,2015). Bloomfield et al. (2003) argue that mixed tribunals (international and local elements) together with the ICC may remove some of these troubles. Mixed courts are cheaper and closer to the population. Generally, traditional/local mechanisms of transitional justice are financially less expensive than the international criminal trials, which makes them more appropriate as their using does not usually require huge resources.

**Conclusion**

The critiques that I have made are not meant to question the importance of legal accountability and punishment for offenders in all circumstances, but rather to highlight the drawbacks of using it in transitional periods. Further, there may not be an ideal solution to the complexities that I have noted. All the above shortcomings of using criminal tribunals by the international community as prime mechanisms to solve post-conflict societies problems suggested that justice was more important than peace. The ICC believes that the rule of law in transitional societies is the most important. Benjamin B. Ferencz, a former Nuremberg prosecutor stated that “There can be no peace without justice, no justice without law, and no meaningful law without a court to decide what is just and lawful under any given circumstance. The process of codification, adjudication and enforcement is as vital to a tranquil international community as it is to any independent national state.” (Gordon,1995, p.218). Without the ICC for dealing with violators, acts of genocide and human rights abuses often go unpunished.

The chapter debated the efficacy of the retributive justice model, mainly criminal prosecutions, in transitional contexts. It concludes by arguing that whether criminal trials are able to deal with transitional societies’ problems remains to be seen. Societies in transition often face difficult political, social, economic and security circumstances. I have argued that the retributive justice paradigm is only eligible if certain conditions are in place, but in transitional societies those conditions are not in place. Therefore, even if trials may be desirable in certain conditions, they are not eligible or desirable in other circumstances. I have argued that achieving transitional justice goals through criminal trials face many obstacles. They are fraught with moral and political problems in fragile transitional states. I drew on the past transitional phases in some countries to justify this argument. Criminal trials often do not enjoy transparency. This is because those communities often do not enjoy a fair judicial system, where evidence may have been destroyed by perpetrators who responsible for human rights abuse before a transition which would affect the possibility of trials procedure. Furthermore, there is the absence of democratic structures and what this means for the prospects of criminal accountability in non-paradigmatic transitional contexts. Also, these communities are usually unsafe and unstable due to warring groups. People in such circumstances tend to worry about their current situation; there is an urgent need to protect themselves and their families; they thus need stability and peace first, followed by implementation of justice. Of course, justice is a necessary moral need in the future for lasting peace, but I have argued that, in transitional contexts while peace can be achieved without justice, the achievement of justice cannot be possible without peace, and there is no guarantee of achieving justice once and for all in periods of transition. Therefore, some justice should be sacrificed for peace benefits and ensuring the interests of communities. Reconciliation, peace building, stability and democracy ought to be a priority in the aftermath of violent conflicts, and then justice can be achieved. This issue can be described as ‘current justice versus justice in the future’. In addition, the international trials are considered as imported and imposed from the outside, thus, they are often prejudicial to the sovereignty of the state, and they require substantial financial resources and consuming time. Therefore, given these the unique conditions faced by the transitional societies, it ends by suggesting to develop alternative mechanisms such as restorative, compensatory and local justice which might be able to play an effective and positive role in solving conflict problems over the retributive justice approach. I will discuss how and why we expect non-retributive mechanisms to achieve the post-conflict reconciliation and peace. These candidate models of transitional justice will be discussed further in the next chapters, starting with restorative justice.

**Chapter Three: Restorative justice practices**

**Introduction**

The previous chapter dealt at length with criminal prosecutions’ effectiveness in transitional contexts. The general conclusion was that the criminal trials, especially the ICC, were seen to be unconvincing in post-conflict societies, particularly by victims of gross violations. It has argued that criminal justice has limits and dangers, and the obstacles are insurmountable in such contexts. Significantly more consideration needs to be given, then, to the practical operation of alternative models of transitional justice available. As mentioned in Chapter Two they include restorative justice practices, such as victim-offender mediation and reconciliation, which will be the subject of this chapter, and truth commissions, apology and reparations, which are discussed in the following chapter as the mechanisms most closely associated with restorative justice model; and also, local justice practices, which are investigated in Chapter Five. The present chapter explores whether implementing the strategies or mechanisms of restorative justice in transitional contexts as an alternative to punitive justice is feasible or even desirable. It aims at answering the following questions: What is restorative justice? How does restorative justice work? How can the restorative justice model avoid or deal with the problems of punitive justice? Is it appropriate to use restorative justice mechanisms to solve the problems of post-conflict societies? This will be investigated, first, by exploring the historical background, definitions and underlying principles of restorative justice and the mechanisms of implementation; second, by discussing restorative justice work; third, by addressing the concepts of mediation and reconciliation as restorative practices , and clarifying why it is reasonable to utilize it in post-conflict societies, explaining its pros and cons; and fourth section by investigating the effectiveness of restorative justice as a candidate paradigm of transitional justice, and examining the key challenges and criticisms.

There is growing dissatisfaction with the purely punitive approach to dealing with past abuses. This is because the whole process may lead to re-victimization of the victims by ignoring them; it is offenders-oriented; it emphasises individual punishment; it does not meet most needs of the victims and offenders; and it neglects the community dimension in dealing with crimes committed in conflict. In addition, the use of punishment – society’s customary response to crime – as a deterrent is questionable. Consequently, this dissatisfaction has stimulated the search for alternatives to retribution that can balance a purely punitive approach. The Western search has generated renewed interest in traditional (non-state) mechanisms of dealing with crime. Inspiration has been found in domestic mediation and reconciliation mechanisms used from the aboriginal heritage in African and Asian societies to solve the conflict. In countries such as New Zealand, the United States, Canada and Australia, these traditional justice mechanisms have only recently been revived (Bloomfield et al.2003). Although these programmes have been used predominantly to handle minor crimes, initiatives in conflict contexts, for example Northern Ireland, have tried to develop and extend the concept. This has led theorists and practitioners to develop the ‘restorative justice’ paradigm to deal with massive violations. Its advocates suggest that restorative justice should be used in place of retributive justice, in which families of perpetrators encourage perpetrators to express repentance, take responsibility for the consequences of their actions, and repair the harm they have done. It could be argued, thus, that restorative justice can provide an attractive alternative to traditional state response to crime (Bloomfield et al.2003; Johnstone,2011; Lauwaert&Aertsen,2015).

This brings me, however, to ask the following questions: Can restorative justice be applied to all crimes or just lower-level crimes? Can it be applied to all perpetrators? London (2014) answers with an unequivocal ‘Yes’. He argues that by focusing on the restoration of personal and social trust, restorative justice may be instrumental for the emotional recovery of victims, the security of communities, and for the successful reintegration of perpetrators. Furthermore, this approach responsibly minimizes resort to punishment by maximizing many means of restoring trust. Dandurand (2018) also argues that there is no need to limit our use of restorative justice programs to cases involving relatively petty crimes or first-time offenders. They can be used for any type of offences. A study of conferencing and victim-offender mediation programs, carried out as part of a project of the European Forum for Restorative Justice, has claimed that conferencing and mediation programs can deal with any type of crime, including serious offences. A restorative justice process can be quite effective in cases involving serious crimes, or even perpetrators entrenched in patterns of serious offences. It may even have a deeper healing impact on perpetrators than on others. It also can help both victims of low-level crimes and those who have experienced the most serious crimes. Moreover, there may be a huge benefit for victims and for society more generally, such as savings for the court and health systems. Dandurand adds that restorative justice “can be successfully applied when the offender and victims previously had some form of relationship with each other, even when violence is involved.” (Dandurand,2018, p.1).

Marshall (1999) argues that restorative justice is based on the following assumptions: that crime has its origins in relationships between community members and their social conditions; that crime preventing of is dependent on communities which take responsibility for addressing those conditions that cause crime; that conflict problems cannot be fully and efficiently resolved for all parties without their personal involvement and cooperation with justice agencies and the community; that justice proceedings must be flexible enough to meet personal and social needs. According to Morgan et al. (2012) the advocates of restorative justice model hold that retributive justice should tend toward restitution and reparation instead of focusing on the punishment of the offender in order to restore the harm done to both the victim, the community, and where possible, to the perpetrator. Similarly, Dandurand&Griffiths (2006) stated that any efforts to address the consequences of a conflict should involve the victim, the offender, their social networks and community by encouraging the participation of them fully and safely in a process of dialogue and negotiation, while also providing help and support that the all injured parties require. The involvement of all parties is an essential part of the restorative process that emphasizes the development of agreements between victims and offenders about how they can reach to desired result in peaceful way, restoring the relationships and achieving reconciliation. They also argue that restorative justice approaches can be adapted to the needs of different communities and various social and cultural contexts.

The purpose of this chapter is to examine the efficacy of the restorative justice paradigm in efforts to reconcile victims and offenders of human rights abuses that occurred before or during conflicts. It investigates to what extent restorative justice mechanisms have potential to solve conflict problems and to achieve justice and peace in transitional societies. There are real problems (political and legal risks, material obstacles) with punitive justice in the transitional contexts, and pardon which is often proposed as an alternative mechanism is a deeply questionable strategy (more on this in Chapter Four). Therefore, it could be argued that a restorative approach based on traditional forms of justice seems more appropriate in transitional contexts. Restorative justice seeks to establish justice taking into account the important need to restore the relationships between community’s members. It offers together with truth-telling, apology and reparation programmes, an attractive middle way between criminal justice and blanket amnesty. However, a great deal of creativity will be needed if traditional restorative mechanisms are to be reframed for use in dealing with massive atrocities (Bloomfield et al.2003).

The central argument that I advance and defend in this chapter is that restorative justice can be highly effective in transitional societies. The way in which I develop this argument is by beginning with what I believe to be ideal model of justice in post-conflict societies: restorative, reparative and local justice. Based on the shortcomings which I have discussed in Chapter Two, punitive justice is critically assessed as a form of justice that is not applicable in aftermath conflicts. Therefore, I will here offer restorative justice mechanisms as a more viable model of transitional justice in deeply divided societies. I will argue that restorative justice model facilitates a way of living well together after conflicts. Although this chapter addresses the principles or philosophy of restorative justice, the focus of it is especially on some of its programs and practices. It emphasises the need for reconciliation policies which are a mix of culturally appropriate strategies and tools. A combination of local trials (where possible), and informal justice mechanisms may well provide the richest possibilities (Bloomfield et al.2003). The first section is intended as a brief description or overview of restorative justice.

**3.1. Restorative justice overview**

**3.1.1. Restorative justice roots**

Morgan et al. (2012) argue that restorative justice is not a new idea in crime control; most local systems of justice, especially in Africa and Asia, have been based on restorative justice practices. Indeed, the roots of the restorative justice movement are sometimes said to be as old as human history; it owes a great debt to a variety of cultural and religious traditions, especially to the native people of North America and New Zealand. Van Ness (2005) states that indigenous justice processes and practices have significantly formed restorative justice. Local forms of justice have been incorporated into formal response to crime. The philosophy of indigenous practices that justice seeks to repair the torn community fabric has resonated with restorative justice programmes. Two main restorative justice programmes are modifications from traditional justice practices:(1) conferences from traditional Maori practices in New Zealand;(2) circles from first nations practices in North America.

Bazemore&Umbreit (1995), Marchetti&Daly (2004) and Umbreit et al. (2005) also argue that restorative justice values, principles, and practices can be found in ancient Arab, Greek, Roman civilizations and Indian Hindus. This pattern is also found in numerous indigenous cultures throughout the world. Among these are many Native American tribes in the US, Japan, the first nation people of Canada, the Maori in New Zealand, African tribes, the Arabic practice of Sulha, the Afghani practice of jirga, the practices of Native Hawaiians, as well as the Aboriginal of Australia. For example, indigenous participation in sentencing procedures has been occurring informally in remote communities of Australia for some time. Since the late 1990s, this practice has been used in urban areas with the advent of indigenous sentencing and circle courts. The goals have been to engender greater trust between indigenous people and criminal justice system staff, make judicial processes in the courts more culturally appropriate, and encourage indigenous people, families, kin group members, elders and organisations to participate in the sentencing process and to provide officials with deep understanding of the crime, the nature of the relations between victim and offender, and the readiness of perpetrator to change. In addition, the values of restorative justice according to Umbreit et al. (2005) are deeply rooted in the ancient principles of Judeo-Christian culture that have always emphasised crime as being a violation against people rather than the state.

Miers (2001) argues that the term of restorative justice was used first by Barnett (1977) to refer to early experiments in America that used mediation between victims and perpetrators. Bonta et al. (1998), Umbreit et al. (2005) and Zehr (2015) confirm that the concept or philosophy of restorative justice emerged during the late 1970s and the early 80s in the US, Europe and Canada where the first form of restorative practices has been used in 1978; that was then called in North America the Victim Offender Reconciliation Program (VORP). From the mid-1980s to the mid-1990s, this kind of justice began to be recognised in many communities as a viable option for victims and offenders. At this period, England initiated the first state supported Victim-Offender Mediation Programs (VOMP). In 1988, Austria established the first national policy commitment in the world to broad implementation of victim-offender mediation. Other European countries such as Germany, Denmark, Sweden, the Netherlands, Italy, Spain, Switzerland, Ireland and Ukraine have now made strong policy commitments to restorative justice and, particularly, victim-offender mediation programs.

Latimer et al. (2005) stated that although restorative justice was discussed in the 1970s in the context of restitution, it has been more clearly integrated into criminological thinking through such works as Marshall et al. (1985), Braithwaite (1989), Zehr (1990), and Umbreit et al. (1994). Although, there is general agreement on the basic outlines of restorative justice, theorists have been unable to come to a consensus on a specific definition. The next section will offer some definitions of restorative justice.

**3.1.2. Defining restorative justice**

Restorative justice has been defined by many theorists. This thesis will adopt the most well-known and internationally used definition, that offered by Marshall (1996, p.37), which states that “Restorative justice is a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future.” An adaption of Marshall's definition, Zehr (2015, p.40) suggests “Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offense to collectively identify and address harms, needs and obligations in order to heal and put things as right as possible.” Anderlini et al. (2004, p.2) stated that “Restorative justice is a process through which all those affected by an offence - victims, perpetrators and by-standing communities -collectively deal with the consequences. It is a systematic means of addressing wrongdoings that emphasises the healing of wounds and rebuilding of relationships. Restorative justice does not focus on punishment for crimes, but on repairing the damage done and offering restitution.” According to Van Ness (2005, p.3) “Restorative justice is a theory of justice that emphasizes repairing the harm caused or revealed by criminal behaviour. It is best accomplished through inclusive and cooperative processes.”

For Dandurand & Griffiths (2006, p.7) “A restorative process is any process in which the victim and the offender and, where appropriate, any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator.” A further definition is given by Dandurand & Griffiths (2006, p.6) that “Restorative justice is a way of responding to criminal behaviour by balancing the needs of the community, the victims and the offenders.”

Sharpe (1998) defines restorative justice as one that focuses on the future not the past. According to Umbreit et al. (2005) restorative justice is a philosophy that seeks to repair the harm done to all parties involved in conflict, often by face-to-face dialogues between victims and perpetrators. It aims to bring healing after wrongdoing and help victims reconcile with offenders. Other terms have been used to describe the restorative justice model. According to Miers (2001, p.88) these include “positive justice”, “relational justice”, “making amends”, “community justice” and “restorative justice”.

A common factor in many of these restorative justice definitions is relationships; it focuses on two levels of relationships: first, relationship between individuals involved in the harm; and second, broader social relationships between community members, built on respect and dignity, that aim to restore social equality in relationships (Elliott,2011).

**3.1.3. The principles and common practices of restorative justice**

As mentioned in the introduction, a new way of thinking about how we should view and respond to crime has emerged called restorative justice (Umbreit et al.2005; Johnstone,2011). Criminal justice systems focus on law violation, the need to hold perpetrators accountable and punish them, and other state interests. Crime is viewed as having been committed against the state, therefore, it is essentially the state that determines how to respond to it. Actual victims of the crime – as already demonstrated in previous chapter – have no legal standing in the proceedings (Umbreit et al.2005). Zehr (1990) and Dandurand & Griffiths (2006) argue that the punitive approach ignores the real needs and wishes of victims for closure and healing. In particular, the formal criminal justice system is not centrally concerned with victims; it is not designed to allow victims to describe the nature of the crime and its consequences. Furthermore, it ignores the need to understand the social conditions of offenders and the causes of their crimes, and to be reintegrated into their communities. Marshall (1999) argues that the main aim of criminal justice system has been to allot proportionate punishments for criminal acts rather than centrally concerned with reintegration of wrongdoers. He confirms that only limited proceedings are taken to encourage the reintegration of perpetrators; it just makes them suffer their punishment.

In addition, the current criminal justice system is distant from the community and plays little role in the future prevention of crime. Out of recognition of these shortcomings in punitive justice measures, theorists suggested the restorative justice paradigm. While the main questions of conventional criminal justice system are: what laws have been broken; who did it; how do we punish perpetrators? The fundamental questions that posed by restorative justice are: who has been hurt; what are their needs; how do we repair the harms of crime? (Umbreit et al.2005).

Zehr (1990&2015), Umbreit et al. (2005), Dandurand&Griffiths (2006) and Johnstone (2011) argue that instead of viewing the state as the primary victim of the crime and placing victims, offenders, and the community in passive roles, the restorative justice model is based on the fundamental principle that criminal behaviour not only violates the law, but also harms the relationships between victims, offenders and the society a whole. It revolves around the idea that crime is a violation of a person by another person. The response to crime as Zehr (2015) argues, thus, needs to have a focus beyond the individual offender to include the damaged relationships between the community members in order to repair the social fabric of a community as a whole. Umbreit et al. (2005) points out that restorative justice is grounded in the belief that those most affected by crime ought to have the opportunity to actively participate in addressing the negative consequences of the conflict. McCold (2004, p.168) points out that “The best way for individuals directly affected by a crime to reliably meet their needs is to participate in deciding what will happen. The very act of participating in a restorative process is what brings the most healing. So, victims, offenders and their respective communities of care need to 'own their conflicts' and stop the courts' professional advocates and magistrates from stealing the resolution of the conflict from them.” According to Hoogenboom (2014) the punitive justice model eliminates this relational aspect by removing the victims and inserting the state in their place. In this sense, it focuses on the punishment of the offenders to the exclusion of any outside actors.

While the replacing of the victim with the state may be justified by the goal of avoiding escalating cycles of revenge, some scholars such as Sawin & Zehr (2007) argue that this exchange actually refers to the prioritization of the state’s interest to the detriment of the victim and the wider society. They stated that the state’s duty is to ensure that offenders receive the punishment that they deserve and take proceedings such as imprisonment, treatment or reform. Although these steps are taken in the name of the larger community, seldom is society involved in any meaningful way. As McCold (2004) argues, once the state garnered control over responses to crime, the community lost its ability to contribute in the justice process and their needs also became lost. Christie (1977, p.7) asserted that “the victim is a particularly heavy loser in this situation. Not only has he suffered, lost materially or become hurt, physically or otherwise … but above all he has lost participation in his own case.” Zehr (1990. p.204) states that “Part of the tragedy of modern society is our tendency to turn over our problems to experts … In doing that, we lose the power and ability to solve our own problems. Even worse, we give up opportunities to learn and grow from these situations. Restorative responses must recognize that the community has a role to play in the search for justice.” Woolford (2009) argues that restorative justice is a living model; it derives its legitimacy from active participation of stakeholders, not from achieving outcomes that are determined by the state.

Restorative justice is thought to deal with the conflict problems differently: it focuses on victims, offenders and community (Bloomfield et al.2003). Braithwaite (1989) and Zehr (1990) argue that restorative justice offers a different way of understanding justice; it includes a set of values and practices for how to live together peacefully. Some of these values involve: meeting the needs of victims and offenders; healing harm; and embodying values of community. Sullivan&Tifft (2001) argue that restorative justice represents a shift from a rights-based justice system to a needs-based justice system. It is concerned with restoring victims, offenders and the community to a healthy state following the harm done by a crime.

According to Umbreit et al. (2005), Uprimny&Saffron (2006) and Sharpe (2007) instead of bringing justice by punishing wrongdoers and making them suffer, restorative justice seeks to allow offenders to take direct responsibility for their actions, repairing harm, restoring losses, decreasing victims’ suffering and reducing their desire for retaliation. Similarly, Bloomfield et al. (2003) argue that the restorative paradigm is concerned far more about restoration of the victims than about costly punishment of the perpetrators. Restorative practices are often uniquely suited to address the victims’ most important needs such as the need for information, truth, expression, participation and restoration of a sense of security. It is a process that can support victims to express their needs and consider their views and interests, where they can receive restoration and redress by being fairly treated and participation in the decision-making. Through this process, victims are able to take steps toward some degree of closure, in sharp contrast to the values and practices of the criminal justice system with its focus on the criminal act and punishment (Umbreit et al.2005; Dandurand&Griffiths,2006). This is why it provides so much to victims.

Sullivan&Tifft (2001) argue that offenders also have emotional and psychological needs to be addressed. In many cases, perpetrators themselves may be the victims of violence and neglect. They also, thus, have a need for emotional support and care. Many perpetrators need to have their voices heard. They desire someone to listen to their truth. They may desire forgiveness and acceptance. Yet the way in which criminal justice system operates neglects such needs of perpetrators, and it overpowers offenders and denies them a chance to participate, make decisions or gain any sense of power. This is why it does little to address the issues that may cause the crime in the first place.

Instead, Sullivan&Tifft (2001) and Umbreit et al. (2005) argue that restorative justice seeks to allow offenders to take direct responsibility for their actions, and it aims to transform perpetrators into positive members of the community, by implementing measures of accountability and rehabilitation into the community, in tandem with services such as housing, education and employment that provide healing for the offender rather than punishment for its own sake. Anderlini et al. (2004) confirm that a restorative justice approach can be a means of getting offenders to acknowledge their wrongdoing, while providing a means of return to ‘normal’ life without permanent stigmatisation.

In short, Marshall (1999) and Bazemore (2001) determine a set of principles for a normative theory of restorative justice. These principles are: making room for the personal involvement of all stakeholders; harm repair; a forward-looking orientation (or preventative) in problem-solving; creativity by flexibility of practice; seeing the problems in their social context; and the role of community in the response to crime.

These principles inform state governments and agencies in formulating restorative processes and programmes (Ikpa,2007). These programmes often take the form of circles that involve the victim, the offender, and the community affected by the crime as a means to address victims’ harm and hold the perpetrators accountable (Ikpa,2007; Zehr,2015). Zehr (2015) states that there is considerable variability among existing restorative justice programmes. This is due in part to different perspectives on how conflict problems are resolved. Restorative justice programmes may be categorized as follows. First, alternative programmes by judge or prosecutor that aim to divert cases from court to other routes to provide alternatives to prosecution and allow an alternative sentencing if a satisfactory agreement is reached. Such cases also can be referred to restorative circles, for example conferences, in order to involve all parties (victim, offender, and the community) in structuring punishments or solutions which suit the parties' needs. Second, healing programs that aim to prevent the perpetrator from being subject to jail sentencing. Third, transitional programs; they aim to help both victim and perpetrator return into the community (reintegration) and prevent recidivism.

According to Umbreit et al. (2005), Dandurand&Griffiths (2006) and Ikpa (2007) the oldest and most common practice of restorative justice is the victim-offender mediation and reconciliation programme (more on this to follow); other often used restorative practices are community and family group conferencing; circle sentencing; reparation probation; and peace-making circles. All have in common the inclusion of victims and offenders in direct dialogue (face-to-face) about a specific crime; the presence of at least one additional person who serves as mediator or facilitator; and usually, advance preparation of the process so the parties will know what to expect. These programmes offer communities and individuals some welcome means of resolving conflicts by promoting responsible community practices, building respect for diversity and returning to local decision-making.

Hoogenboom (2014) argues that while proponents of restorative justice have identified a number of mechanisms, including healing circles, as an alternative to criminal prosecutions, truth commissions have become the mechanism most closely associated with this paradigm in dealing with large-scale wrongdoing. The restorative justice model has become the guiding moral force behind the development of truth and reconciliation commissions following mass atrocities. The remainder of this overview will focus on the key goals of restorative justice processes.

**3.1.4. Restorative justice objectives**

Marshall (1999), Anderlini et al. (2004) and Dandurand&Griffiths (2006) argue that the primary objectives of restorative justice are:

(1) Meeting victims’ (material, psychological, financial and social) needs, offering them assistance, giving them a voice, and enabling their participation in the resolution process that will facilitate healing.

(2) Encouraging the wrongdoers to take responsibility for the crime committed, express honest regret, and, where possible, make compensation (if the perpetrators do not wish to co-operate, the criminal justice system should remain as a parallel option).

(3) Facilitating the offenders reintegration into the community and preventing future wrongdoing. The insistence that offenders accept responsibility for their actions is clearly meant to affect their future behaviour. Transforming or reforming the perpetrators through the restorative process is a legitimate aim in order to prevent recidivism. Offenders’ undertaking about their future behaviour is usually essential component of agreements that have been reached through mediation or other restorative processes. At its best, the process (face to face encounter between victim and offender) may lead the offenders to experience a cognitive and emotional transformation and, in particular circumstances, improve their relationship with the victims, the victims’ family and the community.

(4) Denouncing criminal behaviour as unacceptable to community values. Although the denouncing of certain criminal behaviours is a goal of the restorative justice, it has also been a fundamental aim of the punitive justice model for centuries; however, the manner of dealing with such behaviours is different. Restorative justice processes are more flexible, taking into consideration – as mentioned above – the individual circumstances of the victims, perpetrators, and the crimes rather than merely focus on the rules of criminal law.

(5) Identifying forward-looking outcomes. The restorative justice model tends to focus primarily on the individuals who have been harmed, and repairing of the harm caused by the crime by providing the offender with an opportunity to make meaningful reparation, rather than just emphasizing the punishment for the rules that have been broken. Restorative justice is relationship based and seeks to achieve forward-looking outcomes that satisfy all parties concerned.

(6) Providing a means of avoiding the costs and delays associated with legal justice. This might also be an aim of the retributive justice model, but the current criminal justice system only partially achieves these objectives.

The aims of restorative justice have led to the articulation of a number of values which are: the respectful treatment of all parties (Dandurand&Griffiths,2006), truth telling, expressing remorse and making restitution to the victims in order to settling disputes (Bonta et al.1998; Anderlini et al.2004).

**3.2. How does restorative justice work?**

Zehr (2015) stated that this paradigm arises from a unique view of wrongdoings in which crime damages social relationships within community. According to Johnstone (2011) restorative justice proponents suggest that, once the facts of a crime have been proved, the priority should not be to punish the perpetrator but (1) to meet the needs of victims; and (2) to ensure that the perpetrators are fully aware of the harms they have caused, and make them meet their responsibility to repair that damages. The primary concerns should be to improve the relationship between the offenders and victims and to reintegrate the perpetrators into the society in order to achieve reconciliation and ensure that further crimes are prevented. As it is suggested, achieving these objectives requires something other than a formal criminal justice and punishment. In fact, as argued in chapter two, criminal trial and judicial punishment usually hampers the achievement of such goals.

Instead, Pavlich (2005) argues that restorative justice is the policy of eschewing traditional punishments in favour of finding solution by effective participation involving all conflict parties. Johnstone (2011) says that the measures to be taken to resolve the issues which flow from the crime, prevent reoffending and the form and amount of victims’ reparations should be decided collectively by all community members including offenders and victims through dialogue in an informal process. Restorative justice advocates like Zehr (2015) argue that a crime damages the social relationships, it both involves the community and contributes to its deterioration. Therefore, the community including the victims must be brought to the justice process in order to restore the relationships. Indeed, it is often argued that the focus of the response should not be just on the offence, but rather on repairing the relationships that damaged by the crime. The main feature of restorative justice model is that the response to the crime focuses on more than merely the perpetrator and the criminal incident. Conflict resolution, peace-making, repairing the harm and rebuilding relationships are viewed as the key procedures for achieving justice and addressing the most of the victims and offenders’ needs, and supporting the community interests. It can also be helpful for identifying the causes of crime and setting up the strategies to crime prevention (Dandurand&Griffiths,2006).

Zehr (1990, p.181) highlights this, suggesting that restorative justice “involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance.” In other words, the most appropriate response to criminal behavior is to repair the harm caused by the wrongful act by provide those affected by the crime an opportunity to come together to discuss the event in order to collectively identify needs and harms, and to know what can be done to provide an appropriate reparation. Dandurand& Griffiths (2006) stated that restorative justice practitioners believe that what truly makes a particular response to criminal incident and its consequences a ‘restorative’ one is not specific practices, but rather its goals that provide the participation of all parties in responding to crime.

Traditional restorative mechanisms often allow both victims, offenders and their families to engage in addressing harms. Restorative justice advocates have argued that such participating and communication can help to heal broken relationships, and restore stability and peace (Bloomfield et al.2003). Llewellyn&Howse (1999b) and Johnstone (2011) argue that the key elements of the restorative process include: a face-to-face encounter between the victims, (alleged) offenders and their families in a safe setting; dialogue; truth-telling; and voluntariness.

McKibben (2014) argues that instead of ‘bringing justice’ in the familiar sense of punishing a perpetrator, restorative justice seeks to assuage hurt or pain, and emphasizes responsibility and healing for all parties involved in crime. When the offenders recognise that their actions were wrong, express sincere remorse and say sorry to the victims, this can motivate them to change their behavior and pave the way for their reintegration into the law-abiding society; it also seeks to diminish the tendency of angry victims to vengeance. There are many forms of restorative justice, but dialogue between victims and offenders is the most common. It seeks to provide an opportunity for parties involved to discuss and resolve conflict. According to the restorative justice philosophy, this is where real repair of harms and restoration of relationships and peace are thought to originate.

Professional mediators, who are preferably volunteers, will also take part in the process, not as chief decision-makers but as facilitators. Their role is not to impose their interpretation or solution upon the conflict parties, but to guide the parties towards constructive dialogue and come to a mutually agreeable resolution about what the offender will do to make restitution, usually including a form and amount of reparation and apology. At such meetings perpetrators are urged to account for their behaviour – they should be willing to honestly tell the truth – and assurances are sought from them that the behaviour will not be repeated. Also, victims are encouraged to tell their stories, express their feelings and emotion, and describe the material and psychological effects of the crime upon them. There is an emphasis on persuading offenders to repair the harm they have caused people voluntarily, i.e., without threats. There is also an emphasis on the necessity of reconciling offenders with their victims and with the community (Johnstone,2011; Uprimny&Saffron,2006). Bloomfield et al. (2003) argues that restorative justice aims to restore the relations and the trust, as far as possible, between victims and perpetrators and within their society.

According to its advocates, a shift from a formal criminal justice and punishment to restorative justice will have a number of benefits. They claim that restorative justice will meet the material needs of victims much better than the formal criminal justice process. But, the main beneﬁts are more psychological. Victims usually come to a restorative conference shocked by their experience. At the meeting, they are uplifted in a number of ways: the disclosure of the full story of their crime gives them cathartic release; their face-to-face encounter with the perpetrators helps dissolve many of the ghastly images which they had conjured up in their minds; by their participation in the process in which is decided what is to be done, they regain a sense of power which they might have lost as a result of their victimisation; and they obtain a sense of closure by giving them the opportunity to forgive and accept those who have harmed them. Also, the offenders will benefit from restorative justice because it offers them the chance to regain the respect of the community rather than its permanent scorn. As they claim that communities will also benefit of restorative justice in several ways: perpetrators will be rendered less dangerous; the large financial costs of criminal trials can be diverted to more constructive and crime-preventing projects; and restorative justice will help boost arts of citizenship and a sense of community which will have positive effects on the stability of societies (Johnstone,1999; Johnstone,2011). According to Marshall (1999), attempts at reintegration are essentially restorative, effecting a link between perpetrators and the community through encouraging community programmes for offenders such as help in finding a job, health care, and so on. These important efforts can be done by other community agencies that help reintegration of offenders through the use of restorative model based on conferencing practice.

Therefore, it can be argued that restorative justice mechanisms may provide better possibilities in dealing with the wrongdoings. Restorative justice forms which are inextricably linked to the religion, local cultures, values and practices of societies hold a great deal of promise to re-build post-conflict societies through active participation of all parties in restorative initiatives. Local corrections departments along with community members develop policies and practices to be more responsive to the needs of victims and the community, while providing opportunities for offenders to be actively involved in repairing the harm and developing their skills for becoming productive members of the community (Consedine,1995; Umbreit et al.2005).

The next section seeks to examine current restorative justice practices; it addresses the concepts of mediation and reconciliation, and their relations to other concepts such as forgiveness, mercy, peacebuilding and justice. It offers an understanding of the problems surrounding the reconciliation question after gross abuses. I would argue that such practices might be more effective in solving conflict problems. While punitive mechanisms – as I have demonstrated in chapter two – are often a risky or unattainable strategy in post-conflict states, mediation and reconciliation have fewer disadvantages and can play a positive role in dealing with past atrocities. Therefore, there is good reason to examine these mechanisms, explaining their notable features, strengths and weaknesses (Bloomfield et al.2003).

**3.3. Mediation and reconciliation concepts**

**3.3.1. Victim-offender mediation**

As a means of providing an in-depth examination of restorative justice in practice, this section examines the Victim-offender mediation program (VOMP). This does not mean that it is the best practice or the only practice worth examining. We selected it because it is the oldest and most widely practiced of the various processes of restorative justice. Restorative justice dialogue responses are increasingly used, driven by requests from victims for such opportunities. In their quest for common understanding and healing following the death of their loved ones, family members of murder victims from both criminal and political violence are seeking to meet the perpetrators through restorative dialogue opportunities in North America, Europe, South Africa, and other parts of the world. In such programmes, victims of severe violence, including murder, meet in facilitated dialogue with the perpetrators as part of their search for greater understanding, meaning, and some measure of closure in the wake of trauma. And in the last few years, for example, a former prisoner of the Irish Republican Army (IRA) movement in Northern Ireland met face-to-face with the daughter of one of the men he killed in their joint search for meaning, understanding and peace in their lives (Umbreit et al.2005).

As mentioned above, victim-offender mediation was the first contemporary restorative process. It is also known as victim-offender conferencing, victim-offender reconciliation programmes, victim-offender dialogue or victim-offender meeting, which usually involves victims and offenders in direct mediation facilitated by one or sometimes two mediators or facilitators. In its original form, a trained facilitator prepared and brought together victims, offenders and their family members or friends to openly discuss what led up to this crime, its impact on their lives and the community, and put a detailed plan for making things right, repairing the harms, compensation of victims, and meeting several times to come to greater understanding and tolerance among the parties and foster healing within the community (Umbreit et al.2005; Van Ness,2005).

Marshall (1999) and Ikpa (2007) stated that victim-offender meeting is organised to give victims and perpetrators a chance to negotiate in order to reach an agreement about the best way to resolve the conflict and repair any resultant harm. Cavanagh (1998), Marshall (1999) and Dandurand & Griffiths (2006) argue that the mediation process is designed to address the needs of victims, offenders and the society in more comprehensively way. While insuring that perpetrators are held accountable for their actions, it leads, to the greatest extent possible, to some form of reparation for the victims’ losses, the rehabilitation of the offenders, reconciliation and protect the community. Dandurand & Griffiths (2006), however, argue that there are three fundamental requirements that must be met before using the victim-offender mediation programmes which are:(1) the perpetrators must not deny responsibility for the crimes committed;(2) the victims and offenders must be willing to be involved in the process;(3) the victims and perpetrators must consider it safe to participate. Therefore, it should be recognised that the process cannot proceed successfully without consent from the key people involved and fulfillment the other conditions (Ikpa,2007).

Victim-offender mediation has to be carefully facilitated by specially trained mediators whose main tasks are to ensure a safe and comfortable environment for a fruitful exchange for all parties. As mediators have to be respected and trusted by both victims and perpetrators, they should play a neutral role in helping all the parties involved come up with a solution. The mediator could be a victim or a local community member. Occasionally, victims choose to do the role of mediation, exploring with the wrongdoers how they might avoid trouble in future. Some mediation programmes are community-based, they may be offered by a steering committee including representatives of community groups which undertakes the task of mediation with victims and offenders. The community is given a more direct role in cases of group conferencing, where the mediation includes more parties such as the victims and offenders’ families or supporters. If victims and offenders do not want to meet or are unable to do so, mediation services may negotiate between them. The mediators could be staff who employ in the body offering the service, or volunteers (Marshall,1999).

The support for victims most often occurs through the victims' families or personal acquaintances. However, such assistance may be less available to some victims. Trained Volunteers, then, are available to visit those who request support. In some cases, specialised volunteers may facilitate better support than from relatives and friends who may fail to understand the victim's real needs. Communities also attempt to help offenders by a multitude of projects, whether in literacy education, accommodation for the homeless, improving their skills and capacities, trying to find jobs or encourage social integration. While still addressing victims’ needs, it also addresses the needs of the perpetrators, and of societies that would benefit from their rehabilitation. Dandurand&Griffiths (2006) stated that because the main focus is around desired and valued outcomes, all the participants in the process are playing an active role in facilitating a healing process. Therefore, it could be argued that the victim-offender meeting is an example of how the principles of restorative justice can be applied within a framework in which justice system staff share with community members is in contrast to the formal criminal justice system. It can help to rebuild relationships within families and communities, and foster awareness and respect for the lives of others and the communities’ values.

In short, Cavanagh (1998) and Marshall (1999) argue that the social benefits of victim-offender mediation programme are: meeting the needs of both victims and offenders. On one hand, it allows victims’ more emotional and material needs to be satisfied. They experience a degree of emotional healing, they may feel less angry and fearful, and be happier to see that the offender feels guilty and has not been abandon them. On the other hand, perpetrators are more affected by the experience than by formal legal punishment, the feeling that society is ready to offer re- acceptance gives them a positive motivation to reform. The process also gives them a chance to provide voluntary reparations – which will be discussed in the next chapter – to their victims or their parents which may take the form of monetary compensation such as cash payments, or provisions for education, health and housing, or symbolic reparations such as an explanation of how the crime came about (recognition), offering an apology, a sincere admission and expression of regret for their actions.

Umbreit et al. (2005) argue that the involvement in the process can lead to a deep sense of satisfaction, fairness, and ability to move on with their lives. There is a wealth of literature claiming that this program offers a form of justice that is based on the needs of the participants, makes the situation right and achieves peace (Umbreit et al.1994). Van Ness (2005) and Umbreit et al. (2005) argue that the literature on research concerning restorative justice practices is remarkably consistent in its key findings:

(1) Satisfaction with restorative processes is higher for both victims and offenders than with the proceedings of the criminal court. Some studies showed that the expression of satisfaction with victim-offender mediation and its outcomes is consistently high for both victims and offenders across countries, cultures, and types of crimes. Umbreit et al. (1994), for example, argue that the voluntary victim-offender mediation programs in some courts in the US resulted in very high levels of satisfaction among both victims and offenders. The vast majority of (VOMP) participants believing that the process was secure to both sides and that the resulting agreement was fair. It helped reduce fear and anxiety among victims. It also helped offenders to get a greater understanding of the harm they have caused to their victims and felt more empathy toward them.

(2) The offenders who participated in these programs had substantially higher completion rates of restitution obligations than perpetrators processed in judicial ways alone.

(3) The victim-offender mediation programme helped reduce recidivism. Offenders who go through restorative processes are less likely to repeat their criminal behaviour in the future. The growing studies on recidivism consistently show that perpetrators who participate in the victim-offender mediation programme (VOMP) are less likely to re-offend than those who are dealt with by the court. Preventing recidivism is often used as a long-term measure of the effectiveness of the victim-offender mediation programmes; it benefits offenders directly, and more broadly, benefits communities (Umbreit et al.2005).

Therefore, it could be argued that these steps (mediation, negotiation, exchange and reparations) are more effective and therapeutic for victims who find it helpful to be able to offer forgiveness in return for the perpetrators' atonement, and in reintegration of perpetrators into the community and restoring, to some extent, their own reputations by resolving their guilt in that way. In short, the victim-offender mediation process allows flexible adjustment of agreements to parties' needs, capacities and a greater level of creativity than criminal justice processes (Marshall,1999).

In this section I have argued that the mediation process between fighting groups is a crucial element in conflict resolution and achieving reconciliation. It therefore ends with providing some examples of using the mediation programmes in some societies to justify this argument. Dandurand&Griffiths (2006) point to the Barangay justice system in the Philippines, for example, which comprises a locally elected Barangay captain and a peacekeeping committee; they participate in conflict resolution through facilitating a mediation session after hearing cases and reach agreements which are legally binding and are recognised by the courts.

According to Bloomfield et al. (2003) the civil war between different local factions on Bougainville which concerning secession of this island from Papua New Guinea, has been a testing ground for the effectiveness of restorative justice approach to achieving peace. The Peace Foundation Melanesia has given basic restorative justice training to 10,000 of the Bougainvillians, 50 to 70 as trainers, 500 as facilitators including many traditional leaders. The Peace Foundation Melanesia expects to have around 800 active mediators to deal with the conflicts and crimes that have committed in the villages in the aftermath of civil war, from petty crimes of ethnic abuse up to rape and homicide. The Bougainville people used their own ways of doing restorative justice consistent with their Melanesian principle of wan bel (‘one belly’) or reconciliation. Another example, Sudan has a group of experts called Ajaweed includes the elders (mostly tribal chiefs) who are experienced in mediation. They are usually called upon to mediate between warring groups other than their own. In the mediation process the parties express their stories and grievances against one another. After listening to them, the mediators work against all odds to reach an agreement about how resolving the conflict and living together. Reconciliation rituals are then performed, and the conflict is formally declared resolved. The following section will examine the concept of reconciliation. What lessons have been learnt from reconciliation processes in South Africa?

**3.3.2. Reconciliation**

The subject of reconciliation is a focus of increasing interest. Despite its increasingly common use in diverse contexts, there is still no clearly agreed definition of the term of ‘reconciliation’ (Bloomfield et al.2003; Hamber&Kelly,2004). Anderlini et al. (2004) and Bloomfield et al. (2003) argue that reconciliation differs in meaning and significance. Some studies have appeared in which there are different understandings of the term. Its importance also varies from culture to culture. It can mean dialogue, remorse, apology, healing and pardon; or reconstruction of the community, neighbourly relationships, families, etc; or a moral conversion; a personal change, acceptance of others; or promotion of mutual understanding, trust, respect and development; or restitution of the victim’s integrity; or it can simply mean co-existence and restoring peace. Hamber&Kelly (2004, pp.3-4) defined reconciliation as “the process of addressing conflictual and fractured relationships and this includes... Acknowledging and dealing with the past: Acknowledging the hurt, losses, truths and suffering of the past. Providing the mechanisms for justice, healing, restitution or reparation, and restoration,” and, more usefully, as “a process through which a society moves from a divided past to a shared future.” (Bloomfield et al.2003, p.12). This thesis will adopt the comprehensive and working definition of reconciliation applicable to conflict or post-conflict societies that is offered by Bloomfield et al. (2003, p.12), and which states that reconciliation is: “an over-arching process which includes the search for truth, justice, forgiveness, healing and so on. At its simplest, it means finding a way to live alongside former enemies - not necessarily to love them, or forgive them, or forget the past in any way, but to coexist with them, to develop the degree of cooperation necessary to share our society with them, so that we all have better lives together than we have had separately... Reconciliation is a ... process that redesigns the relationship between us.” (Bloomfield et al.2003, p.12).

