STANDARDS FOR EFFECTIVE
TRANSITIONAL JUSTICE DECISION-MAKING:
LESSONS FROM SOUTH AFRICA AND EAST TIMOR

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ABSTRACT

This thesis examines the valuation of transitional justice. It argues the need for and advances a more theoretically expansive set of ideal standards that can be used to assess the process and substantive outcomes of transitional justice decision-making. In so doing, it advocates a victim-inclusive and sustainable model of justice. Effective decision-making is understood in ideal terms as being: (1) politically and publicly inclusive; (2) methodically planned; (3) politically purposive; and (4) legally comprehensive in the sense of equally recognising state obligations and victim rights.

The thesis is structured in three parts. Part One establishes the explanatory framework for the thesis. Utilising the non-partisan concept of efficacy in international law, Chapter One critically reviews existing post-Cold War measures for optimal transitional justice and proposes a more contemporary set of ideal process-outcome standards that define effective transitional justice decisions at an abstract level and in a more theoretically expansive way. In this part, Chapter Two narrows the theoretical scope of inquiry and describes the research procedures used for the thesis.

The proposed ideal standards provide the main theoretical prism for the thesis. In Part Two, the author tests the utility of the proposed standards as a comprehensive valuation framework by using them to retrospectively investigate, compare, and draw conclusions about the efficacy of past decision-making practice for two in depth case studies of South Africa and East Timor (now Timor-Leste). Chapter Three considers the main case study findings for South Africa, while Chapter Four presents the East Timor findings. Although broadly representing negotiated regime transitions, the two transitions varied on a number of key dimensions that make them profoundly insightful for the practice of effective decision-making. These comparative insights are summarised and discussed in Chapter Five.

Application of the idealised standards to the two case studies highlights a number of valuable lessons that can be used to inform the shift toward a future model of inclusive and sustainable decision-making. These lessons are discussed in Part Three of the thesis consisting of Chapter Six and the thesis Conclusion.
DECLARATION

This is to certify that

(i) the thesis comprises only my original work towards the PhD except where indicated in the Preface,

(ii) due acknowledgement has been made in the text to all other material used,

(iii) the thesis is less than 100,000 words in length, exclusive of tables, maps, bibliographies and appendices.

Hayli Anne Millar

31 January 2006
ACKNOWLEDGMENTS

For their enduring kindness, wisdom and faith, I would like to express my profound gratitude to my two thesis supervisors, Professor Timothy McCormack and Dr Helen Durham. I also would like to thank the University of Melbourne for its generous scholarship support. Thank you also to Shannon Elliott for her marvelous proofreading work.

I would, as well, like to extend my sincere appreciation to those persons in Australia, Guatemala, South Africa, Timor-Leste, and the United States with whom I met or conversed in the course of writing the thesis. I am indebted to these individuals for so graciously giving of their time and sharing their views about the search for justice in transition. It is my genuine hope that the thesis will contribute in some way to achieving a greater voice for the victims/survivors of past political violence in the formulation of originating transitional justice policy agreements.

Research for the thesis was used to prepare a separate article on ‘Facilitating Women’s Voices in Truth Recovery: An Assessment of Women’s Participation and the Integration of a Gender Perspective in Truth Commissions’ in Helen Durham and Tracey Gurd (eds), Listening to the Silences: Women and War (2005). There may be small elements of overlap between the South Africa and East Timor Chapters of the thesis and this article.

Finally, I would like to express my deepest gratitude and dedicate this thesis to my partner, Nelson Ireland, who, in addition to his extraordinary love and support throughout the journey, personifies sustainable development in action.
# ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>ACDP</td>
<td>African Christian Democratic Party</td>
</tr>
<tr>
<td>AIETD</td>
<td>All-Inclusive Intra-East Timorese Dialogue</td>
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<td>ANC</td>
<td>African National Congress</td>
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<tr>
<td>AZAPO</td>
<td>Azanian People's Organisation</td>
</tr>
<tr>
<td>CAVR</td>
<td>Commission for Reception, Truth and Reconciliation (Comissão de Acolhimento, Verdade e Reconciliação)</td>
</tr>
<tr>
<td>CODESA</td>
<td>Convention for a Democratic South Africa</td>
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<tr>
<td>CHR</td>
<td>Commission on Human Rights</td>
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<tr>
<td>CNRM</td>
<td>National Council of Maubere Resistance</td>
</tr>
<tr>
<td>CNRT</td>
<td>National Council of East Timorese Resistance (Conselho Nacional da Resistencia Timorese)</td>
</tr>
<tr>
<td>CPLP</td>
<td>Community of Portuguese Speaking Nations (Comunidade dos Países de Língua Portuguesa)</td>
</tr>
<tr>
<td>CRP</td>
<td>Community Reconciliation Procedure</td>
</tr>
<tr>
<td>CTF</td>
<td>Commission of Truth and Friendship</td>
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<tr>
<td>DP</td>
<td>Democratic Party</td>
</tr>
<tr>
<td>DPR</td>
<td>National Parliament of Indonesia (House of Representatives) (Dewan Perwakilan Rakyat)</td>
</tr>
<tr>
<td>FALINTIL</td>
<td>Armed Forces for the National Liberation of East Timor (Forças Armadas de Liberação National de Timor-Leste)</td>
</tr>
<tr>
<td>FF</td>
<td>Freedom Front</td>
</tr>
<tr>
<td>FRETILIN</td>
<td>Revolutionary Front for an Independent East Timor (Frete Revolucionaria de Timor-Leste Independente)</td>
</tr>
<tr>
<td>GNU</td>
<td>Government of National Unity</td>
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<tr>
<td>IC</td>
<td>Interim Constitution</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>IFP</td>
<td>Inkatha Freedom Party</td>
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<td>INTERFET</td>
<td>International Force in East Timor</td>
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<tr>
<td>JIT</td>
<td>Justice in Transition</td>
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<tr>
<td>JSMP</td>
<td>Judicial System Monitoring Program</td>
</tr>
<tr>
<td>KOMNAS</td>
<td>Indonesian National Commission on Human Rights (Komisi Nasional Hak Asasi Manusia)</td>
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<tr>
<td>HAM</td>
<td>Commission of Inquiry into Human Rights Violations in East Timor (Komisi Penyelidikan Pelanggaran Hak Asasi Manusia)</td>
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MOU  Memorandum of Understanding Regarding Cooperation in Legal, Judicial and Human Rights Related Matters

MPNP  Multi-Party Negotiating Process

MPR  People’s Consultative Assembly

NCC  National Consultative Council

NC  National Council

NGO  Non-Governmental Organisation

NP  National Party

OAU  Organisation of African Unity

PA  Peace Agreement

PAC  Pan Africanist Congress

RDP  Reconstruction and Development Program

RDTL  Democratic Republic of Timor-Leste

RSA  Republic of South Africa

SAPA  South African Press Association

SCU  Serious Crimes Investigation Unit

SPSC  Special Panels for Serious Crimes

TAPOL  The Indonesia Human Rights Campaign

TRC  Truth and Reconciliation Commission

UN  United Nations

UNAMET  United Nations Mission in East Timor

UNMISET  United Nations Mission of Support in East Timor

UNOTIL  United Nations Office in Timor-Leste

UNTAET  United Nations Transitional Administration in East Timor
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INTRODUCTION

In the thesis, the author responds to the dilemma that there are numerous international standards to guide and assess the substantive content of optimal transitional justice decisions but not the process of decision-making. The absence of process-outcome standards is considered a major oversight because there is no means to systematically assess and challenge the process of how political decision-makers formulate transitional justice agreements regardless of how flawless the substantive outcome.

This thesis examines the valuation of transitional justice. It argues the need for a more theoretically comprehensive understanding of optimal transitional justice. The author aims to contribute to existing theory and practice by advancing and testing the utility of a more theoretically expansive and integrated set of ideal standards that define effective transitional justice at an abstract level.

The author defines effective transitional justice by means of four interrelated process-outcome standards. These ideal standards propose, first, that effective transitional justice requires a democratic or participatory decision-making process that is broadly inclusive of and meaningfully engages the affected population.

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1. Transitional justice is understood as the complex justice choices political decision-makers make to rectify past gross or serious violations of international human rights and international humanitarian law ('serious violations') committed by or on behalf of the state on a widespread and/or systematic scale in the context of past political conflict or state repression. These justice choices are inherently complex because they are made in the context of radical political change and instability, yet ideally must balance the rights of alleged perpetrators with the interests of victims and general societal well-being. The author relies on Rama Mani’s, Beyond Retribution: Seeking Justice in the Shadows of War (2002) 5-9, concept of rectificatory justice concerning ‘direct physical violence’ encompassing the most serious crimes in international law including genocide, war crimes/grave breaches, crimes against humanity, torture, enforced disappearance, extrajudicial executions, and slavery, distinguishing it from other types of legal and distributive justice deficits typically associated with conflict and post-conflict societies. While recognising that both state and non-state actors may commit serious violations in the context of past political conflict and repression, the thesis focuses on state sponsored violence and the justice choices political decision-makers make to hold state actors individually and/or collectively accountable, or answerable, for past violations. Accountability for violations committed by non-state actors, especially resistance movements, are not altogether excluded from the thesis but do not constitute its primary focus.

especially the victims of past political violence. Second, effective transitional justice requires a methodically planned and deliberately politically managed decision-making process that produces well-conceived, nationally owned, and contextually responsive substantive agreements. Third, effective transitional justice must be politically purposive in the sense that substantive policy and legislative agreements clearly articulate, and ideally define, the guiding political-legal rationale and aims for intervention. Fourth, effective transitional justice must be legally comprehensive producing substantive policy and legislative outcomes that broadly comply with affirmative state obligations and give equal standing to the full range of emerging victim rights in international law.

The proposed ideal standards provide the main theoretical lens or prism for the thesis. The author uses them to retrospectively investigate, compare, and draw conclusions about the efficacy of past decision-making practice for two in depth case studies of South Africa and East Timor (now Timor-Leste). In so doing, the author tests their utility as a comprehensive valuation framework. Application of the standards to past decision-making practice for South Africa and East Timor highlights some useful lessons for moving toward a future valuation model of transitional justice decision-making.

Although preliminary, the significance of the proposed standards is that they are prospectively explicit about some of the likely parameters for the formulation of effective transitional justice decisions at an abstract, rather than institutional, level. They provide as well some level of theoretical integration between

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3 The term 'victim' is used because of its significance in international law but is taken to encompass victims and survivors and, as appropriate, their immediate relatives. The thesis relies generally on the definition of victims provided by Principle 8, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc A/RES/60/147 (16 December 2005) as ‘... persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law’.

4 'Abstract level' means transitional justice in its broadest sense irrespective of the specific type of institutional intervention or geographic context. Institutional interventions, on the other hand, as
traditionally opposing theoretical domains of law and politics; the standards are interdisciplinary requiring optimal decisions to be both politically and legally sound. They also are non-partisan; they do not preference retributive criminal justice over other forms of justice.

At the same time, the standards seek to bridge divergent state-centric (top-down) and grassroots approaches to decision-making. They do this by providing broad and relatively non-prescriptive parameters that structure both the decision-making process and substantive outcomes but that simultaneously permit context specificity. Likewise, the standards seek to bridge these divergent divides by being victim inclusive. They are intended to ensure greater equity between state interests/perpetrator rights and victim rights by structuring victim/civil society participation as part of the political decision-making process and by recognising the full range of emerging victim rights as part of the requirements for legally comprehensive transitional justice.

Even so, the author acknowledges that the choice of standards reflects a particular value preference for a victim-oriented and sustainable intervention approach. The proposed standards reflect the author’s belief that the victims of past political violence are among the primary beneficiaries of transitional justice; therefore, they must be central to the process and substantive outcomes of decision-making. The proposed standards also presume that the overall aim of transitional justice is to contribute to the broader endeavor of sustainable democratic peace, which is a long-term, perhaps multi-generational, process. In order to do so, decision-making must be, firstly, a participatory or associative exercise that involves the affected population in the management of its own conflict and, secondly, a

defined by the Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, UN Doc S/2004/616 (23 August 2004) 4, are understood to denote a broad range of judicial and non-judicial mechanisms including 'prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals' as well as community-based and healing processes that are designed and implemented to achieve justice, accountability, and reconciliation for past violations.

politically transformative exercise aimed at addressing not only the immediate consequences but also the underlying causes of conflict.\[6\]

The proposed standards are highly aspirational. The author concedes there are likely to be numerous complexities in achieving one, let alone all four, ideal standards in the politically volatile transitioning societies for which they are envisioned. The author is acutely aware that political decision-making in conflict and post-conflict societies is inherently complex. This is especially so for the ideal of public participation in political decision-making. The author recognises that victims/civil society are not a uniform entity but rather a diverse range of individuals and groups often with competing interests.\[7\] As acknowledged in the first chapter, victim/civil society participation in the decision-making process involves a series of enormously complex issues around victim identification, mobilisation, competition, politicisation, and legitimacy in addition to equally difficult questions about the magnitude and methods of participation.\[8\] There are significant risks for political decision-makers that public participation in decision-making will prolong and intensify conflict. Nor is there any guarantee that public participation will necessarily produce higher quality, more legitimate or more durable outcomes.

In much the same way, although conceived as being interrelated, the author is attentive to potential conflict between the four ideal standards; excessively wide-ranging participatory decision-making could impede methodical political planning, the articulation of coherent political-legal principles and aims, and the formulation of legally robust and procedurally sound substantive outcomes.

However, the very point of the proposed standards is to push the boundaries of how optimal transitional justice has traditionally been conceptualised and defined. The standards are intended to provoke discussion about a predominantly substantive, legalistic, retributive and state-centric approach to the valuation of optimal transitional justice and demonstrate the possibilities for a more theoretically comprehensive set of standards by which to gauge effective decision-making. Their aim is aspirational: to cast forward to what is possible in the future in terms of a victim inclusive and sustainable approach. In particular, their aim is to ensure that the efficacy of transitional justice is measured not just from the point of view of substance but also process, and not just from the point of view of the state and perpetrators but also from the perspective of other affected stakeholders, especially victims. Accordingly, it is likely the standards will provoke controversy.

The identified need for a comprehensive valuation framework and the choice of standards responds to and challenges a number of recurrent themes in the contemporary literature on transitional justice. These themes include an historic reluctance to anticipate the likely conditions for optimal transitional justice or to define effective transitional justice at an abstract level. They also include an apparent reliance on one-dimensional, rather than theoretically comprehensive, valuation measures.

In general, transitional justice scholars and practitioners have been reluctant to stipulate the intended results and beneficiaries of intervention. Indeed, the discipline is relatively ambiguous about what optimal transitional justice is and, until comparatively recently, who the primary beneficiaries are envisioned as being.⁹ Even though scholars and practitioners may in fact hold a number of expectations about ‘successful’ transitional justice, including that such interventions will contribute to broad processes of political and relational change

such as peace, democratisation, and reconciliation, these expectations frequently are unstated.

Historically, it seems that, scholars and practitioners have been more inclined to study the reasons why specific transitional justice interventions fail once introduced rather than anticipate the decisive ingredients for the design and implementation of successful interventions from the outset. Like the concept of efficacy in international law, it seems to be easier to identify ineffective transitional justice interventions than effective ones. Typically, the success or failure of such interventions is gauged after-the-fact and then apparently rests on the unspecified preferences of a reviewing author rather than a prospectively explicit set of criteria. Indeed, although scholars have begun to anticipate some of the likely ingredients for well-designed or effective transitional justice at an institutional level, the discipline has yet to define efficacy at an abstract level. The author discusses some of the likely reasons for this reluctance below.

This leads to a second observation, which is a tendency in the existing literature to approach valuation from either the vantage point of law or politics, but generally not both. Historically, there have been two competing approaches to the valuation of transitional justice. One approach is legalistic, centering on the design and assessment of interventions from the perspective of state compliance with

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international law. The other approach, more in keeping with the social sciences, assesses the effect of specific interventions post-implementation against stated policy and institutional objectives, including their contribution to ‘transformation and reconciliation’. Both approaches have merit but, as a rule, international guidelines for decision-making have not yet amalgamated the two. That is, there are fairly well established international legal principles to help political decision-makers make legally valid transitional justice choices but an absence of corresponding standards to assist decision-makers in devising politically sound choices.

In fact, until now the predominant measure of optimal transitional justice has been state compliance with international law. Within the legalist genre there is a strong unstated presumption that western legal retributive criminal justice is superior while other forms of transitional justice are less than optimal. There is limited empirical evidence to support the validity of this presumption.

In effect, as discussed in the next chapter, a broad read of international principles for transitional justice decision-making suggests that existing standards are relatively one-dimensional. More precisely, there are standards to measure the efficacy of substantive outcomes but not the decision-making process. There are standards to measure the legality but not the political validity of substantive outcomes. Even though international principles increasingly emphasise the importance of legally comprehensive approaches, they simultaneously signal a preference for retributive criminal justice. Moreover, existing principles place comparatively greater emphasis on state obligations than victim rights, generally

partitioning victim rights from state obligations and presenting them in relatively narrow terms as the substantive right to reparation.

What then are the main impediments to defining optimal transitional justice at an abstract level and in a more theoretically comprehensive and integrated manner? Historically, there have been at least two serious obstacles.¹⁵

A first critical challenge is the bifurcation of post-cold war transitional justice between law and politics.¹⁶ There traditionally have been deep theoretical divides between proponents of legal idealism and legal realism including an evident disconnect between the objectives of the international community and the affected population, retributive justice and restorative justice, and state-centric and grassroots methods.¹⁷ Of note, these are not the only theoretical tensions. There are other significant conceptual divisions including a tendency to deal with rectificatory transitional justice independently from other forms of justice, such as formal legal and distributive justice.¹⁸

Proponents of legal idealism and legal realism hold conflicting views about the relative importance of international legal ideals versus existing political realities in the exercise of transitional justice preferences. A legal idealist is more likely to frame transitional justice as a question of what is morally desirable or ought to be done vis-à-vis the normative obligations of states. On the other hand, a legal realist is more likely to approach policymaking as a pragmatic question of what is feasible to do given the prevailing political circumstances.¹⁹ In essence, the legalist position holds that the pursuit of formal retributive justice for past

¹⁸ See especially Mani, above n 1, 5-11, 169-186.
¹⁹ See, eg, Aukerman above n 13, 40, 44, 92.
violations is essential to the establishment of democracy. Conversely the realist position sees political change, including the need for short-term political and economic stability, as vital to the establishment and subsequent maintenance of the rule of law and thus are willing to delay or forego formal retributive criminal justice in favor of other justice options. As a rule, legal idealists are far more likely to advocate binding universal legal principles practice while legal realists are more likely to argue the need for flexible and context specific responses.

Less explored in the literature are divergent state-centric and grassroots approaches to policymaking. As Heidy Rombouts cogently describes, the state-centric approach, which has dominated transitional justice theory and practice up to now, focuses attention on state interests and perpetrator-oriented dilemmas. These dilemmas typically include questions about the relative merits of particular types of institutional interventions, how political conditions shape transitional justice preferences, and the respective roles of the international community vis-à-vis transitioning societies in decision-making and implementation. From a grassroots or victim-based approach, the needs of victims are foremost and should be the point of origin for policy development. A victim-based approach requires the assessment of victim needs before formulating policy and legislative agreements. It also requires consulting victims or otherwise providing victims with opportunities to participate in the process of policy formulation and legislative design followed by implementation.

As Rombouts points out, the conundrum in trying to blend these two perspectives is that state-centric approaches are by their very nature generalist and prescriptive

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20 For a brief summary of the legalist-realist divide, see, eg, Teitel, above n 11, 3-4. The quintessential legalist-realist debate is that of Diane Ortentlicher and Carlos Santiago Nino published in the (1991) 100 Yale Law Journal 2537 concerning the state duty to prosecute the human rights violations of a predecessor regime.
21 Rombouts, above n 8, 220.
22 Ibid 216-217.
23 Ibid 219-222.
while victim-based approaches to policy development are not. Hence, theoretical integration of these opposing methods is counterintuitive to the assumption that the *sui generis* nature of each conflict situation, including the needs and preferences of victims, defies generality and normative prescription.

In view of these traditional divides, post-cold war theory and state practice have tended to treat transitional justice as a dichotomous proposition between the polarities of: (1) formal legal justice *or* peace/democratic stability; (2) idealised *or* pragmatic decision-making; (3) fully compliant international justice *or* imperfect national justice; (4) criminal prosecution *or* amnesty/truth; and (5) state interests/perpetrator rights *or* victim rights rather than as an amalgam of these different options.

A serious impediment to defining optimal transitional justice in a more theoretically comprehensive and integrated way is that it can be approached from varying theoretical perspectives, whether legal idealist or legal realist, that evidence a marked lack of disagreement concerning the definability and the appropriate audiences and objectives of ‘successful’ transitional justice. In much the same way, it is possible to approach the definition of optimal transitional justice from varying macrotheoretical (international, state), mesotheoretical (institutional, organisational) and microtheoretical (individual) analytical levels. Thus, one can expect perceptions concerning the decisive ingredients for optimal transitional justice to vary significantly between different transitioning societies, as well as within and between diverse groups of stakeholders including the international community, national political leaders, alleged perpetrators, victims, civil society organisations, and other key interest groups in the same transitioning society.

24 Ibid 220.  
25 See Teitel, above n 16, 76-84.  
26 See generally Rombouts, above n 8, 219-230.
A second critical challenge to comprehensively defining optimal transitional justice is an historical lack of empirical assessment data about the effect of interventions once introduced. Until very recently, empirical data about which interventions work well, and in what circumstances, and whether transitional justice interventions in fact contribute to broad political and social aims, such as peace, democratisation, and reconciliation, have been scarce.\(^27\)

Recent developments suggest these historical impediments may no longer be as formidable as they once were. Particularly since the late 1990s many of the polarities associated with post-cold war transitional justice began to disappear. As a matter of both policy and practice, transitional justice is increasingly integrated. Once considered opposing ideals, the aims of justice, peace, and democracy, as well as idealised (retributive) and pragmatic (non-retributive) forms of transitional justice, are now regarded as mutually reinforcing and multiple institutional interventions are being combined in practice.\(^28\) There is also increasing interdependence between international and national policy and practice.\(^29\) The creation of new forms of blended transitional justice, including hybrid criminal tribunals and truth commissions, are a testament to this growing interdependence.

Approval of the *Rome Statute of the International Criminal Court* (‘*Rome Statute’*) in 1998 and the establishment of the International Criminal Court (‘ICC’) in 2002 portend increasing interdependence between international and state practice in the years to come. Ruti Teitel, a prominent theoretician, considers establishment of the ICC, together with globalisation, so momentous she conceives of transitional justice as entering a new phase.\(^30\) Certainly, the *Rome Statute*

\(^{27}\) See Siri Gloppen, *Reconciliation and Democratisation: Outlining the Research Field* (Chr Michelsen Institute, 2002) vi, 50.


\(^{29}\) Ibid 10-11.

\(^{30}\) Teitel, above n 16, 69-72 conceives of three phases of transitional justice beginning with post-war transitional justice from the 1940s to the 1950s, followed by a second phase of post-cold war transitional justice from the mid-1970s to the late 1990s. Connected with globalisation and
Statute has irrevocably changed the traditional frame of reference for transitional justice from a question of whether to prosecute to how to prosecute.\textsuperscript{31} It also symbolises a major repositioning of victim rights, particularly in relation to emerging participatory rights in political decision-making and international criminal proceedings, with significant implications for the future definition and assessment of ‘effective’ transitional justice. These thematic shifts in international law are a focus of discussion in the next chapter.

A second equally important development is a rapidly growing body of impact assessment and best practices research to inform the selection of standards. In the past few years, institutional impact assessment and best practices research have begun to emerge in a significant way.\textsuperscript{32} The latest research portends three very encouraging trends that support the thesis argument. One trend is an apparent willingness on the part of a reviewing author to be prospectively explicit about the criteria used for assessment and comparison.\textsuperscript{33} A second is the obvious expansion of previously narrow legal assessment criteria.\textsuperscript{34} A third is the scholarly use of emerging best practices research to anticipate some of the decisive ingredients for the design of effective transitional justice interventions, albeit at an institutional level.\textsuperscript{35}

In view of these recent developments, the author contends it is possible to begin the process of defining optimal transitional justice at an abstract level and more theoretically comprehensive way. The author uses the thesis as the means to

establishment of the ICC, Teitel persuasively argues that transitional justice is entering a new third phase of ‘steady-state’ transitional justice.


\textsuperscript{34} Ibid.

\textsuperscript{35} See, eg, Alexander, above n 28, 3, 53-57.
investigate and demonstrate some of the likely distinguishing political and legal characteristics of effective transitional justice.

The thesis is structured in three Parts. Part One is present-oriented and establishes the theoretical argument and methodological framework. Part Two is past-oriented and provides the empirical portion of the thesis. Part Three is future-oriented and highlights some of the lessons learned from South Africa and East Timor concerning the prospects for moving toward an effective (victim inclusive and sustainable) valuation model for transitional justice.

Part One, consisting of Chapters One and Two, establishes the explanatory framework for the thesis. Chapter One (The Efficacy of Transitional Justice) argues the need for, and advances a more theoretically comprehensive and integrated set of, idealised decision-making standards that define 'effective' transitional justice at an abstract level. This Chapter reviews the concept of efficacy in international law and uses efficacy as an overarching construct to provide some of the broad parameters for defining effective transitional justice. The author elucidates the content of effective transitional justice by critically reviewing and expanding existing valuation measures developed for post-cold war decision-making, representing a substantive, legalistic, retributive state-centric model, in relation to emerging victim-oriented and sustainable intervention approaches. As prefaced, the author defines effective decision-making by means of four process-outcome standards - democratically negotiated, methodically designed, politically purposive, and legally comprehensive - that provide the main analytical framework for the thesis.

Chapter Two (Deconstructing Transitional Justice Decision-Making) narrows the theoretical scope of inquiry and describes the research procedures used to test the utility of the ideal standards as a comprehensive valuation framework. The decision-making focus of the study is specific to the formulation of policy and, to a lesser extent, the design of implementing legislation in the context of a
negotiated regime transition. The study does not examine the implementation of specific institutional interventions in any significant way. Drawing on transitional justice and peace negotiation theory, the author develops the standards as part of a heuristic decision-making model, which is subsequently used to investigate, compare, and draw conclusions about the efficacy of past decision-making practice for two in depth case studies.

Part Two, consisting of Chapters Three through Five, provides the empirical portion of the thesis. In this part, the author tests the standards as a comprehensive valuation framework in relation to assessing the efficacy of past decision-making practice for South Africa and East Timor. The author chose South Africa and East Timor as comparative case studies because they broadly represent negotiated regime transitions and provide a consistent decision-making framework to explore similarity and difference. The empirical inquiry for each case study is theoretically wide-ranging and explores basic questions about transitional justice decision-making in relation to the nature of past political conflict, the actual peace negotiation process, timing in the conflict cycle, and their respective influence on the achievement of the ideal standards in practice. Because the standards and model evolve from existing theory and research, the author is able to test, refine, and expand on a range of theories about decision-making.

Chapter Three (South Africa and Cooperative Decision-Making) and Chapter Four (East Timor and Confrontational Decision-Making) present the primary findings for each case study. The presentation of findings in these chapters loosely canvasses the main conceptual elements of the diagrammatic decision-making model. Thus, these chapters critically examine the broader peace negotiation process and identify the realpolitik conditions that most shaped transitional justice decision-making. They deconstruct the actual process and substantive outcomes of decision-making vis-à-vis their timing in the peace
process. Lastly, they critically assess the process and substantive outcomes of decision-making from the perspective of the ideal standards.

Chapter Five (Comparative Insights from South Africa and East Timor) summarises and reflects on the main comparative insights the case studies provide concerning the past practice of 'effective' decision-making and policy formulation. Although South Africa and East Timor broadly represented a similar mode of regime transition, the two transitions varied on a number of key dimensions which had enormous bearing on the ability of political decision-makers to achieve the democratic, methodical, purposive, and comprehensive decision-making standards in practice.

Both individually and collectively, the case studies demonstrate the formidable complexities that are associated with achieving the ideal standards in practice. The case study findings illustrate several well-recognised, as well as lesser-known, tensions between the ideal standards and the political realities of transitional justice decision-making. Some of these tensions include: (1) the ideal of genuine and meaningful public engagement versus the reality of artificial and superficial public participation in the decision-making process; (2) the political use of victim-oriented language in substantive agreements versus the reality of victim/civil society consultation; (3) the ideal of gradual timeframes versus the reality of rushed decision-making; (4) the shift toward victim rights in international law versus the primacy of strategic political interests; (5) the ideal of comprehensive justice versus the international community's relative preoccupation with retributive criminal justice; and (6) the ideal of nationally developed policy and legislative agreements versus the reality of externally imposed solutions.

Just as the case study findings reveal some of the complexities and tensions associated with the ideal standards, they also demonstrate some of the potential benefits of complying with the proposed standards. The case study findings
suggest there is a strong but imperfect correlation between greater public participation in decision-making and the integration of a victim perspective and comprehensive victim rights in substantive agreements. The case study findings also suggest that victim/civil society participation in decision-making and informed public debate contribute to the public ownership and legitimacy of substantive agreements.

The case studies raise provocative questions about the future prospects for effective decision-making including whether there are some transitioning societies like East Timor where it would be prudent to delay decision-making because existing political and legal conditions are completely adversative to a well-designed decision-making process and substantive outcomes. These questions provide the basis for discussion in the final part of the thesis.

In Part Three of the thesis, the author considers some of the lessons learned from South Africa and East Timor that can be used to inform the shift toward a future valuation model of effective decision-making. Chapter Six (Lessons from South Africa and East Timor) discusses some of the comparative insights the case study findings provide about specific conditions and measures that seem to be conducive to effective decision-making and policy formulation. In this chapter, the author also considers some of the practical possibilities and complexities associated with moving from a state-centric (post-cold war) model to an effective (post-Rome) model of transitional justice decision-making.

In the Conclusion, the author returns to the broader question of valuation and contemplates the utility of the proposed ideal interdisciplinary standards as a comprehensive valuation framework. Since the South Africa and East Timor transitions, there have been encouraging developments in international law and transitional justice practice that support the thematic shift toward effective and sustainable interventions, and the author briefly reflects on these developments.
CHAPTER 1

THE EFFICACY OF TRANSITIONAL JUSTICE

I Introduction

In this chapter, the author argues the need for and advances a more theoretically comprehensive and integrated set of idealised decision-making standards that define ‘effective’ transitional justice at an abstract level, one of two main research aims identified for the thesis. The author’s approach to identifying a more theoretically comprehensive set of standards is intentionally interdisciplinary, drawing broadly on international law, transitional justice theory, emerging best practices research, and sustainable peace theory. More precisely, the choice of idealised standards is theoretically informed by: (1) use of the concept of efficacy in international law; (2) existing valuation measures of optimal transitional justice; and (3) contemporary, particularly post-Rome, developments in international law and politics concerning the emergence of comprehensive victim rights and a policy shift toward sustainable intervention.

The author begins by reviewing and using ‘efficacy’ as an overarching construct for the thesis. Application of efficacy to transitional justice is appealing because the construct is so widely used by the international legal instruments that provide the normative framework for transitional justice. Although elusive, use of efficacy in international law provides some of the broad parameters to define effective transitional justice at an abstract level. Efficacy also shows considerable promise for theoretical integration because it is an interdisciplinary construct
where one can approach the definition and assessment of ‘effective’ transitional justice from the vantage point of law, political theory and the social sciences.

The author then considers existing valuation measures for optimal or ‘successful’ transitional justice. These measures are discerned from international principles on accountability and victim rights developed to assist political decision-makers in making legally sound transitional justice choices. Many of these standards arose because of profound victim and civil society dissatisfaction with post-cold war transitional justice that exchanged criminal prosecution for amnesty, and so reflect this particular historical perspective. While providing some of the core benchmarks, existing valuation measures are considered necessary but insufficient to comprehensively define effective transitional justice because they are primarily substantive, legalistic, retributive, and state-centric in orientation. From the perspective of the thesis, they provide insufficient guidance on the process of decision-making, the political-legal aims of intervention, and equity between the rights and interests of victims and those of the state and perpetrators.

Next, the author reflects on contemporary developments in international law and politics and uses these developments to augment existing standards. These developments include the expansion and consolidation of victim rights from the late-1990s onward and a perceptible theoretical and policy shift toward a sustainable peace model of transitional justice intervention. The selection of a more theoretically expansive and integrated set of ideal standards to guide and assess the efficacy of decision-making is thus informed by conventional assessment measures — encompassing state compliance with international law, additional conditions for policy legitimacy, and the articulation of policy objectives — together with these critical shifts toward comprehensive victim rights and sustainable intervention.

In the final section of the chapter, the author advances a set of four ideal political-legal standards that define effective transitional justice at an abstract level. The
proposed standards, which structure the process and substantive outcomes of decision-making, postulate that effective transitional justice decisions are democratically made, methodically designed, politically purposive, and legally comprehensive. As previously acknowledged, these standards are highly aspirational. Therefore, in addition to explaining each standard in this section, the author discusses their presumed benefits and some of the likely complexities associated with their practical achievement.

As the main analytic framework for the thesis, the intent of the suggested standards is to push the boundaries of how 'successful' transitional justice is conceptualised and defined. They signify a significant shift in emphasis toward a more participatory, politically deliberative, and victim-oriented valuation model. The idealised standards represent a reorientation from a traditionally substantive law point of reference, where the value of a political decision rests primarily in its normative content, to a process-outcome orientation, where value is considered to be a composite of the decision-making process and substantive outcome. Consistent with sustainable peace theory, this analytical distinction reflects a basic belief that a procedurally sound and well-managed decision-making process will contribute to producing a qualitatively better, more legitimate, and ultimately more durable outcome. The process-outcome orientation means that, in addition to the content of transitional justice agreements, the process of how, where, and when decisions are made, as well as who participates in decision-making, are valid assessment concerns.

### II Efficacy as an Overarching Construct

In this first section of the chapter, the author briefly reviews and adopts the concept of efficacy as an overarching construct to define optimal transitional

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justice at an abstract level and in a more theoretically comprehensive and integrated way. The author uses efficacy for two reasons, including, first, its wide use in international law as a relatively open-ended construct and, second, its interdisciplinary potential whereby the definition and assessment of 'effective' transitional justice can be approached from not only the vantage point of law, but also political theory and the social sciences.

The idea that transitional justice should be 'effective' is appealing because the term is so widely used by the international legal instruments that provide the normative framework for transitional justice. Comprehensive and specialised human rights and humanitarian law treaties establish normative standards for the 'effective' prevention, protection, remedy, and penalties of enumerated rights.

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2 For example, Art 2, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987): 'Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'.

3 For example, Art 6, International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969): 'States Parties shall assure ... effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.'


5 For example, Art 5, Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951): 'The Contracting Parties undertake to enact ... the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III'. Similarly, the four Geneva Conventions of 1949 provide for 'effective penal sanctions' for persons committing or ordering the commission of grave breaches. For example, Art 146, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950): 'The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. On 'effective measures' for the suppression and punishment of the crime of apartheid, see also
concerning torture and cruel treatment; racial and gender discrimination; fundamental civil, political, economic, social, and cultural rights; genocide; war crimes including grave breaches; and apartheid.

More recently, the *Rome Statute* has expanded conventional usage of the term effective by introducing the concept of ‘effective prosecution’.$^6$ The preamble to the Statute provides that the most serious crimes in international law — including genocide, crimes against humanity, war crimes, and aggression — must not go unpunished and affirms the necessity of their effective prosecution by means of national measures and international cooperation. At the same time, the *Rome Statute* authorises the prosecutor to take ‘... appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court’ (emphasis added).$^7$ Indeed, efficacy was part of the NGO campaign to ensure the creation of a fair and independent ICC and subsequently its ‘effective implementation’. $^8$

In addition to these numerous treaty provisions, the United Nations (‘UN’) Security Council has called on states and the international community to take ‘effective measures’ to bring to justice persons alleged to be responsible for serious violations of international human rights and humanitarian law.$^9$ Accordingly, the legal validity of specific transitional justice interventions

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$^7$ Art 54(1)(b).


$^9$ The Statutes of the International Criminal Tribunal for the former Yugoslavia and Rwanda adopt this language and conceive of the establishment of the Tribunals in relation to halting violations and ensuring that violations are ‘effectively redressed’. See, eg, preambulatory paras 5, 7, *Resolution Establishing an International Criminal Tribunal for Rwanda and Adoption of the Statute of the Tribunal*, SC Res 955, 49 UN SCOR (3453rd mtg), UN Doc S/RES/955 (8 November 1994).
typically depends on a state’s genuine effort to meet its affirmative obligations in international law to ensure the ‘effective’ investigation, prosecution, remedy, and/or penalties or to take ‘effective measures’ in relation to specific conventional or customary law rights that are violated.

Despite its extensive use in international law, efficacy is an elusive concept. Presumably, efficacy serves a boundary-setting function insofar as it determines the scope of the procedures, remedies or penalties state parties use to enforce protected rights when violated. In fact, the respective comprehensive and specialised treaties do not explicitly define the term or the specific content of ‘effective’ investigation, prosecution, remedy, or penalties. Nor do legal dictionaries define efficacy except in a literal sense of producing, or being capable of producing a desired effect. Jurisprudence offers little additional clarification given its greater focus on the question of whether specific procedures, remedies, or penalties are ‘ineffective’ in the sense that they are unavailable, inapplicable, or incapable of being exercised in practice.

In terms of the apparent elusiveness of efficacy in international law, Naomi Roht-Arriaza and Diane Orentlicher’s respective reviews of the effective remedy provisions of international human rights treaties are instructive. Their reviews suggest the treaty drafters were intentionally inexplicit about the specific content of effective remedy provisions in order to permit state parties breadth and flexibility in choosing remedies that are appropriate and adequate to specific violations. It seems the treaty drafters did not envision the same remedy as being superior in all circumstances and, as Diane Orentlicher describes, ‘...
sought to ensure the broadest possible range of remedies for violations of human rights that would include both judicial and non-judicial consequences. Authoritative interpretation of these same provisions supports the proposition that effective remedies should be broad and relative to the specific violations in question.

In much the same way, scholarly commentary concerning the ‘effective penalties’ provisions of specialised human rights treaties suggests that penalties should be proportionate or ‘appropriately severe’ and based on the gravity of the violations in question and the harm suffered. Indeed, even if expressly authorising punishment or compensation the same treaty may include additional remedy provisions thus supporting the premise there is no single or superior remedy to redress past violations. The recently adopted Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law affirm the importance of breadth and relativity — that efficacy is related to adequacy, appropriateness, and proportionality. However, they also add a procedural justice dimension that relates efficacy to promptness, fairness, thoroughness, and impartiality.

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13 Orentlicher, ibid 2570.
14 Roht-Arriaza, above n 10, 479-483; Orentlicher, above n 12, 2568-2582.
15 Orentlicher, above n 12, 2604-2605.
17 ‘Basic Principles on the Right to a Remedy’ Principles 2(b), (c); 3(b),(c); 11(a),(b), 14, 15, UN Doc A/RES/60/147 (16 December 2005). On the procedural justice dimensions, see also Principle 2, Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted by General Assembly Resolution 55/89 Annex (4 December 2000); General Principles, Model Guidelines for the Effective Prosecution of Crimes against Children (Draft Annotated Version) (Prepared by the International Centre for Criminal Law Reform and Criminal Justice Policy for use in a Workshop at the Sixth Annual Meeting of the International Association of Prosecutors - Sydney, Australia, 2 - 7 September, 2001 The Prosecutor in the New Millenium [sic], August 2001).
The idea that transitional justice should be effective is appealing, secondly, as a political theory question in the sense that transitional justice should produce not only legal, but also political results. In effect, post-cold war transitional justice broadened the frame of reference beyond purely legal aims — punishment, deterrence, incapacitation, denunciation, rehabilitation, and reparation — to encompass overtly political or nation-building aims such as peace, democratisation, truth, and reconciliation, as well as social-psychological aims like healing, remembrance, and forgiveness. An assortment of goals are now associated with transitional justice that include: (1) the public acknowledgement and provision of justice to victims; (2) the punishment and accountability of perpetrators; (3) the establishment of an accurate historical record; (4) the healing of social divisions; (5) the reform of state laws and institutions, including domestic rule of law; (6) the eradication of a culture of impunity and creation of a human rights culture; (7) the prevention of new violations of human rights and humanitarian law; and (8) the promotion of international cooperation.

A number of scholars view the pursuit of transitional justice as contributing to nation building by demarcating or separating an incoming regime from an outgoing repressive regime, legitimating the new regime, and/or morally

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18 On the 'political theory' of transitional justice, see generally Robert I Rotberg and Dennis Thompson (eds), Truth v. Justice: The Morality of Truth Commissions (2000). See also Alexandra Barahona De Brito, Carmen Gonzalez-Enriquez and Paloma Aguilar (eds), The Politics of Memory Transitional Justice in Democratizing Societies (2001) 324-326. The standards proposed for the thesis reflect two principal assertions about the theoretical rationale for transitional justice. The first is that transitional justice is intended as an extraordinary course of action taken in the absence of a properly functioning legal system and/or requisite political will to address past violations. The second assertion is that transitional justice is politically purposive justice serving higher order political objectives not normally associated with ordinary criminal justice. Thus, justice is not imposed simply for its own sake, in the sense of rectifying past violations, but also in relation to establishing a new political order that respects human rights and basic democratic principles. In so doing, transitional justice is part of a large-scale national reconstruction project aimed at both structural and relational transformation. Nevertheless, it is acknowledged that not all theorists are likely to agree with these propositions. For an alternative point of view, see, eg, Eric A Posner and Adrian Vermeule, Transitional Justice and Ordinary Justice (University of Chicago Law School, March 2003) 1, 3-4.


educating the general populace.\textsuperscript{21} As discussed below, the idea that transitional justice is demarcative and serves to legitimate a new regime underscores the symbolic importance of ensuring that policy and legislative agreements are negotiated by means of a democratic, and ideally broadly inclusive, decision-making process.

