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WHAT DO YOU THINK SHOULD HAPPEN? PUBLIC PARTICIPATION IN TRANSITIONAL JUSTICE

Anna Triponel & Stephen Pearson*

INTRODUCTION

Transitional justice is defined by the United Nations (“UN”) as “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.”¹ Most typically it refers to the methods by which a state seeks to address major human rights abuses that occurred within its borders, often after a transition from a tyrannical regime to a democratic one.² Instead of focusing solely upon the accountability of individual perpetrators, as in a traditional criminal justice system, transitional justice combines the goals of justice for victims with the objectives of peace, reconciliation, and social reconstruction.³

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¹ United Nations Rule of Law, Transnational Justice, http://www.unrol.org/article.aspx?article_id=29 (last visited Jan. 31, 2010).

² See UNITED NATIONS, WHAT IS TRANSITIONAL JUSTICE? A BACKGROUNDER (2008), [http://www.un.org/peace/peacebuilding/Working%20Group%20on%20Lessons%20Learned/Justice%20in%20Times%20of%20Transition%20\(26.02.2008\)/26.02.2008%20%20Background%20note.pdf](http://www.un.org/peace/peacebuilding/Working%20Group%20on%20Lessons%20Learned/Justice%20in%20Times%20of%20Transition%20(26.02.2008)/26.02.2008%20%20Background%20note.pdf).

³ See *id.*

States often use a variety of both judicial and non-judicial transitional justice mechanisms.⁴ This article will focus on three of these methods. The first transitional justice method involves using high court procedures against individuals who are alleged to have committed gross violations of human rights.⁵ These court procedures are aimed at judging only a nominal number of defendants: typically those accused of particularly serious crimes.⁶ Examples include the International Criminal Tribunal for ex-Yugoslavia, the International Criminal Tribunal for Rwanda, and courts set up in Cambodia, Sierra Leone and Timor-Leste.

The second method is the use of trial-type procedures based on local, traditional justice mechanisms against lower-level offenders.⁷ These procedures are typically integrated into the country's domestic criminal system and are intended to hold accountable those who played a part in the conflict but who did not necessarily commit offences that rise to the level of international crimes. Examples include the Gacaca system in Rwanda and the Bosnian War Crimes Chamber.

The third method involves the use of truth and reconciliation commissions ("TRCs") which are designed to establish a historical record of past conflict and enhance reconciliation.⁸ Unlike the first two mechanisms, TRCs are non-judicial bodies which map patterns of past human rights abuses.⁹ Such bodies have been established in a number of countries, and have been used either

⁴ For more information on transitional justice systems generally, see Oskar N.T. Thoms et al., *Does Transitional Justice Work? Perspectives from Empirical Social Science* (Univ. of Ottawa, Working Paper Series, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1302084; see also David E. Guinn, *Human Rights Education: The Third Leg of Post-Conflict/Transitional Justice* (Int'l Human Rights Law Inst., Working Paper Series, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=854488.

⁵ See Thoms et al., *supra* note 4.

⁶ OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES: MAXIMIZING THE LEGACY OF HYBRID COURTS* 18 (2008), http://www.unrol.org/files/Hybrid_Courts.pdf [hereinafter *HYBRID COURTS*].

⁷ See Thoms et al., *supra* note 4.

⁸ *Id.*

⁹ Human Rights Council, United Nations, Annual Report of the United Nations High Commissioner and Reports of the Office of the High Commissioner and the Secretary-General ¶ 8, U.N. Doc A/HRC/12/18 (Aug. 6, 2009). See generally PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS* (2001).

alone or in conjunction with one or both of the two mechanisms referenced above. In Argentina, Chile and Liberia, TRCs were the only transitional justice methods used, whereas in Sierra Leone, Timor-Leste and Rwanda, they have been combined with high court or trial-type procedures.

Less frequently used transitional justice mechanisms include lustration, which involves excluding officials who have been found guilty of committing abuses from public service, monetary reparations to victims of past abuses, and reform of state institutions.¹⁰

Although the concept of transitional justice has been recognized for more than thirty years, in recent times an increasing number of countries are taking steps to address the legacy of past human rights abuses within their borders, and are resorting to transitional justice as a means of doing so. For example, in Burundi, civil war amongst the country's ethnic groups dating back to 1987 left the country ravaged.¹¹ In 2000, the Arusha Peace and Reconciliation Agreement for Burundi recommended the creation of a Special Tribunal, a Truth and Reconciliation Commission and an international judicial commission of inquiry for which a number of activities are now being launched to raise public awareness.¹² In Kenya, a Truth,

¹⁰ See Thoms et al., *supra* note 4; see also WHAT IS TRANSITIONAL JUSTICE?, *supra* note 2, at 3-4 (defining reparation programs as "state-sponsored initiatives that aim to contribute to repairing, on a massive scale, the material and moral consequences of past abuse experienced by certain classes of victims. They typically distribute some mix of material and symbolic benefits to victims." Defining security system reform as "wide-ranging programs to transform the military, police, judiciary, and related state institutions from instruments of repression and corruption into instruments of public service and integrity.").

¹¹ International Center for Transitional Justice, Burundi, <http://www.ictj.org/en/where/region1/512.html> (last visited Jan. 31, 2010) [hereinafter Burundi].

¹² The Secretary-General, *Report of the Assessment Mission On the Establishment of an International Judicial Commission of Inquiry for Burundi, delivered to the Security Council*, U.N. Doc S/2005/158 (Mar. 2005) [hereinafter *Arusha Peace and Reconciliation Agreement*]. See UN Will Finance Burundi Transitional Justice Consultations, <http://africannewsanalysis.blogspot.com/2008/06/un-will-finance-burundi-transitional.html> (June 22, 2009, 21:13 EST); see also Burundi, *supra* note 11; United Nations Development Programme, Burundi, <http://www.bi.undp.org/html/demgovernance%20-%2000062255.html> (last visited Jan. 27, 2010); BBC World Service Trust, Communicating Justice, http://www.bbc.co.uk/worldservice/trust/whatwedo/where/africa/2008/03/080219_africa_justice_project_overview.shtml

Justice, and Reconciliation Commission was created following the 2008 National Dialogue and Reconciliation brokered by the African Union's Panel of Eminent African Personalities.¹³ This was prompted by the civil unrest which followed the disputed presidential election in 2007. In Uganda, political unrest and rebel violence in the north have threatened the country's stability since the 1980's.¹⁴ The Uganda Government and the Lord's Resistance Army in 2008 agreed on the final Annexure on Accountability and Reconciliation which provided for the creation of a range of transitional justice mechanisms which the Government is now in the process of implementing.¹⁵ In Nepal, the Government recently decided to establish a Disappearances Commission and a Truth and Reconciliation Commission in response to the civil conflict which gripped the country from 1996 to 2006.¹⁶

There is also ongoing debate regarding the possibility of implementing transitional justice mechanisms in a number of other states. In Sudan, thought is being given as to how to promote sustainable peace through post-conflict reconciliation mechanisms.¹⁷ The international community is discussing the

(last visited Jan. 27, 2010).

¹³ See International Center for Transitional Justice, Kenya, <http://www.ictj.org/en/where/region1/648.html> (last visited Jan. 30, 2010) (detailing the other transitional justice mechanisms that were created); see also Njonjo Mue, *Involve the Public in Law-Making*, INT'L CENTER FOR TRANSITIONAL JUST., May 10, 2009, <http://ictj.org/en/news/coverage/article/2608.html> (indicating that the Kenyan parliament turned down the Constitutional Amendment Bill for a Special Tribunal for post-election violence).

¹⁴ See generally International Center for Transitional Justice, Uganda, http://www.ictj.org/static/Africa/Uganda/ICTJ_UGA_Backgrounder_wb2008.pdf [hereinafter Uganda].

¹⁵ SCOTT WORDEN, U.S. INST. PEACE, *THE JUSTICE DILEMMA IN UGANDA 1* (2008), http://www.usip.org/files/resources/1_3.PDF; see also generally Uganda, *supra* note 14.

¹⁶ See generally *Nepal: Send Human Rights Bill to Parliament*, H.R. WATCH, Jan. 29, 2009, <http://www.hrw.org/en/news/2009/01/29/nepal-send-human-rights-bills-parliament> [hereinafter *Nepal: Human Rights Bill*]; USIP/PIECE BRIEFING, U.S. INST. PEACE, *TRANSITIONAL JUSTICE IN NEPAL: A LOOK AT THE INTERNATIONAL EXPERIENCE OF TRUTH COMMISSIONS 1-10* (2007), http://www.usip.org/files/resources/transitional_justice_nepal.pdf [hereinafter *TRANSITIONAL JUSTICE IN NEPAL*]; International Center for Transitional Justice, Nepal, <http://www.ictj.org/en/where/region3/1684.html> (last visited Jan. 31, 2010).

¹⁷ CONCORDIS INTERNATIONAL, *PROMOTING SUSTAINABLE PEACE IN SUDAN THROUGH POST-CONFLICT JUSTICE AND RECONCILIATION* (2007), <http://www.>

possibility of implementing transitional justice mechanisms in Zimbabwe at some point in the future,¹⁸ while in the Democratic Republic of Congo, the international community is analyzing how the transitional justice mechanisms which were implemented there could have been more effective and credible.¹⁹ In recent years, there has been interest in setting up a truth commission in Afghanistan, Angola, Bosnia-Herzegovina, Cambodia, Colombia, Indonesia, Jamaica, Mexico, Morocco, Philippines and Venezuela.²⁰

One factor that is considered increasingly important in the success of transitional justice systems is early consultation with the population about the proposed system. The international community now generally refers to the benefits of public participation during the planning phase as a “given.”²¹ Meaningful participation involves integrating feedback received from the public into the transitional justice mechanism, as opposed to outreach which focuses on educating the public. For example, in Burundi, the UN recommended that there “be a broad-based, genuine and transparent process of consultation . . . with a range of national actors and civil society at large, to ensure that, within the general legal framework for the establishment of judicial and non-judicial accountability mechanisms acceptable to the United Nations and the Government [of Burundi], the views and wishes of the people of Burundi are taken into account.”²² In Nepal, non-governmental organizations (“NGOs”) including

concordis-international.org/files/PCJR%20Summary.pdf.

¹⁸ See, e.g., ZIMBABWE HUMAN RIGHTS NGO FORUM, *EXPLORING TRANSITIONAL JUSTICE OPTIONS IN CONTEMPORARY ZIMBABWE* (2006), http://www.hrforumzim.com/special_hrru/transitional_justice.pdf; see also Pondai Bamu, *Zimbabwe: Transitional Justice Without Transition in Zimbabwe*, ALLAFRICA.COM, Feb. 26, 2009, <http://allafrica.com/stories/200902270233.html>.

¹⁹ International Center for Transitional Justice, Democratic Republic of Congo, <http://www.ictj.org/en/where/region1/646.html> (last visited Jan. 31, 2010).

²⁰ MINISTRY OF NEPAL PEACE SECRETARIAT, WORLDWIDE TRUTH AND RECONCILIATION COMMISSIONS, <http://www.peace.gov.np/admin/doc/World%20experiences%20of%20TRC-Commissions.pdf>.

²¹ See, e.g., Transitional Justice, *supra* note 1 (indicating that “[n]ational consultations are a critical element as successful transitional justice programmes necessitate meaningful public participation, particularly of victims.”); UNITED NATIONS OFFICE OF HIGH COMMISSIONER FOR HUMAN RIGHTS, *GUIDANCE ON THE NATIONAL HUMAN RIGHTS INSTITUTIONS AND TRANSITIONAL JUSTICE* 3 (2008), http://www.nhri.net/2009/NHRIs_Guidance%20Note%20TJ_Oct%2008.pdf.

