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Foreword

On 19 March 2008, the Minister of Foreign Affairs and the Minister for Development Cooperation asked the Advisory Council on International Affairs (AIV) and the Advisory Committee on Issues of Public International Law (CAVV) to produce an advisory report on transitional justice (see Annexe I).

The request for advice stated that in recent years there has been considerable interest in this subject, especially the role of the law after a period of grave human rights violations. This includes both norm-setting and the actual establishment of transitional justice mechanisms, such as the International Criminal Court and amnesty schemes in Northern Ireland, the establishment of the Truth and Reconciliation Commission in South Africa, reparation in Chile, prosecutions of war criminals in third countries such as the Netherlands and institutional reform in the Democratic Republic of the Congo. The background to this is a debate on the relationship between the goals of transitional justice (e.g. punishment and/or reconciliation), the question of which mechanisms are effective and what the role of the Netherlands and/or the international community should be. The ministers drew particular attention to the dilemmas involved in transitional justice and the extent to which transitional justice processes and mechanisms can contribute to justice and lasting peace. More specifically, the ministers asked the AIV and the CAVV five questions:

1. Are there certain general patterns that should be followed in making the choices that will guide the transitional justice process?
2. What empirical material is available for assessing what forms of transitional justice contribute to lasting peace and justice and for describing how this occurs? What recommendations could be made on that basis?
3. What transitional justice initiatives should the Netherlands support as part of its development cooperation efforts?
4. Can negotiations with the main perpetrators of large-scale human rights violations bring peace closer? If so, what conditions should be met before the Netherlands (possibly in concert with the EU and the UN) can support such negotiations?
5. On the basis of its powers and obligations under national and international law, how should the Netherlands treat persons suspected of committing international offences who have been granted amnesty through a process of transitional justice?

The report was prepared by a joint committee consisting of members of the two advisory councils and chaired by Professor M.T. Kamminga (CAVV) and Professor B.M. Oomen (AIV). The other members were Ms S. Borren (AIV), Dr A. Bos (CAVV), Professor T.C. van Boven (AIV), Professor R. Fernhout (AIV), Ms C.F. Meindersma (AIV), Professor P.A. Nollkaemper (CAVV), Ms H.M. Verrijn Stuart (AIV) and Professor E. de Wet (CAVV). Professor S. Parmentier of the Catholic University of Leuven assisted the work of the committee as an expert on transitional justice.

The executive secretaries were Ms A.M.C. Wester (executive secretary of the AIV Human Rights Committee), Dr Q. Eijkman (temporary executive secretary of the AIV Human Rights Committee) and Ms M. Hector (executive secretary of the CAVV), assisted by Ms S.M.N. van Schoten (temporary member of the AIV Unit) and trainees Ms M. van Seeters and Ms A. Wijers.

At the request of the AIV, a preliminary study was conducted by Dr Q. Eijkman of Justice Q&A. Talks were also held with various Ministry of Foreign Affairs officials (of the Human Rights, Good Governance and Humanitarian Aid Department, the United Nations and International Financial Institutions Department, the Fragile States and Peacebuilding Unit, the International Criminal Court Task Force and the Dutch Embassy in Kigali, Rwanda). The AIV and the CAVV are very grateful to the persons consulted for their willingness to share their views with the committee.

The CAVV adopted this report on 17 March 2009, and the AIV on 3 April 2009.

I Introduction

I.1 Definition

Whether in Rwanda, the former Yugoslavia or the Netherlands itself, the way in which justice and lasting peace can take shape after a period of grave human rights violations is increasingly being discussed, often under the heading 'transitional justice'.

In this advisory report the AIV and the CAVV have adopted the definition of transitional justice used by former United Nations Secretary-General Kofi Annan:

> 'the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.'[1]

'Transitional justice' is a complex concept, and each word carries a number of implications. Thus 'transitional' seems to suggest that there is a specific legacy of large-scale human rights violations resulting from a conflict or another situation that is at an end by the time the mechanisms are established. However, transitional justice mechanisms are increasingly being set up *during* an armed conflict. The best-known example is the ad hoc tribunal for the former Yugoslavia in 1993. Other examples that illustrate the complexity of using such mechanisms while violent conflict is still raging are the arrest warrants issued by the International Criminal Court (ICC) against suspects in the Sudan conflict, including the Sudanese president Omar al-Bashir.

The word 'transitional' also reflects the extent to which these are imperfect legal mechanisms that are often used in situations where institutional capacity is very limited, and in many cases are prompted by political pragmatism. The term seems to suggest that the mechanisms will only be needed during a limited transitional period. However, it may take some time for a period of transitional justice to be considered at an end, and for the demands of justice to be met by the normal rules of the rule of law. At that point the state enters a period of what may be termed *post*-transitional justice. However, even if the actual transitional period is considered at an end, transitional justice mechanisms – or their absence – may still have an influence during this ensuing period. Especially if an episode did not receive sufficient attention, disputes about the past often persist: examples include slavery, the Spanish civil war and the Dutch 'police' operations in Indonesia.

The second word, 'justice', also requires further explanation. The term not only covers the process and institutions by which justice is dispensed, but also points to the existence of a large number of different and at times seemingly contradictory goals. Kofi Annan's definition specifically mentions achieving accountability, justice and reconciliation, and making reparation. The literature and the request for advice

1 UN, Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004/616, 23 August 2004, p. 4.

also mention goals such as achieving lasting peace, consolidating the rule of law, establishing the truth and recording history, coping with trauma, providing compensation, preventing recurrence of the injustice suffered and, more generally, coming to terms with the past.

Thus the term 'transitional justice' refers both to a set of mechanisms and processes and to their goals, both individually and in relation to one another. This section looks at the mechanisms and goals of transitional justice in more detail. This is followed by a discussion of various basic principles that have guided both our response to the request for advice and the structure of the report.

It should be remembered that the notion of transitional justice first emerged in the 1980s and 1990s, when South Africa and states in Latin America and Central and Eastern Europe went through transitional periods. In many of these countries there was peace, a degree of economic and political stability, full state control of the national territory and the political will to face up to the past – conditions that made transitional justice possible in the countries concerned.

Today, however, the term is increasingly used with reference to fragile states, many of which have been or continue to be the scene of armed conflict;[2] such situations will often be discussed in this report. However, in states such as these the aforementioned conditions clearly do not exist. Often there is no lasting peace, the government is weak, the economy is far from stable, the idea of justice is highly politicised and there is little or no will to face up to the past. It is not easy to get transitional justice processes started in such circumstances, and a different approach from that adopted in the aforementioned countries is needed. Since the domestic situation is so complex, there is a logical tendency to resort to international mechanisms such as the ICC. However, the AIV and the CAVV wish to emphasise at the outset that, although international justice can play an important role as a catalyst for transitional justice, it cannot replace national justice. This will be discussed in more detail further on in this report.

I.2 Mechanisms and processes

The range of mechanisms and processes that fall under the heading 'transitional justice' includes both legal and non-legal mechanisms, such as individual prosecutions, truth and reconciliation commissions, amnesty schemes, local mechanisms, reparation, institutional reform, vetting and dismissals, or a combination thereof.[3]

- In the case of *individual prosecutions*, a distinction must be made in law between international and other crimes. Prosecution for 'ordinary' crimes such as murder and rape, however serious, is the responsibility of the country concerned (the 'territorial state'). Only when mass murder qualifies as for example 'genocide' or a 'crime against humanity' is it deemed an international crime. In the case of international crimes that are defined as such, in that they 'deeply shock the

2 The term 'post-conflict justice' is therefore sometimes used, and is often interchangeable with 'transitional justice'. See, for example, Bassiouni, M.C. & Morris, M.H. (eds) (2002), *Post-conflict justice,* Ardsley, NY, Transnational Publishers. In this report, we have kept to the term 'transitional justice'.

3 A large number of background studies and handbooks were used in drawing up this report. To avoid overburdening the main text, the AIV and the CAVV have decided to include a bibliography (see Annexe III).

conscience of humanity', the country concerned is again primarily responsible for prosecution. Often this is also the most practical option. In certain circumstances, however, international crimes fall within the jurisdiction of third states ('the doctrine of universal jurisdiction').[4] Examples include the attempt to try Augusto Pinochet in the United Kingdom and the trial of Rwandan nuns in Belgium. Crimes such as genocide, war crimes and crimes against humanity also fall within the jurisdiction of international criminal courts. In recent years international criminal law has made considerable strides, with the establishment of the ICC and its predecessors such as the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY), as well as the special international and hybrid courts and tribunals for Sierra Leone, Cambodia and East Timor (see Annexe II).

- The primary task of truth and reconciliation commissions is to systematically identify human rights violations in order to determine the 'truth'.[5] In recent decades almost 30 countries have set up such bodies. In the 1980s Argentina and Chile were the first countries where such state-recognised commissions gathered factual information and put it in context, in an attempt to put the past into perspective. In the 1990s the South African Truth and Reconciliation Commission set a trend in which the emphasis was not only on establishing the truth, but also on partial amnesty and reconciliation (see Annexe II).
- *Amnesty schemes* are 'official acts that provide an individual with protection from liability – civil, criminal or both – for past acts'.[6] This is discussed in more detail in Chapter II.
- Local mechanisms have an increasing part to play in transitional justice processes. They are traditional (or neo-traditional) mechanisms for settling disputes, such as the gacaca courts in Rwanda or the nahe biti rituals in East Timor. Such processes derive their legitimacy from their local character. They are often considered complementary to individual prosecutions, not only for practical reasons (lack of capacity within the legal system) but also for ideological ones (links with tradition, emphasis on reconciliation and so on). Nonetheless, such mechanisms may also have drawbacks, for example when it comes to safeguarding the position of victims and witnesses.[7]
- *Reparation* may be either material or symbolic, and can be made on an individual or a collective basis. It includes restitution – restoration of the former situation, for example by release from detention, restoration of civil rights or legal remedy through

4 Reydams, L. (2004), *Universal Jurisdiction: International and Municipal Legal Perspectives.* Oxford: Oxford University Press; Slaughter, A.M. 'Defining the Limits: Universal Jurisdiction and the National Courts', in Ratner, S. (ed.) (2006), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*. Philadelphia: University of Pennsylvania Press, pp. 168-192.

5 Hayner, P.B. (2002), *Unspeakable truths: facing the challenge of truth commissions* (preface by Timothy Garton Ash). New York: Routledge.

6 Slye, R.C. (2000), 'Amnesty, Truth, and Reconciliation: Reflections on the South African Amnesty Process', in Rotberg, R.I. and Thompson, D. (eds) (2000), *Truth v. Justice: The Morality of Truth Commissions*. Princeton and Oxford: Princeton University Press, pp. 170-189.

7 Huyse, L. and Salter, M. (eds) (2008), *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*. Stockholm: International IDEA.

return of victims' homes – and various kinds of compensation and rehabilitation. Other possibilities are official apologies or memorials.[8]

- *Institutional reform* or reconstruction of state institutions is also often part of the transitional justice process. This includes vetting and dismissals based on investigation of the past role of politicians, military personnel, police officers, other security personnel, the judiciary, prison staff, et cetera. Specially designed legislation, programmes and/or commissions at national or local level can be used to screen the state apparatus, call officials to account and restore local people's faith in the organs of the state.

I.3 Goals

Transitional justice processes are often assigned different and sometimes seemingly contradictory goals: ensuring accountability, dispensing justice, giving victims support, achieving reconciliation, making reparation, preventing recurrence of the injustice suffered, recording history and – at a higher level – achieving lasting peace, curbing impunity and, more generally, coming to terms with the past. Many of the debates on transitional justice are about how these goals should relate to one another.[9]

One recurrent debate on the subject concerns 'peace versus justice'. The assumption here is that transitional justice in practice involves choosing between (a) large-scale amnesty and allowing for international and other crimes to go unpunished, in order to achieve peace and bring all the parties to the negotiating table and (b) prosecution, which – so the assumption goes – would be an obstacle to peace or peace negotiations. The conflicts in northern Uganda (the first situation to be brought before the ICC) and Darfur are invariably mentioned in this connection.

A related contrast, much heard in the recent past, is 'reconciliation versus prosecution', with truth and reconciliation commissions and local mechanisms standing for reconciliation, and international or other courts and tribunals for prosecution.

However, such contrasts do not seem to reflect the current state of the debate, or indeed reality. Transitional justice implies the co-existence of various legal or quasi-legal mechanisms and processes that sometimes serve different and even seemingly contradictory purposes during a transitional period. The point is not to make a choice from the mechanisms and underlying goals but to decide how the processes and mechanisms should be shaped and coordinated within the relevant legal framework so that together they serve their purposes as well as possible and so ease the transition to lasting peace.

8 De Feyter, K., Parmentier, S., Bossuyt, M. and Lemmens, P. (eds) (2005), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*. Antwerp: Intersentia Publishers (foreword by T. van Boven), and De Greiff, P. (ed.) (2006), *Handbook of Reparations*, Oxford: Oxford University Press.

9 See, for example, Kritz, N.J. (1995), *Transitional justice: how emerging democracies reckon with former regimes.* Washington DC: United States Institute of Peace Press, 3 vols; Minow, M. (1998), *Between vengeance and forgiveness: facing history after genocide and mass violence.* Boston: Beacon Press; Roht-Arriaza, N. (ed.) (2006), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice.* Cambridge: Cambridge University Press; Teitel, R.G. (2000), *Transitional justice.* Oxford: Oxford University Press.

One of the crucial factors here is timing. When is the right time to look back at the serious, systematic human rights violations of the past, and when are societies ready to set up the appropriate mechanisms for this? These are not easy questions to answer, as the diversity of instruments, practices and experiences in various parts of the world makes clear. The matter can be approached in one of two basic ways. The first is to set up the transitional justice institutions and procedures consecutively, for instance prosecution followed by a truth and reconciliation commission and then reparation for victims. The second is to do things simultaneously, setting up the various mechanisms (such as a truth and reconciliation commission and a special court) and letting them operate in parallel.

I.4 Basic principles and structure of the report

In the light of all this, the AIV and the CAVV were guided by a number of basic principles in drawing up their report. Since the Netherlands and other countries must make all the necessary choices within the relevant legal framework, this is discussed first, in Chapter II. This chapter thus answers the first question in the request for advice, regarding general patterns that should be followed in making the choices that will guide the transitional justice process.

After the examination of legal competences and obligations, Chapter III looks above all at 'what works in practice'. How have the various mechanisms and processes been coordinated in the past, and how have the various goals best been served in the specific context? In general, experience over the past twenty years has shown that transitional situations call for an integrated approach; the various transitional justice mechanisms are complementary, and often one will not work in the absence of others. Hence truth and reconciliation commissions cannot be viewed as substitutes for prosecution, or vice versa. However, as Chapter III makes clear, there are no all-purpose recipes for success. At most, certain ingredients will always be needed, and the relationship between them and the timing of their use may differ from case to case. Again and again, broad support for transitional justice processes, concern for victims, correct timing and the role of the international community have proved to be key factors. It is also important to focus systematically on the position of women, children, the elderly, national minorities, indigenous peoples and other vulnerable groups such as the disabled. Besides legality, another crucial element is legitimacy. By broadly examining, mechanism by mechanism, what factors influence legitimacy and effectiveness, Chapter III answers the second question, regarding the empirical material that is available for assessing what forms of transitional justice can contribute to lasting peace and justice and for describing how this occurs.

Against this legal and empirical background, Chapter IV discusses Dutch policy and so answers the ministers' last three questions, regarding the choices to be made as part of the Netherlands' development cooperation efforts, the possibility of negotiating with the main perpetrators of large-scale human rights violations and the attitude to be taken to people who have been granted amnesty. Here again, the AIV and the CAVV are guided by a number of basic factors. First, the Netherlands bears a specific responsibility in the field of transitional justice, not only as the host country to a large number of international legal institutions but also in view of its constitutional obligation to promote the international legal order. Second, Dutch policy will only be credible if the Netherlands' development cooperation and diplomatic efforts on the one hand and its domestic and foreign policies on the other are closely coordinated. This means that the

Netherlands' treatment of its own past and of international crimes for which it bears responsibility must not be overlooked.

Finally, Chapter V contains a summary of the report and the answers to the ministers' questions in the form of recommendations.

II The legal framework

Among the factors that affect political choices regarding transitional justice are international obligations. In order to assess which transitional justice processes are most desirable or appropriate, it is important to have a clear picture of the obligations resting on the states concerned and the international community[10] with regard to transitional processes.

As defined here, a transitional justice process means a society's attempts to come to terms with a legacy of large-scale abuses.[11] In many cases, international crimes – i.e. crimes punishable under international law – will have been committed in the past. These are crimes whose gravity gives them cross-border significance, and which are of concern to humanity as a whole. In particular, these include genocide, crimes against humanity, war crimes and torture. These categories are not mutually exclusive: a given crime may be described in more than one way.

In this chapter the AIV and the CAVV discuss the main obligations with regard to international crimes. Where relevant, a distinction is made between obligations upon the state on whose territory the international crimes were committed (the 'territorial state', which is usually the state involved in a process of transition) and obligations upon other states ('third states').

II.1 Specific obligations

States involved in a transitional justice process usually have considerable latitude in their choice and use of mechanisms. However, they must of course abide by their international obligations. Apart from the general obligations discussed below (which essentially apply to all transitional justice processes), specific obligations or arrangements are often created ad hoc for particular situations. Examples include peace treaties, decisions by international tribunals and Security Council resolutions. Such obligations will often guide policy on transitional justice processes. Account must also be taken of the 'concluding observations' of human rights treaty bodies (which strictly speaking are more like recommendations).

II.2 Protection of human rights

Human rights must be respected at all times: not only in peacetime, but also during armed conflict and in transitional situations following large-scale human rights

10 The notion of the 'international community' is not sharply defined. Over the last fifty years the community has gradually evolved into a multilateral structure of formal and informal international institutions and treaties in order to organise countries' relationships and solve problems.

11 See the definition of 'transitional justice' in Chapter I, taken from the *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616, 23 August 2004, p. 4.

violations.[12] This obligation applies not only to civil and political rights, but also to social, economic and cultural rights.

Transitional justice mechanisms and processes should be designed in the context of universal human rights, and should take account of the indivisibility of those rights. For example, the right to housing, education and health care should be asserted as quickly as possible in transitional situations. Reparation should also apply to violations of not only civil and political rights, but also social, economic and cultural rights. An example from the Netherlands is the legal redress in respect of Sinti and Roma killed during the Second World War; following the payment of individual reparations, the Sinti and Roma Restitution Fund now focuses on maintaining and promoting Sinti and Roma culture.[13] Another example is the payment of NLG 400 million to the Jewish community in 2000, in reparation for inadequate post-war restitution of legal rights.

Many international instruments explicitly point to states' obligations towards certain population groups, which are also applicable in transitional periods. Examples include the UN Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the recently adopted Convention on the Rights of Persons with Disabilities. Similar provisions are laid down in the Declaration on the Rights of Indigenous Peoples. There are also more specific instruments such as UN Security Council Resolution 1325, which emphasises that women should be proportionately represented not only at the negotiating table, but also in dispute resolution mechanisms following serious conflicts.

The concept of 'The Responsibility to Protect', as adopted by the UN General Assembly in 2005, should also be mentioned in this connection.[14] This primarily refers to states' responsibility to protect their own populations against genocide, war crimes, ethnic cleansing and crimes against humanity. What is also emphasised, however, is that the international community – acting through the UN – bears a responsibility to protect populations against these crimes and that it can intervene in cases where the national authorities fail to protect their own population, if necessary under the terms of Chapter VII of the UN Charter.