For each case, reconciliation can begin at a different point after the conflict: at the negotiating table or during the prosecution of offenders, for example. The study by the Johannesburg Centre for the Study of Violence and Reconciliation of the impact of the South African Truth and Reconciliation Commission, for example, showed that although there is a common underlying theme involved in building a relationship between community members as groups or individuals, residents of the one region had different definitions of that relationship and had very different ideas of what reconciliation meant, depending on personal circumstances, culture, political structure and certain experience in the field of human rights violations. However, there seems to be uniform agreement amongst scholars that reconciliation is more a process than an achievable aim. Reconciliation can indeed be misused if it is thought of as an aim, not a process. As a result of such thinking, many people, especially the victims, are suspicious of reconciliation and see it as an excuse to ignore their suffering. These people often suspect that a fast move to a state where everyone is reconciled to the past and to each other means there is no truth, punishment and justice; they must just ‘forgive and forget’ (Anderlini et al.2004; Bloomfield et al.2003).

However, according to Bloomfield et al. (2003) ideally reconciliation prevents, once and for all, the use of the past abuses as an excuse for renewed conflict. In its forward-looking dimension, it breaks the cycle of violence, consolidates peace, helps victims and perpetrators to get on with life, and at the level of society, fosters democratic institutions. Reconciliation is comprehensive process which involves the search for truth, justice, the reparation of past injustices, forgiveness, rebuilding of non-violent relationships between individuals and communities, and the personal healing of survivors. It applies to everyone; it is not just a process for those who suffered directly. The attitudes and beliefs that support the conflict spread through a community and should be addressed at that broad level. Such beliefs and attitudes can effectively hamper the reconciliation process if they are left unaddressed. The past ought to be addressed in order to reach the future, and reconciliation is the mechanism to do that.

Clamp&Doak (2012) argue that unlike criminal justice systems, restorative justice approaches are called on to address both the past by holding offenders to account (backward-looking) and restitution of the victims, while creating the conditions for a peaceful future by reconciling all conflict parties (forward-looking) and to do so in such a way that does not undermine the transition. Reconciliation process is not an excuse for impunity; an alternative to truth or justice; a matter of solely forgiving; nor an excuse to forget. The reconciliation is a process of acknowledging; the rebuilding of the societies and relationships which were broken due to pain, distrust and fear (Bloomfield et al.2003; Anderlini et al.2004); learning from the past; and finding a way to live alongside former enemies that permits a vision of the future and better lives together. The aim of reconciliation process is a future aspiration to build a democratic state to hope for. Reconciliation, therefore, needs to be a broad, inclusive process; it must be inclusive of the various issues, interests and experiences across a society (Bloomfield et al. 2003).

Acknowledging the painful past and understanding it, and going beyond it, is the best way to ensure that it cannot happen again. The need to find out the truth about the past is the central significance of reconciliation. Without it people will not feel trust, security and will have no confidence in the future. The aim must be rebuilding the divided and destroyed societies. There is no alternative route to achieve lasting peace. However, although creating trust and understanding between former enemies is an essential for the process of peace building, it is a supremely difficult challenge to post-conflict societies. There is no easy roadmap for reconciliation. Addressing the pain of victims, understanding the conditions and motivations of perpetrators, in trying to bring justice, truth and, ultimately, peace, takes a very long and painful journey. In other words, reconciliation is usually a difficult and intricate operation involving various steps and stages which are:(1) replacing fear by non-violent coexistence;(2) building confidence and trust;(3) increasing empathy. Therefore, it can never be a quick fix; it requires time, patience, financial and human resources, and a capacity to adapt to challenges and opportunities. Moreover, there is a certain danger in talking about reconciliation in the aftermath of conflicts. At each stage a relapse back into more violent conflicts is always a real possibility (Bloomfield et al.2003).

According to Crocker (2002) the concept of reconciliation that underlies restorative justice means an absolute agreement between all community’s members including victims and offenders regarding the need of restoring the social relationships, understanding and peace. Anderlini et al. (2004) stated that the following are necessary for reconciliation to occur: some form of justice; confidence-building; and strategies for dealing with actors who could potentially hinder the peace process. Reconciliation is often seen to be crucial for peace processes to be succeed, as it re-establishes the relationships among the community’s members after a conflict and decreases the risk of further violence. Reconciliation, therefore, is not an attempt to restore things to how they were before the conflict, but rather it is reconstruction of the community and relationships in a way that allows everyone to move forward together. It is, thus, not so much about punishment, but rather about a series of processes that improve relations. Reconciliation refers to a form of consensus and interaction among all parties within the community.

Crocker (2002) states that in deciding whether and how to address past atrocities, it is commonly believed that reconciliation is morally superior to criminal trials and punishment. He reported that the reconciliation approach used in transitional period of South Africa by actors in order to achieve the values of compassion, forgiveness and friendship. For instance, in No Future Without Forgiveness, the chair of the South African Truth and Reconciliation Commission, Archbishop Desmond Tutu defends the Commission’s granting of amnesty to perpetrators who admitted the truth about their past crimes, and he praises victims who accepted the apology and forgave the wrongdoers. This way of understanding reconciliation demands that all victims who have suffered from massive violations be capable of building strong social relationships with their abusers. Therefore, amnesty is the most praiseworthy mechanism to achieve peace.

Tutu refuses the Nuremberg trial paradigm. He offers practical and moral arguments against applying criminal trials to South Africa. On the practical side, he argues that trials – as mentioned in Chapter Two – are very expensive, time-consuming, and consume valuable resources that can otherwise be used in development, poverty alleviation, health care and educational reforms. On the moral side, he offers two arguments to justify rejection of the criminal prosecutions. Tutu’s first argument is the ‘argument against revenge’: he argues that punishment is retribution; retribution is revenge; and revenge is morally wrong. The second argument is the ‘reconciliation argument’: Tutu rejects judicial justice for South Africa’s transition and others like it not only because he claims it is vengeful but also because punishment obstructs reconciliation. He defends amnesty and forgiveness as the best mechanisms to foster reconciliation. Tutu claims that punishing offenders is wrong because it only hinders social healing and increase the division between former warring groups. He favors the TRC’s approach and contends that ‘reconciliation’ is more convenient to restore social harmony where violators publicly confess the truth and victims forgive their aggressors. However, the problem is, after having been involved in gross atrocities, it seems particularly difficult that all victims and offenders will be able or willing to build relationships and confidence between them. As Crocker (2002) notes regarding the South African case, although some actors made an effort to achieve the values of compassion, solidarity, confidence, forgiveness and amnesty, it is not reasonable to believe that all people will do the same. In addition, it often takes more than one generation for societies to address past wrongs and achieve reconciliation.

Crocker (2002) provides an evaluation of Tutu’s two arguments. First, he argues that retribution differs significantly from vengeance. He says, on the one hand, Tutu does not consider the various roles that punishment may play, such as preventing impunity, rehabilitating offenders and vindicating the rights of the victims. On the other hand, Tutu endorses the threat of punishment as a social tool to encourage wrongdoers to tell the truth about their crimes. The TRC did not grant amnesty to all violators of human rights during apartheid. It offered pardon to offenders only if their confessions were complete and accurate. Otherwise, perpetrators are threatened with criminal trial and punishment if they were lying about their wrongdoing. So, Crocker (2002) argues that the TRC is unlikely to have had the confessions of many perpetrators without such a threat of punishment.

Second, Crocker (2002) contends that regardless of the importance of reconciliation in restoring social ties, a society must be wary of overestimating the restorative effect of forgiveness and amnesty at the expense of justice. Exigent demands for reconciliation may not be ethically, nor politically justifiable. There is the necessity of balancing the human need for justice with the state’s interest in stability and reconciliation. In contrast to Tutu’s argument, Crocker argues that punishment and reconciliation are not so distinct, but that they may promote each other. On the one hand, fair prosecutions may contribute to the reconciliation and truth sought by truth commissions if victims believe that local and international tribunals used their testimony to bring wrongdoers to justice, which can satisfy them and help to healing. On the other hand, the evidence has detected by truth commissions may play a positive role in trials. Adequate truth commissions not only provide the opportunity for societies to deliberate about their past but also to recommend judicial system reform or argue that international criminal courts have jurisdiction. Therefore, the goals of penal justice and reconciliation can be effected by the same tools.

Crocker (2002) concludes that the UN and the international community should seek to achieve the balancing between the penal justice and reconciliation in morally appropriate ways. Uprimny&Saffron (2006) also argue that Tutu’s vision of reconciliation may lead to marginalising and de-legitimizing many people’s point of view, which may not only affect the dissatisfactions of citizens regarding the ways of reconciliation, but rather they may affect democratic process in transitional periods, given that it does not allow all people to express their opinions. These anti-democratic consequences may also affect in the aftermath of transition the new government which might adopt negative attitudes towards opponents, where those people are seen as undesirable hurdles for reconciliation. For example, in the case of Colombia, the victims’ organizations have often been referred to as enemies of peace due to they have firmly refused the negotiations between government and armed groups. Therefore, Crocker (2002) has suggested a better way of understanding reconciliation based on ‘democratic reciprocity’ where all citizens – including offenders – are allowed to deliberate and make democratic decisions regarding the past, present, and future of their country. These decisions may either lead to the choice of pardon and re-building of social ties or lead to a different result. However, in all cases the decision would be fair and legitimate. This way of understanding reconciliation that aim at having long-lasting democratic effects may be more convenient for transitional societies.

According to Bloomfield et al. (2003) reconciliation is among the most difficult challenges facing new or restored democracies. For transitional contexts, there is an urgent demand for the most effective mechanisms to address the most difficult of post-violence issues. It could be argued that an appropriate reconciliation process which is designed to fit the context, and guarantee the participation of all stakeholders concerned, is a vital tool to address adequately the legacy of past violence, to rebuild the broken relationships it has caused, to build a shared vision of the future, and to support nascent democratic structures. The conclusion to all this is that restoring the relationships very important, and that is where reconciliation comes in. Reconciliation supports democracy by rebuilding the relationships. While negative relations will work to undermine the democracy, reconciliation, even though not easy, is the most practical and effective way to address those relations.

I would argue here against Crocker’s idea that prosecutions and punishment might be necessary for reconciliation, truth and victims’ healing. Bloomfield et al. (2003) argue that the international community, especially the UN, almost exclusively favour criminal justice institutions such as ad hoc tribunals, the ICC and universal jurisdiction, which is considered as one-sided approach that may discourage experiments to develop a restorative approach. As discussed in chapter two, it is difficult to even begin to do justice due to the unique circumstances faced by the transitional societies. In addition, the punitive mechanisms may undermine reconciliation, peace and stability in such societies. From my point of view, retribution is not necessarily to be physical punishment or prison; it could be through truth-telling and apology of the offenders before the victims and people, and providing reparations to victims or their families, which may more effective in solving conflict problems. Reconciliation has only recently been recognized as a necessary element of post-conflict reconstruction. Therefore, throughout this section the emphasis is on the urgent need for mediation and reconciliation programmes which are culturally appropriate strategies.

It could be argued that a combination of such traditional justice mechanisms, local courts (where possible) and the international punitive reactions may well provide better possibilities. I argue like Bloomfield et al. (2003) that post conflict rebuilding requires reconciliation if societies are to move forward. Reconciliation addresses the relationship between community members who involved in the conflict. It is necessary to view reconciliation as an integral part of peace-building and democracy. Transitional societies would not be able to achieve justice, stability and better future without reconciliation, along with reconstruction and overall reform of economic, political and judicial institutions. Although in practice all-encompassing reconciliation is a complex process that always involves setbacks and not easy to achieve, the real failures in moving from a divided path to a shared future are when reconciliation was ignored in those societies.

The lesson to be learnt from the experience of South Africa is that reconciliation cannot be imposed from outside. It is never a theoretical matter, but always happens in a particular context. As every conflict is different, the right way of conflict resolution may be different for each conflict. It could be argued, thus, that societies must discover their own solutions which are appropriate to the history and culture of particular context, i.e. each society ought to find its own route to reconciliation that is appropriate to its circumstances. In other words, there is no a specific and perfect reconciliation method or model that may be applied around the world. It is important to remain flexible and creative about designing the reconciliation process depending on a specific context. It could be argued, thus, that the reconciliation process design should adopt new and old, foreign and local tools to be practical and effective and appropriate to a particular set of circumstances. In other words, faced with each new case of conflict, new solutions that are appropriate to the particular cultural, social, political and economic contexts should be devised (Bloomfield et al.2003).

Some post-conflict societies tended to look within their own culture, and use their traditional mechanisms – which will be discussed in Chapters Five and Six – for reconciliation and justice. In fact, these mechanisms are usually cheaper than importing huge Western-designed models, and this is one reason to encourage this development. In addition, such local justice tools are anchored in existing values and relationships. Therefore, they are more likely to win broad support. Much can be learned from the experience of the South African Truth and Reconciliation Commission. Clearly, it played a vital and an effective role in embedding new and peaceful patterns of interaction in that previously deeply divided society. Increasingly, the international community and multilateral and regional actors are beginning to realize the importance of reconciliation as a component in conflict prevention, peace-building, democracy, reconstruction and human development (Bloomfield et al.2003). The next section aims at explaining the salient features, strengths and weaknesses of restorative justice approaches.

**3.3.3. The notable features, strengths and weaknesses of restorative justice practices**

**1. The notable features**

The salient features of restorative justice approach, according to Bloomfield et al.(2003), Dandurand&Griffiths (2006) and Ikpa (2007) are:(1) the problem is viewed as that of the whole society, a response that recognises the importance of the role of the community in solving the problems and preventing crime;(2) the promotion of public participation is a significant element in the restorative process;(3) there is no legal representation;(4) local arbitrators are appointed on the basis of status or lineage;(5) customary law is considered in reaching a compromise;(6) the main focus is on reconciliation, healing of all parties and restoring social harmony;(7) the process is voluntary and the procedures are flexible;(8) the decisions are based on agreement and the enforcement of them is secured through social pressure, they are confirmed through rituals aimed at reintegration.

**2. Strengths**

Bloomfield et al. (2003), Dandurand&Griffiths (2006) and Ikpa (2007) state that the advantages of restorative measures are:(1) they are accessible to local people where its procedures are simple, they are carried out in the local language, within walking distance, do not require the services of a lawyer, and without the delays associated with the criminal justice system;(2) they are highly participatory, giving all parties (victim, the offender and the community) a real voice in finding a lasting solution to the conflict;(3) they are flexible and variable which can be adapted to the conditions of communities, legal tradition and principles of local judicial systems;(4) they are suitable for dealing with different crimes including very serious offences;(5) they offer kind of justice based on reconciliation, reparation, healing and rehabilitation, which is more appropriate to close-knit communities where people must rely on continuous social and economic cooperation with their neighbours;(6) they help in educating all the community members regarding the circumstances and how conflict may be peacefully resolved;(7) they employ non-custodial sentences that effectively reduce prison overcrowding, and which may allow communities to divert prison budget allocations towards social development purposes;(8) they permit the perpetrators to contribute to the economy and to pay reparations to the victims or their families, and prevent the economic and social dislocation of the community.

**3. Weaknesses**

Bloomfield et al. (2003) argue that the traditional restorative mechanisms have some weak points, the major flaws are:(1) although the checks and balances exist (particularly public participation), the unequal bargaining strengths of the parties and existing social attitudes may lead to the compromise that reinforces the inequalities on the basis of gender, age or other status;(2) partiality, traditional leaders may favour certain parties based on their political allegiance or power in terms of status, wealth or education;(3) the procedural safeguards are often inadequate. The next section examines general concerns about restorative justice, then it turns to look at the concerns about using it in transitional societies.

**3.4. Assessing restorative practices’ effectiveness in transitional contexts**

According to Zehr (2015) the effectiveness of the mechanisms and programs of restorative justice can be analysed by answering the following important questions: Is the restorative justice model adequately victim oriented? Does it address harm, needs and causes? Does the model encourage offenders to take responsibility for their actions? Is it respectful to all parties? Does restorative approach serve justice and reconciliation? Woolford (2009) argues that restorative justice success may be measured based on whether or not achieving its goals: whether or not victims are satisfied; whether or not perpetrators had reoffended; whether or not relationships between community members had been restored; and whether or not all parties are involved in the process. Despite the wide support for the restorative justice model, it has been criticised over the years. Before I get on to transition circumstances, I will address general criticisms of restorative justice in following section.

**3.4.1. General concerns about restorative justice**

Zehr (2015) argues that although, modern government structures in some parts of the world have taken away the power from communities to resolve disputes, traditional structures in many places are still working effectively in solving family problems and settling major crimes by community elders. According to Umbreit et al. (2005) restorative justice practices are being used in several countries to enable ethnic communities to access elements of their traditional justice mechanisms, so that the offence and breaches of trust among themselves are handled in a more culturally appropriate way that fosters peace making and accountability. For example, in Canada, indigenous peoples are using the circle format of restorative justice dialogue to deal with a wide range of crimes within the community.

However, one may argue that there is no ‘due process’ in such community forms of justice, in the way that there is in legal systems that obey the rule of law. As Marshall (1999) argues, one of the key concerns has been the boundary between negotiatory practices of restorative justice and the workings of the criminal justice system. Bonta et al. (1998) and Van Ness (2005) argue that restorative justice model was developed as alternative to the formal justice system. This is because of – as shown above – the inadequacies in the practices of criminal justice which has assisted very little in the deterrence and reduction of recidivism. In addition, victims who have felt neglected have criticized the punitive justice because it focuses on the punishment of perpetrators and crimes are viewed as a criminal behavior against the state. It has been argued, thus, societal responses to crime should reflect values such as harmony and felicity rather than those of accountability and punishment. Cautions and questions, however, have been raised about due process (Van Ness,2005).

This section will briefly provide the due process criticisms that have been leveled at restorative justice. Restorative justice model is much advocated as a new and fruitful response to crime. However, many of the concerns about restorative justice in transitional circumstances might grow out of more general worries/weaknesses, for example, lack of proportionality/consistency in sanctions, lack of due process, emphasis on voluntariness, etc. As Messmer&Otto (1992) argue there are concerns that the legal guarantees for rights, equality and proportionality could be lost. However, on the other hand, there are concerns that the criminal justice procedures might undermine the objectives of restorative justice practices for reconciliation and restoration.

According to Ikpa (2007) restorative justice critics take issue with the way that restorative justice handles due process safeguards for rights. Restorative justice emphasises acknowledgment of personal responsibility in the crime committed, an admission of guilt, therefore, will take place. This is problematic because the recognition of crime will violate the due process right against self-incrimination. In a traditional criminal justice procedure, no person shall be compelled in any criminal case to be a witness against himself. In addition, in all criminal prosecutions, persons accused of crimes shall enjoy the right to a speedy and public trial by an impartial jury, and the right to representation by counsel to defend them. While all these rights are protected at every phase in the current criminal justice system, in restorative justice practices, this protection is less distinct. More precisely, the procedural safeguards afforded by a formal court process, such as the rules of the trial, standards of proof, presumption of innocence, restriction of admissibility of evidence, etc, are rarely a part of restorative justice mediations and conferences. Furthermore, a voluntary restorative justice process (when the offender willingly pleads guilty of his own accord) has been questioned, if it is really voluntary. Moreover, Ashworth (2002) argues that restorative justice can lead to disproportionate sentences. The retributive justice’s principle, as mentioned in chapter two, is the punishment should fit the crime. Omale (2006) argues that some view restorative justice as soft on crime. In contrast, Zehr (2015) argues that it is not soft-on-crime, feel-good philosophy, but rather a concrete effort to bring justice and healing to all those involved in a crime (victims, offenders, and the wider community). He confirms that although the current criminal justice system has some important strengths, it has also some shortcomings.

According to Zehr (2002) the restorative model approach stands in marked contrast to the punitive model for its emphasis on the victim. While in the retributive justice paradigm the violations create guilt which necessitates some form of punishment by the state, the restorative justice model suggests that violations create obligations which are owed to all those involved in a crime in order to put things right. This could include, for instance, dialogue between all parties where they share their stories and come to an agreement about what should be done. Llewellyn&Howse (1999a) urges us to think about restorative justice as relationship-centred, rather than victim-centred because the aims of the restorative justice paradigm are broader than individuals. They stated that the ultimate goal of the paradigm is not merely the rebuilding of the relationship between victim and offender, but it concerned with ensuring equality in social relationships between individuals, which requires the satisfaction of each party’s rights to equal concern, respect, and dignity. In short, according to Llewellyn&Howse (1999a) the objective of any process of justice is restoring relationships. Villa-Vicencio (2000, p.215) confirms that restorative justice looks to “prepare the way for victims and perpetrators, their respective families, their communities and the nation as a whole to learn to live together after years of enmity.” Zehr (2015) argues that all those involved in a crime often feel that criminal justice does not adequately meet their needs. In addition, many feel that the punitive justice deepens the conflicts and hurts in the society rather than bringing justice, healing and peace. In contrast, restorative justice, with its emphasis on identifying the needs of victims, offenders, and the society as a whole, is a growing approach that is bringing social harmony by helping victims and communities heal, while holding perpetrators accountable for their actions.

Sharpe (2007) also argues that unlike retributive justice where there is relationship between seriousness of the crime and the sentence, restorative justice focuses on resolving the harm creatively by the stakeholders. While the victim in the punitive justice, as discussed above, is removed from the process and replaced by the state, Llewellyn&Howse (1999a) stated that victims and the wider community are considered as integral actors in the restorative justice process. In other words, a key element of successful restorative justice is willing participation of all parties (victims, offenders and community), and perpetrators acceptance of their responsibility for crime committed. However, the stakeholders' efforts consistency is not guaranteed. Acorn (2004) reported that in some cases not all victims of violent crimes are willing to participate because not all perpetrators are truly remorseful for their actions. This may lead to re-victimization or dissatisfaction of the victims. Therefore, victims may not feel that forgiveness is possible, and punishment may be the necessary to achieve justice. Similarly, Marshall (1999) confirms that restorative justice practices rely in large part upon voluntary participation. Therefore, if one party is not willing to participate in the process, there is no option but to let a traditional form of punitive justice deal with these cases. Braithwaite (1996) argues that although some studies have demonstrated that restorative justice programs have helped victims to get satisfaction and shown high level of victims’ participation, some of these programs have faced difficulty with victims’ participation in the process.

According to Marshall (1999) this might seem a major limitation to restorative justice. However, experience has indicated that the participation and the rate of agreements are high. Moreover, the later failures to implement those agreements are much lower than failures to pay reparations or fines that ordered by the tribunals. Therefore, restorative justice practices are more attractive to all parties, and they are more easily understood than legal procedures. Another limitation for restorative justice is the available resources and skills. The participation of communities, thus, requires increase the education and practical training. A third limitation for restorative justice is the social divisions which make voluntary cooperation less likely or less effective. As long as the communities are a major player in the restorative process, there needs to be effective communities. The existence of such communities depends largely on other social policies like community development, housing, employment opportunities, welfare, education and health services.

**3.4.2. Restorative practices as mechanisms of transitional justice**

Dandurand & Griffiths (2006, p.10) reported that in 1985, the General Assembly adopted a Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power which stated that “informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.” However, a critical question is: do such informal traditional mechanisms offer a viable alternative to state-run systems?

Although some argue that traditional restorative justice mechanisms may complement and even replace punitive ways of dealing with gross human rights abuses, many doubts about their legitimacy, possibility or effectiveness remain, especially in many western states. With this ongoing scepticism, there has been an increasing demand to know what the effects of restorative justice practices are in transitional contexts. Although these practices or mechanisms can play a significant role in solving conflict problems, they have some shortcomings. The most difficult challenges faced by post-conflict societies are restoring relationships and trust between conflicting groups, and the establishment of new democracies. Such traditional restorative forms of justice – as mentioned above – are designed to deal with minor crimes such as theft or conflicts between neighbours and so on. So, the most important reservation is: Do they have the capacity to deal with serious crimes and massive violations such as genocide or prolonged human rights abuses? The problem in answering this question is that there are as yet only a few and fairly recent experiments of restorative justice being implemented in transitional societies like Rwanda and South Africa. For instance, the remodelling of the gacaca tribunals in Rwanda is considered yet as the most ambitious operation that aimed at speeding up the prosecution of suspected wrongdoers of the 1994 genocide, increasing the involvement of all parties, and introducing mediation and reconciliation elements into the process (Bloomfield et al.2003). One can argue that restorative justice has the potential to assist post-conflict societies in promoting community relationships better than the criminal justice systems if it does not compromise its objectives and its core values. However, for restorative justice to be truly restorative and achieve positive results, elements such as visible perpetrator remorse, active participation of all parties, and consensual decision–making must be priorities (Maxwell et al.2006).

Indeed, the restorative paradigm, especially after the South African transition, has been widely discussed regarding the issue of justice in transitional contexts. As previously mentioned, restorative justice has usually been used as an alternative mechanism to deal with ordinary crimes in some societies. Nevertheless, this paradigm was applied in the transitional period of South Africa where led to end the apartheid. Despite the criticisms it has been subject to, it is considered as a better way of facing the criminal prosecutions’ shortcomings by replacing their punitive components. Restorative justice advocates have defended the political convenience and ethical superiority of using its mechanisms as the dominant model not only to face the dilemmas of criminal trials, but also to face complex problems imposed by transitional periods. According to them, this kind of justice remains focused on human rights, healing of deep wounds that left by past violations and building a more stable state (Uprimny&Saffron,2006).

The latter argue that restorative justice mechanisms, such as respectful dialogue and mediation between the actors directly involved in crime, are capable of making offenders admit their responsibility for the harm caused and trying to repair it without being submitted to punishment. Those mechanisms also seek to recognise the victims’ suffering, restore their rights and dignity, and reparation of their harm. This healing process and achieving the reintegration of the victims and the offenders allow for rebuilding a stable social order and lasting peace. According to this vision, the restorative justice paradigm is only concerned with the future, instead of the past. Therefore, some scholars such as Van Ness&Strong (2014) recommend victims-offenders dialogue and reparations to be an alternative to traditional punishment. More precisely, through this dialogue an agreement is reached regarding reparations for the victims’ suffering (Van Ness&Strong,2014). This agreement sometimes, according to Uprimny&Saffron (2006), includes a reconciliation founded on the concession of pardons by the victims to the offenders. Indeed, even if victims’ right to justice is sacrificed in transitional contexts, this is done in order to guarantee victims’ rights to uncovering the truth, reparations, healing and peace. Therefore, restorative justice keeps transitional justice focused on human rights, which legitimizes it. According to this point of view, transitional justice, thus, should be forward looking instead of backward looking. This means that forgiveness and reconciliation ought to be applied to gross human rights abuses and war crimes as long as this might be the only way to solve conflict problems and re-establish social bonds that were destroyed by the conflicts. According to this view, it has been argued that the main aims of transitional societies’ response to the gross abuses ought to be the satisfaction of the victims’ needs and reincorporated the perpetrators in society by the participation of them in communitarian work and psychological therapy in order to re-establish a peaceful social coexistence.

In recent years, in the majority of post conflict societies, efforts have been made to implement restorative justice mechanisms (Anderlini et al.2004). Based on the important experiments of restorative justice in South Africa and Rwanda and other African states, as we will see in more detail in the following chapters, we can argue that traditional restorative forms of justice might be of great value as tools of transitional justice processes in developing post-conflict countries.

**Conclusion**

This chapter is an assessment of restorative justice as candidate model of transitional justice. In addition to explaining what restorative justice is about, the chapter also gave particular attention to the range of ideas, values, and objectives embodied in the practices of restorative justice. Restorative justice has been described as a philosophy or an approach grounded in common lofty principles and good intentions that promote both accountability and healing for all affected by crime. From our discussion of restorative justice so far, I have argued that restorative justice model has become a global phenomenon in justice systems; it emphasizes responsibility, empathy, respect, and fairness. A major pillar of restorative justice is its emphasis upon the involvement of communities and respecting the needs of individuals and community (Umbreit et al.2005). The chapter has argued that the restorative justice approach has been adopted as a response to the challenges faced by the current criminal justice system. The main argument was that restorative justice practices are largely informed by customary and community responses to crime. It is believed that these alternatives allow all parties involved to participate in resolving conflict problems through promoting traditional justice practices and customary law. As we have seen, advocates of restorative justice have made a number of claims about the advantages of restorative justice practices over more conventional judicial ways of dealing with crimes, especially that it outperforms the judicial system in satisfying victims and reducing re-offending (Johnstone,2011).

As transitional justice aims to address victims’ harm, restitution, healing and rehabilitation of both victims and offenders, I have argued that the restorative justice practices are more suited to achieving such goals. Restorative justice uniquely responds to the harm created by human rights violations in transitional contexts by offering alternative ways of responding to such violations and achieving stability. Mediation, circle sentencing, conferencing, preventing recidivism, fostering forgiveness, reconciliation and lasting peace are prominent features of restorative justice programmes. Most restorative forms seek to achieve an interactive dynamic among the parties concerned in order to create a non-threatening environment in which the harm and needs of the victim, the offender, and the community can be addressed. I defend the importance of promoting mediation and reconciliation programme which ought to be a priority in transitional societies to be able to deal with the serious problems which arise in and after periods of conflict. It is particularly concerned with the repair of damaged relationships between the community members and promotes social harmony through a flexible response to the individual circumstances of each crime, the victims and perpetrators. In many cases, as shown above in the South African experience, the social, customary solutions played a major role in achieving reconciliation, because the realizing of justice and peace lies within the complex relationships in communities (Bloomfield et al.2003; Dandurand&Griffiths,2006). Finally, I argue that even though the importance of restorative justice as traditional practices solving the problems of conflict, it should be integrated as far as possible with other mechanisms such as truth commissions, apologies and reparations – which will be discussed in following chapter – as complementary elements that enhance underlying principles of restorative approach and improves the effectiveness and efficiency of justice as a whole.

**Chapter Four: Truth commissions, apology and reparations**

**Introduction**

In chapter three I argued that restorative justice is an approach that has been appropriated by the field of transitional justice based on the belief that, in some cases, criminal prosecutions are inapplicable. It has reviewed the main concepts involved of restorative justice paradigm, as well as its key values and objectives. The main focus was on a number of mechanisms and practices of restorative justice such as mediation, healing circles and reconciliation, as an alternative to criminal prosecutions in transitional contexts. It has argued that whereas in the criminal justice system the victim is ignored, in the restorative justice model, victims and the community are considered as essential actors in the justice process. The main aims of it are restitution, restoration, reintegration, reconciliation and peace building. I have argued, therefore, that restorative justice mechanisms are more fitting responses to gross human rights violations. This chapter is devoted to examining other mechanisms that have become associated with the restorative paradigm, such as truth commissions, apology and reparations as major mechanisms for dealing with massive violations in transitional societies. The questions that need to be asked are: Is a truth commission an effective mechanism to address injustices and past wrongs? Why do transitional societies choose this particular mechanism over other measures of transitional justice? What role does a truth commission play in transitional periods? Why apology and reparations?

An increasingly common feature of attempts at transition to democracy, peace and stability is the creation of some sort of truth and reconciliation process. Truth and reconciliation are an increasingly popular choice of those seeking to go beyond the past to a more peaceful and democratic future (Gibson,2006b). Zehr (2002) argued that the restorative justice model has become the guiding moral force behind establishment of truth and reconciliation commissions in the aftermath of conflicts or massive violations. He argued - as mentioned in chapter three - that restorative justice arises from a unique view that crimes damaged the relationships among community members, thereby, response to the crimes should go beyond the individual offender to include the damage to the very social fabric of a community. Llewellyn&Howse (1999a) argue that the aim of any process of justice is restoring relationships. It can be argued here that the truth and reconciliation commission of South Africa which uses alternative mechanisms derived from religions or African ethics, such as recognition, apology, forgiveness, amnesty and reconciliation, which have led to a reconsideration of the accepted justice concepts (Hoogenboom,2014).

In addition to the criminal prosecutions and restorative justice practices, truth commissions and their underlying philosophy of justice, including apology and reparations, have been appropriated by the field of transitional justice as actions in addressing past violations (Hoogenboom,2014). In the last three decades, truth and reconciliation commissions (TRCs) have been increasingly adopted as a fundamental measure in mapping out the peaceful and restorative options in order to move forward after conflicts (Johnson,2006), especially, after South Africa’s (TRC) has succeeded in building peace and the democratic state. Johnson (2006), however, argues that although that the TRCs are being widely used in transitional contexts, there are some debates or doubts about their purpose, values, effectiveness and limitations that would require us to investigate the philosophical foundations and implications of the truth and reconciliation commissions. It is necessary to understand the theoretical framework that justifies the claim that truth and reconciliation commissions are a unique mechanism to deal with past violations in post-conflict societies in order to establish democracy and lasting peace. The framework rests on theories of truth and justice. It based on the assumptions that truth is prerequisite to justice, a commitment to politics of memory and is liberating to all societies who are free to establish their narratives, which in the end establishes a national reconciliation.

This chapter looks at truth commissions in general, their structure, work and mandate, and it assesses what they can potentially achieve for transitional societies, how successful they were at achieving their aims, and what the challenges are that they must confront. It also deals with the concept of apology and reparations as complementary mechanisms which should operate alongside truth-seeking commissions in order to meet the needs of victims and community and, ultimately, enhance a national reconciliation. In the end of this chapter I will focus on the truth commission of South Africa. Using the case study of South Africa, this chapter presents a framework for assessing the role and the importance of a truth commission in transitional contexts. It evaluates its contribution to using the best strategies to achieving justice, healing of victims, reconciliation, lasting peace and democracy. Drawing on the TRCs experience, this chapter argues that after periods of conflict and massive or systematic abuses of human rights, transitional societies often are unable to prosecute those responsible for violations because of, as already mentioned in chapter two, political, security and practical reasons (Van Zyl,1999). Based on this, such societies should focus on using more creative mechanisms in addressing the past violations in order to meeting the rights and needs of victims, and at the same time meeting the needs of society as a whole. The central argument is that the truth commissions have the potential to support post-conflict societies to move forward by its contributing in achieving truth, reconciliation, reparations for victims, helping them for healing, and restoring the relationships between society's members. As Hayner (1994, p .600) argues that TRCs “can play a critical role in a country struggling to come to terms with a history of massive human rights crimes.”

The chapter is divided into six sections. The first one defines what a truth commission is, and then clarifies its purposes and importance. Section two briefly explains the local and international factors that can affect the adoption of the truth and reconciliation commissions, and then examines the key issues that impact on its work and success. Section three addresses the potential benefits and potential risks of using a truth commission as mechanism of transitional justice. Section four explores the key challenges of truth commissions. Section five illustrates the notion of truth, apology and reparation as the main means of a truth commission in dealing with the past, and its potential role in supporting the transition process. The chapter concludes with an examination of the truth and reconciliation commission of South Africa as the typical example of such truth commissions. The next section reviews the definition and essential attributes of the truth commissions.

**4.1. Truth commissions: An overview**

**4.1.1. Preface**

In the ﬁnal years of the twentieth and the beginning of the twenty-ﬁrst century, truth and reconciliation commissions (TRCs) have become one of the most popular transitional mechanisms. According to Hayner (2002) truth commissions spread in the 1970s and 1980s following the dictatorships in Latin America where the previous regimes insisted on asking for pardons as a prerequisite for leaving power. Gairdner (1999) stated that the transition from dictatorship regimes to democratic governance occurred in many countries of Latin America between 1979 and 1993. The former regimes in each case committed gross and systematic human rights violations, resulting in hundreds of thousands of deaths. Because of this legacy of human rights violations, many of national society groups and the international community refused to simply bury and forget the past and look-forward to the future. These dilemmas were the central issues during transition that confronted the new governments in these societies. How should the offenders who committed past violations be punished? How is it possible to reconcile warring groups, and building a common culture of tolerance and pardon? How do societies move forward after an extended period of conflict, how do they either rebuild or create new institutions to promote and protect human rights and respect democratic process? In such transitional contexts, the issue of addressing the abuses, respecting human rights and restoring the relations between people and the state became the ethical values that societies need to go forward and make its future livable.

Popkin& Roht‐Arriaza (1995) argue that there are several difficulties and political constraints lead many transitional governments to choose the truth commission over other mechanisms to confront the past. First, the need for ‘truth’ is related to the violations committed by the former regime or during the conflict. As argued in chapter two that, in transitional contexts, the courts are often incapable of its inquiries: “The sheer magnitude of past violations, a dearth of evidence concerning crimes that occurred years earlier, and the unwillingness of witnesses to testify in unreliable courts further complicate the task.” (Popkin&Roht‐Arriaza,1995, p.82). Reforming or creating judiciary capable to undertake its investigations is a long-term undertaking and, then, it is still unable to respond to the issue of gross human rights abuses and immediate demands of transition to stability, peace and democracy. Therefore, Popkin& Roht‐Arriaza (1995, p.82) argue that “investigatory commissions shortcut some of the difficulties inherent in using ‘normal’ investigatory channels.”

Second, there are issues concerning the political limitations faced by transitional societies. Indeed, under international law, the new government is responsible for the acts of the former government, even though it had no control over them and often the new power members were victims of the previous regime. There is increasing international recognition that states have a duty to investigate, prosecute, and provide some reparations for serious violations of human rights including systematic summary executions, torture, disappearances and other crimes against humanity. As these crimes are amnestiable under international law, so they must be prosecuted and cannot be subject to a blanket amnesty before investigation (Popkin&Roht‐Arriaza,1995).

Gairdner (1999) argues that the state's responsibility for past violations created a political and legal imperative for new governments to consider the past abuses and provide some form of resolution to the victims and society as a whole. However, the issue of addressing and finding a resolution to such gross violations was not simply a matter of conducting criminal investigations and prosecutions or implementing the institutional and social reforms by the new political regimes. In most cases, the previous regimes actors played a decisive role in shaping the new political system and they retained power, placing significant political and institutional constraints on new governments. In particular, the former regime’s members threatened that they would intervene if the transition process undermined their interests to an unacceptable degree, and they sought a guarantee that the persons who have committed the human rights abuses while they were in the power would not face criminal sanctions. Thus, according to Popkin&Roht‐Arriaza (1995) the demands of no criminal prosecution made by still-powerful former actors have been accompanied by increasing demands from national society groups and the international community for investigation of the grave human rights violations and for taking action against the perpetrators. All these factors and the need for rapid resolution of practical problems of transitional periods make truth commissions an attractive option, either as a first step opening the door to other actions or as a relatively cost-free way to meet those demands for prosecutions or as a compromise between those conflicting demands and then close the book on past violations. Consequently, truth commissions have been used in several countries of Latin America such as Argentina (1984), Bolivia (1984), Uruguay (1985), Chile (1991), Honduras (1993), El Salvador (1993), Haiti (1995) and Guatemala (1997); many other Truth Commissions have been convened world-wide between 1974 and 1998.

Bloomfield et al. (2003) stated that although truth and reconciliation commissions were developed only recently, their potential contribution as a component of the justice process in dealing with a painful past and in supporting peaceful transitions has been widely recognized. Since 1974, at least 25 official truth commissions have been set up around the world. There have been, for example, ‘truth and justice commissions’ in Ecuador and Haiti; ‘commissions on the disappeared’ in Sri Lanka, Uganda and Argentina; ‘truth and reconciliation commissions’ in South Africa, the Federal Republic of Yugoslavia, Chile; and most recently a ‘commission for reception, truth and reconciliation’ in East Timor. Furthermore, as of 2002, new commissions are under way or very recently concluded in some transitional societies such as Nigeria, Panama, and the truth commission in Ghana is in the process of formation. Indeed, the truth and reconciliation commissions have continued to grow in popularity with commissions having been established in other places such as Sierra Leone (2002), Morocco (2004), Paraguay (2004), Canada (2008) and Solomon Islands (2009) (Hoogenboom,2014). Wiebelhaus-Brahm (2009) argues that truth commissions have also used in well-established democracies where human rights ideas sit uncomfortably with a brutal history of the subjugation of indigenous peoples. A clear example of this, Canada’s truth and reconciliation commission established on 2 June 2008.

Bloomfield et al. (2003) argue that two major truth commissions, in Guatemala and South Africa, have brought considerable attention to a formal truth-seeking. Wiebelhaus-Brahm (2010) also stated that since the truth commission of South African, truth commissions have gained considerable legitimacy in the eyes of the international community, as well as international non-governmental organizations (NGOs) concerned with human rights such as the International Center for Transitional Justice, supporters within the United Nations, and commissioners and staff of previous truth commissions. The case of South Africa is examined in this chapter.

It is important here to explain that the truth commissions can be contrasted with other truth-seeking mechanisms such as ‘historical commissions’. All are important forms of investigation in their own right. However, in some contexts they may constitute the most appropriate mechanism for truth-seeking, or perhaps the only available one. In contrast to truth commissions, historical commissions are not established to deal with the problems in political transition periods. They have generally not investigated cases of widespread political repression. Instead, they serve to investigate the state abuses that took place and ended many years, or even decades, ago. Historical commissions clarify historical truths and pay respect to previously unrecognized victims or their families. They have focused on practices that may have affected specific racial, ethnic or other groups. As example of these is the US Commission on Wartime Relocation and Internment of Civilians (Bloomfield et al.2003).

In addition, there are other examples of official or semi-official inquiries into past abuses of human rights that share the main characteristics of truth commissions. However, these investigations are distinguishable by the fact that they are more limited in scope or are less independent of political processes. These forms of official or semi-official inquiry that overlap with truth commissions include, for example, the congressional investigative committees and the various U.K. parliamentary inquiries, the investigations carried out by the National Commissioner for the Protection of Human Rights in Honduras in 1993 regarding disappearances in that country, the inquiry undertaken by Northern Ireland Victims Commissioner in the late 1990s. They also include a variety of international inquiries that investigate and report on war victims or national cases of severe repression, which often sponsored by the UN or by regional organizations. For example, the Organization of African Unity (OAU, now the African Union), International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda, and the various war crimes bodies established by the UN to investigate the violations committed in some countries such as the former Yugoslavia, Rwanda and East Timor (Bloomfield et al.2003). In this section I will focus on the experience, importance and challenges of truth commissions, starting with its definition.