²² *Arusha Peace and Reconciliation Agreement*, *supra* note 12, ¶ 75.

Amnesty International and Human Rights Watch have urged the government “to involve actively all those concerned in the discussions on the establishment, mandate, and powers of the Disappearances Commission and the Truth and Reconciliation Commission.”²³ Furthermore, surveys conducted in countries setting up transitional justice mechanisms, demonstrate that “the legitimacy of a tribunal may be intimately connected with public perceptions of its work.”²⁴ In a 2004 report on the use of transitional justice in post-conflict societies, the UN Secretary-General indicated that the past decade has shown that maintenance of peace in the long term “cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice.”²⁵

An analysis of public participation in the planning phases of transitional justice mechanisms which have already been implemented therefore provides useful guidance to states which are currently implementing these procedures. To set the stage, this article first tracks the evolution of transitional justice mechanisms over the past twenty years, highlighting a gradual increase in national involvement in the nascent stages of transitional justice, as well as a more pronounced focus on reconciliation (Part I). This article then discusses the emerging trend towards promoting early public participation in transitional justice systems. The analysis demonstrates that public participation during the creation of the transitional justice system paves the way for increased public participation throughout its period of operation (Part II). In turn, these evolutionary trends assist in developing a nascent set of best practices, which

²³ *Nepal: Human Rights Bill*, *supra* note 16. See also TRANSITIONAL JUSTICE IN NEPAL, *supra* note 16, at 1-10.

²⁴ HYBRID COURTS, *supra* note 6, at 18 (referring to ICTJ and Human Rights Center, University of California, Berkeley, *Forgotten Voices: A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda* (July 2005), and *The Post-conflict Reintegration Initiative for Development and Empowerment and ICTJ, Ex combatant Views of the Truth and Reconciliation Commission and the Special Court in Sierra Leone* (Sept. 2002) (indicating that “surveys conducted in Rwanda, Uganda and Sierra Leone have illustrated a close relationship between knowing about a court and supporting it.”).

²⁵ The Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 3, *delivered to the Security Council*, U.N. Doc. S/2004/616 (Aug. 23, 2004) [hereinafter *Transitional Justice Report*].

countries emerging from conflict, such as Nepal, Uganda and Kenya, can consult as they strive to achieve justice with reconciliation (Part III).

I. THREE WAVES OF TRANSITIONAL JUSTICE

An analysis of the transitional justice mechanisms used since the concept was first recognized highlight three distinctive waves of transitional justice, ranging from the 1980s (where local TRCs were used almost exclusively), to the 1990s (where international involvement was accentuated), to the 2000s (where transitional justice focused increasingly on national ownership and reconciliation).

A. The 1980s: Localized TRCs as the Single Component of Transitional Justice

Transitional justice, as the term is understood today, emerged in the 1980s in response to political changes in countries throughout Latin America.²⁶ These conflicts gave rise to the concept of TRCs as the key component of transitional justice. For example, in 1983, Argentinean President, Raul Alfonsín, created a TRC - the National Commission on the Disappearance of Persons (“CONADEP”) - to address the abuses of the successive military juntas that had ruled Argentina since 1976.²⁷ Similarly, Chilean President, Patricio Aylwin, created a TRC in 1990 - the National

²⁶ International Center for Transitional Justice, Mission and History, <http://www.ictj.org/en/about/mission/index.html> (last visited Jan. 31, 2010) (indicating that “[w]hat became known as transitional justice emerged in the 1980s and 1990s mainly in response to political changes in Latin America and Eastern Europe -- and to demands in these regions for justice.”).

²⁷ Isabel Perón was deposed in a coup d’état in Argentina in 1976 and was replaced by a military government known as the “National Reorganization Process” (the “Proceso de Reorganización Nacional”). Although it is unclear precisely when the humanitarian crisis began, the military coup sparked a process of political subversion in which thousands of Argentineans disappeared. It was later learned that these Argentineans were, in many cases, transferred to secret detention centers and summarily executed by the Argentine military. In October 1983, elections were held to restore Argentina to civilian democratic rule and the National Reorganization Process leaders were voted out of power. For more information, see NUNCA MÁS: THE REPORT, ARGENTINE NATIONAL COMMISSION ON DISAPPEARED (1984), http://web.archive.org/web/20031013222855/nuncamas.org/english/library/nevagain/nevagain_005.htm.

Commission on Truth and Reconciliation, also known as the Rettig Commission – to address the human rights abuses that had taken place in Chile at the hands of the military junta since 1973.²⁸

The objective of these early TRCs was to document the events that had taken place and the crimes that had been committed, without seeking to determine responsibility. CONADEP's mandate, for example, was to investigate the disappearance of people during a specific time frame (between 1976 and 1983).²⁹ Similarly, the Chilean National Commission on Truth and Reconciliation's aim was to develop a complete picture of human rights violations under the Pinochet regime and recommend appropriate legal and administrative measures to prevent future repetition.³⁰

B. The 1990s: Increased International Involvement

The second wave of transitional justice in the 1990s is characterized by increased international involvement in the establishment of transitional justice mechanisms. In Eastern Europe and Africa, the international community intervened to set up tribunals to judge those responsible for crimes such as genocide, crimes against humanity and war crimes. The Balkans conflict³¹ led to the creation of an international criminal tribunal

²⁸ In 1973, the military in Chile took power from President Salvador Allende. Thereafter, the military ruled by means of a junta, dominated by Augusto Pinochet. The junta committed numerous human rights abuses while in power, including torture and the summary execution of political dissidents. When the military was forced to give in to public support for democratic rule in 1990, President Aylwin was elected on a campaign promise to hold accountable those who were responsible. See generally MARK ENSALACO, CHILE UNDER PINOCHET: RECOVERING THE TRUTH 182-83 (2000) (discussing the history of war and human rights in Chile).

²⁹ Argentine National Commission on Disappeared, Nunca Más, http://www.nuncamas.org/english/library/neveragain/neveragain_000.htm (last visited Jan. 30, 2010). See United States Institute of Peace, Truth Commission: Argentina, <http://www.usip.org/resources/truth-commission-argentina> (last visited Jan. 27, 2010) [hereinafter Truth Commission: Argentina].

³⁰ Eric Brahm, *The Chilean Truth and Reconciliation Commission*, BEYOND INTRACTABILITY, July 2005, http://www.beyondintractability.org/case_studies/Chilean_Truth_Commission.jsp?nid=5221.

³¹ In the early 1990s, several of Yugoslavia's regions declared independence and fighting began along religious and ethnic lines. As the fighting intensified, the various factions began to commit human rights violations, including torture,

by the United Nations Security Council - the International Criminal Tribunal for the former Yugoslavia (“ICTY”) - to prosecute those responsible for gross human rights violations.³² Similarly, in the wake of the Rwandan genocide,³³ the UN Security Council established the International Criminal Tribunal for Rwanda (“ICTR”) to prosecute individuals responsible for the crimes committed during the genocide.³⁴

The increased international involvement in this second wave was also seen in the rise of TRCs whose creation was mandated by the international community, largely through UN brokered peace agreements. In El Salvador, the 1991 peace agreement brokered by the UN, contained provisions creating the Commission on the Truth for El Salvador (Comisión de la Verdad Para El Salvador, CVES) made up of three international commissioners appointed by the Secretary-General of the UN.³⁵ Guatemala also followed a similar path. Its commission for historical clarification was created as part of the UN brokered peace agreement of 1996.³⁶

mutilation, and rape, continuing from approximately the middle of 1991, until at least the Dayton Peace Accord was signed on December 14, 1995. *See generally* HOWARD BALL, *PROSECUTING WAR CRIMES AND GENOCIDE: THE TWENTIETH CENTURY EXPERIENCE* 124-37 (1999).

³² S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993).

³³ In October 1990, a Rwandan exile group composed mostly of ethnic Tutsis invaded Rwanda against the Hutu government. The war continued for approximately two years until the government and the rebels reached a peace accord in Arusha, Tanzania. On April 6, 1994, the Hutu president, Habyarimana, died when his airplane was shot down. In the next three months (April 6, 1994 to mid-July 1994), Hutu militia groups killed up to one million ethnic Tutsis and Hutu moderates, and another two million became refugees. United States Department of State, Background Note: Rwanda, <http://www.state.gov/r/pa/ei/bgn/2861.htm> (last visited Jan. 31, 2010).

³⁴ Bert Ingelaere, *The Gacaca courts in Rwanda*, in *The Gacaca Traditional Justice and Reconciliation after Violent Conflict*, in *Traditional Justice and Reconciliation After Violent Conflict*, in INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE 45 (Luc Huyse et al. eds., 2008), available at http://www.idea.int/publications/traditional_justice/upload/Traditional_Justice_and_Reconciliation_after_Violent_Conflict.pdf.

³⁵ EL SALVADOR: MEXICO PEACE AGREEMENTS—PROVISIONS CREATING THE COMMISSIONS ON TRUTH (1991), *reprinted in* 3 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES, at 174-79, available at [http://www.usip.org/files/file/resources/collections/commissions/El%20Salva dor-Charter.pdf](http://www.usip.org/files/file/resources/collections/commissions/El%20Salva%20dor-Charter.pdf); United States Institute of Peace, Truth Commission: El Salvador, <http://www.usip.org/resources/truth-commission-el-salvador> (last visited Jan. 30, 2010).

³⁶ United States Institute of Peace, Truth Commission: Guatemala, <http://www.usip.org/resources/truth-commission-guatemala> (last visited Jan. 31,

The chair of the commission was German and was selected by the UN Secretary General. While there were two members on the Commission who were Guatemalan, the institution was heavily influenced by the UN and thus highly internationalized.³⁷

C. The 21st Century: A Renewed Focus on National Ownership and Reconciliation

The third wave of transitional justice is characterized by (i) a renewed focus on national rather than solely international involvement in the transitional justice process and (ii) the birth of hybrid tribunals. Hybrid courts are “courts of mixed composition and jurisdiction, encompassing both national and international aspects, usually operating within the jurisdiction where the crimes occurred.”³⁸ Unlike the international ad hoc tribunals created in the early 1990s, these new hybrid courts held trials in their own countries, involved an increasing number of nationals within their operations, and used both national and international law concepts.³⁹ This renewed focus on national ownership is reflected in the general consensus reached by the international community in 1998 that countries should be able to prosecute those responsible for gross human rights abuses within their borders under the principle of complementarity, rather than being required to submit to an over-reaching international criminal court.⁴⁰ At the same time, a number of local TRCs aimed at promoting reconciliation, were created to complement these judicial proceedings.

The example of Sierra Leone demonstrates this third wave of transitional justice. In Sierra Leone, the 1999 Lomé Accord called for the establishment of a TRC which commenced its operations in

2010) [hereinafter Truth Commission: Guatemala]; U.S. INST. PEACE, COMMISSION FOR HISTORICAL CLARIFICATION: CHARTER (June 23, 1994), <http://www.usip.org/files/file/resources/collections/commissions/Guatemala-Charter.pdf>.

³⁷ See Truth Commission: Guatemala, *supra* note 36.

³⁸ HYBRID COURTS, *supra* note 6, at 1.

³⁹ See *Transitional Justice Report*, *supra* note 25, at 15; HYBRID COURTS, *supra* note 6, at 1.