Finally, as noted in the introduction, whether transitional justice interventions actually produce their intended legal and political results is an empirical question that is of interest to social scientists. There is a burgeoning impact assessment literature evaluating the post-implementation effectiveness of specific interventions against their stated policy and legislative aims and identifying best practices that can be used to inform the future design of ‘effective’ institutional interventions.

For the thesis, using efficacy as an overarching construct provides some of the broad analytical parameters that are needed to identify standards that can be used to define optimal transitional justice at an abstract level and in a more theoretically comprehensive and integrated way. Like its usage in international law, efficacy is applied as an open-ended and relatively non-prescriptive construct that serves a boundary-setting function for transitional justice. From a legal point of view, one might reasonably expect ‘effective’ transitional justice to be: (1) capable of producing a desired effect; (2) capable of providing broad — including both judicial and non-judicial — forms of redress; and (3) relative to specific violations of international human rights and humanitarian law that are committed in a particular political context. One might also reasonably expect specific interventions to be designed and implemented in a manner that complies with international due process standards relating to promptness, fairness/equality,

thoroughness and impartiality. For the thesis, 'effective' transitional justice is understood not just in a legal sense, but also as an interdisciplinary construct that is intended to produce both legal and political results that can be empirically measured against those stated aims.

The author now embarks on the process of defining effective transitional justice at an abstract level by critically examining existing valuation measures for optimal or 'successful' transitional justice. These measures are discerned primarily from international principles developed to assist political decision-makers in making legally sound transitional justice choices.

### III Post-Cold War Measures of ‘Successful’ Transitional Justice

Over the past 30 years, numerous international principles have been developed to assist political decision-makers in making legally sound transitional justice choices. Many of these guiding principles arose because of profound victim and civil society dissatisfaction with the perceived failure of (especially) post-cold war transitional justice to provide accountability.

Even though post-cold war transitional justice reflects a diversity of retributive and non-retributive justice practices, this period has been particularly controversial for many transitioning societies because political decision-makers have exchanged criminal prosecution for amnesty, possibly in combination with some form of investigatory or truth commission, in order to secure immediate

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24 See especially De Brito, Gonzalez-Enriquez and Aguilar, above n 18, 3-11. For a discussion of domestic criminal trials during this period, see especially McCormack, above n 21, 115-120.
peace and stabilise an incoming regime. Not surprisingly, this phase is perceived as a period of 'compromise' transitional justice. Transnational advocacy efforts have focused on strengthening the legal content of transitional justice agreements, particularly in terms of ensuring that states respect their affirmative obligation to criminally prosecute or extradite and by placing legal limits on the ability of states to grant amnesty or other measures designed to shield alleged perpetrators from criminal responsibility.

The exchange of formal retributive criminal justice for short-term peace and democratic stability provoked an intense reaction from victim and civil society advocates who mounted an influential counter-impunity campaign seeking to limit the discretion of states and strengthen victim rights in international law. The international campaign against impunity has sought to counter impunity and strengthen victim rights by various means, including through human rights litigation as well as the development of a variety standard-setting instruments pertaining to accountability and redress for serious international crimes. The UN has adopted sets of principles concerning accountability and the rights of victims for serious international crimes. These guiding principles include, but are not limited, to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the Vienna Declaration and Programme of Action, the Basic Principles on the Right to a Remedy, and the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity.

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28 Above n 4.
29 Above n 17.
The campaign against impunity is aligned with the production of numerous non-governmental principles on accountability and redress for serious international crimes such as those proposed by the Siracusa Conference on Reining in Impunity in 1998, subsequently elaborated by groups of academics. International human rights organisations and individual scholars have additionally proposed a montage of policy statements and guiding principles concerning accountability and redress. Although generally regarded as non-binding, collectively these international principles are intended to assist decision-makers in making legally sound transitional justice choices by proposing general substantive and due process parameters. These guiding principles stand in addition to the conventional and customary international human rights and humanitarian law norms on which they are wholly or partially based that enumerate general and specific forms of accountability and redress for international crimes like genocide, war crimes/grave breaches, crimes against humanity, torture, enforced disappearance, extrajudicial executions, and slavery.

Relative to the valuation of transitional justice, a broad read of these international principles and the accompanying literature suggests that scholars and practitioners have traditionally gauged optimal transitional justice by means of one or more of

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three measures. These measures include state compliance with international law, additional conditions for policy legitimacy, and policy objectives.

1 Compliance with International Law

The most common valuation measure for optimal post-cold war transitional justice is state compliance with its affirmative obligations in international law. Indeed, there seems to be relatively broad agreement that states have discretion to determine the specific content of policy and legislative agreements so long as that content is compliant with a state’s affirmative obligations in international law.37 The challenge for transitional justice theory and practice is the absence of shared agreement concerning the specific content of affirmative state obligations and the most appropriate means to fulfil them.38 It is difficult to predetermine affirmative state obligations since they are contextually and temporally specific39 and continuously evolving.

In 1997, Juan Méndez broadly proposed four emerging state obligations in international law including the duty of states to: (1) investigate, prosecute and punish alleged perpetrators; (2) disclose information to victims, their relatives and society; (3) offer victims adequate reparation; and (4) remove known perpetrators from positions of authority.40 According to Méndez, the corresponding rights of victims include entitlements to justice, truth, compensation, and guarantees of non-repetition through the reform of state institutions.41 Jurisprudential developments over the past several years, particularly in relation to the 'ensure and

40 Juan Méndez, above n 38, 255, 260-261. Méndez identifies these emerging obligations and correlative victim rights based on his analysis of comprehensive and specialised human rights treaties and international humanitarian law instruments, authoritative interpretation, and recognised scholarly works on reparation and impunity.
41 Ibid 261-262.
respect’ and ‘effective remedy’ provisions of comprehensive human rights treaties, together with recently updated international principles, support Mendez’ comprehensive interpretation and strongly suggest there is an expectation that states will broadly interpret their affirmative obligations in international law.

As a rule, the barometer for legally valid transitional justice policy is state compliance with these respective obligations. However, as Méndez cautions, the obligations are separate and distinct. Furthermore, Méndez emphasises a crucial means-end distinction between a state’s bona fide effort to comply with its international legal obligations and the actual achievement of specific results such as conviction or acquittal in the case of a criminal trial. Thus, assessment of state performance rests on general compliance and a genuine effort to fulfil each of the four obligations in law and practice, ideally in a manner that respects international due process standards.

2 Conditions for Policy Legitimacy

A second less frequently cited measure of optimal transitional justice is the degree to which transitional justice policy fulfils certain conditions for legitimacy. In addition to state compliance with international law, suggested conditions for policy legitimacy include the requirement that transitional justice policy should

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43 See, e.g., Principle 1, Updated Set of Principles to Combat Impunity, above n 31. The Updated Set of Principles to Combat Impunity affirm the right to know, the right to justice, and the right to reparation including guarantees of non-recurrence. See also preambulatory para 8, Principle 11, Basic Principles on the Right to a Remedy, above n 17, which affirm the obligation of states to prosecute certain international crimes and define a victim’s substantive right to remedies for serious international crimes to include ‘equal and effective access to justice’ and ‘adequate, effective and prompt reparation for harm suffered’. Reparative rights are broadly defined to encompass (1) restitution; (2) compensation; (3) rehabilitation; (4) satisfaction, and (5) guarantees of non-repetition.

44 Méndez, above n 38, 263-264.


46 Ibid 264-266.
facilitate full and public truth disclosure.\textsuperscript{47} Other suggested conditions include subjecting policy decisions to some form of public deliberation and popular endorsement, for example by means of a referendum or through the approval of a democratically elected body.\textsuperscript{48} At least one scholar proposes that popular endorsement embraces the right of victims and human rights advocates to review a state policy once it is formulated.\textsuperscript{49} However, in relation to public endorsement, there are sharply differing views concerning whether the ‘will of the majority’ should prevail over the views of minority groups such as victims.\textsuperscript{50} As discussed next, it is proposed that a new regime should publicise the rationale for its transitional justice policy including the specific legal objectives of the policy and the policy’s relationship to broader transition objectives.\textsuperscript{51}

3 Policy Objectives

A third, even less prevalent, measure pertains to the political articulation of the political-legal rationale and aims for transitional justice intervention. José Zalaquett provides the clearest statement proposing that transitional justice policy should express specific legal objectives and serve broad transition goals.\textsuperscript{52} In terms of specific legal objectives, Zalaquett proposes that policy should aim to repair the damage caused by past violations and prevent the recurrence of future human rights violations. He suggests that policy should relate to the achievement of broad political and societal reconstruction objectives, including the creation of national unity, a just democratic political order, and acquisition of the economic resources to support these aims.

\textsuperscript{47} See, eg, Zalaquett, above n 37, 6-9.
\textsuperscript{48} Ibid 9.
\textsuperscript{49} Ibid.
\textsuperscript{51} Zalaquett, above n 37, 6.
\textsuperscript{52} Ibid 5-6.
A Post-Cold War Measures as Necessary but Insufficient

Existing international principles and valuation measures provide some of the essential benchmarks for defining effective transitional justice at an abstract level. These benchmarks include the ideals that effective decisions should, firstly, comply with affirmative state obligations and due process standards in international law, secondly, meet certain conditions for policy legitimacy including truth disclosure and some form of public deliberation and popular endorsement, and, thirdly, articulate the political-legal rationale and aims for intervention.

While these may be necessary conditions, from the perspective of the thesis they are by themselves considered insufficient for the valuation of 'effective' transitional justice vis-à-vis contemporary developments in international law and politics emphasising comprehensive victim rights and sustainable intervention. These contemporary developments in fact draw attention to four main concerns about existing international standards including: (1) limited guidance on the process of decision-making; (2) limited guidance on policy objectives; (3) a strong retributive presumption; and (4) imbalance between state obligations and victim rights.

1 Limited Guidance on Process

A first concern is the substantive orientation of existing guidelines and valuation measures. In view of the perceived deficiencies associated with post-cold war transitional justice, international principles for decision-making have focused on structuring the substantive content of optimal transitional justice decisions. Until very recently, they have provided little guidance on the process of decision-making in terms of public participation in and political management of the decision-making process. If mentioned at all, public participation has been a peripheral concern. Moreover, the traditional role envisioned for victim and civil society participation is a limited one taking place late in the decision-making process in relation to the democratic validation of political decisions through some
form of public deliberation and/or popular endorsement as a condition for policy legitimacy. Additionally, international principles traditionally have provided limited guidance on other important process requirements such as proper assessment of national justice needs and capacities, which ultimately may be vital to the formulation of sound policy and legislative agreements.

There are encouraging signs that the traditional lack of guidance on process may be changing with some of the most recently updated principles recognising the importance of public consultation in relation to the design of particular types of institutional interventions.\(^53\) Yet, even these recently updated standards are relatively restrictive, prescribing a specific form of public participation (consultation) vis-à-vis political decision-making. They also are much more forthcoming in encouraging public participation in the design of non-prosecutorial as opposed to prosecutorial interventions. As well, they do not sufficiently challenge the timing of public participation in the political decision-making process, which seems to be specific to the design of implementing institutional arrangements rather than founding policy decisions.

Despite the impressive array of international principles to assist political decision-makers in making complex substantive legal choices, a pressing concern is the relative absence of corresponding standards to structure the process of decision-making. The absence of process-outcome standards is considered a major oversight because there is no means to systematically assess and challenge the process of how political decision-makers make policy and legislative agreements regardless of how flawless the substantive outcome. The absence of process-outcome standards is particularly problematic because the existing literature strongly hints at an unsettling prevailing model of state-centric decision-making.

\(^53\) See, eg, Principles 6, 32, 35, *Updated Set of Principles to Combat Impunity*, above n 31. Principle 6 on the establishment and role of truth commissions is the most expansive: "To the greatest extent possible, decisions to establish a truth commission, defined its terms of reference and determine its composition should be based upon broad public consultations in which the views of victims and survivors are sought. Special efforts should be made to ensure that men and women participate in these deliberations on the basis of equality".
based on the short-term strategic interests of states and yet it is difficult to systematically validate or challenge this model.

2 Limited Guidance on Policy Objectives

A second concern for the thesis is the legalistic orientation of existing valuation measures. Apart from the work of a few individual scholars, few guiding principles actually speak to the political-legal rationale and purpose for intervention. Recently proposed and updated principles are no exception and do not address the principles or aims for intervention except in a very superficial way. In fact, to date only a handful of individual scholars have produced theoretically integrated normative frameworks that seek to bridge the legalist-realist divide by articulating guiding principles for both the legal and political aims of transitional justice.

The lack of guidance on the political-legal rationale and aims of intervention is an important omission. In practice, political decision-makers are formulating policy and legislative agreements that either fail to articulate or frame the political-legal aims of intervention in such ambiguous terms, which makes it exceedingly difficult to measure the post-implementation effects of these interventions against

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54 Principle 1, Draft Chicago Principles, above n 33, seem to be the most forthcoming identifying several "... distinct yet interrelated goals" for post-conflict justice that include investigating and documenting past violations; combating impunity through formal legal action; acknowledging victims through reparations; ensuring accountability through measures that promote good governance; and encouraging international cooperation.

55 Notable exceptions include the detailed normative framework proposed by José Zalaquett above n 37, 3-20, specifying guiding principles for the articulation of policy objectives, conditions for policy legitimacy, and parameters for substantive policy content while simultaneously recognising political and domestic rule of law constraints in the formulation of state policy and legislative agreements. Other scholars who have produced integrated normative frameworks include Luc Huyse, 'Justice After Transition: On the Choices Successor Elites Make in Dealing with the Past' (1995) 20 Law and Social Inquiry 51, 71-77; Carlos Santiago Nino, Radical Evil on Trial (1996) 107-185; Méndez, above n 50, 127-141. These influential normative frameworks make an important contribution to the literature because they seek to bridge theoretical divisions between the legal and political dimensions of policymaking and are applied frameworks that can be used to prospectively guide and retrospectively assess decision-making. Although offering fairly limited guidance on process, the thesis relies on these frameworks to provide some of the core benchmarks to define effective transitional justice at an abstract level.
their stated objectives. Additionally, it seems that political decision-makers are rationalising policy and legislative agreements in relation to multiple, incompatible, and unrealistic goals. As Jane Alexander rightly observes, perceived state failure to subsequently produce intended results may well contribute to diminished trust in newly established state institutions and foster political dissension in already deeply divided societies.

3 The Retributive Presumption

In addition to the legalistic orientation of existing normative guidelines, a third concern for the thesis is the strong and usually unstated presumption that retributive criminal justice is optimal. Despite the breadth of requirements concerning state obligations and victim rights in international law discussed above, there remains a strong presumption in even the most recently updated principles that the sine qua non of optimal transitional justice is state willingness to criminally investigate, prosecute and punish or extradite alleged perpetrators. Other forms of justice are by implication regarded as inferior. The retributive presumption is of course not specific to international principles for decision-making but endemic to the theory and practice of post-cold war transitional justice more generally.

58 Ibid 3, 7.
60 The retributive presumption is particularly evident in some of the guiding principles proposed by academic scholars, which give primacy to criminal prosecution and emphasise that non-prosecutorial measures must be regarded as complementary measures and not as substitutes for criminal prosecution. See especially Principles 1, 12, 16, Bassiouni Principles, above n 33. Even the recently adopted preambulatory paras 8, 10, 11 Basic Principles on the Right to a Remedy, above n 17, seem to signal a preference for prosecution by recalling the international legal obligation to prosecute serious crimes in international law before giving preambular recognition to victims, including 'honoring the right of victims to benefit from remedies and reparation'.

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The retributive presumption raises serious questions about reducing the value of transitional justice to a single superior measure. The proposition that retributive criminal justice is superior in all circumstances seems to be contrary to use of efficacy in international law. There is limited empirical evidence to support the proposition that retributive criminal justice is superior to other forms of transitional justice. On the contrary, there is growing recognition that individual interventions, even if retributive, rarely are sufficient in meeting the complex and diverse needs of victims. In this regard, recently updated international principles affirm the ideal of legally comprehensive transitional justice.

Transitional justice theory and practice have been criticised for conveying a legally narrow conception of justice that focus on the redress of past civil and political rights while ignoring more pressing demands for social and economic justice. Increasingly it is recognised that traditionally backward-looking or reparative aims may in fact contribute little to the achievement of positive democratic peace. This recognition is prompting scholars to advocate a much more comprehensive construction of justice and devote greater attention to forward-looking or preventive aims of transitional justice. There is a growing expectation that transitional justice should embrace, or at least be coordinated with distributive justice aimed at addressing underlying issues of poverty, inequality, and social exclusion. Although the standards proposed below are not this comprehensive, they do emphasise the importance of both the reparative and preventive aims of transitional justice.

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61 See, eg, Siri Gloppen, *Reconciliation and Democratisation: Outlining the Research Field* (Chr Michelsen Institute, 2002) v, 49-50.


63 See, eg, Barahona De Brito, Gonzalez-Enriquez and Aguilar, above n 18, 27-32, 312-314; Teitel, above n 19, 85.

4 Inequity between State Obligations and Victim Rights

A final concern for the thesis is that despite giving much greater prominence to victim rights, existing international principles do not yet give equal standing to victim rights in international law. Consistent with the post-cold war historical lens, the language of even the most recent international and non-governmental guidelines is decidedly state-centric focusing much more on the obligations of states than the rights of victims. Many of these guidelines partition victim rights from state obligations and portray substantive victim rights in fairly narrow terms as the right to reparation, while state obligations potentially encompass the duty to investigate, criminally prosecute, provide reparations, memorialise and educate, and reform state institutions including through removal of culpable individuals from public office. Recent recognition of the ‘special status of victims’ reminding states to ‘... give special priority to the complex needs of victims of gross violations of human rights and humanitarian law’ affirms this historic inequity between the rights and interests of the state/alleged perpetrators and victims. An alternative approach would be to conceive of state obligations/perpetrator rights and victim rights as indivisible.

Existing standards provide some of the necessary benchmarks for defining effective transitional justice in terms of state compliance with international law, additional conditions for policy legitimacy, and the articulation of policy objectives. They are regarded as necessary but insufficient because they are not fully comprehensive or integrated, particularly in terms of providing guidance on the process of policymaking, the political articulation of policy and legislative

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65 See, eg, Draft Chicago Principles, above n 33, on ‘acknowledging victims’ [principles 15-18] as opposed to much more expansive state obligations [principles 7-28]. Historically, the rights of criminally accused and victims have been conceived as separate and competing, with international and national criminal justice standards and practice typically favoring the rights of criminally accused over the rights of victims. In international law there is an evident conceptual separation between state obligations to provide accountability as opposed to ensuring victim rights. There are some encouraging signs of greater equilibrium between state obligations and victims rights, with for example a recent Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, UN Doc S/2004/616 (23 August 2004) 18 providing that ‘States have the obligation to act not only against perpetrators, but also on behalf of victims ....’.

objectives, and comprehensive victim rights. The thesis relies on existing standards and valuation measures but, as discussed next, augments them in relation to contemporary developments in international law and politics concerning the expansion and consolidation of victim rights as well as a perceptible shift from a short-term stability to a long-term sustainable peace model of intervention.

IV Contemporary Developments:

Comprehensive Victim Rights and Sustainable Intervention

In this section, the author continues the process of defining optimal transitional justice at an abstract level by considering two important contemporary developments in international law and politics. These two separate, yet in many ways complementary, developments include, firstly, the expansion and consolidation of victim rights in international law and, secondly, a perceptible theoretical and policy shift toward a sustainable peace model of intervention. The author relies on these two developments to augment post-cold war valuation measures and advance a more theoretically comprehensive set of ideal decision-making standards that define effective decision-making.

A The Expansion and Consolidation of Victim Rights

A first critical (post-Rome) development used to theoretically inform the selection of standards for effective decision-making is the emergence of comprehensive victim rights in international law. A core argument of the thesis is that standards for effective transitional justice must be legally comprehensive and ensure there is equity between the rights and interests of victims and those of the state and perpetrators. This argument is broadly consistent with a progressive theoretical shift in theory and practice from a state-centric to a victim-oriented perspective.67

In recent years there have been substantial gains concerning the recognition of victim rights in international law vis-à-vis transitional justice. Many of these gains have come about because of vigorous international advocacy efforts responding to profound victim and civil society dissatisfaction with post-cold war interventions that granted impunity to alleged perpetrators and marginalised the rights of victims. These international advocacy efforts have been highly effective in ensuring the adoption of increasingly stringent international legal standards concerning prosecution and amnesty and, consequently, a narrowing of state discretion to freely formulate policy. Additionally, there has been a progressive expansion and consolidation of substantive, procedural, and participatory victim rights in international law.\(^{68}\)

In many respects, endorsement of the *Rome Statute* in 1998 and the creation of the ICC in 2002 represent the pinnacle of these advocacy efforts to counter impunity and strengthen victim rights. These developments are considered so momentous that, together with globalisation, transitional justice is envisaged as entering a new phase.\(^{69}\) The creation of the *Rome Statute* has irrevocably changed the traditional frame of reference from a question of whether to prosecute to how to prosecute past serious violations of international human rights and humanitarian law.\(^{70}\)

The *Rome Statute* potentially limits the discretion of states to determine national transitional justice policy. The Statute’s introduction of the concept of ‘effective prosecution’ and its complementarity provisions essentially place the Court in a judicial oversight role concerning the policy decisions of states. Subject to the

\(^{68}\) Notably, the progressive expansion and consolidation of substantive, procedural, and participatory victim rights in international law is not solely the product of international advocacy efforts such as those associated with the international campaign against impunity nor is it specific to the sphere of retributive criminal justice. It is equally attributable to national advocacy efforts including those in relation to non-retributive forms of transitional justice.

\(^{69}\) Teitel, above n 19, 69-72.

appropriate jurisdictional requirements, the ICC has the authority to review the decisions of states to delay or not to pursue criminal investigation or prosecution and can assume jurisdiction in those exceptional circumstances where it finds a state is genuinely 'unwilling' or 'unable' to provide effective investigation or prosecution. There is a strong expectation that a state decision not to prosecute the most serious crimes in international law but to pursue justice through alternative means such as a truth commission alone or in combination with amnesty will be vetted against these standards. This is not to say that states can

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71 Arts 5-21, Rome Statute, above n 6, set forth the subject matter, temporal boundaries, and triggering mechanisms for the Court to assume jurisdiction. The subject matter of the Court is limited to the most serious crimes in international law which include genocide, crimes against humanity, and war crimes and at some point in the future will include the crime of aggression. The temporal jurisdiction of the Court is limited to crimes committed after 1 July 2002 when the Statute came into force. The Court generally can exercise jurisdiction in relation to matters referred to it by (1) the Security Council acting under Chapter VII, (2) a State Party involving its own nationals or crimes committed within its territorial jurisdiction, or (3) the Prosecutor conducting an independent investigation, with the latter two instances subject to a number of preconditions.

72 Jurisdiction of the ICC is complementary to national criminal jurisdictions and the Court will only assume jurisdiction in instances where a state is genuinely unwilling or unable to effectively investigate or prosecute. Art 17, Rome Statute, above n 6, establishes the main admissibility provisions for the Court, which provide:

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for crimes which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 1; (d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.


no longer delay or derogate from an international obligation to investigate or prosecute, but rather that a decision to do so may well be scrutinised by the ICC and likely will have to be carefully rationalised in relation to the doctrine of state necessity.

The Rome Statute in combination with post-Rome legal developments such as Security Council Resolution 1325 on Women, Peace and Security signify more settled international legal norms concerning the state duty to prosecute serious international crimes and proscribing amnesty for these same crimes. There seems to be emerging consensus that states should prosecute serious international crimes and generally avoid granting amnesty for these same crimes. With respect to legal limits on amnesty, there also seems to be fairly broad agreement that, firstly, states cannot grant amnesty when doing so is in direct contravention of a binding treaty obligation to prosecute or extradite, secondly, that self- or blanket amnesties generally are incompatible with international law, and, thirdly, that the granting of amnesty by a state cannot prejudice the other rights of victims.

Principle 14, Draft Chicago Principles, above n 33, and Principle 6(b), Bassiouni Principles, above n 33, recognise prosecutorial discretion to ‘... delay prosecutions for a reasonable period of time until, for example, a new government is sufficiently secure to take such action against members of a former regime, or a new government has the judicial resources to undertake fair and effective prosecutions’. A state decision to temporarily delay prosecutions must be balanced against other factors, including, but not limited to, state obligations and victim rights to ‘prompt’ investigation, justice, and reparation as well as a host of procedural considerations including the preservation of evidence. Additionally, as the commentary to the Bassiouni Principles, above n 33, 261 emphasise, delay does not preclude a state duty to pursue prosecutions in ‘good faith’ or extradite. Notably for crimes within the jurisdiction of the ICC, Art 17(2)(b), Rome Statute may in fact place restrictions on how long a state can delay prosecutions given that jurisdiction of the court can be invoked on the basis of ‘unjustified delay’.

The more complex question seems to be whether states can forego the duty to prosecute altogether based on the doctrine of state necessity. See especially, Majzub, above n 73, 272-279 for a detailed analysis.

Para 11, Resolution on Women, Peace and Security, SC Res 1325, 55 UN SCOR (4213th mtg), UN Doc S/RES/1325 (31 October 2000) emphasises ‘... the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, war crimes including those relating to sexual violence against women and girls’, stressing the need to exclude amnesty for these crimes where feasible. It thus consolidates emerging UN practice on the prosecution of serious international crimes and the exclusion of domestic amnesties for these crimes.

See, eg, Majzub, above n 73, 262-279. See also Principle 24, Updated Set of Principles to Combat Impunity, above n 31.
Corresponding with these important legal developments concerning strengthened prosecution and amnesty norms, there have been equally dramatic advances concerning the expansion and consolidation of comprehensive victim rights in international law in relation to serious international crimes.  

As prefaced, at least since the late-1990s there is an expectation that states will comprehensively interpret their affirmative obligations in international law encompassing a duty to investigate past violations; to prosecute, try, and punish perpetrators; to provide adequate reparation to victims; and to prevent the recurrence of violations through the adoption of reform measures. Concerning the substantive rights of victims, four core entitlements are generally recognised including the right to truth, the right to justice, the right to reparation, and guarantees of non-repetition.

For victims, an equally vital development has been the consolidation of procedural rights emphasising state obligations *inter alia* to treat victims with dignity and respect and encouraging states to adopt protective and support measures to ensure the privacy, safety, and well-being of victims. Particularly since the ad hoc international criminal tribunals commenced operations, there have been much more concerted efforts to ensure that adequate protective and support measures are provided for victims and witnesses, including through the creation of victim and witness units.

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78 For an in depth analysis of emerging and especially participatory victim rights in international law, see especially Aldana-Pindell, above n 21, 1399-1501. Aldana-Pindell 1405, 1457-1480 persuasively argues that 'victim-focused prosecution norms' require states to guarantee that victims of violent crimes are afforded effective prosecution as a remedy and are given certain participatory rights in criminal proceedings.

79 Ibid 1426.

The Rome Statute is particularly significant for its embodiment of comprehensive victim rights. Prima facie, the preamble to the Statute acknowledges the special suffering of victims. The Statute also recognises a victim’s substantive right to reparations. Specifically, the Statute authorises the Court to ‘establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation’ and ‘to determine the scope and extent of any damage, loss and injury to, or in respect of, victims’. As well, the Statute authorises the Court to order a convicted person to directly make reparations to victims or to award reparations through an established trust fund.

The Statute provides relatively comprehensive recognition of the procedural rights of victims inter alia authorising the Court to ‘... take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims’. In addition, the Rome Statute authorises the creation of a Victims and Witnesses Unit to provide protective and support measures including counseling and other assistance to victims.

One of the most vital yet controversial developments to occur with the Rome Statute is its codification of the participatory rights of victims. The Statute instructs the Prosecutor to take the ‘interests of victims’ into account concerning a decision not to proceed with an investigation or prosecution. Where their personal interests are affected, victims are permitted to have their views and concerns presented and considered ‘... at stages of the proceedings determined to

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81 Preambulatory para 2, Rome Statute, above n 6: ‘Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity’.
82 Art 75(1).
83 Arts 75(2), 79. Still, some commentators regard the reparation provisions of the Statute as inadequate in view of the relatively narrow definition of reparation, ostensibly limited by article 75(1) to restitution, compensation, and rehabilitation. Moreover, the Rome Statute makes no provision for the ICC to order states to make reparations to victims. It remains to be seen whether the Court, in establishing principles relating to reparations, provides a more expansive interpretation. See especially Bachrach, above n 80, 17-18.
84 Art 68(1).
85 Art 43(6).
86 Arts 53(1)(c), 53(2)(c).
be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'.

While recognition of the participatory rights of victims is not new, the significance of the Rome Statute provisions is that for the first time they extend these rights to international criminal proceedings. These provisions also position victim participatory rights early in the criminal process. As well, the Rome Statute provisions depart from a purely indirect role for victims who may be entitled in some circumstances to make direct representations to the Court. The Rome Statute additionally permits non-governmental organisations to participate in the workings of the Court.

In view of its comparatively extensive integration of victim rights, the Rome Statute may well set a new benchmark for review of the legal validity of state policy in terms of the interests of victims. As Johan Van Der Vyver surmises, a state decision to pursue accountability for past serious international crimes by means of an alternative amnesty and/or a truth commission process rather than

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87 Art 68(3). Arts 15(3) and 19(3) also permit, in specific circumstances, victims to make representations or submit observations to the Court.
88 See, eg, Principle 6, Basic Principles of Justice for Victims of Crime, above n 28: 'The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system'.
89 See Aldana-Pindell, above n 21, 1428-1429. As Aldana-Pindell 1412-1415, 1425-1437 reflects, victims have for some time asserted the right to participate in the criminal process but assertion of this right has been far more contentious than substantive rights because of the potential for conflict with the due process rights of criminally accused individuals.
90 Ibid 1429-1430.
criminal investigation or prosecution likely will have to ensure the interests of victims have been served. 93

Like substantive and procedural victim rights, the assertion of participatory victim rights is of course not specific to the sphere of international or retributive criminal justice but extends equally to non-retributive processes, including truth commissions, at the national level. 94

At a broader political level, the participatory rights of victims have emerged in an equally provocative way in relation to previously exclusive political decision-making domains. Particularly from the mid-1990s onward, there has been a progressive shift towards democratic decision-making where women, victims and other traditionally marginalised sectors of the affected population began to claim the right to participate in the formulation of public policy decisions. 95 For transitional justice theory and practice, assertion of the right to participate in political decision-making has transpired in two particularly significant ways.

First, civil society organisations were instrumental in actively lobbying for and asserting the right to participate in the negotiation of multilateral agreements pertaining to accountability, including the *Rome Statute* 96 and UN Security

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91 Ibid 86.
94 A formal connection was made between restorative justice and transitional justice in the mid-1990s through the work of the South African Truth and Reconciliation Commission ("TRC"), which strongly promoted itself as a restorative model. For the immediate analysis, the particular significance of the restorative perspective offered by the TRC is that it provided a public venue for victims to relate their own stories of victimisation either by publicly testifying in hearings or through a written statement protocol. It thereby affirmed the entitlement of victims to actively participate in non-retributive transitional justice processes.
95 For a discussion of this 'paradigmatic shift', see especially Christine Chinkin, "Human Rights and the Politics of Representation: Is There a Role for International Law?" in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (2000) 131, 131-136.
96 For an insightful analysis of the varied roles and contributions of civil society in relation to multilateral treaty making and in creating the *Rome Statute*, see especially Durham, above n 91, 36-49, 74-124.
Council Resolution 1325 on Women, Peace, and Security. These multilateral agreements place limits on state discretion to freely formulate policy and, in the case of the Rome Statute, strengthen the substantive, procedural, and participatory rights of victims in international criminal proceedings. The inclusion of victim and gender rights provisions in these instruments is directly attributable to the multifaceted contributions of civil society during the drafting and negotiation of these agreements. Even though civil society participation in these multilateral negotiations was indirect, the transnational advocacy campaign for the ICC and the global campaign for women, peace and security portend a critical shift in the traditional role envisioned for civil society actors in multilateral accountability policy negotiations.

Second, in the mid-1990s, civil society representatives began to assert the right to participate in domestic peace processes. In view of their historic exclusion from

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97 The transnational advocacy campaign to promote the equal rights of women in peacebuilding was equally vigorous. This campaign was inspired in part by recognition of the adverse consequences of armed conflict for women, yet the exclusion of women from formal peacebuilding activities, whether peace negotiations, peace operations, or post-settlement rebuilding. The campaign culminated in an historic open Security Council debate and Resolution 1325 on Women, Peace and Security in October 2000. A significant feature of the Security Council deliberations was an Arria Formula meeting that permitted NGO representatives the opportunity to informally present their views to members of the Security Council ahead of the open session. Resolution 1325 is particularly significant because it emphasises the participation of women in all aspects of conflict decision-making, presumably extending to the negotiation of transitional justice agreements. For a discussion of Resolution 1325, see especially Li Fung, 'Engendering the Peace Process: Women’s Role in Peacebuilding and Conflict Resolution' in Helen Durham and Tracey Gurd (eds), Listening to the Silences: Women and War (2005) 225, 228-231. See also Women’s International League for Peace and Freedom, 'United Nations Security Council Resolution 1325: History and Analysis' at http://www.peaccwomen.org/un/UNI325/1325index.html.


99 See generally Catherine Barnes, ‘Democratizing Peacemaking Processes: Strategies and Dilemmas for Public Participation’ in Catherine Barnes (ed), Owning the Process: Public Participation in Peacemaking (2003) Conciliation Resources http://www.c-r.org/accord/peace/accord13/intro.shtml at 8 October 2003. In theory, participatory transitional justice decision-making should be possible given existing models for democratic peace negotiations. Barnes, [para Representative, Consultative and Direct Participation] for example, describes three participatory models that reflect varying degrees of indirect and direct public participation in peace negotiations. These models include: ‘... representative participation through political parties; consultative mechanisms where civil society has an opportunity to voice views and formulate recommendations; and direct participation, where all interested individuals engage in a process of developing and implementing agreements to address the conflict’.
formal peace negotiations, women and other marginalised groups began to claim the right to be at the peace table in order to ensure the integration of their interests and concerns in the negotiation process and in the content of peace agreements.\textsuperscript{100} In this regard, Security Council Resolution 1325 is particularly pertinent to the strengthening of participatory rights because it calls for the increased participation of women at all ‘decision-making levels in the prevention, management and resolution of conflict’ and the ‘integration of a gender perspective in the negotiation and implementation of peace agreements’\textsuperscript{101} Presumably, the Resolution will open the door to greater participation by women and other marginalised sectors of the affected civilian population, including victims, in transitional justice policy negotiations.\textsuperscript{102}

How well are these contemporary legal developments reflected by international principles? There were two important developments in mid-2000 concerning international principles on accountability and victim rights. One of these developments was the commissioning of Professor Diane Orentlicher to update the Set of Principles to Combat Impunity.\textsuperscript{103} The second of these was the General Assembly’s adoption of the Basic Principles on the Right to a Remedy in December 2005 after more than a decade of deliberations.\textsuperscript{104}


\textsuperscript{101} Paras 1, 2, 8, Resolution 1325, above n 76.

\textsuperscript{102} See generally Barnes, above n 99, [para The Right to Participate: Some UN Instruments].

\textsuperscript{103} Louis Joinet, above n 27, Annex, originally reported on and proposed these draft principles in 1997. Diane Orentlicher was tasked with updating them in 2004-2005. See generally Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat All Aspects of Impunity, UN Doc E/CN.4/2004/88 (27 February 2004); Report of the Independent Expert to Update the Set of Principles to Combat Impunity, above n 36. The UN has yet to formally adopt these principles.

These recently updated and adopted principles affirm the state duty to prosecute or extradite the most serious crimes in international law.\textsuperscript{105} They also place a number of limits on amnesty, prescription, and other measures designed to shield alleged perpetrators from individual criminal responsibility.\textsuperscript{106} These recently updated and adopted principles provide comprehensive recognition of affirmative state obligations and substantive victim rights, although there is a tendency to treat state obligations separately from victim entitlements.\textsuperscript{107} These recent principles also recognise procedural entitlements for victims to be treated with dignity and respect and for appropriate measures to be taken to ensure the protection and support of victims and their families and avoid the re-traumatisation of victims.\textsuperscript{108} Indeed both sets of principles contribute to the solidification of prosecution and amnesty norms in international law. They also affirm an increasingly victim-oriented perspective and relatively comprehensive victim rights.

However, a critical deficit of these recent principles is their limited recognition of the participatory rights of victims. The Basic Principles on the Right to a Remedy are particularly disappointing, providing only preambular recognition of the Rome Statute provisions concerning victim participation in the proceedings of the Court, while otherwise avoiding any mention of participatory rights in the text of the principles.\textsuperscript{109} While these principles affirm a passive role for victims by ensuring right of access to information 'concerning violations and reparation mechanisms'...
they apparently do not envision an active role for victims to participate in the process of policy formulation or specific transitional justice processes.\textsuperscript{110}

The \textit{Updated Principles to Combat Impunity} are more forthcoming with respect to victim participatory rights, emphasising the importance of broad public consultation including the participation of victims and ‘other sectors of civil society’ in the design of truth commissions and institutional reform measures.\textsuperscript{111} They also stipulate that ‘special efforts should be made to ensure the equal participation of men and women’ in deliberations for the development of truth commissions, reparation programmes, and preventive/reform measures.\textsuperscript{112} This proposed level of participation is considered inadequate because it is specific to institutional interventions and not founding policy decisions, positioning victim and civil society participation late in the decision-making process. It also envisions public participation only in relation to the design of certain non-prosecutorial measures.

A core argument of the thesis is that standards for effective decision-making must fully account for the emergence of a victim-oriented perspective and comprehensive victim rights in international law, including the right of victims to actively participate in political decision-making and transitional justice processes. A sustainable peace perspective, discussed next, affirms the importance of these value preferences.

\textbf{B \hspace{1em} A Sustainable Peace Model of Transitional Justice Intervention}

A second important contemporary development used by the author to theoretically inform the selection of standards for effective transitional justice is an apparent theoretical and policy shift toward a sustainable peace model of intervention. In

\textsuperscript{110} See Principles 11(c), 12(a), 24, \textit{Basic Principles on the Right to a Remedy}, above n 17.
\textsuperscript{111} Principles, 6, 35, \textit{Updated Set of Principles to Combat Impunity}, above n 31.
\textsuperscript{112} Ibid Principles 6, 32.
recent years a number of scholars have begun to rely on a sustainable peace perspective as an analytical lens to challenge past transitional justice practice and advocate best practices for the design and assessment of future interventions.\textsuperscript{113} While there is no uniform approach to the specification of conditions for sustainable peace and democratisation, an identifiable includes that sustainable intervention requires an associative, deliberate, reasoned, and comprehensive approach.

A defining attribute of sustainable intervention is that it is conceived as a relational or associative exercise.\textsuperscript{114} The perspective emphasises the importance of not only rebuilding political institutions and physical infrastructure, but also transforming fractured relationships in deeply divided societies. Engaging differing levels of the affected population in the design and implementation of peacebuilding interventions is believed to be instrumental to the process of structural-relational transformation. The sustainable peace perspective generally supports a participatory approach to decision-making, although scholars differ in their views concerning how inclusive decision-making should be. One perspective stresses political inclusivity in the sense of broadly engaging conflict protagonists.\textsuperscript{115} A more expansive interpretation emphasises that inclusive decision-making should involve ‘vulnerable, excluded, victimised’ and other traditionally marginalised sectors of the affected population.\textsuperscript{116}

In view of the finding that externally imposed solutions rarely are durable, the sustainable peace perspective emphasises national ownership and urges a delimited and primarily supportive role for the international community in the

\textsuperscript{113} See, eg, Mani, above n 64, 11-18.
\textsuperscript{114} See generally John Paul Lederach, \textit{Building Peace: Sustainable Reconciliation in Divided Societies} (1997) 37-61.
\textsuperscript{116} \textit{Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies}, above n 65, 12.
design and delivery of peacebuilding interventions. The perspective represents a concerted shift away from externally imposed solutions in favor of developing national capacities and institutions to support peace over the long-term.

A second essential characteristic of the sustainable peace lens is that it represents a deliberate and conflict specific approach to intervention. Strategic planning and analysis of the actual political context including national capacities and resources are essential to developing context appropriate and durable solutions. The perspective generally shuns a crisis intervention approach, advocating instead the need for extended timeframes that permit the development of well-conceived interventions. A defining characteristic of the perspective is its recognition that the achievement of sustainable peace is a long-term, and perhaps multigenerational, process.

A third defining characteristic of sustainable intervention is that it is envisioned as a politically purposive exercise aimed at achieving the dual objectives of negative peace, or the cessation of direct violence, and positive peace, which relates to eradication of the underlying structural and cultural causes of violence. As John Cockell describes, peacebuilding is successful when it ‘addresses root causes of violent conflict’. The perspective, fourthly, takes a holistic and multi-sectoral approach offering a template of short-, medium- and long-term peacebuilding interventions, of which transitional justice is part, all of which relate to the attainment of both negative and positive peace. Consistent with the

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118 See, eg, Bloomfield and Reilly, above n 1, 7, 25-27.
120 Lederach, above n 114, 74-79.
121 See, eg, Mani, above n 64, 12-15.
122 Cockell, above n 115, 22.
perspective, the selection of specific peacebuilding interventions is context specific and needs based.