The possibility of military intervention enshrined in the concept of 'The Responsibility to Protect' is its most controversial feature. However, the concept also applies to the prevention and reconstruction phases. The 'responsibility to rebuild' is of particular relevance to transitional justice processes. This may imply a responsibility on the part of the international community to assist and support reparation, reconstruction and reconciliation in cases where states are not sufficiently able or willing to embark on reconstruction in the wake of conflicts, armed or otherwise.[15]

12 International Court of Justice, *Advisory Opinion on Nuclear Weapons*, paragraph 25, and *Advisory Opinion on the Wall*, paragraph 106.

13 See also Sinti and Roma Restitution Fund (<http://www.srsr.nl>).

14 UN General Assembly, *World Summit Outcome*, UN Doc. A/RES/60/1, 24 October 2005.

15 See Evans, G. (2008), *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All*, Washington DC: Brookings Institution Press, pp. 148-174.

Although human rights instruments are not formally binding upon non-state actors, lasting stability in transitional justice situations may in some circumstances require non-state actors (including businesses) to act in accordance with such instruments.

II.3 Prosecution

Transitional processes will almost invariably involve the prosecution of persons suspected of the most serious crimes. The preamble to the Rome Statute of the International Criminal Court ('the Rome Statute') recalls 'that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.' The adoption of the Statute by 108 states has enhanced the binding nature of this obligation.

In addition to general international law, a number of treaties contain clear obligations to prosecute, above all in cases of genocide, grave breaches of the laws of war, and torture.

Obligations upon the territorial state
As regards states' responsibility to prosecute persons who have committed international crimes, a distinction should be made between the territorial state and third states. The primary obligation to prosecute persons suspected of committing international crimes lies with the state where the crimes were committed.[16] Under the UN Convention on Genocide,[17] the territorial state is obliged to prosecute perpetrators of this particular crime. Under the Geneva conventions and their additional protocols, every contracting party[18] is obliged to 'search for persons alleged to have committed [grave breaches of the conventions and] bring such persons, regardless of their nationality, before its own courts.' Incidentally, this obligation applies only to international conflicts, not to other breaches of the Geneva conventions and additional protocols. Under the UN Convention against Torture, all contracting parties are obliged to exercise their jurisdiction in cases of torture, no matter where or by whom it was perpetrated. States that are party to the various human rights instruments are obliged to take action (such as searching for and prosecuting persons suspected of violating the said rights) and to offer victims effective reparation.

Apart from the Rome Statute there are no treaties that lay down such obligations in respect of crimes against humanity. In general, however, such crimes can be defined in terms of one of the aforementioned categories, and thus the state will still be obliged to exercise jurisdiction and, in some cases, to prosecute.

The AIV and the CAVV are aware that states appear to fulfil these obligations only to a limited extent. However, this should not be interpreted to mean that the provisions

16 For more details, see Orentlicher, D. (1991), 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', in *Yale Law Journal*, Vol. 100, pp. 2537-2615, and, for a more nuanced account, Orentlicher, D. (2007), 'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency', in *International Journal of Transitional Justice*, Vol. 1, pp. 10-22.

17 United Nations Convention on the Prevention and Punishment of the Crime of Genocide, Resolution 260 III, 9 December 1948.

18 Given the almost universal accession to the Geneva conventions, this effectively means every state in the world.

in question have ceased to be mandatory. Fulfilment of these obligations may need to be seen in the context of alternative responses to international crimes, especially amnesties and truth and reconciliation commissions (see Section II.4).

The international obligation to prosecute upon states where crimes have been committed has implications for the Dutch position on transitional justice processes. Unless one of the potential exceptions discussed below is applicable, the Dutch position should be that prosecution of persons suspected of international crimes is an essential part of transitional justice.

In general, as already indicated, preference will be given to prosecution in the state where the international crimes were committed. However, if this proves impossible, the manner in which the international community treats persons suspected of large-scale human rights violations (see below) may set an example for legal redress at local and national level.

International and hybrid tribunals

Under certain conditions, persons suspected of international crimes may be tried by ad hoc criminal tribunals set up for the situation in question, such as the ICTR or the ICTY, or by the ICC. However, such tribunals have very limited capacity in comparison with that of national courts, and the number of suspects tried by these international institutions will therefore be relatively small.[19] Moreover, such tribunals suffer from the disadvantage that they operate at a great distance from the state where the crimes were committed. In addition, the ICC will only be able to function to the best of its ability if states such as the United States, China, Russia and India become party to the Statute.

The hybrid (or 'mixed') tribunals for Sierra Leone, Cambodia and East Timor consist of local and international judges sitting in the state concerned. This is a response to criticism of the international tribunals. However, experience with such hybrid tribunals has not been entirely encouraging, partly owing to lack of funding.

Obligations upon third states

If the state where the crimes were committed and which is involved in a transitional justice process proves unable to prosecute persons suspected of international crimes and these persons have not been prosecuted by international or hybrid tribunals either, the question of whether other states have an obligation or are competent to prosecute the suspects may arise.

A number of the instruments referred to earlier do establish an obligation to prosecute or extradite persons suspected of the crimes specified therein. This is true, for example, of the Geneva conventions, under which every contracting party is obliged to 'search for persons alleged to have committed […] such grave breaches and bring such persons, regardless of their nationality, before its own courts'. Alternatively, contracting parties may extradite such persons to another contracting party. Under the UN Convention against Torture, all contracting parties[20] are likewise obliged to exercise jurisdiction over suspects who are on those parties' territory and who are not to be extradited. A similar

19 Drumbl, M. (2007), *Atrocity, Punishment and International Law*. Cambridge: Cambridge University Press.

20 Given the almost universal accession to the Geneva conventions, this effectively means every state in the world.

provision is laid down in the recent UN International Convention for the Protection of All Persons from Enforced Disappearance,[21] to which the Netherlands is not yet party.

The said provision of the UN Convention against Torture forms the basis for the Hissène Habré case which Belgium brought before the ICJ in February 2009. Belgium asked the ICJ to rule that Senegal is under an obligation to prosecute the former president of Chad for torture and crimes against humanity, or else – if it is unwilling or unable to do so – to extradite him.

Under the UN Convention on Genocide, states other than the territorial state – even states on whose territory a person suspected of genocide currently is – are not obliged to prosecute. This was recently confirmed by the ICJ.[22] However, such states may be deemed competent to exercise jurisdiction.

No specific treaty establishes an obligation to prosecute persons suspected of committing crimes against humanity as such. Here again, other states may be competent to exercise jurisdiction over persons suspected of international crimes.

Implementation by the Netherlands

Under the International Crimes Act, the Netherlands has made use of its competence under international law to exercise jurisdiction in respect of international crimes (including crimes for which international law contains no written obligation upon third states to prosecute, such as genocide, crimes against humanity and serious war crimes committed during domestic armed conflict), wherever committed, if there is a serious suspicion that the suspect is in the Netherlands. The search for the person may start as soon as, but not before, the suspect is on Dutch soil. The Act, which implements the Rome Statute, empowers the Netherlands to exercise jurisdiction in the manner provided for by the Statute. In order for the Statute to be implemented effectively, all the contracting parties must introduce such legislation.

Like its predecessor the Wartime Offences Act, the International Crimes Act also provides a jurisdictional basis for prosecuting Dutch nationals suspected of international crimes. The Wartime Offences Act provided a basis for the prosecution and conviction of a Dutch national who had supplied the Iraqi president Saddam Hussein's regime with chemicals that were used in the production of chemical weapons which, in the late 1980s, were deployed in a mass attack on the Kurds. The question of prosecution may also arise in pursuance of Article 1F of the UN Refugee Convention, which obliges states to withhold refugee status from persons suspected on serious grounds of having committed a grave international crime (see also paragraph IV.4).

Incidentally, as a general observation, it should be noted that the Netherlands applies a 'discretionary principle' which qualifies any obligation to prosecute. If, for example, investigation and prosecution are impossible on practical and technical grounds, because they would cause too much harm to the persons concerned or for other reasons, the Public Prosecution Service may decide not to prosecute. The Public

21 This 2006 convention has not yet entered into force.

22 ICJ, 26 February 2007, *Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide: Bosnia and Herzegovina versus Serbia and Montenegro*, paragraph 442.

Prosecution Service is, of course, expected to take the utmost care when deciding whether or not to prosecute persons suspected of international crimes.[23]

II.4 Amnesty

In many transitional justice processes, the question arises of whether the state involved in such a process may grant amnesty to persons suspected of international crimes. Another question that often arises is whether other states (and the international community) should recognise such national amnesties.

Subject to certain conditions, amnesty is recognised in international law as part of the transition from conflict to normality. Article 6, paragraph 5 of the second additional protocol (1977) to the Geneva conventions prescribes that, at the end of hostilities, the authorities must endeavour to grant amnesty to those who have taken part in the armed conflict. Extensive use has been made of this provision to grant amnesty to persons who have taken part in non-international armed conflicts.

However, given the purpose of the protocol, which is to ensure greater protection for the victims of such conflicts, it is generally accepted that such amnesty should not be interpreted so broadly as to cover war crimes.[24] More generally, it is also widely accepted that certain kinds of amnesty for international crimes are not permissible. In 2004, former UN Secretary-General Kofi Annan identified a shift away from acceptance of impunity and amnesty towards the rule of law. He therefore stated that any attempt to make amnesty more readily available for genocide, war crimes and crimes against humanity should be condemned, and that previously granted amnesties should not be a bar to prosecution by a UN tribunal.[25]

This was also the position taken by the UN regarding the amnesty granted in the 1999 Lomé Peace Accord between the government of Sierra Leone and the rebel group RUF. When the accord was signed, the UN representative entered a reservation to the effect that the amnesty provisions in the document did not apply to the international crimes of genocide, crimes against humanity, serious war crimes and other serious violations of international humanitarian law.[26] A number of suspects resisted prosecution by invoking the amnesty granted in the Lomé Peace Accord. However, the Appeals Chamber of the Special Court for Sierra Leone (SCSL) concluded that amnesties granted under the accord were not a bar to prosecution of the perpetrators of international crimes by

23 House of Representatives of the States General, 2001-2002 session, 28337 Nos. 3 and 22, *Regels met betrekking tot ernstige schendingen van het internationaal humanitair recht* (Rules on grave breaches of international humanitarian law).

24 In the same spirit, when the protocol was being adopted the representative of the USSR made a declaration that this article must not be invoked to let war criminals or perpetrators of crimes against humanity go unpunished. This declaration was expressly endorsed at the time by the ICRC.

25 UN, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616, 23 August 2004, paragraph 64, subparagraph (c).

26 This UN position was later enshrined in Article 10 of the Statute of the Special Court for Sierra Leone: 'An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of crimes referred to in Articles 2 to 4 of the present Statute shall not be a bar to prosecution.'

international tribunals or national courts in other states.[27] The ICTY reached a similar conclusion in the Furundžija case,[28] stating that amnesties for the crime of torture were null and void and should not be recognised abroad.

The Rome Statute includes no provisions on amnesty,[29] or on truth and reconciliation commissions. The question is whether amnesty can give the Prosecutor cause not to investigate or prosecute. If a situation has been brought before the ICC by the Security Council or a state, the answer to this question can be found in Article 53, paragraph 2 (c) of the Statute. This gives the Prosecutor the power to conclude after investigation that, under the circumstances, prosecution would not be in the interests of justice. If the Prosecutor has initiated an investigation *proprio motu*, he is free under Article 15 of the Statute to refrain from pursuing it or from prosecuting.

If the Prosecutor does decide to prosecute, the question arises of whether the ICC can declare the case inadmissible because of the amnesty. The key provisions here are in Article 17, which states that prosecution by the ICC is complementary to national prosecutions.[30] A state or a suspect can object that prosecution is inadmissible under Article 17, because the state that has jurisdiction and has granted amnesty has investigated the case and decided not to prosecute. The question here is whether the word 'investigation' as used in Article 17 should solely be interpreted to mean a judicial investigation or also covers an investigation under an extra-judicial procedure such as a truth and reconciliation commission. The AIV and the CAVV feel that if a truth and reconciliation commission does its work very carefully there may, in the interests of transitional justice, be grounds for accepting a decision by the ICC not to prosecute. In any event, a general as opposed to an individual amnesty cannot be a bar to admissibility, since Article 17 states that each case must be investigated separately.

Another important point is that under the terms of Article 17, paragraph 2 (c) national proceedings must be consistent 'with an intent to bring the person concerned to justice'. Advocates of a broad interpretation of Article 17 take 'justice' to include not only 'criminal justice' but also procedures associated with other transitional justice mechanisms.[31] This could cover a procedure such as that of South Africa's

27 Schabas, W.A. (2006), 'The Sierra Leone Truth and Reconciliation Commission', in Roht-Arriaza, N. and Mariezcurrena, J. (2006), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, Cambridge: Cambridge University Press, pp. 21-43.

28 ICTY, 10 December 1998, Case No. IT-95-17/1-T, 151-157.

29 Proposals made during the preparatory talks did not receive sufficient backing from the negotiating delegations. One of the reasons given for this was states' inconsistent practice in granting amnesty. Although there was sympathy for the South African model, in which amnesty was granted to persons who told the truth, other kinds of amnesty were deemed unacceptable, especially in South America, and it proved difficult to agree on a single formula.

30 This is a crucial difference from the ad hoc tribunals, which usually have priority over national prosecutions (see also the preamble to and Article 1 of the Rome Statute).

31 Schabas, W.A. (2004), *The International Criminal Court*, Cambridge: Cambridge University Press, p. 185. See also Kleffner, J. (2008), *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Oxford: Oxford University Press.

Truth and Reconciliation Commission. The opposing view is that the term 'justice' as used in Article 17 clearly means criminal justice proceedings.[32] The assumption here is that, given the obligation to punish persons suspected of the most serious crimes, the Statute leaves no room for alternative forms of transitional justice other than prosecution by national states – or by the ICC, pursuant to the principle of complementarity. In this interpretation, the Statute endorses the view, also expressed by the SCSL and the ICTY, that amnesties for international crimes are not permissible and need not be recognised by international tribunals.

However, a number of international documents raise doubts about the absolute nature of a ban on amnesties for international crimes. For example, UN Security Council Resolution 1325 provides some latitude with regard to amnesties for genocide, war crimes and crimes against humanity. Paragraph 11 of the resolution states: '[The Security Council] stresses the need to exclude these crimes, *where feasible*, from amnesty provisions' (italics added). Principle 7 of the non-binding Princeton Principles on Universal Jurisdiction,[33] drawn up by academics in 2001, states that '[a]mnesties are *generally* inconsistent with the obligations of states to provide accountability for serious crimes under international law' (italics added). The likewise non-binding Nuremberg Declaration on Peace and Justice, drawn up under the auspices of Finland, Germany and Jordan and recently distributed as a document to the UN General Assembly, states: 'Amnesties, *other than for those bearing the greatest responsibility* for genocide, crimes against humanity and war crimes, may be permissible in a specific context and may even be required for the release, demobilisation and reintegration of conflict-related prisoners and detainees' (italics added).[34]

The request for advice asked whether the Netherlands should take account of amnesties granted in other countries. The AIV and the CAVV conclude that there can be little doubt about unconditional, blanket amnesties for international crimes. In principle, there is no reason why these should be recognised by either international courts or third states. The same applies to self-amnesties and 'sham' amnesties. Perpetrators who grant themselves amnesty should not expect this to be recognised abroad, and nor should those who have obtained an amnesty under false pretences, with no trace of sincerity or good faith. Dutch foreign and criminal justice policy should therefore take no account of blanket amnesties, self-amnesty or sham amnesties.

In the view of the AIV and the CAVV, the same applies to individual amnesty granted to persons who bear primary responsibility for serious international crimes. The AIV and the CAVV believe that the Netherlands should support the position taken by the former UN Secretary-General Kofi Annan – who condemned such amnesties – and that Dutch foreign and criminal justice policy need not take account of them.

Other situations will need to be assessed case by case. Relevant factors here will include relations with the country in transition, the importance of the amnesty to the domestic situation there, the seriousness of the offences and whether prosecution

32 Schabas, W.A. (2004), *The International Criminal Court*, Cambridge: Cambridge University Press, p. 26.

33 See also <www.globalpolicy.org>.

34 UN Doc. A/62/885, 19 June 2008, paragraph IV, 2, 2.6.

in the Netherlands is expedient. Even if the amnesty is unlawful by international legal standards, this does not *compel* the Netherlands to take legal action in all cases.

II.5 Victims' rights

A transitional justice process needs to focus sufficiently on the position of victims of international crimes: on both their participation in trials, truth-seeking and reconciliation, and their right to reparation for damage or physical or mental consequences, such as incapacity to work or the birth of children as a result of rape.

National level
Parties to the various human rights instruments are under an obligation to investigate suspected human rights violations, to prosecute the suspects at national level, and to offer the victims effective reparation.

The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law[35] (the Van Boven/Bassiouni Principles), adopted by the UN General Assembly in 2005, elaborate on the law applicable to victims of international crimes. The Principles and Guidelines emphasise the obligation upon states to prevent and penalise crimes, investigate violations and prosecute perpetrators. Victims of violations are entitled to (1) equal, effective access to justice, (2) adequate, effective satisfaction, (3) access to relevant information about violations and (4) opportunities for reparation.

Article 24 of the UN International Convention for the Protection of All Persons from Enforced Disappearance states:

'4. Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate reparation.
5. The right to obtain reparation referred to in paragraph 4 of this article covers material and moral damages and, where appropriate, other forms of reparation such as:
(a) Restitution;
(b) Rehabilitation;
(c) Satisfaction, including restoration of dignity and reputation;
(d) Guarantees of non-repetition.'

This article also refers to victims' right to know the truth.

The non-binding Impunity Principles (the Joinet-Orentlicher Principles)[36] state that amnesty and other measures of clemency must not affect victims' rights to reparation and to know the truth.

35 Annexe to UN Doc. A/RES/60/147.

36 UN Economic and Social Council, *Impunity: Report of the independent expert to update the set of principles to combat impunity*, Diane Orentlicher, UN Doc. E/CN.4/2005/102, 18 February 2005.

In addition to the usually limited scope for compensation in criminal proceedings, the civil law sometimes affords scope for satisfaction, through proceedings in which victims of crimes ask a civil court to award damages against those responsible, even if the latter have not been convicted in criminal proceedings. Such proceedings can be instituted in the territorial state or in a third state, provided that the third state concerned has jurisdiction. One example is the proceedings brought by Srebrenica survivors in an attempt (which eventually failed) to claim damages from the State of the Netherlands and the United Nations for the loss of their relatives. Such civil actions may even form a kind of universal jurisdiction, quite separately from the criminal justice context. Examples include proceedings under the Alien Tort Claims Act in the United States, although it should be noted that this practice has seldom been copied in other countries.

In the light of the foregoing, the Netherlands should urge that particular attention be paid to victims' needs during transitional justice processes. This applies not only to foreign policy, but also to cases for which the State of the Netherlands itself bears responsibility. There is something of an 'accountability gap' in Dutch law, particularly as regards state responsibility. This will be discussed in more detail in Chapter IV.

International level

In proceedings before the ICTY and the ICTR, victims may only appear as witnesses, not as participants or parties. Nor do the two ad hoc tribunals or the hybrid tribunals make provision for damages claims. An exception is the Cambodia tribunal, which provides for reparation to victims; however, it is not yet clear whether victims will really benefit, as the tribunal only recently began to operate.