⁴⁰ See Rome Statute for the International Criminal Court art. 17, § 1(b), July 17, 1998, 2187 U.N.T.S. 90 (stating that the International Criminal Court will be able to assert jurisdiction if the country is unwilling or unable to prosecute).

late 2002.⁴¹ Following repeated violation of the Lomé Accord by the Revolutionary United Front, the Government of Sierra Leone asked the United Nations to help establish a court, in addition to the TRC, to prosecute those “who ‘bear the greatest responsibility’ for the commission of violations of international humanitarian law.”⁴² Unlike the ICTR and ICTY, which were established by UN Security Council Resolutions, the Special Court for Sierra Leone (the “Special Court”) was established by international agreement between the United Nations and the Government of Sierra Leone.⁴³ The Special Court, which used both international and national judges and applied both international and national law, was a prototype for the hybrid courts that would emerge in the future.⁴⁴

Similarly, in Timor-Leste, both a TRC and a hybrid court were set up as a means for achieving transitional justice after the period of Indonesian control of Timor-Leste.⁴⁵ In June 2000, the

⁴¹ See generally United States Department of State, Background Notes, Sierra Leone (2009) <http://www.state.gov/r/pa/ei/bgn/5475.htm> (discussing that the Sierra Leone civil war started in 1991 when a small group known as the Revolutionary United Front (“RUF”), led by Foday Sankoh, invaded Sierra Leone from Liberia. Except for a few short-lived cease-fires and a democratic election, Sierra Leone was engulfed by anarchy and violence. In July 1999, a peace agreement was reached by the Government of Sierra Leone and the RUF in Lomé, Togo (The Lomé Accord), although fighting continued until January 2002, when President Ahmad Kabbah declared that the civil war was officially over. The Sierra Leone TRC subsequently commenced its operation in late 2002.).

⁴² Joe A.D. Alie, *Reconciliation and Traditional Justice: Tradition-Based Practices of the Kpaa Mende in Sierra Leone*, in *TRADITIONAL JUSTICE AND RECONCILIATION AFTER VIOLENT CONFLICT, LEARNING FROM AFRICAN EXPERIENCES* 123, 132 (Luc Huyse & Mark Salter eds., 2008), available at http://www.idea.int/publications/traditional_justice/upload/Traditional_Justice_and_Reconciliation_after_Violent_Conflict.pdf.

⁴³ Tom Perriello & Marieke Wierda, *The Special Court for Sierra Leone Under Scrutiny*, in *INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, PROSECUTIONS CASE STUDIES SERIES* 13 (2006), available at <http://www.ictj.org/static/Prosecutions/Sierra.study.pdf> (indicating that these meetings included police and prison authorities, members of the Bar Associations, representatives of civil society, and human rights NGOs).

⁴⁴ See UNITED NATIONS OFFICE OF THE SPECIAL ADVISOR ON AFRICA, *DDR AND TRANSITIONAL JUSTICE* 33 (2007), <http://www.un.org/africa/osaa/speeches/ddr%20and%20tj%20in%20africa%20-%20english.pdf> [hereinafter OSAA].

⁴⁵ See generally TAINA JÄRVINEN, *FINNISH INSTITUTE OF INTERNATIONAL AFFAIRS, HUMAN RIGHTS AND POST-CONFLICT TRANSITIONAL JUSTICE IN EAST TIMOR* (2004), available at http://se2.isn.ch/serviceengine/Files/RESSpecNet/19246/ipublicationdocument_singledocument/AE3FEC46-96CC-44B1-BEC5-AFB8DE4332CD/en/WP47_2.pdf (discussing that nine days after Timor-Leste

UN Transitional Authority for East Timor (“UNTAET”) established a hybrid court called the Special Panels for Serious Crimes (the “Special Panels”) to prosecute the most serious human rights violations that had taken place in Timor-Leste.⁴⁶ This hybrid tribunal was formed during the creation of the overall judicial system in Timor-Leste, with each Special Panel consisting of one Timorese judge and two international judges.⁴⁷ The law applied by the tribunal mirrored the rules applied by the International Criminal Court with a few exceptions.⁴⁸ Within a year, on July 13, 2001, the UNTAET also established a Commission for Reception, Truth and Reconciliation (Comissão de Acolhimento, Verdade e Reconciliação de Timor-Leste, “CAVR”) charged with creating a mechanism for community reconciliation procedures and drafting a final report detailing the truth about the human rights violations that took place.⁴⁹ While the TRC was mandated by the UN, local participation was vital. The commission was composed of seven commissioners, all East Timorese nationals, and twenty-five to thirty regional commissioners located throughout the country.⁵⁰ Traditional justice mechanisms were also incorporated.⁵¹

Cambodia is also home to a hybrid tribunal, the Extraordinary Chambers in the Courts of Cambodia (“ECCC”). In

declared its independence from Portuguese rule on November 28, 1975, Indonesia invaded it and took control. Timor-Leste was under Indonesian rule for approximately 25 years, and during that time, a large number of human rights violations occurred. These violent acts reached a crescendo when Timor-Leste held a referendum on self-government. The United Nations established the United Nations Transitional Authority for East Timor (“UNTAET”) and immediately began to work with the Timorese to establish transitional justice mechanisms.)

⁴⁶ See UNTAET Reg. No. 2000/11, 4 (Mar. 6, 2000), available at <http://secint50.un.org/peace/etimor/untaetR/Reg11.pdf>; see also JÄRVINEN, *supra* note 45, at 48-50.

⁴⁷ See UNTAET Reg. No. 2000/11, *supra* note 46; JÄRVINEN, *supra* note 45, at 50.

⁴⁸ Suzanne Katzenstein, *Hybrid Tribunals: Searching for Justice in East Timor*, 16 HARV. HUM. RTS. J. 245, 245-78 (2003).

⁴⁹ See EAST TIMOR COMMISSION FOR RECEPTION, TRUTH, AND RECONCILIATION, CHEGA! FINAL REPORT OF THE COMMISSION FOR RECEPTION, TRUTH AND RECONCILIATION IN EAST TIMOR, pts. 2-3 (2005), available at <http://www.cavr-timorleste.org/chegaFiles/finalReportEng/02-The-Mandate-of-the-Commission.pdf> [hereinafter CHEGA! FINAL REPORT].

⁵⁰ See CHEGA! FINAL REPORT, *supra* note 49, intro., paras. 52-54.

⁵¹ See CHEGA! FINAL REPORT, *supra* note 49, pt. 9, at 2.

1997, the Cambodian Government asked the UN to assist them in setting up a tribunal to prosecute senior members of the Khmer Rouge for war crimes committed in Cambodia between 1975 and 1979.⁵² Although the UN's participation was required because of the "weakness of the Cambodian legal system and the international nature of the crimes," the Cambodian Government wanted to keep the process a national one and insisted that the "trial . . . be held in Cambodia using Cambodian staff and judges together with foreign personnel."⁵³ Therefore, the lengthy negotiations between the Cambodian Government and the UN resulted in a hybrid court applying a mixture of local and international law with both local and international judges and prosecutors.⁵⁴

At around the same time, the international ad hoc tribunals set up for Rwanda and Yugoslavia, were complemented by other transitional justice mechanisms aimed at increasing national ownership. The Rwandan Government modernized the Gacaca court system, a traditional grassroots dispute settlement mechanism, to deal with genocide-related crimes.⁵⁵ In addition, a TRC - the National Unity and Reconciliation Commission ("NURC") - was created in 1999.⁵⁶ In Yugoslavia, there was also a push for local involvement, and in 2005, the War Crimes Chamber

⁵² Between 1975 and 1979, the Khmer Rouge, a communist party, ruled Cambodia. During this time, the government committed gross human rights violations, including torture, mass killings, and the plundering of villages. The Khmer Rouge army was finally overthrown in 1979 by the neighboring Vietnamese army. After obtaining independence from Vietnamese influence in 1991, Cambodia nominally converted to democratic rule, with the first president being overthrown in a coup and the second president remaining in office to the present time. Negotiations with the UN on the creation of a tribunal to put Khmer Rouge members on trial for war crimes committed in Cambodia between 1975 and 1979 commenced in 1997 and resulted in the creation of the Extraordinary Chambers in the Courts of Cambodia (ECCC) in 2003. See generally CRAIG ETCHESON, *AFTER THE KILLING FIELDS: LESSONS FROM CAMBODIAN GENOCIDE* 7-8 (2005); Extraordinary Chambers in the Courts of Cambodia, Introduction to the ECCC, http://www.eccc.gov.kh/english/about_eccc.aspx (last visited Jan. 30, 2010) [hereinafter ECCC Cambodia].

⁵³ ECCC Cambodia, *supra* note 52.

⁵⁴ See International Center for Transitional Justice, Cambodia, <http://www.ictj.org/en/where/region3/642.html> (last visited Jan. 27, 2010) [hereinafter ICTJ, Cambodia].

⁵⁵ Ingelaere, *supra* note 34, at 37 (indicating also, *id.* at 45, that the Gacaca court system is the main transitional justice mechanism).

⁵⁶ *Id.* at 45.

in Bosnia and Herzegovina was created to try suspects of lower to mid-level ranks transferred from the ICTY by the UN Security Council.⁵⁷ One of the Bosnian War Crimes Chamber's specific objectives was to "promote the process of reconciliation in Bosnia by bringing war criminals to justice."⁵⁸ It therefore complemented the ICTY with trials focusing on lower-level offenders which were fully integrated into the domestic Bosnian legal system.⁵⁹

II. ANALYSIS OF PUBLIC OUTREACH MECHANISMS

Public participation in transitional justice mechanisms has historically differed depending on the mechanism adopted. The trend has been one of increased public outreach with each new transitional justice wave.

A. *First Wave: TRCs*

The early TRCs were created by national governments without extensive input from the public. Governments instead relied on an implicit mandate from the people, as was the case in Argentina and Chile. In Argentina, President Alfonsín campaigned on the promise to address the abuses of the successive military juntas that had ruled since 1976.⁶⁰ Alfonsín was elected on December 10, 1983, and just three days after assuming office, passed a law requiring the prosecution of military leaders who had perpetrated various crimes, especially those relating to forced disappearances.⁶¹ Two days later, Alfonsín

⁵⁷ See TRIAL: Track Impunity Always, Tribunals, War Crimes Chamber in Bosnia-Herzegovina, <http://www.trial-ch.org/en/tribunals/war-crimes-chamber-in-bosnia-herzegovina.html> (last visited Jan. 27, 2010).

⁵⁸ *Id.*

⁵⁹ BOGDAN IVANISEVIĆ, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, THE WAR CRIMES CHAMBER IN BOSNIA AND HERZEGOVINA: FROM HYBRID TO DOMESTIC COURT (2008), available at <http://www.ictj.org/images/content/1/0/1088.pdf>. See also TRIAL, *supra* note 57.

⁶⁰ See Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina*, 100 YALE L.J. 2619, 2622-23 (1991); see also Juan Carlos Torre & Liliana de Riz, *Argentina Since 1946*, in ARGENTINA SINCE INDEPENDENCE 342-44 (Leslie Bethell ed., 1993); Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 615 (1994).

⁶¹ Law No. 158, Dec. 13, 1983, [25321] B.O. (Arg.).

passed a law establishing a truth commission, CONADEP.⁶²

President Alfonsín had informal consultations regarding the establishment of a TRC with the Madres de la Plaza de Mayo (Mothers of the Disappeared, the “Madres”), a large Argentinean NGO seeking justice for the abuses committed by the previous military governments in Argentina.⁶³ The Madres de la Plaza de Mayo did not support the dual system Alfonsín suggested, which would have prosecuted high-level offenders in the national courts and established a more far-reaching truth commission without the power to punish. The Madres lobbied instead for a commission with more power.⁶⁴ In the end, however, this position was not followed. CONADEP was formed to investigate the disappearances of people between 1976 and 1983 and to turn over its findings to initiate formal proceedings where necessary.⁶⁵ The methods it used for fact gathering were laid out in a decree which resulted from closed-door interviews and no public hearings.⁶⁶ CONADEP’s focus was mostly on investigation as opposed to reconciliation, resulting in the report - “Nunca Mas” (Never Again) - detailing the facts surrounding the disappearance of civilians in Argentina and suggesting recommendations for the Government.⁶⁷

In Chile, President Aylwin was elected on campaign pledges to hold Augusto Pinochet’s military regime accountable for its human rights abuses. On April 25, 1990, after only one month in office, Aylwin created the National Commission on Truth and Reconciliation.⁶⁸ This commission was created by executive decree, in part to avoid a fight with the military, over which Pinochet still had control and which wielded considerable power.⁶⁹

⁶² Law No. 187, Dec. 15, 1983, [XLIV-A] A.D.L.A. 137 (Arg.).