**4.1.2. Definition of truth** **commissions**

According to Bloomfield et al. (2003, p.125) Truth Commissions are “temporary bodies, usually in operation from one to two years; officially sanctioned, authorized or empowered by the state and, in some cases, by the armed opposition as well as in a peace accord; non-judicial bodies that enjoy a measure of de jure independence; usually created at a point of political transition, either from war to peace or from authoritarian rule to democracy; focus on the past; investigate patterns of abuses and specific violations committed over a period of time, not just a single specific event; complete their work with the submission of a final report that contains conclusions and recommendations.”

Teitel (2003, p.78) states that “A truth commission is an official body, often created by a national government, to investigate, document, and report upon human rights abuses within a country over a specified period of time.”Hayner (1994, p.600) defines them as “bodies set up to investigate a past history of violations of human rights in a particular country – which can include violations by the military or other government forces or armed opposition forces.” For Gairdner (1999, p.2) “Truth Commissions are not judicial bodies. Their investigations, therefore, are not a formal legal accounting of the past, achieved through the due process of law, that results in criminal sanctions where guilt is established.”

 Rather, according to Hayner (1994), Gairdner (1999) and Dancy et al. (2010) the definition of a truth commission includes the following major elements that are taken from a review of the mandates of some of the truth commissions like Argentina, Chile, El Salvador, Guatemala and South Africa. These elements are:

(1) Truth commissions are temporary bodies established to investigate systematic human rights abuses committed by both agents of the state and armed warring groups in the past.

(2) Truth commissions are concerned with establishing a picture of the systematic pattern of abuses of human rights used to frighten certain groups of the population.

(3) Truth commissions investigate a pattern of violations over a period of time, rather than a specific event.

(4) Truth commissions receive their mandate from an authoritative body such as the legislative or the executive branch of government. For instance, the commissions of El Salvador and Guatemala were established as one part of peace-building process brokered the United Nations and conducted its investigation under its authority and supervision.

(5) Truth commissions are independent bodies set apart from the existing governmental institutions and the major parties to past conflicts, they are always vested with some sort of authority that allows them greater access to information, greater security or protection to find out the truth about sensitive issues, and a greater impact with their reports. They derive their legitimacy from that differentiation which can help them to make a positive contribution to the transition process.

Generally, these elements distinguish Truth Commissions from other investigation processes such as those conducted by non-governmental organizations. In the cases of Chile and El Salvador, for example, the commissions were differentiated from the institutions of state and actors central to the past conflict. After extended periods of violent civil conflict in these societies, there was a fundamental absence of trust between the conflicting parties and, more generally, between civil society and the state. The transition process, thus, required the creation of a new body for addressing human rights that was set apart from all parties involved the conflict. This independence was achieved by appointing credible people to conduct the investigations. According to Hayner (1996) this official endorsement boosts the legal and political power of the commission, and it allows it access to information, the state protection of the persons to conduct investigations, and increases the likelihood that its conclusions and recommendations would be given serious consideration.

**4.1.3. The objectives and the importance of a truth commission**

The question to be asked is: Why a truth commission? The purpose of the establishment of truth commissions is to support the transition from a dictatorship system or a conflict situation to a stable and democratic system by bringing some form of resolution to the legacy of gross human rights abuses, achieving reconciliation and lasting peace (Gairdner,1999). According to Hayner (1994) the key reason to establish a truth commission is uncovering the facts and setting up an accurate and fair record of a country's history and its government. Thus, an honest report prevents history from being lost or re-written. It allows a society to learn from its past in order to prevent a repetition of such violations in the future. Thence, a truth commission set up to investigate past abuses can serve many different purposes. Questions remain about how the commission can achieve these aims (Gairdner,1999); whether it is possible to achieve them in practical practice; what things should put in the place to do it?

According to Gairdner (1999), Bloomfield et al. (2003), Popkin&Roht‐Arriaza (1995) and Hayner (1994) there are various fundamental things that truth commissions can do to fulfil its task:

(1) Constituting an authoritative body that acts to boost and legitimise the values of basic human rights, where new forms of social relations and alternatives to dictatorial regime can be built.

(2) Establishing the truth by providing a platform for the victims to tell their stories supports the process of creating an authoritative record by legitimising the victims’ narratives, and obtain some form of remedy or compensation for their harms.

(3) Creating and presenting an authoritative record of the scope, means, and victims of the human rights violations, and identifying who were responsible to hold them accountable, it constitutes an ‘acknowledged truth’which is officially sanctioned by an authoritative body. This truth becomes part of the collective memory of society. It changes public discourse by clarifying the reasons for the conflict and recognising acts of violence committed by the outgoing regime or by the conflict parties.

(4) making recommendations for legislative, structural or other changes to avoiding a repetition of abuses and preventing a relapse into conflict or dictatorship.

(5) contributing in achieving national reconciliation. These aims will be as the guide for the commission’s work and how it will be evaluated.

For more explanation, Hayner (1994) stated that the truth commissions are usually set up during or immediately after a political transition in societies which may be in the form of a gradual democracy, as in South Africa and Chile, a negotiated settlement of conflicts, as in El Salvador, a military victory by rebels, as in Uganda and Chad, or a rapid democratic transition after repressive military rule, as in Argentina and Uruguay. Truth commissions can play an important role in a transition through strengthen the human rights and the rule of law. This is particularly likely when a government is under international and local pressure to improve its human rights record. Truth commissions can perhaps help reduce the likelihood of future violations simply by publishing an accurate report of the past, with the hope that people will resist any sign of return to repressive rule or civil war. They also can make specific recommendations for reform, including: military and police reform; apology and reparation to victims of the violence; measures to foster national reconciliation; promoting democratic institutions; and judicial system reform. In most cases, these recommendations are not obligatory, but they can provide pressure points that the local or the international community can lobby for reform and change in the future. Indeed, a truth commissions process outweighs the political and security risks involved. For example, when the Rwandan commission report was published six weeks later, the international pressure on the Rwandan government forced the military to stop its terror actions. With the existing of explicit and strongly-worded reports, the overall impact of truth commissions has generally been positive, often reducing tension and increasing national reconciliation, and perhaps increasing the understanding of and respect for human rights issues by the general public and governments alike.

**4.2. The establishing of a truth commission**

**4.2.1. Local and international factors that affect the establishment of truth commissions**

Roper&Barria (2009) argue that whereas the literature has focused on the effects of truth commissions on human rights, justice, democracy, and reconciliation, there is very little attention paid to the political local and international factors that influence the choice of TRCs as accountability mechanism in post-conflict societies. Bloomfield et al. (2003) argue that because truth commissions are created at points of political transition, there are a set of factors that can affect their establishment. Accordingly, in this section I will examine the factors associated with the adoption of TRCs which may enhance our broader knowledge of their consequences.

Some argue like Chapman&Ball (2001), according to Roper&Barria (2009), that the TRCs are established as part of negotiations between conflicting groups in transitional period in order to solve the problems when there is no victor and vanquished. Others, however, like Snyder & Vinjamuri (2004) argue that the level of human rights abuses affects the states choice of accountability mechanism. For example, Argentina, Chile, and Guatemala, when there were massive violations in the absence of effective traditional justice mechanisms such as the prosecutions and law enforcement, civil societies called for the adoption of a (TRC) to investigate violations. Gairdner (1999) argues that the truth commissions were established in transitional societies as a direct response to the political and legal imperatives resulting from a situation of gross human rights violations. As a result of the emergence of international human rights norms, the new regimes were faced by widely held demands in national society and the international community that past violations be investigated, that offenders be held accountable for their actions, and that the state offer some form of reparations to the victims or their families and helps them for healing. Under law, thus, the new state must assume responsibility for the actions of all of the past governments that represent it over time. As memories of the violence were still fresh in people's minds, trying to simply forget everything and bury the past during transition might be both ethically and politically unacceptable to the majority of the population. Therefore, the truth commissions were required to confront the state's legacy of violations by providing a public forum to establish the credibility of the new governments and giving at least the appearance that action was being taken.

However, according to Bloomfield et al. (2003), the establishment and operation of a commission can be undermined when there are widespread concerns about other issues of disarmament, reintegration and rebuilding in the aftermath of extensive destruction. In fact, some transitional societies such as Spain in the 1970s and Cambodia in the 1980s to Mozambique in the 1990s have consciously opted against any attempt to establish the truth about past abuses in order to avoid specific harms.

They argue that the reasons why truth commissions are not used in these and other cases can be: (1) Fear of renewed violence or armed conflict. There is a perception that conflict could return, violence would increase if past crimes were revisited. (2) Ongoing conflict. In the contexts where a violent armed conflict is ongoing, the utility of truth commissions is doubtful. There may be legitimate public fears about testifying (for example, threats against witnesses) that can significantly obstruct the ability of a truth commission to get to the truth. It would be practically impossible to ensure victim and witness participation and security, or to achieve impartiality. Moreover, in such contexts access to key information as well as geographical access is likely to be severely limited or sometimes impossible. Therefore, it has been argued that it may be useful to form and use truth commissions following the ending of the conflict and the beginning of a transition. (3) Other urgent priorities. In comprehensively destroyed countries both the government and public want to focus on survival and reconstruction. (4) Alternative mechanisms depending on the indigenous national culture. They may prefer to eschew confronting past crimes or use the existing local mechanisms – which will be discussed in the next chapter – that can better respond to the violations that occurred during or after the conflict. (5) Lack of resources or basic institutional structures. In some cases, the capacities to support a formal truth-seeking process are inadequate. Weakness or corruption in the key institutions responsible for the administration of justice and lack of cooperation from the police or army can make a truth commission weak, and force it to become confidential process, rather than an open and public process. It is also typical for there to be widespread destruction of evidence of violations by the previous regime. (6) Lack of the political leadership’s interest in truth-seeking, and a lack of non-governmental actors that can exert pressure to uncover the truth (Bloomfield et al.2003).

It can be, however, argued that although certain circumstances may make transitional societies forgo truth-seeking, it will often be a difficult and questionable decision (Bloomfield et al.2003), especially if a number of victims call for a truth commission. One should treat with considerable scepticism such decision when it is taken with little or no public consultation, or by parties such as the outgoing political regime members and offenders who committed serious crimes and have an interest in preventing investigation of the past violations. Roper&Barria (2009) argue that the regime members who are in office longer are better able to resist calls by civil society for the establishment of a (TRC).

There are particularly important factors that can, according to Bloomfield et al. (2003), promote the establishment and work of a truth commission such as: public support; the existence of strong and active civil societies (in particular of victims’ groups, religious leaders, tribal leaders and human rights groups); vocal and independent media; and persistent attention and pressure of the international community. Although there is often a need to move quickly at a point of transition, it is important to build a broad base of national and international support for the commission. In the absence of these enabling factors, a truth commission may not be desirable or effective. In fact, public support and the active participation of key actors and the principal social sectors (both national and international) are critical factors in ensuring a successful commission. In other words, truth commissions enjoy greater legitimacy when different sectors of society are actively involved in the process.

**4.2.2. Key issues involved in establishing a truth commission**

Every truth commission yet has been unique and different from commissions in other countries. They are flexible and each new one can be established to respond to the circumstances faced by societies in which it will work. While much can be learned from the previous experiences, it is essential that each new truth commission should be derived from a local process of strategic planning in order to respond to the specific needs and opportunities of the particular country (Bloomfield et al.2003). Fombad (2008) argues that the process of creating the commission has an impact on commission’s work. Bloomfield et al. (2003) determine the key issues involved in establishing a truth commission that might affect its chances of success, which are: the process of selection of the commission; the commission’s powers; and decisions about material and human resources.

Firstly, the selection of the commission. The people selected to manage a truth commission perhaps more than any other factor will determine its ultimate success or failure. Indeed, many commissions have faced serious problems due to either the membership is not adequately representative of the population, or the members are guilty of a lack of organisation and management or they are not sufficiently respected due to the bias. Fombad (2008) argues that the commissioners should be qualified and well trained, experienced and respected from varied backgrounds that sufficiently reflect the different interests in society. However, according to Bloomfield et al. (2003) and Fombad (2008) in many of the commissions have been established, many of the members have been selected and appointed by the government, with little or no civil society consultation. This often gives rise to a feeling that the commissioners are there to serve the government’s interests, which diminishes the credibility of the commission. Those commissions created by governments are viewed as either politically motivated to persecute opponents of the regime, or to influence public opinion and divert attention from the real issues, for example, the Sudanese special criminal court on Darfur events which was established a day after the ICC started its investigations. Many commissions have suffered as a result. For instance, in Guatemala it took time and considerable effort for the truth commission to gain the support of the religious and advocacy groups on which it depended to do its work. This was also the case in Chile, Argentina, Haiti, Chad and Uganda. As Hayner (1996, p.25) points out “several African truth commissions have been accused of partisanship in the membership of the commission, with commissioners who are politically beholden to the current administration, unabashedly pro-government.”

Recently, however, the selection of truth commission members has increasingly been conducted through more consultative processes. The main lesson learnt from the past truth commissions is that a commission will generally have public and international support as long as its members are selected through a consultative process, and a fair balance in the representation of ethnic, religious groups, gender and political views is guaranteed. A successful example of the consultative approach to commissioner selection is that of the South African truth and reconciliation commission. A committee was created that included representatives of human rights organizations. It called for nominations from the public and received around 300 nominations, and then it has trimmed down to 50 nominators to be interviewed. The interviews were in an open and public session and closely followed by media. Ultimately the committee narrowed the finalists to a list of 25 candidates, which it sent to President Nelson Mandela for final selection. Nelson Mandela added two members who did not go through the full selection process in order to provide geographical and political balance. A consultative selection process was also employed in Sierra Leone and East Timor in establishing their truth commissions (Bloomfield et al.2003). Fombad (2008) states that the South African commission that was established after broad consultations in transparent and democratic process has been more effective than those commissions that were created by governments.

Secondly, the powers, functions and sanctions. The key powers and functions of the truth commission through which it will pursue its objectives should be indicated. In the preparatory phase truth commission members should devote their efforts to essential tasks which may include (Bloomfield et al.2003): hiring staff; drafting internal regulations; designing an effective database for the storage and organization of files and records; collecting existing information and documentation from the UN, NGOs (both national and international) and other sources where available; designing a public outreach campaign, which is critically important; and budget preparation and fundraising. Bloomfield et al. (2003) argue that these preparatory activities are very important and can serve the commission extremely well in its work. Therefore, they should be undertaking by the commission members in a timely manner (usually their first weeks) in order to do not lose precious time and political capital. The commission’s powers will help to determine its strength and spread. At a minimum, the truth commissions need to be able to carry out any necessary on-site visits, interview anyone who can provide relevant information, and receive the cooperation of public powers. Truth commissions are also increasingly authorized to hold open and public hearings inspired by the TRC experience in South Africa. Some truth commissions have been asked to provide some advice or some form of emotional support to victims and witnesses who may experience trauma while narrating their stories. In some cases, truth commissions have also been directed to identify the individuals responsible for past violations, while in other cases commissioners have either been prevented from naming names of offenders or left to decide for themselves. Also, they have no power to put anyone in jail, they most have not even had the power to compel anyone to answer questions or telling true stories. Therefore, the commission should be given an adequate power to ensure that sanctions such as prison, fines or both against anyone who improperly interferes with or refrains to respond to a subpoena without persuasive justification, or intentionally provides false information. In some cases, the truth commissions are being given powers well beyond those just mentioned such as powers of subpoena, investigation and even witness protection. Ultimately, after submitting a final report setting out its findings and recommendations, the commission should ideally set out what obligations, if any, the government will have both to publicize its report and to implement its recommendations. It also should take consideration to the auditing and keeping its files and records that may subsequent use after it has stopped its operations.

However, it is particularly important here to draw attention to the fact that truth commissions are non-judicial bodies have fewer powers than do tribunals. Although truth commissions deal with many events that could also be the subject of judicial trial, they should not be considered to be a replacement for courts, nor should they be equated with judicial bodies (Bloomfield et al.2003). Hayne (1994) writes that truth commissions must be distinguished from the formal legal accountability achieved through the criminal prosecution of violators responsible for abuses. Gairdner (1999) confirms that truth commissions are not mandated with judicial authority or purpose, therefore, it is not within their competence to prosecute individuals or initiate criminal proceedings. It has been argued that commissions are a “middle solution” between granting amnesty and conducting criminal prosecutions. It is used in a transition period to deal with the state’s legacy of past human rights violations, and at the same time avoid trials that may undermine reconciliation and peace. Skaar (1999, p.1122) argues that truth commissions “appear most frequently as sole solutions precisely in the cases where there is a heavy element of pre-regime transition bargaining. Hence they are appropriately considered a compromise solution.” Synder&Vinjamuri (2004, p.31) argue that TRC is an attractive option to post-conflict societies where the old regime members wish to avoid trials, and societies seek to establish democracy and peace: they confirm that truth commissions “have most often been the choice of states whose stability depends on cooperation of still-powerful potential spoilers and ... a strong, reformist coalition.”

In the cases of Chile and El Salvador, for example, after identifying the perpetrators, gathering the evidence and creating an account of past crimes, technically, this left open the possibility that evidence collected during the investigations could be used at some point in the future to support the formal criminal prosecutions. However, it is important to note that both commissions were accompanied by amnesty laws that effectively prohibited the criminal prosecutions of the offenders responsible for past violations. The amnesties covered acts committed by all parties to the conflicts including the state agents that committed the vast majority of such violations where they were absolved of future criminal responsibility. The new governments accepted the amnesty law as a condition of the transition process and as part of the initial peace process. The effect of the ‘no prosecution’ demand made by the former regime actors, the absence of an effective judicial system, and the presence of amnesty laws, was to effectively take past human rights violations out of the scope of judicial action. Even where evidence about the atrocities was gathered during the investigation process and the identity of violators was widely known, the amnesties undermined the ability of the criminal courts to proceed with that case. Because of their lack of judicial powers, both commissions had two mechanisms that potentially allowed them to carry out indirect accountability. First, creating an historical record that identified institutional responsibility for past human rights violations. Second, public identification by naming the individuals responsible for committing past violations. Although, identifying the perpetrators by name is not a criminal punishment, it can negatively affect the reputation of individuals and their career, political and economic future (Gairdner,1999).

Finally, material and human resources issues. Bloomfield et al. (2003) argue that a truth commission will not be successful if there is lack of material and human resources. This does not mean that truth commissions are expensive projects. In fact, all truth commissions apart from those in South Africa and Guatemala have not been expensive. However, the average budget of new commissions has risen with the increasing international community interest in these bodies, and the increasing powers of truth commissions. This is true of some truth commissions now in operation or being established such as East Timor, Peru, Sierra Leone and Ghana. Regarding the source of funds, these are received from national government, donor states and private foundations, where available. The truth commissions in South Africa and Guatemala, for example, hired more staff than previous commissions. Each appointed over 200 multidisciplinary staff including both nationals and non-nationals. Although the budget may limit the numbers of staff hired, new commissions have followed a similar approach to staffing. In these cases, truth commissions can rely on staff seconded from the government.

**4.3. The pros and cons of truth commissions**

Bloomfield et al. (2003) argue that truth commissions have the potential to generate many benefits for transitional societies. The most important reasons for establishing truth commissions are: First, they can help uncover the truth about the past by establishing a record of the past human rights violations that is detailed, official, accurate and impartial. This record can contribute to countering the unreal or fictitious stories of the past that were propagated by the previous political regime, or other parties involved in the conflict, which may impact the public consciousness. They also can determine the whereabouts of missing victims who may have been forcibly disappeared or buried clandestinely. Second, they can foster the accountability of offenders of past abuses by gathering, organizing and preserving evidence that can be used in prosecutions. They can also recommend forms of non-criminal accountability such as removal from office, reparations or community service programmes. Third, commissions can put victims who were long ignored and forgotten by the public at the centre of the transition process by providing a public platform for victims to speak in their own voices. This can help to ‘make victims whole again’, give them a sense of personal vindication, educate the public about the individual human impact of past crimes, and thereby give support for victim’s reparation programmes. Fourth, commissions can stimulate public debate about the complex set of moral, political and legal issues that must be addressed during a transition process. Where the public begins to take up the discussing of those controversial subjects without fear of recrimination or resort to violence. This can be achieved by engaging with the public through encouraging broad media coverage.

In addition, commissions can recommend reparations for victims or their families. These reparations can be financial reparation or benefits to follow, and they can be symbolic forms such as memorials, reburials and commemorative ceremonies – more on this to follow – that can help to repair the moral dignity of victims by recognition of the ongoing physical, psychological and economic injuries suffered by them. Commissions can also recommend necessary legal and institutional reforms that will enable post-conflict societies to achieve the long-term social, economic and political objectives that are essential to ensuring a better future. These reforms may include, for example, new human rights training programmes for the police and the military, disciplinary rules for the judiciary, land reform, redesign of the electoral and political system (Bloomfield et al.2003). However, it is important to note here that truth commissions are not implementing bodies. As such, its mandates and the sphere of their agency are limited by the political power. Thus, the new regimes must have the political will and the resources necessary to follow up the truth commissions processes to be able to address the grave violations. The implementation of the recommendations of a truth commission requires long time and constant monitoring to reach its objectives (Gairdner,1999).

Furthermore, Bloomfield et al. (2003) argue that truth commissions can boost a national reconciliation and tolerance by providing a safe and impartial forum for direct restorative justice processes in which victims, offenders and other community members can actively participate in the mediation process that allow conflicting parties to hear each other’s suffering and resolution of past grievances. This may help build empathy and forgiveness, thereby deterring acts of vengeance of past events and reintegration of certain categories of offenders back into society. Finally, by all the measures above, commissions can help to establish a democratic state and transition to a more open peaceful future. They help to weaken the actors who may hamper the democratic process.

However, just as truth commissions have the potential to produce many benefits for post-conflict societies, they also may cause some harms. The potential risks of the truth commissions are: (1) Improper motives. For example, it is possible that governments may establish and delegate truth commissions to take its responsibility for difficult tasks that it is not willing to carry out itself. They may also establish truth commissions to try to insulate themselves against criticism from victims that not enough has been done to address the past violations. This may make the commission weak and may lead to challenge or reject the results later. (2) Bias of commissioners. They may approach commission work with a bias which would make reaching the objective truths of the past impossible (Bloomfield et al.2003). In order to be perceived as impartial, commissioners and staff should be selected to represent a broad and fair range of backgrounds or affiliations (Hayner,1994). (3) Unrealistic expectations. Truth commissions should be careful not to boost unrealistic expectations which may lead to renewed frustrations of victims and the public generally. Although, these potential risks are unavoidable, many of them can be mitigated through public pressure by a vocal and independent media and strong civil societies in given countries. Nevertheless, in many transitional contexts neither civil society nor the media will be strong or independent. Therefore, these risks must be understood in advance by those who support the use of truth commissions (Bloomfield et al.2003).

Our evaluations of the impact of truth commissions will have to continue in order to fully understand the possibilities, and the limitations of these often-controversial bodies (Hayner,1994). There are a number of advantages to using truth commissions as a tool of transitional justice, and the potential positive impact they may have upon structural and institutional, but there are also numerous limitations. The next section will discuss the key challenges of truth commissions.

**4.4. Challenges of truth commissions**

Although truth commissions have become increasingly popular, they are still controversial. Hayner (1994) and Fombad (2008) argue that despite a multitude of research in this area, there has been little exploration of the limitations and challenges common to such official truth-seeking bodies. Accordingly, a number of limitations will be explained in this section.

There are some issues that have attracted controversy to truth commissions, such as questions about its mandate, time limitations, staffing and budget considerations, access to information, international support, its ability to investigate serious violations, and the question of whether a commission should publicly name individuals responsible for human rights abuses. According to Hayner (1994) truth commissions can play a critical role in a society trying to come to terms with a legacy of massive human rights violations. Some commissions have been notable successes: their investigations welcomed by the public and by human rights advocates alike, their summary of facts considered fair, and their reports widely read. Such commissions are often referred to as fulfilling the important step of formally acknowledging the past events.

However, not all truth commissions have been so successful, often because of political constraints. Its structure, sponsor, mandate, political support; a basic lack of financial or staff resources; restricted access to information; a weak civil society; population hesitant to testify on abuses; ethnic or other groups threatening a return to violence; willingness or ability to take on sensitive cases; and strength of final report will all be largely determined by the political regime in which it operates and the political forces at play when it is set up. For instance, the commission may end up having reported only a narrow part of the truth. In some cases, the final reports of the truth commissions have been kept confidential. In short, truth commissions do not work in a vacuum. Every commission operates under political limitations. Many of these contextual challenges cannot necessarily be averted (Hayner,1994).

**4.4.1. The restriction of the truth commission’s mandate**

The most significant limitations on the ability of truth commissions to carry out their tasks are their mandates or terms of reference (Fombad,2008). The terms of reference of a commission is usually determined by presidential decree, by the legislature, or as part of a peace agreement. It can define a commission's investigatory powers, set the timeline and geographic scope of the commission's investigation, the exact abuses that a commission is allowed to investigate, when and to whom the final report must be submitted, and sometimes states whether names may be named, or whether certain kinds of recommendations should be included in the report (Hayner,1994). Fombad (2008) argues that these limitations significantly affect their work. Where certain types of crimes are excluded from its jurisdiction, as in Algeria, Morocco and Chad, or where the geographic scope is narrow, it is difficult for the commission to operate effectively.

These critiques are also made by international human rights observers. For example, according to Hayner (1994), some commissions have been restricted to only investigating disappearances. In Chile, the commission investigated disappearances, executions, and torture leading to death, but its mandate prevented it from investigating the torture cases that did not result in death. Because of this limited mandate, the Uruguayan commission missed the majority of the human rights abuses committed by the military regime. The bulk abuses of illegal detention and torture were ignored. These limited powers usually circumscribe their ability to find the truth and thus provide the basis of national reconciliation and sustainable peace (Fombad,2008). The terms of reference of a truth commission, thus, should be sufficiently broad to allow investigation into all forms of violations. For those commissions with a more flexible mandate, a more complete picture of the truth can be created (Hayner,1994).

**4.4.2. Time limitations on a truth commission's mandate**

Timing is of the essence when setting up a truth commission: when and for how long? Hayner (1994) stated that when the government is strong and overseeing a fundamentally unchanged military, as is often the case, it may be the only chance to set up a truth commission. National or international nongovernmental human rights organisations have often played a role in pushing the state political power to establish a truth commission. However, it is generally not easy for the political power to set up a commission. In many cases, the military has remained largely unchanged and is a potentially destabilising force. The military will pressure the government to hold off on investigations, if it perceives a truth commission to be a threat.

Most truth commissions determine an explicit time limit in their mandate, as well as a procedure for requesting an extension. They may have been given six to nine months to complete all investigations and submit a report. But the time pressure often affects a truth commission's work: outlining a work plan, collecting and organizing evidence and documentation, receiving and processing testimony, and submitting a final report within the time allowed is extremely difficult. For most truth commissions, it is impossible to record or investigate everything within its mandate (Hayner,1994). According to Dancy et al. (2010) although truth commissions have been established with the goal of producing a final report, a number have not succeeded due to limited time (Federal Republic of Yugoslavia and Bolivia are examples).

However, it can be argued that despite the limitations of a deadline, the alternative is worse (Hayner,1994). For example, the truth commission of Uganda (1986) was given no time limit. It has taken a long time and many Ugandans have lost faith that a report will ever be published. Many human rights organizations have a sense that reconciliation will be enhanced with truth-telling, and that this justifies the time limitations imposed on a truth commission's work. For instance, Human Rights Watch (Hayner,1994, p.641) argues that: “lt is reasonable to expect efforts by the State to conduct aggressive investigations and prosecution ex officio to be conducted within a limited period. We are fully conscious of society's need to put the past behind it after a reasonable period of truth and justice. In this respect, time limitations on State-sponsored investigations and prosecutions are reasonable provided they afford a fair opportunity for individuals to come forward with evidence and there is adequate public debate and notice about terms and deadlines. The efforts of the government to redress past abuses can be made in good faith within such a reasonable period.”

**4.4.3. The limitations on its investigations and report**

In addition to limitations stemming from a truth commission’s mandate and its time constraints, there are, according to Hayner (1994), other restrictions on the commission’s investigations and its report. Commissioners may avoid certain issues altogether or decide to omit certain information from the final report due to time limitations, restricted resources or staff for investigations, lack of access to sufficient or reliable information, or in response to political pressure. A particularly interesting question is the extent to which the reports of truth commissions have included an analysis of the role of international actors in the political violence within the country. In fact, in many cases, there were international actors -usually foreign governments- that assisted either side of the conflict by helped them to fund, arm and train. Therefore, where government forces have committed gross abuses of human rights, the role of foreign supporters in supporting such violations should be recognised, especially when the atrocities are well known at the time, as is usually the case.

However, most truth commissions do not investigate the international role in the conflict, and few of them address the issue at all in their final report. For example, the El Salvador commission report did not comment on the international role in the war. While the Chad commission did not enter into in-depth investigation, its report names the exact amount of external financial backing provided to the regime, and the extent of training for the intelligence service responsible for the worst violations which were not previously well known by the public or the international human rights community. The United States heads the list of countries that actively provide training, financial, material, and technical support to the intelligence service. The Chilean commission report also briefly outlines the continuation of the US economic and political relations with the regime during the period of the repressive rule (Hayner,1994).

**4.4.4. The international sponsorship of truth commissions by the United Nations or by nongovernmental organizations**

The resources, staff and general investigatory powers provided to the commission will have a great impact on its work. However, international sponsorship has particular characteristics of its own. It has many advantages but can also have significant disadvantages. In some cases, the international sponsorship of a truth commission may be absolutely necessary; but in other cases, it would be unacceptable and inappropriate.

In fact, there are many advantages to UN sponsorship of the commissions (Hayner,1994): (1) The legitimacy derived from the international community's strong support of the commission's work, which pressures the parties within the country to cooperate with the truth commission; (2) Financial support to cover the commission's expenses. Some commissions like Chad, Uganda and the Philippines have been severely limited by financial restrictions. (3) Access to greater security measures, which in El Salvador, for example, included the permanent UN diplomatic security personnel assigned to protect the commissioners and the office. (4) An important source of information. In El Salvador where the government sources resisted providing access to information, the commission obtained such information – which it used in its final report – from the US government, the Department of State, Department of Defense, and Congressional sources. (5) Greater leeway to confront powerful forces within the country with less fear of reprisal. For instance, Salvadorans who wished to continue to live in the country they could not easily name senior military officers. (6) Greater international attention to the work of the commission and its report, which increases pressure for fulfillment of recommendations or the implementation of reforms. Nevertheless, the commission can be very powerful even when not sponsored by the United Nations. For example, the independent commission in Rwanda had a profound impact on Belgium's policy towards Rwanda and pushed the United Nations to immediately nominate a special rapporteur to investigate human rights violations in Rwanda.

There are also important arguments against international sponsorship of truth commissions. First, international staff may be hired, who don't have any experience in the country as in the case of El Salvador. This can slow or limit the extent to which a commission can cover certain issues or events. Second, the international staff usually leave the country when the commission's work is completed. Whereas this has some advantages, it fails to promote or to restore trust in state institutions and the ability of government to play a leadership role on human rights issues. Third, the national character of a country and its attitude towards international involvement in its internal affairs is crucial to determining whether the commission is appropriate. Some countries would reject the suggestion of an international commission because of national sovereignty concerns (Hayner,1994).

**4.4.5. The type of violations**

The questions are: if the truth commissions are bodies established to investigate past human rights abuses, what kind of violations should it investigate, and in particular can a commission investigate serious violations? (Hayner,1994). In fact, gross and systematic human rights abuses are committed in every part of the world. They occur, in particular, in countries that suffer violent conflicts which affect the lives of large sections of society, and in countries that are characterised by an absence or lack of effective judicial mechanisms for the protection and promotion of basic human rights, and by the lack of co-operation of governments. Indeed, with the existence of these mechanisms, such violations are likely to be few in number. It is important here to indicate that many of the truth commissions were created under the former situation. The problem, however, is that the truth commissions were a response to violations that were gross and systematic in nature. These violations were often committed by agents of the state that use violence to achieve the objectives of the government. The policy of violence is facilitated by a policy of impunity that allows agents of the state to commit acts of violent repression without fear of repercussions, where it protects them from the legal sanctions. Impunity implies that there are no effective sanctions under law to deter the agents of the state from committing violations (Gairdner,1999; Hayner,1994).

 According to the United Nations Rapporteur on Impunity, Louis Joinet, the concept of impunity covers all the measures and practices whereby (Gairdner,1999), on the one hand, states fail in their obligations to investigate, and prosecute the offenders, and, on the other hand, hinder the ability of victims and their families to know the truth and restore their rights. Therefore, impunity represents one of the most serious obstacles to the curbing of human rights abuses and establishing the rule of law. Countries lacking an effective national system guaranteeing a minimum of justice and respect for human rights and dignity will inevitably be at risk of falling prey to internal or external conflicts. As transitional societies seek to move from dictatorship or violent conflict period, this necessarily involves efforts to re-establish the rule of law, including holding the perpetrators accountable for their actions. One of the first opportunities to establish and promote the rule of law comes in the treatment of the former rulers, torturers and jailers. It was in this effort by societies undergoing transition to deal with the past and establish the new principles and rules on which human rights would be guaranteed that truth commissions were set up.

According to Gairdner (1999) state human rights obligations under international law provided the normative and ethical framework for the truth commissions' work. The existence of a common language of international norms was particularly important when addressing the conflicting demands and the legitimacy of the state's recourse to violent action against its own citizens. Common international standards were then used by the commissions as a basis for defining the forms of human rights violations falling within the scope of their mandates. The commissions in Chile and El Salvador, for example, concluded that the normative basis of its investigation would be determined by the rules of international law. For instance, in Chile, the definition of violations was based on Chile’s obligations under the Universal Declaration of Human Rights and international humanitarian law as incorporated in the Geneva Conventions. The term ‘most serious violations’ specified in Article One of the commission’s mandate was determined to include the cases of victims who were executed, tortured to death or who disappeared after arrest, in which the moral responsibility of the state is compromised by acts of its members or agents.

The Salvadoran commissioners also referred to Article 4 of the International Covenant on Civil and Political Rights which defines the fundamental rights such as the right to life and the right not to be subjected to inhuman or degrading treatment. They argued that the violation of these fundamental rights may even constitute an international crime in cases where acts reflect a systematic practice of violation of human rights in the large scale. The United Nations played – as a neutral third party – a decisive role in brokering and verifying the peace accords between the government and the Farabundo Martí National Liberation Front (FMLN) in El Salvador (Gairdner,1999).

In the absence of national actors or institutions capable, the participation of the UN was critical to the overall peace process by guaranteeing the implementation of such accords, including the truth commission which constituted one of its dimensions. It had a pacifying effect on the country, where it kept the combatants and their supporters apart, and gave both sides a sense of relative security which defused dangerous conflicts and created the political and social climate for transition. In this regard, the ONUSAL – United Nations Observer Group in El Salvador – presence in El Salvador was essential to the practical functioning of the commission and its ability to conduct investigations by establishing the minimum social and political guarantees for both sides of the conflict (Gairdner,1999).

**4.4.6. The perpetrators’ names**

Another controversial issue is naming names of the offenders (Hayner,1994). The debate is between two contradictory principles that both can be strongly argued by human rights advocates: First, the legal procedures require that individuals receive fair treatment and are allowed to defend themselves before being pronounced guilty; therefore, if the commission report names individuals responsible for certain violations, due process is violated. Thus, no names should be named. Second, naming names is part of the truth-telling process, in particular, when it is clear the judicial system does not function well enough to expect that they will be prosecuted. Telling the full truth requires naming individuals responsible for human rights crimes when there is absolute evidence of their culpability. So far, this issue of whether names should be named has not been addressed by the mandate of commissions, and the decision has been left to the commissioners. The commission of Argentina, for example, decided not to include in its report names of those individuals that it knew to be responsible, instead submitting the list to the president for further action.

According to Hayner (1994, p.648) the mandate states, “In no case is the Commission to assume jurisdictional functions proper to the courts nor to interfere in cases already before the courts. Hence it will not have the power to take a position on whether particular individuals are legally responsible for the events it is considering.” The publication of a person's name is popularly understood to indicate their guilt. Although truth commissions are not judicial bodies, those commissions that name names take pains to reiterate this fact in their report. Some commissions have named names such as the Chadian commission that in its report listed names and published the photographs of those responsible for some of the worst violations of human rights. The truth commission of El Salvador’s report also listed names of high military and judicial figures, and thus has attracted a great deal of attention. It could be argued that, since the truth commission in its investigations does not meet the normal requirements of due process, the report should not name the individuals who the commission considers to be implicated in specific acts of violence.

However, in peace agreements, the parties made it quite clear that it was necessary that the complete truth should be known, and that was why the commission was set up. Now, the full truth cannot be told without naming names. A full truth-telling should therefore include people’s names. Since the attention given to the El Salvador report has served as an international precedent, it is likely that many truth commissions in the future would follow it and choose to name names. There may be a need for legal scholars and human rights advocates to help the commission to do its investigations by determining the standards of proof that a truth commission should commit to insure fair treatment of individuals, and allowing a full truth telling, outside a criminal court. Ultimately, careful investigations often make painfully clear who the worst perpetrators are (Hayner,1994).

Despite their limitations, Gairdner (1999) argues that truth commissions can play a critical role in enhancing an environment where meaningful change can take place. Although there are doubts about their strength of the contribution to justice, it is very important to appreciate their remarkable contributions in achieving reconciliation as a primary objective. It has been argued that truth commissions have a significant potential to support reconciliation, peace, the consolidation of democracy and re-building of the nation through their contribution to essential tasks of transition. They contribute to restoring social relations and confidence in state institutions. While these changes may not be immediately related to the problem of criminal prosecutions, their longer-term impact on transitional societies can be just as significant as prosecutions. Such changes have significant and positive implications for emerging political regime that influences other aspects of society. However, one may argue that there is no reconciliation without justice. Following section will explain that justice here is the truth, not punishment. It will be argued that the truth commissions aim to meet the urgent political, social and security needs rather than focus on offenders’ trial. The South Africa experience justifies the using of truth commissions and sacrificing some moral values such as justice in transitional contexts in order to achieve political and security interests.

Before evaluating the truth and reconciliation commission of South Africa, it is important to outline some controversial concepts closely linked with truth commissions: truth, apology and reparation. The aim of this discussion is to argue that there are alternative approaches that can be used in dealing with past atrocities when criminal prosecutions are not acceptable or are impossible for the reasons that have discussed in Chapter Two.

**4.5. Truth commissions: no justice without truth, apology and reparation**

Wiebelhaus-Brahm (2009) argues that truth commissions’ investigations address past wrongs to uncover the truth and determine the political and socio-economic consequences of such misdeeds. They are often a precursor to apology, reparations, or other affirmative measures to provide redress. The objective of this section is to illustrate the notion of truth, apology and reparation in the context of truth commissions. In doing so, I draw on available literature in the ﬁeld of transitional justice. Many of the arguments focus on the South African TRC (1995-2002) as the best-researched commission as yet.

**4.5.1. Transitional justice and the concept of truth (Truth as Justice)**

Truth is a central element of the concept of transitional justice. The truth commission aims to establish the ‘truth’ about what took place during a specific time in history, but this is an extremely complex concept (Mobekk,2006). It may serve as a basis for peaceful coexistence in the future. This is because truth plays a key role in the recognition of victims’ suffering, it helps to establish a historical record of human rights violations during armed conﬂicts or pervious dictatorship regimes, and it provides the foundation for judgments in a tribunal. However, what is the truth and how does it arise? what kind of truth is revealed? The ﬁrst volume of the South African TRC distinguishes between four different notions of truth. First, factual or forensic truth, which only details what can be verified; it refers to presenting legal evidence that gathered by impartial and objective procedures. Second, personal or narrative truth, a subjective form of truth, it provides set of experiences through individuals’ stories. Third, social or dialogue truth, where truth is reached via discussion between offender and victim, i.e. it is the result of debates about facts on a collective level. Finally, healing and restorative truth, which may come through acknowledgement of the past, it derives from giving facts in a particular context in attempt to recognise the experiences of individuals (Mobekk,2006; Buckley-Zistel et al.2013).

Many efforts to deal with the past human rights abuses take place in forums of communication such as criminal courts, truth commissions, memorial sites or museums where people can exchange their views of the past. As truth commissions can be understood as forums of communication between victims, perpetrators, witnesses and commissioners never happens in isolation but always includes an audience of spectators or listeners. In some cases, for example, the truth commission in South Africa, the audience were not just those in the room but also viewers and listeners on television and radio sets. Such public hearings received much attention. Where truth commissions aim to re-integrate all people into society by uncovering the truth about the injustices they were suffered, and preventing future human rights abuses, the presence and inclusion of wide population is necessary (Buckley-Zistel et al.2013).

This discussion about the concept of truth will focus on a truth commission as a mechanism seeking at uncovering the truth about human rights abuses committed during violent conﬂicts or repressive regimes. It focuses not on factual or forensic truth but its social construction through testimonies and narratives of the witnesses about events belong to the past. Uncovering past violations is, of course, highly relevant for transitional justice which is aimed at dealing with this very past (Buckley-Zistel et al.2013).

As mentioned above, the truth is a central concern of transitional justice. According to International Center for Transitional Justice, truth-seeking in regard to the past abuses is a basic right. After the armed conﬂicts or repression, societies and individuals have a right to know the truth about human rights abuses where all cultures realise the importance of the truth to achieve personal and communal healing. It is essential for various groups (Buckley-Zistel et al.2013). Pasqualucci (1994) and Popkin&Roht‐Arriaza (1995) argue that the citizenry has the right to know the truth and to know the results of investigations. Similarly, Hayner (1994, p.611) writes that international human rights law guarantees this inherent right of the citizenry “to know the truth” and “the right to seek, receive and impart information,” in Article 19 of the Universal Declaration of Human Rights which obliges states to investigate and punish of human rights violations, and it grants the right of the public to know the results of such a process.

International law clearly recognizes the right of victims and survivors to know the whole truth about the crimes they suffered, and about who was responsible for it. Amnesty International (AI) also seeks the truth as an imperative response to serious crimes such as war crimes, genocide, crimes against humanity, extrajudicial executions, torture and enforced disappearances. For direct victims have a right to know about the circumstances of serious violations of their human rights, the reasons behind it, as well as gaining public recognition of their suffering. Also, the families of those killed or disappeared have a right to ﬁnd out what happened to their loved-one and know their whereabouts (Buckley-Zistel et al.2013). Only the knowledge of the truth will restore the dignity of the victims and in some cases make it possible to make reparations for the damage done. Moreover, only upon a foundation of truth will it be possible to meet the basic demands of justice and achieve true national reconciliation (Gairdner,1999).