The Rome Statute gives victims an opportunity to participate in every stage of ICC proceedings. The ICC can also order reparation for victims in the form of restitution, compensation or rehabilitation. Only time will tell how the ICC will apply these provisions. Reparation is to be made to victims through the ICC's Trust Fund for Victims. The Fund also has an independent mandate to provide assistance and reparation in the broadest sense of those terms, in areas that fall within the ICC's jurisdiction.

In practice, victims will benefit from collective reparation programmes such as those established in Chile, Peru and East Timor,[37] as well as mass claim proceedings such as those of the United Nations Compensation Commission (for victims of the Gulf War) and the Eritrea-Ethiopia Claims Commission. Such mechanisms can ensure reparation for very large numbers of war victims and others relatively quickly, without lengthy, complicated legal proceedings. Clearly, not all situations are suited to such mechanisms, but the Netherlands should press for them wherever they can be used. In connection with such collective claims, it is vital that sufficient attention be paid to the position of women and other groups such as children, ethnic or sexual minorities and victims who have become mentally and/or physically disabled.

37 De Feyter K., Parmentier, S., Bossuyt, M. and P. Lemmens (eds) (2005), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*. Antwerp: Intersentia Publishers; De Greiff, P. (ed.) (2006), *The Handbook of Reparations*, International Centre for Transitional Justice. Oxford: Oxford University Press.

II.6 Conclusion

The international community has made it clear that persons who commit serious international crimes must not go unpunished. Under international law, states are obliged to bring to trial persons suspected of genocide, grave breaches of the laws of war, torture and crimes against humanity committed on their soil.

If the state where the crimes were committed proves unable or unwilling to prosecute, the next option is prosecution by international or hybrid tribunals. If this likewise proves impossible, the question of whether other states have an obligation or the power to prosecute the suspects may arise.

Various specific treaties (such as the Geneva conventions and the UN Convention against Torture) establish an obligation to prosecute or extradite persons suspected of committing the crimes specified therein.

'Blanket' or 'sham' amnesties are prohibited under international law, and need not therefore be respected by third states.

As regards individual amnesties granted to persons who bear primary responsibility for serious international crimes, the AIV and the CAVV believe that the Netherlands should support the position taken by the former UN Secretary-General Kofi Annan – who condemned such amnesties – and that Dutch foreign and criminal justice policy need not take account of them.

Under international law, the Netherlands is obliged in certain circumstances to exercise jurisdiction over persons suspected of international crimes. Under the International Crimes Act, it is competent to prosecute or extradite persons who are on Dutch territory and suspected of international crimes. Such persons may be extradited either to the state where the crimes were committed or to other states.

The rights of victims of large-scale crimes to remedy and reparation are set out in international instruments. What matters most is that victims can see their rights upheld. Wherever possible, therefore, the Netherlands must press for the establishment of national and international mechanisms that will make this possible. In such cases, collective reparation programmes and mass claim proceedings are often more effective and less time-consuming than individual proceedings.

III Transitional justice in practice: effectiveness and legitimacy

We have seen that states have obligations in the field of transitional justice but nevertheless enjoy considerable latitude in pursuing their policies. This is especially true of states (such as the Netherlands) that wish to contribute to transitional justice processes in other countries. When making use of the said latitude it is important to learn lessons from the past and look not only at what *ought to* be done, but also at what actually *works*. In recent years, countries such as Chile, Rwanda, East Timor and the former Yugoslavia have made extensive use of a combination of mechanisms and processes during transitional periods, often with generous support from the international community. The increased focus on transitional justice has also resulted in renewed attention being paid to violations from further back in the past, for example under the Pol Pot regime, during the Spanish civil war or in the Second World War (e.g. the Japanese army's 'comfort women'). Strictly speaking, such examples are beyond the scope of this advisory report (see Chapter I), but they do show how transitional justice processes – or their absence – can continue to have repercussions even long after the transitional period can be considered at an end. As a result, later generations may have to seek appropriate forms of post-transitional justice.

What empirical material is available to determine which mechanisms and processes can bring justice and lasting peace closer, and in what way? A number of caveats are in order when answering this question. Transitional justice involves complex, lengthy societal processes whose immediate effect is impossible to measure. Attempts to identify causal links remain subject to caution. Moreover, as already mentioned in Chapter I, transitional justice processes may serve a number of different purposes: punishing suspects does not automatically lead to reconciliation (especially if only a smaller number of suspects are involved), recording the truth does not automatically lead to lasting peace, and so on. Furthermore, as this chapter will discuss at length, it is often the local context that determines which mechanisms and processes will prove the most successful.

Yet much can be learned from the world's experience with transitional justice in recent decades. This chapter will examine this subject from two separate angles. First, it will discuss general factors that contribute to the success of transitional justice processes, which in turn can bring justice and lasting peace closer. The key issue here is the extent to which the processes are rooted in, and in keeping with, the broader process of stabilising and reconstructing society. Apart from specific issues such as the role of women and children, meeting the needs of a given society at a given time has proved of crucial importance. In addition to the legality of transitional justice processes, their legitimacy is a major factor.

After the full set of transitional justice mechanisms and processes in a given context has been considered in the first part of this chapter, the second part will look separately at each mechanism. How can prosecution, truth and reconciliation commissions, amnesty, locally dispensed justice, reparation and institutional reform best help attain the various goals of transitional justice? In line with what has been said earlier, a good deal of attention will again be paid not only to what makes mechanisms legally tenable (their legality), but also to what takes account of the specific context and the needs of the various population groups (their legitimacy).

III.1 General factors

III.1.1 Transitional justice and peace processes

What role can and should transitional justice play during peace negotiations? To what extent can the threat of an arrest warrant issued by the ICC trigger or obstruct a peace process? Do those who commit large-scale human rights violations deserve a place at the negotiating table, and should transitional justice mechanisms and processes be included in a peace agreement?

Transitional justice is an integral part of peacebuilding. Unless action is taken against persons suspected of committing serious war crimes, it will be difficult to start the process of redress and reparation and to create or restore public faith in the rule of law. In this connection, Professor J.J.C. Voorhoeve has called transitional justice a 'peacebuilding activity' that follows the cessation of hostilities, the provision of emergency aid, disarmament, demobilisation and reintegration, and economic recovery. In his view, transitional justice is a temporary and necessarily inadequate means of ensuring at least a certain kind of justice in order to come to terms with past crimes and contribute to future reconciliation.[38]

This is not to say that the link between transitional justice and peace processes is always immediately clear. The question of whether ICC involvement can assist or, on the contrary, hinder a peace process specifically arose in connection with northern Uganda. It is assumed that the ICC's arrest warrants for the leaders of the Lord's Resistance Army (LRA) made the LRA more willing to negotiate or even prompted the first negotiations (although the role of the ICC was just one of the contributing factors here). In any event, the effect has been that the LRA leaders' freedom of movement is greatly restricted, and they have even confirmed that they are taking account, in their daily lives, of the possibility of being handed over to the ICC pursuant to the arrest warrants. This marginalising effect of indictments and arrest warrants has been witnessed on two earlier occasions, namely when Bosnian Serb leaders vanished from the scene, and when Charles Taylor withdrew from public life.

However, even if it was the ICC that gave the initial impetus to peace negotiations, the LRA leaders have made withdrawal of the arrest warrants a condition for peace. Interestingly, it seems as though the LRA has not yet ruled out the possibility that criminal proceedings will be instituted, albeit not in The Hague but under Uganda's national legal system. If Uganda does proceed to prosecute the LRA, the ICC Prosecutor could ask the ICC judges whether refraining from further prosecution of the LRA would perhaps be in the interests of justice. Given the ICC's complementary role, returning the case to Uganda's national jurisdiction would, provided that prosecution does take place, be acceptable and indeed preferable.

Another possibility is that the Security Council, under Article 16 of the Rome Statute and Chapter VII of the UN Charter, may suspend an investigation or prosecution being conducted by the ICC for a period of one year (which may be extended) in the interests of peace. However, this option is intended for exceptional situations, and would create

38 Voorhoeve, J. (2007), *From War to the Rule of Law*. Amsterdam: Amsterdam University Press, pp. 23-27 and 70. See also Bloomfield, D., Barnes, T. and Huyse. L. (eds) (2003), *Reconciliation After Violent Conflicts: A Handbook*, Stockholm: International Institute for Democracy and Electoral Assistance (International IDEA).

a precedent that would arouse expectations in many contexts, including prosecution of the FARC in Colombia, the Taliban in Afghanistan and many other potential suspects who will cross the ICC's path. In theory, such violent groups could claim to want peace just as long as the Security Council protects them from prosecution by the ICC.

The question of the relationship between arrest warrants and peace processes has currently arisen in connection with Sudan. The aim of the ICC Prosecutor, backed by the Pre-Trial Chamber, is accountability for international crimes; this has resulted in an arrest warrant being issued for the incumbent president, Omar Al-Bashir. Many African countries have criticised the decision, claiming that it will jeopardise the achievement of peace in Sudan.

In this connection the AIV and the CAVV call for the strict division of tasks between the ICC and the Security Council to be maintained, as envisaged by the drafters of the Rome Statute. It is the task of the Prosecutor and the ICC to prosecute when there are legal grounds for doing so. Under Article 16 of the Statute, it is the task of the Security Council to defer prosecution where necessary in the interests of peace. In the words of Australia's former foreign minister Gareth Evans: 'I have no doubt that dealing with impunity and pursuing peace can work in tandem even in an ongoing conflict situation; these are not necessarily incompatible objectives. The prosecutor's job is to prosecute and he should get on with it with bulldog intensity. If a policy decision needs to be made, in a particular case, to give primacy to peace, it should be made not by those with the justice mandate, but with the political and conflict resolution mandate, and that is the Security Council. The Statute allows for this in Article 16, and this is the way the international community should be thinking about it'.[39]

Since the pursuit of justice and the pursuit of peace do not necessarily conflict, and since peace negotiations are often hampered by other considerations, the AIV and the CAVV take the view that the Security Council should make use of this power only in exceptional cases. The existence of the veto is in itself a sufficient guarantee that it will not be easy for this power to be invoked. It seems likely that a majority of the Security Council (nine members, including the five permanent members with a veto: the United States, China, Russia, France and the United Kingdom) will very seldom come to the conclusion that a case should be deferred for twelve months because going ahead with prosecution would constitute a threat to peace.

The political process exists alongside the pursuit of justice. In this context, it will sometimes be impossible, even for the international community, to avoid talking to those responsible for large-scale human rights violations. Those who bear primary responsibility will often be the very people who can bring the conflict to an end. Here it is important to ensure not only that all the warring parties should be brought to the negotiating table, but also that women, young people and minorities have a voice at this stage of the process. In fact, it is not always necessary for the main suspects to be involved in the negotiations; thus the Bosnian Serb leader Radovan Karadžić had been indicted by the ICTY before the Dayton agreements were signed, and he was not at the negotiating table.

39 Schabas, W.A. (2004), *The International Criminal Court*. Cambridge: Cambridge University Press, pp. 41-42.

Transitional justice mechanisms are an increasingly common feature of peace agreements. Such agreements thus cover not only the presence of national and international inspectors, DDR (disarmament, demobilisation and reintegration), the development or reform of armed forces and other security services through SSR (security sector reform) and the return of refugees and displaced persons, but also rendering account for the past.[40] The agreements will often also opt for specific mechanisms. Thus the parties in South Africa made provision in the interim constitution for amnesty in return for a confession before the Truth and Reconciliation Commission. The peace agreements signed in Uganda in 2007 specified the role of traditional mechanisms and amnesty. Chapter II has already mentioned, citing Sierra Leone as an example, that third states are rarely bound by amnesties for persons suspected of international crimes.

In general, the greater the number of parties involved and the more local support there is for a specific 'justice package', the greater the likelihood that this will contribute in the long term to lasting peace. Explicit attention should therefore be paid to this during peace negotiations, and the role of international players should not be over-intrusive; although they can point out the importance of transitional justice and indicate the legal frameworks, they will do well to leave ownership of the process to the negotiating parties, subject to the constraints of international law.

One general point of concern is that the power structures that played a part in the outbreak of conflict are sometimes still in place during the transitional justice phase. If the elites that were in power during large-scale human rights violations remain in power, this is very likely to have an adverse impact on transitional justice mechanisms. This is obviously undesirable, and the international community should strive to prevent it wherever possible, but this will not always be feasible. We should not exaggerate the extent to which transitional processes can be controlled.

III.1.2 Taking due account of war experiences: the importance of focusing on women and vulnerable groups and how people cope with trauma

Women are all too often overlooked, both during peace negotiations and when designing transitional justice mechanisms. Yet greater focus on the specific experiences of women and vulnerable groups will make transitional justice processes not only more just but also more effective.

Women, children and minority groups still pay a disproportionately high price for conflict and a culture of impunity, as do the sick, the disabled and the elderly, who are unable to flee or defend themselves. The resulting traumas are due not only to the sexual and other violence that victims have suffered personally, but also to the fear and helplessness felt by witnesses to the murder, rape and humiliation of relatives. Children can repress such traumas for years, and later in their lives these can act as catalysts in symbolic situations. This can result in individual or collective patterns of repetition. Conflict and the ready availability of weapons often also cause an increase in domestic and other violence.

40 Ministry of Foreign Affairs, Ministry of Defence and Ministry of Economic Affairs (2005), *Notitie Wederopbouw na Gewapend Conflict* (Memorandum on Reconstruction after Armed Conflict), September 2005; see <http://www.minbuza.nl>.

Yet it will usually be the warring rulers – men – who negotiate about stability and peace and play an important part in transitional justice processes and their design. Women are often viewed solely as victims, rather than societal leaders and partners in designing processes that will achieve lasting peace and stability. However, women leaders can play an essential part in both formal and informal peace and reconciliation processes, for in terms of general rehabilitation it is women that bear the primary responsibility for conflict management and reconciliation in families and communities. Empathy and communication are traditionally female qualities. Barring exceptions, women political and civil-society leaders are more oriented towards restoring and strengthening social bonds and less towards fighting and winning conflicts (with a concomitant risk that suffering may be downplayed).[41] Also, for example, women often have far more interest in stability and peace than the warring parties. All this calls for careful implementation of UN Resolution 1325, discussed above.

Besides involving women leaders in peace negotiations and the design of transitional justice mechanisms, it is important, in the interests of lasting peace, to take due account of women's specific experiences of war. One example is the qualification of rape as a form of genocide.[42] Article 7, paragraph 1(g) of the Rome Statute, which defines several specific offences – including rape, enforced prostitution, sexual slavery and enforced pregnancy – as crimes against humanity, is very clear. A gender-specific approach is also desirable when designing reparations, such as the return of property. Since such wartime practices as gang rape are still insufficiently recognised at local, national or international level, reparation processes do not take sufficient account of them or of such consequences as the birth of children as a result of rape and their situation. Often the civil proceedings that are customary in the West are not a realistic option for victims, above all because they are costly and time-consuming. A gender-specific approach is also desirable with regard to traditional dispute resolution mechanisms. If transitional justice relies too much on traditional justice, women are often victimised all over again – for example, if they have been raped and are then blamed for supposed indecent behaviour.

Other groups also require specific attention. For example, children are often not only orphaned but also traumatised. If they have been child soldiers, and hence perpetrators as well as victims, their situation is even more complex. In Sierra Leone both the SCSL and the Truth and Reconciliation Commission have focused explicitly on children and given them a role in the trials, with considerable success. Systematic attention should also be paid to the disabled, often far more numerous as a result of the conflict, as well as the elderly, who may suffer disproportionately through the loss of their homes and relatives. Minority groups such as indigenous peoples or certain religious groups are likewise often disproportionately affected, and risk becoming marginalised during the transitional phase. Explicit attention should be paid to them, for example by truth and reconciliation commissions, in order to take due account of their particular suffering. It is also important that details of the work of tribunals and truth and reconciliation

41 See Rubio-Marín, R. (2006), *What Happened to the Women? Gender and Reparations for Human Rights Violations*, Social Science Research Council; Sooka, Y. (2006), 'Dealing with the past and transitional justice: building peace through accountability', in *International Review of the Red Cross*, Vol. 88, No. 862, pp. 311-325.

42 See ICTR, 2 September 1998, Case No. ICTR-96-4-T.

commissions be reported back to the people concerned, including vulnerable groups.[43]

Here it is also important to look at societal processes. Many societies that have suffered mass human rights violations are severely traumatised. Coping with such trauma, at both individual and societal level, is a lengthy and often underestimated process. Another societal process that tends to be overlooked is the cycle of violence. If people have learned that violence is the most efficient way to solve conflicts, this process can extend over many years, even generations. After a change of regime, or a transitional phase, violence does not disappear of its own accord, but often turns into other forms of crime. South Africa and some Central American countries are eloquent examples of this. Not only is a greater focus on these underlying societal processes necessary in order to tackle the consequences of grave, large-scale human rights violations, but it can also have a preventive effect. The law has only a limited part to play in individual and collective processes of coping with trauma.

III.1.3 Consolidating the rule of law and creating a culture of human rights

The link between transitional justice and lasting peace also depends on the extent to which the established mechanisms and processes explicitly help consolidate the rule of law and create a culture of human rights.

Ideally, transitional justice should restore faith in the rule of law. In this connection it is important that the mechanisms and processes involved do not exist in a vacuum, but are an integral part of the reconstruction and consolidation of the rule of law. The establishment of a human rights institution, the appointment of an ombudsman and specific educational focus on human rights are all part of this.

A number of transitional justice mechanisms, for instance in the field of criminal justice, largely depend on the national or local justice system, which is often seriously defective, particularly in fragile states. Since criminal justice is becoming more and more highly developed at global level, there is a tendency to have national trials designed and staffed by international players and, for example, to 'fly in' squads of lawyers. In Bosnia, the judiciary felt that far too little use was made of their own expertise. In Rwanda, on the other hand, the thousands of lawyers trained over the past decade soon replaced the foreign lawyers involved in the genocide trials.

Hybrid tribunals such as those in Sierra Leone, Cambodia and East Timor theoretically lend themselves to capacity building and knowledge transfer, but experience has shown that they sometimes suffer from conflicts of interest and inadequate quality. They do not necessarily lead to capacity building, nor can they be expected to build capacity themselves. The international community will therefore need to take specific additional action to strengthen local capacity. If the hybrid tribunals operate satisfactorily, the newly built capacity may help curb post-conflict impunity.

In drawing up and communicating what are known as the rules of the road, the ad hoc tribunals have made a fundamental contribution to the development of local systems and institutions that will ensure that perpetrators of international crimes are tried, and tried fairly. For example, the ICTY allowed local judges to shadow its work for a time in

43 One example is the child-friendly version of the Truth and Reconciliation Commission Report in Sierra Leone, which tells children about the work of the Commission (see <http://www.trcsierraleone.org/pdf/kids.pdf>).

The Hague, and facilitated the exchange of knowledge between the Tribunal and courts in the former Yugoslavia. Partly as a result of this, the local courts and special war crimes chambers are in a sense an extension of the ad hoc tribunals set up by the UN Security Council, and they cooperate productively rather than compete with them.

Besides building up a physical and knowledge infrastructure, transitional justice mechanisms can specifically help create a culture of human rights which can then play a part in maintaining peace. Communication is crucial here. After a period of serious human rights violations it is often hard for those most closely involved to respect, say, the right to a fair trial. People are unwilling to accept the idea that suspects also have rights, and the reasoning behind this has to be carefully explained. To some Serbs, Congolese and Rwandans, 'The Hague' and 'Arusha' mean endless legal proceedings, highly paid lawyers, luxury conditions for prisoners and insufficient attention and reparation for victims. Although the ICC has also learned lessons about this from the ad hoc tribunals, for example by drawing up a communication strategy, it remains a key issue.