⁶³ PAUL H. LEWIS, *GUERRILLAS AND GENERALS: THE “DIRTY WAR” IN ARGENTINA* 204 (2002).

⁶⁴ *Id.*

⁶⁵ Truth Commission: Argentina, *supra* note 29.

⁶⁶ NUNCA MÀS: THE REPORT, *supra* note 27, § IV; Law No.187, Dec. 15, 1983; Truth Commission: Argentina, *supra* note 29; Nino, *supra* note 60, at 2623.

⁶⁷ NUNCA MÀS: THE REPORT, *supra* note 27, § I.B.

⁶⁸ See Elizabeth Lira, *Human Rights in Chile: The Long Road to Truth, Justice, and Reparations*, in *AFTER PINOCHET: THE CHILEAN ROAD TO DEMOCRACY AND THE MARKET* 5-6 (Silvia Borzuzky & Lois Hecht Oppenheim eds., 2006); ENSALACO, *supra* note 28; Ministry of the Interior Decree No. 355, Apr. 25, 1990 (Chile).

⁶⁹ ENSALACO, *supra* note 28, at 182-83.

President Aylwin consulted with the public on the creation of this commission, although the extent of public input is debated.⁷⁰

B. Second Wave: Internationally Mandated High Courts and TRCs

International actors during the second wave of transitional justice helped bring legitimacy to newly formed organizations and assisted in the application of internationally recognized standards, but in so doing, provided minimal mechanisms for public input in the process.

1. High Courts

High courts have usually been created by the UN, either alone or in collaboration with the concerned state. The history of these high courts highlights that they were often established without seeking the public's views on whether such a body should be created, which is explained in part by the circumstances surrounding their creation.

The UN Security Council unilaterally established the ICTR in November 1994, just four months after the end of the violent conflict in Rwanda.⁷¹ The Security Council did not consult the Rwandan public on the establishment of the ICTR and for a number of years after its creation, the ICTR had few outreach programs directed towards the Rwandan public.⁷² As a result, the

⁷⁰ *Id.* at 183 (claiming there was not much input outside of Aylwin's advisors). *But see* José Zalaquett, *Introduction to the English Edition*, in UNITED STATES INSTITUTE OF PEACE, REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION 6 (2002), available at http://www.usip.org/files/resources/collections/truth_commissions/Chile90-Report/Chile90-Report.pdf (claiming that “[d]uring the presidential campaign the coalition of parties from the center and center-left which supported the Aylwin candidacy set up a commission to prepare policy recommendations on human rights. Immediately after inauguration, President Aylwin engaged in consultations with human rights activists, relatives of victims of human rights violations, religious leaders, and representatives from a broad range of political parties. Defining a policy involved first establishing ultimate objectives.”).

⁷¹ S.C. Res. 955, U.N. DOC. S/RES/955 (Nov. 8, 1994). *See also* International Criminal Tribunal for Rwanda, General Information, <http://69.94.11.53/default.htm> (follow “About the Tribunal” hyperlink; then follow “General Information” hyperlink) (last visited Jan. 30, 2010).

⁷² Mariana Goetz, *The International Criminal Court and its Relevance to Affected Communities*, in COURTING CONFLICT, JUSTICE, PEACE AND THE ICC IN

victims of the Rwandan genocide had no formal venues to express their concerns and no program was in place to inform these victims of the trial proceedings that were being conducted.⁷³

In similar fashion, the UN Security Council created the ICTY unilaterally in February 1993 while hostilities were ongoing.⁷⁴ The Dayton Peace Accord, which ended the conflict in Yugoslavia, was only signed two years after the creation of the ICTY.⁷⁵ As a result, public outreach regarding these international tribunals only started after they had been created.⁷⁶

2. Internationally Mandated TRCs

TRCs during the first wave were usually created pursuant to a peace agreement among all parties to the conflict and, similarly, did not call for extensive public consultation.

In Guatemala, the Historical Clarification Commission, established through a UN peace agreement, was a product of negotiations between the Guatemalan Government, the Unidad Revolucionaria Nacional Guatemalteca General Command, and the UN.⁷⁷ The opportunity for public input in the early phases of TRC development was minimal as the public was not given a choice on whether a TRC should exist and what it should look like. This lack of public input is said to have had a negative effect on the efficacy of the TRC. For example, while the report issued by the commission found that 83% of the victims were Mayans, most of the outreach programs launched by the commission were in Spanish rather than in the indigenous languages of the

AFRICA 65 (Nicholas Waddell et al. eds., 2008).

⁷³ *Id.* at 65.

⁷⁴ See PIERRE HAZAN, *JUSTICE IN A TIME OF WAR: THE TRUE STORY BEHIND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 7-25* (James Thomas Snyder trans., Texas A&M Univ. Press 2004).

⁷⁵ BALL, *supra* note 31, at 137.

⁷⁶ For example, the ICTR started its first outreach program in 2000, nearly six years after its establishment, by opening an “info point” in Kigali where the trial information is publicly accessible. The Tribunal also sought to develop a Kinyarwanda (Rwanda’s national language) section of its website and to translate key decisions into Kinyarwanda. Goetz, *supra* note 72, at 65-66 (indicating also that these outreach programs are limited by their voluntary financing and perceived status as non-core functions of the ICTR).

⁷⁷ Conciliation Resources, Commission for Historical Clarification Accord, <http://www.c-r.org/our-work/accord/guatemala/historical-clarification.php> (last visited Jan. 30, 2010).

Mayans.⁷⁸

El Salvador's truth commission was also established through a UN brokered peace agreement. The TRC was administered and funded by UN member states and was charged with investigating "serious acts of violence that occurred since 1980 whose impact on society urgently demands that the public . . . know the truth."⁷⁹ The lack of public discussions in establishing the TRC added to its lack of credibility, and five days after the TRC issued its report and recommendations, the Government granted a blanket amnesty covering the violent events taking place in this period.⁸⁰

C. Third Wave: Hybrid Courts, Traditional Justice and TRCs

The third wave of transitional justice witnessed a shift towards increased national ownership of the transitional justice mechanisms used, with continued reliance on international standards of justice. The focus shifted from high courts to hybrid court and traditional justice systems, and from internationally influenced TRCs to more locally dominated ones.

1. Hybrid Courts

Similar to the high courts that were created during the second wave of transitional justice, the first created hybrid tribunals lacked public participation mechanisms. In Timor-Leste, the UNTAET created the Special Panels on June 6, 2000 without consulting the public.⁸¹ One NGO, the Judicial System

⁷⁸ Justice in Perspective, Commission for Historical Clarification, http://www.justiceinperspective.org.za/index.php?option=com_content&task=view&id=67&Itemid=142 (last visited Jan. 30, 2010).

⁷⁹ De la Locura a La Esperanza: La Guerra de 12 Años en El Salvador, <http://www.fundacionpdh.org/lesahumanidad/informes/elsalvador/informe-de-la-locura-a-la-esperanza.htm>; Commission for Historical Clarification, *supra* note 78.

⁸⁰ Justice in Perspective, Commission on the Truth for El Salvador, http://www.justiceinperspective.org.za/index.php?option=com_content&task=view&id=65&Itemid=111 (last visited Jan. 30, 2010).

⁸¹ U.N. Transitional Administration for East Timor, U.N. DOC. UNTAET/REG/2000/15 (June 6, 2000). *See* HYBRID COURTS, *supra* note 6, at 10 (where the Office of the United Nations High Commissioner for Human Rights states that "virtually no consultation with local legal actors or the public preceded the decisions to insert international actors into the domestic legal system reflected in . . . UNTAET Regulation N° 2000/15"); *see also* Suzannah

Monitoring Programme, provided some public information regarding the Special Panels, but a system for soliciting feedback from the general population was not provided for from the outset.⁸²

The general transition to hybrid tribunals which occurred at the beginning of the twenty-first century, however, was accompanied by a gradual shift in thinking. During the 2000's, the UN demonstrated an increased readiness to consult with the public in a specified state before determining the exact contours of the post-conflict justice system to be adopted in that state. The ability to gather public input also became simpler because courts were no longer being established while conflict was raging. In Sierra Leone, a peace agreement was signed on July 7, 1999, followed by a UN planning mission which held meetings with representatives of civil society and human rights NGOs on January 7-19, 2002, resulting in the signature of the agreement establishing the Special Court on January 16, 2002.⁸³ In Cambodia, the UN also held consultations with civil society groups while it was negotiating with the Cambodian Government on the structure of the court to be established.⁸⁴

Although these public consultations are to be commended, their actual impact on the creation and format of these courts has been questioned. For example, in Sierra Leone, the negotiations to establish the Special Court for Sierra Leone included mainly Government actors led by the Attorney-General and the Minister of Justice.⁸⁵ Many national groups felt ignored,⁸⁶ leading the UN High Commissioner for Human Rights to conclude that "the lack of involvement of Sierra Leonean legal professionals more broadly

Linton, *Rising From the Ashes: The Creation of a Viable Criminal Justice System in East Timor*, 15 MELB. U. L. REV. 122 (2001).

⁸² HYBRID COURTS, *supra* note 6, at 19 (indicating also that in "Timor-Leste, the Special Panels similarly did not initially engage in any form of public outreach or even dissemination of basic information, in contrast to the Serious Crimes Unit.").

⁸³ Perriello & Wierda, *supra* note 43, at 17 (indicating that these meetings included police and prison authorities, members of the Bar Associations, representatives of civil society, and human rights NGOs).

⁸⁴ KELLI MUDDLELL, THE ASIA SOCIETY, TRANSITIONAL JUSTICE IN CAMBODIA: CHALLENGES AND OPPORTUNITIES 6-7 (2003), <http://www.ictj.org/static/Asia/Cambodia/cambodiasymposium.eng.pdf>.

⁸⁵ HYBRID COURTS, *supra* note 6, at 11.

⁸⁶ Perriello & Wierda, *supra* note 43, at 13.

and the failure to keep them adequately informed of progress meant that, firstly, lawyers felt disengaged from the process and, secondly, a lack of information led to misplaced hopes and expectations.”⁸⁷ Similarly, in Cambodia, civil society groups complained that the UN consultations tended to be limited to educational sessions, and that no system for obtaining feedback from these groups was put into place.⁸⁸

Rather than seeking feedback on whether and how a hybrid court should be created, establishers of these courts have most commonly focused on educating the public about the relevant court. In Cambodia, spokespeople for the court gave interviews to the press about how the court would work and, in conjunction with the Documentation Center of Cambodia (the “DC-Cam”), the court invited villagers from throughout Cambodia to visit the court and learn about its workings.⁸⁹ The UN also kept civil society groups informed of the status of the negotiations regarding the creation of the court through regular meetings with representatives from various groups.⁹⁰

There have also been more targeted efforts to educate local leaders and ex-combatants on the premise that these sub-groups will in turn help to educate the public at large. In Sierra Leone, one national NGO, the Special Court Working Group, had a consistent presence on local radio and educated local leaders about the Special Court.⁹¹ Another national NGO, the Post-Conflict Reintegration Initiative for Development and Empowerment, in coordination with the International Center for Transitional Justice (the “ICTJ”), conducted surveys and

⁸⁷ HYBRID COURTS, *supra* note 6, at 11.