There is, then, truth that can be uncovered and presented. Hence, the idea of establishing a truth commission has been publicly supported in order to fulﬁl this task, and it has been enjoyed much popularity. Such commissions have been established in around 30–40 countries following violent conﬂicts or repressive regimes, initially in Latin America states, but increasingly in Asia, Africa and the Arab world. At ﬁrst they were considered as alternatives to state-centred legal proceedings, understood as temporary institutions that uncover the truth about the crimes of violent conﬂicts or repressive regimes such as persecution crimes political, ethnical or racial for marginalised groups, through witness testimonies. Individual witness testimonies (narrative truths) become the foundation of memory for past events. Therefore, truth commissions become particularly relevant if it reveals the truth about the crimes are unclear or have been suppressed by previous regimes. Once the truth is archived by a commission, and it has been safely stored away, it can be accessible at any time. Its final reports and records are meant to facilitate closure and prevent crimes and violations against humanity (Buckley-Zistel et al.2013). Hayner (1994, p.607) argues that the importance of a truth commission’s report is in “acknowledging the truth rather than finding the truth.” She argues that this report as an official acknowledgment of the facts can play an important psychological role in recognising a 'truth' which the government or opposition forces have formerly previously denied either that the violations occurred or the extent to which they were responsible. Hayner (1994) also stresses that the report is particularly relevant to the themes of closure and reconciliation through truth telling.

The advocates of the truth commissions such as Gairdner (1999), Van Zyl (1999) and Gibson (2006b) have argued that in addition to recognizing the rights and dignity of victims, truth commissions can contribute to a national dialogue and a national reconciliation through uncovering shared, historical narrative truths. According to Gairdner (1999, p.52) where the truth commissions are effective, they can “guarantee the due process of law, the right to participate in the political life of the country, to dissent without fear of physical retribution and they broaden the concept of the ‘national security’ to include the well-being of all persons in society.” He (1999, p.52) writes that “It was necessary, therefore, to liberate both the victors and the losers of past conflicts from their fears, allowing them to submit their interests to the democratic process and to engage in a tolerant civil discourse.” Clear orders in the new democratic regime provide social actors a sense of security, therefore, and enable them to participate in political discourse without the fear of become the target of violent repression. Similarly, Van Zyl (1999, p.667) argues that the truth commissions can “generate a process of national introspection that requires that everyone - soldiers, civilians, lawyers, doctors, clergy, journalists, etc. - examine their role in the conflicts of the past.”

Gibson (2006b, p.419) also stated that “truth makes an independent contribution to democratic consolidation by changing society, changing how people think about their own side and about their opponents.” Gairdner (1999, p.52) also writes that “creating a version of the past that was commonly held in society was a first step towards reconciliation in society.” He stated that the report of a truth commission set an end to the counter-charges between former conflict parties and their allies, allowing the country to focus on the future rather than the past. The Chilean and Salvadoran states, for instance, publicly admitted their responsibility for violent actions, and acknowledged an obligation to provide some form of resolution for their wrong acts. The commissions put a new moral standard against which the future actions of governments can be judged.

Similarly, Buckley-Zistel et al. (2013) argue that whereas, some truth commissions are merely concerned with revealing human rights violations, others promote national reconciliation and looking forward to a common future, as is clear by the addition of the word ‘reconciliation’ in their title. For example, national reconciliation was the highest priority for the truth commission of South Africa, and it used the term ‘reconciliation’ to serve a profoundly political purpose – boosting nation-building – in a society deeply divided as a result of the experience of Apartheid. As Minow (1998, p.82) suggests “many in South Africa proudly embrace the TRC’s search for nonviolent responses to violence. From their vantage point, it is an act of restraint not to pursue criminal sanctions, and an act of hope not to strip perpetrators of their political and economic positions. Yet it is also an act of judgement that prosecutions would impose too great a cost to stability, reconciliation, or nation building…when a democratic process selects a truth commission, a people summon the strength and vision to say to one another: Focus on victims and try to restore their dignity; focus on truth and try to tell it whole.”

Du Toit (2000) argues that transitional justice scholars suggest that an understanding of truth must be expanded in order to understand the value of the truth commissions in transitional societies. The truth in criminal prosecutions is based on evidence beyond a reasonable doubt. It is a very specific understanding of truth confined to what may be relevant to criminal guilt or innocence of the offender. If victims are included, their testimony as well is only admissible if they provide strong evidence. The truth in truth commissions is not only the realistic truth, but the truth as recognition, which can also contribute to justice. This means victims can be a source of truth. According to Hayner (1994) the truth phase is a separate process from that of taking individuals to court.

Van Zyl (1999, p.667) argues that “far from handing down clear-cut judgements about guilt or innocence regarding complex conflicts, commissions force people to think critically about the past, and in so doing, make it impossible for them to glibly dismiss the suffering of victims.” Similarly, Du Toit (2000, p.136) writes that “truth commissions represent an alternative way of linking truth and justice that puts victims first.” Thus, this idea of justice as acknowledgement stands at odds with the traditional understanding of justice in liberal democratic countries. These scholars seem to agree with my central argument against criminal prosecutions and in favor truth and reconciliation commissions: whereas prosecutions insist on a binary verdict – either innocent or guilty – truth and reconciliation commissions allow a more rounded appreciation of the situation.

**4.5.2. An apology**

Apologies are a controversial issue and their importance is not well understood. This section examines the role of apology in a process of addressing human rights violations and reconciling with past injustices. I seek to clarify the moral significance of apologies in the process of reconciliation as an aspect of symbolic reparations. I will argue that apologies have both a moral and a practical role in post-conflict societies. In deeply divided societies, dealing with a legacy of human rights violations and achieving a national reconciliation is a key challenge for such societies (Murphy,2011). The essential question to be asked is: what role, if any, does apology play in a national reconciliation process? To answer this, I will briefly define the concept of an apology. Then I will illustrate the justifications of apologies and their purpose.

Apologies have been identified by the field of transitional justice as one of important mechanisms that can help to achieve healing, move forward, and to build rights-respecting state. For Brook&Warshwski-Brook (2010, p.516) an apology is an act allows the “victim to heal and the offender to take responsibility for the harmful act, be accepted back into society, and therefore have less reason to commit future offenses.” According to Tavuchis (1991, p.17) “apologize is to declare voluntarily that one has no excuse, defense, or justification… for an action.” Minow (1998), Brook&Warshwski-Brook (2010) and De Greiff (2008) stated that the main elements of an apology include an expression of regret or remorse, reparation, acceptance of responsibility for the suffering of victims, and a promise not to repeat such behaviour in the future. According to Teitel (2006) an apology and a promise of non-repetition is a key step in achieving reconciliation.

Regarding to the justifications for apology, according to Murphy (2011) apologies have both a moral and a practical role to play in a process of reconciling. In moral terms, apologies are an important means of recognising the suffering of victims by past injustice. At the same time, it is publicly acknowledging the suffering of their families. It serves as a mechanism for reaffirming the compassion and humanity of the community and as a means of increasing public understanding and support the efforts to address the legacy of human rights abuses. Apologies also contribute to a process of historical truth-telling by adding to the record an acknowledgement of responsibility for past abuses. It is part of the process of constructing a public memory of past violations which can be as a cautionary note to future generations. Apologies may further help in the establishment of mutual respect and trust between former opponents. Brook&Warshwski-Brook (2010, p.516) argue that “the person apologizing relinquishes power and puts him- or herself at the mercy of the offended party, who may or may not accept the apology. This exchange, which is a dramatically powerful encounter, providing the victim with a moral supremacy, is at the heart of the healing process and contributes toward a change in the dynamics between the parties.” It helps to achieve social harmony and increases the potential for cooperation in addressing socioeconomic problems and difficult question of reparations (Murphy,2011).

However, De Greiff (2008) argues that despite the importance of apology, it is merely one piece of a large process of reconciliation between former opponents that in the long term will require other socioeconomic and symbolic compensations. The value of apologies will likely be diminished by a refusal to consider reparations which means that the respect for the victims and their families is not taken all that seriously. For instance, in New Zealand, the apologies for past violations of the Treaty of Waitangi are offered only after Maori and the Crown have agreed on providing reparations. In the absence of these reparations, the apology would almost certainly undermine its legitimacy of the claimants (Murphy,2011).

**4.5.3. The role of reparations**

Bloomfield et al. (2003, p.155) argue that "Reparation should indeed be linked to truth and justice". They stated that when the work of a truth commission properly done, it automatically leads to some form of reparation, as we will define it in this section. Reparations are often demanded by victims of human rights violations, which is an internationally recognised right. They are closely linked to truth commissions, which its recommendations can detail what reparations should be put in place (Mobekk,2006). De Greiff (2006b) argues that the attention given to addressing abuses through reparations has largely been overshadowed by punitive and restorative justice mechanisms. I will argue that reparations can foster number of worthy goals, including the re-aﬃrmation of the moral respect, dignity of victims and reconciliation (Verdeja,2006).

Hoogenboom (2014) argues that in addition to punitive justice (often equated with prosecutions) and restorative justice (often equated with truth-telling), reparative justice has also been identified as a third model by the field of transitional justice. Bloomfield et al. (2003) and Weitekamp (1993) stated that prevalent terminology for reparative justice shares the same conceptual basis, such as compensation, community service, restitution, satisfaction, rehabilitation, redress, and mediation and reconciliation programmes. I will use the notion of reparation as the most comprehensive concept, including all these terms that are taken to redress past wrongs. Weitekamp (1993) confirms that reparative justice is rooted in the notion of reparation. Historically, it has been understood as monetary compensation aimed at responding to harms suffered by victims. However, Bloomfield et al. (2003), Verdeja (2006) and De Greiff (2006a) argue that transitional justice practices in post-conflict societies have reshaped the concept of reparation.

Nowadays, reparative measures taken in transitional contexts have broadened the very definition of reparation from its historically narrow focus on monetary compensation to include symbolic and future-oriented measures. As such, the concept of reparation, in the transitional justice literature, refers to material reparations like cash payments, housing, education and health, or broader symbolic measures such as apologies, memorials and commemorations. For instance, the truth and reconciliation commission in Chile established programs to (Wiebelhaus-Brahm,2010, p.58) “provide educational scholarships for children of victims. In addition, victims’ families were granted access to free physical and psychological health services.”

Reparations such as memorials, days of commemoration, and educational programs in response to mass human rights violations have been done in places like Rwanda, Cambodia and South Africa to remind the youth of the pain suffered by their families. Memorialisation follows truth-telling and legal accountability processes and is intimately associated with educational efforts to engage the public in a dialogue about the past. Memorials can be an important symbol for the public to understand aspects of the conflict and remember the past. According to Barsalou&Baxter (2007, p.1) the memorialisation “satisfies the desire to honor those who suffered or died during conflict.” It can be, thus, argued that memorials are an integral component of traditional transitional justice mechanisms can complement the work of courts and truth commissions.

For De Greiff (2006a, p.460) retributive justice “can be interpreted as an attempt to re-establish equality between the criminal and his or her victim, after the criminal severed that relationship with an act that suggested his superiority over the victim.” Nevertheless, without reparations, criminal justice is incomplete. He (2006a, pp.460-461) also argues that “truth telling provides recognition… in acknowledging facts. This acknowledgement is important, precisely because it constitutes a form of recognizing the significance and value of persons – again, as individuals, as citizens, and as victims.” However, De Greiff (2006a, p.461) argues that truth-telling without reparations is an “empty gesture, as cheap talk.” Minow (1998, p.112) argues that these symbolic reparations provide an opportunity to “acknowledge the fact of harms, accept some degree of responsibility, avow sincere regret, and promise not to repeat the offense.” She (1998, p.102) argues that “monetary payments… symbolically substitute for the loss of time, freedom, dignity, privacy, and equality.”

De Greiff (2006a) suggests that there is consensus concerning the need for reparations in order to address mass human rights abuses. According to Minow (1998, p.104) “the core idea behind reparations stems from the compensatory theory of justice. Injuries can and must be compensated. Wrongdoers should pay victims for losses. Afterward, the slate can be wiped clean.” For Mani (2002, p.174) reparations can address “two principal kinds of injustices suffered by the victim: first, the legal injustice, such as injury, loss of life, employment or property... Second, reparations should address the moral or psychological injustice, that is, victimization, trauma, and loss of dignity.” Similarly, Philpott (2010, p.108) writes that reparations can work by “alleviating or compensating victims for the harm they have suffered, both physical and mental.”

It can be argued that, theoretically, at least, reparations have the potential to affect post-conflict societies positively. There is close link between reparation and achieving reconciliation and democratization in such societies. Implicit in reparations is a desire to peace building; to move forward; to build a democratic rights-respecting state (Hoogenboom,2014). Bloomfield et al. (2003) argue that the concept of political transition in post-conflict societies and the concept of reparation are in their essence closely interrelated.

On the one hand, reparation is a key element of any true reconciliation process. It involves the recognition and protection of individual rights, where the state should commit to provide reparations if there have been abuses of these rights by state actors or former armed groups. Bloomfield et al. (2003, p.145) argue that “Reparation is a key element of any true transitional justice and reconciliation process.” For some victims, reparations are the most concrete response to abuses of human rights (De Greiff,2006b). For instance, in the case of South Africa, many victims asked the truth and reconciliation commission for material reparations for their harms (Lyster,2000). In response, the commission identified reparations as one of its major concerns (Colvin,2006).

Reparation, in transitional contexts, acts as a bridge between the past and the future. It gives victims a role in the transitional justice process. Theoretically, a political transition could limit itself to punishing perpetrators and o legal and institutional reforms such as the judiciary, the police, and the army and so on, ignoring the victims in the process; but if reparation is included, victims are likely to be better integrated into the transitional process. As a result, the facing between victims and offenders and the reconciliation issue has become much more immediately relevant. On the one hand, in some cases, the criminal prosecution of all members of the previous regime who involved in the past abuses may threaten political stability and undermine democratic. On the other hand, requests by them for amnesty and forgetting the past are equally unacceptable. Thus, reparation, which necessarily includes a form of sanctioning and respect victims’ rights, can function as a compromise, it can help the new state in reconciling itself with its past. For example, the Guatemalan Commission for Historical Clarification recommended in particular that collective (as opposed to individual) reparation measures in order to facilitate reconciliation between victims and perpetrators without stigmatizing either. From this perspective, reparation is primarily a matter of ethics and politics (Bloomfield et al.2003).

On the other hand, reparation is also a key element of the democratic transition process. Arthur (2009) argues that democracy was often assumed to be the ultimate aim of transition. De Greiff (2006a) states that reparations can distribute awards to victims but can also be employed as a way to foster the main aim of the political transition of a new, democratic state building. He suggests that reparations are integral in institutional reform where transition to democracy requires measures that help to restore the dignity of victims of the previous regime’s abuses. De Greiff (2006a, p.454) argues that “although reparations are well-established legal measures in different systems all over the world, in transitional periods reparations seek, as most transitional measures do, to contribute to the reconstitution or the constitution of a new political community. In this sense, also, they are best thought of as part of a political project.”

Reparation is a crucial tool in allowing a society to get on with life. The new state should guarantee the individual rights of all its citizens in order to uphold the rule of law. It should immediately show its commitment to provide reparation to the victims. In order to achieve reconciliation and promote peaceful coexistence, acts of vengeance by victims of past violations should be stopped, and their legitimate hunger for justice should be accommodated. This requires acknowledging of their status as victims and recognition of their suffering and the harm they have sustained. Reparation is an important instrument not only in its financial dimension, but also in its symbolic dimension. It helps victims to restore their psychological health and human dignity. The psychological impact of receiving compensation can differ greatly between people. For some victims, reparations may imply the end of healing process; for others it may be just the start of it. For example, the Reparation and Rehabilitation Committee (RRC) of South Africa recommended a reparation and rehabilitation policy consisting of five elements:(1) urgent reparation payments to enable people to access services and facilities;(2) individual reparation grants for each victim paid over a period of six years;(3) symbolic measures;(4) reparations and rehabilitation programmes of victims and their families;(5) institutional and structural reforms which can lead to feelings of fairness and rebuilding people’s trust in the state and its institutions. The TRC of South Africa sets an important example through its holistic approach to reparations, where it is embedded in a wider search for truth, justice and reconciliation. If reparations are used solely to buy the victims’ silence in the absence of truth, their psychological rehabilitation is likely to be obstructed (Bloomfield et al.2003).

**4.6. Assessing the Truth and Reconciliation Commission (TRC) of South Africa**

**4.6.1. Preface**

In recent years there has been a worldwide tendency to using a restorative approach rather than a retributive approach in conﬂicts resolution. The truth and reconciliation commission of South Africa with its principle of ‘amnesty for truth’ was a turning point (Verdoolaege,2009). The TRC of South Africa is undoubtedly the most widely discussed truth and reconciliation process in the world, and based on the literature, it is among the most effective any country has yet produced (Gibson,2006b).

In this section I will draw on the transitional phase in South Africa case to justify one of the main arguments of the thesis by defending the importance of promoting reconciliation and peace in transitional states which ought to be a priority after the conflict in order to be able to deal with the unique complexities which arise in and after periods of conflict. Van Zyl (1999) argues that the nature of South Africa's transition, combined with the inability of its criminal justice system to deal successfully with those who committed abuses of human rights, made it necessary to use a more creative mechanism to deal with a legacy of gross violations. The TRC can be described as a ‘third way’ in dealing with the past because it steered a middle path between an insistence on prosecution for those responsible for human rights violations on the one hand, and an acceptance of amnesty and impunity on the other.

The experience of South Africa is seen as the first in the world that addressed the massive human rights abuses during the apartheid in a peaceful way. Accordingly, in this section I will evaluate the South Africa experience as the largest and most prominent of completed commissions, with the aim of establishing how the South African model of truth and reconciliation commission (TRC) turned successfully from apartheid and repressive regime to democracy in the 1990s. This case study provides an overview of the context and work of the South African truth commission. There is no doubt that the impact the TRC has had on South African society in post-apartheid on a sociological, legal, political or even literary level was fundamental. A lot has been written about its impact, performance and successful in consolidating a reconciliation, peace and democratic transition. On the basis of this, I would argue that the Truth and Reconciliation Commissions can play an important role in transitional process through its contributions toward creating a more reconciled society (Verdoolaege,2009; Gibson,2006b).

This section is divided into five parts: First part provides a brief history of apartheid and the transition to democracy in the early 1990s, in order to clarify why the Truth and Reconciliation Commission in South Africa is chosen as a model case. Then I will examine the establishment of the South African TRC. Additionally, I will discuss a central philosophical issue which is: transitional justice and ‘amnesty for truth’. It is considered that, the TRC in South Africa is the model case for investigating the questions of justice and truth, because it worked under the assumption that putting the historical record of narratives of the victims was itself a form of justice. It is believed that facing the past atrocities in a public forum was the only way to know the truth, to respond to the needs of victims, and to achieve justice in the absence of a fair judicial system (Johnson,2006). After that I will assess South African TRC success in the light of achieving its objectives. Finally, I will explain the criticism of the TRC of South Africa that can be found in the literature about transitional justice, with the aim of answering the question whether truth-telling for amnesty and reconciliation really succeeded in dealing with apartheid and structural violence problems in South Africa, through referring to the positive and negative points of the TRC.

**4.6.2. A brief history of apartheid**

Apartheid can be seen as the prominent traumatic event suffered by a great many South Africans (Verdoolaege,2009). Like many states, South Africa marks the beginning of its tragedy of racial violence with the invasion of European settlers which continued from 1659 to 1906, and the brutal institution of slavery. The seventeenth and eighteenth centuries were marked by the systematic elimination of indigenous peoples by white settlers. The legacy of European exploitation led to a particularly virulent strain of racism in South Africa.

Apartheid legislation itself, in particular the worst of which was enacted between the years of 1948 and 1960, constituted a system of human rights abuses against blacks (Johnson,2006). It was a system of racial oppression established by the white National Party in 1948; it continued through brutal violence and created a society in South Africa (Llewellyn&Howse,1999a, p.365) “premised on lies, secrecy and the abuse of basic human rights.” The legislation of the system of apartheid included Acts such as Separate Amenities Act, Group Areas Act, Prohibition of Marriage Act, etc. Apartheid's systematic, brutal racism literally ripped the South African nation asunder (Johnson,2006). The serious violations committed under apartheid during 45 years had been destructive of the lives of many South Africans, so it was clear that such atrocities had to be addressed, in one way or another. South African society had been wondering how to deal with the human rights abuses committed in order to achieve the peaceful coexistence between all groups of its population (Bloomfield et al.2003; Verdoolaege,2009).

In the 1960s and 70s, the liberation movement of black South Africans became more militant. South African Black Nationalism joined the wider international movement in the Black Consciousness philosophy of Nelson Mandela and others who became the voices and faces of the anti-apartheid struggle. In the 1970s and 80s, some pressure also came from the international business sector that was anti-apartheid, especially in Europe and North America (Johnson,2006).

The negotiations period and the transition to new democracy in South Africa also was tense, and sometimes bloody. Factional differences and conflicts flared (Johnson,2006). For example, the armed conflict between the African National Congress (ANC) and others, in particular, the government-backed Inkatha Freedom Party (IFP) where tens of thousands of South Africans suffered serious human rights abuses and war crimes, and a great number of deaths took place in that conflicts (Bloomfield et al.2003). Nevertheless, the ANC and the National Party (NP), also known as the Nationalist Party (Afrikaans), were able to construct a draft constitutional agreement by the end of 1993, which led to the first truly free and fair democratic elections that were sanctioned by independent monitors on 27 April 1994, and on 10 May 1994 a national unity government was established. Nelson Mandela was sworn as the President of the new Republic of South Africa. The dominant theme of Mandela's inaugural address was reconciliation. After a long-term history of racism, colonialism and apartheid suffered by South Africans, he invoked the image of a New South Africa (Johnson,2006, p.78): “Out of the experience of an extraordinary human disaster that lasted too long, must be born a society of which all humanity will be proud ... Never, never, and never again shall it be that this beautiful land will again experience the oppression of one by another.” Mandela immediately began a series of symbolic public acts intended to foster his commitment to reconciliation in the public eye. Arguably, the greatest of these was the establishment of the truth and reconciliation commission (Johnson,2006). Attempting to unify and reconcile South Africans became a task assigned to the truth and reconciliation commission. Therefore, it became one of the most signiﬁcant phenomena in South African history (Verdoolaege,2009).

**4.6.3. The adoption of South African TRC**

The idea of the establishment of a truth commission began after Nelson Mandela was elected president in 1994. After hundreds of hours of hearings, and serious discussions and considerable input from civil society, the South African Parliament put out the Promotion of National Unity and Reconciliation Act establishing the Truth and Reconciliation Commission (TRC) in 1995 (Bloomfield et al.2003). The Act stated that the objectives of the TRC were to foster national unity and reconciliation by establishing as complete a picture as possible of mass atrocities which were committed under apartheid regime, by facilitating the granting of amnesty to offenders under certain conditions, and by providing recommendations to prevent such human rights violations in the future. In order to achieve these ambitious tasks, three interconnected committees were designed (Verdoolaege,2009). First, the Human Rights Violations Committee (HRVC) was responsible for recording the extent of violations through collecting evidence and written statements from victims and witnesses by holding public hearings where victims and witnesses were allowed to testify in public about past abuses. Second, the Amnesty Committee considered individual applications for amnesty. Third, the Reparations and Rehabilitation Committee recommended policies and programmes to the government regarding reparations for the victims and their families (Bloomfield et al.2003).

Following the selection process of nominators,17 commissioners were appointed. The TRC worked with a staff of up to 350 and four large offices around the country (Bloomfield et al. 2003). The TRC started its work to investigate human rights violations since March 1960. Because a semi-corrupt judicial system was involved in the crimes of apartheid, this made criminal prosecution impossible. South Africans had tended to look for other means to satisfy the collective need for justice during the transition. Therefore, the aim of the TRC was to forge some understanding of the past and to boost reconciliation in the interest of the future of the democratic system. The unique aspect of South African TRC was the fact that it would conduct its work in open public hearings (Johnson,2006). The National Unity and Reconciliation Act gave the TRC the power to seize evidence, subpoena witnesses and protect them, and grant ‘amnesty for truth’ to individuals (Bloomfield et al.2003; Johnson,2006).

**4.6.4. South Africa: justice and ‘amnesty for truth’**

A major divisive issue of transitional justice process has been the question of amnesty. The powers given to the South African commission to grant amnesty to individual offenders on specified conditions was unprecedented and controversial (Snyder&Vinjamuri,2004). However, it could be argued that it opened the way for some reasonable degree of accountability (Fombad,2008). Chaired by Archbishop Desmond Tutu, the Committee on Human Rights Violations (HRVC) created a forum for victims and witnesses to tell their stories and promised offenders amnesty or toleration in exchange for confessions, i.e. conditional amnesty (Bloomfield et al.2003; Hoogenboom,2014). According to Minow (1998, p.81), Tutu, the chairperson of the TRC, argued that “retributive justice is largely Western. The African understanding is far more restorative ... The justice we hope for is restorative of the dignity of the people.” The South Africans TRC invoked uniquely African qualities and took on religious tones to justify their approach, suggesting that wrongdoers should repent rather than be punished. For Tutu, the truth commission offered a ‘third way’ between criminal prosecutions and amnesty. It was often justified using alternative concepts from derived Christian ethics such as forgiveness and reconciliation, or drawn from African philosophy, ethics or ideology like ‘Ubuntu’ which means ‘humanity’ (Kiss,2000; Hoogenboom,2014).

TRC Chairperson Desmond Tutu invokes African ubuntu philosophy in describing the nature and importance of ‘Ubuntu’ for restorative justice, truth, amnesty and reconciliation. This philosophy assumes that human beings are always already related in their humanity; Tutu writes (Johnson,2006, p.87) “there is ... a need for ubuntu but not for victimization”, he adds (Johnson,2006, p.87) “You can only be human in a humane society. If you live with hatred and revenge in your heart, you dehumanize not only yourself, but your community... In the African Weltanschauung, a person is not basically an independent, solitary entity. A person is human precisely in being enveloped in the bundle of life. To be ... is to participate.” However, as Kiss (2000, p.81) argues reconciliation should not be viewed as a “policy of forgive and forget,” rather, “what was required was a renunciation of vengeance and violence in favor of a willingness to work together as South Africans.” As Gairdner (1999, p.52) claims “truth commissions can legitimise the culture, beliefs and values associated with human rights as the new framework for imagining social relations.”

Then, it can be argued that such traditional African values were helped to build a new democratic dispensation and peace. Amnesty agreement occurred so late in the process that it had to be added onto the end of the interim Constitution. Tutu (Van Zyl,1999, p.650) acknowledged the background of the constitutional commitment “...gross violations of human rights, the transgression of humanitarian principles in violent conflicts and the legacy of hatred, fear, guilt and revenge...can now be addressed on the basis that there is a need for understanding but not vengeance, a need for reparation but not for retaliation....In order to advance such reconciliation and reconstruction, amnesty shall be granted...” However, Fombad (2008) argues that in order to ensure lasting peace, amnesty should not be granted upon request with no conditions. Some form of reparations should be given to victims or their families. Bloomfield et al. (2003) stated that the TRC refused most of applications for amnesty. The amnesty was granted only to those who fully recognised to their crimes and showed them to be politically motivated. Many factors were considered by the Amnesty Committee in determining whether the applicant satisfied the conditions for amnesty or not. For instance, it considered whether there was proportionality between the past crimes committed and the political aims that need to be achieved. Nevertheless, wrongs committed for personal gain, malice or ill will were not eligible for amnesty.

**4.6.5. Evaluation of South African TRC success in the light of achieving its objectives**

The purpose of this section is to provide the explanation for the success of South Africa’s truth and reconciliation commission, focusing in particular on its characteristics that contributed to achieve its goals. Of course, it may be impossible to replicate a Tutu or a Mandela, but lessons that have been learnt from the South African case may be valuable to others attempting to move beyond their painful past in order to create a more reconciled, and democratic society (Gibson,2006b).

**1.The effectiveness of TRC of South Africa**

The Committee heard testimony from 23,000 victims and witnesses, around 2000 of them appeared in public hearings (Bloomfield et al.2003). It gathered statements covering 37000 violations which is more than any other previous truth commission had achieved (Graybill, 2002). The hearings took place in public places such as churches, schools and city or town halls. And those statements were recorded by trained statement takers who conducted interviews with victims and witnesses all over the country (Verdoolaege,2009). The process was intensely covered by media where newspapers, radio and television were provided a number of stories on the hearings every day (Bloomfield et al.2003). This brought this Committee to the attention of the national and international public, and it had considerable impact on the victims. Therefore, the Committee on Human Rights Violations has often been considered as one of the most successful components of the South African TRC. There is no doubt that the impact of the TRC was intrinsic on a sociological, legal, political or even moral level. Through the TRC practices such as complaining, testifying, apologising, expressing one’s rage, despair or disappointment, victims and perpetrators started to listen to each other, and they also, to some extent, tried to understand each other. Proponents of the TRC claimed that to allow victims to talk about the past meant a lot to them and helped most of victims for healing. It showed that their suffering and experiences were ofﬁcially recognised which made them feel respected as human beings (Verdoolaege,2009).

According to Johnson (2006) national reconciliation was not possible without truth. Public acknowledgment of the price that South Africans paid during the apartheid regime and conflicts, in the form of the TRC's officially sanctioned ‘truth’, restored the dignity of both victims and offenders. However, many questions remain about the achievement of the truth and reconciliation commission’s goals. Is there evidence that such commissions have in fact succeeded? How well have they done? In the South African case, the objectives were reasonably clear that included creating a collective memory for the society, granting amnesty to those confess their crimes, enhancing reconciliation, in addition to establishing a culture of human rights and democracy in South Africa (Gibson,2006b).

Firstly: creating a collective memory. According to Verdoolaege (2009) the TRC of South Africa composed a collective memory, an ofﬁcial archive of the apartheid past through means of the testimonies of victims and perpetrators. This archive is reﬂected in the TRC report. The establishment of the Truth and Reconciliation Commission was an attempt to reconstitute and then record the apartheid experience to serve as a reminder of the past for future generations. Thousands of testimonies were collected and many of them were distributed in public. The TRC established a ﬁnal report summarising the commission’s outcomes, an ofﬁcial website made the whole TRC process accessible to the international community, and many articles, books and dissertations reﬂected its proceedings and its ﬁnal results. The ofﬁcially authorised and undeniable archive constitutes the collective memory of a society, information gathered will always be there to consult. It will forever be cherished by future generations. This collection can gradually be forgotten by the people. In fact, the records are being stored away in order to be able to forget them, however, it will be possible to retrieve them again when needed. The knowledge that the testimonies were recorded and stored away indicated that a chapter in history could be closed off. Creating an ofﬁcially recognised archive that is open to the public and to national and international researchers had a positive impact on the way apartheid survivors imagined the new future of South Africa.

Secondly, amnesty. Gibson (2006b) stated that the crucial element in transitional justice processes is amnesty. Especially in the cases of negotiated settlements, in which neither side in the conflict emerges as victor. The amnesty was granting to the former regime representatives who were likely to obstruct democratic reform in order to insure their allegiance to the new regime. Undeniably, amnesty for the forces of apartheid, allowing the ANC to take control of the government and smoothing the transitional process. And even amnesty hearings turned attention to the victims, not mainly to the perpetrators. They often turned into tutorials on reconciliation and forgiveness. The victims were given opportunity to tell their stories that captured the imagination of all South Africans, black, white, Coloured, and Indian. Thereby, it would be argued that amnesty played significant role in the truth and reconciliation process by humanising the victims of apartheid which made the coexistence and tolerance – if not full reconciliation – more likely.

Thirdly, the reconciliation discourse. Gibson (2006b) stated that the South African TRC’s even-handed message that all parties did horrible things during the conflict, was necessary for encouraging tolerance, amnesty and, ultimately, reconciliation. He argued that to show that all sides in the past conflict were to blame, and that all parties bear some responsibility, is the most effective way of establishing the truth and enhancing reconciliation. Thus, according to this logic, the truth and national reconciliation were seen as a necessity for democratic transition process, which made it compulsory to involve all people as witnesses of the violence of apartheid by broadcasting the hearings in the media and disseminating the report widely. To put reconciliation into the minds of South Africans while promoting a sense of closure (since peace and liberation had been attained, and new country has been built) were the most important achievements of the TRC (Buckley-Zistel et al.2013). Similarly, Verdoolaege (2009) argues that the discourse adopted at the TRC formed a model for speaking about a traumatic past, and it opened up the debate on reconciliation. The issues of personal and national reconciliation were raised in the testimonies of witnesses along with the question of a peaceful and stable future for South Africa. The language created at hearings has labelled reconciliation discourse. The focus of this discourse was on the urgent social needs of South Africans after their suffering under the apartheid regime. The hearings provided a forum for thousands of apartheid victims to talk about the atrocities they had experienced such as the murder or abduction of beloved ones, rape, torture, arson. The Human Rights Violations Committee (HRVC) was stressed, time and again, that the victims were now allowed to tell their stories and testify onto the stage in their own words and in the language they preferred with the help of a team of interpreters so that the audience could understand and respect their stories.

The commissioners of the committee tended, in their questions to the victims, to emphasise aspects of reconciliation and their willingness for it. A closer analysis of the TRC commissioners’ work explains that they were often the driving force behind the commitment to reconciliation. They sometimes urged the victims to talk as if the terms of reconciliation or forgiveness appeared to be of the utmost concern. Leading questions are posed by the commissioners; it seems to be a question of actually pronouncing these terms out loud which bring the attention of the TRC audience to focus on the importance of establishing interpersonal reconciliation. In some instances, victims were explicitly asked whether they would be willing to meet the offenders, whether they would be willing to talk directly to the wrongdoers, whether they would be prepared to actually reconcile with the perpetrators. If victims had been resentful, the commissioners sometimes attempted to temper these feelings. The victims were praised if they had displayed reconciling attitudes or if they had openly expressed feelings of forgiveness for the perpetrators in the course of their testimonies. The commissioners kept emphasising that reconciliation or forgiveness was the only way to re-build the society of South Africa. A conscious atmosphere about reconciliation was created in order to persuade the witnesses that they could personally contribute to achieving peaceful coexistence in South Africa by their testimonies. It then became almost impossible for the victims and the witnesses to react against this reconciling atmosphere, and it became extremely hard for them to talk in a spirit of vengeance or retaliation. Consequently, all participants in the TRC – victims, offenders, witnesses and commission members – had the sense that they actively helped to building the new South Africa state. It can be, therefore, argued that the TRC has exerted a long-lasting effect on South African society (Verdoolaege,2009). Gibson (2006a) argues that the truth process facilitated reconciliation because it was able to attribute blame to all parties engaging in the struggle over apartheid. He also argues that the culture and institutions of South Africa supported the reconciliation process. Certainly, the truth and reconciliation process capitalised on existing cultural predispositions of all South Africans (whites and blacks) for respecting human rights, peaceful coexistence, reconciliation and the rule of law.

Finally, a democratic transition and human rights. How does reconciliation lead to the consolidation of democratic transition? Some may view reconciliation as an end of itself. For others, reconciliation may contribute to achieve peace irrespective of whether the regime is democratic. For political scientists, reconciliation may support democratic institutions and processes. In fact, reconciliation can play a role in the consolidation of democratic change through the reduction of intergroup conflict (Gibson,2006b). Although the truth commission of South Africa was the sixteenth commission of its kind, starting with the Ugandan Commission of Inquiry in 1974, it did have a number of particular characteristics. One such unique aspect was the public nature and transparency of the truth commission. For example, the truth commission of Argentina did not hold public hearings, and regarding the truth commission of Chile, its public character – such as public testimonies of victims and the attention of the media – also was more limited. Thus, the South African TRC really formed a turning point, nationally as well as internationally. It had always been difﬁcult for South Africans to express emotions of grief and anger toward apartheid atrocities, deﬁnitely not in public and deﬁnitely not when the stories involved themselves or their families. Thus, the TRC was now provided people with an institutional template to listen to victims’ testimonies to pay respect and to deal with their emotions and memories. The hearings identiﬁes four stages that describe the routine ways commissioners took the stories of victims: recognising suffering, the moral equalising of suffering, liberation and sacriﬁce, and redemption through forsaking revenge. Indeed, the stories at these hearings were primarily focused on individual accounts of physical suffering. It could be, therefore, argued that the TRC process helped victims to voice their opinions and make known their needs by allowing people to talk about their experiences under apartheid (Verdoolaege,2009).

In the eyes of many, the TRC was a crucial factor in the success of the transition process from apartheid that was marred by remarkably little bloodshed, retribution, and vengeance. Led by Desmond Tutu and fully supported by Nelson Mandela, the TRC certainly created a report in seven-volumes that includes a great deal of information, if not truth. It adopted the reconciliation discourse from the time when the commission was set up. Although some South African commentators are less sanguine, many observers throughout the world believe that the truth process indeed contributed in achieving reconciliation in South Africa, and that reconciliation contributed positively to the initiation of democratic reform. Despite the fact that the truth and reconciliation process was certainly costly, in terms of both money and in the failure to achieve punitive justice, it is clear that the truth and reconciliation process was worth its considerable price because it has been a crucial factor in moving the country toward a more peaceful and democratic future (Gibson,2006b).

**2. The factors that affect the efficiency of South African TRC**

There were aspects that had a deep impact on the success and effectiveness of South African truth commission in fostering a sense of redress for victims. One aspect is the idea of providing victims with a platform on which they can express their plight and tell their stories. According to Popkin&Roht‐Arriaza (1995) this is the clearest recognition of the value of storytelling in coming to terms with the past. A second, is the attempting to overcome the anger of the victims and their families by responding to their needs through the process of apology and recommendations focused on reparations. The third aspect is the presentation of the final report.

From the South African case, Gibson (2006b) argues that it is possible to draw out several factors contributing to the effectiveness of truth and reconciliation processes. First, the process must capture the attention of all segments of society. The South African TRC pierced the consciousness of nearly all South Africans through numerous hearings in every part of the country and media where the South African Broadcast Corporation, for example, aired special reports on the TRC every Sunday from April 1996 until March 1998, where the program attracted the attention of the public, and it often scored as among the most popular on South African television. The process presented, in highly personalised and excruciating detail, information about the atrocities committed during apartheid that were faced by thousands of individual South Africans. Therefore, it seems likely that everyone had the opportunity to judge the TRC’s conclusions. Second, legal proceedings are less successful at capturing the attention of the public than simple ‘truth-telling’ process. It is believed that the TRC made its work accessible by allowing people to tell their stories unhindered. Many of these stories captured the attention of broad segments of South African society. If the goal is that society is to be changed by the revelations and conclusions of a truth commission, legal proceedings and trials are unlikely to contribute much because they fail to capture the attention of ordinary people. Third, the TRC must be unbiased to any ideology or party. Generally, most South Africans seem to be satisfied with the impartiality of the commission and its work. For instance, roughly three-fourths of black South Africans approve of the work of the commission, although other racial minorities of whites, Asian origin, and coloured people are less positive toward it. Indeed, its findings were not widely rejected by the public; little justification was available to most South Africans for rejecting its conclusions, especially, the collective memory produced by the proceedings. In other words, impartiality contributes to the acceptance and legitimacy of the truth process’s collective memory.

Fourth, the most important characteristic of the collective memory created by South Africa’s TRC was its willingness to apportion blame to all sides who violated the law of human rights, including the liberation forces. Because all participants did horrible things even if they did not do them with equal ferocity. Whites cannot believe today that their apartheid regime did not commit atrocities against blacks. Blacks also cannot believe today that the liberation forces did not harm both black and white South Africans. Once one admits that the other side has legitimate grievances, it becomes easier to accept some of its claims and ultimately, to build the new political system and facilitate reconciliation process. Fifth, despite granting amnesty to gross human rights violators, the truth and reconciliation process in South Africa generated justice that appeared to satisfy many South Africans. More specifically, another effective element of South Africa’s truth and reconciliation commission was its emphasis on non-retributive forms of justice. The justice was compensatory, procedural and restorative. Allowing people to tell their stories and allowing South Africans to hear these stories had an enormous impact on how the public reacted to the truth and reconciliation process. The truth and reconciliation commission contemplated that the compensatory and restorative forms of justice might ameliorate the suffering of victims and their families. They are capable of mollifying people and getting them to accept the injustices forced on them by the transitional process. Finally, the roles of Tutu and Mandela were no doubt helpful in getting people to accept the reconciliation. Tutu’s message of forgiveness and Mandela’s constant and insistent calls for reconciliation, though irritating to many, set a compelling frame of reference for moving beyond the past violations uncovered. These calls were surely convincing for many South Africans. The main issue for societal change is made people accept a collective memory and a commission’s version of the truth. Not all truths can be ‘sold’ to the public. But the truth that is impartial – as signalled by its willingness to cast blame on all who deserved it – is trusted. The South African TRC seemed to succeed at both getting the attention of the people and persuading them of its view of forgetting the past atrocities and achieving reconciliation. Therefore, it can be argued that the truth commission of South Africa was convincing due to the truth it promulgated (Gibson,2006b).

**3. Criticism of South African TRC**

This section presents some of the critiques of South African TRC. According to Bloomfield et al. (2003) the TRC’s ability to grant individual amnesty for politically motivated crimes was the most controversial of its powers. It was the subject of an unsuccessful constitutional challenge early in the life of the TRC. Van Zyl (1999) also argues that the amnesty agreement has been severely criticised, particularly by certain victims and their families. Hayner (2002, p.3) refers to this dilemma, saying that “despite the efforts of the Truth and Reconciliation Commission, many South Africans still demanded strict justice and punishment for their perpetrators. Where justice was not possible, the minimal requirement for forgiveness, most insisted, was to be told the full, honest, and unvarnished truth.” Moreover, the idea of a balance between peace and justice and the will to adopt truth, forgiveness and reconciliation still somehow challenge truth commissions. In South Africa some political groups such as the Azanian People’s Organization rejected the amnesty as it violated their right to prosecute the offenders by criminal courts (Nagy,2004).

However, some argue like Van Zyl (1999) that there were exceptional circumstances that justified the South African TRC in granting the amnesty. The major dilemma that faced by ANC was: without an amnesty agreement, the negotiations would collapse, and the conflicts would return. According to Boraine (2000, p.143) the interviews with President Mandela revealed that “senior generals of the security forces had personally warned him of the dire consequences if members of those forces had to face compulsory trials and prosecutions.” Thus, South Africa was unable to choose the strategy of prosecutions and punishment of those responsible for human rights abuse. This made it necessary to develop a more creative approach to deal with the past: the truth, amnesty and reconciliation. This conscious political decision was an important political compromise where criminal prosecutions would have been undermined the peaceful transition to democracy.