The UN Secretary-General endorsed the principle of sustainable and effective transitional justice approaches in 2004. The report seemingly defines effective and sustainable interventions in terms of: (1) an inclusive and victim-oriented approach; (2) nationally owned and conflict-specific solutions, including the need for national-led consultation and assessment strategies and to support the reform of domestic institutions and capacities; and (3) integrated and comprehensive justice responses.

A sustainable peace lens is useful for the definition of effective transitional justice because it affirms the importance of comprehensive justice and victim rights, including the shift toward participatory decision-making. It also illustrates the potential to prospectively define the conditions for successful intervention, suggesting this is a legitimate scholarly endeavor. A sustainable peace lens is particularly significant because it permits the adoption of a process-oriented approach. A main advantage of the perspective is that it encourages conceptual separation of the process of decision-making from the substantive outcome or the text of agreements that are reached. Each is seen to have intrinsic value. As prefaced in the introduction to this chapter, the process-outcome distinction reflects a basic belief that a procedurally sound and well-managed decision-making process will contribute to producing qualitatively better, more legitimate, and more durable substantive outcomes. In ideal terms, optimal decision-making processes are broadly inclusive, symmetrical, communicatively open, neutrally located, not time limited, and consensus-based. The pace of decision-making is critical as well with slow paced decision-making leading to well-designed

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substantive agreements and quick implementation generally preferred to the reverse scenario.126

In all of these important ways, the sustainable peace perspective provides the means to begin challenging past decision-making practice including: (1) a widely conjectured pattern of elitist, exclusionary decision-making;127 (2) an apparent short-term crisis intervention model of intervention directed at achieving negative peace or the cessation of hostilities;128 (3) a lack of proper planning and assessment;129 and, (4) a traditionally narrow (western legal, retributive) conception of justice.130

As discussed above, international guidelines and assessment measures generally neglect the process and political purpose of decision-making. They also do not yet provide full equity between the rights and interests of victims and those of the state and perpetrators. In view of these perceived inadequacies of existing valuation standards, the author now advances a more theoretically expansive and integrated set of ideal standards for transitional justice decision-making, which is a main aim of the thesis.

126 Bloomfield and Reilly, above n 1, 25-26.
128 See, eg, Huyse, above n 55, 59, 61.
130 See especially Wendy Lambourne, ‘Justice and Reconciliation: Postconflict Peacebuilding in Cambodia and Rwanda’ in Mohammed Abu-Nimer (ed), Reconciliation, Justice, and Co-Existence (2001) 311, 312-314 who critiques the predominant western liberal retributive orientation of transitional justice. Lambourne, 313 argues that post-settlement peace processes must ‘... address the economic as well as legal justice needs of the population in order to promote the attainment of positive peace’.
V Standards for a New Era of Transitional Justice?

In this section, the author defines effective transitional justice by means of four interrelated standards that structure the process and substantive outcomes of decision-making. In brief, these idealised standards propose that 'effective' decision-making is (1) democratic, (2) methodical, (3) purposive, and (4) comprehensive. The first three of these standards — democratic, methodical, and purposive — are process standards, while the fourth standard concerning legally comprehensive transitional justice decision-making is substantive. The efficacy of decision-making is envisioned as a composite of all four ideal standards. The degree to which political decision-makers are able to comply with all four standards should contribute to producing higher quality, more legitimate, and ultimately more durable transitional justice policy and legislative agreements. In order to retain consistency with use of the concept of efficacy in international law and ensure context-specificity, the four standards are intentionally broad and relatively non-prescriptive. While some indicators are proposed for each standard, these indicators are expected to be flexible and evolving.

A more detailed explanation of the proposed standards now follows, including the anticipated benefits and complexities associated with achieving the standards in practice. Because the ideal standards are premised in large part on a sustainable peace model of intervention, a crosscutting theme for all four standards is that measured decision-making timeframes are essential to their achievement.

1 Democratic Decision-Making

Consistent with the emergence of comprehensive victim rights and a sustainable intervention perspective discussed above, the author proposes, firstly, that 'effective' transitional justice requires a democratic or participatory decision-making process that is broadly inclusive of and meaningfully engages the affected population, especially the victims of past political violence. This means that political decision-making is not only representative, involving a broad cross-section of national political groups, but also consultative, affording interested
victims and other national stakeholders the right to present their views or have their views considered in the formulation of substantive policy and legislative agreements.\(^{131}\) It requires as well some level of genuine public dialogue about the guiding principles and aims for intervention and the full range of available policy and institutional options.

Participatory transitional justice decision-making confers several important potential benefits.\(^{132}\) In theory, it should produce substantive agreements that are more likely to integrate the diverse interests and concerns of victims and other vulnerable groups. Among other presumed benefits, it also should: (1) encourage greater public ownership and acceptance of political agreements; (2) contribute to rejuvenating previously disenfranchised victim/civil society groups; and (3) assist in developing human relationships across existing divisions, which is believed to be foundational to the achievement of sustainable democratic peace. At a symbolic level, the very process of public participation and dialogue is believed to be beneficial, irrespective of whether social consensus is achieved, because it symbolises the normative shift from a previously repressive era to a new liberal-democratic political order by demonstrating democratic principles in action.\(^{133}\) As Catherine Barnes encapsulates, it reclaims ‘intensely conflictual issues’ as the ‘... normal subjects of political, dialogue, problem-solving and constructive action’.\(^{134}\)

As noted in the introduction to the thesis, public participation in decision-making is an extremely vexed concept and very difficult to put into practice. If applied to founding policy decisions, it would require, in many instances, changing private political deliberations to open and transparent talks. There are significant risks for political decision-makers that opening the highly emotive matter of transitional

\(^{131}\) Adapted from Barnes, above n 99, [para Representative, Consultative and Direct Participation].
\(^{134}\) Barnes, above n 99, [para People-centred peacemaking?].
justice to public consultation and discussion will intensify existing tensions in already deeply divided societies and ultimately prolong conflict.\textsuperscript{135}

A greater number of participants are likely to slow decision-making, which is exceedingly problematic in any conflict setting where direct political violence and human rights violations are ongoing.\textsuperscript{136} A pivotal ethical question then is whether public participation in decision-making, particularly the negotiation of founding policy agreements, is acceptable if it prolongs peace negotiations resulting in greater physical violence and human rights violations in the search for a ‘perfect democratic peace’.\textsuperscript{137}

The notion of participatory transitional justice decision-making also involves a series of complex practical questions about who should participate, when public participation should occur, and what form public participation should take.

There are potentially many vital constituencies whose participation may be vital to formulating sound policy and legislative agreements. In addition to victims, national constituencies potentially encompass ‘... justice sector officials, civil society, professional associations, traditional leaders, and key groups such as women, minorities, displaced persons and refugees’.\textsuperscript{138} Relative to the victims of past political violence, the very concept of victim is a contested one. There are complex identification and definitional issues concerning who should be recognised as a victim.\textsuperscript{139} Like public participation in political decision-making more generally, there are equally provocative questions about whether

\begin{footnotesize}
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\item \textsuperscript{135} See, eg, Roht-Arriaza, above n 132, 101-102.
\item \textsuperscript{136} Bloomfield, Nupen, Harris, above n 125, 71.
\item \textsuperscript{138} Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, above n 65, 6.
\item \textsuperscript{139} See especially Rombouts, above n 67, 223-230.
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victims/victim groups are themselves sufficiently representative and accountable.\textsuperscript{140}

In transitioning societies where there has been mass victimisation, there are obvious 'problems of scale' in terms of how many victim groups and other stakeholders would be able to participate.\textsuperscript{141} Moreover, victim/civil society organisations are not a uniform entity but rather an assortment of diverse groups with varied and frequently competing interests.\textsuperscript{142} While much of the value of victim/civil society participation in political decision-making is the diversity of the perspectives they offer, the ability of civil society organisations to strategically cooperate, rather than compete with each other, may well determine their ability to influence political action.\textsuperscript{143}

A second practical consideration concerns the timing of public participation in decision-making. Historically public participation has taken place comparatively late in the decision-making process in relation to the democratic validation of elite brokered agreements through elections or referenda and possibly some form of participation in the design of implementing legislative agreements. The thesis proposition that transitional justice decision-making should be democratic or participatory contests this historically limited role by demanding earlier forms of public participation, particularly in relation to the formulation of founding policy agreements.

Nevertheless, it is recognised that participatory decision-making requires a symbiotic relationship where political actors create space for victim/civil society engagement and victim/civil society organisations are ready, willing, and able to

\textsuperscript{140} See, eg, Chinkin, above n 95, 142-145.
\textsuperscript{141} See generally Barnes, above n 99, [para Representation, Accountability and Inclusion].
\textsuperscript{142} See Durham, above n 91, 8, 10, 18-29.
\textsuperscript{143} Ibid, 31-33, 76-81, 109-110, 119-121.
take advantage of this space. In the past, the political timing of founding policy decisions has been a barrier to public participation particularly in instances where political elites have abruptly finalised founding policy agreements at the height of political violence when the influence of civil society organisations is weak. Political decision-makers have not always seen victim groups as sufficiently well organised or central to their own immediate interests to create space for early public engagement in decision-making. The lesson of civil society participation in political decision-making more generally suggests that interested stakeholders likely will have to assert the right to participate in policymaking by means of highly proactive advocacy networks. Additionally, as the case study findings persuasively illustrate, it is not just a matter of creating space but ensuring that the space provided allows for meaningful public engagement.

A third practical consideration concerns the form of victim/civil society participation in transitional justice decision-making. To date, public participation in political decision-making is largely indirect where civil society organisations participate outside of formal political processes through representative or consultative mechanisms. As Helen Durham observes in her important study of non-state actor participation in multilateral treaty making, civil society representatives are not accorded the same rights as full political participants, who directly participate in decision-making and have the final say about the text of substantive agreements. Yet, as Durham concludes, the very value of civil society participation is that it takes place outside of formal processes where non-state actors can provide an 'alternative’ voice and ‘push the boundaries’ of political decision-making. It seems likely that indirect participation will remain the preferred mode of participation at least for the immediate future.

145 See especially Wilson, above n 127, 198-199.
146 Van der Merwe, above n 25, ch 4 [para Government Priorities in the Post-Transition Period].
147 Durham, above n 91, 3-4, 20, 107-108.
148 Ibid, 28-29, 85, 90.
It is essential to acknowledge that public participation in political decision-making does not guarantee the production of qualitatively better agreements or agreements that are necessarily more legitimate or enduring. As Durham wisely cautions, in view of the diversity of civil society organisations, public contributions to political decision-making are varied and not always positive.\textsuperscript{149} Durham qualifies that it is exceptionally difficult to measure the contributions of civil society participation to political decision-making.\textsuperscript{150}

2 Methodically Designed

Consistent with a sustainable intervention perspective discussed above, the author proposes, secondly, that ‘effective’ transitional justice requires a methodically planned and deliberately managed decision-making process that produces well conceived, nationally owned, and contextually responsive substantive agreements. This means that political decision-makers make informed policy and institutional choices that are based on public consultation, noted above, and the proper assessment of transitional justice needs and capacities. Preferably, public consultation and needs assessment should be nationally led and occur before the formulation of policy and legislative agreements.

Like the ideal of participatory decision-making, methodical political planning is envisioned as conferring several likely benefits. It should ensure that political decision-makers formulate well-conceived substantive agreements from the outset that are transparent, coherent, politically purposive, legally robust, and contextually responsive. At the same time, methodical planning should enable political decision-makers to anticipate proper resourcing and coordination requirements thus contributing to the judicious use of scarce financial, human, and material resources in ways that support rather than supplant the development of national justice capacity.

\textsuperscript{149} Ibid 13, 30-33, 43, 97.
\textsuperscript{150} Ibid 36, 48, 122.
The proposition that decision-making should be methodically planned is intended to challenge previous state practice where political elites, including members of the international community, have developed transitional justice interventions in a rushed, non-consultative, and inadvertent manner based on foreign policy and legislative models that have limited relevance to a specific political context.151

Like participatory decision-making, there are numerous complexities associated with the practice of methodical political planning in conflict and post-conflict societies. Foremost amongst these is the requirement for a measured or gradual approach, which may be exceptionally difficult to achieve in the context of ongoing political conflict where there usually are enormous pressures for political decision-makers to reach a quick political settlement.152 Historically, policy agreements on transitional justice have been vital to achieving expeditious political settlements.

In addition, there are certain to be significant tensions between a more measured approach and the often pressing evidentiary and due process concerns of a transitioning society. These concerns include the need to: preserve evidence, including the reliability of victim/witness testimony; respect applicable statute of limitations; secure the custody or release of alleged suspects; and protect the safety of victims and witnesses. A measured approach may well be contrary to existing international principles, which emphasise state obligations and victim rights to ‘prompt’ investigation, access to justice, and remedies including reparation.153 International principles concerning the permissibility of delays in decision-making, which so far seem to be limited to criminal prosecution,

151 See, eg, Huyse, above n 117, 164-166.
152 Bloomfield and Reilly, above n 1, 25-27.
153 See, eg, Principles (2)(b), (c), (3)(b), (11)(b), 14, 15, Basic Principles on the Right to a Remedy, above n 17.
emphasise that delay must be reasonable and balanced against these other concerns and rights.

A methodically planned approach, particularly one that is consistent with sustainable intervention, also calls for much greater precision about the role of the international community in decision-making. There are sharply differing views about whether international involvement in transitional justice should be primarily indirect and supportive or whether some circumstances merit direct international intervention.\textsuperscript{154} To date, international principles for decision-making provide limited guidance on this matter.

3 Politically Purposive

Consistent with the sustainable intervention perspective discussed above, the author proposes, thirdly, that ‘effective’ transitional justice must be politically purposive. This means that political decision-makers clearly articulate, and ideally define, the guiding political-legal rationale and aims for intervention as part of policy and legislative agreements.

Using the original benchmarks proposed by José Zalaquett discussed above, political decision-makers should communicate specific reparative and preventive legal objectives and explain how transitional justice relates to broader political or national reconstruction aims.\textsuperscript{155} As further suggested by Zalaquett, these principles and aims should be made public. Even more vitally, the political-legal rationale and aims for intervention should be established through public consultation and dialogue in order to promote broadly shared understanding.

\textsuperscript{154} For differing views, see, eg, Huyse, above n 117, 163, 163-166; Alexander, above n 57, 10-11, 54, 56-57.

\textsuperscript{155} Zalaquett, above n 37, 3-6. Zalaquett’s approach is consistent with a sustainable peace perspective, establishing broad and relatively non-prescriptive parameters that enable political decision-makers to choose policy and legislative objectives that are appropriate to a particular political conflict setting.
Political articulation of the political-legal rationale and aims for transitional justice is considered to serve two essential functions. First, if expressed in sufficiently precise, reasoned, and achievable terms, the communication of guiding principles and objectives is considered essential to managing victim and public expectations about the results (and ideally beneficiaries) of transitional justice. Second, political articulation of the rationale and objectives for transitional justice is essential to the subsequent monitoring and evaluation of the effect of specific institutional interventions once introduced.

Like the other proposed ideal standards, in practice there are likely to be significant challenges associated with identifying sufficiently precise, reasoned, and achievable objectives. Even though there is a prolific literature concerning the theoretical aims of transitional justice, as discussed above, like Zalaquett, international principles provide exceedingly limited guidance on this topic. There is profound theoretical disagreement concerning these aims and whether transitional justice does or should serve political objectives. Many of the aims associated with transitional justice, like justice, truth, reconciliation, unity, democracy, and peace, are difficult to precisely define because they are extremely nebulous constructs that are subject to multiple and competing interpretations. Despite the myriad of legal and political aims that have come to be associated with transitional justice over the past 30 years, the discipline has yet to conceptually distinguish short-, medium- and long-term objectives.

4 Legally Comprehensive

Consistent with emerging victim rights and a sustainable intervention perspective outlined above, the author proposes, fourthly, that 'effective' transitional justice must be legally comprehensive. Legally comprehensive transitional justice

denotes two requirements for substantive policy and legislative agreements. It is used to convey an inclusive approach to affirmative state obligations in international law to investigate, prosecute, punish, repair, and prevent the recurrence of serious violations of international human rights and humanitarian law, ideally in a manner that respects international due process standards.\textsuperscript{157}

It is used as well to convey a symmetrical approach that gives equal standing to the full range of emerging substantive, procedural, and participatory victim rights in international law. As the \textit{Rome Statute} and other recently updated international principles make clear, these entitlements encompass: (1) substantive rights to truth, justice, reparation, and guarantees of non-repetition through the adoption of preventive measures; (2) procedural entitlements to be treated with dignity and respect and afforded special protective and support measures; and (3) certain participatory rights in transitional justice processes.

There are obvious benefits associated with legally comprehensive transitional justice. A legally comprehensive approach is more likely to address the complex and diverse needs of victims and other stakeholders thus contributing to greater public satisfaction and long-term political stability. It also is more likely to contribute to the broader endeavor of positive peace, especially in instances where preventive state obligations and victim entitlements centering on the reform of repressive laws and state institutions are observed.

In practice it is recognised there are likely to be enormous challenges associated with formulating even minimally compliant, let alone legally comprehensive, substantive agreements. Even post-\textit{Rome}, the theory and practice of transitional justice continues to reflect intense scholarly debates about the minimal international legal obligations of states, particularly in relation to the duty to

\textsuperscript{157} See generally above n 40-46 for a more comprehensive description of the literature concerning these international legal standards.
prosecute, the permissibility of amnesties, and issues around delay and derogation. It is hardly surprising then that existing international principles vary considerably in prescribing specific parameters to guide transitional justice decisions.

The ideal of legally comprehensive transitional justice is certain to increase existing tensions between the substantive and procedural law obligations of states. Most transitioning societies face major domestic rule of law deficiencies that bring substantive and procedural obligations into direct conflict. This is especially so for the pursuit of retributive criminal justice where domestic laws prohibiting serious crimes may not have existed when violations were committed raising complex issues of legality and retroactivity.\textsuperscript{158} Additionally, the time lapse between the commission of violations and subsequent legal proceedings may bring statutory limitations into play, although such limitations do not apply to an increasingly comprehensive list of serious international crimes.\textsuperscript{159} There may be other significant procedural law constraints, including jurisdictional issues around physical access to suspects or the destruction of evidence, that make certain institutional interventions such as criminal prosecution impracticable.\textsuperscript{160} It also may not be feasible to immediately pursue retributive criminal justice for past violations in the absence of a credible or functioning state criminal justice system.

Giving greater prominence to the rights of victims is equally complex to operationalise in practice. Like state obligations in international law, unanimity concerning the substantive, procedural and participatory rights of victims simply does not exist. There is as well considerable potential for conflict between the rights of victims, in particular their procedural and participatory rights, and the rights of criminally accused individuals. Existing international legal standards recognise this tension, generally guaranteeing victim rights only insofar as those

\textsuperscript{158} See generally Teitel, above n 133, 27-67.

\textsuperscript{159} Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, opened for signature 26 November 1968, 754 UNTS 73 (entered into force 11 November 1970); Art 29, Rome Statute, above n 6; Principles 6, 7, Basic Principles on the Right to a Remedy, above n 17; Principle 23, Updated Set of Principles to Combat Impunity, above n 31.

\textsuperscript{160} See generally Van Zyl, above n 42, 43-47.
rights are ‘not inconsistent with’ and ‘do not prejudice’ the due process rights of criminally accused individuals, including the right to a fair and impartial trial.\textsuperscript{161} Giving equal standing to the rights of victims requires a shift in thinking and practice from a state-centric model of decision-making to a more grassroots approach that affords victims the right to participate in political decision-making and requires the assessment of victim needs and expectations. Yet, as Heidy Rombouts observes, there are formidable complexities involved with assessing diverse victim needs and expectations in transitional societies.\textsuperscript{162}

Finally, operationalising legally comprehensive transitional justice clearly requires corresponding financial, material, and human resources that typically are in scarce supply in transitioning societies.\textsuperscript{163} The emergence of comprehensive victim rights in international law requires corresponding state resources to operationalise these rights in practice and ensure that victims and perpetrators have equal access to transitional justice.

Although not resolved by the thesis, the presumed benefits and complexities associated with achieving the ideal standards in practice are examined in more detail in Chapters Three through Six in relation to past decision-making practice for South Africa and East Timor. The two detailed case studies are used to test the utility of the proposed ideal standards as a comprehensive valuation framework. They are also used to highlight lessons learned for a future model of inclusive and sustainable decision-making. In these ways, the thesis seeks to contribute to scholarly debate about the valuation of transitional justice and the future practice of effective decision-making.

\textsuperscript{161} See, eg, Art 68(1), \textit{Rome Statute}, above n 6.
\textsuperscript{162} Rombouts, above n 67, 223-230.
\textsuperscript{163} See, eg, Mani, above n 64, 96-97.
VI Conclusion

In this chapter, the author defined effective transitional justice at an abstract level and in a more theoretically comprehensive and integrated way, one of two main research objectives established for the thesis. The choice of standards was theoretically informed by: (1) use of the concept of efficacy in international law; (2) existing valuation measures for optimal transitional justice; and (3) contemporary developments in international law and politics emphasising comprehensive victim rights and sustainable intervention. The proposed standards postulate that effective decisions are democratically made, methodically planned, politically purposive, and legally comprehensive. As noted previously, the first three proposed standards for democratic, methodical, and purposive transitional justice decision-making are process standards, while the fourth standard concerning legally comprehensive decisions is substantive. The significance of these standards is that they represent a critical shift from a predominantly substantive orientation to a process-outcome orientation. They thus offer the possibility of bridging traditional theoretical divides between state-centric and victim-based approaches to decision-making.

The proposed standards are idealised. Their aim is aspirational: to cast forward to what is possible in the future in terms of an inclusive and sustainable approach to decision-making and intervention. In particular, their aim is to ensure that the efficacy of transitional justice is measured not just in terms of substance but also process, and not just from the point of view of the state and perpetrators but also from the perspective of other stakeholders, especially victims. As acknowledged in the thesis introduction, transitional justice is imperfect justice and achieving the proposed ideal standards in practice, particularly in the conflict and post-conflict settings for which they are envisioned, will be extremely difficult. There is as well the potential for tensions between the different standards. A caveat of the thesis is that the proposed standards are to some extent conjectural. As adapted
from the peace literature, they are based on a reasonable theoretical expectation that a well-designed and managed decision-making process will contribute to producing higher quality, more legitimate, and more durable policy and legislative outcomes.\textsuperscript{164}

The author now sets out the procedures used to test the utility of the idealised standards as a comprehensive valuation framework. In the next chapter, which completes the explanatory framework for the thesis, the author narrows the scope of theoretical inquiry. She then presents the standards as part of a heuristic decision-making model that balances the ideal standards against the realpolitik environment in which transitional justice decisions are made. The decision-making model, which draws on existing theory, enables the author to test and refine a range of theories about decision-making. Together, the standards and model provide the main theoretical lens for the thesis. They are used to investigate, compare, and draw conclusions about the process and outcome of past decision-making practice for South Africa and East Timor. The author chose South Africa and East Timor as detailed case studies because they broadly represent negotiated regime transitions and thus provide a consistent decision-making process to explore similarity and difference.

\textsuperscript{164} Bloomfield and Reilly, above n 1, 20-28.
CHAPTER 2
DECONSTRUCTING TRANSITIONAL JUSTICE
DECISION-MAKING

I Introduction

The thesis aims to contribute to transitional justice theory and practice by not only proposing, but also testing the utility of a more theoretically comprehensive and integrated set of ideal standards that define ‘effective’ transitional justice decisions as being democratically negotiated, methodically designed, politically purposive, and broadly compliant with state obligations and victim rights in international law. The author now embarks on the second part of the research aim, which is to test the utility of the proposed standards as a comprehensive valuation framework.

In this chapter, the author narrows the theoretical scope of inquiry and describes the specific research procedures that were used to test the utility of the proposed standards to assess the efficacy of past decision-making practice for case studies of South Africa and East Timor.

The thesis approach to studying the efficacy of past decision-making practice is unique in at least three vital respects. First, it departs from the mainstream literature by treating the process of how political elites make decisions as a theoretically significant construct and a focal point of analysis. Second, it stresses the importance of founding policy decisions, which has been a relatively neglected area of study. Third, it contextualises the proposed ideal standards as part of a much more theoretically comprehensive diagrammatic model that was developed to retrospectively assess the decision-making practices of negotiated regime transitions like South Africa and East Timor. The diagrammatic model permits wide-ranging analysis of the process and outcome of decision-making for these two case studies in relation to four main conceptual elements. These elements
include: (1) the specific negotiation process; (2) the timing of decision-making in the conflict cycle; (3) the specific political context or mediating policymaking environment; and (4) the proposed ideal standards. Because the diagrammatic model draws on existing transitional justice and peacemaking theory, it permits the author to test and refine a range of theories about decision-making through application of the model to the case studies of South Africa and East Timor.

II Narrowing the Field of Inquiry

The thesis study focuses on the archetypal decision-making dilemma associated with post-cold war transitional justice concerning whether and how to confront past violations committed by a former repressive regime. In order to study this dilemma vis-à-vis the efficacy of past decision-making practice, the thesis study is limited to negotiated regime transitions involving an actual regime change. Other scholars have used a similar bounded analysis approach. This section also shapes the theoretical focus of the thesis study in relation to studying (1) the process and substantive outcomes of decision-making and (2) founding policy agreements.

1 The Archetypal Post-Cold War Decision-Making Dilemma

The thesis study of the efficacy of past decision-making practice focuses on the archetypal decision-making dilemma associated with post-cold war transitions concerning whether and how to confront past violations of human rights and humanitarian law committed by a former repressive regime without destabilising

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1 For the thesis, consistent with Ruti G Teitel’s, ‘Transitional Justice Genealogy’ (2003) 16 Harvard Human Rights Journal 69, 73-85 classification, post-cold war transitional justice is understood to encompass transitions from political conflict and authoritarian rule toward peace and liberalisation/democratisation that took place globally from the mid-1970s until the late 1990s/early 2000. East Timor, which is used as a case study for the thesis, did not formally begin its transition until 1999. However, East Timor is included as a post-cold war transition because its conflict is related to the decolonisation movement and its peace process technically commenced in the early 1980s. Both thesis case studies — South Africa and East Timor — of past transitional justice decision-making practice pre-date establishment of the ICC in 2002.

the present transition. A decision to pursue past violations committed by a former regime is generally regarded as being inherently complex because political elites are vying for power to control the process of transition, including matters in relation to public policy, in a highly volatile political context where the 'rules of the new game are not yet fixed'. In this unsettled context, political elites generally face multiple and competing demands, one of which is likely to be a public demand that the incoming or new regime hold the outgoing repressive regime accountable for past violations. It is equally likely the outgoing regime will demand its own impunity in exchange for ceding power.

Historically, this archetypal dilemma has raised a series of difficult questions about the potential benefits and risks for an incoming regime including whether the failure to address past violations will undermine new democratic institutions, especially the rule of law, and ultimately compromise the legitimacy of a new regime. Pursuing, particularly retributive, transitional justice is perceived to confer a number of potential benefits including legitimating a new democracy and re-establishing the moral order. Conversely, a significant concern has been that a decision to confront past violations will provoke such an extreme reaction from political hardliners associated with the old regime that they will use their remaining power to destabilise a fragile democracy. Beyond jeopardising its own immediate political survival, pursuing transitional justice presents other major political risks for new regimes including the potential to: (1) renew tensions in already deeply divided societies; (2) further violate human rights if transitional justice is pursued in a manner that is inconsistent with due process standards; and

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1 Referring to Guillermo O'Donnell and Philippe C Schmitter, 'Part IV: Tentative Conclusions about Uncertain Democracies' in Guillermo O'Donnell, Philippe C Schmitter and Laurence Whitehead (eds), Transitions from Authoritarian Rule: Prospects for Democracy (1986) 1, 28-32 classic formulation of 'settling a past account (without upsetting a present transition)'.


4 Skaar, above n 4, 1109-1110.

(3) diminish public confidence in the new dispensation if victim and public expectations for justice and accountability are not met.8

In view of these perceived benefits and risks, the existing literature suggests a pattern of post-cold war decision-making where incoming democratic regimes erred on the side of caution and frequently made transitional justice concessions to outgoing repressive regimes.9 Even though post-cold war actually reflects a diversity of practices, this phase has been particularly controversial and is characterised as a period of compromise justice. For many transitioning societies, political decision-makers have traded criminal prosecution for amnesty, possibly in combination with a truth commission, in order to secure an immediate peace and stabilise the incoming regime.

Less explored in the literature is the process of how these decisions were made, although the existing literature strongly hints at an unsettling model of state-centric decision-making.10 It seems that under this prevailing model, narrow political elites, usually the main conflict protagonists, have assumed authority on behalf of the affected population to broker policy agreements about justice and accountability for past violations. These founding policy decisions must be made in a rushed, non-consultative, and secretive manner in response to pressing political imperatives including the need to secure an immediate cessation of hostilities, a smooth transfer of power, and the short-term political survival of an incoming regime.

Under this model, political decision-makers evidently have been able to justify victim and civil society exclusion from policymaking on the pretext that public

9 Skaar, above n 4, 1113, 1121-1122, 1125.
involvement in these deliberations would be too divisive and prolong conflict. Political elites have been able to dismiss or subordinate the views and concerns of victims because they have not been perceived as sufficiently well-organised or vocal enough to represent an immediate threat to the stability of an incoming regime.\(^\text{11}\)

The irony of victim exclusion from post-cold war decision-making is that political elites have framed concessionary agreements in victim-oriented language even though victims and victim rights advocates have not been party to formulating these agreements.\(^\text{12}\) Political elites have been careful to publicly rationalise concessionary agreements after-the-fact as vital to the establishment of peace and democracy effectively suppressing victim or public dissent.\(^\text{13}\) Given the likelihood that both governmental and opposition forces are often implicated in past violations, it is extremely difficult to escape the observation that such concessionary agreements have served not only short-term political interests, but also the self-interests of former combatants rather than the interests of other affected constituencies, especially victims.\(^\text{14}\)

If the suggested post-cold war model of state-centric decision-making exists, it clearly poses major equity issues between state and perpetrator interests and those of victims,\(^\text{15}\) which is a major concern for the thesis. In view of the exclusion of


victims and other vulnerable groups from decision-making, these groups are not likely to regard elite brokered agreements as legitimate or relevant to their specific concerns. The fallacy of the state-centric approach is that while it may be conducive to achieving short-term political stability, it almost certainly is counterproductive to long-term democratic peace. The state-centric model is not likely to contribute to building citizen trust in the new democratic state and its institutions, which is viewed as vital to the establishment or re-establishment of democracy. Nor is it likely to resolve underlying political tensions given that marginalised groups such as victims may become sufficiently disaffected in view of their unmet needs that they mobilise at a later stage of the transition and represent a renewed threat to democratic stability.

As noted below, in view of the process-outcome orientation of the thesis, a subsidiary objective for the thesis study is to validate whether this model of state-centric decision-making actually exists.

2 Negotiated Transitions as a Consistent Frame of Reference

In relation to the archetypal dilemma, the author further narrowed the field of inquiry by drawing on Samuel Huntington’s study of third wave political transitions from authoritarian rule toward more liberal-democratic forms of governance that took place globally from the mid-1970s to the 1990s. In his influential study, Huntington identifies three main political transition types that include transformation, transplacement, and replacement. As described by Huntington, in a transformation transition an authoritarian regime takes the lead in

17 See especially Van Der Merwe, above n 11.
18 Alexander, above n 8.
19 See Huntington, above n 5, 113-114, particularly table 3.1 for a list of thirty-five countries that underwent a process of liberalisation/democratisation between 1974 and 1990. See also Huyse, above n 7, 75 who simplifies the three main types as reform, compromise, or overthrow.
bringing about political change through gradual political reform. With a transplacement transition, governmental and opposition forces collectively agree to end conflict and negotiate political change typically because there is a stalemate where neither party has sufficient military power to win an outright victory against the other. Concerning a replacement transition, opposition forces take the lead in bringing about political change generally through military conquest or collapse of the former regime. A fourth less prevalent type of transition is intervention where democracy is imposed by a foreign power.

The theoretical significance of these idealised types for transitional justice decision-making relates to how conflict is terminated and especially who retains political and military power during the process of regime change. Mode of regime transition is believed to be one of the most critical, although not decisive, determinants of policy choice. As José Zalaquett explains, it limits 'the scope of governmental action' given that an outgoing regime may be able to demand the conditions for its own departure or threaten the stability of an incoming regime. The general proposition is that regime replacement by means of replacement or intervention, especially if abrupt and involving force will enable the formulation of a fully retributive transitional justice policy whereas regime change by transplacement or transformation, particularly if gradual, will produce a more conciliatory policy outcome. As Luc Huyse encapsulates:

The widest scope for prosecutions and punishment arises in the case of an overthrow. Almost no political limits exist. Full priority can be given to the thirst for justice and retribution. But a totally different situation comes up if the transition is based on reform or compromise. In that situation the forces of the

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20 Ibid 124-142.
21 Ibid 151-163.
22 Ibid 142-151.
previous order have not lost all power and control. They are to a certain degree able to dictate the terms of the transition. The new elites have only limited options. They may be forced to grant the outgoing authorities a safe passage in return for their total or partial abdication. The need to avoid confrontation becomes the rationale for exchanging criminal prosecution ... for a policy of forgiveness. The successor government and its democracy is too vulnerable to discard clemency. 27

Relative to Huntington’s typology, the thesis study focuses exclusively on transitional justice decision-making in the context of a transplacement political transition where governmental and opposition forces jointly transacted an end to protracted political conflict and repression and commenced a process of peace and democratisation by means of a formal peace agreement.

The utility of this bounded approach is that it seemed reasonable to expect that transplacement (‘negotiated’) transitions would share similar types of characteristics and produce similar types of policy outcomes. Because regime change is brought about through collaborative governmental and opposition group action, it was anticipated that political elites would be moderately constrained in their transitional justice choices, formulating a primarily conciliatory rather than fully retributive policy outcome. This is in comparison with the lesser and more extreme political constraints imposed by the replacement/intervention and transformation transition types.

Using a negotiated political transition as a consistent frame of reference for the thesis study permitted exploration of variation in decision-making practice within one main transition type, addressing an identified research need to refine existing transition typologies and normative frameworks for decision-making. 28 The existing literature recognises that not all negotiated transitions are the same, and yet there has been limited exploration of variation in decision-making practice

27 Huyse, above n 7, 76.
within similar modes of regime transition. The literature has tended to attribute policy difference to varying balance of power dynamics between the three main transition types. There is considerable value in exploring variation within technically similar types of regime transition.

Certainly it was anticipated that the transplacement transition lens would highlight some of the likely tensions between the interests of states and perpetrators and those of victims. Historically, ongoing violence during peace negotiations has meant in many instances that the pursuit of formal legal justice and peace were considered incompatible priorities, resulting in retributive criminal justice being abandoned, or at least delayed, in order to secure peace. The renowned Anonymous submission captures this schism by asking the question of whether the ‘quest for a perfect peace’, in the sense of securing political agreements for retributive justice in peacemaking, should be allowed to prolong war and human suffering.

One of the main reasons for the analytical focus of the thesis study on negotiated regime transitions is that there have been few empirical studies focusing exclusively on the origins, progressive negotiation, and content of transitional justice decisions in relation to peace processes and agreements.


31 To date, there have been few standalone studies focusing exclusively on transitional justice decision-making as part of a negotiated peace process. Margaret Popkin’s, above n 14, detailed study of the rule of law and rectificatory justice in the El Salvadoran peace negotiations and Paul R Williams’, ‘The Role of Justice in Peace Negotiations’ in M Cherif Bassiouni (ed), Post-Conflict Justice (2002) 115, 115-133 briefer examination of retributive justice in the negotiation of the Rambouillet/Paris peace accords for Kosovo are among notable exceptions. Notwithstanding influential studies of the human rights and gender provisions of peace agreements by Christine Bell, Peace Agreements and Human Rights (2000) and Christine Chinkin, above n 16, these analyses focus much more on the substantive content of peace agreements rather than the process of how these agreements were brokered. Rama Mani, Beyond Retribution: Seeking Justice in the Shadows of War (2002) also provides an insightful and detailed study of justice and peacebuilding for eight transitioning societies, but Mani’s primary emphasis concerns the implementation rather than negotiation of rectificatory, legal, and distributive justice provisions.
3 The Process and Outcome of Negotiated Decision-Making

An essential attribute of the negotiated transition lens is that it enables an analytical distinction to be made between the process and outcome of decision-making. The thesis study of the efficacy of past decision-making practice is equally interested in these two interrelated dimensions.

As adapted from the peace literature, the process of transitional justice decision-making is understood to involve every aspect of how political decision-makers reach substantive agreements about justice and accountability for past violations. This includes the specific mechanics of how, where, and when political elites make their decisions, together with who initiates and participates in the decision-making process. On the other hand, outcome relates to the legal framing and specific substantive content of policy and legislative agreements.

It seemed reasonable to expect the process of transitional justice decision-making to share many of the same characteristics of the broader peace and democratisation process of which it is part. Transitional justice decision-making is envisaged as a political process that is dialogic and agreement-directed. As a political exercise, it is presumed that negotiations about transitional justice will minimally involve the main conflict protagonists, while recognising that other persons may be invited to participate in these deliberations and that other levels of

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33 The process dimensions identified for the thesis draw extensively on the work of David Bloomfield, Charles Nupen and Peter Harris, 'Negotiation Processes' in Peter Harris and Ben Reilly (eds), Democracy and Deep-Rooted Conflict: Options for Negotiators (International Institute for Democracy and Electoral Assistance, 1998) 61-120 in terms of the strategic choices political negotiators make concerning negotiation participants; symmetry between participants; the form of negotiations; the venue and location of negotiations; communication and information exchange; defining the substantive agenda; managing the proceedings; timeframes for negotiations; and decision-making procedures.

34 See, eg, Bell, above n 31, 18.
discussion may take place simultaneously. Like the broader peace process of which it is part, it is anticipated that political discussions concerning transitional justice potentially may take many forms ranging from bilateral discussions to multiparty meetings. It is also expected that such deliberations may take place in public and/or private; be formal and/or informal; be direct and/or indirect; and be entirely indigenous and/or sponsored by an external third-party. It is expected as well that the venue and location for discussions will vary and conceivably may take place in a foreign jurisdiction.

The negotiated transition lens is equally instructive because it permits disaggregation of the timing and progressive development of decision-making in relation to the distinct stages and phases typically associated with peace processes and agreements. For the thesis, the author relies generally on the main stages and phases of peace processes proposed by Nicole Ball and especially Christine Bell’s foundational research documenting the negotiation of transitional justice agreements in relation to prenegotiation, framework-comprehensive, and implementing peace agreements. The significance of Bell’s research for the present study is that it illustrates the long-term and progressive nature of transitional justice decision-making as potentially consisting of multiple decisions or agreements negotiated at different stages and phases of a peace process.

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36 See generally Bloomfield, Nupen and Harris, above n 33, 79-82.
38 See generally Bloomfield, Nupen and Harris, above n 33, 82-84.
For peacemaking theory, the significance of the differing stages and phases is that political negotiations generally become more open and inclusive as talks progress. Prenegotiations often are secretive and exclusionary while, historically, the greatest opportunities for public participation seem to be associated with the democratic transition and consolidation phases of peacebuilding. The significance of these stages and phases is the likelihood that political deliberations about transitional justice will originate as early as the preparatory phase of negotiations. It is equally likely that political elites will broker principal policy agreements in the substantive and/or agreement phases of peace negotiations in relation to conflict termination. On the other hand, implementing legislative agreements to give effect to these original policy agreements are more likely to be negotiated in the democratic transition phase of peacebuilding.

In view of these process dimensions, the thesis study examines transitional justice decision-making as part of the broader peace and democratisation process of which it is part but also as an entity that is separate from this process. There is considerable value in examining transitional justice decision-making as a standalone entity given that policy and legislative negotiations may follow but also depart in important ways from the main negotiation process.

In terms of the outcome of decision-making, it was anticipated that, like the broader peace process, political negotiations about transitional justice will produce written and/or unwritten; publicly disclosed and/or secretive; popularly endorsed and/or elite-level only policy and legislative agreements. These agreements may or may not be incorporated as part of a formal prenegotiation, framework-substantive, or implementing peace agreement.

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41 See, eg, Darby and MacGinty, above n 15, 259.
42 Bell, above n 31, 19-35. See generally Darby and MacGinty, above n 37.
In relation to substantive outcomes, a focal concern is whether transitional regimes formulate an official policy, with policy literally defined as a deliberate plan or course of action, to provide justice and accountability for past violations. The author makes a heuristic distinction between founding policy decisions, the design of implementing or enabling legislation to give effect to these agreements, and the implementation of specific institutional interventions. The thesis study of past decision-making practice concentrates mainly on the original policy agreements that international and/or domestic political elites make to confront past violations and, to a lesser extent, the design of implementing legislation to give effect to these agreements. It does not address in any significant way the implementation of specific transitional justice interventions.

The policy focus of the thesis study is a deliberate choice to avoid duplicating an already prolific literature; instead the author has chosen to study a relatively neglected aspect of decision-making. An abundant literature already exists assessing the design and implementation of specific institutional interventions particularly from the vantage point of their compliance with international law, including for the case studies examined by the thesis, and it seemed counter-productive to reproduce an existing body of work. There is a tendency in much of this contemporary research to disregard the original transitional justice decisions that political elites make that establish the overall political vision, and essentially chart the course of action for the subsequent legislative design and implementation of specific institutional interventions.