⁸⁸ MUDELL, *supra* note 84.

⁸⁹ See Extraordinary Chambers in the Courts of Cambodia, Outreach & Media, <http://www.eccc.gov.kh/english/outreach.aspx> (last visited Jan. 30, 2010). These activities continued once the judges were selected and the court began preliminary operations. DC-Cam worked closely with the ECCC to help further the truth telling and reconciliation goals of the special tribunal. The DC-Cam distributed monthly journals, free of charge, with trial updates and other relevant articles. See Peter Bartu & Neil Wilford, *DDR and Transitional Justice: Cambodia Case Study*, INTERNATIONAL CENTER FOR TRANSNATIONAL JUSTICE, <http://ictj.org/en/research/projects/ddr/country-cases/2378.html>.

⁹⁰ MUDELL, *supra* note 84, at 7-11 (indicating also that Cambodian NGOs complained however that their involvement was limited to receiving information and would have liked to play a larger role in the court’s creation).

⁹¹ Perriello & Wierda, *supra* note 43, at 35.

organized sensitization and focus group sessions with ex-combatants to educate them about the transitional justice systems.⁹² These sensitization sessions were said to have greatly increased the ex-combatants' support for the Special Court and their willingness to cooperate with this court.⁹³ National NGOs led most of the educational efforts before the Special Court was established because local groups were concerned about animosity or retaliation from the ex-combatants.⁹⁴ The Special Court's official outreach program, however, did not start until more than six months after the court started its operations.⁹⁵

2. Traditional Justice Systems

Traditional justice systems are increasingly viewed as an integral mechanism through which transitional justice can take place. Rwanda has established a full transitional justice system based on a traditional justice mechanism, the Gacaca system. Timor-Leste incorporated aspects of traditional justice into its community reconciliation procedures and the Bosnian War Crimes Chamber is a traditional justice system integrated into the local court system.

In Rwanda public participation was vital to the success of the Gacaca system. Public input was sought at every step of the process, and the feedback was used to improve and streamline the final traditional justice system seen in the country now. Before the Gacaca courts were adopted as a nation-wide traditional justice mechanism, local researchers and professors in Rwanda had demonstrated that the Gacaca courts were being used in some areas immediately after the genocide, initiated either by the local people or the local authorities.⁹⁶ The findings of this research were discussed in a 1996 report by the UN High Commissioner for Human Rights (the "UNHCHR") which recommended the use of

⁹² POST-CONFLICT REINTEGRATION INITIATIVE FOR DEVELOPMENT & EMPOWERMENT, EX-COMBATANT VIEWS OF THE TRUTH AND RECONCILIATION COMMISSION AND THE SPECIAL COURT IN SIERRA LEONE 36-39 (2002), <http://www.ictj.org/images/content/0/9/090.pdf> [hereinafter PRIDE]. Perriello & Wierda, *supra* note 43, at 36.

⁹³ PRIDE, *supra* note 92, at 16-17.

⁹⁴ Perriello & Wierda, *supra* note 43, at 35.

⁹⁵ *Id.* at 36-37 (discussing the outreach efforts by the Special Court).

⁹⁶ Ingelaere, *supra* note 34.

Gacaca to deal with genocide-related crimes.⁹⁷ Between May 1998 and March 1999, the then-Rwandan President Pasteur Bizimungu held weekly discussions (the Urugwiro Meetings) with representatives of Rwandan society about serious social issues, including the genocide-related crimes and the possible use of Gacaca.⁹⁸ The participants of the Urugwiro Meetings included members of the government, state institutions, the military, political parties, and the judiciary.⁹⁹ Participation by civil societies was limited however, as the only groups whose opinions were sought were victims' associations.¹⁰⁰ Following these meetings, the government officially proposed to modernize and formalize the traditional Gacaca system to address the large number of prisoners.¹⁰¹ The use of Gacaca as a prong of the country's transitional justice system was thus discussed with certain members of the public before its official adoption.

The Government of Rwanda gave the public a large role in the selection of which people would implement the traditional justice system. Indeed, in keeping with accepted custom regarding the Gacaca courts, the judges are elected from among the local population over which they have jurisdiction. Thus judges at the "Cell" level, Rwanda's lowest administrative level, are elected by the General Assembly of the Cell, which is made up of all Cell residents over eighteen years of age.¹⁰² Judges at the "Sector" level, which comprises a larger area, are elected by the representative members of each Cell found within that particular Sector.¹⁰³ The judges are elected based on their "integrity."¹⁰⁴ Additionally, during the information collection phase of the

⁹⁷ *Id.* at 36.

⁹⁸ *Id.* at 37. At that time, there were approximately 130,000 prisoners being held for genocide-related crimes and the Rwandan court system was overwhelmed. *Id.*

⁹⁹ *Id.* at 46.

¹⁰⁰ *Id.*

¹⁰¹ Ingelaere, *supra* note 34, at 37.

¹⁰² Organic Law No. 16/2004, arts. 13, 6 (June 19, 2004) (Rwanda), available at <http://www.inkiko-gacaca.gov.rw/pdf/newlaw1.pdf> (establishing the Organization, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994).

¹⁰³ *Id.* arts. 13, 7.

¹⁰⁴ Ingelaere, *supra* note 34, at 46.

Gacaca process, which is held at the Cell level, residents of the Cell may offer information relating to an accused perpetrator.¹⁰⁵ The judge will consider such information in determining the “category” of the perpetrator’s crimes.¹⁰⁶

The Government of Rwanda also sought to improve the transitional justice system through pilot programs and building on public feedback prior to its full-scale implementation. In 2002, the Government conducted pilot Gacaca courts in 751 localities, approximately three years before the new Gacaca court system was implemented nationwide, finding that several modifications to the new Gacaca court system were advisable during that process.¹⁰⁷

In Timor-Leste, a smaller scale grass roots traditional justice mechanism, the Community Reconciliation Process (the “CRP”), was launched with the aim of promoting reconciliation among affected communities.¹⁰⁸ The aim of the CRP was to “reintegrate people who had become estranged from their communities by committing politically-related, ‘less serious’ harmful acts during the political conflicts in Timor-Leste.”¹⁰⁹ The CRPs mandate was to facilitate community-based hearings where the community would participate directly in finding a way to reintegrate the perpetrators into the community. The hearings were voluntary and were led by a panel of local leaders in the community affected by the acts of the perpetrator. At the conclusion of the hearings, the panel would broker an agreement with the perpetrator to return to the community in exchange for the perpetrator’s promise to provide community service or other similar tasks.¹¹⁰ While CRP provided for the basic structure of these community hearings, this

¹⁰⁵ *Id.* at 42; *see also* National Service of Gacaca Jurisdictions, <http://www.inkiko-gacaca.gov.rw/En/EnStructure.htm>.

¹⁰⁶ Ingelaere, *supra* note 34, at 42. Gacaca courts place offenders in one of three categories based on their alleged violations. Gacaca courts have jurisdiction over categories two and three, but offenders falling within the first category must be tried by ordinary courts. The first category includes the most heinous and high profile actors, and their accomplices. *See* Organic Law No. 16/2004, arts. 2, 51 (June 19, 2004) (Rwanda).

¹⁰⁷ Ingelaere, *supra* note 34, at 38-42.

¹⁰⁸ East Timor Commission for Reception, Truth and Reconciliation, The Community Reconciliation Process, <http://www.cavr-timorleste.org/en/reconciliation.htm> (last visited Jan. 30, 2010).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

structure was flexible, allowing each jurisdiction to vary the proceedings as they saw fit.¹¹¹

3. Nationally Mandated TRCs

During the third wave of transitional justice, the public came to play an increasingly large role in the establishment of TRCs, and, in particular, in deciding whether a TRC should be created and how such a body should operate. Indeed, governments have to a greater degree encouraged the public to be involved in drafting the legislation establishing the TRC, which includes determining the composition and operation of the commission. In addition, the local population can play a role in raising funds and promoting outreach to expatriates. The experiences of Timor-Leste, Peru, Sierra Leone, and Liberia are pertinent examples of this shift in the establishment of TRCs and illustrate how national and international NGOs work together to contribute to the process.

a. Timor Leste

Timor-Leste included NGOs in the entire CAVR planning process. The Government of Timor-Leste, supported by UNTAET, held a meeting in June 2000 to discuss transitional justice, including whether a truth commission should be established.¹¹² The meeting included various civil society groups, community leaders, and the Catholic Church.¹¹³ It resulted in a recommendation to the National Council of Timorese Resistance to create an independent commission that would have “a mandate to investigate past violations and promote reconciliation.”¹¹⁴ This Council acted upon the recommendation quickly and created a “steering committee” which was to determine the details of the TRC.¹¹⁵

The steering committee in charge of determining what the

¹¹¹ *Id.*

¹¹² East Timor Commission for Reception, Truth and Reconciliation, Formation of the Commission, <http://www.cavr-timorleste.org/en/cavr.htm> [hereinafter Formation of the Commission].

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

TRC would look like included representatives of various national and international NGOs.¹¹⁶ The steering committee conducted consultations in all thirteen districts of Timor-Leste from September 2000 through January 2001. These included consultations with political parties, jurists, human rights organizations and victims' groups to assess the public's views on what such a body should look like, as well as public meetings at the district, sub-district, and village levels.¹¹⁷ The consultations had a built-in educational and feedback system enabling the steering committee to describe the type of institution the TRC would be while allowing the community members to provide feedback.¹¹⁸ Additionally, the CAVR solicited community leaders to endorse the procedures and incorporated small elements of traditional ceremony into the procedures to enhance acceptance of this mechanism by the community leaders.¹¹⁹

b. Peru

In Peru, the legislation creating the Truth and Reconciliation Commission (Comisión de la Verdad y Reconciliación, the "CVR"), was drafted by a working group composed of representatives from the government and civil society, including the ministries of justice, defense, interior, women's issues and human development, the human rights ombudsman's office, the National Human Rights Coordination, the Peruvian Episcopal Conference and the National Evangelical Council of Peru.¹²⁰ The Commission worked

¹¹⁶ National NGOs included women's groups, youth organizations, the Catholic Church, the Association of ex-Political Prisoners, Falintil (the group that would become the army of Timor-Leste), while international NGOs included the UNTAET, and the UN High Commissioner on Refugees. *Id.*

¹¹⁷ Formation of the Commission, *supra* note 112.

¹¹⁸ *Id.* This focus on education continued after the establishment of the TRC as well. To educate the public about the truth and reconciliation process and to assist in the public's education about community reconciliation procedures, CAVR distributed video CDs as it toured the districts of Timor-Leste and conducted its operations. PIERS PIGOU, *THE COMMUNITY RECONCILIATION PROCESS OF THE COMMISSION FOR RECEPTION, TRUTH, AND RECONCILIATION* 17, 22 (2004), [http://www.cavr-timorleste.org/Analysis/Laporan Piers tentangCRP.pdf](http://www.cavr-timorleste.org/Analysis/Laporan%20Piers%20tentangCRP.pdf).

¹¹⁹ *Id.* at 30-31.