Van Zyl (1999) also argues that even if the South African transition to democracy could have occurred without any form of amnesty, thus leaving open the possibility of prosecutions, a tiny number of those responsible for human rights abuse could have been prosecuted successfully. Furthermore, victims often have considerable difficulty presenting sufficient proof, due mainly to the lack of physical evidence; and many of them could not have afforded the services of an attorney or an advocate. Because of this, trials will offer only a small percentage of victims a reasonable chance of obtaining redress. There are a number of arguments support this viewpoint. First, it is commonly accepted that South Africa's criminal justice system was virtually dysfunctional. Second, it is difficult to prosecute highly skilled operatives trained in the art of concealing their crimes and destroying evidence. The South African police had an extremely small number of properly trained investigators, and more than a third of prosecutorial posts were empty and could not be filled. Third, trials are expensive, and the government could not afford the cost of prosecuting thousands of those accused of human rights violations. Fourth, trial preparations and proceedings are extremely time consuming.

According to Gibson (2006b) and Johnson (2006) the TRC of South Africa also has been criticised for being ‘hijacked’ by Archbishop Desmond Tutu and especially for placing a strong religious veneer on its activities. However, Tutu’s religious ideology fits well with dominant notions of reconciliation, especially reconciliation involving forgiveness. Desmond Tutu maintained repeatedly that the truth was indispensable to establish a democratic state, peace building and achieve justice which South Africans hoped after the long history of apartheid and repression. Tutu had strong and independent views of the nature of the mandate extended to the TRC and he was quite effective at casting blame on all parties including the ANC. Nelson Mandela was an inveterate supporter of the TRC. This support providing an important part of the political cover required to maintain the commission’s independence. Without independence, “victor’s justice” might prevail. The success of the truth and reconciliation process undoubtedly reflects the importance of Tutu and Mandela.

Additionally, the manner in which questions about painful apartheid experiences were framed, indicated that victims’ trauma was a thing of the past, and not the present. This meant that the TRC imposed on victims’ narratives the view that their pain and suffering had ended, and which had led to a sense of closure. However, this was contradicted by the victims’ emotions of pain that still lingered and how it affected their lives (Buckley-Zistel et al.2013). Another critique is that the Reparations and Rehabilitation Committee did not have the same decision-making powers as the Human Rights Violations Committee and the Amnesty Committee, its power was limited to formulating recommendations. After three years of the publication of the TRC’s report, the South African government has faced strong criticism for both failing to pay reparation grants for victims and affronting them by paying no more than token amounts (Bloomfield et al.2003).

However, despite these criticisms against truth commissions, Du Toit (2000) argues that truth commissions have become vital mechanism in the move from conflict to democracy. According to Bloomfield et al. (2003) it marked a decisive turning point in South African history by uncovering the truth for the past violations, achieving peace, and democracy. Like no other commission before it, the TRC has led to great international interest in this kind of mechanism. Thus, it could be argued that truth commissions can be established to achieve political interests rather than criminal justice. Although, amnesty granted by the truth commissions, which imply the cancellation of retributive justice itself, may not be morally justifiable, nevertheless, given the fragile justice systems, as outlined above, in transitional states which make prosecutions impossible, other mechanisms such as restorative justice including recognition, apology, reparations, amnesty and reconciliation can be practically justified to achieve social utility, prevent the violence, and move forward even if at the expense of traditional justice. South Africa's committees considered that recognition was sufficient through listening to victims and perpetrators, with the exclusion of the option of prosecutions, especially for political actors who participated in putting the foundation stone for democratic transition, the establishment of peace and equality among all citizens and respect for human rights. Hence, it can be argued that, the positive implications of the South African Truth and Reconciliation Commission lead to this justification.

**Conclusion**

This chapter has evaluated the effectiveness of truth commissions for achieving their stated objectives. It has focused on the factors affecting the adoption of the truth and reconciliation commissions as transitional justice mechanism. I mentioned that there are political and practical conditions that have led to establishment of the TRCs in many parts of the world such as Guatemala, Chile, El Salvador, South Africa, etc., in order to deal with past atrocities. It has been argued that a truth commission is a necessary step to establish truth about the past which can be considered critical and fair (Hayner,1994). Despite its shortcomings, it can play, with other mechanisms such as apology and reparations, a significant role in creating the conditions for a just society, respecting human rights, healing the wounds, promoting reconciliation and consolidating democratic governance. It can also, according to Hayner (1994), contribute to justice and accountability in the absence of an effective system of criminal justice, and reduce the likelihood of a repetition of human rights abuses in the future. I have argued that commissions were generally created for political, social and security interests rather than justice; as Ensalaco (1994, p.657) notes, it is important to recognise that the “commissions for truth and reconciliation, but not ... for truth, reconciliation and justice.”

In the last section of the chapter I examined the case of South Africa as a classic example of commission processes by assessing its role and work in post-conflict societies. Based on the findings of South African truth commission, I have argued that it is no accident that the TRC of South Africa is becoming the best model of the TRCs in addressing the effects of apartheid and the violent conflicts. I tried to elaborate on the positive effects of the TRC on South African society with its strong focus on the issues of truth, justice, reconciliation, democracy and nation building. First, according to Verdoolaege (2009), the truth commissions can reveal the truth by providing public platform for telling the victims and witnesses’ stories. Second, the truth commissions can create an historical record and collect legal evidence that could be used for criminal prosecutions in the future after achieving stability, democracy, and when the circumstances of post-conflict societies are more appropriate. In other words, truth-telling can provide a form of justice at periods of transition, and can be considered as a step toward accountability. Third, the truth commissions can also contribute to repair relations and restore confidence between the state and members of civil society by providing some recommendations for institutional and social reforms to avoid injustices in the future.

To conclude I would say that in the last two chapters I have argued that restorative justice can be applied in many ways:(1) truth commissions, mediation, reconciliation; and (2) traditional domestic justice (the justice of individuals themselves) as an alternative when indigenous people see that criminal courts and truth commissions are impossible due to the exceptional circumstances of transitional societies, or are useless in resolving conflict problems. In the following chapter I will examine traditional justice mechanisms (local initiatives) by giving some developed examples of them, and some assessment of their possible use. The central argument of last three chapters of this thesis is that restorative justice which I call for in transitional societies is justice itself. I believe that recognition, apology, reparations and treatment are itself justice when the criminal justice system is ineffective or undesirable as demonstrated in Chapter Two.

**Chapter five: Rethinking the transition mechanisms: local justice as transitional justice**

**Introduction**

Chapter Four evaluated the effectiveness of truth commissions in addressing gross human rights violations. It highlighted how social, security and political factors can affect their establishment and their chances of success. I have argued that although truth commissions are imperfect because of the limitations and challenges they face, they are nevertheless satisfying in many respects. They can play a decisive role in post-conflict societies by providing a form of justice at transition periods through uncovering the truth, making reparations and reforming institutions. As argued in the previous chapters, however, there is an ongoing critical discussion in the field of transitional justice about justice and reconciliation mechanisms in post-conflict environments (Flomoku&Reeves,2012). These mechanisms are increasingly examined for their impact on the lives of people and societies affected by the violence. New debates in this area are focused on a seeming contradiction between international and local approaches. It concerns the relative ability of global, national, and local mechanisms to promote justice and reconciliation in post-conflict societies (Baines,2010). This chapter critically examines the use of customary justice mechanisms in transitional justice processes and their possible role in supporting national reconciliation and peacebuilding initiatives in post-conflict societies (Ubink&Rea,2017).

In terms of my argument in this chapter, the sections below attempt to address following key questions: Are customary tools appropriate to deal with mass violations? Why do people prefer this kind of mechanisms? Perhaps the most important question is whether the local practices and rituals being promoted can actually achieve the key goals of transition and if so, how. What are the factors that make such mechanisms work? To answer these questions, I draw on some post-conflict societies such as Rwanda, northern Uganda and Mozambique. These case studies are used to illustrate what local justice mechanisms are, and the benefits and the shortcomings of such tools in transitional periods. They also are used as the basis for outlining options for future policy development of dispute settlement.

Despite the fact that the public are infrequent users of the formal justice systems, local justice tools still remain largely neglected (Wojkowska,2006). According to Vieille (2012) the types of legal institutions transplanted provided to the transitional societies are often based on prior template borrowed from European legal traditions. As a result of this clear preference for the rule of law and its state institutions, local mechanisms are often marginalised. Tension between international norms and local context continue to be an increasing challenge for the project of transitional justice. There is a real danger that the field of transitional justice simply serves to promote an abstract or universal form of justice, and it does not actually respond to the needs of local realities. Similarly, Baines (2010) argues that the international policy makers have imposed a uniform approach on justice after conflict, ignoring the complex local dynamics that are most relevant to people’s lives. As a result, the foreign international efforts are often too dislocated from the realities of people's everyday life.

Ubink&Rea (2017) argue that the transitional justice industry has been critiqued for its top-down mechanisms, resulting in detachment from local socio-political reality of the countries concerned and limited interest to the wishes of victims and their communities. For example, the literature suggests that the criminal courts in the former Yugoslavia and Rwanda had little resonance with ordinary people who were unaware of or uninterested in high-level criminal tribunals cases (Baines,2010). Formal justice systems have not focused on issues of accessibility, have been top-down, have tended to focus on institutions rather than people, and have not been cognisant of where the public actually go to seek justice. Thus, they have generally not been successful in improving access to justice for people (Wojkowska,2006). Likewise, some argue, according to Baines (2010), against truth commissions that they have not achieved the desired goals of promoting national healing.

There are growing concerns in the field that western justice mechanisms may displace and discourage local mechanisms from promoting reconciliation and peace. The growing critique of external, top-down approaches to transitional justice has led to greater attention being paid, within academic and policy circles, to more participatory, bottom-up strategies that are responsive to local people’s needs (Ubink&Rea,2017). Vieille (2012) argues that there is a need to find ways to accommodate differences between societies. Buckley-Zistel et al. (2014) also argue that the field of transitional justice should be expanded to include local needs in the design of its mechanisms to be effective in facing conflict problems. Ubink&Rea (2017), however, argue that using the customary justice practices that are responsive to local needs and embedded in local perceptions of justice, as an answer to the externally transitional justice mechanisms, is complicated.

While the academic literature largely has focused on the role of formal justice mechanisms such as criminal tribunals and truth commissions, implying that state and law institutions are solely responsible for achieving justice and shaping the process of social healing (Baines,2010), Huyse (2008) argues that there have been, on the other hand, too few attempts to assess the real or potential role that local practices play or might play in post-conflict settings. Accordingly, this chapter shall try to address this gap by evaluating the practical potential of local mechanisms in transitional societies. It attempts to offers better understanding of how traditional practices work in their socio-political, religious, and cultural contexts. It also highlights the need for developing research on such mechanisms to flesh out the conceptual frameworks of traditional justice and reconciliation, and to learn much from previous local justice experiences (Thomson,2010).

Given the widespread of informal justice systems and the fact that so many people access them for their justice needs, I will argue like Wojkowska (2006) that in post-conflict societies, local mechanisms of dispute resolution may be crucial to restoring some order and stability, and they may be all that is available for many years. Local justice systems are often more accessible to the majority of populations. As Denney&Domingo (2017) argue, local approaches offer an important alternative or complementary route that conventional formal justice processes have tended to neglect. More specifically, they offer an additional path to achieving the goals of truth, reconciliation, reparations, and nonrecurrence. Drawing on local justice mechanisms, and narratives of truth and reconciliation, is in certain transitional contexts more appropriate to the nature of conﬂict. Furthermore, they offer alternative modalities of addressing legacies of violence and human rights abuses, and in response to different experiences of different political-institutional settings. One of their advantages is that they avoid the risks of using external mechanisms and remedies that can be discredited as impositions from abroad. Moreover, conventional formal models of transitional justice such as criminal justice or truth telling often have limited reach in certain contexts where affected people or communities live in rural areas far from the capital and state services, and where the state has limited reach or relevance in methods of conflicts resolution.

While formal transitional justice mechanisms can face the challenge of reaching affected populations, particularly given time and budget restrictions, geographic reach is not a problem for local justice practices because such practices occur in the community, carried out by its members. This is not to idealize local justice mechanisms. Like all transitional justice models, it is important to recognize that local approaches have limitations, including that they are susceptible to being instrumentalized by national elites, and they may diminish the voices of victims (Denney&Domingo,2017). However, despite these potential drawbacks – which will be discussed below – traditional justice forms may have the potential to provide quick, cheap and culturally relevant remedies (Wojkowska,2006). In making this argument, this chapter begins by exploring how local justice practices have gained greater prominence in recent years (Denney&Domingo,2017). It then analyses literature describing some countries – mentioned above – that have opted for using local justice systems specifically for fostering the reconciliation and peace processes. This literature gives a grounded understanding of how such mechanisms function and people’s perceptions thereof (Ubink&Rea,2017). The chapter also considers the nature of justice, trust, and reconciliation supported by customary justice practices and what this tells us about the broadening scope of transitional justice processes that are more “ﬁt for purpose,” as opposed to “one-size-ﬁts-all.” (Denney&Domingo,2017, p.205). The chapter is structured as follows: Part one presents an overview of local justice and reconciliation mechanisms. Part two reviews three case studies, examining the efficacy of traditional dispute resolution mechanisms in order to spell out the role they could play in achieving general goals of transitional justice. Part three explores the strengths, weaknesses and challenges of informal justice systems.

**5.1. An overview of local justice mechanisms**

Local justice practices are not altogether new. Indeed, many draw on customary practices. However, the ‘hype’ now surrounding local justice practices as transitional justice mechanisms has emerged more recently (Denney&Domingo,2017). According to Allen&Macdonald (2013) and Denney&Domingo (2017), since the 1990s, attempts to adopt and using local justice practices as part of post-conflict policy have been increasing. They have played a more prominent role in a number of transitional societies, notably in Rwanda (2002-2012), Mozambique (from 1992), northern Uganda (from 1995), Sierra Leone (from 2000), Timor-Leste (2001-2005), and Burundi (from 2005). Indeed, the foregrounding of local justice mechanisms as a possible alternative to the international mechanisms seems to have come as a bit of a surprise to those promoting criminal tribunals and truth commissions. This is because the shift of interest towards local justice mechanisms is occurring at the same time as international criminal law is expanding its reach. However, both may also be viewed as being part of the same process in that they seek forms of justice which are viable in the fragile political and security circumstances of post-conflict societies. There are other adjectives for ‘local’ justice that are all sometimes used interchangeably such as ‘traditional’, ‘indigenous’, ‘community-based’, ‘grass-roots’, ‘customary’ and ‘informal’ (Allen&Macdonald,2013; Macdonald,2015).

Allen&Macdonald (2013) argue that local justice is laudable. It is suggested that local justice is more appropriate and realistic than criminal prosecutions in transitional periods. The argument here is that local justice is culturally relative. It dependents on indigenous identities and their rituals. Thus, it might be more effective in close- knit societies where there are strong relationships between people. For example, James Otto, the head of Human Rights Focus in northern Uganda opposed the ICC’s intervention by saying that (Allen,2006, p.134) “there is a balance in the community that cannot be found in the briefcase of the white man.” Therefore, the UN Secretary General, Kofi Annan (2004, p.7) explicitly recognised the value of local justice mechanisms, noting: “we must learn better how to respect and support local ownership, local leadership and a local constituency for reform, ...” He (2004, p.1) confirmed that “We must learn as well to eschew one-size-fits-all formulas and the importation of foreign models, and, instead, base our support on national assessments, national participation and national needs and aspirations.” Kofi Annan (2004, p.12) suggested that “while focusing on the building of a formal justice system that functions effectively and in accordance with international standards, it is also crucial to assess means for ensuring the functioning of complementary and less formal mechanisms, particularly in the immediate term. Independent national human rights commissions can play a vital role in affording accountability, redress, dispute resolution and protection during transitional periods. Similarly, due regard must be given to indigenous and informal traditions for administering justice or settling disputes, to help them to continue their often vital role...Where these are ignored or overridden, the result can be the exclusion of large sectors of society from accessible justice. Particularly in post-conflict settings...” According to Denney&Domingo (2017) by 2007, the first reference to local justice processes in a peace negotiation was achieved in northern Uganda in a preliminary agreement on accountability and reconciliation signed by the government of Uganda and the LRA in Juba, South Sudan. It suggested that: “Traditional justice mechanisms, such as Culo Kwor, Mato Oput, Kayo Cuk, Ailuc and Tonu ci Koka and others as practiced in the communities affected by the conﬂict, shall be promoted, with necessary modifications, as a central part of the framework for accountability and reconciliation.” (Waldorf,2016, p.168).

The increasing attention to local justice processes has been spurred by growing attention to customary justice mechanisms in many post-conﬂict contexts (Denney&Domingo,2017). The first researchers to really engage with the ‘local’ in transitional justice asked whether “universalistic assumptions about the beneﬁts of justice accord with what people think on the ground?” (Macdonald,2015, p.75) and whether “adequate account is taken of non-western cultures and beliefs and local practices of justice?” (Macdonald,2015, p.75). A substantial body of academic research recognized the critical importance of local justice mechanisms, given that such processes “are widely used in rural and poor urban areas, where there is often minimal access to formal state justice.” (Denney&Domingo,2017, p.209). According to Denney& Domingo (2017, pp.209-210) “research in many fragile states suggests that non-state systems are the main providers of justice and security for up to 80–90% of the population. Non-state systems may often be more effective, accessible, fairer, quicker, cheaper and in tune with people’s values.” Local justice processes have been seen as especially relevant to transitional justice because they are grounded in local beliefs and norms that bind communities together, thereby providing a more locally grounded foundation for healing and reconciliation.

This is in contrast to the formal transitional justice processes such as criminal prosecutions which can be perceived to work in capital cities or foreign states, shrouded in legal procedures that can seem foreign to many people (Denney&Domingo,2017). In fact, the “complaint regarding formal legal approaches is that transitional justice and peacebuilding more broadly fail sufﬁciently to grasp or respond to the lived experiences of atrocity and conﬂict. Traditional mechanisms, in contrast, offer ordinary persons greater involvement in and access to transitional justice than that provided by remote, formal institutions or technocratic reforms. Anchored in local rituals and indigenous practices, traditional mechanisms promise deeper cultural legitimacy and local ownership. They provide alternate paths to justice, including restorative justice, in broadly participatory forums that aim to reintegrate combatants/perpetrators, victims, and communities.” (Denney&Domingo,2017, p.210).

Support for local justice processes has been practical. The vast scale of violations in places where transitional justice currently operates makes it very hard – as mentioned in Chapter Two – to try all suspected offenders. The Gacaca system that was set up in Rwanda in 2001 to deal with the 1994 genocide effects was partly a national response to this kind of dilemma. The focus on local justice has certainly gained momentum since the establishment of Gacaca courts and the ‘Mato Oput’ ceremonies among the Acholi people in northern Uganda (Igreja,2007). Local justice forms have been officially recognised in some post-conflict societies such as Sierra Leone and East Timor. In the case of Sierra Leone, for instance, the Truth and Reconciliation Act (2000) authorised the truth and reconciliation commission to seek assistance for traditional and religious leaders to facilitate its public sessions and to address local conflicts violations to support healing and reconciliation. In East Timor, the government incorporated a more extensive range of customary law. The community hearings of their Reception and Reconciliation Commission involved local dispute resolution practices named nahe biti boot (Allen&Macdonald,2013). According to Drexler (2009) these practices are based on customary belief, ceremony and historical knowledge. They are usually led by traditional, spiritual leaders who decide right from wrong. These traits that give a concrete expression of their ritualistic-communal character, an aspect that marks a crucial difference with formal justice tools such criminal courts. The majority of such processes are initiated and run by civil society actors in the distinct contrast with state-based models of conflict settlement (Huyse,2008).

Hulme (2014, p.20) argues that local justice systems can be anchored in clan structures, local administrative authorities, or community forums. Under informal mechanisms, “punishment does not usually involve incarceration...The rationale for this is that it serves the greater good of the community rather than separating the perpetrator from the community, and enhances reconciliation to a greater extent.” Increasingly, restorative justice has come to consider local justice mechanisms that are discussed in this chapter. A distinctive feature of restorative justice is the goal to create suitable conditions for reconciliation. Restorative justice involves processes of reconciliation between victim and offender in the form of recognition of wrongdoing or forgiveness (Denney&Domingo,2017). Those processes are (Denney&Domingo,2017, p.206) “about individuals forgiving each other; about societies torn apart by conﬂict mending their social fabric and reconstituting the desire to live together, and about peaceful coexistence and social stability.” Reconciliation refers – as argued in Chapter Three – to a complex process by which communities and individuals ﬁnd ways of coming to terms with each other after terrible experiences of violence, including the paths for reintegrating former combatants, perpetrators, and victims into community life for achieving the peaceful coexistence. Local justice practices as transitional justice mechanisms impact on reconciliation and provide ways of healing and forgiveness that are based on a community’s own narratives of justice, truth and memory. At this level, the emphasis is on creating conditions for reconciliation and rebuilding trust to enable post-conflict societies to move forward (Denney&Domingo,2017).

To illustrate my point, the following section presents some experiences of local justice. It examines the cases of Rwanda, Mozambique and the Acholi people of northern Uganda that used their traditional tools as an approach of local dispute resolution and achieving reconciliation. The case studies are followed by more empirically based assessments of the potential role of traditional mechanisms in transitional periods.

**5.2. The case studies**

The ambition of this section is to develop insights based on case studies which will both enlighten the debate and heighten awareness of the range of local tools and resources available to societies in the pursuit of reconciliation and sustainable peace in post-conflict societies (Huyse,2008).

**5.2.1. Preface**

Africa profiles the highest statistics of violent conflicts in the world. For years the treatment of conflicts involving national armies revolved around formal mechanisms that have excluded the traditional approaches that are now in greater demand in the contemporary world, particularly in Africa (Brock-Utne,2001). When most African countries became independent in the 1960’s, the majority of African citizens and communities were resolving their disputes using informal justice forums. On the one hand, most Africans continued using local justice mechanisms because of three factors: first, most citizens the citizens in many African settings were living in rural villages where customary mechanisms have a stronger connection to populations and access to a formal state justice system was limited. This is true where the state has been largely absent from the lives of many people. In such cases, it is these customary structures - this may include leaders, elders and secret societies - rather than the state that may gain more popular legitimacy and provide a stronger sense of identity (Penal Reform International,2000; Denney&Domingo,2017); second, formal criminal courts offer a type of justice which may be inappropriate for those living in rural villages or urban settlements; third, justice systems in Africa operate with a limited infrastructure, lacking the resources to deal with minor disputes. On the other hand, it is argued that traditional mechanisms offer greater access to justice. While the movement towards a formal justice system is characterized by its emphasis on retribution and punishment, the traditional justice systems aim at restoring social cohesion within the community through promoting reconciliation and peace (Penal Reform International,2000).

Brock-Utne (2001) stated that African communities have often resolved their disputes at the community level without much government or NGO involvement. Once the problems are identified, communities convene meetings to deliberate over them and resolve them. For such meetings to bear fruit, the role of opinion leaders and council of elders who enjoy social recognition is crucial. The Acholi, for example, believe in leadership through consensus, and the traditional head of each clan rules by consent, allowing everyone in their localised clans to have a voice. Elders are respected as trustworthy mediators all over Africa. They have gained their influence through wisdom, accumulated experience and integrity. The roles of these mediators would depend on circumstances, personalities and traditions. A major task of the traditional chiefs is to act as arbitrators, negotiator and reconcilers when conflict occurs in order to restore peace and repair relations between families and clans. What must be keenly noted is the salience of traditional practices such as the use of rituals, interpretation of myths and symbols to resolve conflicts. These include, for example, the identification of a particular type of cattle and/or goat that must be sacrificed to cleanse society from the evils of conflict. Also, the curse is used by elders to deter the young from continuous conflicts. It is believed that the curse of elders leads to mysterious death or disappearance of those who have caused problems from society.

According to Brock-Utne (2001) the method of negotiation generally used in Africa is the neighbourhood system. Its success and effectiveness may be attributed to its simplicity, participatory nature and adaptable flexibility. The negotiation process starts with discussions by individuals within the social context on an emerging struggle. The contexts usually are according to the circumstances, for example, neighbours or a larger neighbourhood, or families or different parties of a state, or religious groups. In this process, instead of directing the discussion towards grudge or blame, it is pointed towards a solution. Mediators make decisions based on rules. The conflicting groups often are granted the scope to make their decisions. Arbitrators and mediators look forward to the future, for improved relations, not only between the disputing parties but also in the whole community that is involved.

As such, post-conflict societies should not be depicted as void of capacity. It is this depiction that has justiﬁed the export of models of formal justice from more developed countries to these societies, often regardless of their appropriateness. Instead, it should be highlighted that institutional maturity often exists in the customary structures that are much closer to people’s day-to-day lives, rather than existing only within the ‘go-to’ the institutions of the international community such as criminal courts and police forces. Despite the fact that customary structures may not appear particularly mature in terms of IT systems, organizational efﬁciency and professionalised staff, they can represent complex systems of social responsibility and order (Denney&Domingo,2017). According to Baines (2010, p.412) local justice practices “resonate with local cosmological beliefs about morality, social responsibility, and norms regarding appropriate behaviour.” Therefore, it could be argued that in transitional contexts, local justice practices may be the most appropriate and relevant mechanisms for establishing accountability and bring justice for victims and affected communities, rather than the judiciary systems (Denney&Domingo,2017).

Local justice practices as transitional justice mechanisms remain a burgeoning area of research, and what exists to date tells only partial stories of their variety and spread (Denney&Domingo, 2017). This section addresses local strategies and practices of dispute settlement in some African countries. It examines what kind of justice should be considered in transitional periods. Part one presents brief history of conflict of Rwanda, it also addresses traditional mechanism which called ‘Gacaca’. Part two explains how Acholi communities deal with the consequences of conflicts according to their traditional culture. It starts with depicting the local background of the Acholi people, and then illustrates how the Acholi rituals, ‘Mato Oput’, are implemented as dispute resolution mechanism. Part three examines the case of Mozambique and the role of ‘Magamba Spirits’ in post conflict.

**5.2.2. The case of Rwanda**

**1. The genocide and post- genocide Rwanda**

In 1994, as briefly mentioned in Chapter Two, a campaign of genocidal violence against the Tutsi minority ethnic group and the so-called ‘moderate’ Hutu group that opposed the regime in place had started. The Hutu military and Interahamwe militia elements took to the streets and began a systematic slaughter of their neighbors of Tutsis and those attempting to flee. Within 100 days, approximately 800,000 Rwandans of Tutsis and the moderate Hutus were butchered in homes, streets, churches, and in the hospitals in the context of a civil war due to the struggle over power and wealth. These tragic events shocked the world. It was the violent apex of a country history marked by a struggle grafted on to the Hutu–Tutsi ethnic divide that marks the Rwandan socio-political landscape (Peskin,2005; Ingelaere,2008; Ehling,2018). While the insecurity affected all people during these years of conflict, the Tutsi were those most often targeted. Immediately after the war start in 1990 a significant number of Tutsi were arrested, and massacres of Tutsi civilians were instigated. This echoed the revenge killings in 1993, and it established patterns for the genocide of 1994. It is important to note that the Hutu peasantry who became involved in the genocidal campaign to track down, pillage and kill their Tutsi neighbours, also became victims of the violence (Ingelaere,2008).

On 4 July 1994 the RPF – Rwandan Patriotic Front army – took over power and ended the genocide. The defeated government and its armed forces fled to the neighbouring Democratic Republic of the Congo (DRC) that caused regional instability and insecurity for years to come. The consequence was that despite the end of the genocide, violence remained the order of the day in Rwanda. From 1996 onwards, after the camps in the DRC were dismantled, the defeated government forces and the militia attacked northern Rwanda in what came to be known as the war of the infiltrators, in which thousands of civilians were killed (Ingelaere,2008).

The RPF as the military victor was able to set the agenda for post-genocide Rwanda without much restriction. President Paul Kagame has repeatedly indicated that he ‘wants to build a new country’ where Rwandaness, not ethnicity, should define relations between state and society. The RPF can be seen as aiming to create the true Rwanda. Building or re-establishing this unity of Rwandans requires eradicating the genocide ideology. By the end of the 1990s, an element of reconciliation had begun to dominate the post-ideological framework (Ingelaere,2008). According to Denney&Domingo (2017) Rwanda is one of the early experiences of the formally sanctioned use of local justice practices. Such traditional practices – Gacaca is one of them – derived from the Rwandan socio-cultural fabric were needed to replace imported mechanisms. The choice of the Gacaca courts fit perfectly into this vision (Ingelaere,2008).

**2. The** ‘**Gacaca courts**’

The ‘Gacaca courts’ applied in the aftermath of the 1994 genocide as a mechanism for dealing with the past has attracted worldwide attention. These courts, despite being subject to procedural criticisms, were Rwanda’s main transitional justice instrument (Ingelaere,2008; Denney&Domingo,2017; Ehling,2018). Once the RPF had taken control of Kigali, it began to establish a new government (Ehling,2018). The new government of Rwanda inherited a completely collapsed state, with a destroyed infrastructure, and a traumatized and impoverished population (Bloomfield et al.2003). Ehling (2018) argues that the immediate hindrance to achieving justice was a near total collapse of judicial infrastructure. According to Ehling (2018, p.11), “only 12 prosecutors remained alive in the country.”

Eight years later, many of the state institutions and the economy have been rebuilt, at times better than they were before. However, the giant rupture in the social fabric of Rwanda has not been repaired. Achieving reconciliation, peace and justice remains the great challenge for Rwanda. The new government argued that unless the culture of impunity ends in Rwanda, the violence would never end. Although some donors were interested in the South African truth and reconciliation model, the Rwandan government firmly rejected this. It has argued that only when the offenders had been punished would it be possible for the victims and their families to create a joint future together (Bloomfield et al.2003).

Therefore, the Rwandan government and donors invested heavily in the re-construction of the justice system. Many justice-related projects have been funded; supplying technical assistance to the Ministry of Justice and the Supreme Court; funding the construction of courts and prisons; training lawyers, judges, investigators and policemen; supporting court procedures; and paying for vehicles and fuel. As a result, the quality of trials has improved over the years as verdicts have become more accurate, but the quality of the justice delivered is deficient because of some serious problems such as political pressure, corruption of judges, instances of investigative bias, intimidation of witnesses, and weak or absent defence counsel. Other major problems are time and quantity: at the current pace, the trials of around 130,000 persons who are accused of participation in the genocide and currently imprisoned would take more than a century to finish (Bloomfied et al.2003), where according to Allen&Macdonald (2013) only fifteen judges were able to oversee their trials. Those awaiting trial are often detained in horrendous conditions where more of them die in Rwanda’s prisons each year than are judged. This is socially, economically and politically very expensive for the Rwandan government and society. Allen&Macdonald (2013) reported that the United Nations Security Council had set up the ICTR in Arusha, Tanzania in November 1994. However, the court was seen as too slow, too expensive and too far removed from Rwanda, which had led to the feeling of frustration with it.

Senior Rwandans began thinking about alternative mechanisms of dealing with this challenge. From mid-1997, discussions grew, resulting in adopting a time-honored tradition of conflict resolution mechanism at the local level called ‘gacaca’ communal trial system by the Rwandan government as part of efforts to deal with the incredibly large numbers of the alleged perpetrators, who were languishing in overcrowded prisons, accused of the crime of genocide and other crimes against humanity, committed between 1 October 1990 and 31 December 1994 (Bloomfied et al.2003; Ingelaere,2008; Denney&Domingo,2017; Ehling,2018). According to Ingelaere (2008), Hulme (2014) and Denney&Domingo (2017) the word ‘Gacaca’ literally means in Kinyarwanda ‘justice on the grass’. This is because people sit on a plant so soft that they preferred to gather on it. The main goal of these gatherings was the restoration of social harmony.

Between 2002 and 2012, the gacaca courts have been rolled out throughout the country, with nearly two million people tried by such tribunals (Denney&Domingo,2017). They composed of judges who were elected by the inhabitants of local districts and provinces. Judges must be of high moral standing, non-partisan and not related to accused persons (Bloomfied et al. 2003; Hulme,2014). A number of local community members were selected and trained to serve on committees in 11,000 jurisdictions (Clark,2010). The Gacaca courts, thus, are a home-grown resource: these institutions are meant to fight genocide; to establish the truth about what happened; to eradicate the culture of impunity; to speed up the trials and empty the prisons; to focus on the more senior and powerful of the accused; to involve the community in establishing the truth; social healing; to reconcile Rwandans by re-enforcing unity; and to use the capacities of Rwandan society to deal with its problems through a justice based on Rwandan custom. They are seen as part of what is called ‘the building of a democratic culture’ because it involves consensus and public participation (Clark,2010; Bloomfied et al.2003; Ingelaere,2008). It can be argued here that this an important point regarding local justice when it helps people to build and practice democracy.

The Gacaca system constitutes an unprecedented legal-social experiment in its size and scope (Bloomfied et al.2003). It was a handy justice mechanism to relieve the pressure on the ordinary court system, freeing them to handle more serious cases (Ingelaere,2008; Hulme,2014). There were no lawyers: after hearing the arguments of both sides, judges (Hulme,2014, p.9) “were given leeway to decide any punishment they wished within certain boundaries.” However, despite the introduction of some formal elements and its instrumental relation with the judicial structures, the informal and conciliatory character of the Gacaca system had remained since decisions were to a great extent not in conformity with written state law. The judges come to a decision on the nature of the restitution. It is important to note that restitution for the offences has no legal basis, only a customary basis (Ingelaere,2008; Hulme,2014). Sentences did not include prison, because what punitive action may be taken by Gacaca proceedings is aimed at rehabilitation of perpetrators into their communities, rather than at punishment directed at satisfying legal principles like proportionality; instead, offenders might have had to pay reparations, fines or provide the community with banana beer.

The aim of my discussion here is to explore how does the gacaca system work and whether it would be able to achieve its aims, what are its merits and limitations. All prisoners **–** except those accused of category I crimes like genocide, torture or rape **–** will be brought before the court in the community where they are alleged to have committed a crime. The entire community will be present and act as group, discussing the alleged acts and providing testimony and counter-testimony. One of the innovative elements of the gacaca tribunals is the confession procedure (Bloomfied et al.2003; Hulme,2014). People in many parts of Africa live in a social world that traditionally practises the belief that the killing of human beings through traumatic acts is an offence that requires immediate redress through atonement rituals. If crimes are not acknowledged, the spirit of the victim will return to the realm of the living to fight for justice (Ingelaere,2008). Perpetrators can receive dramatic reductions in punishments – mentioned above – if they confess and ask for forgiveness before the proceedings against them start, either while in jail or before the gacaca proceedings, when they are explicitly asked if they want to confess. The reductions of penalties are smaller for those who confess only during the gacaca procedure. For those who do not confess at all but are found guilty, sentence is unchanged. In addition, up to half of the punishment of each convicted person can be turned into community service, if the accused asks for forgiveness publicly. Finally, for survivors of genocide, the gacaca law greatly simplifies the reparation procedure for all the damages they suffered, which include destruction of property, physical harm or loss of relatives and providers. When the gacaca procedure regarding damages is completed, the victims or their families receive a statement of their losses and can use this to receive reparations from a public fund which will be established for this purpose (Bloomfied et al.2003). Buckley-Zistel et al. (2014) argue that some Rwandans talked about the importance of compensation in promoting peace and reconciliation. They believed that people cannot forget and live peacefully together with wrongdoers. They therefore need reparations of their material possessions that were stolen or burnt in order to be able to reconcile.

It could be argued that the gacaca proceedings have the potential to produce great benefits. The gacaca system may be able to achieve transitional justice objectives much better than the formal justice system. Given around one-quarter of the adult population was suspected of atrocities during the war, it may solve problems of the current slow judicial practice: with large numbers of tribunals, it should be possible to judge all prisoners over a much shorter period of time (Bloomfied et al.2003; Ehling,2018). More important, given the central role played by local communities, the importance attached to popular participation and acceptance, its relatively simple and recognizable procedures, and its decentralized nature, the gacaca ought to be much better at involving the entire community, including victims. Therefore, it is potentially more victim-centred, and may thus have a more profound impact in achieving reconciliation (Bloomfied et al.2003). As Ehling (2018) argues, this simplified system may have held the key to reconciliation specifically because the public were given an open forum to speak their truth, suffering and stories in their own communities and in their own language. The gacaca system provided a practical and culturally relevant method toward reconciliation, especially when the majority of punishments were reduced to ‘community service’, which mostly included rebuilding homes for survivors. Through the process of local discussion and truth-seeking, the gacaca proceedings may well develop a fuller picture of massive violations that occurred and the responsibilities of different people. With its requirement for complete confession, including the names of all other people implicated in the crime, it is likely to lead to significant debates as people seek to contextualize events, explain themselves, involve others and so on. Hence the gacaca system could provide more truth than the formal justice system has so far managed to do. Finally, the community service commutation option brings significant reductions in length of prison sentences, which allows many people to finally re-join their families and get on with life (Bloomfied et al.2003).

However, according to Bloomfied et al. (2003), the gacaca system suffers from significant limitations. A common criticism in the literature is the problem of the lack of due process (Hulme,2014). One may argue that it compromises on principles of justice as defined in internationally-agreed human rights and criminal law. No legal counsel, no separation between prosecutor and judge, no legally reasoned verdict, and a potential for major divergences in the punishments awarded. In other words, the gacaca system seems to provide inadequate guarantees for impartiality, defence and equality before the law. As a result, many legal specialists and human rights observers have been highly sceptical about the gacaca courts (Bloomfied et al.2003). However, the alternatives they suggest, such as guaranteeing the right to legal counsel, ultimately end up reinventing the same formal justice system which is clearly not appropriate for the reasons mentioned above. At the same time, some real arguments have been proposed which may be adequate to defend the gacaca system even from within a human rights perspective. The practice of formal justice also violates human rights. For example, the basic right to a speedy trial, decent conditions of detention and reasonable detention times is being violated under the current practice. This practice has been maintained for years with massive international assistance, and no one has any credible ideas about how to change this. Additionally, about 60 per cent of those brought to justice so far have not had legal counsel, and even if where they did have a legal counsel, in many cases this counsel was of low quality as were the investigators, prosecutors and judges (Bloomfied et al.2003). Igreja (2007) argues that although the gacaca system has been widely criticised for the lack due legal procedures, it demonstrates the prospect of various types of legal orders in addressing mass violations such as grassroots justice.

Bloomfied et al. (2003) have added that in the aftermath of mass violence, full formal justice and complete adherence to human rights standards may be impossible. All this is compounded by conditions of extreme poverty, continued civil war and the absence of a strong and independent justice system such as the case of Rwanda. Hence, it is possible to argue that the gacaca constitute a locally appropriate, and popularly legitimate, form of justice, with a higher potential for contributing to truth and reconciliation. Because of difficult circumstances of post-war countries, it may worth sacrificing fairness through rule-of-law trials for the sake of other benefits. For instance, while there is no legal counsel, the play of argument and counter-argument and of witness and counter-witness by the community is a fair defense, possibly leading to better results than the formal justice system has until now been able to achieve. Similarly, if one accepts that people largely know the truth about who did and did not kill, how and why, the gacaca system is a superior tool to that which the formal justice system has produced. Research results suggest that prisoners, the survivors and all Rwandan communities overwhelmingly favour the gacaca system. There is strong evidence that prisoners, in particular, are largely in favour of gacaca. Admittedly, people who are imprisoned for many years in horrendous conditions are likely to be willing to try anything to get out of jail. Since the public discussions about the gacaca law began, confession rates have skyrocketed which is giving a certain legitimacy to the idea of gacaca. The great majority of the population, both Hutu and Tutsi, also prefer the gacaca process. They judge that under current conditions the gacaca system is superior to the formal justice practice. For these reasons the international community and many human rights organizations have decided to cautiously support the process.

**5.2.3. The case of Northern Uganda**

**1. Brief outline of Acholi society**

The conﬂict began in the Acholi region of northern Uganda soon after Yoweri Museveni seized power from a principally northern government in 1986. The civil war in northern Uganda between the government of Uganda and the Lord’s Resistance Army (LRA) has resulted in mass human rights violations (Branch,2014;Denney&Domingo,2017). The LRA soon became infamous for its massacres and the forced recruitment of thousands of Acholi, many of them children (Branch,2014). According to Branch (2014) and Denney&Domingo (2017) up to 75,000 children and adults were abducted by the LRA and recruited into the Ugandan army and local militias. The Ugandan government’s response was also brutal, and thousands of Acholi, who suspected rebel support, were killed by direct state violence. In addition, the government forcibly displaced the entire rural Acholi population in 1996. More than 1 million people have been driven from their homes and into internment camps by a campaign of threats, bombing and burning down entire villages. As Baines (2010, p.410) argues, “The methods of violence employed in this conﬂict – forcing children and youth to join armed groups and often to exercise power, control, and brutality against families and neighbours – coupled with the breakdown of ‘traditional’ kinship networks and relations in camps, have resulted in the erosion of social trust and morality.”

The conflict did not end until 2006, when the LRA departed from Uganda, and the dominant discourse in the north shifted to one of reconstruction and justice (Branch,2014). Despite the fact that there were calls for prosecuting the leaders of the LRA, Joseph Kony in particular, for their crimes against humanity during the conflict, transitional justice has largely been pursued through local justice practices as part of reconciliation and reintegration efforts (Denney&Domingo,2017). Debates over justice arose about the intervention of the ICC. A number of divergent demands were heard: that the ICC prosecute all parties involved in the conflict, that the ICC leave Uganda, that a mixed of national and international trials be used, that a truth commission be established, or a blanket amnesty be guaranteed. However, the position that received the most attention was voiced by Acholi activists, traditional leaders and political leaders who demanded that legal procedures should be replaced by Acholi traditional justice approach (Branch,2014).

As elsewhere in Africa, research in northern Uganda has shown how rituals and ceremonies are used to interpret the experience of misfortune, and to re-establish social relations. These rituals and ceremonies have become important at particular time and circumstances. More recently in northern Uganda, in the context of efforts to establish peace and reconciliation after twenty-year conflict between the Government of Uganda and the LRA, there have been moves to codify local rituals, especially those that draw on traditional Acholi **–** a Luo speaking tribe occupying northern Uganda **–** values and institutions (Brock-Utne,2001). For the activists, traditional leaders and religious leaders advocating this, the reasons were as follows Firstly, the conflict had led to a collapse in traditional social values that needed to be restored. Secondly, they thought that decisions about reconciliation, peace and justice should be made by the victims and not by the Ugandan government or by foreign institutions, such as the ICC. This approach was subsequently articulated vigorously in the peace negotiations between the Ugandan government and the LRA in Juba, formalised in the 2007 Agreement on Accountability and Reconciliation, that listed Acholi rituals as part of transitional justice efforts in Uganda alongside the High Court and a possible truth commission (Allen&Macdonald,2013).