The mechanics of transitional justice policy negotiations, and the substantive outcomes of these deliberations as an entity that is conceptually distinct from institutional interventions, have received scant attention in the contemporary

43 The implementation of specific institutional interventions is recognised as a crucial dynamic of the decision-making process since non- or delayed implementation can potentially undermine original policy agreements or decisions. However, others have extensively studied the implementation of specific transitional justice interventions, including for the case studies examined by the thesis, and it seemed counter-productive to reproduce this already existing body of work.
literature. Even the most recent international principles offer limited guidance to decision-makers about the vitally important matter of formulating an overarching policy or strategy from the start.\(^4\)

This relative neglect is understandable given that founding political decisions about transitional justice may be privately negotiated and/or abruptly settled with limited political or public debate. They may be impossible to analyse in the absence of personal experience or the perspectives of actual participants in the negotiation process. Absent an unassailable public record, it is difficult to comment on the specific details of policy negotiations. It is possible to study general aspects of the process and timing of these negotiations, that are a matter of public record, as well as the specific content of published agreements.

In view of the foregoing observations, the author applies the process-outcome orientation to the thesis study of past decision-making practice to counterbalance the relative neglect of process in the existing literature. The existing literature is commendable in explaining what transitional justice options are available, and why transitional regimes are likely to choose particular policy options.\(^4\) However, standalone analysis of the process of how political decision-makers reach agreements is a much less obvious theoretical concern. Traditionally, process has been a concern only in the formal legal sense of ensuring that transitional justice interventions comply with due process standards. Attention to process in a more colloquial sense has only recently begun to emerge as part of the mainstream discourse, with some of the latest research focusing in a significant way on process-related issues, such as the role of civil society in transitional justice\(^4\) and the timing and pace of decision-making.\(^4\)

\(^4\) See, eg, Alexander, above n 8, 7, 45, 54, 55.
\(^4\) See generally Alexandra Barahona de Brito, Carmen Gonzalez-Enriquez and Paloma Aguilar (eds), The Politics of Memory Transitional Justice in Democratizing Societies (2001) 320-324, 334-351.
The present study therefore departs from the mainstream literature by treating the process of how transitional regimes make transitional justice decisions as a theoretically significant construct and a focal point of analysis. The author uses the thesis study to obtain some baseline data about the strategic choices political decision-makers make vis-à-vis the specific procedures they use to negotiate policy and legislative agreements. As the present study demonstrates, there is considerable value in applying a process-outcome orientation to the study of transitional justice decision-making given that the way in which decision-making is designed and managed may offer the greatest potential for policy-oriented change in comparison with the relatively fixed qualities of the other political, legal and resource conditions traditionally envisaged as shaping transitional justice choices.48

III Assessing the Efficacy of Past Practice

In this second part of the chapter, the author describes the specific research procedures that were used to study the efficacy of past decision-making practice, including the development of a more theoretically comprehensive diagrammatic model to retrospectively assess the efficacy of past decision-making practice for South Africa and East Timor. This section includes a brief description of the comparative case study approach, the main research objectives and questions posed, and some of the principal caveats associated with the thesis research.

I A Diagrammatic Decision-Making Model

Although theoretically expansive, the proposed standards by themselves are insufficient as an applied assessment tool because they are idealised and fail to

account for the complex and varied peacemaking contexts in which transitional justice decision-making takes place. The author presents the ideal standards as part of a more theoretically comprehensive diagrammatic model, summarised as Figure 1 at the end of this Chapter. This model juxtaposes the ideal standards against the realpolitik environment in which transitional justice decisions are made that presumably mediates the ability of political decision-makers to achieve the ideal standards in practice.

The diagrammatic model is intentionally broad in scope. It describes the main conceptual elements and sets of variables that are theoretically associated with transitional justice decision-making in a peacemaking context. 'Effective' decision-making is understood as a complex interplay between: (1) the proposed ideal standards, representing what is desired in most circumstances, counterbalanced against; (2) the specific negotiation process; (3) the political timing of decision-making in the conflict cycle; and (4) the mediating policymaking environment, which collectively represent what is practicable given the prevailing conditions of an actual negotiated political transition.

Considering each of the four main conceptual elements individually, the diagrammatic model first incorporates the proposed ideal decision-making standards, described in detail in Chapter One.

Secondly, it employs the transplacement regime transition type as a consistent decision-making process to explore how political decision-makers negotiate transitional justice decisions. The theoretical significance of the negotiated regime transition type is the expectation it will produce a moderately conciliatory rather than fully retributive policy outcome because decision-making is the product of compromise between opposing political forces. Equally vital for the present study, using one regime transition type permits exploration of similarity and difference in decision-making practice within technically similar types of transition.

Thirdly, the model locates the process and substantive outcomes of transitional justice decision-making in relation to when they occur, or their timing in a typical peace process. A typical peace process is envisaged as encompassing two main stages of conflict termination and peacebuilding and four distinct phases of: (1) prenegotiations; (2) substantive peace negotiations; (3) endorsement of a framework or substantive peace agreement; and (4) the formulation of implementing agreements to give effect to a framework or substantive peace agreement. While the first three phases are specific to conflict termination, the fourth phase relates to the democratic transition phase of peacebuilding.

Lastly, the model describes the specific mediating policymaking environment, which essentially explains why transitional regimes make particular transitional justice decisions. While each political context is sui generis, the mediating policymaking environment is visualised as encompassing two broad sets of mediating variables. These variables include the prevailing political, legal, and resource conditions that exist at the time of transition as well as the multitude of forward-looking peace and democratisation objectives that typically are at issue in a peacemaking environment.
There is a substantial literature concerning the existing political, legal, and resource conditions that enable or constrain the transitional justice choices of political elites. The main political conditions are thought to include: (a) the severity and consequences of past state repression; (b) balance of power between an outgoing and an incoming regime; (c) political leadership, including individual leadership preferences and the ability of political leaders to strategically manage the question of transitional justice; and (d) public demands for justice and accountability especially by human rights groups.50

A similar number of compelling legal conditions are believed to shape policy choices, the most prominent of which include: (a) the international legal context at the time of transition referring to the substantive and procedural obligations of states and the rights of victims in international law; (b) domestic rule of law capacity, encompassing issues of legal continuity and applicable law as well as the overall legitimacy and functionality of the existing legal system; in addition to the more subjective (c) domestic legal traditions and legal culture including prevailing conceptions of justice.51 Additionally, resource considerations, and especially the financial costs of pursuing transitional justice, are thought to influence the transitional justice policy preferences of political decision-makers.52

There is an equally ample literature concerning the multiplicity of short-, medium- and long-term peace and democratisation objectives that relate to the cessation of hostilities and design of a future society, although there has been limited empirical research concerning the effect of these broader objectives in shaping transitional justice decision-making.53 It is anticipated that transitional justice will have to


51 See, eg, Huyse, above n 7, 74; Rama Mani, above n 49, 94-97.

52 See, eg, Mani, above n 31, 96-97.

53 See, eg, Miall, Ramsbotham and Woodhouse, above n 49, 185-215; John Cockell, above n 49, 24-26.
compete for political attention against these other priorities; therefore, they are incorporated as part of the diagrammatic model.

The diagrammatic model takes a theoretically expansive view of the mediating policymaking environment by simultaneously considering multiple political and legal conditions that potentially influence transitional justice decision-making. This breadth of inquiry is important because up to now the empirical study of mediating conditions typically has been narrow in focus, concentrating on the comparative influence of two or three variables at one time. The study of mediating conditions also has been strongly bifurcated between legal idealists, who tend to study legal norms in isolation from political conditions, and political scientists, who tend to study political conditions separately from legal norms. The range of variables considered in the thesis study is not exhaustive omitting, for example, any consideration of macro-economic conditions.

Together, the ideal standards and diagrammatic model provide the main explanatory framework for the thesis. They are used to systematically investigate, compare, and draw conclusions about the past practice of effective decision-making for two primary case studies, discussed next. Because the standards and model draw broadly on existing transitional justice theory, the author is able to test and refine a range of theories about decision-making through their application to assess the efficacy of past decision-making practice for South Africa and East Timor.  

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54 Variables that were tested concerning existing political and legal conditions at the time of transition included the nature and immediate consequences of human rights violations (severity, proximity, visibility); balance of power; political leadership preferences and strategic calculations; public demands/human rights advocacy for accountability; the international legal context in terms of state obligations and preemptory norms; legal continuity/rupture between regimes extending to domestic justice system capacity; contagion effect or other country transitional justice experience; and domestic legal traditions including historical in-country antecedents and prevailing conceptions of justice. A summary of hypotheses and indicators for these variables is provided as Appendix A.
2 A Comparative Case Study Approach

In order to test the utility of the proposed ideal standards as a comprehensive valuation model, the author uses a comparative case study approach drawing on the political transition experiences of South Africa (1990–1996) and East Timor (1998–2002). The main analytical focus of the case studies is the negotiation of founding policy agreements during the substantive phase of peace negotiations in relation to the termination of conflict. The design of implementing legislation to give effect to these founding policy agreements during the democratic transition phase of peacebuilding is considered but to a lesser extent and then with a predominant focus on the process of legislative negotiations.

The author chose South Africa and East Timor as case studies because they broadly represent negotiated regime transitions where opposing political forces transacted political change from conflict and repression toward peace and democratisation by means of negotiations. Both transitions involved an actual regime change where an outgoing repressive regime formally ceded power to a more liberal democratic interim government. Both transitions encompassed two related yet conceptually distinct stages of, first, peace negotiations culminating in a formal peace settlement followed by, second, a fixed period of interim governance. Transitional justice decision-making followed this dual pattern whereby political elites negotiated founding policy agreements to confront past violations in the context of substantive peace negotiations when the repressive regime was still in power. On the other hand, implementing legislation to give effect to these policy agreements was formulated after a new interim government assumed power. The fact that political decision-makers for both transitioning societies negotiated some form of official written transitional justice policy agreement made their inclusion in the study possible.

55 A third case study on Guatemala was originally part of the thesis study but was excluded because of space limitations.
South Africa and East Timor also were chosen as case studies because they symbolise protracted identity conflicts involving internal state repression.\textsuperscript{56} A racial oligarchy ruled South Africa for 46 years (1948–1994), while Indonesia militarily invaded and occupied East Timor for 24 years (1975–1999). Before the emergence of political repression and conflict both societies were subject to extensive periods of European colonisation. As protracted conflicts, political decision-makers for both societies faced the enormously complex task of not only responding to past direct physical violations, but also formulating transitional justice agreements that contributed in some measure to the broader processes of political and relational transformation aimed at alleviating the underlying structural and cultural causes of violence.

Despite their similarities, the two transitions varied on a number of key dimensions. South Africa was a pure transplacement transition that produced a domestically owned, politically inclusive, and relatively symmetrical peace process. Conversely, East Timor was a combined transplacement-intervention transition that involved a vastly internationalised, politically exclusionary, and asymmetrical peace process. The two transitions also exhibited crucial differences in timing. By the time the East Timor transition began in earnest in early 1999, only five years after the negotiation of South African transitional justice policy, the international legal context had fundamentally changed. In the case of East Timor, it would have been exceedingly difficult for political leaders to adopt an amnesty policy similar to that of South Africa given the emergence of much clearer international legal norms requiring prosecution and prohibiting amnesty for serious international crimes. As discussed in Chapter Five, these variations between the transitions make them profoundly insightful for the comparative study of past ‘effective’ decision-making practice.

3 Research Objectives and Data Sources

\textsuperscript{59} Law and Contemporary Problems 231, 244-246, Table 4.
The case studies were conceived with two research objectives in mind — descriptive-evaluative and policy-oriented. A principal aim of the case studies was to apply the proposed ideal standards by means of the diagrammatic model to systematically assess the efficacy of the process as well as the substantive outcomes of transitional justice decision-making practice. Underlying this descriptive-evaluative objective was the desire to validate the existence of a widely conjectured state-centric model of post-cold war transitional justice decision-making. If the process and outcome of decision-making practice for South Africa and East Timor were determined to fall short of the proposed ideal standards, as they are fully expected to do, a second policy-oriented objective was to highlight lessons learned from these two experiences that can be used to support the thematic shift to a future model of effective (victim inclusive and sustainable) decision-making.

The ideal standards postulating that ‘effective’ transitional justice decision-making should be democratic, methodical, purposive, and legally comprehensive provided the main research questions for the case studies. To answer these questions, the author relied on three data sources including a comprehensive literature review, documentary analysis, and some field interviews. A comprehensive review of the existing literature on transitional justice was undertaken up to the end of 2003, with some updating of materials for 2004 through 2006. The literature review generally canvassed the main thematic pathways associated with transitional justice including: standard decision-making dilemmas; conditions that shape transitional justice choices; the legal and political aims of transitional justice; specific types of transitional justice interventions; and international involvement in transitional justice.57 Particular emphasis was placed on the literature pertaining to transitional justice and peacebuilding. The literature review included a specific focus on the transitional justice experiences of South

57 See generally Barahona de Brito, Gonzalez-Enriquez and Aguilar, above n 45, 320-329.
Africa and East Timor and did not address the 'politics of memory' in any significant way.  

The literature review was complemented by an analysis of primary documentation encompassing peace agreements; international human rights and humanitarian law instruments; inter-governmental resolutions; parliamentary debates; and constitutional and legislative agreements. In order to chart the progression of the formulation of founding policy agreements through to the implementation of specific institutional interventions, the literature review and documentary materials were used to construct detailed chronologies of transitional justice decision-making in relation to the broader peace and democratisation processes for each case study.

Some field interviews were conducted early in the research process. Formal field interviews were undertaken in South Africa in 2001 but were not carried out for East Timor mainly because the necessary research materials were publicly accessible. The South African field interviews were particularly instructive in shaping the analytical direction of the thesis in relation to the question of efficacy. Specifically, one of the interview questions concerned respondent perceptions about whether the South African Truth and Reconciliation Commission ('TRC') had provided effective redress for past violations. A frequent response was that it would take years to assess the actual effects of the TRC. This response was formative in posing the question of whether there is in fact a sufficient body of knowledge that can be used to inform the design of effective transitional justice agreements and interventions from the outset. Unless overtly referenced in the

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58 Ibid 329-334.
59 These chronological tables, summarised as Figures 2 and 3 in the respective South Africa and East Timor case study chapters, are on file with the author.
60 A list of persons interviewed is on file with the author. Field interviews were conducted between 30 September and 19 October 2001 in Johannesburg, Cape Town and Pretoria, South Africa with a range of South Africans involved in the design and implementation of the South African Truth and Reconciliation Commission. A total of twenty-four persons were interviewed. The interviews were supplemented by site visits to gather original documentary materials from governmental and non-governmental agencies.
text of the thesis, these interviews are considered as background material only and are not part of the case study analysis.  

The author was not able to arrange interviews with those persons believed to have been most intimately involved in negotiating South Africa's substantive transitional justice policy agreement and, as noted, interviews were not undertaken in East Timor. An attempt to obtain written disclosure, even of the names of persons who actually negotiated South African transitional justice policy, was not successful. A key challenge concerning the deconstruction of policy negotiations is that these negotiations frequently take place in private producing agreements that may never become part of the public record. The public record is used as a general barometer of historical patterns and events and is not construed as an exhaustive account of policy negotiations and agreements. As discussed in the next chapter, it is exceedingly likely that at least some aspects of transitional justice policy for South Africa were negotiated in private and do not form part of the official public record.

4 Research Caveats

As with any research, the theoretical scope of analysis and procedures used for the thesis study reflect certain assumptions, benefits and limitations. The proposed decision-making standards and diagrammatic model assume that political decision-makers exercise some element of choice in formulating transitional justice policy and legislative agreements. It seemed plausible to build on existing theory and use the specific mode of political transition, in this case a transplacement transition, as a consistent decision-making framework that would to some extent confine, but not determine, the transitional justice policy and institutional choices of political elites.

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61 A copy of the interview schedule is attached as Appendix B.
62 The request and response are on file with the author.
Second, the proposed standards and model are theoretically wide-ranging. An advantage of this theoretical breadth is that it permits equally comprehensive analysis of past decision-making practice vis-à-vis each of the four main conceptual elements and sets of theoretical variables believed to influence transitional justice decision-making in a peacemaking environment. A disadvantage of this breadth is that analysis of past practice for each of the decision-making elements and sets of variables is to some extent broad-brush for each case study. The presentation of case study findings in the individual case study chapters is lengthy and may read somewhat awkwardly as a function of using the diagram to organise findings.

Third, the case studies of past decision-making practice are based on information that is a matter of public record. A key concern is the ability to accurately represent policy negotiations given that these negotiations may take place in private and produce agreements that never become part of the public record.

It is equally important to acknowledge that the research perspective provided for the study is that of an outsider. The author is neither South African nor East Timorese and did not reside in either jurisdiction when transitional justice policy agreements were negotiated. Because the case study research is retrospective, it is subject to decontextualisation. The negotiation of transitional justice policy for South Africa and East Timor took place amidst extreme political violence and instability, and it is difficult to adequately capture this volatility when deconstructing transitional justice negotiations after-the-fact.
Chapter One and Two have established the main explanatory framework for the thesis to advance and test the utility of a more comprehensive and integrated set of standards that define effective transitional justice at an abstract level. In Chapter One, the idea of ‘effective’ transitional justice was introduced as a possible construct to achieve greater theoretical integration between traditional divides of law and politics. Based on a review of paradigmatic shifts in international law emphasising comprehensive victim rights and sustainable intervention, a more theoretically expansive set of ideal standards was proposed with the intention that these standards can be used to either prospectively guide or retrospectively assess ‘effective’ transitional justice decision-making and policy formulation. In the chapter just reviewed, the proposed standards were presented as part of a comprehensive diagrammatic model that can be used as an applied assessment tool to systematically and even-handedly assess the efficacy of past decision-making practice.

The empirical portion of the thesis now follows, which utilises the diagrammatic model to critically assess, compare, and draw conclusions about the efficacy of past decision-making practice for South Africa and East Timor. The thesis study of decision-making practice for South Africa and East Timor constitutes a major part of thesis. The case studies are used to: (1) test the utility of the standards as a comprehensive valuation framework, and (2) highlight lessons learned from these two experiences that can be used to inform the future practice of effective (victim inclusive and sustainable) decision-making.

Chapter Three (South Africa and Cooperative Decision-Making) and Chapter Four (East Timor and Confrontational Decision-Making) present the individual case study findings. The presentation of findings in these chapters loosely canvasses the main conceptual elements presented in the diagrammatic model. These chapters locate transitional justice decision-making in relation to the broader peace negotiation process of which it is part, and the realpolitik conditions
that shaped decision-making practice. They provide separate analysis of the actual process, timing, and substantive outcomes of decision-making. Finally, they assess the extent to which the process and substantive outcomes of decision-making practice for South Africa and East Timor complied with the proposed set of ideal standards. Chapter Five (Comparative Insights from South Africa and East Timor) then provides comparative summary and analysis of these main findings.
broadly on the work of others as expressly acknowledged in Chapter Two.

The main conceptual elements of the proposed decision-making model build

![Diagram: A Diagrammatic Model for Effective Decision Making](image)

*Figure 1: A Diagrammatic Model for Effective Decision Making.*
PART TWO — PAST PRACTICE

Part Two, consisting of Chapters Three through Five, provides the empirical portion of the thesis. In this part, the author tests the standards and model as a comprehensive valuation framework in relation to past decision-making practice for South Africa and East Timor. Chapter Three on South Africa and Chapter Four on East Timor present the main findings for each case study, followed by comparative summary and analysis of these findings in Chapter Five. South Africa and East Timor were very different kinds of negotiated regime transitions, which had enormous implications for their respective achievement of the ideal decision-making standards in practice. These variations make them profoundly insightful for the assessment of past ‘effective’ decision-making practice.

CHAPTER 3
SOUTH AFRICA AND COOPERATIVE DECISION-MAKING

I Introduction

In this chapter, the author presents the main case study findings concerning the South African practice of ‘effective’ transitional justice decision-making. The presentation of chapter findings loosely canvasses the main conceptual elements of the diagrammatic decision-making model — encompassing the ideal standards for effective decision-making versus the actual negotiated decision-making process, decision-making timing in the conflict cycle, and the mediating policymaking environment — but in roughly reverse order.

The chapter begins with an overview of the unique South African political context that provides the setting for transitional justice decision-making. This overview includes brief consideration of the apartheid conflict, as well as the main features of the peace process and mediating policymaking environment that most shaped

1 Consistent with the parameters established in Chapter Two, the case study of South Africa focuses on the negotiation and design of state-sponsored transitional justice policy and to a lesser extent implementing legislation. The chapter does not address the implementation of specific institutional interventions because this topic has been extensively canvassed by others. For a detailed assessment of the implementation of the South African Truth and Reconciliation Commission (“TRC”), see generally Charles Villa-Vicencio and Wilhelm Verwoerd (eds), Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa (2000).
decision-making. Indigenous ownership of the peace process and a largely cooperative approach to negotiations were enormously influential in enabling South African decision-makers to formulate a primarily conciliatory, albeit comparatively well designed, transitional justice policy.

The author then offers a précis of the actual process and substantive outcomes of transitional justice negotiations vis-à-vis their timing in the peace process. Like the broader peace process, transitional justice negotiations were lengthy and gradual, encompassing two main stages of policy formulation (1990–1993) and implementing legislative design (1994–1995).

The author critically evaluates the process and substantive outcomes of transitional justice decision-making from the perspective of the ideal standards proposed in Chapter One. Retrospective assessment suggests that South African decision-makers complied with these standards in two critical respects. Not only did domestic political elites deliberately manage the decision-making process, they also designed politically purposive national amnesty policy and implementing legislation. As a state-centric model of decision-making, the approach fell considerably short of the proposed ideals for democratic decision-making and maximal compliance with state obligations and victim rights in international law.

As a retrospective assessment, the South African negotiation of transitional justice policy and implementing legislation reveals some intriguing themes that are emphasised throughout the chapter.

South African political elites were well positioned to design effective policy and implementing legislation. As a sovereign and influential state exercising an internal self-determination claim, South Africans chose to negotiate peace domestically with limited international intervention. In full control of their peace
process, domestic elites shaped an exemplary representative negotiation model that was broadly politically inclusive. Equally important, at the time of its transition South Africa was a relatively stable state with a functioning infrastructure. It generally had the requisite national capacity and resources to address reconstruction challenges. Domestic political elites were both politically willing and materially able to address past violations.\(^2\)

A prominent characteristic of transitional justice decision-making is that it was a top-down, politically dominated process. The National Party (‘NP’) government and the African National Congress (‘ANC’) were the main power brokers in the decision to have a constitutional amnesty agreement with subsequent legislative expression through the *Promotion of National Unity and Reconciliation Act* (‘Reconciliation Act’).

Political elites defined the substantive agenda for transitional justice negotiations and they carefully structured opportunities for public participation in the legislative design process. In particular, the ANC, first as government ‘in-waiting’ and then as the majority of a coalition government in power, adeptly managed public opinion. The ANC executive, at times through civil society, extensively researched comparative state practice and selectively used this research to campaign for conditional amnesty based on truth disclosure. It tightly orchestrated public debate, portraying a national truth commission as the only reasonable alternative to a Nuremberg ‘style’ prosecution. It cleverly rationalised its institutional preferences by appealing to nationalistic sentiments including the association of *ubuntu* with amnesty, a symbol of African understanding and forgiveness. It also used civil society, which it invited to respond to its proposals, to flesh out the technical details of this purportedly middle ‘South African way’ approach.

A key benefit of the state-centric approach to decision-making is that political elites were able to produce relatively sound substantive outcomes. In the short term, they also were able to generate considerable domestic and international support for a position of conditional amnesty based on truth disclosure.

A major deficit of the state-centric approach is that it arguably suppressed the voices of apartheid victims, including those who wanted retributive justice. It also ensured a superficial level of public dialogue and relatively artificial public engagement in the decision-making process since political elites essentially called on civil society to validate previously elite-brokered agreements.

Consequently, in South Africa, there is no commonly shared understanding of the guiding principles and objectives for granting amnesty. Rather than reducing victim demands for justice and accountability, the Truth and Reconciliation Commission (‘TRC’) apparently has had the inverse effect of inciting a united and well-organised national victims’ rights movement which emerged to campaign for implementation of the TRCs recommendations.

II A Domestically Owned Peace Process

Many scholars regard the South African peace process as an exemplary negotiation model in recognition of its national ownership; political inclusivity; extended and gradually paced timeframes for negotiations; high caliber of political leadership; innovative decision-making procedures; and initiatives for gender inclusion.3 For the present analysis, one of the most remarkable features is that, despite 46 years of state repression and resistance, the main parties to the conflict

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were able to collectively shape an essentially cooperative approach to political negotiations that extended to transitional justice decision-making.

A  Apartheid Repression (1948–1994)

The South African conflict was a protracted identity conflict involving internal state repression. The NP established statutory apartheid in 1948, extending and consolidating previous colonial subjugation by a minority white population of the majority non-white population through a system of enforced racial segregation and discrimination. There is disagreement as to precisely when apartheid ended, given the gradual dismantlement of statutory apartheid between 1974 and 1994. Apartheid is considered to have legally ended on 27 April 1994, coinciding with the first nonracial democratic elections and the Interim Constitution taking effect, thereby demarcating a 46-year period of repression and resistance.

Over the years, numerous anti-apartheid organisations and movements emerged both nationally and abroad to oppose the racially discriminatory and oppressive policies of the apartheid state. The ruling NP government typically responded to such resistance with institutionalised repression, as well as overt and covert violence. In March 1960 the apartheid regime banned leading national anti-apartheid organisations including the ANC and the Pan Africanist Congress (‘PAC’). This compelled these organisations to adopt armed struggle as part of their overall strategy of resistance. Subsequently, many resistance leaders were politically imprisoned or went into exile.

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7 Ibid 128-133.
During the apartheid conflict, the NP regime committed widespread violations of human rights and humanitarian law. Some of these violations were technically legal under the apartheid legal order, while others clearly contravened both international and domestic law. Major types of state violations included land confiscation; forcible relocation; deprivation of citizenship; banning and restriction of persons and organisations; restrictions on freedom of the press; pass arrests; detention without trial; political trials and imprisonment; torture and ill treatment in detention; enforced disappearances; and extra-judicial executions. Most victims of state repression were non-whites who were targeted because of their race/ethnicity and political ideology.

Comprehensive data concerning state violations committed over the entirety of apartheid repression are scarce. Human rights violations were particularly acute in the post-1985 state of emergency periods and especially during formal peace negotiations between 1990 and 1994. As many as 14,000 persons, representing two-thirds of the known number of apartheid fatalities, were killed as a result of political violence during formal negotiations. Much of the 1990–1994 political violence took place in the racially segregated townships between supporters of the ANC and Inkatha. However, the NP is believed to have played a figurative role in covertly fomenting this violence. Individuals from the right wing also used violence at this time in an attempt to destabilise the peace process.

The consequences of internal apartheid repression for South African individuals, communities, and society are incalculable. Apartheid produced a deeply divided racial and ethnic society. Among its many harmful consequences, the system of apartheid resulted in: land dispossession; political exclusion; social tensions; deaths and injuries; widespread poverty; inadequate access to health services; low levels of educational attainment; disruptions to family life; lasting psychological and emotional trauma; and high crime rates. These consequences have been most acute for the majority non-white population but also have specific gendered dimensions.\textsuperscript{14} Even post-apartheid, South Africa continues to exhibit high rates of poverty, inequality, and social exclusion and is among the top ranked 50 countries with a substantial percentage (40% or more) of its population below the poverty line.\textsuperscript{15}

\textbf{B An Exemplary Model of Peace Negotiations (1990-1996)}

Like other post-cold war transitions, several factors precipitated the South African political transition. One of the most significant of these factors was a stalemate by the late-1980s between the apartheid regime and the resistance movements where neither entity had sufficient power to fully subordinate the other, hence the necessity of engaging in a negotiation process.\textsuperscript{16}

The stage was set for formal peace negotiations when a more reform-oriented FW De Klerk replaced PW Botha as President in September 1989. In his renowned national address of 2 February 1990, De Klerk declared the NP government's

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\textsuperscript{16} See, eg, Worden, above n 6, 152-155.
intention to commence a formal process of political negotiations in order to achieve a new constitutional dispensation based on equal rights. De Klerk also unbanned key resistance organisations, including the ANC, and committed to the unconditional release of Nelson Mandela and other political prisoners. Thereafter, the apartheid government publicly engaged in formal talks with the resistance movements.

A prominent attribute of the South African peace process is its domestic ownership whereby national political parties negotiated a comprehensive peace settlement in South Africa with limited international intervention. Domestic political leaders carefully reflected on the peace processes of neighboring states and deliberately chose to negotiate peace and interim governance arrangements domestically with limited international assistance. This meant that South Africans determined the rules and procedures as well as the substantive agenda for political negotiations and were the main participants in these negotiations. Transitional justice negotiations followed this broader pattern whereby South Africans controlled and directly participated in the negotiation of national policy and implementing legislative agreements.

Presumably, domestic control of the peace process was possible because South Africa was a sovereign and strategically important state. Its principal legal claim for internal self-determination did not significantly involve the governments

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18 South African negotiators were relatively unconstrained by external intervention except on questions of economic policy. There seem to have been only two major instances during peace negotiations, once in July 1992 and then in early 1994, when South African negotiators sought international involvement. For a discussion of these incidents, see, eg, Bouckaert, above n 17, 391-397.
of other nation-states.\(^\text{20}\) Thus, the international community seemed willing to adopt a largely hands off approach to political negotiations.

Despite a plethora of UN General Assembly and Security Council resolutions on the apartheid conflict over the years, the Security Council exercised its Chapter VII powers on one occasion only.\(^\text{21}\) Particularly from late-1989 onward, when the General Assembly adopted its *Declaration on Apartheid and its Destructive Consequences in Southern Africa* committing member states to support the peaceful resolution of the apartheid conflict through negotiations, the UN repeatedly expressed its preference to support the domestic resolution of conflict.\(^\text{22}\) Consistent with its Chapter VI approach to the apartheid conflict, the international community did not directly intervene in the South African peace process.

Nor did the UN significantly intervene in transitional justice negotiations with the exception of the *International Convention on the Suppression and Punishment of the Crime of Apartheid* ('Apartheid Convention') that the General Assembly adopted in 1973, which was subsequently characterised by one legal commentator as more propaganda than law.\(^\text{23}\) The main UN decision-making bodies were relatively silent on the question of state accountability for past human rights violations.\(^\text{24}\)

Domestic control was important because it enabled South Africans to design a politically inclusive negotiation process. The peace process is fêted as an


\(^{21}\) Ibid 42-43.

\(^{22}\) *Declaration on Apartheid and Its Destructive Consequences in Southern Africa*, Adopted by General Assembly resolution S-16/1 Annex (14 December 1989).


\(^{24}\) Over the course of apartheid, the Security Council made sparing references in its resolutions to the South African authorities bringing alleged violators to justice in relation to specific incidents such as the Boipatong massacre. See, eg, *Resolution on the Question of South Africa*, SC Res 765, 47 UN SCOR (3096th mtg), UN Doc S/RES/765 (16 July 1992) [para 2].
exemplary representative model of negotiations in recognition of the main negotiation process. Nineteen political parties participated in the first round of formal multiparty talks, known as the Convention for a Democratic South Africa ('CODESA') that took place in South Africa in late-1991 and mid-1992. Twenty-six political parties participated in the second round of formal multilateral talks, known as the Multi-Party Negotiating Process ('MPNP') that were convened in Johannesburg in April 1993 and led to adoption of an Interim Constitution in late-1993. Among its more than 250 provisions, the Interim Constitution incorporated a national transitional justice policy constitutionally guaranteeing amnesty. As observed in Part IV below, the negotiation of amnesty policy to some extent followed, but also departed in important ways from the multiparty negotiation process.

For South Africa, an essential dynamic of political inclusivity was the release and return of politically imprisoned and exiled resistance leaders ahead of formal negotiations. Resistance leaders were included as equal negotiating partners in political negotiations. In retrospect, it seems that the release and return of national resistance leaders was crucial not only as a confidence building measure, but also in enabling these leaders to adequately prepare for political negotiations, including the question of transitional justice.

In view of national ownership, South African political elites were able to control the timing and pace of their transition. Political negotiations were protracted and gradual, which, as mentioned in Chapter One, is generally preferred to the reverse scenario. The official peace process unfolded in two distinct stages of peace negotiations (1990–1993) and constitutional negotiations (1994–1996) over a roughly seven-year period commencing on 2 February 1990 with President De

26 For a summary of its provisions, see, eg, Bell, above n 20, 44-51, 121-134, 206-213, 305-306.
Klerk’s historic address and ending on 10 December 1996 when President Mandela signed the permanent Final Constitution into law.\textsuperscript{27} Formal talks were preceded by an extended preparatory phase of informal peace initiatives, including five-years of secret so-called ‘talks about talks.’\textsuperscript{28} The extended length and gradual pace of negotiations arguably were instrumental to domestic political elites being able to strategically manage the potentially divisive question of transitional justice.

A less tangible but hugely important dynamic of the South African peace process was the generally cooperative approach of political parties to negotiations.\textsuperscript{29} Despite a dramatic upsurge in the level of political violence and deteriorating relations between FW De Klerk and Nelson Mandela over the course of peace negotiations between 1990 and 1994, the negotiating environment was reasonably cooperative. South Africa’s exercise of internal self-determination, where the main political goal was integration, or more specifically the creation of a new \textit{racially inclusive} constitutional democracy, seems to have been a pivotal force in necessitating cooperative relations among national political parties.\textsuperscript{30} Cooperation between the NP and the ANC was particularly evident in the latter half of the peace negotiations, especially from late September 1992 onward when the NP and the ANC progressively reverted to bilateral discussions to reach agreements. This cooperative approach between the two main negotiating parties was formative in the negotiation of transitional justice policy and implementing legislation.

\textsuperscript{27} February 1990 to December 1996, when the permanent Constitution was signed into law, provides the analytical focus because transitional justice policy and legislative negotiations took place during this period. Officially, the South African transition unfolded over nine years encompassing four years of substantive peace negotiations (February 1990–April 1994) followed by a constitutionally mandated five-year period of interim governance (May 1994–March 1999) that included drafting of the Final Constitution (May 1994–December 1996).

\textsuperscript{28} See, eg, Bouckaert, above n 17, 383-388.


\textsuperscript{30} See especially Bouckaert, above n 17, 399-404.
III Skillfully Managed Decision-Making

Contextually speaking, a number of political and legal conditions coalesced to shape decision-making. A key dynamic of South African transitional justice negotiations, however, was that domestic political elites chose to define and deliberately manage the political-legal problem of transitional justice.

A Two-Level Game

As a domestically owned peace process, the political negotiating environment was a relatively straightforward ‘two-level game’ primarily requiring an interactive relationship between national political parties and civil society organisations in the formulation of public policy. Although technically a multiparty process, there were two main negotiating parties; the NP and the ANC, both of which had stable and prominent national leadership. National political parties and their respective leadership, especially the ANC which was widely regarded as the government ‘in-waiting’, were politically willing to address past human rights violations.

FW De Klerk, as leader of the NP, and Nelson Mandela, as leader of the ANC, were eminently capable leaders and their leadership preferences clearly influenced the negotiation of transitional justice. Both leaders enjoyed widespread popular support and a high degree of credibility illustrated by being jointly awarded the 1993 Nobel Peace prize as a testament to their peacemaking abilities. It was helpful as well that the ANC was internationally recognised as a legitimate representative of the oppressed peoples of South Africa.

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32 The NP and the ANC and their respective leadership are the focus of analysis because these two parties had the greatest influence in shaping transitional justice policy.

33 See, eg, Bouckaert, above n 17, 377, fn 9.
The fact that neither De Klerk nor Mandela was personally implicated in past violations lent moral legitimacy to their respective positions on transitional justice. Moreover, there seems little doubt that the conciliatory views of Nelson Mandela, who is described as being without resentment despite being politically imprisoned for 27 years, were especially persuasive in shaping public opinion. It is equally significant that during formal peace negotiations, neither De Klerk nor Mandela personally petitioned for retributive justice, essentially undercutting public momentum for criminal prosecution.

From 1989 onward, when the two leaders adopted the language of reconciliation as part of their ordinary political rhetoric, it was apparent that De Klerk and Mandela were likely to favor a conciliatory approach to transitional justice.

Both leaders were political pragmatists yet strongly guided by a future vision of South Africa as a democratic, racially inclusive state. This ideological imperative of integrating racially divided groups within a new constitutional dispensation was profoundly influential in shaping their views on transitional justice. There is an evident connection between Mandela’s long-term vision of creating a lasting democracy through national unity and reconciliation of racially divided groups, emphasised in several of his speeches leading up to his inauguration as well as his inaugural address, and the foundational values that are expressed for granting amnesty in the constitutional postamble agreement.

1 Internal Balance of Power Dynamics

The respective views of De Klerk and Mandela on transitional justice were strongly mediated by their perceptions of internal balance of power dynamics.

35 See, eg, Allister Sparks, Tomorrow is Another Country: The Inside Story of South Africa’s Road to Change (1995) 233. See also Hamber, above n 29, 227.
The NP and its leadership were arguably in a much stronger negotiation position during the first half of peace negotiations, but began to lose credibility in mid-1992 because of ongoing allegations of state involvement in political violence. On the other hand, the ANC and its leadership steadily gained credibility over the course of negotiations with the September 1992 Record of Understanding considered a definitive moment in shifting power relations that thereafter favoured the ANC.

Even though internal balance of power dynamics consistently shifted in favour of the ANC, when transitional justice policy was negotiated the NP government controlled state law and institutions, including the security forces. Not only did the NP/De Klerk apparently refuse to cede power without a constitutional amnesty agreement in place, it has been persuasively argued that state security forces posed a significant threat of violent reprisal and would have destabilised democratic elections should the successor regime, widely expected to be an ANC majority, have opted to pursue prosecutions. Whether these threats were real or embellished, it seems clear that the ANC/Mandela believed the NP/security forces retained sufficient power to impede the democratic transition process, and thus opted for a more cautious policy approach.

Even after the 1994 election when the ANC won a decisive electoral victory capturing almost two-thirds of the seats in the National Assembly, the ANC was still somewhat constrained during implementing legislative negotiations because it was part of a power-sharing government.

37 See, eg, Hamber, above n 29, 225-226.
38 This finding corresponds with transitional justice theory where, in addition to the importance of leadership preferences, political leaders 'strategically calculate' the risks and benefits associated with pursuing particular policy choices. See especially David Pion-Berlin, 'To Prosecute or Pardon? Human Rights Decisions in the Latin American Southern Cone (Chile, Argentina, Uruguay)' (1994) 16 Human Rights Quarterly 105, 118.
Both as the main opposition party, and then as the majority coalition government in power, the ANC was to some extent constrained in its decision-making because it did not have complete control over coercive state institutions — particularly state security forces and the administration of justice — until well after the Reconciliation Act was enacted. With other political priorities on the agenda, not least of which concerned the adoption of a permanent constitution, presumably the existent balance of forces inhibited the ANC’s ability to pursue a retributive policy. Given the ANC’s ongoing assessment of the balance of forces and identification of amnesty as a potential strategic concession in mid–1992, there seems little doubt that internal power relations was a crucial factor in its preference for a conciliatory policy.

In addition to the ‘fear of destabilisation’ hypothesis, it is important to note that as peace negotiations progressed there was a strong thrust within the ANC to conclude negotiations as quickly as possible. Growing impatience with protracted negotiations seems to have been an additional incentive for ANC negotiators to support amnesty and civil service concessions to avoid further ‘stalling the process’.

2 Legal Continuity

Elite preferences for a conciliatory policy were also strongly shaped by legal continuity given that the transition was a continuous, rather than rupturous, transition. The Interim Constitution provided constitutional continuity between regimes for a five-year period of interim governance during which a Constitutional Assembly would draft a permanent constitution. In addition, retention of the civil service ensured legal continuity.

Like amnesty, a major ANC negotiating concession was retention of the civil service, including the military and police who were guaranteed job security for five years. As Graeme Simpson and Paul Van Zyl submit, retention of the same institutions and individuals previously responsible for enforcing repressive apartheid laws, yet who now were expected to maintain law and order under a new democratic dispensation, presented a ‘delicate political context’ in which to determine the most appropriate institutional means to address past violations.41

Legal continuity had at least two important implications for elite preferences. First, there was a high degree of political and public awareness concerning the existing justice system’s incapacity.42 Although functioning, the inherited apartheid legal system was widely regarded as illegitimate and perceived to be incapable of immediately coping with apartheid prosecutions.43 This perception apparently prompted political negotiators to look outside of the existing criminal justice system to address past violations.

Second, legal continuity meant that implementing amnesty/truth commission legislation had to be designed in such a way that it was compliant with applicable international and domestic law. In this regard, the public record strongly suggests that political negotiators carefully formulated the Reconciliation Act to minimally

42 Kader Asmal and Albie Sachs, one or both of whom are believed to have co-authored the amnesty postamble, wrote prolifically about the shortcomings of the apartheid legal system. Justice system reform was a major element of the constitutional and political reforms instituted by the ANC-led GNU between 1994 and 1999.
43 See, eg, Paul Van Zyl, ‘Dilemmas of Transitional Justice: The Case of South Africa’s Truth and Reconciliation Commission’ (1999) 52 *Journal of International Affairs* 647, 651-653. It remains unclear why some initial high profile apartheid prosecutions were allowed to proceed within a criminal justice system that was widely regarded as illegitimate and had yet to be reformed when part of the rationale for granting amnesty rested on the proposition that the inherited justice system was incapable of such prosecutions. The sequencing of these initial prosecutions ahead of a national truth commission seems illogical and to have served strategic political objectives, especially since political elites subsequently used the failed and extremely costly prosecutions of Magnus Malan and Wouter Basson as evidence that a functioning, yet illegitimate, criminal justice system was indeed incapable of prosecuting apartheid perpetrators.
comply with international legal obligations and withstand a domestic constitutional challenge.\textsuperscript{44}

Political arguments justifying a conciliatory amnesty policy thus centred on the potentially destabilising effects of apartheid prosecutions, as well as the existing justice system’s incapacity to cope with such prosecutions.