III.1.4 The link between transitional justice and socioeconomic justice

In a broader sense, too, the potential effect of transitional justice processes and mechanisms is closely linked to reconstruction and the particular country's level of development. First of all, stability – created by the army, the police and the security services – is a precondition for the successful operation of transitional justice mechanisms. This must be accompanied by consolidation of the rule of law. Also important are basic necessities such as food, shelter and access to water, health care, and education and so on.[44] Studies have shown that those most closely involved view these as priority matters.[45] Only when such needs have been met can people start to consider other priorities, such as coming to terms with past international crimes and human rights violations. Besides reparation, other transitional justice mechanisms can make a direct contribution to reconstruction.[46] For example, development in Rwanda after the 1994 genocide was hampered by the fact that over 100,000 suspects were in prison. The *gacaca* later sentenced them to community service, such as helping to repair roads or wrecked homes.

What is crucial here is that economic, social and cultural rights should be an integral part of the mechanisms; reparation can be based on the right to education, health care or housing.

44 See Ashdown, P. (2007), *Swords and Ploughshares: Bringing Peace to the 21st Century*. London: Weidenfeld & Nicolson. Ashdown states that a successful reconstruction process depends, in succession, on human security, consolidation of the rule of law, economic development, and elections (preferably as late as possible, once the other conditions have been met to some extent).

45 See Uvin, P. & Mironko, C. (2003), 'Western and local approaches to justice in Rwanda', in *Global Governance* (2), pp. 219-231; Stover, E. and Weinstein, M. (eds) (2004), *My Neighbor My Enemy: Justice and Community in the Aftermath of Mass Atrocity*. Cambridge: Cambridge University Press; Hovil, L. and Lomo, Z. (2005), 'Whose justice? Perceptions of Uganda's Amnesty Act 2000: the potential for conflict resolution and long-term reconciliation', *Refugee Law Project Working Papers* (Kampala 2005), RLP: 32.

46 In this advisory report, reconstruction means 'the physical, economic, social and political development of a particular area after armed conflict has ended.' See Ministry of Foreign Affairs, Ministry of Defence and Ministry of Economic Affairs, *Notitie Wederopbouw na Gewapend Conflict* (Memorandum on Reconstruction after Armed Conflict), September 2005, p. 14 (<http://www.minbuza.nl>).

III.1.5 The importance of timing

As we in the Netherlands are aware, coming to terms with suffering (to the extent that this can be done at all) takes generations. The Second World War and this country's colonial past are still sensitive topics. As indicated above, there are various priorities during a transitional period, and first among them are stability, consolidation of the rule of law and socioeconomic recovery. Although governments may feel compelled to look at the past as soon as they can – if only to avoid ugly showdowns – it is often just as necessary to mark time. Transitional justice mechanisms and processes can only work if there is sufficient political and social consensus, as well as institutional capacity, for their ultimate success. This may mean that it is inappropriate to prosecute immediately. In other words, in order for transitional justice processes to be successful, attention should be paid to the sequencing of the various mechanisms.

In Afghanistan, for example, it was decided that a number of warlords who were probably involved in international crimes and other human rights violations should be members of the government and parliament. Those concerned felt that any other solution would undermine stability. Yet there is growing criticism of amnesty legislation, and there are increasing calls for vetting of political and official appointees and for transparent, merit-based appointment procedures. At first it was not considered necessary to apply transitional justice procedures to perpetrators of major crimes, but this approach did not ultimately lead to lasting stability.

Not too much time should therefore be allowed to pass between large-scale crimes and transitional justice. Experience in Chile and Spain has shown that a violent past – in both cases under dictatorial regimes, those of Pinochet and Franco – cries out for accountability even decades later. The same applies to Cambodia and Suriname. In the absence of proper trials, society remains persistently and seriously traumatised by its past, only a few people (as in the case of Cambodia) can still be prosecuted, and evidence is much more difficult to produce. All things considered, although it is crucial to get the timing right and ensure that transitional justice is part of a broader socioeconomic reconstruction process, the ideal approach will very much depend on the context.

In practice, the exact purposes served by particular transitional justice mechanisms often become apparent only in the long (sometimes very long) term. Thus the chief merit of the Nuremberg and Tokyo tribunals is now felt to have been their contribution to the historical record: the evidence produced there can be used to refute Holocaust denial on factual grounds.

III.1.6 The importance of local legitimacy

A crucial condition for the success of the mechanisms is their legitimacy. If they enjoy the broad-based support of the various population groups, there will be a feeling that the past has been put into perspective, and this will help end the culture of impunity and bring lasting peace closer.

That is why academics and policymakers are increasingly studying local perceptions of transitional justice. Such studies raise problems of methodology. For example, one study conducted in northern Uganda in 2007 showed that about half of the respondents considered local customs and rituals an important part of the transitional justice process, that even more people preferred the ICC as a prosecution mechanism, but

above all that many respondents did not know what the ICC actually was.[47] People's preferences naturally depend on their knowledge, and may fluctuate over time.

Yet something can be learned from such studies. One thing is the extent to which local preferences may vary. The following table shows the results of a 1999 study by the International Red Cross. Respondents in different countries had very different views about where war criminals should be tried, and by whom.

WHO SHOULD PROSECUTE WAR CRIMINALS?

	Total	Colombia	El Salvador	Philippines	Georgia	Abkhazia	Afghanistan	Cambodia
ICC	**36%**	23%	34%	10%	16%	14%	11%	54%
Own Government	**24%**	45%	27%	41%	37%	34%	34%	8%
Own Courts	**19%**	15%	18%	31%	9%	15%	34%	33%
Military	**7%**	3%	7%	5%	19%	17%	2%	0%
Own political leaders	**5%**	2%	2%	6%	8%	12%	6%	2%
Civilian Population	**2%**	3%	4%	3%	4%	4%	3%	1%
Others	**2%**	1%	1%		1%	0%	4%	0%
No idea	**4%**	7%	6%	2%	6%	4%	4%	2%

	Total	Bosnia & H	Lebanon	Israel	Palestinian Ter.	Somalia	South-Africa	Nigeria
ICC	**36%**	61%	43%	30%	76%	37%	38%	52%
Own Government	**24%**	6%	29%	12%	3%	9%	30%	13%
Own Courts	**19%**	11%	15%	23%	1%	30%	12%	9%
Military	**7%**	2%	6%	20%	4%	5%	11%	19%
Own political leaders	**5%**	11%	4%	1%	2%	4%	2%	1%
Civilian Population	**2%**	1%	0%			3%	3%	1%
Others	**2%**	5%	1%	11%	4%	3%	1%	0%
No idea	**4%**	4%	2%	3%	2%	10%	3%	4%

Source: ICRC (1999). *The People on War Report*, Geneva: International Red Cross, pp. 47-48

These greatly differing preferences are probably due to the authoritarian or non-authoritarian nature of the state and the respondents' experience with the various entities. Other studies have shown just how much people's appreciation of international tribunals is coloured by their perceptions of the international community; for example, according to several studies conducted in Serbia, Croatia and Bosnia and Herzegovina, the ICTY is seen there as a political tribunal that is the embodiment of victors' justice.[48] Recent studies in the east of the Democratic Republic of the Congo have shown that a majority of the population (51%) trusts the national legal system to achieve justice, followed by the ICC (26%), military courts (15%) and traditional mechanisms (15%).

47 A considerable number of respondents had never heard of the ICC, were quite favourable to the idea of such a court, but did not have a realistic picture of what it could do for them in terms of prosecution. There was concern about how the indictments of five Lord's Resistance Army (LRA) leaders would affect the peace negotiations.

48 Fletcher, L.E. and Weinstein, H. (2004), 'A world unto itself? The application of international justice in the former Yugoslavia', in Stover, E. and Weinstein, H.M. (eds) (2004), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*. Cambridge: Cambridge University Press, pp. 29-49.

Despite this faith in national institutions, there was evidence even here of a strong wish for support from the international community in the event of national prosecutions (82%).[49]

Empirical studies of legitimacy show not only how much the degree of legitimacy can fluctuate, but also what features enhance it.[50] On the 'input' side, it is important to involve as many stakeholders as possible in designing transitional justice mechanisms. A mechanism – whether it be a tribunal or a truth and reconciliation commission – can also acquire legitimacy through its 'output': by trying suspects expeditiously, and by according equal treatment to suspects from all the parties to the conflict. Faith in the *demos*, the community that is responsible for dispensing justice – the international community, the nation state or the local community – likewise helps determine the legitimacy of transitional justice processes. Also important are open, transparent proceedings, preferably in language that can be understood by broad segments of the population. Legitimacy can sometimes also be enhanced by taking account of religious and cultural traditions – as long as this is based on principles of equality and does not have adverse consequences for women or other groups. A good example is Archbishop Desmond Tutu's habit of opening sessions of South Africa's Truth and Reconciliation Commission by lighting a candle and saying a prayer.

In short, legitimacy is not a given, it is a process. Consultation and output are part of this process, as is faith in the community that has taken the lead in bringing the guilty to justice, whether it be the international community, the nation state or the local community. In addition, communication on the goals and processes of transitional justice is of crucial importance in enhancing legitimacy. Radio programmes, for example, can make a vital contribution here.

III.1.7 The role of the international community

Owing to the nature of the crimes discussed here, as well as ongoing globalisation, almost every transitional justice process is at least funded or monitored, if not actually launched, by the international community. Some national and international NGOs emphasise the need to curb impunity, others the importance of reconciliation. Bilateral or multilateral donors reflect on and contribute to transitional justice processes. On the one hand, this interaction between international organisations, states and NGOs has created the dynamic that is helping transitional justice become a field of law in its own right. Had it not been for NGOs, for example, the Rome Statute would probably not have been adopted. On the other hand, coordination is of vital importance. This particularly applies to action by the donor community; coordination within and between government authorities, and between them and private donors, is essential. The European Union could also play a part here.[51]

49 Human Rights Center, Payson Center, International Center for Transitional Justice (2008), 'Living with Fear: A Population-Based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Eastern Democratic Republic of Congo' (<http//www.ictj.org>).

50 Oomen, B. (2008), 'Justice mechanisms and the question of legitimacy: the example of Rwanda's multi-layered justice mechanisms', in Ambos, K. *et al*. (2008), *Building a Future on Peace and Justice*. Berlin: Springer Berlin Heideberg, p. 175.

51 In the near future the AIV plans to produce an advisory report on the EU's human rights policy, in which this topic will also be discussed.

Furthermore, assuming that the purpose of transitional justice is to create more just societies, the international community should focus not only on the crimes resulting from conflict, but also on the underlying factors. These are often cross-border problems, and therefore require international as well as national action. Examples are arms supplies, playing off economic interests and lack of transparency in the operations of foreign (including Dutch) companies in the area. If these factors are overlooked, much effort will be wasted, and even if a transitional justice process has taken place the country will run a serious risk of relapsing into its former situation. Moreover, it goes without saying that conflict, and the ensuing need for transitional justice, should ideally be prevented from arising in the first place – yet another reason to look closely at the underlying factors.

In conclusion, mechanisms and processes that are rooted in a broader process of peacebuilding and socioeconomic reconstruction are in general more likely to bring lasting peace closer. Ideally, transitional justice should help consolidate the rule of law and create a culture of human rights. Explicit involvement of women and vulnerable groups in both peace negotiations and transitional justice processes is of great importance, as is greater focus on coping with trauma, and also timing. Local legitimacy has also proved a crucial factor in bridging the gap between, say, prosecution and lasting peace. All this argues in favour of a context-based approach. The international community can play a constructive part here, provided that it acts in a coordinated manner and also takes account of the underlying causes of conflict.

III.2 A closer look at the various mechanisms

Transitional justice is essentially a combination of mechanisms and goals: a good example is the 2005 Action Plan on Peace, Reconciliation and Justice in Afghanistan. What actually works – if only in the eyes of those involved – will also depend on the context. However, in the light of experience it is possible to make a number of general statements about how (and under what circumstances) prosecutions, truth and reconciliation commissions, amnesty schemes, local mechanisms, reparation and institutional reform can help attain major goals such as lasting peace. Above all, it is clear that an integrated approach – the use of a combination of mechanisms – often works best in practice.

III.2.1 Prosecutions

How and to what extent does criminal justice, as described in Section II.3, help attain the broader range of goals of transitional justice? With all forms of criminal justice, the legitimacy of the trials, and hence their contribution to lasting peace, would appear to depend on the number of parties involved in setting up the institutions, the extent to which they succeed in remaining impartial, their ability to ensure that justice is dispensed in an accessible, timely and affordable way, and whether goals and results are communicated clearly. In many countries, such criminal justice systems hardly exist. In the former Yugoslavia, East Timor, Afghanistan, Peru, Chad, Uganda, the Democratic Republic of the Congo and elsewhere, those bearing the greatest responsibility have often gone unpunished. This has been termed ‘the impunity gap’.

The following can be said about international tribunals, national courts and prosecutions in third countries. The number of international tribunals has greatly increased in recent years: the ad hoc tribunals for the former Yugoslavia, Rwanda and Lebanon; the hybrid tribunals for Sierra Leone, Kosovo, East Timor, Cambodia and Bosnia and Herzegovina;

the Supreme Iraq Criminal Tribunal, and the ICC.[52] As regards the hybrid tribunals, the importance of capacity building has already been mentioned. The kind of tribunal will depend on the context: in Cambodia, victims feared corruption and therefore mainly put their faith in international justice, but in the former Yugoslavia there was considerable opposition to the ICTY. What is clear is that there are often very high – and in practice unrealistic – expectations of ad hoc tribunals (as regards not only the administration of criminal justice but also reparation for the victims). There is therefore a need for adequate information on the tribunals' goals and procedures, specifically aimed at the people in the countries concerned.

A key aspect of international trials is their influence on national criminal justice systems. The establishment of the ICC has led many countries, including the Netherlands, to adapt their own legislation so that they can prosecute people suspected of international crimes in their own courts, or do so more easily than hitherto. However, much remains to be done in this regard: at the last Assembly of States Parties to the ICC it was found that, of the 108 countries that had ratified the Rome Statute, 20% had fully implemented it in their own legislation, 30% had done so partially, and 50% had not done so at all. The first result of this failure to implement the Statute is that some countries do not cooperate with the ICC. Another is that many people suspected of international crimes are not prosecuted in the territorial state, whereas the role of the ICC is complementary and must remain so. Prosecution by national courts is often neglected in the debate on transitional justice. Finally, the lack of implementation affects what third states can actually do: they often do not have the necessary jurisdiction in respect of international crimes, the crimes in question are not defined in national legislation, and there are no procedures for prosecuting non-nationals or protecting witnesses and victims.

Ideally, prosecutions in third countries should lead to investigation and prosecution in the state where the crimes were committed, as in the case of Pinochet. This is usually preferable; victims can then see for themselves that justice is being done. This in turn makes reconciliation easier, and is also desirable for the purposes of evidence, since evidence and witnesses are much easier to find in the territorial state.

III.2.2 Truth and reconciliation commissions

'Only the truth will set us free' was the slogan used by South Africa's Truth and Reconciliation Commission to advertise its work. In recent decades, in the wake of Latin American countries such as Argentina, Uruguay and Brazil, truth and reconciliation commissions have been set up in a total of 28 countries. Although there are great differences between them, they generally focus on victims more than individual suspects. Sometimes their goal is reconciliation, but they always gather as much factual information as possible in order to put events in their proper sociopolitical and historical perspective.

This, of course, is an eminently political process; just as it is impossible to produce a definitive historical record, *the* truth can never be determined. An example is the debate in the Netherlands on the role of Dutch UN troops ('Dutchbat') in the massacre of at least 7,000 men in the Bosnian town of Srebrenica in July 1995. There is considerable divergence between the views of the victims and their relatives, the historical investigative report by the Netherlands Institute for War Documentation and the political version of events based on the parliamentary inquiry into the matter. Even in truth and reconciliation

52 For more details of these tribunals, see Annexe II.

commissions, differing memories and versions of events also conflict, and the final report is often a political compromise negotiated in a specific institutional context. That is why it is so important to hear, record and take due account of the experiences of women, children and minorities. It is also essential to take account of the cultural context and ideas about collective or individual guilt, shame, atonement and confession.

Extensive experience with truth and reconciliation commissions shows which institutional features matter most. Broad-based societal involvement in their design, as well as support from all political players, especially the authorities, are key conditions for their success. It is also important that not only politicians but also churches, the judiciary, public officials and other relevant societal players can be held up to scrutiny. Another crucial factor is the commissions' mandate. Do they have a broad mandate with quasi-legal powers? Are they allowed to look at the underlying causes of conflict? Do they have enough resources? Are their proceedings transparent? Due consideration should be given to the protection of witnesses and victims, and to the membership of the commissions: integrity, experience and independence are essential. Here again, legitimacy is important, but cannot be taken for granted: it is achieved by clear communication and visible results.

Although it often assumed that truth and reconciliation commissions contribute to lasting peace, social reconstruction and reconciliation, there is little empirical evidence for this. A study conducted among war victims from the Democratic Republic of the Congo, Bosnia and Herzegovina, Kosovo, Croatia, Macedonia, Serbia and Montenegro, Israel, the Palestinian Territories, Cambodia, Afghanistan, the Philippines and Sudan suggests that, although the people involved are in favour of establishing the truth, there is a lack of knowledge about this transitional justice mechanism, and that the degree of involvement also varies.[53] In general, this form of transitional justice too, will have to be complementary to other mechanisms, and it is essential, among other things, to look at how it relates to the criminal justice process. For example, can testimony before a truth and reconciliation commission be used later in a criminal trial? And how should one deal with a request by a truth and reconciliation commission to hear a suspect in a criminal trial, as happened with Charles Taylor?

III.2.3 Amnesty schemes

Some 420 amnesty processes have been instituted worldwide since the Second World War, 66 of them between 2001 and 2005.[54] Such processes often play a part in peace negotiations; amnesty is then the price paid for lasting peace, or at least stability. The lawfulness or otherwise of amnesties was discussed in Chapter II. Another question is whether amnesties can be seen as a form of justice and respond to victims' need for retribution.

Research in countries including South Africa have shown that many victims are satisfied

53 Kiza, E., Rathgeber, C. and Holger-Rohne, C. (2006), *Victims of War: An Empirical Study on War Victimization and Victims' Attitudes towards Addressing Atrocities*. Freiburg: Max-Planck-Institut für ausländisches und internationales Strafrecht, pp. 106-108.

54 Mallinder, L. (2007), 'Can Amnesties and International Justice be Reconciled?', in *The International Journal of Transitional Justice*, Vol. 1, No. 1, pp. 208-219.

with amnesty schemes that emphasise reconciliation.[55] Under certain conditions, South Africa's Truth and Reconciliation Commission granted some of those who violated human rights individual amnesties in return for a confession. In this case, two transitional justice mechanisms were combined: a truth and reconciliation commission and an official amnesty scheme. Although there was considerable public backing for this form of transitional justice, it also proved disappointing: only a small number of victims received compensation, testifying before the commission sometimes caused additional trauma, and faith in the rule of law was only very partially restored.

An empirical study of the amnesty in Afghanistan after the fall of the Taliban in 2005 showed that a majority (61%) of respondents opposed amnesty for people who confessed to crimes.[56] There were striking differences between regions. A charter on national reconciliation and coexistence that included far-reaching amnesty provisions was adopted in 2007, despite fierce criticism.[57] This was largely because many people suspected of war crimes, who would obviously benefit from the adoption of the charter, had seats in parliament.

In general, then, amnesty schemes may sometimes be deemed necessary at national level in the interests of stability, but their contribution to justice and hence lasting peace very much depends on their design.