The issue of warrants of arrest for Lord’s Resistance Army rebel leaders, Joseph Kony, and another four high-ranking LRA commanders on charges of war crimes and crimes against humanity, and the referral of the Northern Uganda conflict to the ICC in 2003 have sparked considerable controversy in Uganda and in the international sphere. On the one hand, proponents of prosecution by the ICC accusing supporters of traditional justice of condoning impunity, and they argue that individuals who committed gross human rights abuses should be punished for the sake of justice and combat of impunity. On the other hand, proponents of traditional justice accuse the ICC of prolonging the war and imposing Western ideas of justice upon the Acholi, and they argue that the ICC should give peace a chance, as saving civilians is more important than judging offenders (Katshung,2006;Branch,2014). This group prefers traditional justice to the ICC. They argue that modern justice will have a negative impact on the peace process in Northern Uganda. For this group, the arrest warrants would make further peace negotiations impossible with the LRA leaders, who refuse to be involved until the charges have been dropped and the arrest warrants have been revoked. They argue that the withdrawal by the ICC would not mean the end of accountability, but the beginning of indigenous justice processes (Katshung,2006). The majority of Acholi recognize that most combatants in the LRA were forcibly abducted and have themselves been victims, this creates a moral empathy with the offenders, and recognition that the criminal justice system is not sufficiently nuanced to make the necessary distinctions between legal and moral guilt. As a result, most Acholi have decided to promote reconciliation through traditional mechanisms, ‘Mato Oput’ in particular, rather than achieving retributive justice, to create conditions to end the conflict and reintegrate the community (Afako,2002).

However, there are always tensions between the requirements of the criminal justice system and those of non-punitive approaches to massive violations of human rights. Ending wars and peace-building is an absolute priority for today's victims and for future generations. However, insisting on criminal trials may undermine peace efforts. Katshung (2006) addresses the conflict between peace and justice issue that has come out in debates about the relationship between the ICC and traditional justice forms, specifically the ‘Mato Oput’. While he sees the advantages of using traditional mechanisms, he also points out the potential danger of using these mechanisms as an excuse to avoid moral and legal accountability. One could ask whether the ‘Mato Oput’ is designed to generate truth, justice, reparations, and genuine institutional reform or whether it is an attempt by Uganda to justify or disguise impunity. Someone could say that the purpose of this traditional mechanism is just to shield some offenders (Kony and others). If the goal of this process is to evade the State and society’s legal, ethical and political obligations to their people, it will violate international law and will not be in the interest of justice and society as a whole. If this were to be the case, thus, it should be rejected.

Therefore, one should examine how to use the traditional form of justice named ‘Mato Oput’ instead of the ICC, give that it is the typical mechanism of balancing peace and justice in Uganda, and whether the ‘Mato Oput’ mechanism implies good faith. Answers to these questions can be found in the design of the process itself, but also in the degree of participation and consultation, trust, credibility and transparency that surrounds this ‘Mato Oput’ mechanism (Katshung,2006).

**2.** ‘**Mato Oput**’ **as a traditional Acholi justice practice**

According to Quinn (2007) Uganda has experimented with a number of transitional justice mechanisms since 1986. The Commission of Inquiry into Violation of Human Rights worked to collect information about the violations committed between 1962 and 1986. In 1999, the Government of Uganda passed the Amnesty Act, which guarantees amnesty to those who had been involved in any conﬂict between 1986 and 2000. However, Yoweri Museveni **–** President of Uganda **–** was displeased by this amnesty, and he formally requested the ICC to investigate the actions of the Lord’s Resistance Army in northern Uganda in 2003. This impractical combination of mechanisms is unmistakably undermining the process of peacebuilding. As a result, the Ugandan truth commission had been beset by any number of shortcomings. There is no evidence of its success in promoting the process of acknowledgement. Instead, it seems likely that some of the traditional practices might be capable of producing this kind of acknowledgement, providing a strong system of reconciliation outside the formal justice mechanisms imposed by the Western world. While the Western models often allow for only one form of justice **–** punitive, restorative, or reparative **–** these local mechanisms seek to combine various of these forms of justice, and other elements in keeping with the values of the community.

Quinn (2009b) argues that in fact rebuilding society, both physically and socially, after long periods of conflict is a very difficult task. Ugandan society, however, is rich with traditional practices, symbols, rites and ceremonies, one of which is explored below, that could be useful in solving conflict and rebuilding society. Quinn (2007, p.402) reported that “everyone respects these traditions.” A common understanding of these symbols, rites and ceremonies and their meanings, remains prevalent throughout Uganda. Therefore, it can be argued that the promotion of these mechanisms frequently discussed by those working to resolve conﬂict ought to be a priority. When transgressions occur during the conﬂict such as murder and rape, all relationships between the families of offenders and victims and their communities stop and cannot be restored until reconciliation is achieved. A central focus is on appeasing ancestral spirits linked to particular clans that oversee the moral order. When such transgressions occur, these spirits can send misfortune until the clans restore social relationships and unity. In order to appease ancestral spirits and reconcile people, local cultural practices can be used. The most documented term that used to denote reconciliation process in which social harmony is restored through recognition, repentance, apology, and forgiveness and by which ancestral spirits are appeased is ‘Mato Oput’ (Denney&Domingo,2017).

‘Mato Oput’ is one of the mechanisms for forgiveness and reconciliation among the Acholi people in Northern Uganda, which in the Acholi language literally means to drink a bitter potion made from the roots of the ‘Oput’ tree. The bitter drink has no medicinal effect. It only symbolises the psychological bitterness that is felt by the parties in a conflict situation. After the offender recognises and accepts responsibility for the crime and the victim’s family has granted forgiveness, a special ceremony is performed. But it is not a happy ceremony, the mood of all present expresses the seriousness of the occasion (Brock-Utne,2001;Katshung,2006). This ceremony involves the aggrieved parties meeting on neutral ground and slaughtering a cow or bull and goat to share a meal, and both perpetrator and victim (or victims’ family members) drink ‘Mato Oput’ out of a shared bowl. The drinking of this bitter ‘Oput’ root juice symbolises swallowing one’s anger and the reconciliation of the families. It means that the conflicting groups bury the bitterness of the past and promise never to taste such bitterness again (Brock-Utne,2001; Katshung,2006; Denney&Domingo,2017). This ceremony is conducted with the whole clan present as a collective reconciliation process. After the parties drink the bitter juice, the ‘Mato Oput’ ceremony ends with another Acholi ritual, Gomo tong (bending of spears), which is a practice especially relevant to inter-clan disputes (Igreja,2007; Denney&Domingo,2017). These spears from each party are “bent and made useless, and then passed on to the former enemy as a proof that ﬁghting can never again be allowed between the two groups.” (Denney&Domingo,2017, p. 220). Gomo tong symbolises the reconciliation and the ending of hostilities between the parties (Igreja,2007).

Compensation payment follows the ceremony. Victims or their families are compensated for the harm done, in the form of cash or cows. But is such kind of reparation enough to satisfy people? It is believed by many Acholi that ‘Mato Oput’ can bring true healing much more effectively than the formal justice system. It does not aim at determining whether an individual is guilty or not, rather it seeks to restore the social harmony in deeply divided communities (Katshung,2006; Brock-Utne,2001). According to Lanek (1999), the Acholi approach contrasts with the western legal approaches. The Western approaches, where evidence must be direct and specific, emphasise establishing guilt and executing punishment without reference to the victim or the families or future reincorporation of the perpetrators into the community. The use of force, including costly prisons, and physical and material penalties effectively encourage the accused to deny responsibility while the Acholi approach of conflict resolution and reconciliation is co-operative and can be indirect effectively encouraging the accused to admit responsibility.

The implication is that in certain circumstances such ritual which have deep roots in the local cultures may be more important to reconciliation than truth (Kelsall,2005). As Quinn (2007, p.402) argues, reconciliation continues to be an “essential and ﬁnal part of peaceful settlement of conﬂict.” The ‘Mato Oput’ ritual has the reconciling of victims and offenders in the wake of conflict as its main goal (Kelsall,2005). Latigo (2008, pp.107-108) argues that ‘Mato Oput’ “is predicated on full acceptance of one’s responsibility for the crime that has been committed or the breaking of a taboo. In its practice, redemption is possible, but only through this voluntary admission of wrongdoing, the acceptance of responsibility, and the seeking of forgiveness, which then opens the way for healing.” In short, the ‘Mato Oput’ process involves: the guilty acknowledging responsibility; the guilty repenting; the guilty asking for forgiveness; the guilty paying reparations; the guilty being reconciled with the victim's family through sharing the traditional drinking of a bitter herb (Mato Oput). The immediate objectives of such mechanisms are to mend the damaged relationships, rectify wrongs, restore justice and ensure the full integration of all parties into their societies again (Brock-Utne,2001).

The question is: is ‘Mato Oput’ appropriate to deal with gross violations of human rights? Afako (2002) states that the unacceptably high costs of unending civil war have caused Ugandans to re-assess approaches to resolving conflict. Their bitter experience has generated a remarkable commitment to a peaceful settlement of the conflict and reconciliation rather than calling for retribution against the offenders. This call for amnesty was supported by their faith in the capacity of the community and cultural institutions to manage effective reconciliation even in the cases of serious offences. According to Katshung (2006) ‘Mato Oput’ as restorative justice employs integral responses that focus upon redressing the harm to the victims, holding perpetrators accountable for their actions, restoring relationships between people, engaging the community, victim and perpetrator in a conflict resolution process, restoring rights that have been abused, trust building and reconciliation. It is forward-looking and is based on values of respect for all participants. Kelsall (2005, p.363) argues that the ritual “created an emotionally charged atmosphere that succeeded in moving many of the participants and spectators, not least the present author, and which arguably opened an avenue for reconciliation and lasting peace.” It can be, thus, argued that the lesson we can learn from the experience of Uganda that the peace and reconciliation process could start from below (the community). Anything that comes from below can have a better chance. Anything that comes from above (that is, from the authorities) will be questioned by the people (Quinn,2009b).

To sum up, the process of peace and reconciliation **–** as mentioned above **–** is preceded by discussion and truth-telling. Quinn (2007&2009b) argues that acknowledgement of the past injustices is a particularly important step in the process of rebuilding divided transitional societies. More precisely, it is the one stage through which any successful process of societal recovery must pass. Acknowledging the past crimes can lead to the rebuilding of a viable democracy, the restructuring of the judicial system, and enhancing the participation of civil society, all of which may lead to restoring the social trust between community members and, ultimately, reconciliation. He confirms that there is a strong and causal relationship between acknowledgement, forgiveness, social trust, reconciliation and democracy.

Once acknowledgement has taken place, genuine forgiveness can then occur. This is not to suggest that the victim will necessarily be able to forget what happened, or that the wounds and pain disappear magically. Rather, the victim is granted some measure of comfort through the process of forgiving. The carrying of grudges and bitterness that come with unforgiveness are the stuff which keeps acknowledgement of the truth from having any meaningful impact. Through the establishment of such social interaction the victim is able to start again to pursue relationships of friendship, create bonds of trust, and begins to participate in social organizations. Trust is an essential element in re-building the society. It has been identified as a functional prerequisite for the possibility of a society. It also been identified as fundamental factor that must exist to strengthen reconciliation. In short, forgiveness through acknowledgement makes possible the establishment of the bonds of trust and restoring social relationships, which promote those democratic goals sought by transitional societies (Quinn, 2007&2009b).

**5.2.4. The case of Mozambique**

**1. Historical background**

Portugal's colonization of Mozambique began in the 1930s. The Mozambican people were exposed to colonial violence which took the form of forced labour. While the Portuguese were granted full rights of citizenship, the indigenous population of Mozambique were deprived of social, economic, political and cultural rights. In the early 1960s Frelimo started an armed struggle for independence of the country. This violent conflict would continue for almost three decades. The war against colonization lasted for ten long years (1964–74). Mozambique gained independence from Portugal in 1975 through the Lusaka Peace Agreement between Frelimo and the Portuguese authorities (Igreja&Dias-Lambranca,2008). However, peace was short-lived, as a civil war between the adherents of the Frelimo led governmental troops and the former rebel movement Renamo started. The Mozambican civil war that lasted nearly two decades (1976–92), was one of the bloodiest civil wars in Africa, where extreme ruthless events occurred (Igreja,2007;Thompson,2016). Both conflicts caused overwhelming disruption and destruction in Mozambique. However, survivors agree that the civil war was incomparably worse in terms of the extent of the human and physical devastation (Igreja&Dias-Lambranca,2008).

Although the war was spread all over the country, residents of rural areas were most affected because their regions were the main battlefields. A culture of peace was entirely replaced by a culture of war. The war destroyed the country’s socio-economic infrastructure. It also created relations of hatred between family and community members (Igreja,2007). Many villages were burned, and many innocent civilians were tortured and killed. According to some observers the number of people killed during the civil war was around 100,000. Young men were recruited by both Renamo and government troops to fight. They were forced to destroy their own villages and kill their relatives. Family members were forced to spy on one another, leading to the torture and killing of many kin. Social relations, trust, solidarity, mutual support, and respect for taboos were severely eroded (Igreja&Dias-Lambranca,2008).

The General Peace Agreement between the Front for the Liberation of Mozambique (Frelimo) and the former rebel movement the Mozambican National Resistance (Renamo) that was signed on 4 October 1992, in Rome, Italy, brought an end to this very bloody civil war. The peace agreement brought immense socio-political and economic changes (Igreja,2007; Thompson,2016). The pluralistic constitution of 1990 was established which created multiparty democratic system and a market-oriented economy. Although the peace agreement brought enormous relief to the victims, from a transitional justice perspective the Mozambican government did not develop any specific policy or program aimed at reparation of victims while dealing with perpetrators of violations during the civil war. It had focused on national reconciliation and peace building. Therefore, the government and many war survivors urged the victims, after much abuse, torture and killing, to ‘forgive and forget’ the horrors that they had lived through and to simply move on. There has been almost no focus on accountability for past crimes (Igreja,2007; Igreja&Dias-Lambranca,2008; Thompson,2016). Igreja (2007, p.3) argues that the only reference to justice was the emphasis placed on “you shall not take revenge upon your fellow man.” Just two weeks after the peace agreement was signed, the Mozambican General Assembly issued Law 15/95 which grants amnesty to all individuals that committed crimes during the war (Thompson,2016).

However, despite the practices of denial and abandonment, the victims and survivors were not without hope. By using their local resources (Christian religious beliefs and socio-cultural practices), they were able to start the task of repairing their lives. They have given more attention to the historical and ritual ceremonies which had allowed for healing of fractured communities. These resources and practices have played a significant role in dealing with the legacies of civil war. The next part of this chapter focuses on the ‘Magamba Spirits’ as one of the traditional practices of Mozambican people that take the form of restorative justice in the aftermath of the civil war. The people of the Gorongosa district used this mechanism as a means of resolving these injustices and preventing the revenge (Igreja&Dias-Lambranca,2008; Thompson,2016).

**2. ‘Magamba Spirits’ in Gorongosa**

As a result of cultures of denial, as is demonstrated above, in Mozambique, the plight of the victims was disavowed. The consequence of the strategy of denial was that the victims and offenders had to live in the same villages where most of the crimes and abuses had taken place. The debates on transitional justice suggest that this type of settlement after the conflict may lead to further violence as a form of reckoning with war crimes. However, as we will discuss below, such acts of violence did not take place in Gorongosa. It can be noted that one of the most important ways of addressing the abuses in Gorongosa is the process of using of restorative justice by ‘Magamba Spirits’ and magamba healers (Igreja&Dias-Lambranca, 2008).

The ‘Magamba Spirits’ are the only post-war phenomenon that relates closely to transitional justice in Mozambique. This is because they deal with past violations in order to create healing of war wounds. They also establish public meetings in open spaces where restorative justice is practised in a context of the transition from a civil war to peace (Igreja&Dias-Lambranca,2008; Thompson,2016). According to Igreja&Dias-Lambranca (2008, pp. 61-62) “Magamba are generally the spirits of dead soldiers who return to the realm of the living to fight for justice. In their varied meanings and manifestations, magamba both heal war-related wounds and play a pivotal role in the attainment of restorative justice among the survivors of war.”. Gamba is the name of a spirit, and also a healer that specialises in gamba afflictions (Igreja,2007).

‘Magamba Spirits’ play an important role in society. They are particularly prominent in the Gorongosa region of Mozambique. People in Gorongosa, as in many other parts of Africa, traditionally practise the belief that the death of individuals through violent acts is a crime that requires immediate redress through atonement rituals. If crime is not acknowledged, the spirits of the innocent victims will return to the realm of the living (culprits, their relatives and society as a whole) to struggle for justice. The gamba spirit embodies this value, extreme suffering will never end unless they are properly addressed. ‘Magamba Spirits’ can possess anyone in Gorongosa so long as he/she has a history of abuse, trauma and victimization through murder. Although the possession by ‘Magamba Spirits’ brings severe health and social afflictions in the life of the victims or their families, the spirits also create the possibility for healing to take place. They bear witness in multiple forms to the crimes that occurred during the civil war. Magamba healers have bayonets, which are said to be those found attached to the Kalashnikovs (AK-47s) that were used many times in the past to stab and kill people. Magamba healers often argue that, if the spirits have to be dealt with, the past crimes cannot be ignored. There is a need to find out what injustices were done, to acknowledge the wrong and to repair the harm (Igreja &Dias-Lambranca,2008; Thompson,2016).

When any gamba healer receives a patient, who is in need of ‘ku socera’ (a diagnosis ceremony) in his/her house, the healer beats a drum to tell the neighbours about the ceremony. The neighbours come to the healer’s house in the night to help perform ‘ku socera’. In a diagnosis and healing session, the patient is placed sitting in the middle of the participants, while they sing songs to evoke the events of the war, suffering and death. The healer enters a trance, holds his/her bayonet and begins re-enacting events of the civil war. It is believed that the re-enactment of the violent past by the gamba spirit can restore the dignity of the survivors and achieve healing, reconciliation, justice, and peace (Igreja,2007;Igreja&Dias-Lambranca,2008).

‘Magamba Spirits’ and healers reinforce these values. The healer starts to crawl, shoot, run, smoke nbanje (cannabis) and drink alcohol. The main aim of these movements performance is to trigger fear and empathy feelings in the patient in order to induce the state of possession. The patient begins to be hyper-aroused, making uncontrolled movements, while the participants start screaming loudly to call upon the spirit to manifest itself. Before the spirit manifests itself, the patient gives a loud scream as if he/she is being hurt. In this session, the patients become violent in their body movements and speech. The Gorongosa theory is that the spirit is returning to take revenge for past crime. When the gamba spirit subsides, the healer then returns to his or her normal state. The focus is on the patient who is possessed by the spirit. This spirit begins disclosing what happened to him/her so that all participants can hear. When the gamba spirit is ready to make the indictments, the gamba healer acts as a mediator in the public deliberations in order to reach a settlement (Igreja,2007;Igreja& Dias-Lambranca,2008).

De Bortoli (2014) argues that the use of traditional justice practices in the case of Mozambique has been a great success in healing war-related wounds and achieving reconciliation and peace. In fact, according to De Bortoli (2014), Igreja& Dias-Lambranca (2008) and Thompson (2016), the ‘Magamba Spirits’ more specifically created a social avenue to break down the walls of silence that the government and many survivors had built in order to deny and to forget the past. It allowed individuals, families and communities to come together to address the past violations. Inspired by their own wisdom, the survivors in Gorongosa managed to develop their own socio-cultural mechanisms to overcome the past abuses. Such indigenous mechanisms with the local ownership of such methods provided the opportunity for healing, justice, reconciliation, and communal stability in one of the epicentres of the civil war.

From a political perspective, the ‘Magamba Spirits’ are not a response to the failure of the state to provide accountability measures as part of a transitional justice process in the aftermath of the conflict. They are part of the development of well-established local tradition of dealing with the violence, which allows war-torn societies to contain violence, re-establish the state institutions, re-establish and produce trust, foster a sense of continuity and communal identity. However, it is important to note that ‘Magamba Spirits’ like other informal justice mechanisms run the risk of political /governmental manipulation by national elites. For example, those elites can use the success of magamba spirits and healers as arguments to justify their option for amnesty, impunity and silence (De Bortoli,2014;Igreja&Dias-Lambranca,2008;Thompson, 2016).

**5.3. An assessment of the use of local justice mechanisms in transitional societies**

I have argued in this chapter that many communities around the world use various strategies and mechanisms based on custom or tradition to bring, peace, justice and reconciliation, some of which have been discussed above. Latigo (2008) argues that local initiatives that have been used in some countries have provided useful lessons in efforts to pursue reconciliation and social harmony. Recently, the traditional systems of conflict management have become the hope to help break an apparent impasse in the peace process. According to Bloomfied et al. (2003) informal mechanisms of justice may complement and even replace more formal and punitive mechanisms of dealing with past violations and achieving reconciliation. However, many doubts remain about such mechanisms. They argue that although there are strengths of the traditional dispute settlement mechanisms, awareness of the many weaknesses was not lacking. This section will try to examine the strengths and the weaknesses of informal justice systems.

**5.3.1. The strengths**

The strengths of local mechanisms are:

(1) That they are understandable, culturally comfortable, accessible and cheap. The informal processes and proceedings are usually much simpler than formal legal proceedings. They are usually conducted in the local language and follow local customs; therefore, people are likely to be more comfortable in these settings. Moreover, in countries that were colonised, laws were subordinated to Roman or common law systems. Therefore, the majority of the population may see the formal justice system as something foreign to them as compared to the customs with which they are familiar. In addition, local justice systems are usually close to the people, and they are usually free or affordable (Wojkowska,2006). For instance, ordinary Rwandans prefer the Gacaca courts over the classical criminal tribunals for dealing with the genocide crimes. For ordinary peasants the criminal courts are both physically and psychologically remote institutions (Ingelaer,2008). It could be argued that, thus, the main reason of the power of local mechanisms is that they work in communities that are relatively homogenous, linguistically, culturally and religious.

(2) Swift solutions. Because of the delays of drawn-out procedures that so often characterise the formal justice system, people prefer informal justice system processes based on the belief that delaying justice is a denial of justice (Wojkowska,2006). For example, while criminal trials, as has been argued above, will take long time in dealing with approximately 130,000 persons, the Gacaca proceedings are speeding up the backlog of genocide-related cases and handle the thousands of accused (Ingelaer,2008). More importantly, local mechanisms can act as a temporary alternative in cases where formal justice systems are absent, delayed or crippled by political and practical limitations. Gacaca meetings, for example, were held immediately after the genocide ended, years before Rwandan government determined its policy. Also, the ‘Magamba Spirits’ practice in Mozambique has shown that it is able to deal with the effects of civil war such as property conflicts when refugees return (Huyse,2008).

(3) Focus on reconciliation and social harmony. The aim often is not just to punish the offenders, but to compensate victims for their loss, to prevent the perpetrator from committing the crime again, and to reintegrate both the victim and perpetrator back into the community. Therefore, the approaches that promote these objectives may be the most appropriate option for people living in a close-knit society, and they rely on continued social and economic cooperation with their neighbours (Wojkowska,2006). The ‘Magamba Spirits’ ceremony in central Mozambique is strong proof of how such a practice can bring about reconciliation (Igreja&Dias-Lambranca,2008). Latigo (2008) also says that the conflict in northern Uganda has not yet evolved. The cleansing and reintegration rituals in ‘Mato Oput’ ceremonies in northern Uganda have succeeded in restoring family and clan relations, reintegration ex-combatants and child soldiers, and returning abducted children (Huyse,2008). So, it can be argued that local approaches may give convenient, viable options for bringing about genuine peace and reconciliation.

(4) Social legitimacy, trust and understanding of local problems. Traditional justice mechanisms often reflect local social norms and are closely linked to the local community. Huyse (2008) argues that traditional justice mechanisms are home-grown, locally owned, culturally embedded and so on. Community members often have a sense of ownership towards their respective local justice systems. Wojkowska (2006) argues that the informal justice actors have social legitimacy because they often understand local problems and are capable of finding practical solutions to local disputes problems and ensure enforcement. In Mozambique (Huyse,2008, pp.190-191) “Gamba is part of the development of a well-established local tradition of settling accounts with histories of individual and collective violence.” Its credibility is high. People feel that local justice systems reflect their values. The majority of them recognise community leaders – not the police – as responsible for maintaining law and order. They are comfortable bringing a problem to either the leader or to the traditional processes as we have seen in the cases above (Wojkowska,2006). Legitimacy not only supports the effectiveness of traditional practices; it also guarantees their survival (Huyse,2008).

**5.3.2. The weaknesses and threats**

Despite traditional justice mechanisms being widely viewed by many communities as the most likely way of achieving justice and stability, there are challenges faced by informal justice systems (Wojkowska,2006).

First, lack of accountability. In general, traditional justice tools are not accountable. The right to appeal is integral to an accountable and transparent legal system but is not always present in informal mechanisms of dispute resolution. Generally, there are no minimum standards that have to be followed. Therefore, the rulings often depend on the knowledge and moral values of arbitrators. As such the fairness of proceedings is up to the individual mediator/ arbitrator conducting them. In addition, because traditional systems do not have specific enforcement measures to their decisions, they are often non-binding and rely primarily on social pressure (Wojkowska,2006). Igreja (2007) argues, however, that in relation to ‘Mato Oput’ ceremony as a mechanism to resolve conflict in northern Uganda, although nobody is prosecuted during the ceremony, as in the case of gacaca, the fact that the wrongdoer must admit responsibility, ask for forgiveness and agree to pay reparation refers to the presence of a kind of accountability in these systems.

Second, partiality. Because traditional mechanisms are not formally regulated and not subject to the rule of law, they can easily be captured by powerful interests, or otherwise biased and distorted. Informal justice actors may abuse their authority to benefit those who they know or who are able to pay bribes, and thus corruption. Leaders also may favour certain parties depending on their political allegiance or wealth, education or status, where not to do so might pose a threat to their power. However, the same can sometimes be said of the criminal courts (Wojkowska,2006)

Third, opaque interface between informal and formal justice. Regarding jurisdictional authority this can create legal ambiguity. Due to informal justice actors’ lack of knowledge of the written law, they may make their decisions without taking the formal law of the state into consideration, thus depriving someone of their lawful rights (Wojkowska,2006).

Fourth, the authority of the informal justice actors rarely extends beyond their own sphere of influence. The informality of the procedures may be capable of dealing with small scale civil and criminal cases, but they are inappropriate for cases in which formality is needed to protect the rights of both the victim and the offender (Wojkowska,2006).

Fifth, the assumption that underlies the local justice process is that the affected parties (victims, their families and the community) will be willing to forgive. However, pardon is not easy. People may not be willing and able to forgive one another. Overcoming attitudes of resentment and anger that may persist for long when one has been injured by wrongdoing. Forgiveness and amnesty require lots of effort. It requires working over, amending and overcoming attitudes. Indeed, the blanket amnesty and forgiveness may be perceived as defying justice (Latigo,2008). A blanket amnesty policy as in the case of northern Uganda, or a culture of denial and silence as in the case of Mozambique lacks legitimacy if it involves explicit impunity (Huyse,2008).

Sixth, non-adherence to international human rights standards. In substantive terms traditional justice systems sometimes take decisions that are inconsistent with basic principles of human rights such as inhuman forms of punishment like flogging and banishment. Informal justice systems also often hold individuals accountable to social collectivities and broader social interests. This collective responsibility imposed on the community as whole is seen as removing individual responsibility from perpetrators of crimes (Wojkowska,2006). Allen&Macdonald (2013) and Waldorf (2016) argue that one of the major concerns among international lawyers, and large human rights NGOs such as Human Rights Watch and Amnesty International is that local tools do not respect the duty under international law to prosecute the offenders who committed mass atrocities. Such NGOs are outspoken defenders of criminal procedures and accept no curtailment of the international obligation to prosecute. Legalist critics apply strict criteria in their assessment of traditional justice processes. For example, the Gacaca have come under widespread criticism for the lack of due process. However, analysts with a less narrowly legalistic approach than some of the international human rights NGOs are more open to the possibilities of informal justice procedures (Allen&Macdonald,2013). Waldorf (2016, p.165) says that one legal scholar argues that such concerns are overstated. He argues that “fair trial rights may well be irrelevant to procedures in traditional courts,” “if the principal aim of hearing is to reconcile the parties, the human rights guarantees – which are aimed at protecting an accused against harsh penalties – become redundant.” As Igreja (2007) argues under the circumstances that faced by post-conflict communities it is appropriate to consider using sociocultural processes performed by ‘Magamba Spirits’, ‘Gacaca Courts’ system, ‘Mato Oput’ and similar local practices around the world with international and national strategies of transitional justice.

Finally, state capture: some stakeholders worry that local justice mechanisms can be captured or compromised by state elites (Waldorf,2016). Allen & Macdonald (2013, p.9) argue that “Just because a process or an institution is nominally traditional does not insulate it from interference from various kinds of public authority, including the state.” It has been argued that local traditional justice can be readily captured and manipulated by the state in order to further its interests (Macdonald,2015). This issue has been raised about the ‘Gacaca Courts’ in Rwanda and ‘Mato Oput’ in Uganda (Allen&Macdonald,2013; Branch,2014; Waldorf,2016). It is argued that post-genocide Rwanda “responded to mass violence with mass justice.” (Waldorf,2006, p.3). However, international NGOs such as Amnesty International and Human Rights Watch, as well as non-Rwandan scholars like Waldorf (2006), have argued that the gacaca courts are controlled by the Rwandan government and have been used by an oppressive state to regulate justice and reconciliation processes across Rwanda (Allen&Macdonald,2013; Denney&Domingo,2017). The argument follows that the state has forced Rwandans into participation and publicly sharing the details of the genocide, violating a cultural inclination towards silence. It has also interfered in the hearings in order to collectivise the guilt of all Hutu (Allen&Macdonald,2013). In the case of Uganda, Branch (2014, p.625) argues that the Ugandan government promoted the use of Acholi traditional justice because its potential to guarantee state impunity. He argues that “the government has often made successful efforts to co-opt the newly established, and foreign-supported, set of chiefs whose unaccountable authority makes them good candidates for state manipulation.” Therefore, it has been argued that local justice forms can entrench the forms of state-driven inequality and injustice, and reconstitute pre-conflict structures of exploitation (Branch,2014; Macdonald,2015). However, other analysts like Clark (2010), according to Allen&Macdonald (2013), have argued that the government’s controlling role is not as pervasive as has been suggested. They maintain that the gacaca system has a degree of autonomy and continues to be widely accepted as local justice mechanism.

Related to the above discussion is the key issue as to whether justice in transitional contexts should be restorative or retributive. Is traditional justice restorative? Is local justice appropriate to deal with past massive violations? (Allen&Macdonald,2013). Allen&Macdonald (2013, p.12) argue that “The reality is that Western justice systems and indigenous dispute resolution systems pursue the similar objectives to different degrees and the restorative/retributive dichotomy is exaggerated and essentialising.” Usually the biggest difference between formal and informal justice approaches is the procedures used to reach the various objectives. Informal systems emphasise the community dimension of criminal behavior over individual accountability and tend to draw on local rituals. In complicated situations, local processes have very clear benefits. In violent conflicts characterised by moral ‘grey zones’, dichotomies between the ‘guilty’, ‘not guilty’, ‘victim’, ‘offender’ can be misleading. This ‘grey area’ is complicated for criminal law and makes the delivery of clear verdicts a difficult exercise. Allen&Macdonald (2013, p.20) argue that because of the limitations of national and international tribunals as already noted in Chapter Two, “the turn to the local and the traditional for a better approach is likely to persist, whatever the controversies involved.”

As this chapter has already argued, while local justice is generally considered restorative, aiming at restoring the social harmony and achieving reconciliation, it can also have punitive functions (Mobekk,2005; Allen&Macdonald,2013). There is a clear accountability component to most of the documented local reconciliation rites. As mentioned above, reconciliation ceremonies in Uganda, Rwanda and Mozambique that have been used by activists require that offenders must recognize their guilt in order to be redeemed (Allen&Macdonald,2013). Punitive measures are common and depend “on the crime, who had committed it, and who was arbitrating.” (Denney&Domingo,2017, p. 224). In cases in which a crime is locally understood to be atrocious –such as witchcraft– retribution could be very severe (Allen&Macdonald,2013). Mobekk (2005) argues that local methods of justice on a broad perspective are mechanisms for solving disputes and dealing with crimes perpetrated towards the community or individuals. The punishment can vary extensively, not only depending on the seriousness of the crime, but also upon the culture of the community. It can include paying fines, public humiliation of the offender, or community labour. They are often put forward as a means of conflict resolution and reconciliation and it is in this role that they are increasingly promoted as a tool for addressing human rights violations in post-conflict societies, but without any real proof as to what it is they can achieve (Mobekk,2005). Local methods associated with social accountability vary widely from community to community, resulting in different outcomes (Allen&Macdonald,2013; Mobekk,2005). To date there is little detailed knowledge of the effects of those mechanisms. Much more adequate assessment, thus, is required (Allen& Macdonald,2013). Macdonald (2015) and Allen&Macdonald (2013, p.21) argue that it is clear that local rituals are important for people caught up in violent conflict. However, it also appears that those local rituals do not form a coherent alternative to formal processes and that “Traditional justice cannot be harnessed to the transitional justice agenda in a straightforward way.” There are several arguments for both applying and being cautious with promoting local justice mechanisms to past crimes in the transitional settings (Mobekk,2005).

Probably the most important question is whether the local mechanisms being promoted are really capable of dealing with large-scale human rights violations, war crimes and genocide that committed over long time periods, and often involving the destruction of the social, moral and material systems upon which local processes depend (Allen&Macdonald,2013). As Allen&Macdonald (2013, p.16) argue, “it is unclear whether community based processes can resolve inter-communal problems as their scope and legitimacy tends to be limited.” However, “It is worth pointing out that even the more formal, legalistic procedures (including the International Criminal Court) are not designed to address those conflicts that have crossed over national borders or that have been fuelled by neighbouring countries.” (Allen&Macdonald, 2013, p.16). Local justice methods must not only be assessed as to their ability to deal with past crimes, but there must also be awareness that they can, in certain contexts, positively contribute to reconciliation and sustainable peace. Local justice mechanisms, because of their both restorative and retributive nature, can be a valuable mechanism to use in the context of transitional justice (Mobekk,2005).

To avoid the dilemma of local versus international approaches, traditional practices are being adapted to the Western justice model. As Baines (2007, p.114) argues “The Juba talks are thus not only a historic opportunity to achieve peace in the country; they also provide a unique opportunity to begin to resolve how local approaches to justice and reconciliation can better inform and shape international approaches. This might involve adapting aspects of local justice that meet international standards,but will also require that international strategies be transformed to fit local sociocultural and economic realities.”

**Conclusion**

An evaluation of the role of local justice and reconciliation mechanisms after violent conflict was the subject of this chapter. Some of the strengths and weaknesses of local justice systems have been highlighted. Despite their many challenges, this chapter has argued that traditional practices play an effective role in achieving the objectives of transitional justice. The role of traditional leaders, rituals and the community ceremonies of reconciliation are indispensable mechanisms for trust rebuilding and the enhancement of genuine reconciliation. They are more reliable for conflict management and harmonious living within the society. I have argued that conflicts can be solved only when they are understood in their different social contexts. The cultural beliefs and traditional rituals shape people’s perceptions of justice and reconciliation, and in many cases, they prefer to use them for addressing the effects of conflict as opposed to foreign formal justice systems. By using available societal resources, the public are able to begin the paramount task of repairing their lives. Local accountability mechanisms are very useful in peace building and prevention of new conflicts. They have the potential to restore social cohesion, and facilitate the healing and reintegration processes, since people can easily associate with them. The case studies have demonstrated that local practices have the potential to produce a measure of accountability, truth and reconciliation that is not negligible. Although, they cannot provide the solution for all problems, to ignore or discard the home-grown traditional practices of societies that have been seen to work in the past makes no sense. Therefore, I have proposed that local justice mechanisms as practiced in the communities affected by the conflict, should be promoted as a central part of the framework for justice, reconciliation and peace making (Wojkowska,2006&Huyse,2008). This chapter concludes on an optimistic note. This is because the international community, as mentioned above, seems to be increasingly aware of how important it is for a society to address the past human rights violations locally. As stated by the International Center for Transitional Justice (Binder,2013, pp.28-29) “All transitional justice approaches are based on a fundamental belief in universal human rights. But in the end, each society should – indeed must – choose its own path.” With this general grounding in the impact of customary justice mechanisms in the reconciliation and peace processes, the next chapter turns to Libya. I will first examine the efficacy of criminal justice, restorative justice, and then conclude by considering the role that Libya’s local mechanisms could play in this regard.

**Chapter Six: Assessing the efficacy and relevance of transitional justice mechanisms: The case of post-Gaddafi Libya**

**Introduction**

The previous chapters explored the mechanisms of transitional justice. The thesis started by positioning criminal trials as the main tool for the attainment of justice, focusing on the role of the ICC in post-conflict societies. It also considered restorative and customary practices as other resources for transitional justice. Drawing on examples, I have argued against an overreliance on trials in transitional contexts where it was noted that there were cases where the prosecutions, especially the ICC, exacerbated conflicts. I suggested that restorative and local mechanisms might be more effective in such contexts if the aim is to achieve reconciliation and sustainable peace. The focus of this chapter is Libya’s experience with transitional justice after the ending of the country’s armed conflict between Gaddafi supporters and rebels in 2011.The question that this chapter aims to answer is: how can Libya establish a more stable state and move forward? This will be investigated by assessing three mechanisms of transitional justice: criminal justice; restorative justice; and customary practices in Libya. A brief overview of the structure of this chapter is as follows. The first section provides the background of the political situation in Libya from 2011 to the present. The second section assesses retributive justice with ICC and national prosecutions. The third section discusses Libya's controversial transitional justice laws. The fourth section examines restorative and customary justice mechanisms in Libya and their role and potential in resolving the conflict.

Libya has been in a state of transition since 2011. Lamont (2016) argues that because of the violent nature of the transition that caused injustices and massive human rights violations, there is an urgent need for transitional justice. Steps must be taken so that society can move forward. The issue of transitional justice is increasingly important with the deteriorating security situation and political division, and the reports of thousands of detainees held in Libya with no competent justice system nor appropriate legal processes taking place so far (Eljarh,2011). The UN Support Mission in Libya (UNSMIL) recognised that and made transitional justice a key priority for the new mission (Lamont,2016). In 2012, according to Kersten (2015b) and (Lamont,2016), the UNSMIL declared that a transitional justice strategy can contribute to building a new Libya, citizens can be reconciled, and foundations can be laid for a new democratic society that respects the rule of law and human rights. Whether, however, these expectations are realised in Libya remain to be seen. There are no guarantees with transitional justice. It is a risky process.

Although Libya in the aftermath of the conflict has used some mechanisms of transitional justice such as criminal prosecutions, lustration and amnesty laws, so far, very little in terms of transitional justice has been achieved. I argue like Kersten (2015b) that none of these mechanisms have been used as elements of a reconciliation and peacebuilding process. Instead, to date, they have perpetuated a climate of one-sided justice and revenge against the officials of the Gaddafi regime whilst elevating the revolutionary legitimacy of Libya’s rebel militias, as will be explained below. Compounding matters, Libya today is a highly divided state with two governments fighting each other, and each claiming to be the legitimate authority: one in Tobruk (East Libya) and one in Tripoli (West Libya). This has impacted on the selective use of those transitional justice mechanisms (more on this to follow) that have been implemented in the country so far. Such divisive transitional justice has not only complicated the pursuit of accountability but frustrated a peacebuilding process.

It is impossible to discuss transitional justice mechanisms in a country like Libya without reference to certain key concepts of justice, reconciliation, reintegration and sustainable peace. Reconciliation is the ultimate goal in Libya for rebuilding the state. In its simplest form, reconciliation is referred to as recognition and repentance from the offenders, forgiveness from the victims, reintegration, and peaceful coexistence. It includes, thus, four concepts, namely, truth, justice, mercy and peace (Eljarh,2011). A constant challenge for scholars and practitioners, according to Kersten (2015b), is how to combine justice with peacebuilding in transitional period. Yet there is no clear answer to this question. The case of Libya demonstrates the problem clearly. Aboueldahab (2019) argues that although nearly a decade has passed since the Gaddafi regime changed, Libya remains in a precarious transitional phase in which neither peace nor justice has yet been achieved. The complexities of the transitional phase of Libya is an important example for understanding the challenges of the pursuit of peace and justice. Tribal tensions and conflicts between Gaddafi regime loyalists, anti-Gaddafi revolutionaries, and between tribes and militias have further diminished prospects for reaching consensus on justice decisions. A key challenge is the state of insecurity and power vacuums that have allowed militias to take control. Arbitrary detention, forced displacement, torture in clandestine prisons, property theft or destruction, and corruption all prevail in Libya, leading to more grievances on a scale that will take years to address.

Ongoing violence continues to keep the rule of law in the country weak and delays the transition to democracy. As Gaub (2014) argues Libya appears to be heading for disaster due to mob rule, kidnappings, assassinations and a lack of strong institutions that can rebuild the country. In this volatile climate, Libya remains far from realising the peaceful transition to democracy. Rather than standing as a model for political transition, Libya has become a precarious state. Its inefficient institutions have been incapable of carrying out their tasks. Due to insecurity, Libyans are increasingly pessimistic about their country’s fate, with one-third of them having doubts about the value of democracy.

This chapter analyses the challenges of transitional justice in Libya based on the human rights violations that the country experienced during and after the conflict. The discussion in this chapter is motivated by the question: whether the pursuit of peace or of justice would better promote the interests of Libya (Aboueldahab,2019). The chapter considers the consequences of pursuing criminal justice by trials under unsuitable security and political circumstances. It argues that the weakness of state institutions has created a climate of “Victor’s Justice”, revolutionary legitimacy and impunity. As discussed in the previous chapters, debates such as justice vs. reconciliation, justice vs. peace, justice vs. truth, all suggest that justice by criminal proceedings is aimed to punish guilty individuals, and this approach will not lead to reconciliation or peace in Libya as required (Eljarh,2011). Libya’s tumultuous transition requires an expanded understanding of what constitutes ‘justice,’ as argued in Chapters Three and Four, so that it is not confined to criminal accountability which transitional societies are often unprepared to handle effectively. When understood as multi-faceted, justice does not only serve punitive purposes, but it also serves to address political, security and socio-economic challenges (Aboueldahab,2019). I argue that restorative and customary justice practices are more proper for the circumstances that are facing Libya. These mechanisms have proven to support reconciliation and peace in some post conflict contexts, as shown in Chapters Four and Five. To justify this argument, transitional justice mechanisms in Libya need to be examined and discussed. In addition to the evaluation of transitional justice mechanisms that have been used since 2011, it is crucial to explore customary justice mechanisms that already exist in Libya, building on the assumption that such practices of justice are essential for reconciliation and stability, and moreover that it can serve to increase the sense of local ownership of the whole process of transitional justice. The chapter concludes by arguing, as in the previous chapters, that meaningful transitional justice strategies that contribute positively to the consolidation of democratic transitions and increased respect for the rule of law and human rights may be difficult to achieve until it is possible to stop the violence, disarm the militias and build lasting peace. By analysing Libya’s current situation in the next section, it will be possible to expose the difficulties facing a new Libya that affect policies of transitional justice.