¹²⁰ Sup. Res. No. 314-2000-JUS, Feb. 27, 2001 (Peru), *translation available at* <http://190.41.250.173/rij/bases/legisla/peru/304-2000.html>; WORLDWIDE TRUTH AND RECONCILIATION COMMISSIONS, MINISTRY OF NEPAL PEACE SECRETARIAT, <http://www.peace.gov.np/admin/doc/World%20experiences%20of%20TRC->

with the International Center for Transitional Justice which allowed for consultation with other TRCs around the world in order to gather input on design, methodology and other similar details.¹²¹

c. Sierra Leone

In Sierra Leone, various civil society groups were involved in the creation and establishment of a TRC.¹²² The civil society groups involved in peace negotiations advocated for the establishment of a TRC and worked with the Office of the UNHCHR on preliminary issues regarding the TRC's establishment.¹²³ Civil society also reviewed the draft terms for the TRC's statute prepared by the office of the UNHCHR.¹²⁴

A Truth and Reconciliation Commission Working Group was subsequently established to make recommendations on the composition of the TRC.¹²⁵ This resulted in a transparent process as the public nominated sixty-five commissioner candidates.¹²⁶ A selection panel then made recommendations to a selection coordinator who recommended four of the finalists for appointment to the TRC.¹²⁷ Sierra Leoneans living abroad were

Commissions.pdf.

¹²¹ International Center for Transitional Justice: Peru, <http://www.ictj.org/en/where/region2/617.html> (last visited Jan. 27, 2010). This consultation with the public continued after the initial formation of the TRC. To implement the recommendations of the TRC, the government created a National Council for Reconciliation which relied heavily on input from civil society. Outreach was crucial to the commission and they worked at gathering information throughout the country by setting up five regional offices throughout Peru. The CVR also sought to educate the public and made sure their final report and recommendations were made publicly and were widely distributed. INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMITTEE OF PERU (2003), <http://www.ictj.org/static/Americas/Peru/TRC.FinalReport.eng.pdf> [hereinafter PERU TRUTH AND RECONCILIATION REPORT].

¹²² SIERRA LEONE TRUTH & RECONCILIATION COMMISSION, THE FINAL REPORT OF THE TRUTH & RECONCILIATION COMMISSION OF SIERRA LEONE: SETTING UP THE COMMISSION 1, 49-77 (2007), <http://www.sierra-leone.org/Other-Conflict/TRCVolume1.pdf> [hereinafter SETTING UP THE COMMISSION].

¹²³ OSAA, *supra* note 44, at 37; SETTING UP THE COMMISSION, *supra* note 122, at 49-77.

¹²⁴ SETTING UP THE COMMISSION, *supra* note 122, at 49-77.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

also included in the process and were able to nominate the commissioners for that state's TRC.¹²⁸ Public input in the design of the TRC and in the selection of its commissioners allowed for increased national ownership of the institution, while still relying on international groups such as the ICTJ, for assistance in technical and other matters.¹²⁹ Thus, the institution was given credibility not only for being a product of national civil society, but also for adhering to international standards.

Education was also made a high priority. The commission provided a grant to the International Human Rights Law Group and other NGOs to establish a public education and awareness campaign before the establishment of the TRC.¹³⁰ This campaign used radio, television, songs, drama, and posters to educate the public, and it also relied on civil society groups to carry out the campaign.¹³¹ Other NGOs also conducted public education on the TRC with independent funding.¹³² Furthermore, public workshops and conferences were held with strong civil society engagement prior to the inception of the TRC.¹³³

d. Liberia

In Liberia,¹³⁴ the Transitional Justice Working Group (the

¹²⁸ *Id.*

¹²⁹ International Center for Transitional Justice, Sierra Leone, <http://www.ictj.org/en/where/region1/141.html> (last visited Jan. 27, 2010).

¹³⁰ SETTING UP THE COMMISSION, *supra* note 122, at 49-77.

¹³¹ *Id.*

¹³² *Id.*

¹³³ Ambassador, *EU Presidency Statement - The Role of Civil Society in Post-Conflict Peace-Building, delivered by Ambassador Richard Ryan to the Security Council* (June 22, 2004), available at http://www.eu-un.europa.eu/articles/fr/article_3605_fr.htm [hereinafter *EU Presidency Statement*].

¹³⁴ The Liberian civil war was initiated in 1989 by the National Patriotic Front of Liberia (NPFL), an armed group led by Charles Taylor, challenging then-President Samuel Doe. In 1990, a break-away faction from Taylor's NPFL captured and killed Doe and an interim Government of National Unity was formed, headed by Dr. Amos Sawyer. In 1992, Taylor finally agreed to the formation of a transitional government. Taylor was elected President of Liberia after a special election in 1997. Between 1989 and 1996, more than 200,000 Liberians lost their lives and a million others became refugees. The conflict in Liberia continued until 2003, when President Taylor resigned and accepted an asylum offer from Nigeria. A comprehensive peace agreement (the Accra Peace Agreement) was reached by the Liberian government, the rebels, political

“TJWG”), a coalition of NGOs, worked closely with the UN Mission in Liberia and the ICTJ to provide input on the creation of the TRC.¹³⁵ The act creating the TRC allowed the public, including those abroad, to nominate TRC commissioners, subject to a further vetting process by a selection panel.¹³⁶ In 2005, the Liberian public nominated over 150 candidates for the TRC commissioners.¹³⁷ The selection panel screened the 150 nominees and shortened the candidate list to fifteen.¹³⁸ The commission also conducted a Nationwide Needs Assessment in May 2006 and later launched a Nationwide Outreach and Sensitization Campaign to introduce itself to the public prior to its launch.¹³⁹ The Liberian TRC commissioners conducted extensive public outreach within Liberia and amongst the Liberian community world-wide, calling for widespread participation from all members and former members of the society.¹⁴⁰

During the months prior to launching the TRC, the Liberian civil society, international NGOs, and the TRC commissioners conducted extensive educational campaigns.¹⁴¹ The TJWG

parties, and civil society in 2003 in Accra, Ghana. For more information, see United States Department of State, Background Note: Liberia, <http://www.state.gov/r/pa/ei/bgn/6618.htm> (last visited Jan. 30, 2010); International Center for Transitional Justice, Liberia, <http://www.ictj.org/en/where/region1/589.html> (last visited Jan. 30, 2010); the full text of the Peace Agreement is available at http://www.usip.org/files/file/resources/collections/peace_agreements/liberia_08182003.pdf; United States Institute of Peace, Liberia, <http://www.usip.org/resources/truth-commission-liberia> (last visited Sept. 8, 2009).

¹³⁵ *Liberia Launches Truth and Reconciliation Commission*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, June 22, 2006, <http://www.ictj.org/en/news/features/961.html> [hereinafter *Liberia*, INTERNATIONAL CENTER].

¹³⁶ AMNESTY INT'L, LIBERIA: TRUTH, JUSTICE AND REPARATION: MEMORANDUM ON TRUTH AND RECONCILIATION ACT 26 (June 21, 2006), <http://www.amnesty.org/en/library/asset/AFR34/005/2006/en/3205abe5-d41f-11dd-8743-d305bea2b2c7/afr340052006en.pdf> [hereinafter LIBERIA: TRUTH, JUSTICE AND REPARATION].

¹³⁷ *Id.* at 27.

¹³⁸ *Id.*

¹³⁹ Massa A. Washington, Chairman, Truth and Reconciliation Commissioner of Liberia Commission on Diaspora Relations, Remarks at the Official Launching of the TRC-US Diaspora Statement Taking Process, *available at* <https://www.trcofliberia.org/news-1/trc-happenings/remaks-at-the-official-launching-of-the-trc-us-diaspora-statement-taking-process>.

¹⁴⁰ *Liberia*, INTERNATIONAL CENTER, *supra* note 135.

¹⁴¹ LIBERIA: TRUTH, JUSTICE AND REPARATION, *supra* note 136, at 30-31.

conducted a public education and awareness campaign, including meetings in four Liberian counties to obtain public feedback on the TRC.¹⁴² In May 2006, the TJWG and ICTJ organized a consultation session to outline the role of civil society groups in the truth and reconciliation process.¹⁴³ Approximately fifty civil society representatives from all counties in Liberia attended this session.¹⁴⁴ The ICTJ also helped organize workshops to train the local media groups about the TRC.¹⁴⁵

III. EMERGING BEST PRACTICE

The foregoing analysis of the creation of transitional justice mechanisms demonstrates that, when determining the types of mechanisms to use and procedures to follow, states have increasingly found it advisable to engage in direct communication with the public at the outset. Such public outreach during the planning phase can be beneficial in multiple ways. First, feedback received from the public can assist the state in creating a transitional justice system that better responds to local needs. The success of the Gacaca system in Rwanda, for example, is due in part to its responsiveness to public feedback before its nationwide launch. Second, input from the public can assist in creating a fairer system, taking into account the many actors and perspectives involved in the conflict. This in turn will help increase the chances of successful reconciliation.¹⁴⁶ Third, the public is more likely to support a transitional justice system if it is familiar with the system and was instrumental in its creation.¹⁴⁷

¹⁴² *Id.* at 30

¹⁴³ *Liberia*, INTERNATIONAL CENTER, *supra* note 135.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *See, e.g.*, Anna F. Triponel, *Can the Iraqi Special Tribunal Further Reconciliation in Iraq?*, 15 *CARDOZO J. INT'L & COMP. L.* 277 (2007) (demonstrating that reconciliation is not achieved when transitional justice is viewed as one-sided).

¹⁴⁷ *See, e.g., id.*; LOUIS AUCOIN & EILEEN F. BABBITT, UNITED NATIONS DEVELOPMENT PROGRAM, STRATEGIC GUIDELINES FOR TRANSITIONAL JUSTICE ACTIVITIES IN THE FORMER YUGOSLAVIA (2007), <http://www.undp.org.rs/index.cfm?event=public.getFile&fileid=06FC4932-3FF2-8C75-2EA1D3F9F50CDCBC>; African Transitional Justice Research Network, ATJRN Capacity Building Workshops, http://www.transitionaljustice.org.za/index.php?option=com_content&task=view&id=466&Itemid=40 (last visited Feb. 13, 2010).

Conversely, if the public is not consulted, this can lead to lack of integrity, as with the Sierra Leone High Court where it was believed that many misperceptions and resentments “could easily have been prevented if there had been more consultation from the outset.”¹⁴⁸

At the same time, public participation in a country emerging from conflict on issues as sensitive as torture, disappearances and mass murder is difficult. There is a need to address conflict expeditiously while at the same time ensure feedback from the most representative group possible. The evolution of practices over the three waves of transitional justice illustrates the key factors which should be considered when incorporating public participation in the planning phases of transitional justice.

A. Consulted Issues

Depending on the particular transitional justice system implemented, the government or the UN may consult with the public on a range of issues. For example, the public could be asked whether the particular transitional justice mechanism proposed should be adopted. This has happened in connection with a number of the recently formed TRCs, such as in Sierra Leone and Liberia.

The public can also be asked to provide input in drafting the implementing legislation for the transitional justice mechanisms. This includes determining the personnel and procedures for such mechanisms. In addition, the government can encourage individual citizens or non-governmental organizations to generate support among the general population for the mechanism, including raising funds. The government can also seek to educate the public, keep the public abreast of the latest developments regarding the implementation of the transitional justice mechanism, and convey what the government hopes to achieve.

Experience demonstrates that when civil society is present at the beginning of the process, it will generally remain involved throughout the process. For example, in Liberia, the TJWG, representing various groups in civil society, was involved in making the decision as to whether transitional justice mechanisms were needed and subsequently provided input on the

¹⁴⁸ HYBRID COURTS, *supra* note 6, at 11.

drafting of the TRC act, planning for the TRC's operations, and selecting TRC commissioners.¹⁴⁹

B. Meaningful Participation

The UNHCHR has commented on the need for meaningful participation, indicating that “effective outreach should involve” four elements:¹⁵⁰ first, “[a] proactive strategy that seeks to target different sectors of the population (women’s groups, schoolchildren, the legal profession, the security sector, private business, etc.);”¹⁵¹ second, “[a] comprehensive approach that focuses not just on the prosecutor, who will always attract much public attention at the beginning of the proceedings, but on all parts of the trial process, including the right to a fair trial and competent defence, this should include the provision and dissemination of preliminary basic information as early as possible[];”¹⁵² third, “[a] network that is able to disseminate accurate information quickly over a wide geographic area;”¹⁵³ and fourth, “[g]enuine, two-way communication that involves dialogue and opportunities for feedback.”¹⁵⁴

The evolution of transitional justice mechanisms in the past three decades demonstrate that, when determining the best strategy for meaningful public participation, there are three key questions to be resolved: who, how and when?