\textit{B Strategically Managed Decision-Making}

A less explored facet of the South African transition is the strategic political management of negotiations. The political transition was a highly planned event. Albie Sachs, a former ANC negotiator, encapsulates it thus: ‘It wasn’t a miracle. It didn’t just come to pass. Our transition had been the most willed, thought-about, planned-for-event of the late twentieth century’.\textsuperscript{45} In much the same way, political elites exhibited a high degree of skill in strategically planning for and managing the difficult question of transitional justice.

Domestic political elites defined the substantive agenda for transitional justice negotiations. The NP and the ANC were the main power brokers in the decision to have a constitutional amnesty agreement and its subsequent legislative expression by means of the \textit{Reconciliation Act} that established a national truth commission. Both agreements are widely regarded as top-down, macropolitical agreements. As Hugo Van Der Merwe affirms:

\begin{quote}
The initiative and momentum to establish a TRC in South Africa did not arise as a result of grass-roots and collective civil society groundswell. While there was significant civil society input into the process, the incentive for such a commission was rather the product of party-political concerns and negotiations.\textsuperscript{46}
\end{quote}


\textsuperscript{46} Hugo Van Der Merwe, \textit{The Truth and Reconciliation Commission and Community Reconciliation: An Analysis of Competing Strategies and Conceptualizations} (PhD Thesis,
Political negotiators deliberately planned for transitional justice negotiations. Domestic elites, at times through civil society, extensively researched international law and comparative state practice. This research intersected with transitional justice negotiations in quite significant ways. ANC negotiators relied on comparative jurisprudence and state practice during bilateral policy negotiations to resist NP demands for a general, unconditional amnesty and to pressure for individualised amnesty combined with truth disclosure and victim compensation as the minimally acceptable standards to fulfil international legal obligations. Political elites also relied on comparative state practice to shape the design of implementing amnesty/truth commission legislation, especially in terms of its investigatory mandate.

Over the course of negotiations, political elites publicly campaigned for their transitional justice preferences. Institutional expression of an amnesty agreement through a truth commission was an idea championed by leading figures within the ANC executive and a few influential individuals from civil society. Particularly from May 1992 onwards, mid-way through peace negotiations, the ANC together with select civil society proponents actively promoted the establishment of a national truth commission.

One of the most salient features of political management was the tight orchestration of public debate. The ANC carefully structured the public debate of transitional justice in very narrow and polarised terms portraying institutional options as a finite choice between Nuremberg ‘type’ trials on the one hand, or

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47 This finding on comparative state practice is reasonably consistent with transitional justice theory on the relative influence of ‘contagion effect’ or policy transfer between transitioning societies. See especially Pion-Berlin, above n 38, 123-126

48 Kader Asmal as cited by Alex Boraine, Janet Levy and Ronel Scheffer (eds), Dealing with the Past: Truth and Reconciliation in South Africa (2nd ed, 1997) 34.
collective amnesia on the other. \textsuperscript{49} By presenting transitional justice options in this way it was possible to promote a national truth commission as the only reasonable third option, or “the South African way”, \textsuperscript{50} between the two extremes.

ANC officials used the Nuremberg imagery on numerous occasions during negotiations to provide public assurances that there would be no Nuremberg prosecutions. Once established, the TRC also relied on the ‘Nuremberg or Nothing’ metaphor to justify the granting of amnesty, combined with truth disclosure.

In the words of the TRC:

Through extensive negotiations, which included broad-based public debate, the notion of a blanket amnesty for undisclosed deeds was rejected as an inadequate basis for laying the past to rest. A middle path was required, something that lay between a Nuremberg option and total amnesia. The choice, ultimately, was for amnesty with a considerable degree of accountability built into it. \textsuperscript{51}

It seems clear that political elites also sought to influence public opinion by publicly rationalising the necessity of a compromise amnesty agreement as indispensable to the process of democratic transition.

In the lead up to adoption of the concessionary amnesty agreement, the ANC/Mandela devoted considerable publicity to threats of democratic destabilisation and impending civil war by ultra right wing groups, often at critical

\textsuperscript{49} See, eg, Dugard, above n 9, 281-282 on Nuremberg as a consistent feature of ANC rhetoric. The Nuremberg imagery originates from the ANC’s original plan to seek the prosecution of apartheid officials using the Apartheid Convention. What is so fascinating about the idiom is that it lacked any real explanatory framework and yet became deeply embedded in public discourse. Reduced to Nuremberg ‘style’ trials only, the possibility of apartheid prosecutions seems to have been summarily dismissed without benefit of sustained academic scrutiny, or public debate, essentially on the premise that the South African transition was brought about by a political stalemate rather than military defeat and therefore trials were a practical impossibility.

\textsuperscript{50} De Lange, above n 40, 22-23.

moments during policy negotiations. For example, in mid-August 1993, a day before it publicised its policy statement foreshadowing acceptance of a political amnesty agreement and the establishment of a national truth commission, the ANC executive released a media statement warning of the potential threat of violence and the possibility that it would disrupt democratic elections. The ANC also produced several publicity statements on the threat of a civil war in November 1993, ahead of finalisation of the constitutional amnesty agreement.

This portrayal of violence fed political interests given that negation of international legal obligations to prosecute was contingent on illustrating that the pursuit of retributive criminal justice would pose ‘... a serious threat to vital national interests’. The characterisation of increasing political violence and threats of an imminent civil war supported the permissibility of amnesty in international law based on the doctrine of necessity. There continue to be widely varying views amongst South Africans regarding how real the threats of democratic destabilisation were and whether the ANC possessed sufficient power to completely block amnesty and press for a retributive policy.

Following its adoption, political elites vigorously promoted the constitutional guarantee of amnesty as vital to national interests in the sense that without the compromise agreement the democratic transition simply would not have happened. ANC MP Johnny De Lange contends, ‘...without this specific compromise, there would have been no settlement, no interim constitution, no elections, no democracy and a possible continuation of the conflicts of the past’. In an even more flamboyant expression of this sentiment, Archbishop Desmond

55 De Lange, above n 40, 22.
Tutu, as then ANC-appointed chair of the TRC, characterised the political amnesty agreement as vital to ‘preventing the country going up in flames’.\textsuperscript{56}

Political elites also managed public discourse by justifying amnesty in relation to the traditional African concept of \textit{ubuntu}. The constitutional association of amnesty and \textit{ubuntu}, combined with the TRCs subsequent conceptual imagery of ‘\textit{ubuntu} as restorative justice as African justice’, served to legitimize the political amnesty compromise and delegitimate public demands for retributive justice.\textsuperscript{57}

Political elites controlled public debate in other ways as well, largely determining \textit{when} and \textit{how} members of the public/civil society participated in the formulation of transitional justice policy and implementing legislation.

Like negotiations more generally, political elites provided far greater opportunities for public participation in transitional justice decision-making following the April 1994 elections. Yet even then, participation took place primarily at the behest of the newly elected government, which invited often individual civil society representatives, rather than their organisations, to respond to politically initiated proposals.\textsuperscript{58}

\textsuperscript{56} As cited by Hamber, above n 29, 225. In a similar expression of nationalistic sentiment, Kader Asmal, Louise Asmal and Ronald Suresh Roberts, \textit{Reconciliation Through Truth: A Reckoning of Apartheid's Criminal Governance} (2nd ed, 1997) 20 observe, ‘No rule of international law requires the pursuit of perpetrators regardless of the risk of reducing the body politic to ashes’.

\textsuperscript{57} Richard A Wilson, \textit{The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State} (2001) 9-13, 97-98. The phrase ‘there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for \textit{ubuntu} but not for victimisation’ was interpreted as a rejection of retributive justice and an endorsement for restorative justice. In particular, influential South Africans, such as Archbishop Desmond Tutu, overtly used the \textit{ubuntu} concept to promote the notion that traditional culture is more forgiving and conciliatory and that African justice is non-retributive.

The ANC-dominated coalition government provided two main opportunities for public engagement in the legislative drafting process, briefly in June 1994 in preparation for the draft legislation and more extensively in response to the draft bill following its publication in November 1994. At the same time, public participation in the legislative drafting process was more likely to be at arm's length from the government with one civil society organisation, Justice in Transition, appointed by the Minister of Justice to serve as the main conduit for civil society input into the legislative drafting process.

Given that transitional justice decision-making was a politically dominated process, and with a national truth commission presented to the public as the only reasonable alternative to a Nuremberg ‘style’ prosecution, most civil society engagement in the decision-making process was reactive and focused on fleshing out the technical details of this middle-way approach.

The significance of the strategic political management of transitional justice negotiations is that political elites were able to slowly build public momentum for their institutional preferences and prevent a groundswell of public opposition against a political amnesty agreement. It is important to acknowledge that public debate remained superficial, particularly in terms of exploring competing conceptions of justice and the full range of institutional transitional justice options, both of which were lacking.

It is equally important to acknowledge that the willingness of South African political elites to define the substantive agenda and manage decision-making was related to other factors including indigenous capacity and resources to address national reconstruction challenges, as well as a comparatively restrained campaign particularly by domestic human rights organisations for transitional justice.
Factors Influencing Political Management

The ability of political elites to strategically manage transitional negotiations was very much a function of relative state stability and the nature of state rebuilding requirements. Despite escalating political violence over the course of peace negotiations, South Africa was a relatively stable state with a functioning infrastructure. As a legally continuous, rather than rupturous, transition there were applicable national laws, functioning state institutions, and a civil service.

Notwithstanding the devastating effects of apartheid, including the fact that institutionalised poverty, inequality, and social exclusion have yet to be fully redressed, the immediate reconstruction demand confronting political decision-makers at the time of transition was the reform or replacement of functioning, albeit illegitimate, apartheid institutions. This contrasts sharply with other political transitions where the level of physical destruction and legal discontinuity have been so extreme as to require the complete rebuilding of critical infrastructure together with state laws and institutions.

At the time of its transition, South Africa had the requisite national capacity to address its reconstruction challenges. There was a history of limited democratic governance in addition to a rich legacy of grassroots democracy. There were mature political parties and resistance organisations with stable and highly capable leadership. Resistance organisations such as the ANC, although banned in South Africa before 1990, were internationally recognised and, in their own words, 'ready to govern', having developed an array of transition policies in advance of the democratic transition. As well, the fact that South Africa was a sovereign and powerful state meant that political elites had access to the material resources needed to address national reconstruction requirements.

59 See, eg, Mani, above n 2, 94-100.
The ability of political elites to strategically manage transitional justice was facilitated as well by a comparatively restrained human rights advocacy campaign. National civil society demands for transitional justice were modest and largely compatible with elite preferences, especially those of the ANC. Consistent with the publicised position of the ANC, there was a reasonable degree of consensus amongst domestic human rights organisations broadly rejecting general or self-amnesty by the apartheid regime and favouring some form of accountability for past violations. Over the course of negotiations, typically in response to political pronouncements, several prominent national human rights organisations publicly expressed their support for a truth commission, some form of victim compensation, and disqualification from public service/office.

At the same time, there was no vociferous, and particularly transnational, human rights advocacy campaign for criminal prosecution. Only two international human rights organisations strongly pressured the NP and the ANC for prosecutions, an approach that seemed at odds with the more conciliatory stance taken by many national human rights organisations.

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62 See, eg, Kader Asmal, ‘Truth, Reconciliation and Justice: The South African Experience in Perspective’ (2000) 63 Modern Law Review 1, 8. Still, it is important to stress that apartheid victims were not a homogenous entity and held differing views on the question of retributive justice. While many victims, and a number of human rights organisations, supported the idea of a truth commission, a minority of victims were deeply opposed to amnesty. For a discussion of the complexity of victim views, see, eg, Richard A Wilson, The People’s Conscience? Civil Groups, Peace and Justice in the South African and Guatemalan Transitions (Catholic Institute for Race Relations, 1997) 30, 33.
63 See, eg, Sachs, above n 45, 228-229 on disunity between international human rights advocates and South Africans on the question of amnesty, whose respective interpretations of minimal state obligations in international law seemed to differ. Amnesty International and Human Rights Watch, while supportive of the concept of a truth commission and victim compensation, were quite vocal about the state’s obligation to punish, specifically lobbying the NP and ANC leadership to prosecute alleged perpetrators of crimes against humanity, disappearances, extra-legal executions and torture. Conversely, some national human rights organisations argued that international legal obligations could be fulfilled through a combination of truth disclosure combined with a lesser punitive option, such as disqualification from public service/office.
While openly sharing some agreement about institutional preferences, national human rights organisations did not launch an especially vigorous advocacy campaign. Speaking in 1993, one human rights advocate characterised the domestic transitional justice debate as ‘somewhat superficial’ arguing that among civil society there was ‘... no common position as to the practical ways of dealing with accountability and what mechanisms should be put in place to resolve the matter satisfactorily’. Other scholars similarly acknowledge that domestic human rights organisations were not particularly unified and lacked a ‘popular’ position on transitional justice. A paradox of the South African negotiations is that a united and well-organised domestic victims’ rights movement arose primarily in response to the government’s draft TRC legislation and especially following delayed implementation of the TRC’s recommendations rather than in the conceptualisation and design of originating agreements.

There are several possible explanations for the comparatively moderate advocacy approach of national human rights organisations. Such an approach was historically consistent in the sense that national human rights groups had traditionally exercised considerable restraint in their reporting of apartheid violence. A remarkable feature of much of the civil society portrayal of human rights violations, even in the post-1990 period, was the framing of violations in comparatively neutral terms as ‘political violence’ or as ‘formal and informal repression’.

Additionally, at the time of transition, domestic civil society organisations apparently were plagued by a host of internal organisational challenges including funding and personnel losses that compromised their ability to mobilise an advocacy campaign for transitional justice.

64 Kollapen, above n 61, 6.
65 See, eg, Wilson, above n 13, 199.
66 See especially Van Der Merwe, Dewhirst and Hamber, above n 58, [Lobbying in Response to Draft Legislation; NGO Impact on Conceptualisation and Lobbying].
67 Ibid [Constraints on NGO Involvement in Conceptualisation and Lobbying].
It seems there was a strong perception amongst civil society organisations that transitional justice was a politically determined process.\textsuperscript{68} Political elites progressively marginalised civil society organisations from peace negotiations more generally and largely excluded them from the 1993 bilateral and MPNP negotiations that led inter alia to political endorsement of a constitutional amnesty agreement. At the time transitional justice negotiations took place, the ANC, as chief political contender, is described as being a hierarchical, top-down organisation which limited space for civil society engagement in public policy formulation.\textsuperscript{69}

The reserved approach of national human rights organisations, and especially the absence of a vocal advocacy campaign for criminal prosecution, also seems to be attributable to the nature of political violence that was most proximate to the transition.\textsuperscript{70} Despite a dramatic upsurge in the level of political violence and an enormous number of apartheid fatalities between 1990 and 1994, the role of the apartheid state in this violence was unclear. In contrast with previous decades, the pattern of political violence in the 1990s shifted from being principally vertical to horizontal or so-called 'black on black' violence committed between citizens in the townships.\textsuperscript{71} The role of the state in orchestrating violence during this period was so obscured that even the TRC was unable to draw definitive conclusions about the presence of a so-called 'third force' in its original 1998 report. Given the extremely prolonged length of apartheid violence, there likely was a certain

\textsuperscript{68} Ibid [Role of NGOs in Conceptualisation and Lobbying].

\textsuperscript{69} See Sparks, above n 36, 403.

\textsuperscript{70} Transitional justice theory generally holds that human rights violations that are lengthy, severe and proximate to a political transition are more likely to produce public demands for retributive criminal justice. See, eg, Pion-Berlin, above n 38, 107-111. While all of these characteristics apply to apartheid repression, they seem to have been offset by the hidden role of the state in orchestrating the most severe and proximate violence.

amount of ‘conflict exhaustion’ where members of the public/civil society simply wanted to move forward with the process of nation building.

As a rule, national human rights organisations were broadly supportive of the policy direction set by political elites. At the same time, civil society organisations appear to have been equally strategic in their own advocacy approach, choosing to work within the confines of a politically established agenda and expending their lobby efforts to ensure that implementing legislation was as robust as possible.72 With the exception of the 1996 AZAPO constitutional challenge, together with a few individual challenges to amnesty applications during TRC operations and some post-TRC victim advocacy for apartheid prosecutions, there generally has been limited public pressure within South Africa for retributive transitional justice.

Because of their moderate approach, civil society organisations obtained several important political concessions during the legislative drafting process. Civil society organisations were particularly successful in lobbying the ANC coalition government to ensure that amnesty hearings would be public rather than private, in recommending a public nomination process for commissioners, and in encouraging the TRC to pay greater attention to gender issues.73

At the same time, civil society organisations were less successful in pressuring political elites to limit the remit of an amnesty law to the extinguishment of criminal liability. Nor were they able to secure political endorsement of their proposals to disqualify those implicated in past violations from public

72 See, eg, Wilson, above n 62, 33-35.
service/office, presumably because political deals already had been brokered on these matters.

The political management of transitional justice negotiations and human rights advocacy are explored further in the section that now follows, which offers a précis of the actual process and substantive outcome of transitional justice negotiations in relation to their timing in the peace process.

IV The Formulation of Conciliatory Policy

Like the broader peace process, South Africans negotiated transitional justice policy and implementing legislation domestically using indigenous decision-making forums. For the most part, the international community did not involve itself in these negotiations.

Transitional justice negotiations unfolded over roughly five-and-a-half years in two main stages of policy negotiations (1990–1993) and implementing legislative negotiations (1994–1995). In December 1993, following several months of political wrangling between the NP and the ANC, the MPNP Negotiating Council endorsed a transitional amnesty policy as the final clause, or postamble, to the Interim Constitution. In mid-1995, after extended multiparty negotiations, Parliament approved the Reconciliation Act legislatively giving effect to the constitutional promise of amnesty through establishment of a national TRC.

Although both are compromise political agreements, the process for negotiating amnesty policy appreciably differed from that for implementing legislation. Non-elected political elites negotiated amnesty policy before there was a formal transfer of power between regimes and in an environment of escalating political violence. Balance of power dynamics favored the apartheid government during policy negotiations because it retained control of state law and institutions. In contrast, a democratically elected ANC majority government negotiated
implementing legislation. In view of its decisive electoral victory in April 1994, the ANC was in a considerably stronger bargaining position during these latter negotiations.

Presumably because of political instability, the decision-making process was neither transparent nor inclusive during the first stage of policy negotiations. The constitutional amnesty agreement represents a bilateral pact the NP and the ANC privately brokered outside of the established multiparty process. Corresponding with growing political stability, the second stage of legislative negotiations was much more democratic under the leadership of the ANC-led coalition government. It is important to qualify that the negotiation of both agreements was a politically driven process.


South African transitional amnesty policy is often characterised as a last minute deal. While there is some truth to this claim, in the sense that a constitutional amnesty pact was finalised at the last possible moment, the NP and the ANC began to contest the question of a political amnesty mid-way through peace negotiations. Given that these two parties formulated, debated, and refined their respective policy positions in public, particularly in the interval between August 1992 and August 1993, political leadership preferences were a known entity.

The main dispute between the apartheid government and the ANC over transitional justice revolved around the NP government’s desire to unilaterally impose a self-amnesty without conditions. In contrast, the ANC demanded that only a democratically elected interim Parliament could grant amnesty and that amnesty must be conditional on full truth disclosure and some form of victim compensation.
The political debate over amnesty evolved from previous negotiations to indemnify political prisoners so that they could participate in peace negotiations.\textsuperscript{74} The debate was also very much intertwined with government and ANC sponsored investigations of human rights violations that were initiated during peace negotiations.\textsuperscript{75} In effect, these historical antecedents provided the NP and the ANC with critical opportunities to publicly develop and promote their respective policy positions on the question of amnesty.

The ANC was especially strategic in this regard. Not only did the ANC demonstrate its willingness to investigate allegations of abuse within its own ranks, it deliberately released the findings of its two internal inquiry reports at pivotal moments during peace negotiations. Specifically, the ANC released its Skweyiya Commission findings in October 1992 in an effort to galvanise opposition against the NP’s controversial \textit{Further Indemnity Act}.\textsuperscript{76} The ANC subsequently publicised its Motsuenyane Commission findings in August 1993, providing it with a vital public platform to foreshadow its acceptance of an amnesty agreement and campaign for creation of a national truth commission. The response of the ANC executive to its inquiry recommendations also clearly signaled a preference to accept collective responsibility for past violations and its extreme reluctance to pursue measures for individual accountability.\textsuperscript{77}

1 The Process of Amnesty Negotiations

A prominent characteristic of policy negotiations is that they were mainly bilateral and took place outside of established multiparty forums. It is important to qualify as well that both the NP and the ANC visibly shifted their original positions over the course of these negotiations. These policy shifts were most dramatic for the

\textsuperscript{74} See especially Parker, above n 44, 1, 1-3.
\textsuperscript{75} See, eg, Van Der Merwe, above n 46, ch 5 [Political Context: Not Victory, but Negotiated Transition].
\textsuperscript{76} Berat and Shain, above n 34, 178-179; Bell, above n 20, 275.
\textsuperscript{77} For a detailed discussion of the two ANC commissions of inquiry, see, eg, Priscilla B Hayner, \textit{Unspeakable Truths: Confronting State Terror and Atrocity} (2001) 60-61, 62-64.
ANC, which in May 1992, began to publicly contemplate the idea of a truth commission. Shortly thereafter, the ANC formally relinquished its original demand to seek the prosecution of apartheid perpetrators based on a Nuremberg model.  

In relation to the broader peace process, amnesty negotiations developed in several distinct phases. Political contestation over amnesty was not a main feature of initial peace negotiations. Formal pre-negotiations between 1990 and 1991 were mainly bilateral and focused on the suppression of political violence and the release of politically imprisoned and exiled resistance leaders to participate in negotiations. Nor was political debate of amnesty an obvious feature of the CODESA multiparty negotiations that followed in late-1991 and mid-1992.

Political controversy over a future amnesty publicly emerged in a significant way mid-way through peace negotiations with concentrated debate between August and November 1992. In August 1992, the NP and the ANC began to publicly contest the question of amnesty when the Goldstone Commission of Inquiry called for a general amnesty to facilitate its investigation of political violence. The NP government seized upon the idea and publicly proclaimed its support for a blanket amnesty for the liberation movements, right wing organisations and state security forces that would 'wipe the slate clean and bury the past'. The NP continued to publicly lobby for a blanket amnesty for the remainder of peace negotiations.

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79 See, eg, Du Toit, above n 19, 71.
80 See, eg, Wilson, above n 62, 33.
81 See, eg, Berat and Shain, above n 34, 175-176.
The NP's conflation of the unconditional release of political prisoners, a longstanding and highly divisive issue between the NP and the ANC, with a general amnesty that would include state security forces provoked an extreme reaction from the ANC, which suspended all talks with the government. Nevertheless, the ANC used the opportunity to begin outlining its position on amnesty through a series of press releases. Avowing that it had never supported a general amnesty, the ANC reiterated its demands for the unconditional release of political prisoners and the prosecution of security force members implicated in violence. At the same time, the ANC openly acknowledged the possibility of a future political amnesty. Categorically rejecting any attempt by the apartheid regime to amnesty itself, the ANC stipulated that only a future interim government could legitimately grant amnesty and that amnesty must be conditional on full truth disclosure.

In an effort to revitalise stalled peace talks, FW De Klerk and Nelson Mandela convened a bilateral summit in late-September 1992 producing the historically significant Record of Understanding. The September agreement represented a definitive policy shift for the ANC. Not only did the ANC formally relinquish its original demand to seek the prosecution of apartheid officials, the NP and the ANC apparently reached an 'understanding' that a future interim government could grant amnesty for politically motivated crimes, including government officials. Shortly thereafter, the ANC publicly affirmed its acceptance of amnesty as a potential strategic negotiation concession.

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85 See, eg, Sparks, above n 35, 182-184.
86 As reported by Pierre Claassen, 'Ramaphosa and Meyer Strike A Deal On Release of Political Prisoners' (23 September 1992) [para 14] African National Congress http://www.anc.org.za/anc/newsbrief/1992/news9209.23 at 7 September 2002, days before the summit the chief NP and ANC negotiators agreed to '... an undertaking or understanding regarding the granting of an amnesty by an interim government at some future stage to cover politically motivated crimes by the supporters of other parties, including the government'.
Less than a month after the *Record of Understanding*, the NP government introduced, and then in November 1992 unilaterally passed, new indemnity legislation to settle the additional releases of political prisoners, which had been agreed to at the September summit. The *Further Indemnity Act* provoked enormous controversy, not only for its undemocratic passage but also because it extended indemnity eligibility to members of the state security forces by means of secretive procedures. National and international human rights organisations, together with the ANC, vigorously denounced the legislation for its non-compliance with international legal standards.  

Despite its public renunciation of the *Further Indemnity Act*, the ANC removed all doubt about its position on a future amnesty when, in November 1992, it formally adopted and published its strategic negotiation perspective supporting a general amnesty for past political crimes as a potential negotiating concession.

In the latter part of 1992 until early 1993, the NP and the ANC resumed bilateral negotiations apparently reaching a 'democratisation pact' in early 1993 that set the stage for the resumption of multiparty talks. Although this phase of bilateral negotiations was enormously important, it is unclear what role, if any, political discussions or agreements about amnesty played in these talks because most of these negotiations were held in private. Multiparty negotiations reconvened in

*Truth and Reconciliation Commission of South Africa Report*, above n 51, vol 1, 52 supports this proposition given its observation that, some time around the *Record of Understanding*, the NP government and the ANC agreed there would be ‘... no Nuremberg-type trials for the many human rights violations legally committed in the course of implementing apartheid’ and, secondly, ‘some form of amnesty for politically-motivated offences committed in the past’ (emphasis added).


For a detailed discussion of these negotiations, see especially Bouckaert, above n 17, 392-394.
April 1993. Like the earlier CODESA forums, political debate of amnesty was not an obvious feature of the MPNP.

The amnesty debate publicly resurfaced several months later in August 1993 when the ANC formally responded to the findings of its second internal inquiry. In its response to the Motsuenyane Commission report, the ANC executive advanced its most explicit policy statement on transitional justice. While tacitly endorsing a future amnesty, the ANC called for the establishment of a national truth commission to comprehensively investigate human rights violations committed by ‘all quarters’ and ensure appropriate victim compensation. Consistent with its earlier negotiation position, the NP publicly rejected the ANC’s call for a national truth commission and continued to press for a blanket amnesty.

Notwithstanding their comparatively lengthy discussions, the NP and the ANC did not officially resolve the question of a future amnesty until early December 1993 roughly three weeks after the MPNP had approved the draft Interim Constitution. Although agreeing in principle there would be a constitutional guarantee of amnesty, the NP and the ANC could not agree on the particulars of an agreement forcing the two parties to abruptly negotiate a final agreement under enormous political and time pressures.

The NP and the ANC privately negotiated a constitutional amnesty pact in the brief interval between 18 November, when the MPNP endorsed the draft Interim Constitution, and 6 December when the negotiating parties reconvened to sign the Interim Constitution so that it could be forwarded to Parliament to be enacted as law. Apparently because of time constraints, negotiators drafted the amnesty pact outside of established multiparty procedures in what is described as a 'closed and

91 Lourens Du Plessis as cited by Boraine, Levy and Scheffer, above n 48, 109.
secretive process'. The NP and the ANC presented their bilateral proposal to the
MPNP Negotiating Council at the last possible moment on 6 December 1993,
which endorsed the amnesty agreement with 'sufficient consensus'. For
different reasons, the Democratic Party ('DP'), the PAC, and some traditional
leaders opposed the agreement. The PAC, for example, preferred 'retribution' for
apartheid crimes.

By most accounts, the constitutional amnesty proposal was a 'make or break deal'
since final approval of the entire interim constitutional package depended on the
NP and the ANC reaching such an agreement. It is difficult to escape the
observation that last minute negotiation of the amnesty agreement conferred
certain advantages to the NP and the ANC. It forced multiparty endorsement of a
potentially contentious amnesty concession in order to avert collapse of the entire
constitutional package. Its private bilateral negotiation and the late hour of its
presentation to the MPNP Negotiating Council also foreclosed any possibility of
open and extended public debate and therefore any upsurge of opposition against
the agreement.

Political and public reaction to the constitutional amnesty agreement in the days
immediately following its publication were muted, perhaps because the agreement
was expected and remained largely consistent with the previously stated positions
of the NP and the ANC. It also seems likely that finalisation of the Interim
Constitution overshadowed the last minute inclusion of an amnesty clause.

92 Wilson, above n 57, 8.
93 See especially Du Toit, above n 19, 73. In view of this rule, the NP and the ANC did not need
the agreement of any other political parties to secure passage of their amnesty proposal.
94 South African Press Association, 'Multi-Party Talks Ended with New Amnesty Agreement' (7
at 18 September 2002.
95 See, eg, Van Der Merwe, above n 46, ch 5 [Political Context: Not Victory, but Negotiated
Transition].
In terms of international reaction to the constitutional amnesty agreement, as John Dugard aptly remarks, there was never any suggestion by the UN '... that those responsible for the worst features of apartheid should be brought to international justice'. As a rule, the international community did not interfere in the national negotiation of transitional justice policy and broadly supported South Africa's decision to establish a TRC even though this meant that amnesty would be granted for serious international crimes.

2 The Constitutional Amnesty Agreement

The drafters of the 'National Unity and Reconciliation' postamble to the Interim Constitution cleverly framed amnesty as a binding, yet non-conclusive, constitutional commitment. The postamble agreement constitutionally guaranteed that a future government would grant amnesty for past political offences while leaving it to a democratically elected Parliament to adopt a law, within specified parameters, to give effect to the amnesty agreement.

The entire National Unity and Reconciliation postamble is attached for reference as Appendix C but the essence of the agreement provides:

In order to advance reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offenses associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 [October] 1990 and before 6 [December] 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed (emphasis added).

The postamble agreement was a political compromise between the NP and the ANC. The NP achieved its objective of a constitutional guarantee of amnesty

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96 Dugard, above n 78, 291.
97 Lourens Du Plessis as cited by Boraine, Levy and Scheffer, above n 48, 108-109, 141.
while the ANC avoided a general or self-amnesty by the apartheid government. The ANC also ensured that a future Parliament determined the specific procedures for granting amnesty, opening the way for adoption of its policy preference of conditional amnesty based on full truth disclosure. Not only was this approach wholly consistent with the ANC’s previously stated positions of August 1992 and August 1993, it also was incredibly strategic because it meant that a democratically elected government would be called upon to legitimate an essentially privately negotiated bilateral amnesty pact.

The significance of the postamble agreement is that it provided a coherent national public policy statement on transitional justice that established the basic parameters for subsequent legislative negotiations.


A democratically elected Parliament adopted the Reconciliation Act in mid-1995, legislatively giving effect to the postamble agreement. As noted, the legislative development process was significantly more transparent and inclusive than negotiation of the constitutional amnesty agreement. This was partly a function of a more stable political environment. The first nonracial democratic elections had taken place resulting in a smooth transfer of power from the apartheid regime to an interim power-sharing government. Internally, political violence had begun to abate and, in view of its peaceful transition to democracy, South Africa no longer constituted a threat to international peace.99 Greater inclusivity also was a function of changed political leadership with the ANC-dominated GNU generally embarking on a more publicly consultative approach to constitutional negotiations at this time.100

99 Dugard, above n 78, 291.
1 The Process of Legislative Negotiations

Although the constitutional amnesty agreement did not prescribe a particular mechanism for granting amnesty, in view of the ANC's previous stance on conditional amnesty based on truth disclosure and an expected electoral victory, many South Africans anticipated the establishment of a truth commission.\textsuperscript{101}

The idea for a national truth commission originated during policy negotiations and is attributed to Kader Asmal, a senior ANC negotiator, who publicly contemplated the idea in a May 1992 lecture.\textsuperscript{102} Specifically, Asmal argued that a Nuremberg 'type' trial was inconsistent with negotiated political change. Drawing on the comparative experiences of other countries, including those that had established truth commissions, Asmal asserted the need to acknowledge the past, oppose a general amnesty, and compensate the victims of apartheid.

Thereafter, the ANC became the main political proponent for a truth commission with the ANC executive, apparently after significant internal debate, publicly endorsing this institutional preference in August 1993. From August 1993 onward, the ANC worked internally to refine the truth commission concept and in conjunction with select individuals from civil society publicly promoted the idea.\textsuperscript{103} By the time the postamble agreement was finalised in December 1993, there was considerable political and public momentum for the establishment of a national truth commission.

Once the ANC majority government assumed power in May 1994, it announced its intention to enact amnesty/truth commission legislation. From the outset, there

\textsuperscript{101} Van Der Merwe, above n 46, ch 5 [The Legislative Process].
\textsuperscript{103} Kader Asmal and others from civil society, including Alex Boraine, published several articles and gave interviews on the topic of a truth commission especially from October 1993 onwards. Justice in Transition Database obtained through personal communication with Ms Paddy Clark, Personal Assistant to Dr. Alex Boraine (Cape Town, 11 October 2001). Copy on file with the author.
was political opposition to the creation of a truth commission. Two national political parties, the IFP and the Freedom Front ('FF'), strongly opposed the idea and continued to lobby for a general amnesty.\textsuperscript{104} The IFP, for instance, opposed a truth commission on a number of grounds including insufficient national debate on whether this was the most appropriate institutional mechanism to address past violations. Implementing amnesty/truth commission legislation was potentially quite divisive with right wing political parties threatening to destabilise the democratic transition process over this issue well after the 1994 elections.\textsuperscript{105}

Because of its potential divisiveness, the ANC deliberately steered the legislative negotiation process. As part of a coalition government, the ANC evidently went out of its way to garner broad-based political support by offering legislative concessions to the other six political parties in order to secure passage of the controversial amnesty/truth commission legislation.\textsuperscript{106} Members of the ANC executive, including President Mandela and Justice Minister Dullah Omar also expended significant efforts over the course of legislative negotiations to publicly reassure members of the right wing and the security forces that the proposed truth commission would not be 'Nuremberg like' nor would it be retributive.\textsuperscript{107}

The ANC carefully steered legislative negotiations in other ways as well. Justice Minister Omar purposefully chose to have the legislation drafted outside of the regular departmental process relying instead on a small-handpicked group of advisers and one non-governmental organisation, Justice in Transition, to take the lead in preparing a draft legislative framework.\textsuperscript{108} This informal drafting

\textsuperscript{106} For an in depth analysis of legislative negotiations, see especially Van Der Merwe, above n 46, ch 5.
\textsuperscript{108} For elaboration of this arrangement as well as his role and that of Justice in Transition in the legislative negotiation process, see especially Boraine, above n 104, 11-75.
arrangement sought to avoid political complications while simultaneously coordinating civil society input through one NGO. 109

As mentioned in Part III above, the ANC majority government provided two main opportunities for public engagement in the legislative drafting process, briefly in June 1994 in preparation for the draft bill and more extensively in response to the draft bill following its publication in November 1994.

In early June 1994, the Justice Minister announced his government’s intention to establish a TRC and invited public submissions in preparation of the draft bill. 110 The timeframe for submission of public comments was very brief, likely because the government intended to introduce draft legislation to Parliament by August 1994. Nonetheless, some human rights organisations did in fact prepare detailed submissions. 111

After significant delays, cabinet approved a draft bill in October and it was published as the Promotion of National Unity and Reconciliation Bill in November 1994. 112 Once published, the draft bill was subject to an extensive review process by means of the parliamentary Portfolio Committee on Justice, which invited and received submissions from a wide-range of civil society and political groups and convened public hearings between late-1994 and early-1995. 113

109 Van Der Merwe, above n 46, ch 5 [The Legislative Process].
112 Parker, above n 44, 2, fn 11.
113 See, eg, Van Der Merwe, above n 46, ch 5 [The Legislative Process].
Civil society organisations lobbied vigorously in response to the draft bill. Major concerns included the breadth of the proposed amnesty provisions, private procedures for granting amnesty, limited victim rights provisions, and insufficient punitive measures for perpetrators.\(^{114}\) Although most successful when their lobbying interests intersected with those of the ANC, civil society organisations are perceived to have played an important role in influencing several amendments to the draft bill and particularly in ensuring stronger victim rights provisions.\(^{115}\)

The bill was introduced into Parliament on 17 May 1995 where, after extensive debate, it was passed with majority support.\(^{116}\) President Mandela signed the Reconciliation Act into law in July 1995 after slightly more than a year of legislative negotiations. Following enactment of the Reconciliation Act, civil society organisations launched an influential advocacy campaign to shape the selection process for commissioners. Based on their recommendations, the government engaged in a public nomination process resulting in the appointment of 17 commissioners at the end of November 1995.

The TRC officially commenced operations at the end of 1995. Originally intended to function for a period not exceeding two years, the commission was extended in modified form to accommodate the finalisation of amnesty hearings following the October 1998 publication of its five-volume report. Human rights violations and reparations were the focus of its first three years of operation (1996–1998), while amnesty hearings were extended and became the commission’s principal concern until the end of May 2001. The government formally dissolved the TRC on 31 March 2002 after approximately six-and-a-half years of operation. Two codicil volumes of the Report concerning amnesty and victim findings were subsequently published in March 2003.

\(^{114}\) Ibid ch 5 [Lobbying in Response to Draft Legislation; TRC Resolution of Key Controversies].

\(^{115}\) Ibid ch 5 [Treatment and Definition of Victims].

\(^{116}\) Republic of South Africa, Debates of the National Assembly 1995 (23 January to 2 June) vol 5, (Wednesday 17 May 1995) cols 1-2124 at 1339-1442. Five parties, including the ANC, NP, DP, PAC and African Christian Democratic Party (‘ACDP’) supported the Reconciliation Act while the FF opposed the legislation and the IFP abstained.
Figure 2, at the end of the chapter, summarises the timing of transitional justice policy and legislative negotiations.

2 The Reconciliation Act

Like the constitutional amnesty agreement, the Reconciliation Act was a compromise political agreement. As part of a power-sharing government, the ANC is considered to have made two major concessions during legislative negotiations. First, the ANC accepted a much more restricted temporal mandate than it originally advocated. The TRC was limited to investigating human rights violations from 1960, rather than 1948, onward. Second, the ANC agreed to a narrow legalistic definition of human rights violations that essentially confined the investigatory and reparative, although not the amnesty, remit of the TRC to extra-legal physical violations, defined to include killing, abduction, torture, and severe ill treatment. This definition effectively precluded the consideration of human rights violations, in particular the system of institutionalised apartheid as well as the many everyday human rights violations such as forced removals and pass arrests experienced by a vast majority of the non-white population that were contrary to international law, yet considered legal under the apartheid legal order.

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118 See Dugard, above n 9, 278-279. One of the main legal concerns was whether the investigation and/or prosecution of acts considered legal under the laws of the apartheid regime would violate the principle of legality and prohibitions against retroactive application of the criminal law. Ostensibly, to avoid procedural legal difficulties and especially the constitutional issue of retroactivity, legislative drafters limited the remit of the TRC’s investigation and reparation, but not amnesty mandate, to gross violations of human rights. These so-called ‘dual character’ violations of killing, abduction, torture, and severe ill treatment were both internationally and domestically criminally proscribed at the time of their commission.
The limited mandate of the TRC has been extensively criticised, as has the inequitable legislative structure of the commission.\textsuperscript{119} The significance of the \textit{Reconciliation Act} is that it provided a unified or integrated legislative framework to address past violations.

The strengths and limitations of the \textit{Reconciliation Act} are considered further in the next section.

\textbf{V \ Autocratic-Transformative Transitional Justice}

A main research aim for the thesis was to assess the extent to which the actual process and substantive outcome of decision-making complied with the proposed ideal standards for effective transitional justice decision-making. South African transitional justice policy and implementing legislation complied with the ideal standards in two fundamental respects. Both amnesty policy and implementing amnesty/truth commission legislation were methodically designed and politically purposive. Nevertheless, the constitutional amnesty agreement and the \textit{Reconciliation Act} fared less strongly in terms of their democratic negotiation and comprehensive recognition of state obligations and victim rights in international law.

Transitional justice policy for South Africa is therefore characterised as autocratic because the decision to grant amnesty was made through essentially undemocratic means. The constitutional amnesty agreement and the \textit{Reconciliation Act} are recognised for their transformative potential in view of the fact that political elites deliberately designed both agreements to contribute to the relational and structural transformation of South African society.

A Methodically Designed

As discussed in some detail in the sections above, to their enormous credit, South African political elites deliberately managed transitional justice negotiations.

South African negotiators formulated transitional justice policy and implementing legislation in South Africa using indigenous negotiating forums and procedures. On the surface, transitional justice policy and implementing legislation appear to have been contextually responsive to the unique apartheid conflict. Among other things, both agreements recognised the profound harm caused by past violent conflict and its indescribable consequences for South African society. Both agreements also were premised on the traditional African concept of *ubuntu* to justify a conciliatory, rather than retributive, approach to addressing past violations.

Commensurate with the extended length of political negotiations, a prominent feature of transitional justice negotiations is that domestic political elites were able to gradually formulate policy and implementing legislation over an extended period. The NP and the ANC developed their respective positions on amnesty and truth disclosure over several months, mid-way through formal peace negotiations, particularly in the interval between August 1992 and August 1993. Even though the MPNP Negotiating Council endorsed the bilateral NP-ANC amnesty proposal as a last minute constitutional deal in December 1993, this agreement was widely expected.

Like amnesty policy, domestic political elites negotiated implementing legislation over a period of several months following the formal transfer of power to an interim government in April 1994. As part of a power-sharing government, the ANC engaged in coalition politics offering legislative concessions to other political parties in order to secure passage of the controversial amnesty/truth commission legislation. Furthermore, the Minister of Justice carefully managed
the legislative drafting process through a politically chosen yet arms length legislative drafting committee and one NGO, Justice in Transition.