III.2.4 Local mechanisms

In recent years, explicit attention has been paid to locally dispensed justice – from the Community Reconciliation Process in East Timor to the *bashingantahe* in Burundi – as a form of transitional justice. For example, villagers try other villagers in proceedings that emphasise reconciliation and are rooted – albeit often only loosely – in local traditions.[58] Although it is once again hard to generalise, studies have shown that many of those involved are in favour of this form of justice, and that the benefits outweigh the drawbacks (which are often considerable). The principal benefits include direct involvement in the trials, ease of access and the familiarity of the proceedings. Local courts can also handle far more cases than national ones. The main drawback is the patriarchal nature of traditional justice, which focuses on male authority and – once again – leaves large groups such as young people and women at a disadvantage. In addition, such trials often assume a highly charged political dimension in the local context and may lead to reprisals against witnesses.

In general, the main benefits of traditional justice are the ability to hold to account suspects who bore relatively little responsibility, and the potential contribution to

55 Gibson, J. (2007), 'The Truth About Truth and Reconciliation in South Africa', in *International Political Science Review*, Vol. 26, No. 4, pp. 341-361.

56 AIHRC (2005), *A Call for Justice: A National Consultation on Past Human Rights Violations in Afghanistan*. Kabul: Afghan Independent Human Rights Commission, pp. 20-21.

57 The charter was adopted by the *Wolesi Jirga* (Lower House) in January 2007 and by the *Meshrano Jirga* (Upper House) on 20 February 2007.

58 It should be noted here that mechanisms sometimes continue to be described as traditional and reconciliation-oriented even though their original features have changed. For example, the *gacaca* courts in Rwanda have now become real courts that no longer resemble traditional forms of conflict resolution.

reconciliation and social reconstruction at local level. However, it is important to realise here that 'traditional' does not imply reliance on existing power structures. In this form of justice it is particularly important that experienced women and members of minority groups should also be involved. This may allow traditional justice to evolve into transformative justice.

III.2.5 Reparation

If there is one form of transitional justice on which most of those involved feel there is too little focus, it is reparation. As already mentioned, justice also includes socioeconomic justice, and victims often consider the return of property and other material and symbolic acknowledgements of their suffering more important than accountability.

Chapter II has already discussed the right of victims of international crimes to redress, opportunities for compensation as part of criminal or civil judicial proceedings and the importance of collective reparation programmes.

Not only can reparation take many different forms, but it is also rooted in a variety of institutions. Reparation schemes are sometimes part of peace agreements, later translated into legislation or policy. Specific legislation or policy sometimes makes provision for reparation. In other cases, special commissions may be set up. Reparation may often be provided in specific fields, such as property. The Dayton Agreement, for example, provided for the return of homes through specific legislation and a commission that supervised claims regarding real property belonging to refugees and displaced persons. Actual implementation was supervised under the Property Law Implementation Plan. Reparation may be provided through other transitional justice mechanisms, such as the ICC Victims Trust Fund or the El Salvadorean Truth Commission's recommendations on symbolic and material reparation.

Studies have confirmed that victims consider reparation important. The kind of reparation they prefer can vary. An admittedly unrepresentative study among 1,114 war victims in eleven countries revealed considerable regional differences. Preferences (respondents could give more than one answer) were 42% for monetary compensation, 29% for memorials to victims, 24% for forgetting the past, 22% for apologies from the perpetrators, 19% for apologies from an official representative. Other preferences were also expressed: thus 3% favoured prosecution.[59] The following figures point to extreme regional variation. Victims in the Democratic Republic of the Congo and Kosovo considered material compensation less important. There was an above-average preference for memorials in Israel, Cambodia and Croatia, but this was less important to Afghans and Filipinos. In Sudan, 62% of respondents wanted apologies, but the equivalent figure in Cambodia was just 11%. In Kosovo, 31% wanted apologies from an official representative. All this argues in favour of context-based choices, and for inclusion of the specific needs of groups that are often forgotten, such as women, young people, and ethnic and religious minorities.

The risk with individual reparation is that it can cause tension within communities, especially if particular groups are felt to be receiving preferential treatment. When

59 Kiza, E., Rathgeber, C. and Holger-Rohne, C. (2006), *Victims of War: An Empirical Study on War Victimization and Victims' Attitudes towards Addressing Atrocities*. Freiburg: Max-Planck-Institut für ausländisches und internationales Strafrecht, pp. 117-122.

discussing the legal framework, the AIV and the CAVV called for more attention to be paid to collective reparation programmes and mass claims, and for the situation of specific groups of victims (such as women, children, minorities and the disabled) to be clearly addressed. Donors are well advised – again given the reasoning behind transitional justice – to contribute to reconstruction and collective development programmes (e.g. a new school rather than individual compensation).

All in all, this particular mechanism needs to be used with well-informed care, above all from the victims' perspective. This is especially true because the states and international players involved often make undertakings that they subsequently fail to keep: glibly promised victims' funds remain unfilled, and impressive-looking legislation is never implemented. Contributions to compensation funds like those set up in Sierra Leone and by the ICC are desirable and effective from the point of view of transitional justice. Governments' reluctance to take action in this area often stems from fear that compensating victims may imply an admission of guilt.

III.2.6 Institutional reform

The purpose of institutional reform is to use specially designed legislation, programmes and/or commissions at national or local level to screen the state apparatus, call officials to account and restore local people's faith in the organs of the state, thereby creating conditions that will prevent recurrence of the injustice suffered. Reform may also involve private institutions – such as the media and educational establishments – that can help consolidate the values on which the rule of law is based.

Institutional reform aimed at preventing recurrence of the injustice suffered includes the reorganisation of government bodies so that they can more effectively maintain the rule of law and protect human rights. Such measures, as recommended in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the Van Boven/Bassiouni Principles) [60] and the Impunity Principles (the Joinet-Orentlicher Principles),[61] may be of many kinds, and their purpose should be to enhance people's faith in future law enforcement. They include effective civilian control over the military apparatus and the security services; a more independent judiciary; protection of people working in health care and the medical and legal professions, and human rights defenders; education on human rights and international humanitarian law (especially for military personnel and guardians of public order and security); and a review of legislation that has helped to maintain unjust structures and practices.

The term 'lustration' is often used to describe the institutional reform that took place in Central and Eastern Europe after the fall of the Berlin Wall in 1989. It refers to policy aimed at preventing (in particular) security service officers or informers from becoming members of the newly formed government apparatus.[62] In Hungary, for example, there was a far greater preference for this form of transitional justice than for prosecution,

60 Annexe to UN Doc. A/RES/60/147.

61 UN Economic and Social Council, *Impunity: report of the independent expert to update the set of principles to combat impunity,* Diane Orentlicher, UN Doc. E/CN.4/2005/102, 18 February 2005.

62 Mayer-Rieckh, A. & De Greiff, P. (2007), *Justice as prevention: vetting public employees in transitional societies*. New York: International Center for Transitional Justice/Social Science Research Council.

amnesty or a truth and reconciliation commission. The stated reason for this (and for similar choices in other Central and East European countries) is that such a large proportion of the population were working for the security services that it was impossible to judge who should or should not be considered 'guilty'.[63] Another country that rejected legal proceedings in favour of keeping people who had worked for the security services out of public office (including the senior civil service, the judiciary, the security services, the army, the central bank, the railways, senior academic posts and the public media) was the Czech Republic.[64] The main goal of the Czech lustration process was to prevent history from repeating itself.

The way in which a country screens its state apparatus and calls officials to account varies from situation to situation. Bosnia and Herzegovina took collective action against groups of officials, who could then reapply for jobs. Nothing of the kind was done in Croatia, Chile or Mozambique, and in Argentina and other countries these processes were informal.

Public backing for such measures also varies. In Greece, Hungary, the former Soviet Union and South Africa people hardly supported the mechanism, or else the criteria used were disputed. In Afghanistan and Kosovo there was considerable support, but implementation has proved time-consuming. In 2010 Afghanistan will introduce vetting procedures and merit-based appointments for the entire civil service.[65] Here again, timing seems important. Swift dismissals in the wake of a change of power do not make for long-term legitimacy. In Iraq, for example, there was at first considerable support for 'de-Ba'athification', but eventually the process was deemed too political, too destabilising and too extensive. Nor is it a good idea to wait too long: people in Poland lost faith in the process for precisely that reason. Here again, a 'gender-based approach' is essential; women in Iraq and Afghanistan have in some cases seen their legal and social position deteriorate rather than improve as a result of institutional reform.

In the light of these and other experiences, the High Commissioner for Human Rights, together with the International Centre for Transitional Justice, has drawn up guidelines for vetting public figures during transitional periods. She recommends that the situation first be realistically evaluated, with emphasis on the wishes of the population, the specific sector, the possibility of replacing the person concerned, and the political will and scope for combining the process with other institutional reforms.[66] The transitional government should then set standards and design a process comprising phases such as registration of delinquent officials, selection and certification. Those responsible for implementing all this must be independent, adequately funded and, of course, honest.

63 *Ibid*.

64 'Czech Republic: A scorecard for Czech Lustration', K. Williams, in *Central Europe Review*, October 1999 <http://www.ce-review.org>.

65 Islamic Republic of Afghanistan, Office of the President, 'Five-Year Strategic Benchmarks', <http://www.president.gov.af>.

66 Office of the UN High Commissioner for Human Rights (2006), *Rule of Law Tools for Post-Conflict States. Vetting: An Operational Framework*. Geneva, UN, pp. 27-31.

III.3 Conclusion

The question of which forms of transitional justice can, in the light of empirical evidence, contribute to lasting peace and justice, and in what way, has been answered as follows. Transitional justice is the set of mechanisms and processes that is most capable of stabilising and reconstructing society and contributes to this by focusing on socioeconomic justice, consolidation of the rule of law and the creation of a culture of human rights. Women can play a particularly crucial role here. It is also essential to pay attention to vulnerable groups and approach matters from a local angle: if processes are widely perceived to be legitimate, there will be a feeling that the past has been put into perspective, and this will bring lasting peace closer. Legitimacy is not a given, but a process that depends on clear communication, involvement of all the stakeholders, and results. The international community can play a constructive part in transitional justice processes, provided that it acts in a coordinated manner and takes due account of the underlying causes of conflict.

The main goals of transitional justice – justice, peace, reconciliation, establishing the truth, reparation and action to prevent recurrence – can only be attained by a combination of mechanisms. An integrated approach is important: the various mechanisms are often complementary, and a given mechanism will often prove less than effective unless others are also applied. Reparation is often a forgotten element in transitional justice processes. Traditional courts *can* be legitimate and effective, but are often in need of reform. Finally, although institutional reform is important, it should not be applied too rigorously, for example where vetting is concerned.

Chapter III has discussed the importance of legitimacy in addition to legality. This has implications for Dutch policy, which is the subject of the next chapter.

IV Main elements of Dutch policy

The Netherlands is involved in transitional justice mechanisms and processes in a number of ways. It has supported local mechanisms, various truth and reconciliation commissions and tribunals at both bilateral and multilateral level. At diplomatic level, the subject of transitional justice has been raised in negotiations with countries including Serbia and Sudan. In addition, The Hague increasingly presents itself as the 'legal capital of the world': the seat of the ICJ, the ICC and the ICTY and the venue for the trial of Charles Taylor (before a chamber of the Special Court for Sierra Leone) and the trial of those responsible for the murder of Rafik Hariri. Since international crimes are involved here, issues relating to transitional justice in countries such as Rwanda and Liberia are also of relevance to the Netherlands. Finally, the Netherlands often seeks the most appropriate ways to deal with its own past, be it in Srebrenica, Suriname or Indonesia.

This chapter examines what a proper understanding of the legal framework and general practical experience imply for Dutch policy. The guiding principle here is that the Netherlands feels a firm commitment to the various transitional justice mechanisms and processes. In particular, this can be seen in the constitutional obligation to promote the international legal order, the position of The Hague and the emphasis on human rights in Dutch foreign policy. Rather than focus more closely on the actual tribunals, truth and reconciliation commissions and other mechanisms, the challenge is to focus on them in such a way that the set of mechanisms and processes do as much as possible to help attain the main goals: justice, reconciliation, lasting peace and an end to impunity.

In this connection, the AIV and the CAVV feel that the way in which the Netherlands deals with its own past and treats persons suspected of committing large-scale offences in their own country – including Dutch nationals – should be in line with Dutch foreign policy. Furthermore, The Hague's presentation of itself as the 'legal capital of the world' imposes a responsibility on the Dutch government to act in a way that justifies this description. The Netherlands should continue, on its own account and as a member of the EU, to press for universal acceptance of the Rome Statute. This will do much to help achieve one of the purposes for which the ICC was set up, namely obviating the need for ad hoc tribunals. A universally accepted ICC will, moreover, be in a better position to claim the status of the supreme judicial body in the field of international criminal justice. As a corollary, other parties to the Statute should be persuaded that the ICC can only function properly if the Statute is implemented in their national legislation.

After a brief review of current practice in the Netherlands, the last three questions raised in the request for advice will be discussed. They concern three different policy areas. The question of which transitional justice initiatives the Netherlands should support in the field of *development cooperation* will be examined first. The AIV and the CAVV then turn to an issue that primarily concerns *diplomatic relations*: is it acceptable for the Netherlands to support multilateral or other negotiations with the main suspected perpetrators of large-scale human rights violations? Finally, a question primarily relating to *domestic politics* will be discussed: how should the Netherlands treat persons suspected of international crimes who have been granted amnesty as part of a transitional justice process?

IV.1 Current practice in the Netherlands

As already mentioned, the Netherlands is playing an active part in many of the areas covered by the term 'transitional justice'. However, these efforts are not always referred to as such, nor are they coherent in terms of policy. For example, the Ministry of Foreign Affairs does not yet have a clear picture of the type, or number, of projects that come under the heading 'transitional justice'.[67] Below is a brief review of the current position of transitional justice mechanisms and processes within Dutch policy (to the extent that this could be determined).

The notion of transitional justice is very much in line with the main priorities of Dutch foreign and development cooperation policy. The topic is mentioned in the 2007 human rights strategy, which points to potential conflict between (a) prosecution of war criminals, institutional reform in the security sector and establishing the truth and (b) the achievement of lasting peace.[68] Support for transitional justice is also mentioned as part of policy relating to fragile states. According to a ministerial letter to the House of Representatives concerning the strategy on security and development in fragile states, 'the Netherlands is encouraging national ownership in the search for a satisfactory, context-specific balance between justice, the search for truth, and reconciliation.'[69]

The recently established Fragile States and Peacebuilding Unit (EFV) deals with reconstruction processes, focusing among other things on the legal dimension. In practice, Dutch policy on fragile states is mainly directed at Afghanistan, Burundi, Colombia, the Democratic Republic of the Congo, Guatemala, Kosovo, Pakistan, the Palestinian Territories and Sudan. A total of €243.9 million is available for bilateral country programmes in these states, as well as a central budget of €228 million for activities relating to regional stability and crisis management (not including humanitarian aid).[70] It is hard to tell how much of this is allocated to transitional justice projects. One important country is Afghanistan, where €1 million a year has been specifically allocated to transitional justice mechanisms over the period 2008-2010. However, many other

67 A recent study of the various projects relating to the rule of law states that it is difficult to classify projects 'not only because they often serve more than one purpose, but also because the categories are hard to define and overlap cannot in practice be avoided.' See Bos-Ollermann, H. (2007), *Versterking van de Rechtsstaat in Partnerlanden: Een inventarisatie en analyse van programma's en projecten* (Consolidating the rule of law in partner countries: an inventory and analysis of programmes and projects), Leiden, Kenniscentrum Rechtsstaat en Ontwikkeling (in cooperation with the Human Rights and Peacebuilding Department, Ministry of Foreign Affairs), p. 8.

68 The section entitled *Een rechtvaardige vrede* (A just peace) discusses impunity and the importance of transitional justice. The guiding principle here is that 'without justice there cannot be lasting peace, but peace takes more than justice alone.' Ministry of Foreign Affairs (2007), *Human dignity for all: a human rights strategy for foreign policy*, pp. 74-78. See also AIV, *Response to the 2007 human rights strategy*, Advisory Letter no. 12, The Hague, November 2007.

69 Letter of 7 November 2008 from the Minister for Development Cooperation and the Minister of Foreign Affairs setting out the 'Security and Development in Fragile States' strategy, House of Representatives, 2008-2009 session, 31787, No. 1.

70 *Ibid*., p. 23.

projects supported by the Dutch embassy in Kabul can also be seen as contributions to transitional justice, even though they are not classified as such.[71]

Dutch development policy pays a relatively large amount of attention to Security Sector Reform (SSR); projects in this area are usually paid for out of the Stability Fund.[72] SSR can contribute to transitional justice provided that a justice-sensitive approach is adopted, with sufficient emphasis on human rights and, for example, the need for vetting.

Many specific transitional justice initiatives in the fragile states mentioned above come under the heading 'consolidation of the rule of law'. They include criminal justice, training of judges, support for truth and reconciliation commissions and local mechanisms.

In Dutch policy, the specific focus on women in crisis situations is reflected in emphasis on awareness of rights and prosecution of persons suspected of sexual or other violence. The Netherlands' policy focus on gender, security and development calls for effective coordination between the Minister of Foreign Affairs and the Minister for Development Cooperation, as well as cooperation with civil society in the countries concerned. This is sometimes reflected in concrete measures: on 4 December 2007, the government, civil society organisations, businesses, trade unions and churches adopted a National Action Plan for the period 2008-2011 to implement UN Security Council resolution 1325, entitled *Op de bres voor vrouwen, vrede en veiligheid* (Taking a stand for women, peace and security).[73]

Specific bilateral projects are often run by local embassies, which manage 80% of the budget in this area. This is in line with efforts to tailor projects to the local context wherever possible. However, probably owing to extensive delegation of powers, staff working on consolidation of the rule of law, SSR, DDR and gender issues appear to focus on their individual policy dossiers rather than transitional justice in a broader context.

At multilateral level, the Netherlands again places great emphasis on the various transitional justice mechanisms and processes. Among other things, this is reflected

71 See letter to the House of Representatives on the fight against international terrorism, House of Representatives, 2006-2007 session, 27925, No. 254.

72 The purpose of this fund – the only other EU country with an equivalent arrangement is the United Kingdom – is to provide rapid, flexible support for activities at the interface between peace, security and development in countries that risk lapsing into violent conflict or have already been the scene of conflict. The main focus of the fund is on conflict prevention and peacebuilding, including SSR. See also House of Representatives, 2003-2004 session, 29200 V, *Vaststelling van de begrotingsstaat van het Ministerie van Buitenlandse Zaken voor het jaar 2004* (Adoption of the Ministry of Foreign Affairs' budget statement for the year 2004), No. 10.

73 The plan was drawn up pursuant to the Schokland Agreement (signed on 30 June 2007), the aim of which is to attain the Millennium Development Goals. With reference to five specific areas, the plan describes how the bodies concerned will take action in defence of women, peace and security over the next four years. The government will hold six-monthly progress talks with the signatories (see the Schokland Agreement website (<www.akkoordvanschokland.nl>).

in this country's pioneering role in supporting international courts and tribunals and transitional justice initiatives in the Great Lakes region. UNDP has proved a suitable multilateral channel for this. Immediately after the genocide in Rwanda, for example, the Netherlands paid 100 million guilders into a UNDP trust fund. The money was mostly allocated to the dispensation of justice. In Bosnia and Herzegovina, the Netherlands is endeavouring to coordinate UNDP support for the Sarajevo court's special War Crimes Chamber with other donors. Such multilateral coordination is important, but it is complex and often very difficult. To take one example, the EU contribution to transitional justice initiatives in Georgia, the former Yugoslavia, the Democratic Republic of the Congo, Darfur and Sudan is not running smoothly, despite attempts by individual member states to get things back on track.