**6.1. Background**

On 17 February 2011, Libyan demonstrators took to the streets, calling for justice and socio-economic and political reform. It is notable that the first demonstrations were organized by a group representing the families of the Abu Salim prison massacre victims which occurred in 1996. Other demonstrators agitated against the absence of civil, political, and economic rights. Initially, they were not calling for removing Gaddafi from power, at least not explicitly. However, towards the end of February 2011, the situation in Libya had descended into a civil war, with Gaddafi’s security forces fighting to respond to the rebel factions and their political wing, the National Transitional Council (NTC). At this phase, the end goal of the opponents transformed. The aim that they shared with NATO-led intervening forces, was now the removal, by force, of the Gaddafi regime (Kersten,2015b; Lamont,2016; Aboueldahab,2019). International rights groups such as Human Rights Watch worked with rebels to document alleged use of excessive force against demonstrators, use of internationally prohibited weapons, arrest and torture of suspected revolutionaries, and indiscriminate attacks on civilians (Van Lier,2017).

As violence escalated, there was a remarkable consensus on the necessity for international intervention in order to protect civilians. The speed with which events moved was unprecedented. On 26 February 2011, the United Nations Security Council (UNSC) passed Resolution 1970 consisting of a set of sanctions aimed at pressuring the Gaddafi regime to stop the violence against the demonstrators, and it unanimously referred the situation in Libya to the ICC’s jurisdiction (Stahn,2012; Kersten,2015a; Lamont,2016). On 17 March 2011, the Security Council passed Resolution 1973 that authorized a no-fly zone over Libya and referred to Libya’s ‘responsibility to protect’ its own citizens, precipitating a NATO-led military intervention against the Gaddafi regime. Just two weeks after Resolution 1970, the ICC Chief Prosecutor Luis Moreno-Ocampo opened an official investigation into alleged crimes committed by Gaddafi regime. On 16 May 2011, he requested that the ICC issue three arrest warrants for leader Muammar Gaddafi, Abdullah al-Senussi, Libya’s head of internal and external intelligence, and Saif al-Islam Gaddafi, the London School of Economics-educated son of the Libyan leader. On June 27, the ICC issued warrants against all three. Ultimately, however, as will be clarified below, the Court’s prosecutors did not pursue warrants of arrest for the indicted individuals and none of them were surrendered to The Hague (Stahn,2012; Kersten,2015a; Aboueldahab,2019). Lamont (2016) argues that the ICC’s failure to pursue the transfer of accused left the court largely irrelevant on the ground.

By September 2011, the Libyan opposition, which involved a broad coalition of rebels backed by NATO forces, achieved their aim of regime change. On October 20, 2011, Muammar Gaddafi, who had reigned over Libya for forty-two years, was killed by opposition forces (Bodszyński&Wierda,2018;Aboueldahab,2019). Although the circumstances surrounding Gaddafi’s killing instigated calls for ICC scrutiny, the prosecutor did not press for an investigation. His death marked the end of the conflict, which lasted eight months, between the Gaddafi supporters and the rebels in Libya. It also represented the beginning of Libya’s transition. Since Gaddafi's death, Libya has moved forward in its transition towards becoming a democratic state. However, achieving justice, which is considered by many to be necessary for the establishment of democracy, has not been a smooth task. It is clear that the pursuit of justice in post-conflict Libya has been characterised by rancour and vengeance amongst actors with conflicting interests. As a result of the security vacuum, the lack of independently functioning institutions, the growing antagonism between the parties and misguided decision-making, it seems all too likely that achieving these aims will be diminished (Kersten,2012; Kersten,2014a; Kersten,2015b).

The transitional government formed by the NTC following the ending of the conflict, failed to lay the groundwork for transitional justice and to prioritise areas of state management, most notably in the security sector. When the NTC rejected UN military support after the fall of Tripoli, Libya began its new era without any security forces. Although the process of rebuilding the police and armed forces was presented as an urgent concern of the NTC and, later, the General National Congress (GNC), it has been very slow, resulting in a serious security crisis in the country (Gaub,2014). Libya has descended into anarchy, leaving a power vacuum which encourages militia lords and extremism to grow. The UN Support Mission in Libya has been struggling to solve the political problem by brokering peace talks. But the endless clashes between the armed militias and the lack of genuine desire to reach a political solution has undermined the UN efforts (Xinhua,2015). Libya now is described as ‘lawless’ (Chothia,2014). In Libya, the main problem is that neither the state military nor the security forces have been able to impose order. Armed militias have been powerful enough to hamper the work of the state institutions, creating chaos in many parts of Libya. The conflict between armed groups for control of Libya that continues to this day (El Fegiery,2014; Karnavas,2016). Chothia (2014), Van Lier (2017) and Bodszyński &Wierda (2018) argue that since the overthrow of Gaddafi regime, Libya has been hit by instability. No one is in control of Libya, that is the problem. After the 2011 civil war, lots of different competing political, ethnical and regional factions and heavily armed emerged to intimidate and disrupt the process of transition. These local armed groups (militias) operate without a unifying goal, structure or ideology. Some of them are liberals, others are militant or moderate Islamists, and yet others are secessionists or monarchists, making it a combustible mix. They often find themselves in competition over access to natural resources, money or political influence. They have little understanding of democracy. Instead of addressing the issues of justice, reconciliation, rebuilding the state based on the rule of law and meeting urgent needs, in 2014, as mentioned above, the transitional government itself split amid an armed civil conflict that has yet to be concluded (El Fegiery,2014; Chothia,2014; Van Lier,2017).

Since then the country has faced a governance crisis with no solution apparent on the horizon. Due to a mix of the weak authority of Libya’s temporary institutions, a lack of capacity of the military, police and judicial structures, and the influence of armed militias which rule large swathes of Libya, citizens felt largely disappointed with the political process and have lost trust in their political institutions, such as parliaments and political parties, which are essential components of the liberal state. Consequently, successive transitional governments have lost their legitimacy in the eyes of the public (Lamont,2016; Van Lier,2017).

Despite all this, the international community has invested heavily in strengthening internationally recognized governments (Lamont,2016). Between 2011 and 2012 the NTC in Benghazi was internationally recognized as the official transitional government of Libya. Following elections in July 2012, power was handed over to the GNC in Tripoli. On June 2014, elections were held again and the House of Representatives (HOR) was elected. However, the GNC refused to cede its power and remained in Tripoli. As a result, the newly elected and then internationally recognized HOR – also known as the ‘Tobruk government’– retreated to the city of Tobruk in east Libya to govern from there. Since then the two competing governments have fought for both domestic and international legitimacy, and for political and economic control of the country, with each side supported by a myriad of armed militias and against a backdrop of the Islamic State ‘ISIS’ gaining control in certain parts of Libya (Karnavas,2016; Lamont,2016; Aboueldahab,2019). On December 2015, according to Karnavas (2016), the UNSMIL conducted extensive negotiations between the representatives of the two rival governments in an attempt to establish one unified Libyan government, and the Libyan Political Agreement was signed and the Government of National Accord (GNA) was formed. This agreement was immediately supported by the UN Security Council. In April 2016, the Tripoli authorities ceded power to the GNA, although there were reports that others in power in Tripoli were not supporting the new government. But so far, the GNA has failed to obtain the support of the HOR in Tobruk, which is no longer the internationally recognized government. Meanwhile, none of these national governments could effectively control over Libya’s vast territory (Lamont,2016). Within this context, Libyan governments have sought to carry out transitional justice strategies. It was, however, clear that transitional justice in Libya was not to be impartial (Lamont,2016). In the next section, transitional justice in the aftermath of the 2011 Libyan conflict is explored.

**6.2. Criminal prosecutions**

**6.2.1. Preface**

The decision of where to hold trials has always been politically contentious in post-conflict societies. Identifying offenders, extracting evidence, and protecting witnesses becomes a very difficult process when prosecution takes place far from where crimes were perpetrated. In many cases, however, post-conflict societies do not have the resources or political stability or sufficiently fair judicial system (as argued in Chapter Two) to adjudicate serious violations that breach international criminal law. This dilemma is encapsulated by the ICC's principle of complementarity where the ICC cannot intervene and investigate crimes unless countries are unable or unwilling to do so. This section shows that the fight over who will try Saif and Senussi and where, as well as Libya's admissibility challenge at the ICC, has created an acrimonious rift between the ICC and Libyan authorities (Kersten,2012; Kersten,2014a). While Libya has clearly indicated that its actions regarding accountability of senior members of the Gaddafi regime are aimed at maintaining its sovereignty and establishing itself as a member of the international community able and willing to do its investigations, the ICC has sought to show that it is an important entity that can bring justice by prosecuting previous regime members (Kersten,2012; Kersten,2014a).

Similarly to a number of other post-conflict societies in which the ICC has intervened, a debate has ensued as to the effects of the court intervention in Libya on the efforts to establish peace and stability. There were worries that the ICC would obstruct a resolution to the conflict and make a transition of the country from conflict to peace less likely. It was argued that the intervention of the court would motivate Gaddafi and a lot of his supporters to continue fighting to the death, and that the ICC may have perpetuated, rather than ended, the civil war because of Gaddafi's international prosecution (Kersten,2015a).

This section begins by exploring questions relating to the prosecution’s role and impact on the pursuit of justice, and the efforts to establish peace and stability in Libya since 2011. It argues that both the ICC's interventions and national courts are more likely to undermine peacebuilding which is (as argued in Chapters One and Two) a precondition to establishing justice and democracy (Kersten,2012; Kersten,2014a; Kersten,2015a). The sections below expose the limitations of the ICC and local courts which are likely to undermine the key objectives of transitional justice, especially, reconciliation and peace that I think are the most important and feasible goals for Libya.

**6.2.2. Libya and the ICC: trying Saif al-Islam Gaddafi and Abdullah al-Senussi**

The ICC intervened in Libya and has played a controversial role in the country's political transition (Kersten,2014a). The decision of where to hold prosecutions has always been politically charged (Kersten,2015a). Kersten (2015a, p.470) stated that “Law’s place is complicated by the tension between the internationalisation of criminal justice and the fact that justice is best served at the local level where the crime has taken place, where the evidence is located, and where the witnesses live.” The case of Libya reaffirms this point, as will be demonstrated below. This section assesses the efforts on the part of the ICC and Libya to prosecute Saif and Senussi and is followed by an examination of the potential for local ownership for holding them to account in Libya. It examines the debate regarding who should try Saif and Senussi, who are indictees of the ICC, and where they should be tried. It has been argued that the question and controversy of where to ‘do justice' has affected international criminal justice since its inception (Kersten,2015a). For the case of Libya, this section argues that the ICC’s ability to positively affect the goals of justice, reconciliation and peace in post-Gaddafi Libya has been limited.

Kersten (2012&2014a) argues that despite significant evidence that violations of human rights were committed during and after the conflict by other actors, including Libyan rebels, or ‘thuwar’, Saif and Senussi remain – following the death of Muammar Gaddafi – the only two individuals indicted of crimes against civilians in 2011 and wanted by the ICC. Saif had played a key role in the reforms in Libya and spearheaded efforts to make peace with the Libyan opposition, especially with the Libyan Islamic Fighting Group. He also had been instrumental in Libya's rapprochement with the West, sought to transform Libya's status as a pariah state by integrating the country into the international community, helped to secure compensation for Lockerbie victims, and played an important role in the negotiations on the surrender of the country's Weapons of Mass Destruction and nuclear programme. In 2011, many hoped that Saif could moderate the regime's response, perhaps even act as a transitional figure. However, this hope quickly diminished as Saif so fervently sided with his father against protesters.

The ICC issued an arrest warrant for Saif, accusing him of committing crimes against humanity, murder and persecution (Robertson,2011). Saif, like his father, appeared unshaken and committed to remaining in Libya, declared the ICC “a Mickey Mouse court.”, and exclaimed that: “We live here, we die here, so we are very patient. We may win tomorrow, in one week or in one year, but one day we'll win. One day the French will go back to Corsica in France, the Italians will go back to Sicily in Italy, the Danish will go back to Denmark, the Canadians will go back to Toronto and Libya will go back to the Libyans.” (Kersten,2012, p.7). Despite his obstinacy in the face of the ICC warrant and the military intervention of NATO, following the death of Muammar Gaddafi in the late October 2011, Moreno-Ocampo suggested that Saif had been in contact with the ICC, via mediators, to discuss his potential surrender. Saif, however, later claimed that he had never been in touch with them, and Moreno-Ocampo's statement was “all lies” (Kersten,2012,p.7). On 19 November 2011 (ICG,2013; Kersten,2014c), a group of rebels from Zintan, a mountain town in western Libya, arrested Saif near Obari town in south Libya. He was then whisked away to an unknown location in Zintan. The NTC greeted Saif’s capture by declaring that it marked the ending of the Libyan drama. In fact, however, the drama was just beginning (Kersten,2012; Kersten,2014a; Westcott,2015).

Senussi, the former intelligence chief, was a key member of the most trusted circle of advisors in Gaddafi's regime. In 2011, as with Saif, the ICC issued an arrest warrant against Senussi as responsible for organising the crackdown on demonstrators in Benghazi, as well as committing crimes against humanity, murder and persecution. In March 2012, Senussi had been arrested in Nouakchott, Mauritania by French and Mauritanian officials. For his intimate knowledge of everything about Gaddafi's rule and the security and intelligence systems in Libya, Senussi has been described as the Libyan regime's ‘black box’. For this, intelligence officials from many countries, primarily west states, have been interrogating Senussi while in detention. Despite the importance of Senussi’s knowledge of Gaddafi regime's secrets to the aim of achieving justice, Saif has been the centre of efforts in the pursuit of justice in post-Gaddafi Libya (Kersten,2012; Kersten,2014a).

Questions abounded about where Saif and Senussi could and should be tried. There were three primary options: a trial by the ICC in The Hague; a trial in Libya by Libyan judges; or a trial conducted by the ICC in Libya (Kersten,2015a). The decision on where to try Saif has been characterised by fighting between Libyan authorities, who have announced their intention to put Saif on trial in Libya with Libyan judges to face capital punishment, and the European Union and international human rights NGOs, who have insisted that Gaddafi's son be tried in The Hague, where the death penalty is forbidden, as they believe that only the ICC can do so impartially and legitimately (Robertson,2011;Kersten,2015a). This was in addition to the expressed doubts that other officials of Gaddafi regime would be tortured, perhaps even killed, if tried in Libya (Kersten,2014a; Kersten,2015a).

Van Lier (2017) argues that the international actors –Amnesty International, Pre-Trial Chamber I (ICC), Human Rights Watch – had concerns about whether Libyan authorities were willing or able to deliver justice according to international standards and pressed the case for the ICC heavily upon the Libyans. Nevertheless, the NTC has maintained, from the beginning, that Saif and senior regime officials would be tried in Libya. In October 2011, Libyan authorities explained that Libya has its rights and its sovereignty, which it will exercise, and that it will not accept its sovereignty being violated by the intervention of the ICC (Kersten,2012; Kersten, 2014a). Since April 2012, both the Libyan government and the militias have maintained this attitude, and have continued to insist that Saif and Senussi be tried in a domestic court, with or without an ICC approval (ICG,2013; Kersten,2014c; Aboueldahab,2019). Libyan officials emphasised the symbolic importance of the trials for dealing with the past and insisted that the domestic prosecution of Saif and Senussi were paramount to re-establishing the country as a sovereign member of the international community; bringing justice for the Libyan people; and proving that the new Libyan judicial system is capable of conducting fair trials that meet all international standards (Kersten,2012; Kersten,2014a;Van Lier,2017).

According to Kersten (2012&2014a), however, there are fears that ceding Saif or Senussi to the ICC could potentially undermine peace and destabilize the country. There is a concern that Saif could be found innocent or released if tried at the ICC because of the relatively small charges against him at the court, compared to the possibility of more serious charges against him and the imposition of the death penalty in Libya. Furthermore, if Saif is tried at the ICC, where his judges would be independent, he has the makings of an arguable defense and could put the prosecutor’s case to a scrupulously fair test. He would be permitted to summon witnesses to his good character, perhaps his friends Tony Blair and Peter Mandelson, or one of the LSE professors. His judges would be independent and his conviction on the basis of clear evidence would by no means be a foregone conclusion (Robertson,2011; Kersten,2014a). It is also important to mention that the experts in the Libya Working Group have noted that it would be politically impossible for the NTC to allow Saif to receive a short lenient sentence or an innocent verdict because it would be seen to ‘betray the revolution’. This raises the troubling possibility that the NTC gives greater importance to public opinion at the expense of the rule of law (Kersten,2012; Kersten,2014a).

In the aftermath of the civil war, Libyan authorities in Tripoli filed an admissibility challenge at the ICC regarding the case of Saif on 1 May 2012, and the case of Senussi on 2 April 2013 (Kersten,2015b). It employed a widely respected group of international lawyers and legal scholars. None of the legal team representing Libya were Libyan, giving the impression that Libya did not have lawyers who are able to present the case themselves (Kersten,2014a; Kersten,2015a). However, the Libyan government argued that under the principle of complementarity (already explained in Chapter Two) underpinning the ICC set forth in Article 17 of the Rome Statute, the court had an obligation to allow Libya to prosecute both locally. It has argued that the intervention of the ICC is inadmissible on the grounds that its national judicial system is actively investigating, and it is willing to prosecute Saif and Senussi for their alleged crimes committed during the conflict (Kersten,2015a; Aboueldahab,2019).

Following Senussi’s surrender by Mauritania in September 2012 (ICG,2013; Kersten,2015b), criminal proceedings against him, by the Libyan government, were subsequently initiated. Despite his trial being undermined by systemic due process violations (more on this to follow), the ICC refused requests by Senussi’s legal representatives to reinstate Senussi’s case before the international judicial body, and the Pre-Trial Chamber I ruled that the case against Senussi was inadmissible before the court as it was subject to the competent domestic authorities and that Libya was willing and able genuinely to conduct such investigation (Kersten,2015b; Lamont,2016; Aboueldahab,2019). However, in the case of Saif, the Libyan government was unable to replicate its success. Because of its failure to gain custody of Saif, the admissibility challenge at the ICC failed. The court expressed concerns about Libya’s ability to carry out a fair trial. And the ICC judges ruled that Saif’s case was thus admissible before the Court as long as Saif remained outside the custody of the Libyan authorities (Kersten,2015b; Aboueldahab,2019).

Van Lier (2017) argues that the dispute between the ICC and Libya was a clear example of a broader mistrust towards international intervention in internal affairs, which was fostered during the Gaddafi era. Gaddafi abhorred western intervention in Libya and around the world. His ideology and ideas affected many Libyans. As such, it has been noted that Libyans from the beginning (Van Lier,2017, p.19) “were determined to control [the] transition, and were wary […] of post-conflict situations dominated by external actors.” Therefore, “a prominent external role would be perceived in Libya as intrusive and end up undermining the transition process” and “suspicion of foreign conspiracies runs high in Libya” (Van Lier,2017, p.19). Therefore, Libyans' sensitivity of foreign intervention must be taken into consideration in any approach of transitional justice, if this is to help the country to move forward.

To conclude this section, it could be argued that Libya has been a battleground between the ICC and Libyan transitional authorities for legitimacy. On the one hand, the ICC has sought to demonstrate that it is viable and able to positively affect the pursuit of justice and the rule of law in post-conflict Libya. On the other hand, Libya has striven to demonstrate that it is a sovereign state able and willing to legitimately achieve justice. In the end, however, both the ICC and the Libyan state, based on the consequences, are likely to be deeply disappointed. This section has sought to provide a critical overview of the ICC's role and effect in post-Gaddafi Libya. The key finding is that it seems unlikely that either the ICC or Libya will achieve their goals, as it can be seen that Libya is a lawless country with various challenging obstacles to justice. Libya's inability to achieve custody over Saif fundamentally undermines its admissibility challenge by the ICC. It undermines its legal case that it is willing and able to investigate and prosecute them (Kersten,2012; Kersten,2014a).

At the same time, it seems that the authority and legitimacy of the ICC suffer. As we will now see, the OTP's leniency with the NTC has severely diminished the Court's appearance of being impartial and independent. Moreover, Libya's insistence on not handing over Saif to the court affects its authority. This contradicts a generally held assumption that whenever the ICC intervenes in conflict societies or post-conflict, it will have a significant impact on the decision-making of such societies. This does not appear to be the case in Libya. The ICC's role in Libya has been characterised by growing mistrust, malevolence between key actors, and imprudent decision-making. It thus seems the ICC has some limitations as discussed in Chapter Two, which are likely to undermine its ultimate aims – not to mention the pursuit of justice. The lesson to be learned from the case of Libya is that the ICC's intervention in post-conflict societies will have greater effects on the court itself than on the societies. Specifically, how it will or should function in fragile contexts in the future; what must be in place for there to be a successful, independent and impartial Court; how it can maintain its relevance; and how it can have a positive effect on justice and peace (Kersten,2012; Kersten,2014a).

**6.2.3. National prosecutions**

In a leniency that would seem unprecedented in the history of the ICC, the ICC's Office of the Prosecutor (OTP) has shown initial flexibility towards the prioritization of local proceedings and sided with the NTC’s plans to try Saif, Senussi and other members of the previous regime in Libya (Stahn,2012; Kersten,2012; Kersten,2014a). It effectively abrogated its obligation to seek the transfer of Saif and Senussi in the context of the absence of minimal protections for due process and the widespread practice of torture in Libyan detention centres (Kersten,2014c; Lamont,2016). During Moreno-Ocampo’s visit to Tripoli in November 2011, he capitulated to the inevitability of the NTC's demands to try Saif. As suggested above, the main reason for this leniency appears to be that the ICC does not want Saif to be put on trial in The Hague as it does not have a strong case against him, therefore, it is not a given that the court would be able to successfully convict Saif (Kersten,2012; Kersten,2014a).

Karnavas (2016), Human Rights Watch (2017) and Aboueldahab (2019) noted that during those political and security upheavals faced by Libya, Saif, Senussi and 36 other senior Gaddafi regime officials were put on trial on March 2014 by the Tripoli Court of Assize on charges of committed serious crimes during 2011. During the trial several defendants said they were being tortured and beaten (Westcott,2015; Galustian,2015). Although it never had custody of Saif, the court sentenced him to death in absentia on 28 July 2015. The chief prosecutor in the case said that under Libyan law, Saif would have the right to a retrial once he is apprehended by the authorities in Tripoli (Karnavas,2016; Human Rights Watch,2017).

In a response to death sentences against Saif and other officials, Kersten (2015b), Nebehay (2017), Lamont (2016) and Human Rights Watch (2017) pointed out that the trial, which convicted another 32 officials of the Gaddafi regime, was undermined by serious due process violations. These include: the lack of meaningful legal representation for defendants; repeated violations of defendants’ right to communicate with their lawyers in confidence; solitary confinement during trial; torture; the lack of contact with families and lawyers for prolonged periods (Galustian,2015); and no witnesses called to testify in the court.

Karnavas (2016) and the Defender Center for Human Rights (2018) argue that the trial seems to have been a sham. The legal proceedings were flawed and shrouded in secrecy and controversy. Given his detention in Zintan, according to Stephen (2014), Karnavas (2016) and Human Rights Watch (2017), Saif did not meaningfully participate in his trial. The Zintani militia holding Saif refused to hand him over to Tripoli government due to the security situation and crisis of the country (Robertson,2011; Westcott,2015; Nebehay,2017). It has claimed that it – not Tripoli – would host Saif's trial, fearing for his security and potentially his life if transferred to Tripoli. Saif only sporadically appeared in the court via live video-link from Zintan (Kersten,2014a; Van Lier,2017; Defender Center for Human Rights,2018), and he was only able to join for 4 of the 25 trial sessions. Moreover, nobody is even sure how many of the accused were actually on trial, as some were absent in the recent hearings (Kersten,2012; Kersten,2014a; Kersten,2015b).

Therefore, some international observers and organizations such as the Office of the High Commissioner for Human Rights (OHCHR), UNSMIL, Human Rights Watch and Amnesty International have expressed their strong concerns that the trial in absentia, which resulting in a conviction and death sentence, had myriad problems and did not meet universally recognized fair trial rights protections (Karnavas,2016; Defender Center for Human Rights,2018). The UNSMIL declared that (Westcott,2015), “If the trial continues to proceed in this way, it will not meet international standards.” HRW cautioned (Westcott,2015), “While accountability for serious crimes ... is essential for Libyans to move forward, it cannot come at the cost of the most basic due process rights, particularly the defendants’ lack of access to legal representation.” HRW also has expressed concern that Saif has not been seen or heard from since a video-link court appearance. Meanwhile, his case remains at the center of the dispute between Libya and the ICC (Westcott,2015).

As a result, the UN issued a comprehensive report in February 2017 that concluded that the trial of Saif and other officials failed to meet international fair trial standards and it also breached Libyan law in some respects. It was labelled a charade, an absurdity, a perversion of justice (Nebehay,2017; Human Rights Watch,2017). The UN Working Group on Arbitrary Detention also asserted in its November 2013 opinion that the gravity of the violations of due process and the lack of transparency in Saif’s trial made it impossible to guarantee him a fair trial in Libya. Thus, the ICC did not accept the results of the Tripoli trial and held that Libya was really unable to investigate Saif. The UN report said that the Libyan government has been unable to secure surrender of Saif who remains in Zintan which is outside the control of the internationally-recognized Libyan authorities in Tripoli. On May 2014, it made a decision rejecting Libya’s bid to prosecute Saif domestically, and decided that the case against him was admissible before the ICC (Karnavas,2016; Nebehay,2017; Human Rights Watch,2017). Finally, the UN report urged Libyan authorities to reform the justice system saying that the trial of Saif had highlighted ‘major flaws’ (Nebehay,2017).

Following that, because the ICC does not allow the death penalty, the prosecutor of the court requested an order for Libya to refrain from executing Saif. And the ICC called on the Libyan government to surrender Saif to The Hague in compliance with Libya’s international obligations (Karnavas,2016; Nebehay,2017). In its response to the prosecutor, Libya argued that the Tripoli trial proceeded fairly, where both the Libyan prosecution authorities and judiciary, in accordance with the separation of powers doctrine, worked independently from the two rival Libyan governments. It also submitted that there is an absolute prohibition, under Libyan law, on imposing the death sentence following a trial in absentia. Libyan law, as noted above, guarantees a right to a new trial once Saif is in the custody of the Libyan authorities. Therefore, Libya argued that such an order of the prosecutor of the ICC was unnecessary. However, given the incapacity of the justice system and the political and security instability in Libya, there is no guarantee that Saif will have a fair trial before the same court (Karnavas,2016). According to Westcott (2015) the Ministry of Justice in Baida in east Libya issued – after the trial of Gaddafi regime officials resumed in Tripoli – a statement declaring: “No impartial and independent judgement can be issued at gunpoint under illegitimate militias,” and saying that it has no responsibility for any legal proceedings taking place in Tripoli, opposing the practices of its legal institutions. Galustian (2015) argues that the Tripoli court is under the control of the Islamist GNC and the Libya Dawn militia, with its nefarious links to ex-Al Qaeda members. It is not a court in any proper legitimate sense. To make matters worse, the Libya Dawn militia is in control of the prisons. Even the Libyan Supreme Court (LSC),is subjected to intimidation and threats of the militias to force favourable rulings to this Tripoli gang of extremists.

The criminal prosecutions should have represented a significant step forward on Libya’s road to justice, but people’s interest has waned. As post-conflict Libya has unraveled, dreams of justice and freedom for many Libyans have been replaced by the urgent need for security, peace and stability (Westcott,2015). While the Libyan courts press on with the trial for war crimes committed during the conflict 2011, many Libyans today are more concerned with accountability for crimes committed since 2011. Westcott (2015) quotes Ahmed, a medical student, as saying that “I think more people have been killed since the revolution than were killed during it,” citing the hundreds of assassinations in the east of Libya and crimes due to the ongoing civil conflict across the country for which no one was brought to justice. He added (Westcott,2015): “But I am worried about the future because, from what I see, nothing is fair in Libya, and there is no justice.”

The International Crisis Group (ICG) (2013) argued that Libya’s ‘trial by error’ approach to achieve justice has triggered “more grievances, further undermining confidence in the state.” There is no functioning court system in many parts of the country. Judicial authority has been eroded by overall lack of security. The situation has been complicated, according to the ICG (2013) and Kersten (2015b), by the proliferation of militias, which have been operating above the law, hindering the work of investigators, lawyers and judges. They undertake the roles of police, jailers, prosecutors and judges. Such armed groups have run their own investigation and detention facilities, which are outside of the control of Libyan authorities, and have enforced their own forms of justice. Thousands of detainees, who are suspected of aiding the former regime, remain in the militia’s prisons, outside the official legal framework, without charges and without benefit of basic due process. Assassinations of lawyers, judges, police and military have further darkened the picture. Kersten (2015b) argues that a number of lawyers and judges have been assassinated, which has a ‘chilling effect’, where lawyers are now unwilling to represent former officials of Gaddafi regime.

Therefore, it could be argued that the absence of an effective police force, widespread possession of weapons, and persistent assassination of security officials have hampered the state’s ability to investigate and carry out justice. According to the ICG (2013), for example, the investigation into the killing the U.S. ambassador, Christopher Stevens, and three other U.S. citizens, who were killed in the attack against the U.S. consulate in Benghazi in 2012, has come to an impasse. Given this, reforming the security institutions and building a functional judicial system able to hold perpetrators to account is essential for delivering justice and ensuring the rule of law (Amnesty International,2012a; ICG,2013). The Libyan government will have to provide visible signs that it is addressing such shortcomings in order to restore confidence in state institutions (ICG,2013).

**6.3. Libya’s controversial transitional justice laws**

The disturbances and the events that followed the civil war in 2011 created an urgent need to apply the processes of transitional justice. The successive Libyan authorities issued controversial laws on some special procedures concerning the transitional phase (Defender Center for Human Rights,2018). This section explores some of these laws which are: the law No.37 in 2012, the amnesty law No.38 in 2012, the political and administrative isolation law No.13 in 2013, and the general amnesty law No.6promulgated by the House of Representatives in Tobruk in 2015.

**6.3.1. Law No.37: Violation of freedom of expression**

In May 2012, the first transitional authority at the time, the NTC, passed thirty-eight laws in the framework of re-shaping the foundation of Libya’s legal system and confronting numerous transitional period challenges. One of these laws is Law No. 37 which criminalized the praising or glorifying of Gaddafi, his sons, his ideas or his regime. It prohibits criticism of the state and its institutions and decrees the possibility of a life sentence for anyone who undermine or harms the state, terrorizes citizens or weakens their morale. This law was described as a violation of fundamental human rights and freedoms, and a step backwards on Libya’s path to establishing a democratic state built on the rule of law and human rights (Gaub,2014; Kersten,2012; Kersten,2015b). It was, thus, immediately met with widespread international and local criticism from Human Rights Watch, Amnesty International, and Libyan human rights lawyers. All confirmed that the law was in contravention of the right of free speech in the Constitutional Declaration of Libya, 3 August 2011. A wave of assassinations targeting judges, policemen and army officers seen as loyal to, or collaborators with, the previous regime has swept across Libya, especially in the east. In short, the state is subject to mob rule, and unable to provide basic security to its citizens (Gaub,2014; Kersten,2012).

It seemingly made it impossible to defend either Saif or Senussi for their actions in 2011, where a defence could easily be described as harming the interests of the state. Interestingly, Saif clearly referred to this issue in a statement given during an OPCD visit in June 7, declaring that there will not be truth because there is no security or protection for witnesses, where they are faced with possible life sentences or they are threatened and killed for simply testifying in his favour (Kersten,2012). Libyan human rights lawyers, therefore, challenged the Law 37 on the basis that it was unconstitutional and had it referred to Libya’s supreme court, which ruled that the law was indeed unconstitutional. The decision has been accepted by the NTC. However, the equally controversial Law 38 has escaped similar judicial scrutiny (Kersten,2012).

**6.3.2. Law No.38: Rebels (thuwar) crimes with impunity**

In addition to officials of Gaddafi regime, there have also been calls for the ICC to prosecute the rebels for their alleged crimes perpetrated during (and since) the civil war (Kersten,2015b). The UN Commission of Inquiry on Libya, which was established by the UN Human Rights Council on 25 February 2011, has detailed crimes of an international character such as war crimes and crimes against humanity that were committed by the rebels, or thuwar, and concluded that such violations of international human rights law have continued after the ending of conflict in a climate of impunity (Kersten,2015b;Lamont,2016;Van Lier,2017). Despite pledges of the NTC to bring to justice those who committed serious violations of human rights on both sides, no action has so far been taken by the Libyan authorities to bring the rebels responsible for serious crimes to justice, fostering a climate of impunity for such crimes (Amnesty International,2012b). Lamont (2016) confirms that although the rebels fought Gaddafi under the revolutionary slogan, they were also involved in numerous alleged crimes such as unlawful killings, abductions, arbitrary detentions without trial and torture that would become transitional justice legacy issues (Van Lier,2017); for the new Libyan authorities, the serious crimes committed by fighters (thuwar) who fought with the NTC forces were not to be investigated, or even acknowledged (Amnesty International,2012b; Lamont,2016).

For instance, despite clear evidence identifying some of the offenders, no investigation has been carried out into the killing of around 65 Gaddafi loyalists whose bodies were found in the Mahari Hotel in Sirte city on 23 October 2011. Some victims were beaten to death; some were hanged; others were shot dead after they surrendered or were captured. Some of the bodies had their hands tied behind their back and many had been shot in the head. Video footage taken by opposition fighters themselves on 20 October 2011 shows them hitting, insulting, threatening to kill and spitting at a group of 29 men in their custody, many of whom were found dead on 23 October 2011 at the hotel. One of the opposition fighters is heard saying take them all and kill them (Amnesty International,2012b). Similar impunity has been apparent in other cases highlighted below. In 2012, human rights organisations such as HRW reported widespread acts of revenge against Gaddafi regime officials and supporters. Many of them were unlawfully killed following capture, among them the Libyan leader himself and one of his sons. Militias also took captive thousands of suspected Gaddafi loyalists who were ill-treated in custody and tortured, in some cases leading to death. Militias also looted and burned homes of Gaddafi loyalists, forcibly displacing tens of thousands of Libyans. In some cases, entire communities became subjects of vengeance (Amnesty International,2012b; Van Lier,2017).

Of particular importance is the issue of forced expulsion of the entire population of the city of Tawergha by the Misratan rebels in August 2011 in an act of apparent retaliation for supporting the Gaddafi regime (Kersten,2012; Kersten,2015b). Tawerghans became the target for Misrata militias, who accused them of committing brutal crimes against Misrata while fighting with pro-Gadhafi forces during the conflict. On 14 August 2011, the Misrata militias attacked the town of Tawergha, and the residents were forcibly displaced (Van Lier,2017). Their homes were looted and burned down. The city of Tawergha has been destroyed to render it uninhabitable. The former inhabitants remain in poorly resourced camps in other cities of Libya and face an uncertain future, where they are still barred from returning to their town. The International Commission of Inquiry on Libya also reported that the Misratan thuwar have killed, arrested and tortured Tawerghans across Libya (Amnesty International,2012b, Kersten,2012; Kersten,2015b). Similar acts of vengeance were committed by Zintan militias against the Mashashya and Qawalish tribes in the Nafusa Mountains where thousands of people have been evicted or fled their homes (Amnesty International,2012b; Van Lier,2017). The cities of Sirte and Bani Walid also remain targeted by militias because of their alleged support for Gaddafi forces during the conflict. However, the transitional authorities have been unwilling to recognise the scale of militias’ violations, despite the mounting evidence of patterns of grave abuses in many parts of the country (Amnesty International,2012b). In response, some groups such as HRW increased their calls on the OTP to investigate and potentially prosecute Libyan militia leaders (Kersten,2012). Despite these allegations, however, the prosecutor of the ICC has chosen not to pursue arrest warrants for thuwar or opposition combatants. As discussed below, they have enjoyed immunity from prosecution for their crimes committed during the conflict (Kersten,2015b).

In May 2012, the NTC passed Law 38, which grants a blanket amnesty to the revolutionaries for any military, security or civil actions that were performed by them during the civil war with the aim of protecting their revolution, including the murder, forced displacement, detention of suspects, outside of any legal framework. The expansive nature of Law 38, thus, seems to cover all crimes committed in the name of the revolution (Gaub,2014;Kersten,2012; Kersten, 2015b). This law gives a legal cover for thuwar, allowing them to commit violations without accountability (Defender Center for Human Rights,2018). Rather than being investigated, those suspected of human rights violations often are hailed as national heroes. The immunity awarded to the fighters and their status as heroes has made it extremely difficult to prosecute the revolutionaries, even for more recent wrongdoings (ICG,2013). The state’s unwillingness or inability to investigate crimes committed by rebels during and after the conflict, such as the unlawful killing of prisoners of war, only fosters the militias’ sense that they are above the law, entrenching chaos and becoming a trigger of violence (ICG,2013; Gaub,2014). Considering themselves above the law, some thuwar have engaged in criminal activities and carried out targeted assassinations and torture. This has fuelled resentment and grievances, leading to the loss of confidence in the state’s ability to deliver justice (ICG,2013).

With this law, both the NTC and later the GNC sent a clear signal that transitional justice was to target Gaddafi regime officials. Law No. 38, on the one hand, referred detainees who were suspected of loyalty to Gaddafi for prosecution, while on the other hand amnestying the rebels (thuwar) who committed war crimes on the revolutionary side (Lamont,2016). The lenient attitude toward thuwar treatment of Tawergha residents is a case in point (ICG,2013). Although the forced displacement and the treatment of citizens of Tawerghans by Misrata militia may amount to ethnic cleansing and arguably even genocide, it seems unlikely to be investigated or prosecuted by Libyan authorities. This would run in contradiction to Libya’s obligations under international human rights law, and undermine rebuilding the state upon a foundation of respect for the rule of law (Kersten,2012; Kersten,2015b).

While subsequent revisions to Law 38 may limit impunity for the rebels, in practice, all their crimes have been amnestied. The justification of Law 38 had little to do with building or consolidating lasting peace. Instead, the blanket amnesty law has entrenched selective justice (one-sided justice), the culture of impunity, and the authority of militias. It granted immunity to the rebels and opposition groups, which has emboldened armed groups (thuwar) to continue their illegal activity to protect their revolution. Arbitrary detention, torture and murder by the militias is commonplace. In addition to Gaddafi regime officials, human rights advocates have been assassinated. The cost of Law 38 has been evident. The lack of accountability of the militias for their crimes, as well as secretive local criminal justice aimed solely at the defeated, fuels violence and undermines the country’s peaceful transition (Kersten,2012; Kersten,2015b; Defender Center for Human Rights,2018). One may argue therefore that this law represents a threat to the path of transitional justice. Such law may transform it into retaliatory justice (Defender Center for Human Rights,2018).

Amnesty International (2012a&b) and ICG (2013) argue that justice requires reining in militias that also will need to be held accountable for their actions; justice for yesterday’s crimes must go hand-in-hand with justice for today’s crimes. The new Libyan authorities must publicly acknowledge the gravity of ongoing human rights violations, and condemn those carrying them out, without seeking to justify such actions by blaming Gaddafi supporters and thereby causing further damage to families, communities and entire towns widely perceived as loyal to Gaddafi. All offenders who are responsible for human rights violations, regardless of their political positions, ought to be brought to justice in fair trials that meet international standards in order to provide redress to the victims of such violations and ensure respect of human rights and the rule of law (Amnesty International,2012a&b).

Law No. 38 was sharply criticised by the Libya Working Group, which observed that the law served the interests of certain groups such as protecting members of the NTC and militias from future prosecution. It also provoked a strong condemnation from Libyan Lawyers for Justice who argued that the Law’s vague language which amnestied all acts carried out by the revolutionaries acted to enshrine a culture of impunity (Kersten,2012; Lamont,2016).

Following Law 38’s passage, HRW argued that with the NTC now openly trying to protect thuwar leaders from justice, the ICC is responsible for strenuously examining these alleged crimes (Kersten,2012). However, despite Moreno-Ocampo declaring that Law 38 was not binding to the ICC and could not prevent an investigation or prosecution by the court, to date, nothing has materialized from the court’s investigations and there is no evidence that such action is forthcoming. There is no indication that the OTP has any interest in requesting arrest warrants for Libya's thuwar or that the ICC is applying pressure on Libya to conduct its own investigations into militia and opposition crimes. That made some groups frustrated with what they view as the resultant immunity gap (Kersten,2012; Kersten,2015b). I argue like Lamont (2016) that the ICC’s rapid intervention after Resolution 1970 in the form of three arrest warrants against Muammar Gaddafi, Saif and Senussi in the long term have harmed international justice. The question of whether to target all sides to a conflict, has sparked great debate at the UN ad hoc tribunals and at the ICC. In the case of Libya, with the arrest warrants by the ICC against only one side of the conflict and the failure of the court to address serious and systemic crimes perpetrated by the rebels (thuwar) helped reinforce the impunity and diminished the ICC’s standing as an impartial institution.

**6.3.3. Law No.13: Lustration**

According to Van Lier (2017, p.8), some of the Libyan militias, which are “both suspicious of remnants of the old regime and pleased with their new-found power,” started to forcefully introduce their own agendas into the political process. As suggested above, since the end of the civil war, Libya has been unable to control the militias that had held on to arms to fill the security vacuum after the former regime collapsed and consolidated control over key cities and areas, undermining the Libyan government’s authority. These militias maintained that the government had to be purged of virtually everyone who had ties to the Gaddafi regime. This had serious consequences for national reconciliation, peace and transitional justice (Kersten, 2015b).

On 14 May 2013, Libya’s GNC passed the controversial Political Isolation Law (PIL) to prevent all individuals who had served under Gaddafi’s regime from holding political and sovereign positions during and after the country’s transition (Kersten,2015b; Van Lier,2017; Defender Center for Human Rights,2018). Although the PIL was ratified by the GNC, the process was highly irregular (Lamont,2016).