For South Africa, the extended length and gradual pace of transitional justice negotiations enabled the NP and the ANC to progressively formulate, publicly test, and refine their respective policy positions on transitional justice and, most importantly, slowly build national and international momentum for a final compromise policy of conditional amnesty based on truth disclosure. At least initially, there was limited opposition to the constitutional amnesty agreement and relatively widespread support for the idea of a truth commission. The fact that domestic political actors determined national-level transitional justice policy and implementing legislation also seems to have contributed in some measure to the overall legitimacy and initial acceptance of these agreements by South Africans and the international community.

In formulating transitional justice policy, domestic political elites carefully studied and built on comparative transitional justice experience as well as previous in-country experience with indemnity legislation and investigatory commissions. While political negotiators appear not to have assessed victim needs or justice system capacity ahead of policy formulation, arguably an important shortcoming of the design process, they certainly were well aware of the many deficiencies of the existing apartheid legal system. Political elites used the perceived illegitimacy of the apartheid legal system and the extraordinary financial costs associated with pursuing apartheid prosecutions to publicly justify the decision to grant amnesty and address past violations through an adjunct TRC.

Because of methodical planning, peace negotiators devised a coherent national-level public policy that established a deliberate course of political action for

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120 For a detailed analysis, see, eg, McCarthy, above n 54, 203-245. See also Parker, above n 44, 1-8.
transitional justice. As a constitutional agreement, political negotiators strategically designed amnesty as a compulsory, yet open-ended, commitment obliging the future government to grant amnesty while enabling it to determine the specific institutional arrangements for doing so. This binding, yet non-conclusive, arrangement advantaged the NP and the ANC because it required a democratically elected Parliament to endorse an essentially privately brokered amnesty deal by means of national legislation.

Deliberate political management extended to the design of implementing legislation. In accordance with the constitutional provision that Parliament adopt 'a law', legislative drafters opted to give effect to the postamble agreement by means of one national law. The Reconciliation Act legislatively interpreted the amnesty agreement as an innovative multidimensional strategy that combined the individualised and conditional grant of amnesty with the comprehensive investigation of past gross violations of human rights alongside non-compulsory provisions for victim reparation and ameliorative reforms. A primary advantage of the unified legislative framework was that it provided some level of coordination among, and adequate resourcing for otherwise disparate transitional justice interventions of amnesty, truth recovery, and reparations.

The legislative drafters seem to have been relatively calculating in their configuration of the TRC structure. Only decisions of the Amnesty Committee to grant or refuse amnesty were legally binding, precluding the initiation of criminal and civil proceedings against amnestied perpetrators. The Human Rights Committee could only initiate inquiries and make findings while the Reparation and Rehabilitation Committee was limited to making non-compulsory recommendations to the President and Parliament concerning reparation to victims and measures to prevent the recurrence of future gross violations of human rights.\textsuperscript{121}

\textsuperscript{121} See Mamdani above n 119, 176.
Nor was the legislation fully comprehensive or integrated in view of its omission of any express reference to criminal prosecution. Although the Reconciliation Act is characterised as a comprehensive and integrated legislative framework, it failed to decisively address this issue. The Act only addressed criminal prosecution in relation to a request to temporarily postpone and/or recommence trial proceedings against amnesty applicants pending consideration of their amnesty application, the extinguishment of criminal liability for successful amnesty applicants, and the inadmissibility of incriminating evidence obtained by the TRC in criminal proceedings.¹²²

This legislative omission created two specific problems. Firstly, the TRC was intended to be complementary to, and function concurrently with, the existing legal system.¹²³ The absence of statutorily defined coordinating arrangements resulted in an often-tense relationship between the operations of the TRC and the ordinary justice system. Secondly, despite an apparent legislative presumption that individuals who did not seek or were denied amnesty would be liable to criminal and/or civil proceedings following conclusion of the TRC proceedings, the Reconciliation Act did not legislatively prescribe the routine initiation of such proceedings.¹²⁴ The legislative drafters either advertently or inadvertently left the door open, so to speak, to further governmental amnesties in an effort to bring closure to the past.

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¹²³ De Lange, above n 40, 28-29.
¹²⁴ In 1998, the TRC recommended the prosecution of alleged perpetrators of gross violations of human rights who did not seek or were denied amnesty. However, it is only quite recently, on 17 January 2006 that the South African government announced its policy on the post-TRC prosecution of apartheid perpetrators. See BuaNews, 'Policy on Prosecution of Apartheid-Era Human Rights Violators Unveiled' (17 January 2006), AllAfrica.com, http://allafrica.com/stories/200601180126.html at 23 January 2006.
B Politically Purposive

A second positive attribute of the amnesty postamble and the *Reconciliation Act* is that both agreements provided some indication of the aims and objectives for intervention.

Given its inclusion as part of the Interim Constitution, South Africa's substantive peace agreement, transitional amnesty policy plainly functioned as a subset of a much broader transition policy and in relation to far-reaching peace and democratisation objectives. The amnesty postamble and its derivative implementing legislation, the *Reconciliation Act*, were part of a comprehensive package of major constitutional and political reforms aimed at the relational and structural transformation of South African society. The *Reconciliation Act* establishing the TRC was only one of several macro-political human rights reforms.125

As suggested by the title of the constitutional postamble agreement, the principal aim for granting amnesty was to advance national unity and reconciliation. More specifically, the postamble stipulated that amnesty would be granted to advance reconciliation and reconstruction.

The *Reconciliation Act* affirmed and expanded on the original constitutional intent of advancing national unity and reconciliation by non-retributive means. While the Act did not explicitly define the TRC as a restorative justice model, it did introduce the importance of restoring the human and civil dignity of victims and the commission subsequently cast its work as a restorative justice model. The Act also counterbalanced the sole constitutional emphasis on amnesty with the

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125 As Mark Gannage, above n 14, [Appendix D] suggests, other state-sponsored transitional justice interventions included criminal trials, the establishment of a new constitutional order, and land restitution. For a comprehensive discussion of other human rights reforms, see also Bell, above n 20, 50, 206-213, 243-245.
importance of publicly establishing the truth about past human rights violations to prevent their future recurrence and repairing the harm done to victims.

Like the amnesty policy, the *Reconciliation Act* legislatively conceived of the TRC as an extraordinary and politically purposive measure. The proclaimed legislative purpose of the TRC was to ‘... promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past’.\(^{126}\) Although identifying multiple reparative-preventive functions for the TRC,\(^{127}\) the Act conceived of the commission and structured its activities in relation to serving three principal objectives. First, the TRC was to comprehensively investigate and report on past gross violations of human rights. Second, the TRC was to facilitate the individualised grant of amnesty for acts associated with a political objective in exchange for full truth disclosure. Third, the TRC was to repair the harm to victims of gross violations of human rights, by, among other things, providing victims with an opportunity to recount their experiences and recommending reparative and preventive measures to restore the human and civil dignity of these victims.

The advantage of politically articulated objectives, such as those for the amnesty postamble and the *Reconciliation Act*, is that it is possible to assess the efficacy of transitional justice interventions against their stated policy and institutional objectives. A number of scholars have in fact carried out such impact assessments of the South African TRC.\(^{128}\) One of the principal criticisms of the *Reconciliation Act* is that the TRCs overall aim of advancing national unity and reconciliation was ambiguous and subject to multiple understandings.\(^{129}\)

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\(^{127}\) See generally ss 3, 4 *Promotion of National Unity and Reconciliation Act 1995*, above n 122.


\(^{129}\) Ibid 64.
C Partially Autocratic, Partially Democratic

In spite of the benefits conferred by methodically designed and politically purposive policy formulation, a serious deficiency of South African transitional justice policy is that political elites formulated the policy by essentially undemocratic means.

As documented above, the constitutional amnesty pact was a bilateral proposal of the NP and the ANC that was suddenly and privately negotiated outside of established multiparty negotiation procedures. The late hour presentation of the bilateral proposal to the Multiparty Negotiating Council, combined with its presentation as a deal breaker for the entire interim constitutional package, not only compelled political endorsement of the agreement but also circumvented open and extended public debate. MPNP endorsement was sufficient, rather than unanimous.

A disconcerting feature of policy negotiations is that two sets of former combatants effectively negotiated a ‘private settlement to a public dispute’.130 While elected, the apartheid government was widely regarded as an illegitimate governing authority. Even though the ANC was internationally recognised as a legitimate representative of the South African peoples, and many of the ANC negotiators were themselves the direct victims of apartheid repression, the fact remains that those individuals who negotiated amnesty policy were self-appointed. They evidently failed to consult with and did not necessarily represent the interests of apartheid victims in their negotiations.131 The bilateral negotiation of amnesty policy certainly was at odds with the transformational political intent of the agreement.

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131 See, eg, Wilson, above n 13, 198; above n 57, 8.
The failure to consult with or otherwise engage victims and civil society representatives in the negotiation of the constitutional amnesty agreement was a major shortcoming of the decision-making process. The drafters of the amnesty postamble presumed to speak on behalf of victims by setting aside victimisation and retribution in favour of understanding and reparation. The exclusion of victims from the decision to grant amnesty also stands as a critical deficit of the TRC's characterisation of itself as a restorative justice model given that a guiding principle for restorative justice is the free and voluntary consent of victims to participate in such a process.\textsuperscript{132}

In relation to transitional justice negotiations, it is virtually impossible to escape the observation that the amnesty agreement was mutually beneficial to the NP and the ANC given the implication of both sets of forces in past political violence. It would not have been politically advantageous for either the NP or the ANC to expose their respective forces to prosecution. Kader Asmal's characterisation of the amnesty postamble as a 'collective act of reassurance to each other' when the agreement was made public certainly seems to lend support to this observation.\textsuperscript{133}

The private negotiation of amnesty policy is equally troublesome. It is likely that the amnesty postamble was not a standalone agreement but the public representation of agreements privately brokered by the apartheid government and the ANC between mid-1992 and early December 1993. It is difficult to reconcile the scope of the amnesty proffered by the \textit{Reconciliation Act} with the constitutional postamble since nothing written in the postamble agreement

\textsuperscript{132} \textit{Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters}, UN Doc E/2000/INF/2/Add.2 (27 July 2000) [para 7]. The free and voluntary consent of victims and perpetrators is held as a fundamental requirement for the use of restorative justice processes, extending to withdrawal of consent at any time during the proceedings.

required such a broad grant of amnesty.\textsuperscript{134} If these other agreements exist, they are not part of the official or written public record.

In contrast to policy negotiations, the process for negotiating implementing legislation was considerably more democratic. A democratically elected coalition government negotiated national amnesty/truth commission legislation over an extended period of several months. By most accounts, parliamentary debate of the draft legislation was extensive,\textsuperscript{135} and the bill was subject to numerous amendments before being endorsed by most although not all members of the interim GNU.

During the legislative negotiation process, the ANC government provided two important opportunities for the public to make submissions. As the designated conduit between government and civil society, Justice in Transition facilitated much of the civil society input in the legislative drafting and review process by means of preparatory conferences, seminars, and public education campaigns. It

\textsuperscript{134} McCarthy, above n 54, 194-248. The constitutional postamble provided only that a future Parliament would have to grant amnesty within certain minimal parameters. The written agreement did not specify a particular form of amnesty, whether general or individualised, or the breadth of amnesty that would be granted, whether extinguishing of criminal and/or civil liability. In fact, civil society organisations lobbied for conditional amnesty, which might have included a punitive element such as disqualification from office, some form of contrition, or the requirement that a perpetrator make individual reparations. They also pushed for the restriction of indemnification to criminal and not civil liability, or if extended to civil liability then only the extinguishment of individual and not organisational or state liability. Despite these advocacy efforts, the amnesty provisions of the \textit{Reconciliation Act} were exceptionally broad essentially providing that, subject to certain eligibility criteria being met, anyone could apply for amnesty for an act associated with a political objective so long as the act was committed between 1 March 1960 and 10 May 1994. Conditional on full disclosure of all relevant facts about the offence, the Amnesty Committee could then grant amnesty. If an applicant was granted amnesty, individual criminal liability, together with individual, organisational and state civil and vicarious liability was extinguished. This exceedingly broad grant of amnesty is anomalous because, although consistent with earlier national indemnity legislation, it was not required by the written postamble. If one accepts Berat and Shain's, above n 34, 182-183 description of events, however, it seems probable the broad grant of amnesty was part of an \textit{unwritten} agreement that was privately negotiated by the NP and the ANC during the 18 November to 6 December 1993 hiatus when the ANC evidently agreed to a comprehensive, though individualised, amnesty in exchange for the establishment of a truth commission. This \textit{unwritten} agreement stipulated that the new parliament would be required to pass an amnesty law within six weeks of assuming power providing \textit{indemnity from both criminal and civil liability} for acts associated with a political objective.

See, eg, McCarthy, above n 54, 196-197, fn 68.
also made representations on behalf of numerous NGOs to the parliamentary Portfolio Committee on Justice suggesting specific amendments to the draft bill.

Some observers, including the TRC as cited above, depict the legislative drafting process as broadly participatory. As Figure 2 at the end of this chapter illustrates, it is important to qualify that public participation occurred late in the decision-making process and then largely at the behest of government which invited civil society organisations to respond to, rather than initiate, proposals. The ANC majority government effectively controlled the substance of debate and determined who, when, and how civil society participated in the legislative negotiation process.

The ANC approach to public consultation at this time has been criticised for its artificiality because the government called on civil society to legitimate previously elite-brokered agreements. Additionally, the political structuring of transitional justice discourse around predetermined options ensured a superficial level of public debate. Political elites carefully managed public deliberations by presenting amnesty as a necessary condition for democratic transition ‘to prevent the country from going up in flames’ and the TRC as the only reasonable third option between the polarities of a Nuremberg trial or collective amnesia. Civil society advocacy efforts were politically steered to develop the technical details of this purportedly middle-way ‘South African’ approach.

For South Africa, an unanswered question is whether greater public consultation and more meaningful debate might have generated other transitional options as well as more sustained public, and especially victim, support for a final policy outcome.

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136 See n 51 above.
137 Wilson, above n 57, 27.
D Minimal, Not Maximal Compliance

There is diversity of opinion concerning the compliance of South African transitional amnesty policy with international law. Still, if one reads the constitutional postamble together with the Reconciliation Act, a persuasive argument can be made that the state minimally complied with its affirmative obligations in international law. The South African government was not maximally compliant, particularly in terms of giving full and equitable consideration to the rights of victims.

The political elites who negotiated transitional justice policy and implementing legislation, many of whom were lawyers, were well aware of South Africa’s international legal obligations. The public record strongly suggests that political negotiators deliberately designed both agreements to minimally comply with international legal obligations and withstand a constitutional challenge.

Like many repressive states, South Africa had minimal treaty obligations although there likely was a sufficient legal basis to pursue apartheid prosecutions had political elites chosen to adopt this course of action. At the time of its transition, international legal norms compelling a state to prosecute or extradite and prohibiting amnesty for the most serious crimes in international law were unsettled. The political negotiators who designed the constitutional amnesty agreement carefully researched international law and comparative state practice. They relied on an absence of state practice establishing a definitive duty to prosecute, emphasising in particular the widespread practice of granting amnesty, especially in some Latin American countries.

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138 For a detailed discussion of state treaty obligations, see especially Bell, above n 20, 41-44.
139 Dugard, above n 78, 277-311.
140 Those who sought to legally justify the constitutional amnesty agreement relied heavily on Latin American state practice granting amnesty and have been criticised for their selectivity and failure to adequately consider comparative state practice supporting national prosecution, particularly in neighboring states such as Ethiopia and Rwanda. See, eg, Dugard, above n 9, 265-266, which critiques the AZAPO Constitutional Court judgment in this regard.
In 1995, the establishment of a national truth commission that was empowered to grant individualised and conditional amnesty, comprehensively investigate and publicly report on past violations, and make recommendations concerning state reparations to victims and possible measures to ensure non-repetition was legally innovative and likely fulfilled existing state obligations to investigate, punish, repair and prevent future violations.

While the Reconciliation Act facilitated the granting of amnesty, it simultaneously authorised the comprehensive investigation and public reporting of gross violations of human rights, as well as the recommendation of state reparations for victims and ameliorative measures to prevent the recurrence of future violations. The Act limited amnesty to past political offences that were defined in accordance with internationally prescribed criteria. Amnesty was individualised and conditional, requiring individual perpetrators to apply and fully disclose all relevant facts associated with their offence, thus departing from the previous legally dubious blanket or general amnesties granted in other jurisdictions. The amnesty process incorporated a punitive element through public disclosure and the identification of perpetrators and their offences. Moreover, the Reconciliation Act avoided complete impunity because it did not preclude the prosecution of alleged perpetrators who chose not to apply for, or who were refused, amnesty. The fact that, first, a democratically elected Parliament subsequently validated the constitutional amnesty agreement by means of national legislation and, second, the international community broadly supported the establishment of the TRC, lent enormous legitimacy to the combined amnesty-investigation-reparation approach.141

141 See, eg, Dugard, above n 78, 291-308.
The constitutional amnesty agreement would have been legally defensible based on the doctrine of state necessity. The necessary legal grounds for this doctrine were foreshadowed by political arguments that the amnesty agreement was essential to avert the possibility of a civil war or political destabilisation by members of the security forces and that an illegitimate criminal justice system could not possibly cope with a large number of apartheid prosecutions.

Collectively these factors suggest that the constitutional amnesty agreement together with the Reconciliation Act were minimally compliant with international law. The AZAPO Constitutional Court judgment, which upheld the legality of the constitutional postamble and the Reconciliation Act, affirms the minimal state compliance proposition.

From the point of view of maximal state compliance with its international legal obligations, the public constitutional postamble as a standalone agreement gives considerable pause because it was a partial, rather than comprehensive, policy agreement. The postamble compelled only the granting of amnesty. It contained no express commitment by the state to investigate past human rights violations other than a veiled reference to ‘tribunals’ as a possible mechanism for granting amnesty. Even though the agreement emphasised ‘a need for reparation’ rather than retaliation, it is arguable that reparation was expressed as a foundational value, rather than as a binding constitutional commitment. Agreements on truth recovery and reparation were either implicit or verbally made during private bilateral negotiations and therefore non-compulsory. Even though the Reconciliation Act subsequently gave statutory recognition to the investigation


and reparation of gross violations of human rights, the Interim Constitution did not require the GNU to honor these obligations.

The non-compulsory dimension of transitional justice policy was in fact replicated in the legislative structure of the TRC and became particularly vexatious when the payment of individual reparation grants to victims was, in the words of the TRC, 'considerably delayed' and then awarded as only a fraction of the amount originally proposed by the TRC.\textsuperscript{144}

Relative to victim rights, the constitutional amnesty agreement and the Reconciliation Act fell short of a fully victim-based approach. Neither agreement was based on an actual assessment of victim needs or preferences. As noted, the amnesty agreement in particular can be criticised for politicising victimhood because it presumed to speak on behalf of victims by setting aside 'victimisation' in favor of \textit{ubuntu} without the benefit of directly consulting victims.\textsuperscript{145}

Even though civil society was relatively successful in its lobby efforts to ensure greater legislative recognition of victim rights and the Reconciliation Act incorporated multiple references acknowledging the importance of victims, and to some extent recognised a victim's substantive rights to truth, reparation, and guarantees of non-repetition, the amnesty provisions obviously infringed a victim's substantive right to justice. In instances where the TRC granted amnesty to a perpetrator, a victim's right to formal legal justice, including the right of access to domestic criminal and civil judicial processes, was denied.

\textsuperscript{144} \textit{Truth and Reconciliation Commission of South Africa Report} (2003) vol 6, 96. In April 2003, almost five years after the TRC first proposed the policy, President Mbeki announced that the government would provide a once-off grant of R 30 000 for each officially designated victim. This amount fell considerably short of the original benchmark proposed by the TRC of R 21 700 per victim per annum over six years for an approximate total grant of R 130 200 per victim.

This issue was the crux of the 1996 AZAPO legal challenge, wherein the applicants challenged the constitutionality of the amnesty provisions of the Reconciliation Act on the basis that it denied their constitutional right 'to have a justiciable dispute settled by a court of law'. Although the Constitutional Court determined the amnesty provisions to be constitutional, the extraordinarily broad grant of amnesty offered by the Reconciliation Act, extinguishing both criminal and civil liability, was potentially quite problematic as a matter of international law because it foreclosed not only a victim's right to justice, but potentially to reparation had the state refused to meet its reparative obligations. It was all the more disquieting because nothing written in the constitutional postamble agreement required such a broad grant of amnesty. As Emily McCarthy maintains, while the 1993 constitutional amnesty agreement likely was supportable by the doctrine of state necessity, it is highly doubtful whether the broad grant of amnesty authorised by the 1995 Reconciliation Act could be justified on the same basis given that South Africa had made the peaceful transition to democracy.

The exceedingly broad grant of amnesty offered by the Reconciliation Act has been extensively criticised, as have the lack of contrition and limited punitive requirements for successful amnesty applicants. The granting of amnesty to alleged perpetrators was conditional only on their full and public truth disclosure. There were no additional requirements for contrition, for the imposition of

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146 In 1996, in Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others 1996 (8) BCLR 1015-1048, the families of several prominent anti-apartheid activists who were killed during apartheid repression challenged the legality of the amnesty provisions arguing inter alia that the section 20(7) amnesty provisions of the Reconciliation Act infringed their section 22 constitutional right 'to have justiciable disputes settled by a court of law or, where appropriate, other independent or impartial forum'. The Constitutional Court judgment upholding the amnesty agreement has been widely criticised, especially for its failure to adequately consider international law, prompting some commentators to characterise the decision as a political, rather than sound legal, judgment. See especially John Dugard, 'Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question' (1997) 2 South African Journal on Human Rights 258, 258-268.

147 McCarthy, above n 54, 201-202.

148 Ibid 244-248.
additional punitive sanctions, such as disqualification from public service/office, or for individualised reparation to victims.

Beyond substantive rights, it is important to acknowledge that the Reconciliation Act did grant some procedural and participatory rights to victims. The TRC process gave victim’s a voice in the truth recovery process by affording victims an opportunity to relate their own victimisation experiences. Yet, the procedural entitlements of victims’ were somewhat limited in scope given that victim consent was not a condition for an amnesty application to be considered or for amnesty to be granted or refused. A number of victims actively opposed their perpetrator applications but could not statutorily prevent the Amnesty Committee from hearing such applications or granting amnesty.

As legislatively defined by the Reconciliation Act, the rights of victims and the rights of perpetrators were vastly inequitable. This legislative inequity was manifested in the comparatively broad definition of perpetrators who were eligible to apply for amnesty for an ‘act associated with a political objective’ as opposed to a more restricted definition of victims as essentially those individuals who suffered harm as the result of a ‘gross violation of human rights’. The most

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149 Van Der Merwe, above n 46, ch 5 [Treatment and Definition of Victims] attributes the incorporation of these procedural rights for victims to civil society lobbying efforts. Procedural protections for victims included principles for fair treatment and non-discrimination, provisions for the creation of a limited witness protection program, and special measures to protect the identity of victims.

150 Direct participatory rights were recognised insofar as victims were afforded an opportunity to relate their own accounts of victimisation, although for most victims this was limited in practice to a written form, rather than being able to testify in person.

151 Amnesty hearings were generally open to the public. Victims were entitled to be notified about, be present at, and have their views and submissions represented at amnesty hearings, which meant that they could oppose amnesty applications. They also were entitled to be notified when amnesty was granted or refused. Still, these statutory provisions fell considerably short of a victim consent requirement.

152 Van Der Merwe, above n 46, ch 5 [Treatment and Definition of Victims]. S 1(1)(xix), Reconciliation Act, above n 122, defined ‘victims’ to include:

(a) persons who, individually or together ... suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights- (i) as a result of a gross violation of human rights; or (ii) as a result of an act associated with a political objective for which amnesty has been granted; (b) persons who, individually or together ... suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human
overt manifestation of this inequity was in the structure of the TRC itself whereby decisions of the Amnesty Committee granting or denying amnesty to perpetrators was legally binding, while the Reparation and Rehabilitation Committee was limited to making recommendations to the President concerning the substantive rights of victims to reparation and guarantees of non-repetition.

In the case of South Africa, the constitutionalisation of some aspects of transitional justice policy, in this case amnesty, to the exclusion of other elements, such as truth recovery and reparation, created an imbalance in implementation between what the state was legally required to do and that which was politically dispensable. If transitional justice scholars and practitioners accept that it is permissible for governments to meet their international legal obligations through a variety of measures other than exclusively prosecution or extradition, then surely equivalent constitutional or legal status must be accorded to each of the chosen institutional measures. This is especially so in instances such as South Africa where the granting of amnesty results in the broad and involuntary, for victims at least, extinguishment of criminal and civil liability.

E A Postscript Concerning Ongoing Demands

Throughout its lifespan, the TRC was the subject of much adulation and criticism, as well as an assortment of legal challenges that included various attempts to prevent publication of its report. Despite the fact that a broad cross-section of South African society and the international community initially supported the TRC, political and public disillusionment with the TRC grew over the course of its operations.

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rights, as a result of such person intervening to assist persons contemplated in paragraph (a) who were in distress or to prevent victimization of such persons; and (c) such relatives or dependents of victims as may be prescribed.

155 See Truth and Reconciliation Commission of South Africa Report, above n 51, vol 1, 174-200; above n 144, vol 6, 54-82.
From the outset, at least some victims were not supportive of the TRC as evidenced by the AZAPO legal challenge to the *Reconciliation Act* that was initiated by the families of several prominent anti-apartheid victims. Victim and civil society dissatisfaction visibly increased when the ANC government failed to take decisive steps to implement the TRC’s recommendations, particularly to pay individual monetary reparation grants to the more than 21,000 victims formally recognised by the commission.154

An essential paradox of the TRC is that, rather than reducing victim demands for justice and accountability, it has had the inverse effect of inciting a united and well-organised domestic victims’ rights movement to campaign for the implementation of its recommendations.155 Post-TRC, the Khulumani Support Group emerged in a significant way to pressure the government for the payment of state reparations to apartheid victims.156 When unable to obtain redress domestically, it sought satisfaction by means of apartheid litigation in the United States, much to the annoyance of the South African government. Apartheid victims and survivors also have vigorously opposed additional government amnesties/pardons and lobbied for the prosecution of non-amnestied perpetrators.

The overall contribution of the TRC intervention to the advancement of national unity and reconciliation is thus rather mixed and a topic of considerable debate. Major deficiencies of the TRC process include its failure to address institutional apartheid or produce senior level accountability.157


155 See generally Khulumani Support Group for Apartheid Survivors http://www.khulumani.net/component/option,com_mamboezine/itemid,17/ at 16 January 2006 for a discussion of post-TRC lobbying and advocacy activities. The Khulumani Support Group represents about 44,000 apartheid victims and survivors and has played a decisive role in pressuring the government to ensure the payment of individual reparation grants to victims.

156 See generally Amnesty International and Human Rights Watch, above n 154, 2-3, 10-15.

To date, the most enduring contribution of the South African TRC seems to be that it provided a public platform for victims to directly tell their stories. As Brandon Hamber explains:

The publicity generated by the TRC and the telling of stories to the nation seem to be what the survivors (including those who were ambivalent about other achievements of the TRC) felt was most useful about the process. In this context, the power of having a denied truth recognised must be appreciated. The TRC also created, at least during its lifetime, a legitimate social space for the voices of victims to be heard, as well as creating open public debate about the needs and concerns of victims.\(^{158}\)

One of the lessons of the South African transitional justice experience is that there are no quick solutions to addressing past violations. Victim demands for justice and accountability have endured well beyond the TRC. Despite the many positive attributes of South Africa's innovative approach to transitional justice, it seems that these continuing demands are potentially attributable in part to flaws in the way that transitional justice policy negotiations were conducted and in original policy design.

VI Conclusion

This chapter presented the main case study findings concerning the South African practice of effective transitional justice decision-making. Because South Africa was a sovereign and relatively stable state with a functioning infrastructure, domestic political elites were comparatively well-situated to design effective transitional justice. In fact, decision-making practice complied with the proposed ideals for methodically and purposively designed policy and implementing legislation.

The amnesty postamble was cleverly designed to compel the granting of amnesty, while ensuring that a democratically elected Parliament validated this essentially privately brokered deal by means of national legislation. The Reconciliation Act was equally innovative, legislatively interpreting the constitutional promise of amnesty as a multidimensional and integrated strategy of individualised and conditional amnesty combined with non-compulsory provisions for truth recovery and state reparation.

Both agreements were overtly politically purposive. As part of the Interim Constitution, transitional justice policy plainly functioned as a subset of a broader transition policy, in relation to far-reaching reconstruction objectives and other macropolitical human rights reforms. Both agreements deliberately conceived of transitional justice as contributing to the relational and structural transformation of South African society by advancing national unity and reconciliation. The Reconciliation Act also conceived of the TRC as serving a number of specific reparative-preventive human rights objectives.

The difficulty with the South African approach to decision-making is that it was state-centric. A small group of NP and ANC negotiators decided on behalf of the affected population that the pursuit of criminal prosecution was counterproductive to the main political objective of achieving a stable, racially inclusive
constitutional democracy, and so chose a conciliatory policy of conditional amnesty based on truth disclosure. As a state-centric model, the South African approach fell considerably short of the proposed ideals for democratic decision-making and maximal compliance with state obligations and victim rights in international law. The South African case study raises three main policy concerns that are the focus of discussion in Chapter Seven.

A first concern is the absence of proper victim and justice needs assessment ahead of policy formulation. While it is clear that political elites extensively researched comparative state practice and were well versed in the deficiencies of the inherited apartheid justice system, there is no evidence that victim needs or justice system capacity were formally assessed before transitional justice policy and implementing legislation were formulated. Nor is there any evidence that traditional justice practices were assessed. Despite political use of *ubuntu* in the amnesty postamble and the *Reconciliation Act* to support a conciliatory, rather than retributive, policy approach, there appears not to have been any rigorous assessment of whether amnesty and truth recovery were accepted traditional practices. There have since been some major academic challenges to the proposition that African justice is one-dimensional and restorative, rather than retributive.

A second concern relates to whether political elites so strategically managed transitional justice negotiations that it was manipulative. The public record strongly suggests the ANC selectively used comparative state practice to publicly campaign for its institutional preferences of conditional amnesty based on truth disclosure. It tightly orchestrated public debate by presenting transitional justice options as a finite choice and portraying a truth commission as the only reasonable alternative to a Nuremberg ‘type’ prosecution. It cleverly rationalised its institutional preferences by appealing to nationalistic sentiments, including the association of *ubuntu* with amnesty as a symbol of African conciliatory justice.
The ANC controlled the public debate of transitional justice in other ways including effectively determining when public participation in the decision-making process took place, who from civil society participated, and how civil society participated. Public participation took place comparatively late in the decision-making process after a constitutional amnesty agreement was brokered and there had been a formal transfer of power. Public participation was largely indirect or at arms length from government and channeled through one politically chosen NGO. Public engagement also was primarily reactive with civil society organisations generally invited to respond to, rather than initiate, policy and legislative proposals. The strategic political management of transitional justice negotiations ensured broad-based support and minimal opposition to political preferences for conditional amnesty and truth disclosure in the short term it also suppressed the views of those victims who wanted retributive justice.

A third related concern involves the absence of a commonly shared understanding concerning the guiding principles and objectives for transitional justice intervention. A principal criticism of the TRC is that its legislative aim of advancing national unity and reconciliation was ambiguous and subject to multiple understandings.

The absence of a commonly shared understanding seems to have resulted from the overall lack of open and extended public debate about transitional justice. A critical deficit of the South African approach to decision-making is that public debate remained superficial, particularly in terms of exploring the full range of transitional justice options and competing conceptions of justice. Moreover, the ANC-led GNU approach to public consultation was to some extent artificial given that the government called on civil society to legitimate previously elite-brokered political agreements.
For South Africa, an unanswered question is whether greater public consultation and debate might have generated other transitional options as well as more sustained public, and especially victim, support for a final policy outcome.

In the next chapter, the author presents the main findings on the practice of transitional justice decision-making for East Timor. Even though it too was a negotiated political transition, the East Timor transition was vastly internationalised and represents a much more confrontational approach to decision-making than was the case for South Africa. While international intervention enabled external political elites to formulate a primarily retributive policy, the policy was far less compliant with the proposed ideal standards for effective transitional justice decision-making than was the case for South Africa.
Figure 2: Temporal Deconstruction of Transitional Justice Decision-Making for South Africa
CHAPTER 4
EAST TIMOR AND CONFRONTATIONAL DECISION-MAKING

I Introduction

In this chapter, the author presents the main case study findings concerning the practice of ‘effective’ transitional justice decision-making for East Timor. Like the previous chapter, the presentation of findings canvasses the main conceptual elements of the diagrammatic decision-making model proposed in Figure 1, encompassing the actual negotiated decision-making process, the mediating policymaking environment, decision-making timing in the conflict cycle, and the ideal standards for effective decision-making.

The chapter begins with an overview of the unique political context that provides the backdrop for transitional justice decision-making. This overview includes brief consideration of the Indonesia-East Timor conflict as well as the main features of the peace process and mediating policymaking environment that most shaped transitional justice decision-making. The author then offers a précis of transitional justice negotiations, which, like the broader peace process, unfolded in two main stages of policy negotiations (1999-2000) and the design of implementing legislation (2000-2001). After this, the author critically evaluates the process and substantive outcomes of transitional justice decision-making from the perspective of the ideal standards proposed in Chapter One.

1 In the chapter, East Timor is referred to as East Timor before its May 2002 independence and as Timor-Leste post-independence. Consistent with the parameters established in Chapter Two, the case study focuses on the negotiation and design of state-sponsored transitional justice policy and, to a lesser extent, implementing legislation. The chapter does not address the implementation of specific institutional interventions in any significant way as this topic that has been extensively canvassed by others. For a detailed assessment of implementation, see, eg, Conflict, Security Development Group, ‘East Timor Report’ in POR Report: A Review of Peace Operations — A Case for Change (2003) [chapter six] Kings College London http://ipi.sspp.kcl.ac.uk/index.html at 17 April 2003.
Like the previous case study, retrospective assessment of transitional justice decision-making for East Timor reveals some important themes that are emphasised throughout the chapter.

East Timorese political leaders were not well situated to design effective transitional justice policy. As a geopolitically vulnerable non-self-governing territory exercising an external self-determination claim against Indonesia, a sovereign and influential state, East Timor's peace process was vastly internationalised. With the acquiescence of Portugal and the UN, the Indonesian government, and not East Timorese leaders, effectively controlled the peace process including its abrupt timing and pace. There are few redeeming qualities associated with the peace process, which, at the insistence of Indonesia, excluded the direct participation of East Timorese leaders.

Unlike South Africa, where political elites were both politically willing and materially able to address past violations, genuine political commitment on the part of the UN, the Indonesian government and East Timorese leaders, including the material capacity to address the pattern of serious violations of human rights and humanitarian law committed in East Timor over the Indonesian occupation was in short supply.¹

In the case of the East Timor conflict, the negotiating parties, particularly the UN and Indonesia, were not genuinely committed to pursuing transitional justice for its own sake. A prominent characteristic of transitional justice negotiations is that policy agreements were unplanned and incidental to achieving more pressing political objectives. More precisely, in the context of its Chapter VII deliberations to intervene in the conflict, the UN resorted to the threat of an international criminal tribunal to leverage Indonesian compliance on other matters. At the

¹ Adapted from Rama Mani, 'The Rule of Law or the Rule of Might? Restoring Legal Justice in the Aftermath of Conflict' in Michael Pugh (ed), Regeneration of War-Torn Societies (2000) 90, 99-100.
same time, the international community lacked the political resolve to act on its threat, essentially deferring to the transitional justice preferences of Indonesia while subordinating those of East Timor.

A confounding factor for the strategic political management of transitional justice was the extreme violence and vast state of disrepair in East Timor at the time of transition. East Timor’s decision to separate from Indonesia produced not only a legally rupturous, but also a politically violent, transition. In addition to the urgency of addressing the precarious humanitarian situation, the state apparatus was essentially collapsed requiring the complete rebuilding of state laws, institutions and infrastructure, including the justice system. As an economically weak, non-self-governing territory, East Timor clearly lacked the necessary material resources to address these enormous reconstruction challenges, including past violations, and was heavily reliant on the international community for assistance. Evidently, the international community was unwilling to invest the necessary financial resources to establish another ad hoc tribunal opting instead to support national investigation and prosecution as a more cost-effective measure.

Transitional justice negotiations conformed to a state-centric model of decision-making based on the short-term strategic interests of narrow political elites. In the case of East Timor, the short-term strategic interests were those of the international community and Indonesia, rather than those of East Timor. As a state-centric model that excluded the affected population and subordinated their interests in transitional justice decision-making, the approach fell considerably short of the proposed ideals for democratic decision-making and certainly seems to depart from previous and subsequent UN practice for other jurisdictions.

The approach also fell considerably short of maximal compliance with state obligations and victim rights in international law. Even though international intervention enabled external political elites to formulate a diffuse transitional justice policy framework that was primarily retributive in emphasis, inadequate
political planning and management produced poorly designed policy agreements. Principal deficiencies of these agreements include: (1) the vague and permissive wording of UN Resolution provisions concerning transitional justice; (2) the UN’s failure to stipulate benchmarks for state compliance or to mandate legal cooperation; and (3) the UN’s omission of any specific provisions concerning state obligations to provide compensation and/or reparation to the victims of past violence.

II A Vastly Internationalised Peace Process

From a sustainable peace perspective, there are few redeeming qualities about the peace and democratic transition processes for East Timor given that these processes were vastly internationalised, politically exclusionary, abrupt, and increasingly confrontational.

A Indonesian Military Invasion and Occupation of East Timor (1975–1999)

The Indonesia-East Timor conflict was a protracted identity conflict involving internal state repression. Preceded by extended Portuguese colonisation and a brief civil war between pro-independence and pro-integrationist forces, Indonesia militarily invaded and occupied East Timor, a Portuguese colony, in December 1975. The UN Security Council and General Assembly did not recognise Indonesia’s occupation, including its subsequent 1976 annexation of East Timor, as legal and initially called for Indonesia’s immediate withdrawal from the territory. The UN did not directly intervene in the conflict until September 1999.

1 See generally Peter Harris and Ben Reilly (eds), Democracy and Deep-Rooted Conflict: Options for Negotiators (International Institute for Democracy and Electoral Assistance, 1998).


5 See generally James Dunn, Timor: A People Betrayed (new ed, 1996) 14-308.

6 See, eg, Resolution Concerning East Timor, SC Res 384, 30 UN SCOR (1869th mtg), UN Doc S/RES/384 (22 December 1975).
almost a quarter of a century later. The Indonesian occupation of East Timor formally ended on 25 October 1999 when the UN assumed interim governing authority for the territory, demarcating a 24-year period of repression and resistance.

The ensuing conflict between East Timor and Indonesia centred on East Timor's political status as a non-self-governing territory. The main resistance organisation, FRETILIN, sought the right to exercise external self-determination and create a sovereign, independent state. The domestic political struggle against Indonesian occupation for independence was complemented by an international solidarity movement that gained momentum with political opening of the territory in the late 1980s, and especially following the 1991 Santa Cruz massacre.

During its occupation of East Timor, the Indonesian government pursued a dual strategy of force and accelerated development. Over the course of the 24-year occupation, the Indonesian state and its security forces supported and/or committed a wide array of human rights and humanitarian law violations. State violations included arbitrary detention and imprisonment; chemical warfare; cultural suppression and forced integration; destruction of evidence; enforced disappearance; extrajudicial killings; forced population movement; forced population control; gender based violence including sexual slavery and rape; systematic persecution and intimidation; torture and maltreatment; restriction of persons and organisations; starvation; and willful destruction of property.

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7 Attention is focused on FRETILIN (Frente Revolucionaria de Timor-Leste Independente) and its eventual non-partisan successor, the CNRT (Conselho Nacional da Resistencia Timorese) as the main resistance organisations involved in transitional justice negotiations.


More than 100,000 persons, representing about one-quarter of the East Timorese population, are estimated to have been killed between 1974 and 1999. Many of these fatalities occurred during the first five years of Indonesian occupation. Fatalities also were particularly acute in the January to October 1999 period, with an estimated 1500 to 2500 persons killed before and after the popular consultation.

Both state and non-state actors, including pro-autonomy and pro-independence forces, perpetrated human rights violations. Indonesian security forces, together with East Timorese paramilitaries and pro-integrationist militias, are considered the main perpetrators and are believed to have committed the vast majority of human rights and humanitarian law violations. Primary victim groups included members of the resistance, student and youth organisations, women and children, religious organisations, journalists and humanitarian workers.

Like South Africa, the consequences of state repression for East Timorese individuals, communities and society are incalculable. Extended periods of colonisation and state repression have produced a deeply divided and traumatised society. Post-independence, Timor-Leste is plagued by high rates of poverty, inequality, and social exclusion. It is among the top ranked 50 countries in the world with a substantial percentage (40% or more) of its population below the poverty line.


11 Ibid [Part 8: Responsibility and Accountability].
Officially, East Timor’s transition to peace and democracy transition unfolded over 20 years in two main stages, encompassing 17 years of UN-mandated tripartite peace talks (November 1982–September 1999) followed by a two-and-a-half year UN-administered transition to independence (October 1999–May 2002).15

East Timor’s political transition was a very different kind of negotiated regime transition than South Africa given that East Timor was a non-self-governing territory, first under the occupation of the Indonesian military (1975–1999) and then under the interim administration of the UN (1999–2002). Because East Timor was a non-self-governing territory, or colony, rather than a sovereign state, its peace process was vastly internationalised.

East Timorese leaders did not politically control the peace process nor were they included as direct participants in peace talks. When the UN General Assembly mandated political talks on the question of East Timor in November 1982, with talks commencing in 1983, only Portugal, as the legally recognised administering authority for the territory; Indonesia, as the de facto occupying force; and the UN, in view of its responsibilities for decolonisation and self-determination under the UN Charter, were considered direct parties to these talks.16 The Indonesian government was vehemently opposed to East Timorese participation in tripartite negotiations and the UN and Portugal acquiesced to this demand.