Besides such support at governmental level, there is support for national and international NGOs. The main reason for providing this is that NGOs are often familiar with the local situation and operate on a small scale. In the field of transitional justice, the Netherlands thus funds co-financing organisations (such as Oxfam Novib, ICCO, IKV/Pax Christi and Cordaid) that work to promote reconstruction, reconciliation and justice. Smaller Dutch NGOs such as Justitia et Pax also carry out projects on sexual violence against women, and lobby for justice and reconciliation. The NGOs also support large numbers of local partner organisations.

The Netherlands' attitude is more cautious in bilateral contacts, especially where politically sensitive situations are involved. Examples including the dispensation of justice – or its absence – in connection with Guantánamo Bay, the Abu Ghraib prison in Iraq and civilian victims in Afghanistan.

Finally, transitional justice issues also come before Dutch courts. Under the International Crimes Act, a number of suspects have been prosecuted and in some cases convicted of international crimes committed outside the Netherlands. In 2008, for example, the Court of Appeal in The Hague, on the basis of Article 1F of the UN Refugee Convention (see section IV.4), found two Afghan defendants guilty of torture in Afghanistan during the 1980s and sentenced one to twelve and one to nine years' imprisonment. Another case involved a Dutch businessman who was found guilty of complicity in war crimes because he had supplied chemicals to the Saddam Hussein regime, and was sentenced to seventeen years' imprisonment. His appeal in cassation is still before the Supreme Court. Another Dutch businessman was acquitted of participation in war crimes and supplying arms to Liberia. The Public Prosecution Service appealed in cassation against this judgment. The Mothers of Srebrenica's case against the State of the Netherlands, which is still before the courts, is also essentially about transitional justice and reparation for serious human rights violations.

As already indicated, not all such initiatives are included under the heading 'transitional justice': the search for the most suitable combination of legal and non-legal mechanisms and processes that will bring lasting peace closer in a specific context. For example, criminal proceedings before either national or international courts primarily serve the purposes of the criminal law, such as individual accountability. The question of how the Netherlands' considerable but fragmented resources can best be deployed in the field of transitional justice is discussed in the next section.

IV.2 Development cooperation policy

The AIV and the CAVV note that Dutch efforts in connection with fragile states are based on a context-specific approach. To quote the ministerial letter to the House of Representatives on security and development in fragile states,[74] 'there is […] no universally applicable solution' and 'a detailed analysis of the local political situation should dictate the mix of interventions'. Although the AIV and the CAVV certainly share this view, they are struck by the fact that Dutch activities in the field of transitional justice are (as already mentioned) rather fragmented and complex. If the Netherlands' approach is to be coherent and integrated, its efforts need to be well coordinated. This will require a degree of harmonisation between the departments of the Ministry of Foreign Affairs that deal with the various aspects of transitional justice, as well as clear communication between the Ministry and Dutch diplomatic missions. This should make clear exactly what is being done in the field of transitional justice, which funds are involved and whether they are being deployed in the right areas – for example, whether enough money is reaching women and other vulnerable groups. The lessons learned from the past, as described in the previous chapter, can then be translated into coherent, integrated Dutch efforts in the field of transitional justice.

The AIV and the CAVV believe that their comments in Chapter III concerning the general factors on which successful transitional justice processes depend, as well as their findings on the individual mechanisms, should be taken into account in Dutch development and foreign policy. A number of specific issues are discussed in more detail below.

In the search for mechanisms and processes that can make the best possible contribution to lasting peace, it is important – and this is reflected in Dutch policy – to consider the issue in a specific social, political and economic context. The AIV and the CAVV therefore emphasise the need for a proper knowledge of the context and for extensive consultations with all the players involved. It should also be remembered that local legitimacy is crucial and can never be taken for granted. Communication on processes, once they have been designed, is therefore vital, and extra attention should be paid to outreach, whether in connection with the work of international tribunals or that of truth and reconciliation commissions.

Stability, security and reconstruction are necessary conditions for the implementation of transitional justice processes. Setting up tribunals or truth and reconciliation commissions in mid-conflict will have little effect, but the current treatment of transitional justice as part of a broader approach to SSR and DDR in fragile states does appear to be effective. However, more attention should be paid to consolidating the rule of law, and in particular independent, proficient courts. Owing to the focus on local mechanisms and international tribunals, conventional criminal justice is sometimes forgotten. Alternative ways of settling disputes, such as an ombudsman, are also important. In many countries the first institutional reform during transition has been the appointment of an ombudsman. Examples from the past are Spain, Portugal and several Latin American countries, and more recent ones are the countries of Central and Eastern Europe, South Africa and Indonesia.

74 Letter to the House of Representatives setting out the 'Security and Development in Fragile States' strategy, House of Representatives, 2008-2009 session, 31787, No. 1, p. 18.

As already mentioned, women and vulnerable groups still tend to be overlooked, both in peace negotiations and in the design of transitional justice mechanisms. Greater focus on the specific experience of women and vulnerable groups will make transitional justice processes not only more just but also more effective. A gender-specific approach is also desirable with regard to traditional dispute settlement mechanisms. Where this is not already the case, this should be given priority in Dutch development policy relating to transitional justice. This should also be reflected in resource allocation.

Another element that often does not receive the attention it deserves is coping with trauma. Many societies that have experienced mass human rights violations are seriously traumatised. Tackling and coping with such trauma will require a long-term approach, as will another societal process that usually receives little attention: the cycle of violence, which extends over many years, or even generations. The AIV and the CAVV call for development policy to focus more closely on these processes, especially as this may have a preventive effect.

As regards criminal justice, hybrid tribunals such as those in Sierra Leone, Cambodia and East Timor theoretically lend themselves (as already indicated) to capacity building and knowledge transfer, but experience has shown that they are scarcely capable of doing so unaided. The international community will need to take specific additional action to strengthen local capacity. The Netherlands should clearly play a part in this.

As indicated earlier, the main goals of transitional justice can only be attained through a combination of mechanisms. One aspect of this that is often overlooked is reparation. The Netherlands, too, should focus more closely on victims' rights and the need for reparation. Transitional justice mechanisms such as easily accessible programmes for compensation, the return of refugees and displaced persons, the return of homes, legal and psychosocial assistance and the tracing and identification of missing persons, support for women and children (sometimes born as a result of rape) are often of great initial importance to those involved. The Netherlands could give higher priority to such programmes, which also help prevent local disillusionment with mechanisms such as criminal justice, which require more time.

Another key element is institutional reform designed to prevent any recurrence of the injustice suffered. Details of such measures are laid down in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law[75] (the Van Boven/Bassiouni Principles) and the Impunity Principles (the Joinet-Orentlicher Principles). The AIV and the CAVV recommend that Dutch development policy focus on institutional reform based on these two documents.

Finally, the AIV and the CAVV would draw attention to the role of the international community and what was said about this in the previous chapter. In view of the need for greater cooperation and coordination, the Netherlands could usefully seek strategic partners in the field of transitional justice, such as Canada, Switzerland and Norway, whose foreign and domestic policies pay a great deal of attention to transitional justice. Belgium, the United Kingdom and Germany are also active in this area, although they do

75 Annex to UN Doc. A/RES/60/147.

not always have a comprehensive transitional justice policy.[76]

What has been said about the international community's responsibility to consider the underlying factors in conflict also has implications for Dutch policy. This means that the Netherlands must be prepared to take a good look at itself. Where the Dutch government or Dutch business plays a part in the outbreak or continuation of conflict (for example by supplying arms or exploiting economic interests), the Netherlands should accept responsibility. This country can only be a credible advocate of transitional justice processes if it does all it can to prevent situations involving large-scale human rights violations from arising.

IV.3 Diplomatic relations: negotiating with war criminals?

The need to negotiate with persons suspected of human rights violations and international crimes is a political reality that has confronted the Netherlands both at bilateral level and in concert with the EU or the UN, and continues to do so. This country has played an active diplomatic role in various negotiation processes. At the Abuja negotiations between the Sudanese government and rebel groups from Darfur, the Netherlands was one of the observers: countries that do not act as mediators, but support and assist the negotiation process. Now that the Darfur Peace Agreement (DPA) signed on 5 May 2006 has proved to be a dead letter, the Netherlands has been endeavouring to get the warring parties back to the negotiating table. This involves Dutch ministers either meeting leaders of rebel fighters and the Sudanese government in Sudan or inviting them to the Netherlands to prepare or take part in talks.

In principle, the AIV and the CAVV are in favour of such Dutch involvement. In many cases, as already indicated in section III.1.1, lasting peace cannot be achieved without talking to those who committed human rights violations during an armed conflict. The fact that such contacts may entail recognising persons or groups suspected of international crimes cannot be an overriding factor here. However, it goes without saying that no undertakings can be given to the people concerned that they will not be prosecuted for the offences they are suspected of committing. As explained in Chapter II, any such undertakings to persons who bear primary responsibility for international crimes would, moreover, be highly questionable in law.

IV.4 Domestic politics

The question of whether those suspected of international crimes should be prosecuted arises not only in the territorial state or in international tribunals. Dutch or non-Dutch nationals suspected of committing such offences may sometimes be on Dutch soil. The course followed in such cases should be in line with Dutch policy as propagated abroad. Under international law the Netherlands is obliged, and under the International Crimes Act it is competent, to exercise jurisdiction over persons who are on Dutch soil and are suspected of committing international crimes. In some cases the Netherlands will have an obligation to prosecute and/or extradite the person concerned. Suspects may be extradited to either the territorial state or a third state.
In general, the AIV and the CAVV do not see any legal reason to be circumspect in

76 See the report of the conference entitled 'Donor Strategies for Transitional Justice: Taking Stock and Moving Forward', held by the International Center for Transitional Justice and the UK Department for International Development (DFID) on 15-16 October 2007.

exercising the universal jurisdiction enshrined in the International Crimes Act. However, if the Netherlands is not obliged to prosecute but is competent to do so, it should always consider whether prosecution in the Netherlands will make a meaningful contribution to a transitional justice process in the state where the crimes were committed. Attempts to prosecute in third countries may encourage prosecution in the territorial state, as in the case of Pinochet. If impunity persists in a country and one of the main suspects is in the Netherlands, prosecution before a Dutch court can send an important signal. In general, however, it is preferable to try suspects where the crimes were committed, for the victims can then see for themselves that justice is being done. This makes it easier for society to come to terms with large-scale crimes committed in the past.

It is also usually preferable to try suspects in the territorial state for the purposes of evidence. Language problems, great distance from the country where the crimes were committed, poor understanding of local conditions and high costs may be practical obstacles to investigating and prosecuting suspects outside the territorial state. Moreover, in order to guarantee defendants a fair trial, the defence as well as the prosecution must be able to investigate in the country of origin.

At the same time, if cases are to be tried in the Netherlands, the capacity to do so must be in place. The decision to further improve investigation and prosecution and to expand the capacity available is therefore to be welcomed.[77]

A separate reason for persons suspected of committing crimes elsewhere to be prosecuted in the Netherlands is that Article 1F of the UN Refugee Convention requires states to withhold refugee status from persons in respect of whom there are serious reasons to consider that they have committed a grave international crime.[78] Such persons must be investigated and, if possible, prosecuted. To date, the Netherlands has only instituted criminal proceedings in a relatively small number of cases, and in some cases this has resulted in conviction.[79] However, this is a better result than in most other European countries.

Such prosecutions under the Refugee Convention are not always in the best interests of a country that is in transition or where conflict is raging. The crimes may have been committed long ago in a country that has already completed its transition or, like Afghanistan, has become embroiled in a new conflict. In such cases, prosecution in the Netherlands will not assist the transition process in the country where the crimes were committed. However, the Dutch legal order also plays a part here. If the suspect's

77 See House of Representatives, 2007-2008 session, 31200 VI, No. 193.

78 I.e. a crime against peace, a war crime or a crime against humanity; a serious, non-political crime outside the country of refuge; or acts contrary to the purposes and principles of the UN. Article 1, paragraph 2 of the UN Declaration of 14 December 1967 on Territorial Asylum prohibits persons suspected of a crime against peace, a war crime or a crime against humanity from seeking or enjoying asylum.

79 See House of Representatives, 2007-2008 session, 31200 VI, No. 132. Practical experience with Article 1F has shown that the Netherlands must provide certain basic guarantees that may not have been immediately foreseeable: for example, children of persons suspected under Article 1F may well be entitled to asylum even if their parents are not. For more on this, see <http://www.defenceforchildren.nl/p/53/817/mo124-m0/mo125-cg196%7C24=*>.

victims are living in the Netherlands, the suspect must be prosecuted under Article 1F, because failure to do so would be incompatible with this country's legal order.

In this connection the question may arise as to whether the Netherlands should prosecute perpetrators of international crimes if the state where the crimes were committed has granted them amnesty. As indicated in Chapter II, the AIV and the CAVV believe that 'blanket' or 'sham' amnesties are in any case prohibited under international law and should not be recognised by the Netherlands. No cut-and-dried answer can yet be given to the question of whether individual amnesties for serious international crimes are permissible under current international criminal law. The AIV and the CAVV feel that the Netherlands should support the position taken by former UN Secretary-General Kofi Annan – who condemned such amnesties – and that Dutch foreign and criminal justice policy need not take account of them.

Finally, the AIV and the CAVV wish to comment briefly on victims' rights and reparation in cases in which the State of the Netherlands is itself involved. As indicated in Chapter II, the AIV and the CAVV believe, on the basis of varying examples, that there is sometimes an 'accountability gap'. In the light of the foregoing, the AIV and the CAVV recommend that the Netherlands should set a good example in the treatment of war victims and the provision of reparation in cases where Dutch officials bear or share responsibility. This would make Dutch efforts in the field of transitional justice elsewhere more credible.

IV.5 Conclusion

The Netherlands carries out many activities in the field of transitional justice, even though these are not always referred to as such. The AIV and the CAVV feel that better coordination, for example between foreign and development cooperation policy or specific policy themes, could make these efforts more effective. The Netherlands' own behaviour, for example when dealing with reparation for the Srebrenica victims, will also affect the credibility of this country's foreign policy.

As regards development cooperation, it is important to bear in mind both the legality and the legitimacy of transitional justice. Legitimate mechanisms are ones that are set up in consultation with all those involved and that operate independently and effectively. They should also be in keeping with the specific phase that the country is in. This calls for a context-based approach. Key elements include the involvement of women, the often forgotten role of national courts, and the importance of the rule of law, reparation and institutional reform. It is these that may enhance the legitimacy of the mechanisms and hence their contribution to lasting peace.

Negotiations with persons who are suspected of international crimes and human rights violations are a fact of life, and often the only way to achieve lasting peace. Although active Dutch diplomacy during peace negotiations can in some cases make a positive contribution to lasting peace, this must not lead to 'blanket' amnesties for persons suspected of international crimes, or amnesties for the main suspects. Dutch involvement must be prompted by the additional benefit of the Netherlands' role as a negotiator in the specific conflict.

Finally, international crimes are of concern to the entire international community. Under international law the Netherlands is obliged, and under the International Crimes Act it is competent, to exercise jurisdiction over persons who are on Dutch soil and are suspected of committing international crimes. In some cases the Netherlands will have

an obligation to prosecute and/or extradite the person concerned. The judicial apparatus must be suitably equipped for this task. In cases where the Netherlands has more latitude, considerations of transitional justice may arise, and then it may often be more appropriate to aim for prosecution in and by the relevant state.

V Summary and recommendations

V.1 Summary

General
While there has been greater focus on the notion of transitional justice in recent decades, the principle that states with a violent past must come to terms with it if they are to enjoy a stable, peaceful future is by no means new. To quote Sir Winston Churchill, 'we cannot say "the past is the past" without surrendering the future.' However, what may be new about present-day approaches to the principle is the conscious effort to find a combination of mechanisms that offers the greatest likelihood – in a specific context – of a successful transition to a situation of justice and lasting peace.

The definition of transitional justice on which this advisory report is based covers the entire range of processes and mechanisms associated with a society's attempts to deal with the past and live with a legacy of major abuses in order to achieve accountability, justice and reconciliation. This includes both legal and non-legal mechanisms such as individual prosecutions, truth and reconciliation commissions, amnesty, local mechanisms, reparations and institutional reform. The notion of transitional justice implies the co-existence of the various mechanisms and processes, which may sometimes serve different and even seemingly contradictory purposes during the transitional period. An integrated approach is essential here. The point is not to select a particular process or mechanism but to decide how all of them should be shaped and coordinated within the relevant legal framework so that together they serve their purposes as well as possible and so ease the transition to lasting peace.

It may take some time for a period of transitional justice to be considered at an end, and for the demands of justice to be met by the normal rules of the rule of law. At that point the state enters a period of what may be termed post-transitional justice. However, even if the actual transitional period is considered over, transitional justice mechanisms – or their absence – may still have an influence during this ensuing period.

It should be remembered that the notion of transitional justice first emerged in the 1980s and 1990s, when South Africa and states in Latin America and Central and Eastern Europe went through transitional periods. In many of these countries there was peace, a degree of economic and political stability, full state control of the national territory and the political will to face up to the past – conditions that made transitional justice possible in the countries concerned. Today, however, the term is increasingly used with reference to fragile states, many of which have been or continue to be the scene of armed conflict. In states such as these the aforementioned conditions do not exist. It is not easy to get transitional justice processes started there, and a different approach is needed. It should be borne in mind here that international criminal trials can promote transitional justice at national level but cannot entirely replace it.

This report looks in turn at the legal framework for transitional justice, the question of how transitional justice mechanisms work in practice (their effectiveness and legitimacy) and Dutch policy in this area.

Legal framework

The first element in the legal framework within which transitional justice takes shape is human rights. These must be respected at all times: not only in peacetime, but also during armed conflict and in transitional situations following large-scale human rights violations. Another element is that of 'The Responsibility to Protect', as adopted by the UN General Assembly in 2005: the responsibility of states – and the international community – to protect the population against genocide, war crimes, ethnic cleansing and crimes against humanity. This applies equally during the prevention, conflict and reconstruction phases.

In the specific case of international criminal law, the legal framework is increasingly binding. The Rome Statute is a clear statement by the international community that persons who have committed serious international crimes must not go unpunished. The preamble states 'that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.' Although international law is clearly evolving towards a general obligation to prosecute all persons who have committed international crimes, this stage has not yet been reached.

As regards states' responsibility to prosecute persons who have committed international crimes, a distinction should be made between the territorial state and third states. The primary obligation to prosecute persons suspected of committing international crimes lies with the state where the crimes were committed.

If the state where the crimes were committed proves unable or unwilling to prosecute suspects, the next option is prosecution by international or hybrid tribunals. If this likewise proves impossible, the question of whether other states have an obligation or the power to prosecute the suspects may arise.

Various specific treaties (such as the Geneva conventions and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) establish an obligation to prosecute or extradite persons suspected of committing the offences specified therein. However, no treaty establishes an obligation to prosecute persons suspected of committing crimes against humanity as such. In such cases other states may, on the other hand, be competent to exercise jurisdiction over persons suspected of international crimes.

In certain circumstances the Netherlands has an obligation under international law to exercise jurisdiction over those responsible for committing international crimes. Under the International Crimes Act, the Netherlands is competent to prosecute or extradite individuals who are on Dutch soil and are suspected of committing international crimes.