1. Who: Consulting Representative Groups

Public participation is rendered meaningless if the people who participate are not sufficiently representative of the local population.¹⁵⁵ The modalities for seeking true representation will

¹⁴⁹ *Id.*, see also AMNESTY INT’L, LIBERIA: TOWARDS THE FINAL PHASE OF THE TRUTH AND RECONCILIATION COMMISSION 1-36 (2008), available at <http://www.amnesty.org/en/library/asset/AFR34/002/2008/en/f98485d1-571e-11dd-90eb-ff4596860802/afr340022008eng.pdf>.

¹⁵⁰ HYBRID COURTS, *supra* note 6, at 20.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 11 (indicating that “[i]ntimately connected with the question of ownership is that of identifying interlocutors. The range of interlocutors with whom the international community seeks to engage during the negotiation on

vary depending on the country and conflict. Nevertheless, a number of trends have emerged as best practice.

First, when high courts or hybrid courts are created by the UN, the UN's in-country planning missions should focus on ensuring ownership of the process by the national government. For example, the ICTJ recommends "that the mission team ha[ve] a specific national liaison identified from within the government of the potential host country with whom to ensure effective coordination."¹⁵⁶ The planning mission should address "[t]he presence and organisational capacity of civil society, non-governmental organizations (NGOs), both national and international, and human rights groups."¹⁵⁷ The Office of the UNHCHR recommends "clear assessment of the national capacity, with the participation of human resource experts" and that these assessments teams "not only be led by a UN actor with detailed knowledge of the country but also include national legal actors."¹⁵⁸ Key players to involve during this planning mission include relevant ministries as well as civil society.¹⁵⁹

Second, there is a need to focus on the sectors of society that were particularly affected by the conflict. This includes not only the victims of the conflict but also the perpetrators. For example, in Sierra Leone, child soldiers were both victims and perpetrators of violations, and their views on how to best achieve justice and reconciliation were considered particularly important.¹⁶⁰ This was

the formation of a hybrid court plays an important role in securing buy-in from stakeholders in civil society and the legal community. As a result, this range should be wide and include major stakeholders."). For example, in Nepal, NGOs including Amnesty International and Human Rights Watch urged the government of Nepal "to involve actively all those concerned in the discussions on the establishment, mandate, and powers of the Disappearances Commission and the Truth and Reconciliation Commission." *Nepal: Human Rights Bill*, *supra* note 16.

¹⁵⁶ ROBIN VINCENT, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, AN ADMINISTRATIVE PRACTICES MANUAL FOR INTERNATIONALLY ASSISTED CRIMINAL JUSTICE INSTITUTIONS 4 (2007), <http://www.ictj.org/images/content/9/3/931.pdf>.

¹⁵⁷ *Id.* at 5.

¹⁵⁸ HYBRID COURTS, *supra* note 6, at 9.

¹⁵⁹ VINCENT, *supra* note 157, at 6.

¹⁶⁰ NATALIE MANN AND BERT THEUERMANN, UNICEF, CHILDREN AND THE TRUTH AND RECONCILIATION COMMISSION FOR SIERRA LEONE: RECOMMENDATIONS FOR POLICIES AND PROCEDURES FOR INVOLVING CHILDREN IN THE TRC 1 (2001), <http://www.unrol.org/files/TruthandReconciliationSierraLeone.pdf> (stating that in Sierra Leone, "[c]hildren's experiences

taken into account in the TRC act which called “on the TRC to give special attention to the experiences of children within the armed conflict . . . and, to this end, to consider implementing special procedures to address the needs of children who have been victims, or perpetrators of violations”¹⁶¹ Another example is Sierra Leone, where surveys of ex-combatants were organized by a national NGO in coordination with the ICTJ.¹⁶²

Third, national civil society should be encouraged to convey the views of locals on the ground. If the national NGO is intended to reflect views from a specific part of the population, then a number of NGOs representing different parts of the populace should be consulted. If the national NGO purports to represent views of the community as a whole, the mechanisms they employ to speak in the name of the population should be explored. International civil society can also play a role, especially with regard to sharing expertise regarding public participation mechanisms that have been successful in other countries.

Fourth, professionals with specific expertise should be targeted. These can include members of the legal community, human rights campaigners, and other specific professions. However, while the 2002 UN planning missions in Sierra Leone included representatives of civil society and human rights NGOs, the national groups still felt left out. This experience demonstrates the difficulty of ensuring that all constituents feel involved in the process.

Fifth, to ensure true representation, different regional viewpoints should also be taken into account. The atrocities will not have had the same impact in all parts of the country. For example, in Liberia, meetings took place in four Liberian counties to obtain the public’s feedback on the TRC, and civil society representatives from all the counties in Liberia attended a consultation session to outline the role of civil society groups in

should form an integral part throughout the TRC process - from the preparatory phase and the undertaking of preliminary background research to the final report and the establishment of a follow-up committee.”).

¹⁶¹ *Id.* (stating that in Sierra Leone, “[c]hildren’s experiences should form an integral part throughout the TRC process - from the preparatory phase and the undertaking of preliminary background research to the final report and the establishment of a follow-up committee.”).

¹⁶² PRIDE, *supra* note 92, at 36-39; Perriello & Wierda, *supra* note 43, at 36.

the truth and reconciliation process.¹⁶³ In Peru, the CVR set up five regional offices to promote participation from affected groups throughout the country.¹⁶⁴ Several TRCs have also focused efforts on including expatriates in the reconciliation process.

2. How: Methods of Participation

In the past, either the UN or the government has spearheaded the public participation process, depending on who is the primary entity responsible for its creation. In addition, before it actually starts its operations, the court or TRC in question can be responsible for obtaining feedback from the public.¹⁶⁵ The government can also train other actors to play a role, such as local media or local NGOs, which has the added benefit of enhancing national ownership.

a. Transparency

It is important that consultations with the public be transparent and that the process be made public. For example, the establishment of the TRC in Sierra Leone was deemed by the international community to be a transparent process.¹⁶⁶

b. Education

Recent trends in the establishment of both TRCs and tribunals show education as a fundamental element of outreach. For example, for criminal trials to play an important role in transitioning societies, former UN Secretary General commented that they must “giv[e] [victims] a chance to see their former tormentors made to answer for their crimes.”¹⁶⁷ In Cambodia,

¹⁶³ LIBERIA: TRUTH, JUSTICE AND REPARATION, *supra* note 136, at 30.

¹⁶⁴ PERU TRUTH AND RECONCILIATION REPORT, *supra* note 121.

¹⁶⁵ HYBRID COURTS, *supra* note 6, at 19 (“While NGOs can play a crucial role in amplifying awareness and encouraging debate about hybrid courts, this should not in turn justify a reduction of the hybrid court’s own responsibility for outreach. Outreach needs to be complemented by public information and by a trained media adviser and spokesperson. Public information offices of hybrid tribunals can contribute to building the capacity and legal literacy of local media, including through working with NGOs.”).

¹⁶⁶ EU Presidency Statement, *supra* note 134.

¹⁶⁷ *Transitional Justice Report*, *supra* note 25.

DC-CAM played a key role in involving and educating the public about the trials. Furthermore, organizations such as ICTJ have engaged in the capacity of building among local organizations, to allow them to better monitor the proceedings and distribute the information.¹⁶⁸ In Sierra-Leone, there was an attempt to educate local leaders and ex-combatants in hopes that they would spread information and also increase their willingness to cooperate with the courts.¹⁶⁹

In Timor-Leste, before the CAVR was established, a steering committee underwent various consultations throughout the country to determine what kind of TRC would be best suited to the needs of the people.¹⁷⁰ These consultations incorporated an educational and feedback mechanism, whereby the public being consulted would learn about the various TRC mechanisms and provide feedback as to what their community felt was necessary.¹⁷¹ Both Sierra Leone and Liberia also launched education and public awareness campaigns prior to the establishment of their TRCs.¹⁷²

Educating the public allows not only for a mode of cultivating public feedback, but also provides a way to nationalize the process of reconciliation. If transitional justice mechanisms are viewed as having been imposed from the outside, their effectiveness to create change will be diminished.

c. Feedback Mechanisms

The example of Cambodia, where civil society groups complained that the UN consultations tended to be limited to educational sessions, demonstrates the importance of feedback mechanisms to take into account the public's concerns and comments.¹⁷³ There are many different ways for obtaining feedback from the population on specific questions, including surveys of victims, group discussions, workshops, and through soliciting written submissions. Educational campaigns to educate

¹⁶⁸ ICTJ, Cambodia, *supra* note 54.

¹⁶⁹ Perriello & Wierde, *supra* note 43; PRIDE, *supra* note 92.

¹⁷⁰ CHEGA! FINAL REPORT, *supra* note 49.

¹⁷¹ *Id.*

¹⁷² See SETTING UP THE COMMISSION, *supra* note 122; LIBERIA: TRUTH, JUSTICE AND REPARATION, *supra* note 136.

¹⁷³ MUDDLELL, *supra* note 84, at 6-7.

the public in parallel can include radio, television, songs, drama and posters, as was done in Sierra Leone.¹⁷⁴ Past practices demonstrate that one way to obtain feedback from a number of groups is by creating a specific working group whose mandate is to provide input into the work of the transitional justice mechanism. In Liberia, NGOs came together to create the TJWG to provide input on the creation of the TRC¹⁷⁵ while in Sierra Leone, NGOs established a TRC Working Group that made recommendations on the composition of the Commission.¹⁷⁶

d. Public Funding

In most cases, transitional justice mechanisms have been funded either by the state that created them or, if the mechanism was created internationally, by a number of foreign contributors. Allowing the public to assist in the funding of these mechanisms, however, could increase the sense among the public that the institution is their own, rather than a system imposed from the outside. For example, the act establishing the TRC in Liberia allowed the TRC to be financed by different sources including individual Liberians and non-Liberians, as well as international non-governmental organizations.¹⁷⁷

3. When: Providing for Timely Input

Meaningful participation also means providing sufficient time for the public to provide feedback. This is very closely linked with the feedback mechanisms and can have serious effects on nationalizing the transitional justice process. If processes such as surveys or educational consultations are in place, the public should be given enough time to respond, and those in charge of collecting this input should be given significant time to analyze and incorporate the results.

Many countries have employed working groups whose mandate it is to gather and analyze public input before the creation of a TRC. Implicit in this mandate is that these

¹⁷⁴ SETTING UP THE COMMISSION, *supra* note 122.

¹⁷⁵ *Liberia*, INTERNATIONAL CENTER, *supra* note 135.

¹⁷⁶ SETTING UP THE COMMISSION, *supra* note 122.

¹⁷⁷ LIBERIA: TRUTH, JUSTICE AND REPARATION, *supra* note 136, at 31-32.

consultations will help inform the working group's decisions as to the makeup or structure of the TRC. It is important that enough time be given to the working group. In Timor Leste, the working group was given five months, enabling it to gather information from each of its thirteen districts, as well as sub-districts and villages.¹⁷⁸ In Peru, the working group had three months and was composed of a large cross section of civil society in order to obtain well rounded input in creating its TRC.¹⁷⁹

C. Varying Consultation Depending on the Transitional Justice Mechanism

This analysis of the degree of public participation in the varying transitional justice mechanisms highlights that the nature of the public consultation depends on the type of transitional justice system being implemented. Consultations regarding the early high courts tended to be limited to educational sessions, while hybrid tribunals have come to rely more on public input with regards to the design of the tribunal. TRCs have also increased their reliance on public input, including on the question of whether a TRC should be created at all.