15 The analytical focus for the chapter is the four-year period between 9 June 1998, when the Habibie government offered a wide-ranging autonomy package opening the way to serious tripartite negotiations, and 20 May 2002, when East Timor achieved independence as the Democratic Republic of Timor-Leste (RDTL). Transitional justice policy and legislative agreements were negotiated during this period.

The pattern of exclusionary negotiations continued when tripartite talks were revived following the Habibie regime change in 1998 and persisted until the conclusion of peace talks in October 1999. Unlike the political inclusivity of South African negotiations where resistance leaders were released from prison or able to return from exile in order to participate in negotiations, the Indonesian government refused to release Xanana Gusmão, then President of the CNRT, until after the August 1999 referendum, then only agreeing to change Gusmão’s imprisonment status to house arrest so that he could be consulted in relation to the 5 May negotiations.  

Consequently, East Timorese political participation in peace negotiations was indirect taking place largely through bilateral discussions with the office of the Secretary-General and parallel negotiating forums such as the All-Inclusive East Timorese Dialogue (1995–1997) and the Dare reconciliation meetings (1998–1999).  

In addition to determining who participated in peace talks, the Indonesian government effectively controlled the timetable for framework-substantive negotiations and the exercise of self-determination insisting on rapid peace negotiations and a quickly organised popular consultation. A second prominent attribute of the peace process is that, although technically unfolding over 17 years, it was in reality an abrupt and abbreviated process spanning less than one-and-a-half years between June 1998 and October 1999.

The decision to revitalise serious peace negotiations was made by the Indonesian government when a newly appointed President Habibie suddenly announced in June 1998 that Indonesia would entertain a special autonomy arrangement with

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East Timor. The main period of substantive negotiations was in fact far shorter, occurring primarily between January and May 1999. In January 1999 President Habibie expanded his original offer to include a second option that would enable the East Timorese people to reject Indonesia’s special autonomy package, opening the way to independence. Habibie’s announcement was considered an ‘historic opportunity’ and on 5 May 1999, after less than five months of substantive negotiations, Portugal, Indonesia, and the United Nations concluded agreements for a popular consultation on the question of special autonomy.\(^{19}\)

The hastily negotiated 5 May peace agreements, which are the main framework-substantive agreement for East Timor, were not a comprehensive or detailed peace agreement, but dealt solely with the modalities for the UN-organised popular consultation that would allow the East Timorese people to directly vote on their acceptance or rejection of special autonomy. The 5 May agreements made no provision for transitional justice.

Because the Habibie government was opposed to an extended transition, the popular consultation was quickly scheduled for August 1999.\(^{20}\) Such abbreviated timelines were contrary to the established preferences of several East Timorese resistance leaders who had for some time advocated the need for a phased, multi-year transition process before a referendum on self-determination was convened. The abbreviated timetable for the popular consultation almost certainly curtailed the ability of not only East Timorese leaders, but also the UN, to adequately prepare for the transition to independence and develop national capacity to manage the transition, including matters of public policy such as transitional justice. It arguably created a more hostile atmosphere with the Indonesian military than otherwise might have been achieved had the Habibie government been willing to entertain an extended and gradual transition. The rapidity of the

\(^{19}\) Department of Foreign Affairs and Trade (Australia), above n 16, 38, 81-88.

East Timorese peace process and popular consultation, which seems to have served the broader strategic interests of Indonesia, Portugal, and the UN, has been the subject of extensive criticism.21

Equally disconcerting, the UN then set a very short timeframe for East Timor's transition to independence, which was to be concluded by 20 May 2002. The artificiality of UN timelines for transitional governance also has been resoundingly criticised.22

A third distinguishing characteristic of the peace process was the increasingly confrontational style of political negotiations, which in large part was a function of the type of self-determination claim. Unlike the South African exercise of internal self-determination, where the main political objective was integration, the East Timorese resistance sought to exercise the right to external self-determination involving a permanent change in the political status of the territory.23 The goal of political change was secession from Indonesia and the creation of a sovereign independent state.24 The Indonesian government and military clearly were not in favour of East Timor's separation nor were a minority of the East Timorese population who supported integration with Indonesia.

In accordance with the 5 May peace agreements, the United Nations Mission in East Timor (‘UNAMET’) organised the August 1999 popular consultation under very tight timelines and in less than ideal political circumstances given that...


Indonesia retained responsibility for security in the territory.\textsuperscript{25} The September announcement of the popular consultation result, in which the East Timorese population overwhelmingly rejected Indonesia’s autonomy proposal opening the way for the territory to separate and become an independent state, provoked an extreme reprisal from pro-integrationist militias who, with evident involvement and support of the Indonesian military and police, unleashed a scorched earth campaign.

In response to escalating violence and disorder in the territory, which were in direct contravention of Indonesia’s security commitments to the UN, the Security Council was compelled to intervene. Following intense deliberations with Indonesia, the Security Council exercised its Chapter VII powers, first in September 1999, authorising the establishment of a multinational International Force in East Timor (‘INTERFET’), and then in October 1999, authorising the establishment of a United Nations Transitional Administration in East Timor (‘UNTAET’).

For transitional justice decision-making, the significance of all of these broader peace negotiation patterns – Indonesian dominance, East Timorese exclusion, and an abbreviated and confrontational style of negotiations – is that they were essentially replicated in the negotiation of transitional justice policy agreements which emanate from the September and October Security Council Chapter VII deliberations.

\textsuperscript{25} See, eg, Martin, above n 20, 29-131.
III Politically Unmanaged Decision-Making in the Context of Intervention

A key dynamic of transitional justice decision-making for the Indonesia-East Timor conflict is that it seems to have been a less well politically planned and managed process than was the case for South Africa. In large part, difficulties in managing transitional justice decision-making for the Indonesia-East Timor conflict can be attributed to the sheer complexity of the conflict and the fact that the UN was negotiating with, in effect, two sovereign states as they had become by the time core transitional justice policy decisions were brokered. As a tripartite negotiation, the UN needed to obtain the cooperation of not only Indonesia, a recalcitrant state, but also East Timor, a newly separated state, in designing an appropriate transitional justice mechanism.

A A Three-Level Game

A major challenge for the deliberate political management of transitional justice negotiations was the sheer complexity of the decision-making environment, which involved an intricate three-level game of policy interdependence between Portugal/East Timor, Indonesia and the UN all of which had a stake and played some role in transitional justice decision-making.26 Furthermore, the UN did more than just mediate transitional justice negotiations between Portugal/East Timor and Indonesia. Like Indonesia, it effectively dominated these negotiations.

To complicate matters, governance arrangements in East Timor and Indonesia were unstable. Between September 1999 and August 2001, when transitional justice policy and legislative agreements were brokered, East Timor was subject to three separate but overlapping UN peacekeeping missions.27 During its brief administration of East Timor, UNTAET implemented three different co-

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27 These missions included UNAMET (11 June-20 November 1999) which was responsible for organising the popular consultation; INTERFET (15 September 1999–28 February 2000) which was responsible for restoring peace and security; and UNTAET (25 October 1999–20 May 2002) which governed East Timor during its transition to independence.
governance structures that, due to intense criticism, became progressively more inclusive and empowering of the East Timorese in political decision-making.\(^{28}\) Within East Timor, national political parties, although long-established, were characterised by considerable infighting and shifting alliances.\(^{29}\) For this same period, the political situation in Indonesia, which was undergoing its own process of democratic reform, was equally volatile involving three successive presidential regimes.\(^{30}\)

Not only were there multiple and conflicting ‘government’ positions on transitional justice,\(^{31}\) the confusing array of international and national governance arrangements made it exceedingly difficult for victim and human rights advocates to know who was responsible for, or whom to lobby in relation to, the formulation of transitional justice agreements.

Unfortunately, a confounding factor for East Timor is that neither international nor national political leaders developed decisive or unified policy positions on transitional justice.

\(^{28}\) Co-governance structures included a small, and arguably ineffectual, National Consultative Council (‘NCC’) that was appointed in December 1999. In mid-July 2000, UNTAET appointed a more robust eight member Transitional Cabinet composed of four East Timorese and four international UNTAET members, and replaced the NCC with a more broadly representative and exclusively East Timorese 33-member National Council (‘NC’) in October 2000. A Constituent Assembly was elected in August 2001 to draft a permanent constitution and subsequently became the first Parliament of the RDTL, in May 2002. Notably, even with changed co-governance arrangements in mid-2000, the two key portfolios concerning the administration of justice (Police and Emergency Services, Justice) were retained by international UNTAET staff and not East Timorese representatives. For a detailed critical evaluation of co-governance structures, see especially Beauvais, above n 22, 1120-1133.

\(^{29}\) See, eg, Greenlees and Garran, above n 8, 1-24, 306-328.

\(^{30}\) These included BJ Habibie (May 1998–October 1999); Abdurrahman Wahid (October 1999–July 2001); and Megawati Sukarnoputri (July 2001–October 2004).

Over the course of transitional justice negotiations, UN leaders asserted contradictory and uncertain policy positions.\textsuperscript{32} Some UN representatives, in particular Mary Robinson as then High Commissioner for Human Rights, strongly advocated the establishment of an international criminal tribunal for East Timor, while other UN officials and member states openly supported Indonesia’s policy preference to nationally investigate and prosecute. Secretary-General, Kofi Annan, while initially threatening to pursue the international criminal accountability of Indonesian officials, quickly moved away from this position to support Indonesia’s pursuit of justice by national means.

Like the UN, East Timorese leadership preferences on transitional justice were characterised by division, rather than strategic unity, and considerable vacillation. In fact, since the onset of 1999 political violence, the national political and public debate of transitional justice in East Timor has been polarised between advocates of a reconciliation position and proponents of a retributive justice position.\textsuperscript{33}

On the one hand, some national resistance leaders, including Xanana Gusmão as a foremost proponent, together with pro-autonomy and militia members, some victims and their relatives have strongly advocated a policy of reconciliation.\textsuperscript{34} Gusmão, first as President of the CNRT and then as President of Timor-Leste, generally has not viewed individual retributive or reparative justice as a high priority for East Timor emphasising instead the need for collective justice measures.\textsuperscript{35} At least since 1999, the reconciliation/Gusmao position has openly lobbied for enactment of a national amnesty policy and the promotion of friendly relations with Indonesia in the interests of securing long-term political and

\textsuperscript{33} Guteres, above n 18, 17-18.
\textsuperscript{34} Ibid 18.
economic stability. The reconciliation/Gusmao position evidently reflects a strong commitment to social justice ideals, as well as recognition of the political costs to East Timor associated with pursuing the criminal prosecution of Indonesian officials or state compensation from Indonesia. 36

The reconciliation/Gusmao position has been visibly at odds not only with some UN leaders but also with other prominent resistance leaders such as Mari Alkatiri, José Ramos-Horta, and Bishop Carlos Belo who, together with many victims, younger generation East Timorese, and some international and national NGOs, have more forcefully pressured for retributive transitional justice particularly by means of an international criminal tribunal. 37

In addition to evident tensions between their respective positions, East Timorese leaders quite clearly shifted their policy positions on transitional justice over the course of policy and legislative negotiations. All three of the most outspoken national leaders involved in the political-public debate of transitional justice — Xanana Gusmão, Mari Alkatiri, and José Ramos-Horta — moderated their original positions, apparently succumbing to external political pressure to do so. Ostensibly due to pressure by the UN, President Gusmão changed his original reconciliation position advocating a general amnesty for all political crimes to a position of justice first, and then reconciliation. 38 Then Prime Minister Mari Alkatiri and Foreign Minister José Ramos-Horta, who initially advocated the establishment of an international criminal tribunal, substantially softened their public positions on retributive justice and, at the same time, became more openly receptive to the idea of some form of political amnesty in view of maintaining friendly relations with Indonesia. Public statements by these leaders favoring the

36 See Burke-White, above n 26, 41-53.
37 Guterres, above n 18, 17-18.
38 Bull, above n 35, [para amnesty].
establishment of an international criminal tribunal were typically met with some form of diplomatic censure by the Indonesian government.39

Of the three ‘governments’ involved, the Indonesian government seems to have been the most decisive and unified in its position on transitional justice, consistently rejecting calls for the creation of an international criminal tribunal and asserting the right to pursue violations by means of its own national judicial system. Indonesia was also the most successful in achieving its transitional justice preferences.

In addition to the complexity created by a ‘three-level game’, other factors collectively impeded the deliberate political management of transitional justice. These factors include: (1) external balance of power dynamics favoring international and Indonesian interests; (2) the simply overwhelming reconstruction demands resulting from a legally rupturous and politically violent transition; and (3) a maximalist human rights advocacy campaign perpetuated by contradictory and indecisive political leadership on the question of transitional justice.

1 Balance of Power Dynamics Favoring Indonesia

The deliberate political management of transitional justice negotiations was influenced by external balance of power dynamics that generally favored the interests of the international community and Indonesia over the East Timorese. East Timor’s lack of political independence and its lack of strategic importance at the time of transition seem to have seriously compromised the ability of East Timorese political leaders to assert their transitional justice policy preferences.

The ‘strategic interests of powerful States’ were a dominant force in the UN’s lack of political resolve to establish an international criminal tribunal for East Timor.\textsuperscript{40} At the time of transitional justice negotiations, Indonesia was undergoing its own process of democratic reform and the UN was extremely reluctant to take any decisive actions that might be politically destabilising to Indonesia or the region. As the Conflict, Security Development Group observe:

East Timorese calls for justice focused on demanding the establishment of an ad hoc international criminal tribunal. Yet the fragility of the political situation in Indonesia meant that the international community was reluctant to declare Indonesia unwilling or unable to provide justice using its own judicial system, which as a matter of both international law and policy remained the preferred option.\textsuperscript{41}

Non-establishment of an international criminal tribunal apparently served other important international strategic interests including that UN Member States avoided public scrutiny of their role and culpability in the Indonesian invasion and occupation of East Timor.\textsuperscript{42}

Additionally, as the Conflict, Security and Development Group identify, the UN’s decision not to establish an international tribunal was consistent with a dramatically changed international legal context. By the time of the East Timor transition, political negotiators were much more constrained in their policy choices. In view of the 1998 adoption of the \textit{Rome Statute}, there were considerably strengthened international legal norms requiring the prosecution or extradition of serious international crimes and prohibiting the granting of amnesty for such crimes. Simultaneously, the \textit{Rome Statute} introduced the principle of complementarity, giving primacy to the national investigation and prosecution of serious international crimes as a first resort.

\textsuperscript{40} Christopher Rudolph as cited by Burke-White, above n 26, 1, 27.
\textsuperscript{41} Conflict, Security and Development Group, above n 1, [para 258].
\textsuperscript{42} See, eg, Katzenstein, above n 32, 272-275.
In formulating transitional justice policy, UN policymakers evidently sought to comply with these emerging legal developments. On the one hand, pressuring the Indonesian government to investigate and prosecute past violations committed in East Timor but acquiescing to Indonesia’s request to do so by means of its own national judicial system. On the other hand, because of these developments, presumably UN officials felt they had little alternative but to pressure Xanana Gusmão/the CNRT to modify their original reconciliation/amnesty position to a position of retributive justice first and then reconciliation, with reconciliation limited to less serious criminal offences. Given international peacekeeping intervention in the East Timor conflict, it would have been exceedingly difficult to invoke the doctrine of state necessity to justify a national amnesty policy that extended to serious international crimes.

2 A Legally Rupturous and Politically Violent Transition

Transitional justice policy preferences, particularly those of the UN, were shaped as well by pragmatic concerns relating to the enormity of East Timor’s reconstruction challenges and East Timor’s almost complete reliance on the international community to meet those demands.


The Timor National Resistance Council (CNRT) is currently working out a position on justice and reconciliation, driven in part by a belief that only a carefully thought through reconciliation policy will succeed in encouraging the many East Timorese still in Indonesia to return home. On one level, this involves negotiations with the more moderate militia leaders, on the understanding that there will be no immunity from prosecution for any serious crimes committed. On another level, it involves the establishment of a national reconciliation commission, with branches in every district of East Timor, to work out programmes for reintegration of returnees and accountability for less serious crimes that traditional justice mechanisms at a very local level may be able to handle (emphasis added).

On 7 May 2002, days before the establishment of the UNMISET mission and East Timor’s independence, the UN Secretary-General emphasised the need for the East Timorese to strike an effective balance between ‘the twin demands of justice and reconciliation’. See Kofi Annan, ‘Celebrating the Birth of a Nation’, 7 May 2002, East Timor Action Network, Timor Postings http://www.csmonitor.com/2002/0507/p11s01-coop.html at 2 May 2003[para 6].

In view of its decision to separate from Indonesia, the East Timor transition was legally rupturous. State laws and institutions that were based on Indonesia’s system for the 24 year military occupation no longer applied. The exodus of many Indonesians from the territory meant that East Timor lost most of its civil service. This overall state of disrepair was greatly exacerbated by the retaliatory scorched earth campaign unleashed by pro-integrationist militias in the territory following announcement of the popular consultation result. The post-referendum campaign of violence resulted in the death and injury of hundreds of civilians, the deliberate destruction of critical infrastructure, and the forced displacement of much of the civilian populace. An estimated 70% of East Timor’s physical infrastructure was destroyed or inoperable and 75% of the population internally displaced or forcibly removed to West Timor because of the 1999 violence.

By the time the UN assumed administering authority for the territory in late-October 1999, the UN and East Timorese leaders faced a worst-case scenario of totally devastated and non-functional state laws and institutions, heavily damaged physical infrastructure, disrupted essential services, and a collapsed economy. Reconstruction in the East Timor context meant the almost complete rebuilding of collapsed state laws and institutions, including the justice system, together with critical infrastructure and essential services. As an economically weak non-self-governing territory that had been militarily occupied for 24 years, and considering the abruptness of the transition, at the time of its transition East Timor clearly lacked the requisite national capacity and material resources to address these massive reconstruction challenges and was almost completely reliant on the international community for assistance.

46 Mani, above n 2, 96-97.
UN policy preferences apparently were guided by pragmatic considerations; the international community was unwilling to invest the necessary financial resources to establish another ad hoc tribunal, opting instead to support national investigation and prosecution as a more cost-effective measure. In addition to its cost-saving benefits, international support for national investigation and prosecution efforts evidently was politically appealing because the UN would be perceived to be supporting the development of national justice capacity.

3 Maximalist Human Rights Advocacy

Since the onset of 1999 political violence, national public debate of transitional justice in East Timor has been polarised between proponents of reconciliation and retributive justice positions. On one hand, proponents of a modified reconciliation position have advocated the temporary suspension of prosecution of alleged perpetrators to accommodate their return from West Timor followed by prosecution and some form of amnesty or sentence reduction after some time served. On the other hand, proponents of a retributive justice position essentially have insisted that all perpetrators must be prosecuted, prosecution must precede reconciliation, and reconciliation must be limited to minor criminal offences.

Of the two positions, retributive justice proponents have been the most vocal. Strongly backed by international human rights organisations, a maximalist human rights advocacy campaign emerged in mid-2000 seeking the establishment of an international criminal tribunal to try senior (Indonesian) officials for alleged violations committed in East Timor in 1999.

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48 Burke-White, above n 26, 44-46.
49 Guterres, above n 18, 17-18.
The emergence and persistence of this maximalist advocacy campaign is explained by a number of factors. These factors include the intensity and proximity of the 1999 campaign of violence and the visible role of the Indonesian state in fomenting and supporting this violence in direct contravention of its security commitments to the UN.\textsuperscript{51} The campaign is explained as well by the policy gap created by contradictory and indecisive political leadership on the question of transitional justice. The UN's endorsement of the primacy of national prosecution, yet its failure to stipulate timelines and benchmarks for state compliance or cooperative measures as part of its Resolutions, has fuelled the maximalist campaign. In view of numerous Indonesian delays in designing and implementing its national prosecution process, human rights organisations assumed a pivotal role in pressuring Indonesia to comply with its commitments to the UN. Like the UN, these same human rights organisations have relied on the threat of an international criminal tribunal as a lobbying instrument to induce Indonesian compliance. The evident failure of both the Indonesian and UNTAET prosecution processes to subsequently produce senior level accountability of Indonesian officials has only served to perpetuate the maximalist demands for creation of an international criminal tribunal.

The campaign for an international criminal tribunal seems to have shaped transitional justice decision-making but likely not in the way intended. Political and civil society threats to create an international criminal tribunal for East Timor seem to have fostered Indonesian political resistance rather than cooperation. These threats have been instrumental in Indonesia's refusal to cooperate with UN investigation and prosecution efforts.\textsuperscript{52} The promotion of a singular, retributive

\textsuperscript{51} This finding is consistent with transitional justice theory on the severity of violations. See, eg, David Pion-Berlin, 'To Prosecute or Pardon? Human Rights Decisions in the Latin American Southern Cone (Chile, Argentina, Uruguay)' (1994) \textit{16 Human Rights Quarterly} 105, 107-111.

\textsuperscript{52} This finding corresponds with transitional justice theory on human rights advocacy proposing that maximalist — particularly singular, retributive — public demands for accountability are more likely to produce political resistance rather than cooperation. See especially Carlos Santiago Nino, 'The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina' (1991) \textit{100 Yale Law Journal} 2619, 2634-2636.
policy option was a questionable advocacy strategy to use in a negotiated regime transition such as East Timor where fully retributive policy options are rarely endorsed. When balance of power dynamics plainly favored Indonesia, it was extremely unlikely the Indonesian government would agree to an international tribunal that was directed at trying its own nationals. The establishment of an international criminal tribunal for East Timor is highly improbable because there is insufficient international, Indonesian and East Timorese political support for this institutional option.

The pursuit of a singular, retributive option has so dominated the public debate of transitional justice for East Timor that human rights advocates have been largely indifferent to fully exploring other transitional justice options or ways of strengthening likely policy and legislative outcomes. There are evident gaps in civil society advocacy campaigns relating to other retributive justice options such as trials in a third state or a combined UN-Indonesia-East Timor tribunal that might have garnered greater Indonesian cooperation. Furthermore, even though some human rights organisations advocated benchmarks for Indonesian compliance with UN Resolutions had civil society organisations launched a more unified campaign on this specific issue they might have achieved the necessary political concessions.

B Questionable Strategic Decisions

Consistent with political division and indecision, transitional justice negotiations were characterised by an overall lack of strategic planning and management, especially by the UN.

Prima facie, the negotiation of transitional justice policy agreements for the Indonesia-East Timor conflict was inadvertent. The UN, Indonesia, and Portugal

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did not negotiate policy agreements as a deliberate political commitment to the pursuit of justice and accountability for past serious violations of human rights and humanitarian law committed in East Timor. Transitional justice policy agreements materialised in the context of Security Council and Commission on Human Rights ('CHR') deliberations and were incidental to achieving the more pressing political objective of bringing an immediate end to escalating political violence in East Timor.

The UN used the spectre of an international criminal tribunal to leverage a recalcitrant Indonesian government’s consent to accept a multinational force in East Timor and agree to the orderly transfer of power to a UN interim administration. The Security Council negotiations were relatively confrontational because the Council invoked its Chapter VII powers under the UN Charter. The transitional justice policy agreements that emerged from these negotiations were coerced rather than volitional. The Indonesian government agreed to nationally investigate and prosecute violations committed in East Timor in 1999 but its primary motivation for doing so was to avoid becoming a pariah state\(^{54}\) and the public humiliation of having its officials tried before an UN-constituted international criminal tribunal.\(^{55}\)

The UN made a series of questionable strategic decisions during its policy negotiations with Indonesia that disadvantaged the position and interests of East Timor while advantaging Indonesia.

The political timing and location of transitional justice policy negotiations were extremely adversative to the direct political or public participation of the East Timorese. Core policy agreements were negotiated in September and October


1999 in the context of final tripartite talks between Portugal, Indonesia, and the
UN that excluded East Timorese political leaders as a direct party. Policy
negotiations were convened outside of East Timor at the Security Council in New
York and the CHR in Geneva, both of which are recognised as highly politicised
decision-making bodies. Although East Timorese political leaders participated in
these negotiations, given that East Timor, as the affected population, was not a
UN Member State and the UN had never accorded the resistance movements the
same level of recognition in international law as their counterparts in South
Africa, their participation was indirect. East Timorese resistance leaders also
quite clearly lacked the lobbying power of a UN member state.

Policy negotiations took place in international decision-making forums outside of
East Timor effectively limited national civil society organisations to indirect
participation in policy deliberations. The main conduit for gathering information
on civil society/victim preferences were visiting UN fact-finding missions,
including those conducted by the Security Council and the High Commissioner
for Human Rights in September 1999. The most directly relevant missions, the
CHR-endorsed fact-finding inquiries, were conducted after core UN policy
agreements were brokered. When transitional justice policy directives were
negotiated, the domestic political context was not at all conducive to open and
extended national debate about transitional justice. Political violence was at its
peak, Indonesia remained in de facto control of the territory, including security
arrangements. Additionally, some of the most outspoken resistance leaders on the
question of transitional justice were physically absent from, and unable to return
to, the territory because of extreme violence.

57 Report of the Security Council Mission to Jakarta and Dili, 8 to 12 September 1999, UN Doc
S/1999/976 (14 September 1999).
Rights on the Human Rights Situation in East Timor, UN Doc E/CN.4/S-4/CRP.1 (17 September
1999)
Secondly, notwithstanding the laudable aims of Portugal/the High Commissioner for Human Rights in initiating the special session on East Timor, the choice of the CHR as a forum for the negotiation of transitional justice policy was an extremely questionable strategy. As José Ramos-Horta once remarked about the CHR, 'It is a highly politicised body, subject to the same conflicting national interests that paralyze the General Assembly and the Security Council'.

When the special session was convened, neither Portugal nor East Timor was a CHR Member State and so their participation at the session was indirect, expressed as an observer Member State or through other Member States and international organisations in attendance. Neither Portugal nor East Timor was entitled to vote on the Resolution. Indonesia, on the other hand, was a voting Member State and well represented at the session with a nine-member delegation in attendance.

Even if intended to supplement the work of the Security Council, utilising the CHR effectively displaced the role of the Security Council as the main UN decision-making body to formulate transitional justice policy and monitor state compliance. The Security Council never directly endorsed the CHR Resolution nor the Special Rapporteur and International Inquiry fact-finding recommendations that were authorised by the CHR Resolution, leaving this task to the Secretary-General and the President of the Security Council acting on behalf of the Council. Between 2000 and 2002, the CHR, much more so than the Security Council, became the pressure point to monitor Indonesia's compliance with its transitional justice policy commitments to the UN.

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59 José Ramos-Horta, above n 56, 176-177.
61 Only the United States had a similar number of delegates in attendance.
The special session exposed the respective bargaining positions of the UN and Indonesia and the political sensitivities around the establishment of an international criminal tribunal for East Timor. Negotiation of the CHR Resolution made it clear that certain Asian bloc and other member states, including permanent Security Council members with veto powers, almost certainly would vote against the future establishment of an international criminal tribunal for East Timor. These voting divisions provided the Indonesian government with the advantage it needed to formally reject the CHR Resolution and refuse to cooperate with the UN fact-finding inquiries that were mandated by the Resolution, thus making the establishment of an international criminal tribunal ‘quite unlikely’.

The CHR special session and Resolution arguably reflected other critical errors in judgment. Given that credible reports already existed, the UN’s authorisation of two fact-finding missions to document past violations and recommend future actions to the Secretary-General unnecessarily delayed UN decision-making. This delay afforded the Indonesian government the time it needed to complete its own national investigation process and strengthen Member State opposition to an international tribunal. The commissioning of more than one UN fact-finding inquiry also was potentially confusing in the event that the separate inquiries recommended different future actions, which is precisely what happened.

The UN further advantaged the Indonesian government by affording it the opportunity to provide advance comments on the International Inquiry report even though it had refused to cooperate with the inquiry. The Indonesian government used the opportunity, first, to formally reject the Inquiry’s main recommendation.

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calling for the establishment of an international human rights tribunal and, then, to commit itself to the national criminal investigation and prosecution of alleged human rights violations committed in East Timor in 1999.\footnote{Letter dated 26 January 2000 from the Minister for Foreign Affairs of Indonesia to the Secretary-General, Annex, UN Doc A/54/726 and S/2000/59 (31 January 2000).}

The fact that the UN then subsequently ignored its own expert fact-finding recommendations underscored its ambivalence and questionable management of transitional justice. Given that the East Timorese transition was a legally rupturous transition, where there was no applicable constitution, laws or functioning criminal justice system, had domestic rule of law capacity been a decisive factor in decision-making, the UN almost certainly would have accepted its expert recommendations and avoided using the East Timorese justice system to pursue the investigation of past violations while insisting on the creation of an international tribunal.

Inadequate strategic planning and management of transitional justice decision-making by the UN was manifested in other ways as well, particularly the Security Council’s failure, whether by oversight or design, to expressly mandate the INTERFET and UNTAET missions to address past violations. This omission left it open to both missions to assume responsibility for transitional justice based on their generic mandates ‘as the need arose’, which in practice created tension between overlapping missions.\footnote{See Conflict, Security and Development Group, above n 1, [paras 218, 230, 257, 259-261, 277].} The Security Council subsequently corrected this oversight in 2002 by explicitly authorising UNTAET’s successor mission UNMISET to assume responsibility for serious crimes.\footnote{Para 3(a), Resolution on the Situation in East Timor, SC Res 1410, 57 UN SCOR (4534th mtg), UN Doc S/RES/1410 (17 May 2002).}

In contrast to the rather haphazard approach of the UN and Portugal to transitional justice negotiations, the Indonesian government was much more strategic. The political timing and location of policy deliberations advantaged Indonesia, as the
alleged offending party, which was a direct party to negotiations. When critical policy agreements were brokered, Indonesia had strong allies on the Security Council and, as noted, was a voting member of the CHR. The Indonesian government preemptively initiated its own national investigative process ahead of the CHR special session, essentially outmaneuvering international and East Timorese demands for an international tribunal by relying on the Rome Statute's complementarity provisions and actively demonstrating its political willingness and capacity to pursue national investigation. As a sovereign and powerful state, the Indonesian government used its considerable resources and political influence to vigorously lobby other Member States, gaining key concessions from the UN on overall policy direction, as well as the text of Security Council and CHR Resolutions.

As discussed in more detail in Parts IV and V below, the upshot of political indecision and the haphazard political planning and management of transitional justice decision-making, particularly by the UN, is that it produced diffuse and divided, rather than cohesive, transitional justice policy and legislative frameworks and generally poorly designed substantive agreements.

IV The Formulation of Retributive Policy

Like the broader peace and democratic transition processes, transitional justice negotiations unfolded in two main stages of policy negotiations (September 1999–February 2000) and implementing legislation negotiations (February 2000–August 2001).

By default, transitional justice policy direction is drawn from three UN Resolutions that were negotiated in September and October 1999. In chronological order these Resolutions include: Security Council Resolution 1264 of 15 September 1999; CHR Resolution 1999/S-4/1 of 27 September 1999, and Security Council Resolution 1272 of 25 October 1999. Collectively these
Resolutions endorsed individual responsibility for serious violations of international human rights and humanitarian law committed in East Timor in 1999, demanded that those responsible for violence be brought to justice, gave primacy to national judicial systems in this task, and validated the importance of reconciliation to the East Timorese people.

The UN subsequently interpreted the Resolutions to support parallel prosecution efforts in Indonesia and East Timor and the establishment of a Commission for Reception, Truth and Reconciliation (‘CAVR’) in East Timor. In a rather unusual arrangement of divided political authority, the Indonesian government negotiated implementing legislation to establish an Indonesian Ad Hoc Human Rights Court for East Timor (‘Ad Hoc Court’) between February 2000 and August 2001, while the UNTAET administration formulated Regulations for a serious crimes process in East Timor between March and June 2000. UNTAET and East Timorese representatives jointly formulated the CAVR Regulation between August 2000 and July 2001.

The various Resolutions and implementing legislative enactments are attached in summary form as Appendix D and Appendix E.

As was the case for South Africa, the context for negotiating transitional justice policy agreements appreciably differed from that for implementing legislation. Policy agreements were negotiated in relation to escalating political violence in East Timor and before there was a formal transfer of power from Indonesia to the

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67 CAVR is the Portuguese acronym for the Commission for Reception, Truth and Reconciliation (Comissão de Acolhimento, Verdade e Reconciliação). The CAVR was not the only national reconciliation process undertaken in East Timor. Other processes included political and border reconciliation meetings initiated by East Timorese political leaders between 1999 and 2001 and a more recently established 2005 bilateral Indonesia-East Timor Commission of Truth and Friendship (‘CTF’). While obviously important, these other processes are excluded from the present analysis either because they evolved as informal initiatives without benefit of enabling legislation or their establishment fell outside the main temporal parameters established for the chapter (1998-2002).
UN. Policy negotiations were less democratic than for the formulation of implementing legislation.

The legislative negotiation environment was considerably more stable. In East Timor, UNTAET had assumed administering authority, Indonesian military forces had withdrawn, and INTERFET had to some extent restored law and order. As the sole UN-appointed governing administration, UNTAET was almost completely unfettered by either power-sharing politics or political accountability to an electorate. It was supposed to consult and cooperate closely with the East Timorese people. On the other hand, the Indonesian government was much more constrained by shifting internal military-civil power relations and its accountability to an electorate. Despite greater political stability, legislative negotiations in East Timor and Indonesia involved varying degrees of transparency and participation.


Transitional justice policy negotiations unfolded over a roughly six-month period between September 1999 and February 2000. The most critical policy decisions were made in the very brief interval between 4 September and 25 October 1999 during the final phase of tripartite negotiations between Portugal, Indonesia, and the UN relating to implementation of the 30 August popular consultation result.

Policy negotiations physically took place outside of East Timor at the Security Council in New York and the CHR in Geneva. The UN and Indonesia, rather than the East Timorese, were the main parties involved in policy negotiations, with Portugal and European Union Member States at times playing a crucial intermediary role. The main issue of political contestation between the UN and Indonesia revolved around the UN’s threat to establish an international criminal tribunal to try senior officials alleged to have committed international crimes in East Timor in 1999.
On 15 September, acting under Chapter VII of the UN Charter, the Security Council responded to escalating violence and disorder in East Timor by unanimously adopting Resolution 1264 authorising the establishment of a multinational intervention force in East Timor, known as INTERFET, to restore peace and security utilising all necessary measures. The Resolution was passed after days of intense negotiations that included a Security Council mission to East Timor to assess the deteriorating security situation first-hand and an open Security Council debate eliciting the views of more than 50 speakers who sought to persuade Indonesia to accept a multinational force.

Negotiation and debate of Resolution 1264 provided the first real indication of international support for individual criminal accountability. The point of origin for the UN’s threatened creation of an international criminal tribunal is a 10 September 1999 press statement by Secretary-General Kofi Annan warning the Indonesian military that persons responsible for crimes against humanity would be held to account. In pressuring Indonesia to accept the offer of a multinational force, the Secretary-General cautioned:

I urge the Indonesian Government to accept their offer of help without further delay. If it refuses to do so, it cannot escape the responsibility of what could amount – according to the reports reaching us – to crimes against humanity. In any event, those responsible for these crimes must be brought to account.68

During the open Security Council debate, the Secretary-General and several Member States publicly called for those responsible for human rights and humanitarian law violations in East Timor to be brought to justice.69 Some

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delegations also appealed to Indonesia to take specific action against those responsible for violations, foreshadowing possible Member State support for the Indonesian investigation and trial of its own nationals.\(^7^0\)

For the diffuse transitional justice policy framework that would emerge, *Resolution 1264* contained the Security Council's first and most robust demand for retributive justice in relation to acts of political violence committed in East Timor.\(^7^1\) The preamble to the Resolution expressed the Security Council's concern about reports of 'systematic, widespread and flagrant violations of international humanitarian and human rights law' and stressed that persons committing such violations would 'bear individual responsibility'.\(^7^2\) The first operative paragraph of the Resolution more explicitly demanded that those responsible for the violence be brought to justice.

Although not expressly mandated to do so, between October 1999 and early 2000, using its generic mandate, INTERFET arrested and detained persons suspected of committing serious crimes in East Timor during the 1999 campaign of violence setting in motion UNTAET's subsequent prosecution and trial of serious crimes suspects.\(^7^3\)

2. **Security Council Resolution 1272**

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\(^7^0\) Ibid. See, eg, statements by the delegations from Portugal and Italy.

\(^7^1\) With the exception of a *Statement by the President of the Security Council*, UN Doc S/PRST/1999/20 (20 June 1999) demanding that an attack on an UNAMET regional office be investigated and the perpetrators brought to justice.

\(^7^2\) Preamble, *Resolution on the Situation in East Timor*, SC Res 1264, 54 UN SCOR (4045th mtg), UN Doc S/Res/1264 (15 September 1999) ("Resolution 1264").

\(^7^3\) For an insightful analysis of the INTERFET arrest and detention process, including its legal framework, see Bruce M Oswald, 'The INTERFET Detainee Management Unit in East Timor' in H Fischer and Avril McDonald (eds), *Yearbook of International Humanitarian Law* (2002) vol 3, 347. See also Michael J Kelly et al, 'Legal Aspects of Australia's Involvement in the International Force for East Timor' (2001) 841 *International Review of the Red Cross* 101.
Still utilising its Chapter VII powers, the Security Council unanimously adopted its next significant Resolution 1272 on 25 October 1999 establishing UNTAET.

Resolution 1272 was a curious blend of an essentially colonial administration model and a sustainable peace model for peacekeeping intervention. The Security Council vested UNTAET with overall administering responsibility for the territory authorising it to exercise ‘all legislative and executive authority, including the administration of justice’ as well as to maintain security, law and order.\(^{74}\) In carrying out its responsibilities, UNTAET was expected to ‘consult and cooperate closely with the East Timorese people’ in order to develop local democratic institutions, support capacity building for self-government, and assist in establishing conditions for sustainable development.\(^{75}\)

Notwithstanding its expansive mandate, like the INTERFET mission, the Security Council did not expressly authorise UNTAET to address past human rights and humanitarian law violations, although UNTAET subsequently assumed responsibility to do so based on its generic mandate. Various explanations have been forwarded for this major omission from the UNTAET mandate including inadequate planning by the UN in preparing for the mission,\(^{76}\) as well as the political sensitivities associated with transitional justice at the time.\(^{77}\) As noted by the Resolution itself, it is equally clear the Security Council considered the matter of transitional justice to be open-ended because the Indonesian and UN-mandated fact-finding missions were ongoing when Resolution 1272 was negotiated.

The relevance of Security Council Resolution 1272 for transitional justice policy is that it contained provisions very similar to Resolution 1264. The Security

\(^{74}\) Resolution on the Situation in East Timor, SC Res 1272, 54 UN SCOR (4057th mtg), UN Doc S/RES/1272 (25 October 1999) (‘Resolution 1272’) [paras 1,2].

\(^{75}\) Ibid [paras 2,8].

\(^{76}\) Conflict, Security and Development Group, above n 1, [paras 259-260].

\(^{77}\) Järvinen, above n 35, 19.
Council re-emphasised that persons committing 'systematic, widespread and flagrant violations of international humanitarian and human rights law' were individually responsible. In a near restatement of the Council’s previous demand for retributive justice, operative paragraph 16 explicitly condemned acts of violence and demanded that those responsible be brought to justice; however, the textual placement of this paragraph at the end of the Resolution suggested already weakening resolve by the UN to hold Indonesia accountable for violations committed in East Timor in 1999. Unlike Resolution 1264, Resolution 1272 additionally gave preambular recognition to ‘the importance of reconciliation among the East Timorese people’.

3 The CHR Special Session on East Timor

In between negotiation of Security Council Resolutions 1264 and 1272, the CHR convened its fourth special session on the situation of human rights in East Timor. The idea for the session ostensibly originated from the High Commissioner for Human Rights but was officially requested by Portugal with support of the European Union, which sought a comprehensive UN response to prevent further violations of human rights in East Timor. In its Resolution following the special session, the CHR provided a relatively prescriptive statement of transitional justice policy.

The main issue of contention at the special session was an UN-backed proposal calling for creation of an international commission of inquiry to investigate alleged human rights violations committed in East Timor since January 1999. Although the draft Resolution did not specifically associate the proposed inquiry with an international criminal tribunal, the connection arguably was implicit.

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78 Preamble, Security Council Resolution 1272, above n 74.
79 Ibid.
Indonesia strongly objected to the proposed international inquiry lobbying instead for the right to mount a national investigatory and prosecution process. In what was a highly strategic preemptive move, the Indonesian government announced its intention to have its National Human Rights Commission ("KOMNAS HAM") form an inquiry to investigate violations of human rights committed in East Timor and establish a human rights court to try cases. The Indonesian government made its announcement just hours before the CHR special session began with the express intention of avoiding ‘international intervention’. Indonesia then premised its rejection of the proposed international inquiry on its own willingness and ability to nationally address past violations.

Indonesia was not successful in quashing the international inquiry proposal. In view of its intensive lobbying efforts, it was able to secure crucial changes to the wording of the Resolution and garner sufficient Member State support for its preference of a national investigatory and prosecution process.

After significant debate, the CHR adopted Resolution 1999/S-4/1 on 27 September by a split vote, with predominantly European and Portuguese-speaking countries voting in favor, while Indonesia and several Asian bloc countries voted against. The Resolution voting patterns were extremely significant because they revealed the future improbability of being able to secure Security Council support for an international criminal tribunal for East Timor given that two permanent Security Council members, China and the Russian Federation, were amongst those voting against the proposed international inquiry and the draft Resolution. It was anticipated that one or both would use their veto power against any Resolution.