The question often arises of whether a state involved in a transitional justice process may grant amnesty to persons suspected of committing international crimes. It is unlawful to grant a 'blanket' or 'sham' amnesty, especially to those who bear primary responsibility for the said crimes, and such an amnesty need not therefore be respected by third states.

The rights of victims of large-scale offences to remedy and reparation are set out in international instruments. What matters most is that victims can see their rights upheld. In such cases, collective reparation programmes and mass claim proceedings are often more effective and less time-consuming than individual proceedings. In connection with such mass claims it is important that sufficient attention be paid to the position of

women and other groups such as children, ethnic or sexual minorities and victims who have become mentally and/or physically disabled.

Transitional justice in practice: effectiveness and legitimacy

A number of reservations should be expressed about how transitional justice works in practice. Transitional justice involves complex, lengthy societal processes whose immediate effect is impossible to measure. Attempts to identify causal links remain subject to caution. Moreover, transitional justice processes may serve a number of different purposes: punishing suspects does not automatically lead to reconciliation, recording the truth does not automatically lead to lasting peace, and so on. Furthermore, it is often the local context that determines which mechanisms and processes will prove the most successful. We should not exaggerate the extent to which transitional justice processes can be controlled. For example, if the power structures from the period when the large-scale human rights violations occurred are still in place during the transitional phase, this will of course adversely affect the operation of transitional justice processes.

Empirical evidence indicates that a number of general factors may contribute to the success of transitional justice processes, which in turn can contribute to justice and lasting peace. The following may be said about these general factors.

- Transitional justice is an integral part of peacebuilding. Unless action is taken against persons suspected of committing serious war crimes, it will be difficult to start the process of redress and reparation and to create or restore public faith in the rule of law. The relationship between arrest warrants and peace processes is currently highly topical. However, the much-quoted dilemma of 'peace versus justice' may be a red herring. Although some have said that arrest warrants are an obstacle to peace processes, this seems an essentially political line of reasoning. The most serious obstacles to peace often lie elsewhere.
- Women, children, the elderly and disabled, and ethnic or religious minorities are still too often overlooked, not only in peace negotiations but also when designing transitional justice mechanisms. Greater focus on the specific experiences of women and vulnerable groups will make transitional justice processes not only more just but also more effective.
- Greater focus on the societal processes involved in coping with trauma and breaking the cycle of violence is not only important in order to tackle the consequences of grave and large-scale human rights violations, but can also have a preventive effect in the future.
- Ideally, transitional justice should restore faith in the rule of law and foster the emergence of a culture of human rights. In this connection it is important that the mechanisms and processes involved do not exist in a vacuum, but are an integral part of reconstruction of the legal system.
- In a broader sense, the potential impact of such mechanisms and processes greatly depends on the country's socioeconomic reconstruction. What is crucial here is that economic, social and cultural rights should be an integral part of the mechanisms; reparation can be based on the right to education, health care or housing.
- Transitional justice mechanisms and processes can only work if there is sufficient political and social consensus, as well as institutional capacity, for their ultimate success. In some cases this may mean that it is inappropriate to prosecute immediately. In order for transitional justice processes to be successful, attention should be paid to the sequencing of the various mechanisms.
- A crucial condition for the success of the mechanisms is their legitimacy. If they enjoy the broad-based support of the various population groups, there will be a feeling that

the past has been put into perspective, and this will help end the culture of impunity and bring lasting peace closer. Legitimacy cannot be taken for granted, but needs to be built up by effective consultative processes, trust and communication.
- The international community can play a constructive part in transitional justice processes, provided that it acts in a coordinated manner and takes due account of political realities, the demand for transitional justice in the country in question and the underlying causes of conflict (the arms trade, exploitation of economic interests, activities of foreign businesses, et cetera).

The main goals of transitional justice – justice, reconciliation, establishing the truth, reparation, peace, and action to prevent recurrence and curb impunity – can only be attained by a combination of mechanisms. In the light of empirical findings, the following can be said about the various mechanisms.

Criminal justice

With all forms of criminal justice, the legitimacy of the trials, and hence their contribution to lasting peace, would appear to depend on the number of parties involved in setting up the institutions, the extent to which they succeed in remaining impartial, their ability to ensure that justice is dispensed in an accessible, timely and affordable way, and whether goals and results are communicated clearly. Prosecution in the territorial state is usually preferable; victims can then see for themselves that justice is being done. This in turn makes reconciliation easier, and is also desirable for the purposes of evidence. An important factor here is national legislation to implement the Rome Statute – an area in which much remains to be done.

Truth and reconciliation commissions

Extensive experience with truth and/or reconciliation commissions shows that broad-based societal involvement in their design, as well as support from all political players, especially the authorities, are key conditions for their success. It is also important that not only politicians but also churches, the judiciary, public officials and other relevant societal players can be held up to scrutiny. Another crucial factor is the commissions' mandate. Do they have a broad mandate with quasi-legal powers? Are they allowed to look at the underlying causes of conflict? Do they have enough resources? Are their proceedings transparent? Due consideration should be given to the protection of witnesses and victims, and to the membership of the commissions: integrity, experience and independence are essential. Here again, legitimacy is important, but cannot be taken for granted: it is achieved by clear communication and visible results.

Amnesty

Amnesty processes often play a part in peace negotiations. They are the price paid for lasting peace, or at least stability. The question is to what extent such mechanisms can be considered a form of justice and meet victims' need for retribution. In general, an amnesty may sometimes be deemed necessary at national level in order to guarantee stability, but its contribution to justice and hence lasting peace greatly depends on how it is designed.

Local mechanisms

The main benefits of traditional justice are the ability to hold to account suspects who bore relatively little responsibility, and the potential contribution to reconciliation and social reconstruction at local level. However, it is important to realise here that 'traditional' does not imply reliance on existing power structures. In this form of justice it is particularly important that experienced women and members of minority groups

should also be involved. This may allow traditional justice to evolve into transformative justice.

Reparation
Those most closely involved feel that there is often too little focus on this form of transitional justice. Victims often consider the return of property and other material and symbolic acknowledgements of their suffering more important than accountability. The kind of reparation they prefer can vary. All this argues in favour of context-based choices, and for inclusion of the specific needs of groups that are often forgotten, such as women, children, the elderly and disabled, and ethnic and religious minorities. Donors are well advised – again given the reasoning behind transitional justice – to contribute to reconstruction and collective development programmes.

Institutional reform
The purpose of institutional reform is to use specially designed legislation, programmes and/or commissions at national or local level to screen the state apparatus, call officials to account and restore local people's faith in the organs of the state, thereby creating conditions that will prevent recurrence of the injustice suffered. Experience has shown that, although institutional reform is important, it should not be applied with equal rigour in all cases, for example where vetting is concerned.

Main elements of Dutch policy
The Netherlands is involved in transitional justice mechanisms and processes in a number of ways. The notion of transitional justice is very much in line with the main priorities of Dutch foreign and development cooperation policy. The Netherlands has supported local mechanisms, various truth and reconciliation commissions and tribunals at both bilateral and multilateral level. At diplomatic level, the subject of transitional justice has been raised in negotiations with countries including Serbia and Sudan. In addition, The Hague increasingly presents itself as the 'legal capital of the world': the seat of the ICJ, the ICC and the ICTY and the venue for the trial of Charles Taylor (before a chamber of the Special Court for Sierra Leone) and the trial of those responsible for the murder of Rafik Hariri. Since international crimes are involved here, issues relating to transitional justice in countries such as Rwanda and Liberia are also of relevance to the Netherlands. Finally, the Netherlands often seeks for the most appropriate ways to deal with its own past, be it in Srebrenica, Suriname or Indonesia.

Dutch activities in the field of transitional justice are not always referred to as such. Better coordination, for example between foreign and development cooperation policy or specific policy themes, could make these efforts more effective.

In the field of development cooperation policy it is important to bear in mind both the legality and the legitimacy of transitional justice. Legitimate mechanisms are ones that are set up in consultation with all those involved and that operate independently and effectively. They should also be in keeping with the specific phase that the country is in. This calls for a context-based approach. Key elements include the involvement of women, the often forgotten role of national courts, and the importance of the rule of law, reparation and institutional reform. It is these that may enhance the legitimacy of the mechanisms and hence their contribution to lasting peace.

Negotiations with persons who are suspected of international crimes and human rights a fact of life, and often the only way to achieve lasting peace. Although active Dutch diplomacy during peace negotiations can in some cases make a positive contribution

to lasting peace, it goes without saying that no undertakings can be made to the people concerned that they will not be prosecuted for the crimes they are suspected of committing. violations are

The question of whether those suspected of international crimes should be prosecuted does not only arise in the territorial state or in international tribunals. Dutch or non-Dutch nationals suspected of committing such offences may sometimes be on Dutch soil. The course followed in such cases should be in line with Dutch policy as propagated abroad.

Under international law the Netherlands is obliged, and under the International Crimes Act it is competent, to exercise jurisdiction over persons who are on Dutch soil and are suspected of committing international crimes. In some cases the Netherlands will have an obligation to prosecute and/or extradite the person concerned. The judicial apparatus must be suitably equipped for this task. In cases where the Netherlands has more latitude, considerations of transitional justice may arise, and then it may often be more appropriate to aim for prosecution in and by the relevant state.

Finally, in the field of justice and home affairs policy, it is also important for the Netherlands to deal appropriately with victims' rights and reparation in cases in which the State of the Netherlands bears some responsibility.

V.2 Recommendations

The recommendations are grouped under the individual questions in the request for advice. A number of general recommendations are given at the end.

1. *Are there certain general patterns that should be followed in making the choices that will guide the transitional justice process?*

- Rather than 'general patterns', the AIV and the CAVV prefer the term 'legal framework'. International obligations are among the factors that may affect political choices regarding transitional justice. In order to decide which transitional justice processes are most desirable or appropriate, it is essential to have a clear picture of the obligations of the relevant states and the international community with regard to transitional processes.

- Transitional justice mechanisms and processes should be designed in the context of universal human rights, and should take account of the indivisibility of those rights. For example, reparation should offer a remedy for violations of both civil and political rights and social and economic rights.

- The concept of 'The Responsibility to Protect', as adopted by the UN General Assembly in 2005, applies, among other things, to the prevention and reconstruction phases. 'Responsibility to rebuild' is of particular relevance to transitional justice processes. This may imply a responsibility on the part of the international community to assist and support reparation, reconstruction and reconciliation in cases where states are not sufficiently able or willing to embark on reconstruction in the wake of conflicts, armed or otherwise.

- The international community has made it clear that persons who commit serious international crimes must not go unpunished. Although international law is clearly

evolving towards a general obligation to prosecute persons who commit international crimes, this stage has not yet been reached. Constant efforts are needed to achieve this end, and the Netherlands should continue to press for them.

- As regards prosecution proceedings, the guiding principle should be that the state concerned must shoulder as much of the responsibility as it can. During and immediately after a conflict, national courts will have little or no opportunity to ensure fair trials. Such gaps can be bridged by the ICC, but the bulk of the responsibility should eventually shift towards the state concerned.

- If the state in which the offences were committed and which is involved in a transitional justice process has itself been unable to prosecute persons suspected of committing international crimes and if they have not been prosecuted by international or mixed tribunals either, third states may in some cases have an obligation to prosecute (for example, if the Geneva conventions and/or the UN Convention against Torture are applicable); in other cases, third states may not have an obligation to prosecute, but may be competent to do so.

- Under international law, the Netherlands has an obligation in certain circumstances to exercise jurisdiction over persons responsible for international crimes. Under the International Crimes Act, the Netherlands can prosecute or extradite persons who are on Dutch soil and are suspected of committing international crimes. For recommendations on such exercise of jurisdiction and the question of amnesty, we refer to question 5 in the request for advice.

- Parties to human rights instruments have an obligation to investigate violations of human rights at national level and prosecute the perpetrators, and to offer the victims effective redress. The Netherlands must take every opportunity to press for the establishment of national and international mechanisms that will enable victims to assert their right to remedy.

2. *What empirical material is available for assessing what forms of transitional justice contribute to lasting peace and justice and for describing how this occurs? What recommendations could be made on that basis?*

- For a detailed review of what can be said in the light of empirical research into factors that contribute to the success of transitional justice processes, as well as the individual mechanisms, we refer to the summary above (see *Transitional justice in practice: effectiveness and legitimacy*).

- To sum up, it is important during transitional justice processes to pay attention to social and economic justice, consolidation of the rule of law and the establishment of a culture of human rights. Women can make a particularly crucial contribution here. Attention should also be paid to vulnerable groups, as well as a locally based approach: if the processes are broadly considered legitimate, there will be a feeling that the past has been put into perspective, and this will bring lasting peace closer. The international community can play a constructive part here, provided that it acts in a coordinated manner and also takes account of the underlying causes of conflict.

- The main goals of transitional justice – coming to terms with the past, justice, peace, reconciliation, establishing the truth, reparation, peace, and action to prevent recurrence – can often only be attained by a combination of mechanisms. An

integrated approach is important: prosecutions, truth and reconciliation commissions, amnesty schemes, local mechanisms, reparation and institutional reform are often complementary, and a given mechanism will often prove less than effective unless others are also applied.

- As regards the relationship with peace negotiations, the AIV and the CAVV call for the strict division of tasks between the ICC and the Security Council to be maintained, as envisaged by the drafters of the Rome Statute. It is the task of the Prosecutor and the ICC to prosecute when there are legal grounds for doing so. Under Article 16 of the Statute, it is the task of the Security Council to defer prosecution where necessary in the interests of peace. Since the pursuit of justice and the pursuit of peace are complementary, and since peace negotiations are often hampered by other considerations, the AIV and the CAVV take the view that the Security Council should make use of this power only in exceptional cases.

3. *What transitional justice initiatives should the Netherlands support as part of its development cooperation efforts?*

- The challenge for Dutch policy on transitional justice is not so much the need to focus more closely on tribunals, truth and reconciliation commissions and other mechanisms, as the need to do so in such a way that the complex of mechanisms and processes will make the best possible contribution to justice, reconciliation and lasting peace.

- If the Netherlands' approach is to be coherent and integrated, its efforts need to be well coordinated. This will require a degree of harmonisation between the departments of the Ministry of Foreign Affairs dealing with the various aspects of transitional justice, as well as clear communication between the Ministry and Dutch diplomatic missions.

- In the search for mechanisms and processes that can make the best possible contribution to lasting peace, it is important – and this is reflected in Dutch policy – to consider the issue in a specific social, political and economic context. The AIV and the CAVV therefore emphasise the need for a proper knowledge of the context and for extensive consultations with all the players involved in Dutch development policy.

- Stability, security and reconstruction are necessary conditions for the implementation of transitional justice processes. The current treatment of transitional justice as part of a broader approach to SSR and DDR in fragile states appears to be effective. However, more attention should be paid to consolidating the rule of law, and in particular independent, proficient courts.

- Greater focus on the specific experience of women and vulnerable groups will make transitional justice processes not only more just but also more effective. Where this is not already the case, this should be given priority in Dutch development policy relating to transitional justice. This should also be reflected in resource allocation.

- The AIV and the CAVV call for development policy to pay more attention to the societal processes involved in coping with trauma and breaking the cycle of violence, especially as this can also have a preventive effect.

- As regards criminal justice, hybrid tribunals such as those in Sierra Leone, Cambodia and East Timor theoretically lend themselves to capacity building and knowledge transfer. However, the international community will need to take specific additional action to strengthen local capacity. The Netherlands should clearly play a part in this.

- Reparation is often a forgotten element in transitional justice processes. Dutch development policy should also focus more closely on victims' rights and the need for reparation. In appropriate situations the Netherlands should press for collective reparation programmes and mass claim proceedings. Such mechanisms can ensure reparation for very large numbers of war victims and others relatively quickly, without lengthy, complicated legal proceedings. However, special provision should be made for specific groups as such as women, children, ethnic and sexual minorities and the disabled.

- In view of the need for greater cooperation and coordination, the Netherlands could usefully seek strategic partners in the field of transitional justice, such as Canada, Switzerland and Norway, whose foreign and domestic policies pay a great deal of attention to transitional justice. Belgium, the United Kingdom and Germany are also active in this area, although they do not always have a comprehensive transitional justice policy.

4. *Can negotiations with the main perpetrators of large-scale human rights violations bring peace closer? If so, what conditions should be met before the Netherlands (possibly in concert with the EU and the UN) can support such negotiations?*

- In many cases, lasting peace cannot be achieved without talking to those who committed humans rights violations during an armed conflict. In principle, therefore, the AIV and the CAVV are in favour of Dutch support for such negotiations. However, it goes without saying that no undertakings can be made to the people concerned that they will not be prosecuted for the offences they are suspected of committing. Any such undertakings to persons who bear primary responsibility for international crimes would, moreover, be highly questionable in law.

5. *On the basis of its powers and obligations under national and international law, how should the Netherlands treat persons suspected of committing international crimes who have been granted amnesty through a process of transitional justice?*

- In general, the AIV and the CAVV do not see any legal reason to be circumspect in exercising the universal jurisdiction enshrined in the International Crimes Act. However, if the Netherlands has no obligation to prosecute but does have the power to do so, it should always consider whether prosecution in the Netherlands will make a meaningful contribution to a transitional justice process in the territorial state. If impunity persists in a country and one of the main suspects is in the Netherlands, prosecution before a Dutch court can send an important signal.

- The way in which the Netherlands treats persons suspected of committing large-scale offences in their own country – including Dutch nationals – should be in line with Dutch foreign and development policy.

- 'Blanket' or 'sham' amnesties are prohibited under international law, and need not therefore be respected by third states.

- As regards individual amnesty granted to persons who bear primary responsibility for serious international crimes, the AIV and the CAVV believe that the Netherlands should support the position taken by former UN Secretary-General Kofi Annan – who condemned such amnesties – and that Dutch foreign and criminal justice policy need not take account of them.

- Other situations will need to be assessed case by case. Relevant factors here will include relations with the country in transition, the importance of the amnesty to the domestic situation there, the seriousness of the offences and whether prosecution in the Netherlands is expedient. Even if the amnesty is unlawful by international legal standards, this does not compel the Netherlands to take legal action in all cases.

6. *General recommendations*

- The Hague's presentation of itself as the 'legal capital of the world' imposes a responsibility on the Dutch government to act in a way that justifies this description. The Netherlands should continue, on its own account and as a member of the EU, to press for universal acceptance of the Rome Statute.

- On the assumption that the purpose of transitional justice is to create more just societies, the international community should focus not simply on crimes that stem from a conflict, but also on the underlying factors. Where the Dutch government or Dutch business plays a part in the outbreak or continuation of conflict (for example by supplying arms or exploiting economic interests), the Netherlands should accept responsibility.

- In the light of the foregoing, the AIV and the CAVV recommend that the Netherlands itself set a good example in the treatment of war victims and the provision of reparation in cases where Dutch officials bear or share responsibility. This would increase the credibility of Dutch transitional justice efforts elsewhere.

Annexes

Annexe I

Request for advice

Professor M. Kamminga
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on Issues of Public International Law

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Re: Request for advice on transitional justice

Dear Professor Kamminga and Mr Korthals Altes,

The international community is becoming increasingly aware of the importance of the various issues that fall under the heading 'transitional justice'. In essence, the term refers to the way in which countries emerging from major conflicts, dictatorships or other oppressive regimes choose to deal with a legacy of large-scale human rights violations. Transitional justice can thus encompass any or all of the following: criminal prosecutions, establishing the truth, compensation for victims, institutional purges and reconciliation. In an international context transitional justice often takes the form of international tribunals, like the International Criminal Tribunal for the former Yugoslavia or the International Criminal Court. In some countries the transitional justice process is conducted in internationalised domestic tribunals, as for instance in Sierra Leone, East Timor and Cambodia, or in specially equipped national courts, local courts (e.g. the Rwandan *gacaca*) and truth and reconciliation commissions. In other countries legal proceedings are sometimes conducted on the basis of universal jurisdiction, which raises the question of the international community's role with respect to human rights violations.