At its heart, the PIL is a lustration law. It aims to exclude opponents through legal and political means (Kersten 2014c). Historically, the exclusion of a vanquished political opponent has been a common tool in the pursuit of transitional justice. However, lustration is a controversial mechanism for achieving justice in the aftermath of a conflict (Kersten,2014c). Following the Second World War, for example, the process of de-Nazification, as mentioned in Chapter One, sought to expel former Nazi figures from political, cultural, and social positions. Also, after the collapse of communist rule, states in Eastern Europe such as Poland and Czechoslovakia used lustration law to prevent former communists from holding political office. Another example is the process of De-Baathification in Iraq, which ensured that members of Saddam Hussein's Ba'ath party were purged from public positions. However, as discussed in Chapters One and Two, in many cases, the lustration mechanism contributed to the continuation of violence and instability (Kersten,2014c; Kersten,2015b).

In the Libyan context, it is notable that international (HRW) and local human rights groups (Lawyers for Justice in Libya) argued that the PIL should not be drafted in a manner as to violate human rights. However, due to growing instability and political pressure applied by the powerful militias such as Misrata thuwar and Islamists (Smith,2013; Kersten,2014c; El Fegiery,2014), the Libyan government did not – or perhaps could not – respond to their calls. As the GNC was discussing the bill, the militias took control over the foreign and justice ministries in Tripoli and pushed the GNC violently into passing the law (Smith,2013; Kersten, 2014c; Lamont,2016). On 5 May 2013, the militias successfully ensured that the PIL was passed when the GNC voted overwhelmingly in favour of the bill under which anyone who is associated with Gadhafi regime and held a key official position between 1969 and 2011 will be excluded from public office for a period of 10 years (Smith, 2013; El Fegiery, 2014; Kersten, 2015b). It therefore, according to Gaub (2014), makes it possible to try and punish individuals on the basis of their associations rather than their crimes proven in court. For example, no officer who commanded a unit in Gadhafi’s army was permitted to serve in the Libyan military. Gaub (2014) argues that this law has the potential to have more impact than Iraq’s de-Ba’athification legislation, which itself caused much trouble, and to eradicate what little is left of the previous Libyan armed forces. It would therefore hinder reconciliation, worsening the brain drain in new institutions.

The desire of citizens in transitional states to exclude former officials from holding power is understandable. Removing those responsible for autocracy or dictatorship is a way of facing the past, assuring that the old figures would not be in the state's new leadership, and the past violations will not be repeated. The lustration and political vetting, therefore, can act as a necessary mechanism to foster public trust in democratic change and institutional reform (Kersten,2014c; Lamont,2016). However, lustration processes have raised a heated debate and caused a deep division between various elements of Libyan society, because often individuals are excluded based on past associations (Lamont,2016; Defender Center for Human Rights,2018).

In the case of Libya, many like Smith (2013) have argued that the passage of the PIL will deeply hinder Libya’s transition. Both the law itself and the circumstances under which it was passed are highly controversial. She argues that: “The manner in which it was passed has set a precedent for rule by intimidation and has undermined Libya's transition towards democracy, justice and rule of law. Its application will mean the removal of key political figures creating more political confusion, chaos and instability.”

Moreover, the tension and frustration which has been generated within Libya because of this debacle could eventually lead to more conflict. While the militias (or thuwar as they like to be called) claim they are defending their revolution by ensuring that Libya's new government is free from all associations with Gaddafi's regime in order to remove the corruption, for many Libyans their actions represent an alarming shift towards rule by coercion and intimidation rather than the democratic order. In a democracy all citizens have the right to peaceful protest. But, once they bring arms to a protest, it becomes an armed attack or coup. However, most militias seem unwilling or unable to understand that this constitutes intimidation and that bringing weapons to the protest is both illegal and reprehensible. Those militias have come increasing under fire from the rest of Libyan society, raising a flurry of condemnation in the media, with support being expressed for the rule of law and democracy (Smith,2013).

More worryingly, in its final form, Libya’s PIL was very vague and unspecific (Smith,2013; Kersten,2015b). Rather than targeting individuals for specific crimes, the law is aimed at public positions. It was seemingly, in fact, aimed at anyone associated with Gaddafi regime and who served under him – even those who played an important role in guaranteeing the rebels’ and the National Transitional Council’s victory in the civil war – and not simply those who were responsible for crimes during the conflict (Smith,2013; Kersten,2015b; Bodszyński & Wierda, 2018). By most accounts, it is the Muslim Brotherhood who will make greater gains once the law is implemented (Smith,2013). Even before the election of the GNC in 2012, according to Lamont (2016), Libya’s Islamists were becoming increasingly hostile toward the drafting of a new Libyan constitution and the building of a secular state that did not sufficiently recognize Islamist notions of governance. Therefore, for Libya’s Islamists, the PIL offered a roadmap for countering the secular challenge by disempowering competing ideological currents. Therefore, almost two years after its passage, a new government in Tobruk that recognized by the international community as the legitimate government of Libya, the HoR, revoked the PIL, but it was retained by the rival GNC (Kersten,2015b; Lamont,2016). Revoking the PIL highlights political differences within the country between the HoR in Tobruk and the predominantly Islamist-backed GNC which retains control of Tripoli (Kersten,2015b).

Insofar as the PIL constituted a transitional justice mechanism, it was certainly not one which was adopted in order to contribute to reconciliation and peacebuilding (Kersten,2015b). Furthermore, the PIL has deprived state institutions of experienced and competent individuals from the previous regime, who would be very difficult to replace, and who could otherwise have contributed their expertise to the new Libya. According to Kersten (2014c;2015b), the PIL fits a precarious pattern of accountability during the transitional period of Libya, which has been characterised by one-sided acts of revenge aimed at those associated with the defeated regime. It also reflects the current situation of political instability in Libya, where decisions are politically motivated and often imposed by weapons rather than agreed upon through democratic processes. As such, it has fuelled the conflicts and divisions rather than foster national reconciliation. Thus, the Defender Center for Human Rights (2018) argues that this issue should have been left to the institutional reform clause. By this important mechanism of transitional justice, the corrupt could have been eliminated. Bodszyński & Wierda (2018) argue that the case of Libya provides a cautionary tale regarding the risks of pursuing transitional justice in the form of unfair trials and retaliatory purges without parallel mechanisms that could help victims to heal and promote national reconciliation such as truth telling, apology and reparations for victims and their families.

**6.3.4. Law No. 6: The Tobruk amnesty law**

Xinhua (2015), Karnavas (2016), Human Rights Watch (2017) and the Defender Center for Human Rights (2018) argue that in response to the death and life imprisonment verdicts ruling by the Tripoli court on Saif, Senussi and a number of former officials of Gaddafi's regime on 28 July 2015, Libya’s internationally recognized parliament in Tobruk unanimously approved and issued in the same day a law of general amnesty. This law provides conditional amnesty for all Libyans for certain crimes committed from 2011 until the date of issuance of the amnesty law. The law does not apply to all crimes, as its Article 3 states that those who commit crimes of murder for identity and ethnicity, crimes of terrorism, torture, drug dealing and trafficking, kidnapping, honor and rape, corruption crimes may not receive an amnesty. However, it does not rule out amnesty for other serious violations of human rights such as unlawful killings, forced disappearances, and forced displacement. According to Xinhua (2015) and the Defender Center for Human Rights (2018), the main conditions set by the law for amnesty are that: individuals who are included by the general amnesty law must present a written repentance pledge that they will not commit crime again; there must be a turn–in of the weapons used in committing the crime; and there must be reconciliation with victims.

The Defender Center for Human Rights (2018) argues that this is a highly controversial law. It has been subject to criticism because it was issued at a time of political division and military conflict between the competing governments. The law was widely covered by the media, particularly following reports of possibly applying it to Saif Gaddafi. The controversy has escalated since Mabrouk Graira, the late minister of justice of the interim governmental, issued a letter on 10 April 2016, ordering Zintan prison warden to release Saif because the conditions of amnesty law apply to him. This controversy about the issue of Saif illustrated that there were political and social actors seeking his release (Defender Center for Human Rights,2018). The amnesty law sparked many reactions, reflecting the importance and sensitivity of the issue, not only in its legal dimension but in its political and social dimensions. The first reaction was from a Zintan prison warden who emphasised the implementation of the order in the letter and the release of Saif as of 12 April 2016. Khaled al-Zaydi, Saif’s first lawyer, confirmed that Saif benefited from the amnesty which was applied to his case, and that the ICC does not have the right to demand to try his client after he had already been tried for the same charges before the Libyan court in Tripoli in the infamous case known as ‘the symbols of the regime trial’. Also, Karim Khan, Saif’s second lawyer, stated the same with regard to the amnesty law (Defender Center for Human Rights,2018).

As Karnavas (2016) argues, since Saif’s trial had been a sham, he has not been tried and thus he fell under the general amnesty law passed by the Tobruk government. Saif was amnestied for the crimes of which he was tried in absentia and sentenced to death. This law, therefore, would be a total bar to any future prosecutions. However, on June 2017 the Tripoli-based acting General Prosecutor asserted, according to Human Rights Watch (2017), that Saif was wanted for a retrial once he was in the custody of the authorities in Tripoli, and he did not qualify for the amnesty. He said that in any event, only judicial authorities were authorized to determine who met the criteria outlined in law to obtain the amnesty. Moreover, the charges against Saif are in fact crimes against humanity and the general amnesty law does not apply to them. The Tripoli-based acting General Prosecutor also reiterated that Saif is still wanted by the ICC (Human Rights Watch,2017; Defender Center for Human Rights,2018). Karnavas (2016) stated that the ICC, throughout this period and thereafter, has been attempting to secure Saif’s presence in The Hague. As mentioned above, Saif is being held by the militia of Zintan which is neither loyal to nor cooperating with the two rival Libyan governments.

The amnesty law, according to Karnavas (2016), has also sparked a significant debate over whether the Tobruk government, as the internationally recognized government of Libya in July 2015, can issue a blanket amnesty for crimes against humanity such as the alleged crimes for which Saif is indicted at the ICC; and whether other states or international criminal tribunals are bound to recognise such decrees. Karnavas (2016) argues that Libya as a sovereign state was free to grant such an amnesty. However, he argues a domestic amnesty is not necessarily binding on other states or the ICC. He suggests that the ICC may accept a state’s amnesty if negotiated and co-guaranteed by the UN. There are many reasons why the ICC does not or will not accept state amnesty. Most importantly, accepting state amnesty for serious human rights violations would effectively defeat the main reason for the establishment of the ICC, which is the ending of impunity for crimes against humanity. A state could issue binding amnesty for senior officials to prevent their prosecution before the ICC.

In my view, those who say that Saif should be handed over to the ICC ignore the fact that Libya – as mentioned in Chapter Two – is not a party to the ICC (Fikre,2011). It has not signed the Rome Statute, which is the treaty that established the ICC, and therefore the decisions of the latter are not binding on it, and local law remains the holder of jurisdiction over its citizens. As argued in Chapter Two, the ICC is neither a complementary judiciary nor an authentic judiciary. Its decisions are often purely political and not criminal. The ICC’s preoccupation in the exercise of its mandate so far only on African countries and its continued failure to at least become critical of war crimes of the US and the UK in Iraq and other states has put its noble purposes into doubt (Fikre,2011). Why has it not seen, for example, trials of the presidents and soldiers of America who committed horrendous crimes in several countries such as Iraq, Vietnam, Nicaragua and Afghanistan? In the case of Iraq, for instance, American soldiers committed terrible crimes documented by evidence, such as the killing of civilians and the destruction of cities by air bombing; terrible crimes were also committed by American soldiers in Abu Ghraib prison such as rape and torture of prisoners. Yet none of these have been prosecuted by the ICC, which casts doubt on the integrity and impartiality of the court.

I argue like Karnavas (2016) that Libya as a sovereign state was free to grant such an amnesty. In the event that states are forced to extradite their nationals, such as in Libya, it should be considered to violate of the sovereignty of the state. The general amnesty law issued by the Libyan parliament in Tobruk, which is the highest legislative authority in Libya, has included Saif based on the belief that he was referred to the court, as mentioned above, for purely political reasons, not by criminal evidence. Therefore, he is considered as free under the amnesty law, which must be the sovereign.

Fikre (2011) argues that when the Iraq Special Tribunal (IST) prosecuted and executed Saddam Hussein, even though it was nominally a local court, the occupying forces in Iraq had intervened in the whole process that Iraqi people have been forced to live with. It is, therefore, in the interests of Libyans that the application of transitional justice mechanisms is left for the locals. In my opinion, in Saif’s case, there is a need to consider the internal political and security situation of Libya. I would argue that amnesty is a part of the reconciliation and peace process. As Karnavas (2016) argues, amnesty is repugnant but necessary. He characterizes amnesty as a virtuous evil, or a necessary evil dictated by common sense and the desire to protect innocent civilians from the inevitable tragedies that the current situation – the continuation of the conflict in Libya – would bring. As the Defender Center for Human Rights (2018) argues, amnesty should be justified by social interest, and it should aim to overcome the existing circumstances and maintain the cohesion of society. However, it is clear that amnesty laws are often controversial.

**6.4. Restorative justice and customary justice practices in Libya**

**6.4.1. Preface**

Since the death of Gaddafi in 2011, violence in Libya has increased dramatically. As mentioned above, armed militias took over the country. Kidnappings, assassinations, and explosions have become commonplace. National and international policymakers have sought ways to resolve the conflict and promote stability. However, local and international initiatives have failed to break the violence and achieve national reconciliation (Elmangoush,2015). Van Lier (2017) argues that the hope of national reconciliation, as a priority area for the transition, has been diminished due to the limited capacity of Libya’s transitional institutions to address deep political and social divisions. The deep wounds inflicted on society need time and help to heal, but the weak state and its fragile legal system cannot provide that assistance. Thus, restorative outcomes may be particularly important to justice in transitional settings characterized by conflicts at the community level (Elmangoush,2015). According to Elmangoush (2015), restorative justice shares some values and concepts with Libya’s customary system that is conducted by traditional and religious leaders. The customary justice system played a crucial role in Libyan society during the Gadhafi regime. A majority of Libyans consider customary justice to be both an accessible and an acceptable means of resolving their disputes. As Libya’s formal justice system is in disarray and conflicts are threatening the lives of Libyan people, this section argues that restorative and local justice must be an essential component in Libyan conflict resolution. Braithwaite&Rashed (2014, p.1) argue that “In places like Libya, traditional tribal justice informed by evidence-based restorative justice is imperative for smothering sparks that might reignite civil war.” The hope of security for the frightened Libyans is traditional tribal reconciliation by trusted Hukama (wisemen) (Braithwaite&Rashed,2014;Almenfi,2017).

Nevertheless, it is hard to determine exactly how large a part the customary practices could play in conflict resolution and reconciliation efforts in Libya, since scholars have yet to undertake any extensive studies of the country’s customary justice system. The uncertainty about the scale of the contribution that local practices might make must be acknowledged until such studies become available. But there is no good reason to doubt that it does have the potential to play an important role in post-conflict societies (Elmangoush,2015). This is especially clear given examples in Chapter Five from elsewhere in Africa of states that have used customary practices. This section addresses ‘reconciliation’ as one of the key principles to be addressed in order to move forward. It also considers a role of ‘Orf’ in resolving the conflicts and achieving reconciliation. The goal of this section is to stimulate debate among scholars, policymakers and practitioners about the role and potential of restorative and customary justice in the Libyan context.

**6.4.2. Reconciliation process**

Given deep divisions in society, and among international interests, calls for achieving an inclusive national reconciliation have emerged. At the outset of the transitional period, the NTC leadership publicly expressed its intention to achieve justice by addressing past and persisting issues, and appealed to Libyans for forgiveness and reconciliation. This is a necessary matter for moving forward and for the success of the future Libya (Gaub,2014; Van Lier,2017). But while a discourse of reconciliation dominated the early days of new Libya, revenge has soon emerged in the absence of law (Gaub,2014). The weakness of capacity in Libya’s institutions and the deteriorating security situation have hampered the processes of transitional justice. These aspects allowed the militias, as mentioned above, to impose a one-sided approach to accountability (Van Lier,2017). Death sentences have been issued for former regime officials, international arrest warrants have been issued for hundreds of exiled Gaddafi supporters living in other Arab countries and Europe, and so far, thousands of those suspected to be supporters of Gaddafi regime have been put in militia-controlled prisons without trial (Gaub,2014). Therefore, instead of addressing past and persisting issues of justice, new grievances have been created, hampering the national reconciliation efforts (Van Lier,2017).

The UN, and some Libyan political actors, actively attempted to foster national reconciliation by various national dialogue initiatives. However, such efforts to bring all Libyans together to discuss the possibility of reconciling and end violence between them, to date, have led nowhere (Elmangoush,2015; Van Lier,2017). Some initiatives were successful locally, but for many reasons could not be translated to the national level (Van Lier,2017). Elmangoush (2015) and Van Lier (2017) argue that the failure of reconciliation springs from a set of reasons: deep divisions in society; an enduring desire for revenge; the political isolation law of Gaddafi supporters; and the lack of political will or the necessary resources for implementation at national level. Sabha is just one example of how difficult the reconciliation process in Libya is, due to the violence and societal divisions between 17 February thuwar and the supporters of the former regime. This section refers to the importance of “magnanimity and forgiving past offences,” (Aboueldahab,2019) and the need for reconciliation for “wounds inflicted on Libyans…over the past 8 years and earlier.” (Aboueldahab,2019). It recommends that reconciliation efforts should be predicated on a comprehensive and viable national reconciliation program between supporters of February and the supporters, most of who live in exile in neighboring countries, of the Gaddafi regime. But how is such a reconciliation to be achieved (Elmangoush,2015)?

In the case of Libya, the key actions that are necessary for reconciliation are: first, a general amnesty (Aboueldahab,2019) “for the period of the conflict.” The conflict here refers to developments since the 2011; second, releasing all political prisoners; third, disarming outlaw militias; fourth, unifying the military and security institutions; lastly, ensuring the return of the displaced while securing their lives (Aboueldahab,2019). Van Lier (2017) added that there is need for an inclusive national dialogue in order to agree on how to solve the problems and build consensus among different actors. However, for a National Dialogue to be fruitful, the dialogue must include all components of the Libyan people: political factions, tribal elders, local councils, and civil society organizations, regardless of their political views and tribal affiliations. The most important thing is that the security conditions need to be propitious.

Although there is currently a growing consensus regarding the urgent need of national reconciliation in Libya, such reconciliation is still frequently described as conflicting with justice (Eljarh,2011). However, it could be argued that the challenge in Libya’s critical transitional phase lies in expanding the meanings of justice to include non-judicial mechanisms such as reconciliation (Aboueldahab,2019). Braithwaite & Rashed (2014, p.8) argue that “The more the situation deteriorates, the more reconciliation that gradually displaces guns becomes increasingly the way forward.” It offers a critical opportunity to ensure that the complex justice, peace and state building needs of Libyan society are addressed. Less emphasis on criminal prosecutions and greater emphasis on inclusive dialogue, establishing the truth, reparations and restoring security serve as a more attractive strategy to achieve a level of reconciliation in Libya. Without reconciliation, efforts to bring about a sustainable peace will fail (Aboueldahab, 2019). Therefore, reconciliation needs to be promoted to the Libyan people by designing national campaigns for that purpose (Eljarh,2011).

According to Aboueldahab (2019) “Libya has a history of reconciliation, amnesties and forgiveness.” Therefore, “National reconciliation must be achieved, based on traditional Libyan practices and values and with respect for the demands of justice. The reconciliation process must be free from foreign interference.” (Aboueldahab,2019). Libyans believe that reconciliation efforts “are most likely to be successful if those responsible for the process reflect on the legacy of Libya’s ancestors, customs, traditions, and if the efforts of Libya’s old and young are combined.” (Aboueldahab,2019). Bodszyński & Wierda (2018) argue that Libya’s rich traditions of mediation and reconciliation between tribes could provide the basis for genuine transitional justice and post-conflict reconciliation.

**6.4.3. The potential of customary law ‘Orf’ in Libya at reconciliation and peace-building**

Braithwaite & Rashed (2014) argue that local justice is important in transitional societies beyond state authority for controlling conflict and crime. Van Lier (2017) argues that the inability of Libyan authorities to reassert control over the security sector led Libyans to revert to non-judicial options to resolve the conflicts. With violence increasing in some places in Libya, tribal leaders were asked to mediate local disputes through traditional conflict resolution mechanisms (more on this to follow). Though prospects of a permanent peace in Libya still seem extremely fraught, at least the reconciliation processes in some regions of Libya temporarily suppressed fighting (Braithwaite & Rashed,2014).

Given the urgent need to address the deep divisions and harms, Libya has one significant asset: the prominent role traditional leaders can play in dispute resolution by using customary practices (Elmangoush,2015). Almenfi (2017) argues that Libya is a tribal society where tribal leaders are the major actors. They have played a crucial role throughout the history of the country – from the Italian colonisation between 1911 to 1943, to the conflict in 2011– in keeping the unity between Libyans and maintaining a peace. Since 2011, tribes have practiced their role where they are not only solving individual crimes but addressing the local disputes across the country. This role of the tribes has evolved the customary law which is called ‘Orf’ in Arabic. Customary law or ‘Orf’ is also referred to as ‘unwritten law’, ‘indigenous law’ and ‘folk law’ (Almenfi,2017; Index Mundi,2018). It is the common law that is used by the tribal leaders to resolve local conflicts into an established law system (Almenfi,2017). This common law is based upon the customs of a community. Common features of customary legal systems are: they are rarely written down; they embody a set of rules that regulate social relations; and they are agreed upon by members of the society. Although customary law systems include punishments for violations of the law, resolution tends to be reconciliatory rather than retributive (Index Mundi,2018).

Customary law in Libya follows the same principles as that in tribal societies; where tribal elders use traditions in order to resolve a problem between fighting parties and impose fines, usually as camels, sheep or cash. The customary law typically includes four elements:(1) building trust between the leaders and victim’s family by visiting the family and offering solace for their loss;(2) selecting unbiased, neutral leaders from other tribes to serve as respected mediators in negotiations and contacting them to hear their insights and perspectives;(3) providing reparations to the victim's family, such as by giving the family a number of camels or sheep or equivalent value of money; and (4) asking for an agreement to resolve the problem (Elmangoush,2015).

Almenfi (2017) argues that in the case of Libya, with the competing governments fighting over power and thus failing to provide security and peace, the customary law or ‘Orf’ is “the only effective law that the vast majority of Libyans respect.” It is widely believed that tribes can play a key role in peace-making. However, the efforts of the Hukama (Wise Men) – usually tribal sheikhs (leaders) – in resolving the conflicts, is underestimated. Hukama have become the most active peacemakers in Libya. In the absence of state institutions, they are engaged in conflict resolution and peacebuilding by using ‘Orf’. Their importance emerged prominently after the breakdown of state security in 2014 due to the split of the governments and militias control. Thus, as Almenfi (2017) argues “capitalising on the effective role that Hukama are playing is the most pragmatic solution for containing most of the conflicts in Libya now.”

During the Gadhafi regime, customary law or ‘Orf’ played a crucial role in Libyan society. Tribal leaders became more influential in society than the government, using ‘Orf’ as a mechanism for dealing with conflicts between families or tribes (Elmangoush,2015; Almenfi, 2017). ‘Orf’ was one of the sources used in criminal cases. The state relied on tribal sheikhs to solve crimes (Almenfi,2017). According to Almenfi (2017), a Libyan judge can free the offender in a killing crime, if the tribes of victim and perpetrator resolve the conflict using ‘Orf’. Elmangoush (2015) argues that when a crime is committed against an individual in Libya, whether as minor a crime as petty theft or as serious as attempted murder, the individual enjoys two kinds of rights:(1) a personal right to report the crime by going to the police and insist on punishing the offenders following a legal process; and (2) a state’s right, where the crime is considered to be against the state, and then the state has right to intervene to achieve justice for the individual’s safety. Traditional leaders, according to Elmangoush (2015), can play an important role to bridge these two rights and achieve justice for all involved.

The following example neatly illustrates the complex layers within the Libyan system and traditional customary law’s potential as a mechanism of restorative justice. Ahmad, a well-known businessman, was stabbed by two men and received minor injuries while walking at night in Benghazi. Despite the fact that no one recognized the attackers, his father went to the police to report the crime. After one week, two men representing the offenders’ tribal leaders came to the home of the tribal leader of Ahmad’s family; they were asking about Ahmad’s health. A week after that, they came again to ask Ahmad’s family to waive their right to go to court and, instead, to solve the issue privately because the two offenders were minors and committed the crime under the influence of alcohol, and they were not expected to cause trouble again. Ahmed's father agreed to waive his personal right but did not drop the right of the state. In the end, the problem was resolved during an official meeting between the traditional leaders from both sides; they made the decision on behalf of the two families; and the offenders were put in jail for a short time (Elmangoush,2015).

Traditional leaders can also significantly affect the relationship between the parties of a conflict, even when the conflict involves the state. For example, on 8 March 2014, a militia had seized four oil ports on the eastern coast, placing pressure on the GNC and the central government. The GNC tried to resolve the matter by sending government representatives to the militia at the oil port, but the militia refused to speak to them. Only when the government asked tribal leaders to intervene and mediate were there productive negotiations and the possibility of reconciliation. After a series of conversations negotiated over a month, the issue was resolved, and the militia returned control of the ports to the government (Elmangoush,2015).

Many would argue that such justice violates the law, and hinders access to legal justice. In the case of Libya, however, formal judicial proceedings can take years and still fail to reach a decision. As mentioned above, most judges and lawyers have been threatened, the courts are bombed out, and the police is too weak to protect the legal system and its employees. Moreover, individuals in tribal societies often depend on traditional practices as the main method to resolve dispute. These practices are part of the cultural, social, and political structure of community life (Elmangoush,2015). Therefore, customary practices and processes are more likely to be attuned to the cultural landscape in which local conflicts arise than the formal legal system (Elmangoush,2015). Libyans – especially those who live in areas far from the central government – saw ‘Orf’ as an essential element in restoring relationships, enhancing reconciliation, and fostering social cohesion within the community (Almenfi,2017). As Najla Mangoush argues, according to Almenfi (2017), “The power of the tribal leaders is how they can restore the relationship between two sides that have been affected by the conflict.”

The advantages of traditional practices, especially in a weak state mired in conflict, are many and, thus, should be recognized. It can function in little time with minimal preparation and resources. As has been noted from the examples given above, the negotiations required little time, low expense, and are quickly implemented. Moreover, some elements of traditional practices are more restorative than those of the state’s formal legal system. Tribal leaders focus on repairing relationships that have been destroyed in a conflict by visiting both parties, building trust, and providing gifts and goods. These practices help restore relationships and trust between parties (Elmangoush,2015).

Since 2011, Hukama as traditional peacemakers have been forced to develop their engagement from solving small disputes to dealing with disputes at the national level. With the absence of law and the deterioration of the security, tribal sheikhs became almost the most active peacemakers in Libya, and ‘Orf’ gained more respect by many Libyans. It “is considered to be the only thing that is still holding Libya together and providing a relative stability in some parts of the country” (Almenfi,2017). According to the United States Institute of Peace (USIP) report in 2016, “Tribe, Security, Justice and Peace in Libya Today”, 979 Libyans were interviewed and more than 60% of participants agreed that tribes were able to provide security to the society. One of the elders of the Magarba tribe in the east Libya said (Almenfi,2017): “If thousands of Libyan lives have been lost in the current civil war in Libya, ‘Orf’ has saved hundreds of thousands.”

Despite the fact that the weapons are available easily across Libya with no government control, ‘Orf’ has been relatively successful in maintaining the social fabric in some parts of Libya (Almenfi,2017). First example, as mentioned above: in 2011, Zintan and Mashashya tribes in west Libya were involved in a violent conflict, where Zintan accused Mashashya of helping Gaddafi forces (Van Lier,2017; Almenfi,2017). Since October 2011, more than 2500 people of Mashashya tribe fled three villages near Zintan. There was a direct threat to their lives if they returned. With the security vacuum, the three competing governments were not able to make a peace accord between the Zintan and Mashashya tribes. So, an alliance of twelve tribes from all over Libya intervened to mediate between the two tribes. This coalition negotiated tirelessly for more than a year and managed to reach a reconciliation and peace agreement. This inter-tribal peace agreement, which was signed on 18 May 2017 in Alasaba city, paved the way for the schools, hospitals and shops to reopen and ultimately the return of all displaced people from Mashashya to their villages (Almenfi,2017). Almenfi (2017) argues that “This alliance reflects the tribal leader’s ability to stop and prevent further conflicts and act as peacemakers in the absence of state authority.”

A second example: the assassination of army and police officers started in the eastern region of Libya in 2013. That led to the war in Benghazi between the Libyan National Armey (LNA), and February thuwar and Ansar al-Sharia (Al Qaeda). With the war, the collapse of security and the absence of the rule of law, tribal sheikhs in the East decided to act. A sheikh from Twajeer tribe based in Benghazi, said (Almenfi,2017): “We cannot wait for the government or the army to provide security; we need to act and do it fast”, and a sheikh from the Magarba tribe said (Almenfi,2017) “Tribes cannot be a political party, lawmaker, or get involved in politics, but we cannot sit by and watch people die every day and do nothing.” Based on their understanding of their national responsibility, the eastern tribes gathered in Asahel city, east of Benghazi, on 15 April 2017 to codify and endorse the ‘Orf’ temporarily. This was the first time that the ‘Orf’ or customary law was officially written. “This Honor Code is meant to fill the security vacuum, prevent revenge, avert violence and preserve the sense of security that most Libyans are missing.” It includes guidelines to solving conflicts and maintaining security and peace, providing steps to be taken in case of any crime or violent act. This tribal initiative succeeded in holding the eastern region of Libya together, where no city or tribe is currently attacking another. It is a culmination of tribal efforts in preventing the outbreak of conflict in the region (Almenfi,2017).

By using ‘Orf’, the Libyan tribal leaders have played a key role in preventing violence and saving many lives among the current chaos in Libya. Therefore, not utilising tribal traditional mechanisms and ignoring their importance in restoring relationships and maintaining peace can show a lack of understanding of how Libyan society functions. Hence, any future peace initiative, whether it is from the Libyan governments, the UN or other national governments, should respect the tribal traditional way of bringing people together again. Any strategy to end the conflict should consider the successful tribal efforts of peace-making. The tribal sheikhs, with support, can be effective in preventing violence at the local level. Therefore, Hukama (tribal sheikhs) interventions should be supported to help the local police in containing any conflicts (Almenfi,2017). The success of the east of Libya in sustaining peace between tribes can be a Libyan model for all unstable regions of the country. The relative stability in the eastern regions underscores the efficacy of the ‘Orf’ due to the high respect for it among Libyans. The advantage of Libyans’ respect for ‘Orf’ can be taken as first step to avoid violence until national reconciliation can be achieved and lasting peace built (Almenfi,2017).

Elmangoush (2015) confirms that the customary practices in Libya are currently capable of dealing effectively with some disputes, but not with all kinds. It is important to mention here that the state faces the challenge of dealing with massive violations of human rights, and traditional leaders lack the necessary knowledge and training on how to deal with the victims of war crimes such as torture and rape. They also lack the power to impose sanctions such as the sentence of imprisonment. Libyan elders and traditional leaders, however, could play a significant role in promoting reconciliation between former enemies and defuse conflicts that will lead to the commission of further human rights abuses. To expand their role, local leaders will need to be trained in the principles and practices of restorative justice. Libya will need support from the international community to provide its leaders with the necessary training. This support must be given in the form of partnerships that allow local leaders to have ownership of the customary process.

As mentioned in Chapter Three, a key aim of restorative justice is to restore relationships between victims and offenders and entire communities that have been directly involved in a conflict. Restorative justice has religious roots that recognize a community responsibility to address the harms and make things as right as possible. This emphasis on the community responsibility makes restorative justice ideally suited to help solve the conflict in Libya. The process of restorative justice can include all stakeholders in Libya: government, civil society, tribes, pro-Gadhafi groups, and militias. The principles of restorative justice can fit well in the Libyan context, where Libyans already value the interconnected communities and have great respect for their traditional leaders. If restorative justice mechanisms were to be integrated into Libya’s customary practices for addressing conflicts, traditional leadership could become central to the transition process. It would be more able to help break the cycle of violence, to handle the harms that have been done, to address the ongoing needs of the victims and how they can support them. In short, the security situation would be improved both in the short-term and the long-term because training in the principles of restorative justice would prepare leaders to handle the present and future conflicts (Elmangoush,2015).

**Conclusion and recommendations**

This chapter examined the use of some mechanisms of transitional justice in Libya. What does the above investigation tell us about their effectiveness in achieving the transitional justice goals? Transitional justice practices that have been used in Libya have been unable to cope with the complexities of justice, reconciliation and peace demands, due to a multitude of difficulties that have faced by the country since 2011. The security crisis due to the weak judicial system and army and police institutions; domination by militias, which continue the conflict for access to power and resources; the fragile and competing Libyan governments; and political mismanagement are examples of such difficulties.

Transitional justice in Libya highlights the urgent need to rethink prosecutions in post-conflict societies where state institutions are very weak. The focus on accountability for the past in the judicial processes of both the ICC or national courts has proven controversial in transitional contexts. It hampers any peaceful transition in the country. This chapter has argued that, rather than contributing to respect for the rule of law and human rights, and creating conditions for the consolidation of stability and democracy, the use of retributive justice may lead, as the Libyan experience today suggests, to exacerbating the violence, instability, divisions and impunity. The experience of criminal justice in Libya is a clear example of one-sided justice, i.e., “Victor’s Justice”, which prosecutes and punishes the former regime figures, whilst granting immunity to the country’s militias that lead the perpetuation of violence and undermine peacebuilding. As witnessed in Libya, the political isolation law also was a highly divisive process. It deepens divisions among components of society and hinders rebuilding the state.

For Libya, criminal justice is unlikely to be a priority in such circumstances. It may be the last thing on Libyan people's minds. Surely, achieving reconciliation, maintaining peace and stability, and rebuilding the country's infrastructure, are the priorities of the Libyans. Criminal prosecutions, of course, are an important step, but they will not be sufficient. Libya needs a more comprehensive transitional justice process that includes restorative and local justice mechanisms, which might be more appropriate for the current situation of the country. This chapter has argued that, as the formal legal system is not effectively functioning, there is an opportunity to use the country’s restorative and customary justice system to help restore relationships between individuals and the community as a whole and promote reconciliation. Well-trained traditional leaders in restorative practices can play a significant role in handling crimes and defusing disputes.

To achieve Libyans’ hopes for justice, human rights, the rule of law and democracy, my recommendations include: establishing security and peacebuilding before applying transitional justice; not conducting criminal justice any time soon; ensuring the necessary reforms of the justice system and its effectiveness; ensuring local ownership of the transition mechanisms; reining in the militias and ending revenge attacks against Gaddafi supporters; implementing a disarmament and reintegration process; achieving an inclusive national reconciliation; and providing sensible reparations for victims and their families for their losses. I also recommend accelerating the reform of the state institutions and security forces; and lastly, inclusion and activating laws and regulations to combat corruption, ensuring that abuses of power will not accrue in the future.

**Conclusion**

I conclude by providing a brief summary of the key arguments of the thesis. The main ambition of this dissertation has been to provide a contribution to the study of transitional justice by analysing its mechanisms which I hope then to facilitate future studies. Drawing from the previous chapters I attempted to critically answer the major question of this thesis about which mechanisms are more appropriate to transitional societies. Of several mechanisms of transitional justice, I have chosen to investigate the most used. By considering under what circumstances these mechanisms are likely to emerge and operate, by evaluating the justifications, strengths and weaknesses of each approach, by investigating the role that each may play in achieving transition goals, I concluded by arguing that transitional justice requires attention to more than just retributive justice if it is to contribute to reconciliation and sustainable peace-building in the aftermath of conflicts. Drawing on some cases, I suggested that adopting restorative and local mechanisms are more appropriate to fulfil long-term objectives and needs of post-conflict societies.

The first Chapter presented the theoretical framework and various approaches of the concept of transitional justice. I argued that the field of transitional justice faces a number of normative and practical dilemmas. The central dilemma is: how to address human rights violations while at the same time achieving reconciliation and building peace? I argued that post-conflict societies, in dealing with a legacy of human rights abuses, often ﬁnd themselves struggling between moral imperatives to do justice and political, economic and security interests to achieve reconciliation and peace. I argued that the approaches of transitional justice should be flexible to meet the challenges faced by transitional societies. I considered the key concern of this dissertation which is the tension between justice and peace. I explained my view about this issue. I argued that balancing justice and peace is difficult – if not impossible – in transitional contexts. I argued, thus, that given the difficult circumstances and demands of transition, a trade-off of justice for peace is crucial in order to move forward. I have stressed that the view I have defended does not mean to deny the importance of legal justice for both victims and communities, but rather to argue that peace is a prerequisite for establishing justice, the rule of law and democracy in transitional societies.

Accountability of offenders as one of the key goals of transitional justice was given due attention in Chapter Two. Trials are the most direct way to deal with those have committed human rights abuses and to establish punishment. The role of criminal prosecutions and legal proceedings in transitional contexts was critically assessed. This evaluation addressed the existing literature on the justifications of trials and their aims. I attempted to respond to the arguments for the possibility of conducting criminal trials and the positive potential impact that they may have on reconciliation, peace and democracy in post-conflict societies. I argued that although holding perpetrators accountable is vital, this mechanism is highly questionable in transitional contexts for the reasons that I clarified in this chapter. The dissertation's contribution to the existing literature on criminal trials lies in drawing attention to the extremely complex conditions of the judicial system in post-conflict societies. In view of the practical and legitimacy shortcomings from which local and international courts often suffer, especially the ICC, I have argued in favour of using restorative mechanisms. To justify this argument, I attempted to explain the conditions and limitations of both local and international courts in such societies that may make prosecution of offenders impossible or infeasible in the short-term. I argued that domestic courts are unable to investigate violations and punish offenders, and the intervention of the international community represented in the ICC, on the other hand, is not locally acceptable and inappropriate. By drawing on some cases, I demonstrated that there was dissatisfaction with retributive approach as a means of dealing with human rights violations in such circumstances. I explained the ways in which the ICC has intervened in some countries, especially in Africa, to bring justice. Many transitional societies refused its interventions. It is believed that criminal prosecutions may undermine peace efforts or even fuel the conflict rather than achieve justice. By arguing against criminal prosecution and by showing their potential risks and negative effects on post-conflict societies, I did not mean to deny justice, as mentioned above; rather I have sought to explain that there are political, social, economic and cultural conditions that may make it impossible for post-conflict societies to fulfil the duty to prosecute. I also sought to defend the ethical values of reconciliation, stability and peace that societies ought to prioritise in transition periods.

Chapter Three, Four and Five reviewed restorative justice strategies. Chapter Three argued that restorative practices and programmes such as victim-offender mediation process may have potential to avoid retributive justice challenges in transitional contexts. Punitive justice is seen as insufficient for peace building, for it does not attend to the victims’ suffering and needs, and it does not allow for the reincorporation of the offenders in the community. As opposed to criminal justice that focuses on punishment and deterrence, restorative justice responds to crime and disputes with dialogue, reconciliation and rehabilitation. It has a different view of justice that particularly focuses on repairing the harm caused by crime and restoring the relationships between conflict parties. It considers the circumstances and needs of victims, perpetrators as well as the community. I argued that restorative practices have been proven to work better than criminal prosecutions in meeting victim’s needs, reducing recidivism, and helping both victim and offender to reintegrate and return into the community. Thus, I argued that restorative justice can play a significant role in deeply divided societies that look to bring people together again within the society and move forward. The flexibility of restorative justice processes allows transitional societies to respond to large scale of human rights violations across distinct cultures. Through stakeholders’ engagement – victims, offenders, the community – in these processes, they have the opportunity to determine the appropriate justice mechanism for them.

In the Fourth Chapter I have defended – based on the South African experience – the political and moral importance of using a truth and reconciliation commission and reparations as a form of justice in transitional periods. I contended that the unique aspect of its work is that it focuses on reconciliation and peace which are required as a priority in order to face the enormous challenges of transitional periods. I argued that despite the fact that a truth commission has some limitations, it can play a critical role in transitional societies. It may create a moral and political climate in which necessary changes and reforms may take place. Key arguments that have been made are: that a truth commission is the most viable mechanism for truth-seeking, reducing desire for revenge, bringing a national reconciliation.

In Chapter Five, I argued in favour the implementation and development of local justice systems as long as they are desirable, available and they can help societies to move forward. I have argued that there is no one-fits-all solution. Therefore, every case has to be addressed in accordance with local contexts. By considering traditional practices of some African countries, and explaining their advantages and disadvantages, I argued that the local and customary practise of justice which are grounded in the culture of communities can play an effective and quick role in solving conflict problems and restoring some stability. This is because they focus more on re-building relations, reconciliation and social harmony. I conclude by arguing that enhancing local justice approaches and initiatives as a strategy for achieving transitional justice objectives, is necessary.

In Chapter Six I analysed the Libyan challenge of transitional justice given the complex conditions in that country. I examined the mechanisms of transitional justice that have been applied in Libya since 2011. The chapter attempted to demonstrate the impacts of the ICC's intervention and national trials on post-conflict Libya. It discussed the controversial transitional justice laws. It also analysed the contributions made by domestic justice mechanisms at reconciliation and peace. In this contribution we have suggested, for a range of reasons already mentioned in the chapter, that the restorative and customary justice practices that are used for decades in Libya such as ‘Orf’ are the preferred choice by the locals due to their uniqueness and effectiveness. I argued that such mechanisms are more appropriate to Libyan conflict milieu, which are likely to have more influence on the resolution of conflicts and support peace to move forward. I have argued that reconciliation and peace are urgent priorities in post-conflict Libya. As long as the political state institutions, the judicial sector, the military and security apparatus are not robust enough, criminal accountability, while it has its value, can potentially create more trouble. It can easily turn to revenge and undermine stability. I argued, as in Chapters One and Two, that the priorities of transitional justice should include peace building, reform judicial and security sector which allow holistic transitional justice strategies to be fulfilled. Since conflicts take place in particular cultural and social contexts, it is therefore logical and necessary for leaders and actors, as shown in Chapter Five, to use their own tools in resolving the conflicts and achieving reconciliation. Libya should adopt its local mechanisms in tackling conflicts, especially when most of those earlier mechanisms employed by the international community and the Libyan government have yielded little or no result.

Ultimately, I hope this thesis may give greater room for dialogue on transitional justice mechanisms. Further research in regard to transitional justice field can make a significant contribution to our understanding of the efficiency of its mechanisms in dealing with the problems of transitional contexts.

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