These differences in the nature of the consultation process can be explained by a number of factors. TRC's aim is first and foremost to promote national reconciliation and to establish a balanced picture of the conflict. A TRC may not be appropriate for every transition and this is a decision that should belong to those who have lived through the conflict.¹⁸⁰ The international community may assist in providing information and expertise based on other TRCs but cannot force such decisions.¹⁸¹ Trials on the other hand seek to achieve justice which, to a certain degree, should be achieved whether or not all nationals agree. The

¹⁷⁸ CHEGA! FINAL REPORT, *supra* note 49.

¹⁷⁹ Sup. Res. No. 304-2000-JUS, Dec. 9, 2000 (Peru), *translation available at* <http://190.41.250.173/rj/bases/legisla/peru/304-2000.html>.

¹⁸⁰ OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES: TRUTH COMMISSIONS 5* (2006), *available at* http://www.unrol.org/files/ruleoflaw-TruthCommissions_en.pdf [hereinafter TRUTH COMMISSIONS].

¹⁸¹ *Id.* (indicating that "International actors . . . should recognize from the start that a country may choose, for very legitimate reasons, not to have a truth commission or at least not to have one immediately upon transition. National views on this matter should be respected.").

resemblance of hybrid tribunals to domestic criminal proceedings for which public participation does not play a part, explains in part why, during the initial hybrid tribunals, public participation has not always been seen as crucial.¹⁸² In addition, although the design of court systems varies, there are a number of procedural and substantive similarities among tribunals.¹⁸³ This is not true however of TRCs which should be unique to each conflict.¹⁸⁴ Indeed, the Office of the UNHCHR has emphasized that “[u]nlike courts, for which there are clear international norms regarding their appropriate structure, components, powers and minimal standards for proceedings, truth commissions will reasonably differ between countries in many aspects.”¹⁸⁵

Today, however, it is increasingly clear that when a hybrid tribunal is created, consultation with the local population in addition to negotiations with the government is required to achieve an appropriate balance between the national and international elements of the tribunal. The populace should feel that the tribunal belongs to them, with an international presence, rather than being imposed from the outside.¹⁸⁶ This public consultation at the outset can help avoid misunderstandings and assess the importance of particular factors for the population. For example, the Government of Sierra Leone amended the implementing legislation for the court to appoint international staff instead of nationals to some of the key posts in the court, which led to the view that the court was more international than national.¹⁸⁷ In addition, because the population is not involved in

¹⁸² HYBRID COURTS, *supra* note 6, at 19 (“In part, this [lack of consultation] has been due to a general reluctance, including on the part of legal professionals within hybrid tribunals, to view the trial processes of hybrid courts as inherently different from domestic criminal proceedings.”).

¹⁸³ See Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955 (Nov. 8, 1994); Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., Annex, U.N. Doc. S/RES/827 (May 25, 1993); Rome Statute, *supra* note 40.

¹⁸⁴ TRUTH COMMISSIONS, *supra* note 180, at 5-6.

¹⁸⁵ *Id.* at 1.

¹⁸⁶ HYBRID COURTS, *supra* note 6, at 9 (“By definition, hybrid approaches require investment from both international and national organizations, Governments, victim organizations, legal communities, and civil society. Ideally, all those involved ought to feel vested in the process.”).

¹⁸⁷ *Id.* at 11 (“In the Special Court, the percentage of Sierra Leonean staff overall is greater; however, very few Sierra Leoneans are in positions of

the operation of a tribunal to the same degree as they are in a TRC, it is especially important that a mechanism be put in place at the outset to consult with the public. Tribunals often tackle complex international criminal law issues that are difficult for the public to understand. This problem is exacerbated in countries with low literacy levels.¹⁸⁸ As such, outreach during the creation of hybrid tribunals will help introduce the public to the workings of the tribunal and involve victims and other stakeholders.¹⁸⁹ The Iraqi Special Tribunal is an example of a tribunal that was viewed as somewhat biased and, accordingly, did not fulfill its potential relating to reconciliation.¹⁹⁰

In addition, unlike the early high court tribunals, such as the ICTR and ICTY that were located outside of the country in transition,¹⁹¹ many hybrid courts now insist that the tribunal be established within the country. This was seen in the ECCC and the Special Tribunal for Sierra Leone which were both set up within the national borders of the transitioning country. The UN Secretary General has commented that “there are a number of important benefits to locating tribunals inside the countries concerned, including easier interaction with the local population, closer proximity to the evidence and witnesses and being more accessible to victims.”¹⁹² As such, establishing transitional mechanisms locally, including hybrid courts, has emerged as good practice.

CONCLUSION

This article demonstrates that the public outreach

authority or participate in high-level decision-making.”).

¹⁸⁸ *Id.* at 19.

¹⁸⁹ *Id.* at 18-19 (“Outreach [during the creation of hybrid tribunals] may be the main way of involving victims and other stakeholders, who may not otherwise be able to participate more formally in the trials. A hybrid court may be seen as largely irrelevant unless there is a robust outreach programme that informs the public about its activities.”).

¹⁹⁰ Triponel, *supra* note 146.

¹⁹¹ For the ICTY, see Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, S.C. Res. 820, 3200th mtg., U.N. Doc. S/RES/820 (Apr. 17, 1993), available at <http://www.unhcr.org/refworld/docid/3b00f21b10.html>; for the ICTR, see S.C. Res. 977, 3502d mtg., U.N. Doc. S/RES/977 (Feb. 22, 1995), available at <http://www.unhcr.org/refworld/docid/3b00f1564f.html>.

¹⁹² *Transitional Justice Report*, *supra* note 25.

mechanisms used by a country and the UN during the establishment of a transitional justice system will depend on the specific circumstances of each country. Nevertheless, early and comprehensive public outreach is increasingly viewed as crucial in helping the state achieve its objective of creating a successful transitional justice system inclusive of all perspectives of the conflict and accepted by the population at large. The need to obtain public feedback at the outset is especially important in view of the current trend towards the establishment of hybrid courts with increased national elements and national TRCs focused on reconciliation.

The experience of various transitioning countries throughout the first, second, and third waves provides a lesson to those countries who now find themselves in similar circumstances. Experience shows that in designing a transitional justice system that incorporates feedback from the public, the system ultimately has a better chance of achieving its aim of justice for victims, while reinforcing the possibility of peace, reconciliation, and social reconstruction. Countries now emerging from a conflict could learn from the experience of countries before them.

Integrating public input into a transitional justice system will have major benefits for the country as a whole and the converse is also true. Kenya's recent creation of the Truth, Justice, Reconciliation Committee ("TJRC") highlights this point. When the Kenya National Commission on Human Rights was consulted regarding setting up the TJRC, the short timelines set for consultation did not enable this commission to consult properly with its constituencies.¹⁹³ In addition, the Bill on Special Tribunals appeared in that country's Gazette for two weeks of public debate after discussions between the Ministry of Justice and the Attorney-General, by which time, changes were unlikely.¹⁹⁴ Kenya's experience accordingly demonstrates that "meaningful public input must take place before the tabling of Bills in Parliament, and that a special duty is imposed upon government to ensure that this happens."¹⁹⁵ The head of the Kenya National Commission on Human Rights has, for example, stated that "public participation improves lawmaking while giving

¹⁹³ Mue, *supra* note 13.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

citizens a stake in it. By inviting participation, lawmakers not only gather important information on which to make better laws, they also express their respect for the citizens whom they consult. In turn, those consulted become more engaged and responsible in public life.”¹⁹⁶

Although the initial burden is on the organization and state that are creating the transitional justice mechanism, the local population plays a key role in ensuring true representation. Civil society should view this as an opportunity to organize. In Nepal, for instance, in order to provide for meaningful public participation, the ICTJ and Advocacy Forum (“AF”) conducted a survey of victims from seventeen regions in Nepal, followed by focus-group discussions regarding the possible implementation of a TRC. This resulted in the recommendation from the ICTJ and AF that “an official joint task force on transitional justice comprising representatives from the government, civil society, National Human Rights Commission, victims, and the UN” be created to “conduct broad-based national consultations on the Truth and Reconciliation Commission, and to gather stakeholders’ views on the Commission’s mandate, powers, goals, and timeframe.”¹⁹⁷

Lessons extracted from the three waves of transitional justice are not only useful for the countries emerging from conflict, but also for those who have established transitional justice mechanisms without adequate public consultation. Mechanisms that were historically put in place without initial public participation are now focusing on incorporating consultation programs. For example, in Rwanda, the Rwandan Government did not appear to have consulted with the public about the creation of the NURC, but since its commencement, the NURC has conducted extensive outreach programs. These programs include meetings, conferences, workshops, consultations, and sensitization campaigns on the theme of unity and reconciliation.¹⁹⁸ The Rwandan Government organized the

¹⁹⁶ *Id.*

¹⁹⁷ See INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, *NEPALI VOICES: PERCEPTIONS OF TRUTH, JUSTICE, RECONCILIATION, REPARATIONS AND THE TRANSITION IN NEPAL* 14 (2008), <http://www.ictj.org/images/content/8/3/830.pdf>.

¹⁹⁸ Eugenia Zorbas, *Reconciliation in Post-Genocide Rwanda*, 1 *AFR. J. LEGAL STUD.* 29, 38 (2004), available at <http://www.africalawinstitute.org/ajls/vol1/no1/zorbas.pdf>. For information about

Ingando solidarity camps for reintegration and re-education.¹⁹⁹ It also held a number of national summits which both current and expatriate Rwandans attended.²⁰⁰ Similarly, the Bosnia War Crimes Chamber and the Rwandan Gacaca system were both mechanisms used to take ownership of their transitional justice systems and to build on shortcomings of their respective ad hoc tribunals.

When the public is involved in the threshold question as to whether a particular court or commission should be created at all, it is easier to secure the public's participation in the subsequent design and operation of the system that is adopted. Although this article focuses on public participation at the outset, participation does not, and should not, end with the creation of the transitional justice mechanism. Ownership should be viewed as a continuum and activities promoting both participation and education should be conducted throughout a tribunal's existence. Only through meaningful public participation and ownership of the various transitional justice mechanisms available will the goal of reconciliation be truly felt.

the outreach programs initiated by NURC since its inception, *see generally* National Unity and Reconciliation Commission, <http://www.nurc.gov.rw/>; INSTITUTE FOR JUSTICE AND RECONCILIATION, EVALUATION AND IMPACT ASSESSMENT OF THE OF THE NATIONAL UNITY AND RECONCILIATION COMMISSION (2005), *available at* http://www.nurc.gov.rw/documents/researches/Impact_assessment_of_NURC_Sammary.pdf [hereinafter EVALUATION AND IMPACT ASSESSMENT]. For general discussions about the outreach programs initiated by NURC since its inception, *see* the NURC website, <http://www.nurc.gov.rw/>; Institute for Justice and Reconciliation, Evaluation and Impact Assessment of the NURC, <http://www.nurc.gov.rw> [hereinafter NURC Assessment].

¹⁹⁹ *See* Zobras, *supra* note 199; EVALUATION AND IMPACT ASSESSMENT, *supra* note 198, at 38-39. For general discussions about the outreach programs initiated by NURC since its inception, *see* the NURC website, <http://www.nurc.gov.rw/>; NURC Assessment, *supra* note 198.

²⁰⁰ EVALUATION AND IMPACT ASSESSMENT, *supra* note 198, at 38.