Transitional justice revolves around the dilemma of whether to give priority to peace and stability, or to the prosecution of widespread and systematic human rights violations. Fundamentally, this can be seen as a choice between peace and justice. An extreme position would be that the criminal justice system is itself a form of injustice because it divorces the crimes from their broader social context. The preamble of the Rome Statute of the International Criminal Court takes the opposite view, 'affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation'.

In the meantime a certain degree of consensus has been reached that an enduring solution must comprise both peace and justice. The Secretary-General of the United Nations argues

for a holistic approach in his report 'The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies' (UN Doc. S/2004/616, 23 August 2004): 'The international community must see transitional justice in a way that extends well beyond courts and tribunals. The challenges of post-conflict environments necessitate an approach that balances a variety of goals, including the pursuit of accountability, truth and reparation, the preservation of peace and the building of democracy and the rule of law.' Our own human rights strategy for foreign policy ('Human Dignity for All') argues that the goals of peace and justice are not mutually exclusive, but rather two sides of the same coin: 'Without justice there cannot be lasting peace, but peace takes more than justice alone.'

One question that is particularly relevant to this issue is what forms of transitional justice genuinely contribute to lasting peace and justice. A related question concerns local perceptions of the various forms and processes of transitional justice.

The relationship between peace and justice is entwined with the question of how the Netherlands can best support the development of processes of transitional justice, financially or otherwise. This relationship also figures in the connection between, on the one hand, individual criminal liability and, on the other, obligations arising from international law to prosecute criminal offences. The problems inherent in this relationship manifest themselves largely in situations where amnesty has been granted for international offences.

We would appreciate receiving policy recommendations about these matters from the AIV and the CAVV on the basis of a survey of knowledge and empirical material.

In this connection we would ask the AIV and the CAVV to consider the following questions:

1. Are there certain general patterns that should be followed in making the choices that will guide the transitional justice process?
2. What empirical material is available for assessing what forms of transitional justice contribute to lasting peace and justice and for describing how this occurs? What recommendations could be made on that basis?
3. What transitional justice initiatives should the Netherlands support as part of its development cooperation efforts?
4. Can negotiations with the main perpetrators of large-scale human rights violations bring peace closer? If so, what conditions should be met before the Netherlands (possibly in concert with the EU and the UN) can support such negotiations?
5. On the basis of its powers and obligations under national and international law, how should the Netherlands treat persons suspected of committing international offences who have been granted amnesty through a process of transitional justice?

Yours sincerely,

(signed)

Maxime Verhagen
Minister of Foreign Affairs

(signed)

Bert Koenders
Minister for Development Cooperation

Annexe II

International tribunals and truth and reconciliation commissions

International tribunals since 1993[1]

(1) Ad hoc tribunals:

These tribunals were set up by the UN Security Council (SC) under Chapter 7 of the UN Charter.

- The International Criminal Tribunal for the former Yugoslavia (ICTY) was set up in 1993 and is based in The Hague.
- The International Criminal Tribunal for Rwanda (ICTR) was set up in 1994 and is based in Arusha, Tanzania.
- The Special Tribunal for Lebanon was set up in 2009 and is based in The Hague.

(2) Hybrid tribunals:

These tribunals or special chambers were set up under an agreement between the UN and the country concerned. They operate within the national legal system, but international participation is guaranteed.

- The Special Court for Sierra Leone was set up in 2000 and is based in Freetown.
- The 'Regulation 64' panels in the Kosovo courts were set up in 2000.
- The Special Panels for Serious Crimes in East Timor were set up in 2002 and are based in Dili.
- The Special Tribunal for Cambodia was set up in 2003 and is based in Phnom Penh.
- The War Crimes Chamber of the Court of Bosnia and Herzegovina was set up in 2004 and is based in Sarajevo.

(3) Other international tribunals:

- The Supreme Iraqi Criminal Tribunal (2003) was set up under an agreement between the US-led Coalition Provisional Authority (CPA) and the Iraqi Interim Governing Council, and is based in Baghdad.

1 Amnesty International website, see <http://www.amnesty.org/en/international-justice/issues/other-courts>, 5 April 2008; Schabas, W.A. (2008), *An Introduction to the International Criminal Court*, Cambridge: Cambridge University Press, pp. 11-15; UN, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616, 23 August 2004, pp. 14-15.

Truth and reconciliation commissions around the world[2]

Between 1974 and 2007 at least 32 bodies that may be considered truth and reconciliation commissions were set up in a total of 28 countries, most of them over the last 10 years:

1. Argentina (National Commission on the Disappearance of Persons, 1983)
2. Bolivia (National Commission of Inquiry into Disappearances, 1982)
3. Chad (Commission of Inquiry on the Crimes committed by the Hissène Habré Regime, 1991)
4. Chile (National Truth and Reconciliation Commission, 1990; National Commission on Political Imprisonment and Torture, 2003)
5. Democratic Republic of the Congo (Truth and Reconciliation Commission, 2003)
6. East Timor (Commission for Reception, Truth and Reconciliation, 2002)
7. Ecuador (Truth and Justice Commission, 1996; Truth Commission, 2007)
8. El Salvador (Truth Commission, 1992)
9. Federal Republic of Yugoslavia (Truth and Reconciliation Commission, 2001)
10. Germany (Commission of Inquiry for the Reappraisal of the History and Consequences of the SED Dictatorship in Germany, 1992)
11. Ghana (National Reconciliation Commission, 2002)
12. Grenada (Truth and Reconciliation Commission, 2001)
13. Guatemala (Historical Clarification Commission, 1997)
14. Haiti (National Commission for Truth and Justice, 1995)
15. Indonesia (Truth and Reconciliation Commission, 2004)
16. Liberia (Truth and Reconciliation Commission, 2005)
17. Morocco (Equity and Reconciliation Commission, 2004)
18. Nepal (Commission of Inquiry to Locate the Persons Disappeared during the Panchayat Period, 1990)
19. Nigeria (Human Rights Violations Investigation Commission, 1999)
20. Panama (Truth Commission, 2001)
21. Paraguay (Truth and Justice Commission, 2003)
22. Peru (Truth and Reconciliation Commission, 2000)
23. Sierra Leone (Truth and Reconciliation Commission, 2002)
24. South Africa (Truth and Reconciliation Commission, 1995)
25. South Korea (Presidential Truth Commission on Suspicious Deaths, 2000)
26. Sri Lanka (Presidential Commission of Inquiry into the Involuntary Removal or Disappearance of Persons in the Western, Southern and Sabaragamuwa Provinces; Presidential Commission of Inquiry into the Involuntary Removal or Disappearance of Persons in the Central, North Western, North Central and Uva Provinces; Presidential Commission of Inquiry into the Involuntary Removal or Disappearance of Persons in the Northern and Eastern Provinces, 1994)
27. Uganda (Commission of Inquiry into the Disappearances of People in Uganda, 1974; Commission of Inquiry into Violations of Human Rights, 1986)
28. Uruguay (Investigative Commission on the Situation of 'Disappeared' Persons and its Causes, 1985; Peace Commission, 2000)

2 Amnesty International website, see <http://www.amnesty.org/en/international-justice/issues/truth-commissions>, 28 March 2008.

Bibliography

General

AIHRC (2005), *A Call for Justice: A National Consultation on Past Human Rights Violations in Afghanistan*. Kabul: Afghan Independent Human Rights Commission.

Amnesty International (2001), *Universal jurisdiction: The duty of states to enact and implement legislation*. London: Amnesty International, AI Index: IOR 53/002-018/2001.

Bassiouni, M.C. & Morris, M.H. (eds) (2002), *Post-conflict justice.* New York: Ardsley, Transnational Publishers.

Bloomfield, D., Barnes, T. & Huyse, L. (eds) (2003), *Reconciliation After Violent Conflicts: A Handbook.* Stockholm: International Institute for Democracy and Electoral Assistance.

Bos-Ollerman, H. (2007), *Versterking van de Rechtsstaat in Partnerlanden: Een inventarisatie en analyse van programma's en projecten.* Leiden: Kenniscentrum Rechtsstaat en Ontwikkeling.

Bosire, L. (2006), *Overpromised, Underdelivered: Transitional Justice in Sub-Saharan Africa*. New York: International Centre for Transitional Justice.

Cohen, S. (2001), *States of Denial: Knowing about Atrocities and Suffering*. Cambridge: Polity Press.

Corkalo, D., Ajdukovic, D., Weinstein, H.M., Stover, E., Djipa, D. & Biro, M. (2004), 'Neighbors Again? Intercommunity Relations after Ethnic Cleansing', in Stover, E. & Weinstein, H.M. (eds) (2004), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*. Cambridge: Cambridge University Press, pp. 143-162.

De Feyter, K., Parmentier, S., Bossuyt, M. & Lemmens, P. (eds) (2005), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*. Antwerp: Intersentia Publishers.

De Greiff, P. (ed.) (2006), *Handbook of Reparations*. Oxford: Oxford University Press.

Drumbl, M. (2007), *Atrocity, Punishment and International Law*. Cambridge: Cambridge University Press.

Duthie, R. (2007), 'Introduction' in Mayer-Rieckh, A. & De Greiff, P. (eds) (2007), *Justice as Prevention: Vetting Public Employees in Transitional Societies*. Chicago/New York: Social Science Research Council/International Centre for Transitional Justice, pp. 17-38.

Hayner, P.B. (2002), *Unspeakable truths. Facing the challenge of truth commissions.* Preface by Timothy Garton Ash. New York: Routledge.

ICRC (1999), *The People on War Report.* Geneva: International Red Cross.

ICTJ (2006), *Colombian Perceptions and Opinions on Justice, Truth, Reparations, and Reconciliation.* New York: International Centre for Transitional Justice.

International IDEA (2008), *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*. Stockholm: International Institute for Democracy and Electoral Assistance.

Kritz, N.J. (1995), *Transitional justice: How emerging democracies reckon with former regimes.* Washington DC: United States Institute of Peace Press.

Mallinder, L. (2007), 'Can Amnesties and International Justice be Reconciled?' *The International Journal of Transitional Justice*, Vol. 1, No.1.

Ministry of Foreign Affairs, *Human dignity for all: a human rights strategy for foreign policy*, policy document on human rights strategy, November 2007 (<www.minbuza.nl>).

Minow, M. (1998), *Between vengeance and forgiveness: Facing history after genocide and mass violence.* Boston: Beacon Press.

Naniwe, A.-Kaburahe (2008), 'The Institution of Bashingantahe in Burundi', in IDEA (2008), *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*. Stockholm: International Institute for Democracy and Electoral Assistance, pp. 149-179.

Orentlicher, D. (2007), 'Settling Accounts Revisited: Reconciling Global Norms with Local Agency', Vol. 1, *The International Journal of Transitional Justice,* pp. 10-22.

Reydams, L. (2004), *Universal Jurisdiction: International and Municipal Legal Perspectives*. Oxford: Oxford University Press.

Rotberg, R.I. & Thompson, D.F. (eds) (2000), *Truth versus Justice: the Morality of Truth Commissions.* Princeton, NJ: Princeton University Press.

Roht-Arriaza, N. (ed.) (2006), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*. Cambridge: Cambridge University Press.

Siegel, R. (1998), 'Transitional Justice. A Decade of Debate and Experience', *Human Rights Quarterly,* Vol. 20, pp. 431-454.

Slaughter, A.M. (2006), 'Defining the Limits: Universal Jurisdiction and the National Courts', in Ratner, S. (ed.) (2006), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*. Philadelphia: University of Pennsylvania Press, pp. 168-192.

Teitel, R.G. (2000), *Transitional justice.* Oxford: Oxford University Press.

United Nations Security Council (2004), *The rule of law and transitional justice in conflict and post-conflict societies*. New York: Report of the Secretary-General to the Security Council, 23 August 2004, S/2004/616.

Voorhoeve, J. (2007), *From War to the Rule of Law: Peace Building after Violent Conflict*. Amsterdam: Amsterdam University Press.

Websites

<www.amnesty.org> (Amnesty International, London)
<www.hrw.org> (Human Rights Watch, New York)
<www.icc.int> (International Criminal Court, The Hague)
<www.iccnow.org> (Coalition for the International Criminal Court, Brussels)
<www.ictj.org> (International Centre for Transitional Justice, New York)
<www.idea.int> (International Institute for Democracy and Electoral Assistance, Stockholm)
<www.truthcommission.org> (Search for Common Ground, Washington DC)
<www.usip.org/library/truth.html> (United States Institute of Peace, Washington DC)

Truth and reconciliation commissions

(Democratic Republic of the Congo)
ICTJ (2004), *The First Few Steps: The Long Road to a Just Peace in the Democratic Republic of the Congo*. New York: International Centre for Transitional Justice, pp. 39-46.

International Crisis Group (2005), *Maintaining Momentum in the Congo: The Ituri Problem*. Brussels: International Crisis Group.

International Crisis Group (2006), *Security Reform in the Congo*. Brussels: International Crisis Group.

(East Timor)
Burgess, P. (2004), 'East-Timor Community Reconciliation Processes', in Roht-Arriaza, N. & Mariezcurrena, J. (eds) (2006), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*. Cambridge: Cambridge University Press, pp. 176-206.

(Northern Uganda)
ICTJ (2007), *When the War Ends: A Population Based Survey of Attitudes about Peace, Justice, and Social Reconstruction in Northern Uganda*. New York: Human Rights Centre, University of California, Berkeley/International Centre for Transitional Justice.

OHCHR (2007), *Making Peace Our Own: Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda*. Geneva: Office of the United Nations High Commissioner for Human Rights.

(Latin America)
ICTJ (2006), *Colombian Perceptions and Opinions on Justice, Truth, Reparations, and Reconciliation.* New York: International Centre for Transitional Justice, pp. 29-35, 65-75.

Espinoza Cuevas, V., Ortiz Rojas, M.L., Rojas Baeza, P. (2002), *Comisiones de Verdad: Un Camino Incierto? Estudio Comparativo de Comisiones de la Verdad en Argentina, Chile, El Salvador, Guatemala y Sudáfrica desde las Víctimas y las Organizaciones de Derechos Humanos*, Santiago, Chile: Corporación de Promoción y Defensa de los Derechos del Pueblo – Chile (CODEPU)/Association for the Prevention of Torture (ATP).

Gonzales Cueva, E. (2006), 'The Peruvian Truth and Reconciliation Commission and the Challenge of Impunity', in Roht-Arriaza, N. & Mariezcurrena, J. (eds) (2006), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*. Cambridge: Cambridge University Press, pp. 70-94.

(Sierra Leone)
Bosire, L. (2006), *Overpromised, Underdelivered: Transitional Justice in Sub-Saharan Africa*. New York: International Centre for Transitional Justice.

Horovitz, S. (2006), 'Transitional Criminal Justice in Sierra Leone', in Roht-Arriaza, N. & Mariezcurrena, J. (eds) (2006), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*. Cambridge: Cambridge University Press, pp. 43-69.

Schabas, W.A. (2006), 'The Sierra Leone Truth and Reconciliation Commission', in Roht-Arriaza, N. & Mariezcurrena, J. (eds) (2006), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*. Cambridge: Cambridge University Press, pp. 21-43.

(South Africa)
Gibson, J.L. & Macdonald, H. (2001), *Truth – Yes, Reconciliation – Maybe: South Africans Judge the Truth and Reconciliation Process*. Rondebosch: Institute for Justice and Reconciliation.

Greenawalt, K. (2000), 'Amnesty's Justice', in Rotberg, R. I. & Thompson, D. (eds) (2000), *Truth v. Justice: The Morality of Truth Commissions*. Princeton and Oxford: Princeton University Press, pp. 189-211.

Hayner, P.B. (2001), *Unspeakable Truths*. New York: Routledge, pp. 40-45.

Nagy, R. (2004), 'Violence, Amnesty and Transitional Law: "Private" Acts and "Public" Truth in South Africa'. *African Journal of Legal Studies*, Vol. 1, No.1, pp. 1-28.

Slye, R.C. (2000), 'Amnesty, Truth, and Reconciliation: Reflections on the South African Amnesty Process' in Rotberg, R. I. & Thompson, D. (eds) (2000), *Truth v. Justice: The Morality of Truth Commissions*. Princeton and Oxford: Princeton University Press, pp. 170-189.

Wilson, R.A. (2001), *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State*. Cambridge: Cambridge University Press, pp. 27-30.

International tribunals

(Bosnia and Herzegovina)
Biro, M., Ajdukovic, D., Corkalo, D., Djipa, D., Milin, P. & Weinstein, H. M. (2004), 'Attitudes toward Justice and Social Reconstruction in Bosnia and Herzegovina and Croatia', in Stover, E. & Weinstein, H.M. (eds) (2004), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*. Cambridge: Cambridge University Press.

Buyse, A. (2008), *Post-Conflict Housing Restitution: The European Human Rights Perspective, with a Case Study on Bosnia and Herzegovina*, Brussels/Oxford: Intersentia.

(Former Yugoslavia)
Fletcher, L. E. & Weinstein, H. (2004), 'A World unto Itself? The Application of International Justice in the Former Yugoslavia', in Stover, E. & Weinstein, H.M. (eds) (2004), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*. Cambridge: Cambridge University Press, pp. 29-49.

UNDP (2006), *Transitional Justice*; *Assessment Survey of Conditions in the Former Yugoslavia*. Belgrade: United Nations Development Programme.

(Iraq)
ICTJ (2004), *Iraqi Voices: Attitudes Towards Transitional Justice and Social Reconstruction*. New York: Human Rights Centre, University of California, Berkeley/International Centre for Transitional Justice.

ICTJ (2008), *Iraq's New Accountability and Justice Law*. Briefing Paper, New York: International Centre for Transitional Justice.

Mayer-Rieckh, A. & De Greiff, P. (eds) (2007), *Justice as Prevention: Vetting Public Employees in Transitional Societies*. Chicago/New York: Social Science Research Council/International Centre for Transitional Justice.

(Kosovo)
UNDP (2007), *Public Perceptions on Transitional Justice: Report on Transitional Justice Opinion Polling Survey Conducted in April-May 2007 Kosovo*. Kosovo: United Nations Development Programme, pp. 26-28.

(Rwanda)
Des Forges, A. & Longman, T. (2004), 'Legal Responses to Genocide in Rwanda', in Stover, E. & Weinstein, H.M. (eds) (2004), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*. Cambridge: Cambridge University Press, pp. 49-68.

HRW (2008), *World Report: Rwanda*. Human Rights Watch, pp. 144-146.

ICTR website, <http://69.94.11.53/default.htm>, 5 April 2008.

Ingelaere, B. (2008), 'The *Gacaca* Courts in Rwanda', in International IDEA (2008), *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences.* Stockholm: International Institute for Democracy and Electoral Assistance, pp. 25-61.

List of frequently used abbreviations

AIV	Advisory Council on International Affairs
CAVV	Advisory Committee on Issues of Public International Law
DDR	Disarmament, Demobilisation and Reintegration
DPA	Darfur Peace Agreement
EFV	Fragile States and Peacebuilding Unit
EU	European Union
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
LRA	Lord's Resistance Army
NGO	Non-governmental organisation
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone
SSR	Security Sector Reform
UN	United Nations
UNDP	United Nations Development Programme
UNSC	United Nations Secretary General

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