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calling for an international tribunal. In view of significant Member State opposition to the Resolution, the Indonesian government did not see itself bound by the Resolution and overtly refused to cooperate with the International Inquiry that was authorised by the Resolution.  83

In its Resolution, the CHR reiterated the Security Council demand that those responsible for serious violations of international human rights and international humanitarian law be brought to justice, and declared that:

All persons who commit or authorise violations of human rights or international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to ensure that those responsible are brought to justice, while affirming that the primary responsibility for bringing perpetrators to justice rests with national judicial systems (emphasis added).  84

The CHR called on the Indonesian government, in cooperation with its national investigatory process, to ensure that 'persons responsible for acts of violence and flagrant and systematic violations of human rights were brought to justice'.  85

The CHR also endorsed UN technical assistance for reconciliation in East Timor. In fact, the CHR was rather more forthcoming in its articulation of reconciliation than justice responsibilities specifically requesting the High Commissioner ‘... to prepare a comprehensive programme of technical cooperation in the field of human rights ... focusing especially on capacity-building and reconciliation with a view to a durable solution to the problems in East Timor’.  86

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81 See, eg, Letter dated 26 January 2000 from the Minister for Foreign Affairs of Indonesia to the Secretary-General, Annex, UN Doc A/54/726 and S/2000/59 (31 January 2000).


85 Ibid [para 5(a)].

86 Ibid [para 7(c)].
The CHR Resolution authorised the establishment of an international inquiry to document possible human rights violations committed in East Timor in 1999 and report its conclusions to the Secretary-General who would then recommend ‘future actions’ to the UN. The CHR requested certain of its thematic Special Rapporteurs to conduct missions to East Timor and report their findings at the CHR’s next session. The CHR requested all three fact-finding efforts – the Indonesian National Commission on Human Rights, the International Commission of Inquiry on East Timor, and the Special Rapporteurs – work cooperatively.

Although the CHR special session Resolution endorsed a compromise policy position that gave primacy to national criminal investigation and prosecution, the Resolution did not fully resolve the matter of transitional justice since the Indonesian and UN fact-finding missions had yet to report their conclusions.

4 The Fact-Finding Inquiries and Letters of ‘Endorsement’

Three separate fact-finding inquiries into alleged human rights violations committed in East Timor in 1999 were conducted between 22 September 1999 and 31 January 2000. The Indonesian government established the first of these inquiries, the Commission of Inquiry into Human Rights Violations in East Timor (‘KPP HAM Inquiry’) on 22 September 1999, which reported its principal findings and recommendations at the end of January 2000.87 Pursuant to the CHR special session Resolution, the Special Rapporteurs on Extra-Judicial Executions, the Question of Torture, and Violence against Women (‘Special Rapporteurs’) jointly conducted a fact-finding mission to East Timor in November 1999 and reported their findings and recommendations in early December 1999.88 The third inquiry was the UN-backed International Commission of Inquiry on East Timor.

88 See generally Note by the Secretary General on the Special Rapporteurs Report on the Human Rights Situation in East Timor, UN Doc A/54/660 (10 December 1999) (‘Special Rapporteurs Report’).
The three inquiries reached remarkably similar conclusions about the systematic and widespread pattern of violations committed by militia groups in East Timor in 1999, actively involving and supported by the Indonesian military and police and state security policy. The inquiries visibly differed in their recommended future actions concerning national versus international investigation, prosecution, and adjudication.

The KPP HAM Inquiry supported the continued national investigation and prosecution by the Indonesian authorities. The Special Rapporteurs identified the need for a sustained investigation process but strongly advised against using the East Timor justice system for this task because in their words it had yet to be ‘created and tested’ and lacked geographic jurisdiction over suspects in Indonesia. The Special Rapporteurs, in fact, tentatively endorsed the Indonesian investigation and prosecution of 1999 violations committed in East Timor under the proviso that if Indonesia failed to take immediate and decisive steps to credibly investigate and prosecute alleged perpetrators, including those with command responsibility, then the Security Council should consider establishing an international criminal tribunal with jurisdiction over all international crimes committed in the territory since April 1974. The most forthright recommendation for international investigation and prosecution was presented by the International Inquiry, which specifically proposed that the UN establish an international human rights tribunal composed of UN appointed judges to try serious violations committed in East Timor in 1999. All three inquiries recommended some form of state reparation to the victims of past violations.

The Secretary-General provided the next definitive step in the development of transitional justice policy directives. In his 31 January 2000 letter conveying the International Inquiry report to the main UN decision-making bodies, the Secretary-General effectively delayed the establishment of an international criminal tribunal by expressing his support for the pursuit of justice by national means, both in Indonesia and in East Timor. The Secretary-General accepted the assurances of the Indonesian government that it would nationally investigate and prosecute alleged perpetrators and, with a view to ‘bringing justice’ to the East Timorese people, committed the UN to strengthening UNTAET capacity to conduct further investigations in East Timor. Stipulating what would come to be essential benchmarks for the review of prosecution efforts in Indonesia and East Timor, the Secretary-General formally acknowledged the UN’s special responsibility in relation to investigating and punishing those responsible for the 1999 violations and assured the Security Council, General Assembly and CHR that he would ‘... closely monitor progress towards a credible response in accordance with international human rights principles’.  

By mid-February 2000, it was obvious the Security Council did not support the establishment of an international criminal tribunal with individual members. The Council publicly expressed their support for Indonesian efforts to pursue justice by national means. On 18 February 2000, the President of the Security Council removed all doubt in his letter to the Secretary-General welcoming ‘... the commitment of the Indonesian Government ... to bring those responsible to justice through Indonesian’s national judicial system’ and encouraging ‘Indonesia

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90 Identical Letters Dated 31 January 2000 from the Secretary-General Addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights, UN Doc A/54/726 and S/2000/59 (31 January 2000) [paras 5-8] ('Identical Letters').

to institute a swift, comprehensive, effective and transparent legal process, in conformity with international standards of justice and due process of law.\textsuperscript{92}

Although effectively delaying the decision to establish an international criminal tribunal, the matter was non-conclusive with the UN keeping the threatened tribunal in reserve in the event the Indonesian prosecution process did not conform to international standards or 'fully satisfy international community expectations'.\textsuperscript{93}

5 A Diffuse Retributive Policy Framework

In summary, Security Council Resolutions 1264 and 1272, together with the CHR special session Resolution 1999/S-4/1 and the letters from the Secretary-General and President of the Security Council acting on the recommendations of the International Inquiry report, established a diffuse transitional justice policy framework for the East Timor conflict. Collectively, these policy directives expressed a preference for retributive justice by national means, on the one hand, and support for national reconciliation efforts in East Timor, on the other.

The UN policy directives reflected a compromise between the UN and Indonesia. Even though the Indonesian government acquiesced to international pressure to nationally investigate and prosecute its officials, the UN did not impose any concrete timelines or benchmarks for state compliance nor did it compel Indonesian cooperation with other investigatory or prosecutorial efforts. Consequently, as discussed next, the Indonesian government was relatively unconstrained in its development of implementing legislation.

\footnote{\textsuperscript{92} Letter dated 18 February 2000 from the President of the Security Council to the Secretary-General, UN Doc S/2000/137 (21 February 2000) [paras 1, 2].

As is explored in detail in Part V on policy compliance below, the diffuse transitional justice policy framework was deficient in several respects and these combined deficiencies contributed to the development of a divided, rather than integrated, legislative framework for transitional justice intervention.

B The Negotiation of Implementing Legislation (2000-2001)

Implementing legislation to give effect to the various UN policy directives on transitional justice was formulated primarily over an 18-month period between February 2000 and August 2001. The Indonesian government in Jakarta and the UNTAET administration in Dili separately developed implementing legislation for three distinct state-sponsored interventions. These interventions included: a national criminal prosecution process in Indonesia via the Ad Hoc Court; a hybridised criminal prosecution process in East Timor by means of a Serious Crimes Investigation Unit and Special Panels for Serious Crimes; and a national truth recovery and community reconciliation process in East Timor through the CAVR.

For reasons of space, and given that a prolific literature on the three legislative frameworks already exists, discussion in the following section is necessarily brief and mainly focused on the legislative development process in relation to the standards advanced by the thesis.

There were important differences in the three legislative development processes. First, the Indonesian legislative development process was relatively

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confrontational because of its ongoing delays in designing and implementing the Ad Hoc Court process necessitating repeated threats by the UN to establish an international criminal tribunal to leverage state compliance. Second, of the three legislative regimes, formulation of the CAVR Regulation was the most gradual and inclusive process, with the serious crimes legislative regime the least so. Indeed, notwithstanding the profuse criticism that has been directed against it, the legislative development process for the Ad Hoc Court was considerably more participatory than UNTAET’s extremely rushed and non-consultative development of serious crimes Regulations.

Legislative development is presented in chronological order:

1 The Indonesian Ad Hoc Human Rights Court for East Timor

As prefaced, the decision by the Indonesian government to initiate a national prosecution process was compelled by the government’s desire to protect its international reputation and avoid international scrutiny of its role in the commission of human rights violations in East Timor. In view of its vigorous lobbying efforts, Indonesia was successful in securing UN support for its prerogative to mount a national prosecution process within its existing judicial system and postpone the establishment of an international criminal tribunal.

In September 1999, when the Habibie Government announced its intention to nationally investigate and prosecute alleged perpetrators of human rights violations committed in East Timor in 1999, it lacked the necessary legal framework to conduct human rights trials. Development of the legislative framework for an Ad Hoc Court was a relatively convoluted process that technically commenced with the September establishment of the KPP HAM inquiry but mainly unfolded between February 2000, following release of the national inquiry findings, and August 2001.

95 See, eg, Human Rights Watch, above n 82, [para Inadequate Legal Framework in Indonesia].

The Ad Hoc Court was not a *fait accompli* but had to be created by presidential decree on advice of the DPR in relation to a specific place and time of offence. Several more months elapsed before Presidential Decree 53/2001, issued by President Wahid in April 2001, and Presidential Decree 96/2001, issued by President Sukarnoputri in August 2001, gave effect to the *Human Rights Court Act* for East Timor trials. These decrees further limited the geographic and temporal remit of the court to past violations committed in the districts of Liquica, Dili, and Suai in the months of April and September 1999.

Law 26/2000 established a multi-stage investigation, prosecution, and trial process that began with the KPP HAM preliminary inquiry (September 1999–January 2000). The preliminary inquiry was followed by criminal investigation by the office of the Attorney General (April–September 2000) and then prosecution and trials before an Ad Hoc Court, consisting of mixed panels of appointed career

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96 East Timor Observatory, above n 93.
97 See, eg, International Crisis Group, above n 54, 14.
(two) and ad hoc (three) judges.\textsuperscript{99} Eighteen defendants were tried between March 2002 and August 2003, all except one of whom were acquitted at trial or on appeal.\textsuperscript{100} The Indonesian prosecution process was completed within four years, with some appeals still pending in 2005.

There are varying explanations for the many delays in establishing the Ad Hoc Court including that the delays were intentional on the part of the Indonesian government or attributable to military interference.\textsuperscript{101} Given that Indonesia was undergoing its own process of democratic reform, legislative negotiations took place amidst considerable political instability, vividly illustrated by the involvement of three successive presidential regimes in formulating implementing legislation. In view of this instability, the UN evidently was reluctant to force Indonesian compliance with its Resolutions.

Despite internal political instability, the process of legislative drafting and debate was comparatively open. The main legislative enactment, the \textit{Human Rights Court Act}, was debated, extensively amended, and unanimously endorsed by Parliament. The Indonesian press regularly reported on legislative development efforts. National and international human rights organisations were able to review and comment on the draft law, presenting detailed submissions to the government and vigorously lobbying for specific legislative amendments. Some of the amendments proposed by civil society were incorporated in the final draft law. National and international human rights groups also vigorously lobbied for amendments to the two presidential decrees, although with more limited effect.

Each of the delays in establishing the Ad Hoc Court was accompanied by considerable political and public pressure to compel Indonesia to institute the Ad


\textsuperscript{100} Ibid 50.

\textsuperscript{101} See generally Draper, above n 98, 396-405, 416-417.
Hoc Court. The UN, particularly by means of its CHR regular sessions, exerted significant pressure on the Indonesian government to implement the Ad Hoc Court including by resort to its threat to establish an international criminal tribunal.

Notwithstanding relatively broad-based political and public participation in the legislative drafting process, from the perspective of international law, the legal framework for the Ad Hoc Court was quite flawed especially in terms of its exceedingly narrow substantive, geographic and temporal remit. Implementation of the Ad Hoc Court process is considered to have been equally deficient.

The Ad Hoc Court was symbolically important as a first attempt by the Indonesian government to try alleged perpetrators of past violations and as a beginning, rather than end, for human rights trials. The role of the UN in ensuring Indonesian compliance with its commitments to undertake a bona fide or credible national investigation and prosecution process can be considered a ‘test run’, so to speak, of the complementarity provisions of the *Rome Statute* concerning state willingness and ability. It is extremely unfortunate that the Security Council and CHR were not more forthcoming in stipulating precise timelines and benchmarks for Indonesian compliance in their originating Resolutions, which might have avoided the confrontational approach to legislative development.

The strengths and limitations of legislative framework for the Ad Hoc Court are considered further in Part V below.

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104 Amnesty International and Judicial System Monitoring Programme, above n 102, 4-9.
The Serious Crimes Regime in East Timor

As early as November 1999, just one month into its mission, UNTAET officials publicly foreshadowed that the Dili District Court would try serious crimes suspects arrested and detained by INTERFET. UNTAET subsequently created the serious crimes legislative regime by means of three principal Regulations in the brief interval between March and June 2000.

On 6 March 2000, UNTAET promulgated Regulation 2000/11, establishing a transitional court system. Among other things, the Regulation granted the Dili District Court exclusive jurisdiction over serious criminal offences. Three months later, in June 2000, UNTAET promulgated a more comprehensive legislative scheme to support the prosecution and trial of serious crimes. UNTAET Regulation 2000/15 established special mixed panels of judges within the Dili District Court that were empowered to exercise exclusive jurisdiction over serious criminal offences. The Special Panels for Serious Crimes ('Special Panels') were granted universal jurisdiction over genocide, war crimes, crimes against humanity, and torture in addition to temporarily limited jurisdiction over murder and sexual offences committed in East Timor between 1 January and 25 October 1999. At the same time, UNTAET promulgated Regulation 2000/16, establishing a transitional prosecution service, which inter alia formalised arrangements for the investigation and prosecution of serious criminal offences by means of a Serious Crimes Unit ('SCU') under the authority of the Deputy General Prosecutor for Serious Crimes. These three main Regulations

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108 S 14, UNTAET Regulation No 2000/16 on the Organization of the Public Prosecution Service in East Timor, UNTAET REG/2000/16 (6 June 2000).
pertaining to serious crimes were augmented by transitional rules of criminal procedure promulgated by UNTAET in September 1999. 109

This rather diffuse regulatory framework established a hybridised serious crimes process in East Timor. The Special Panels were mixed in terms of their judicial composition and subject matter, with panels of two international judges and one East Timorese judge applying a combination of international and domestic criminal law. 110 Likewise, the SCU represented a hybridised prosecution model consisting of mixed composition – international and East Timorese – investigation and prosecution teams. The serious crimes regime was implemented over five years, commencing in mid-2000 and ending in May 2005 with conclusion of the UNMISET mission.

UNTAET’s decision to establish a hybrid prosecution and trial process for past serious crimes was curious because it was not expressly mandated to undertake this function but assumed jurisdiction to do so based on its generic mandate. 111 Neither Resolution 1272 nor the October 1999 pre-mission planning report specifically identified transitional justice or the prosecution of serious crimes as a priority for the mission. The pre-mission planning report described the East Timorese justice system as non-functioning and identified the assessment and reconstruction of the legal system as urgent priorities. 112 Nor did any of the fact-finding missions contemplate a hybrid model. The investigation and prosecution of past crimes within the East Timorese justice system was contrary to the advice of the Special Rapporteurs, who warned that the judicial system, which did not yet exist, lacked the necessary capacity and geographic jurisdiction to mount the type of sustained process required to establish Indonesian responsibility for human

111 See generally Preamble, UNTAET Regulation 2000/15, above n 107.
112 Report of the Secretary-General on the Situation in East Timor, above n 45, [paras 22, 23(b), 33].
rights violations committed in East Timor. The establishment of a criminal prosecution process in East Timor also was contrary to national preferences, which although divided, clearly favored an international criminal tribunal and some form of national reconciliation.

Even more peculiar was the extreme haste with which UNTAET designed the serious crimes Regulations. When UNTAET promulgated the serious crimes Regulations in June 2000, it had only months earlier determined the applicable law and very recently established a transitional court system. It had yet to create a police, corrections, or legal defence service, which were not established until a year later in August–September 2001.

Consistent with its rushed approach, UNTAET failed to perform crucial assessment and consultation tasks before establishing the serious crimes legislative regime. There is no evidence that UNTAET assessed domestic justice system capacity to assume the task of serious crimes prosecutions. Nor is there any evidence that UNTAET conducted its own research, consulted East Timorese experts, or meaningfully consulted the East Timorese people on the range of possible transitional justice and prosecution options. When UNTAET promulgated the serious crimes Regulations in March and June 2000 national consultative structures were extremely weak. The then NCC was widely perceived as an ineffectual mechanism. The first CNRT National Congress to develop transition priorities and policies, which was scheduled for August 2000, had yet to be convened. In view of the still tenuous security situation in the

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113 Special Rapporteurs Report, above n 88, [para 73].
115 Linton, above n 110, 213.
territory until mid-to-late 2000, civil society advocacy for transitional justice had yet to gain serious momentum.\textsuperscript{116}

As then UNTAET Legal Adviser Hansjoerg Strohmeyer, who ostensibly had a lead role in drafting the serious crimes Regulations, concedes:

\ldots most of UNTAET’s Regulations were driven by the urgent need to establish quickly a minimum legal framework for the functioning of core areas of administration. In the future, however, UNTAET must adopt a more participatory methodology, both in terms of seeking the consent of the East Timorese representatives on the National Consultative Council when adopting Regulations and ensuring the participation East Timorese lawyers [sic] and experts when drafting legal instruments.\textsuperscript{117}

It has been suggested that international UNTAET staff, who were strongly influenced by their own familiarity with a ‘readily available’ Cambodia model that was being negotiated in early 2000 and the proposed though abandoned plans for a Kosovo War Crimes and Ethnic Crimes Court, adopted the hybrid court model as a model of convenience.\textsuperscript{118}

In view of the rushed and non-consultative legislative development process, the substantive provisions of the serious crimes Regulations were lacking in several critical respects including their major omission of a prosecution strategy.\textsuperscript{119} The Special Panels were the first hybrid court to be established by the UN and represented a major innovation in, and contribution to, international law. The serious crimes process, gauged in large part by the number of indictments, arrest warrants, trials, convictions and sentences that were produced during its five years of operation, generally is considered a much more credible process than the Ad Hoc Court process.

\textsuperscript{116} See, eg, La’o Hamutuk, above n 50, 1-4.
\textsuperscript{117} Strohmeyer, above n 114, 276.
\textsuperscript{118} See, eg, Linton, above n 110, 203-204.
The strengths and limitations of the legislative development process and framework for the serious crimes regime are explored in more detail in Part V below.

3 The Commission for Reception, Truth and Reconciliation

Like the serious crimes process, UNTAET was not expressly mandated to establish a national truth and reconciliation commission but assumed jurisdiction to do so based on its generic mandate. In a rather unusual sequencing of interventions, the transitional administration promulgated UNTAET Regulation 2001/10 establishing the CAVR in July 2001, a full year after the serious crimes regime was enacted. In sharp contrast to the rushed development of the serious crimes legislative regime, the CAVR Regulation was gradually formulated with legislative drafting and deliberations taking place primarily over a one-year period between August 2000 and July 2001.

Of the three state-sponsored interventions, the legislative development process for the CAVR was the most sound. The CAVR was consistent with national leadership preferences. It also was compatible with UN policy directives such as Security Council Resolution 1272 acknowledging the importance of reconciliation to the East Timorese people, in addition to being broadly supported by national and international civil society organisations.

In effect, the UN and East Timorese representatives jointly owned the idea for a national truth and reconciliation commission and the legislative development process. Evidently, the idea for a national reconciliation process originated from

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East Timorese resistance leaders. José Ramos-Horta, speaking on behalf of the FRETILIN leadership, foreshadowed the possibility of a truth and reconciliation process emulating South Africa’s approach in his April 1997 statement to the CHR.\textsuperscript{121} CNRT leaders subsequently contemplated a national reconciliation process both before and after the August 1999 popular consultation. The UN-backed International Inquiry also considered the possibility of a South African style truth and reconciliation commission and the idea gained currency and form in deliberations between UNTAET and East Timorese civil society representatives in early 2000 in response to the various fact-finding inquiry reports.\textsuperscript{122} In late August 2000, the 500-member CNRT National Congress unanimously endorsed a joint UNTAET Human Rights Unit and the East Timor Jurists Association proposal to establish a national truth and reconciliation process.\textsuperscript{123}

Following the August Congress, the UNTAET Human Rights Unit formed a broadly representative steering committee to formulate a draft Regulation.\textsuperscript{124} The steering committee, in consultation with international experts, developed a preliminary proposal and operating principles by November 2000 that were then used in a community consultation process.\textsuperscript{125}

The timing of legislative development for the CAVR was conducive to political and public participation in the legislative drafting process. By late-2000,
UNTAET had implemented more meaningful co-governance structures with East Timorese political representatives and the security situation in the territory had become increasingly stable. The newly appointed eight-member Transitional Cabinet agreed to establish a truth and reconciliation commission in December 2000 and approved a draft Regulation ‘in principle’ in April 2001. The matter was then referred to the greatly expanded 33-member National Council for review, which further studied the draft Regulation and conducted public hearings.\(^{126}\) The National Council unanimously endorsed an amended Regulation two months later, on 20 June 2001.\(^{127}\)

In addition to being politically inclusive, the CAVR legislative drafting process seems to have been much more publicly inclusive. Civil society representatives, including victim and women groups, directly participated in the legislative drafting process as members of the steering committee. The steering committee organised a comprehensive community consultation process between October 2000 and February 2001, visiting each of 13 districts at least once and meeting with a wide array of community leaders and representatives to raise public awareness about the proposed commission and seek community input concerning the draft Regulation.\(^{128}\) As part of its consultations, the steering committee also held meetings with pro-autonomy groups in West Timor.\(^{129}\) Civil society representatives participated as members of the panel that undertook community consultations for the nomination and selection of commissioners in October and November 2001.


\(^{129}\) CAVR Website, above n 123, [Chronology].
The CAVR Regulation, which was promulgated in July 2001, conceived of the commission and structured its activities in relation to serving two principal functions. The CAVR was mandated to seek the truth at the national level about past human rights violations, including serious crimes, that took place in the context of past political conflicts in East Timor between 25 April 1974 and 25 October 1999. The truth-seeking mandate of the CAVR tasked the commission with preparing a comprehensive report and recommending legal, political, and administrative reforms aimed at preventing the recurrence of future violations and responding to the needs of victims of human rights violations.

As indicated by its title, the other primary function of the CAVR was to assist with the community reception and reintegration of persons alleged to have committed less serious or 'minor' crimes through an innovative grassroots community reconciliation procedure ('CRP'). Whilst the CAVR did not offer amnesty, deponents who successfully completed the terms of a community reconciliation agreement were indemnified from criminal prosecution and civil liability. Such indemnification extended only to persons accused of committing less serious crimes and was expressly prohibited for alleged perpetrators of serious crimes.

The CAVR formally commenced operations in April 2002 and submitted its final report at the end of 2005 after approximately three-and-a-half years of work.

Unlike the rapidly formulated serious crimes regime, the substantive provisions of the CAVR Regulation reflect the benefits of extended planning and consultation. It was a well thought out Regulation that overcame many of the deficiencies associated with the South African Reconciliation Act, legislatively incorporating preparatory activities for the establishment of the commission, articulating the CAVR’s relationship to the serious crimes process, and statutorily defining broadly representative selection procedures for commissioners. The Regulation
also integrated comparatively extensive gender provisions\textsuperscript{130} and, as discussed in more detail in Part V below, relatively robust victim provisions.

In terms of implementation, the CAVR was a highly credible process.\textsuperscript{131} The CAVR offered wide-ranging recommendations in its final report concerning reforms and other ameliorative measures that should be undertaken to prevent human rights violations and respond to the needs of victims.\textsuperscript{132} Because the recommendations are volitional, rather than mandatory on the part of government, it remains to be seen whether there will be sufficient national and international political will to implement the recommendations, some of which call for reparations from UN member states.\textsuperscript{133}

Figure 3 at the end of the chapter summarises the timing of transitional justice policy and legislative negotiations for the East Timor conflict.

\section{Internationally Imposed-Politically Expedient Transitional Justice}

Like the preceding chapter, a pivotal research question was the extent to which the actual process and substantive outcome of decision-making for the Indonesia-East Timor conflict complied with the proposed ideal standards for effective transitional justice decision-making. In the East Timor context, international intervention enabled external decision-makers to formulate a primarily retributive transitional justice policy. Even though Indonesia and UNTAET/East Timor ultimately developed separate yet innovative criminal prosecution and

\textsuperscript{130} For a detailed comparative analysis of the CAVR Regulation gender provisions, including the role of civil society in legislative deliberations, see especially Hayli Millar, 'Facilitating Women's Voices in Truth Recovery: An Assessment of Women's Participation and the Integration of a Gender Perspective in Truth Commissions' in Helen Durham and Tracey Gard (eds), \textit{Listening to the Silences: Women and War} (2005) 171-222.


\textsuperscript{132} See generally \textit{CAVR Final Report}, above n 4, [Part 11: Recommendations].

\textsuperscript{133} See especially \textit{Report of the Secretary-General on Justice and Reconciliation for Timor-Leste}, above n 131, 5-6.
reconciliation interventions, the process and outcome of transitional justice decision-making fell considerably short of the proposed ideal standards for effective transitional justice.

Transitional justice policy directives and the serious crimes Regulations were not democratically negotiated. They represent macropolitical, top-down agreements that were determined by international actors rather than the people of East Timor. With the main exception of the CAVR Regulation, transitional justice policy directives and implementing legislation were not methodically designed or politically purposive and, at best, were narrowly compliant with state obligations and victims' rights in international law. Like South Africa, a key case study finding is that flaws in originating policy agreements were replicated in the design of implementing legislation.

A Internationally Imposed

Transitional justice policy directives for the East Timor conflict represent internationally imposed agreements. Transitional justice decision-making for East Timor fell considerably short of the proposed democratic decision-making ideals. As was the case for South Africa, decision-making was characterised by the twin deficiencies of limited political and public participation in the negotiation of founding policy agreements and exceedingly narrow political-public debate of guiding justice principles and transitional justice options.

A hugely aggravating factor was the exclusion of the East Timorese people as direct participants in policy negotiations. As discussed in Part III above, both the political timing and physical location of policy negotiations were adversative to East Timorese participation in policy deliberations. Core policy agreements were negotiated in the context of tripartite talks that excluded East Timorese leaders as a direct party. The fact that policy negotiations physically took place outside of East Timor in international decision-making forums also limited opportunities for
East Timorese participation. In this instance, the main redeeming feature of the Security Council and CHR deliberations was that the meetings were open, rather than closed, sessions. East Timorese representatives were able to indirectly participate through Member State delegations or other international observers in attendance. The sessions also were transparent to the extent they produced a written record of official policy deliberations and the final agreements that were reached.

A related concern is that the UN effectively brokered core policy agreements with Indonesia before consulting the affected population. Although endorsed as part of the CHR Resolution, the UN fact-finding inquiries were initiated after core Security Council and CHR policy agreements concerning justice and reconciliation were brokered. Even then, the mandate of the UN fact-finding inquiries was quite limited. Pursuant to the CHR Resolution, the primary purpose of the inquiries was to systematically investigate and document possible violations of human rights and humanitarian law committed in East Timor in 1999. The inquiries were not specifically tasked with assessing victim needs, justice system capacity, or the appropriateness of differing transitional justice models.\(^{134}\)

Like South Africa, opportunities for political and public participation in decision-making generally were greater in relation to implementing legislation following the formal transfer of power between regimes and coinciding with increasing political stability.

Of the three state-sponsored transitional justice interventions, formulation of the CAVR Regulation was the most democratic. As a jointly supported UN and East Timorese initiative, the legislative development process was extended, in addition to being politically and publicly inclusive. Negotiation of the legislative framework for the Ad Hoc Court also was relatively democratic. The Indonesian

\(^{134}\) See generally Linton, above n 110, 212.
Parliament unanimously adopted the *Human Rights Court Act* after comparatively extended legislative deliberations. Indonesian and international civil society organisations were able to make detailed submissions to the government, with varying effect, concerning the draft law and the presidential decrees that created the court and limited its remit. Formulation of the serious crimes legislative regime was neither politically nor publicly inclusive. International UNTAET staff quickly formulated the serious crimes Regulations during the early stages of the mission when national political consultative structures and civil society organisations were at their weakest.

A politically and publicly inclusive legislative development process for the CAVR Regulation seems to have produced not only a sound legislative outcome, particularly in terms of the integration of victim rights discussed below, but also much greater legitimacy. The CAVR process was strongly backed by the East Timorese people and the international community. The same cannot be said for the Ad Hoc Court and serious crimes processes. Non-establishment of an international criminal tribunal and endorsement of parallel prosecution processes in Indonesia and East Timor were policy choices that were made by and served the interests of the UN and Indonesia much more so than the East Timorese. Consequently, national ownership of and support for the Ad Hoc Court and serious crimes processes is lacking.\(^{135}\)

In addition to limited participation in the negotiation of founding policy agreements, the political-public debate of transitional justice for East Timor was problematic as well. The political-public debate of transitional justice has been polarised. Although the respective justice and reconciliation positions have moderated with time, a recent opinion poll suggests that the East Timorese leadership and populace are still deeply divided concerning their justice and

reconciliation preferences. As Francisco da Costa Guterres warns, these divisions ultimately need to be resolved, perhaps by means of a national transitional justice policy, in view of their implications for the long-term political stability of East Timor.

Much of the political-public debate about transitional justice options for East Timor also was exceedingly superficial focusing overwhelmingly on the creation of an international criminal tribunal. Because of this singular focus, there are critical gaps in transitional justice discourse concerning different prosecution models as well as reparative and preventive justice measures. Unfortunately rather than encouraging broad-based debate of transitional justice, the international community seems to have inadvertently suppressed debate by openly pressuring Xanana Gusmao/the CNRT to change national reconciliation policy preferences, particularly those favoring a national amnesty policy, to accord with international legal standards. International advocacy supporting the exploration of a much broader range of transitional justice options for East Timor is comparatively recent.

Like South Africa, an unanswered question for East Timor is whether greater public consultation and more open and extended dialogue about transitional justice might have generated alternative transitional justice options as well as more sustained East Timorese, and especially victim, support for a final policy outcome.

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137 Guterres, above n 18, 19-20.
As discussed in some detail in Part III above, transitional justice decision-making for the Indonesia-East Timor conflict was characterised by considerable political indecision and an overall lack of strategic planning and management, particularly by the UN. The level of preparation by the UN, especially for the serious crimes process in East Timor, fell considerably short of its practice for other transitioning societies where it has engaged in extensive consultations with the affected population, sought the advice of international and national experts, and fully explored the appropriateness of different transitional justice models.\(^{139}\)

The UN’s overall lack of strategic planning and management of transitional justice was manifested in diffuse policy and legislative arrangements. Even now, East Timor lacks a cohesive policy on transitional justice. By default, transitional justice policy direction was drawn from the diffuse set of directives provided by the Security Council and CHR Resolutions and the Secretary-General and Security Council President letters acting on the International Inquiry recommendations rather than one unified policy agreement. These various directives were never intended as the main transitional justice policy framework for the Indonesia-East Timor conflict but have been used in this way in the absence of any other cohesive policy agreement.

The language of the Security Council and CHR Resolutions supported a divided rather than integrated approach to transitional justice intervention. As prefaced, the principle that the primary responsibility for bringing perpetrators to justice rested with national judicial systems was interpreted to support a somewhat unusual arrangement of parallel prosecutions in Indonesia and East Timor. A

\(^{139}\) The UN’s lack of preparation is particularly striking when compared with the extensive political negotiations and preparations it subsequently undertook for the Cambodia Extraordinary Chambers and the Special Court in Sierra Leone. See especially Linton, above n 110, 185, 187-202, 231-241; Burke-White, above n 26, 30-41.
critical flaw associated with this arrangement was that neither the Security Council nor the CHR had the foresight or political resolve to compel state cooperation between potentially multiple prosecution efforts. Due in large measure to intense lobbying efforts by the Indonesian government, the UN Resolutions generally contained weak provisions for state cooperation, with the Security Council and CHR essentially ‘requesting’ Indonesia, Portugal and UNTAET to cooperate in their investigation of alleged violations and in the implementation of their Resolutions.

In view of the confrontational negotiating environment, the absence of a Security Council Resolution, particularly one adopted pursuant to Chapter VII of the Charter, explicitly demanding cooperation between parallel prosecution processes was singularly problematic. The Indonesian government and UNTAET signed a bilateral agreement in the form of a Memorandum of Understanding Regarding Cooperation in Legal, Judicial and Human Rights Related Matters (‘MOU’) in April 2000, partway through the legislative development process, but the agreement, which Indonesia subsequently refused to recognise, was largely ineffectual in producing cooperation. A lack of cooperation by Indonesia is regarded as the ‘... most fundamental obstacle to the effective functioning of the serious crimes regime’ in East Timor.

Secondly, all three UN Resolutions treated justice and reconciliation as conceptually distinct rather than mutually interdependent imperatives. The Resolutions cast the provision of retributive justice as a UN concern while largely limiting the UN’s role to technical support for reconciliation, with reconciliation expressed as a subsidiary and primarily East Timorese concern. Consequently, the UN formulated and implemented the serious crimes regime while it provided

140 See, eg, Burke-White, above n 26, 44.
141 For details on the MOU, see, eg, Hirst and Varney, above n 119, 6, 11, 16.
142 Ibid 16.
technical support for ‘indigenous’ processes of reconciliation including legislative development and implementation of the CAVR.

The UN’s role as the ‘owner’ and ‘operator’ of the serious crimes process in East Timor clearly differs from its support for hybrid prosecution models elsewhere. In view of its far-reaching implications for sustainability, it is vital that the UN carefully revisits not only the linguistic framing of its Resolutions but also its role as the service-provider of transitional justice interventions. The marginalisation of East Timorese actors and expertise in the serious crimes process has been the subject of extensive commentary and, at best, the serious crimes regime is considered to have minimally contributed to domestic capacity building.

In view of their partition in originating UN Resolutions, UNTAET developed prosecution and reconciliation processes as discrete and, to some extent, competitive processes by means of diffuse legislative enactments.

A final concern, vis-à-vis the strategic planning and management of transitional justice decision-making, is that all three state-sponsored interventions drew heavily on legislative models developed elsewhere with questionable contextual relevance to the East Timor conflict. The Human Rights Court Act and serious crimes Regulations drew extensively on provisions of the Rome Statute, while the CAVR Regulation drew extensively from provisions of the South African Reconciliation Act. The CAVR Regulation was the most contextually specific of the three legislative regimes, clearly responding to the pressing need to repatriate and reintegrate refugees from West Timor through a highly innovative

144 See, eg, the Conflict, Security and Development Group, above n 1, [para 279].
community reconciliation process that was consistent with indigenous compensatory justice practices in East Timor. 146

C Politically Expedient

From the perspective of the proposed ideal standards, a third deficiency of transitional justice policy and implementing legislation is that they were politically expedient rather than purposive agreements. With the exception of the CAVR Regulation, policy directives and implementing legislation provided little or no indication of the political-legal rationale, aims or beneficiaries of transitional justice intervention.

As discussed in Part III above, the transitional justice provisions of Security Council Resolutions 1264 and 1272 and the CHR Resolution 1999/S-4/1 were not negotiated as a deliberate political commitment to confronting past violations. The main political motivation for all three Resolutions was to end extreme violence and restore order in the territory so that East Timor could make a peaceful transition to independence. The justice and reconciliation provisions of these Resolutions were incidental to achieving these wider political objectives.

The Resolutions provided no indication of the intended purpose or beneficiaries of transitional justice intervention other than in the most literal sense of recognising that individual perpetrators should be held responsible for serious violations and that reconciliation was important to the East Timorese people. If an underlying political rationale and objectives for intervention existed, these principles and aims were unstated. Because the policy agreements were not integrated as part of the 5 May substantive peace agreements or the UN peacekeeping mission mandates, especially that of UNTAET, there was no immediately obvious

146 For an in depth examination of the CRP process, see especially Kent, ibid 1-49. See also Fausto Belo Ximenes, The Unique Contribution of the Community-Based Reconciliation Process in East Timor (Judicial System Monitoring Program, 2004) 1-32.
connection between transitional justice intervention and broader reconstruction objectives.

Only the CAVR Regulation clearly proclaimed the legislative purpose of the commission 'to promote national reconciliation and healing following the years of political conflict in East Timor' and set forth multiple reparative-preventive objectives for the CAVR to achieve. The serious crimes Regulations failed to provide any explanation of the legislative purpose or objectives for prosecuting and trying serious crimes in East Timor by means of a hybridised model. The Indonesian Human Rights Court Act espoused general political aims of the Indonesian government to protect human rights, but these aims were not specific to addressing human rights violations committed in East Timor.

The absence of clearly articulated political aims and beneficiaries for transitional justice intervention obviously makes monitoring and evaluation of the effectiveness of the Ad Hoc Court and serious crimes processes rather challenging. Scholars have had to impute the likely political motives for transitional justice intervention from other policy documents.

In retrospect, it seems likely that the political aims and beneficiaries of transitional justice intervention were intentionally unstated. The UN policy directives were politically expedient agreements that almost certainly served the short-term strategic interests of Indonesia and the UN more than the interests of the East Timorese. Indonesia avoided the humiliation of having its officials publicly tried before an international tribunal. The UN, on the other hand, avoided the expense of establishing a tribunal while at the same time it was seen to be 'doing

147 Preamble, s 3(1), UNTAET Regulation 2001/10, above n 120.
148 On this critical omission, see especially Linton, above n 110, 217-219.
149 Cohen, above n 103, 60, [Annex 2: Law 26/2000 Establishing the Ad Hoc Human Rights Court, Preamble (b)].
150 See, eg, Burke-White, above n 26, 45 who suggests the serious crimes process was intended to contribute to strengthening the capacity of a nascent East Timorese justice system.
something’ to ensure justice and accountability for the people of East Timor. Taking into account East Timorese retributive justice preferences and the UN expert recommendations, the best case scenario for East Timor, on the other hand, likely would have been the creation of an international criminal tribunal that was broadly mandated to investigate all violations of international human rights and humanitarian law committed in the territory since April 1974, or trials in a neutral third jurisdiction.

D Narrowly Compliant

Like South Africa, there is little doubt that the political elites who formulated transitional justice policy and implementing legislation for the Indonesia-East Timor conflict were well aware of Indonesia’s international legal obligations and sought to minimally comply with some of these requirements.

In terms of compliance with substantive international law, transitional justice policy and implementing legislation likely fulfilled state obligations to investigate, prosecute and punish alleged perpetrators of serious violations of human rights and humanitarian law committed in East Timor in 1999, although the UNTAET serious crimes process is generally considered a much more credible process than the Indonesian Ad Hoc Court in this regard. From the point of view of maximal state compliance, the justice and reconciliation provisions of the Security Council and CHR Resolutions and letters of endorsement give considerable pause because they were essentially non-compulsory agreements and provided a partial, rather than comprehensive, policy framework. The various UN policy directives failed to mention state obligations to repair and prevent serious violations. With the exception of the CAVR Regulation, the UN policy directives and implementing legislation contained nominal victim rights provisions.

1 Permissive Rather than Authoritative Agreements
The UN's indecision on transitional justice for East Timor was reflected in its Resolutions, which provided extremely ambiguous policy direction on justice and reconciliation and failed to incorporate specific timelines and benchmarks for state compliance.

In particular, the justice and reconciliation provisions of Security Council Resolutions 1264 and 1272 were exceptionally vague. Not only did the Resolutions fail to define the meaning of justice or reconciliation, they were noticeably unprescriptive about who was responsible for implementing these measures or the specific means by which justice and reconciliation should be achieved. In view of their ambiguity, it is arguable that the justice and reconciliation provisions were permissive rather than compulsory. The most prescriptive policy directives were provided by the CHR in its special session Resolution and the subsequent letters of endorsement from the Secretary-General and Security Council President, all of which lacked the authoritative force of a Security Council Resolution, particularly one adopted under Chapter VII of the UN Charter.151

In marked contrast to UN practice for other jurisdictions, neither the Security Council nor the CHR Resolutions authorised the establishment of a specific prosecutorial or adjudicatory process, or for that matter a truth commission.152 The vaguely worded Resolutions and letters of endorsement were broadly interpreted to support national and hybridised prosecution processes in Indonesia and East Timor and a national reconciliation process in East Timor that were then

151 Even though it provided a more prescriptive statement, the CHR special session Resolution also was remarkably inexplicit. It was not immediately obvious whether 'national judicial systems' referred to both Indonesian and East Timorese justice systems, or only the Indonesian justice system, or possibly to a third state relying on universal jurisdiction.

152 It departed from previous Security Council practice for the establishment of the international criminal tribunals for the former Yugoslavia and Rwanda, which were created and mandated by means of Security Council Resolutions 827 (1993) and 955 (1994), respectively. It departed from subsequent UN practice whereby the Special Court for Sierra Leone was created and mandated by Security Council Resolution 1315 (2000) and the Cambodia Extraordinary Chambers for the Khmer Rouge trials was endorsed by UN General Assembly Resolution 57/228 B (2003).
established by means of national legislation and UNTAET Regulations. The ambiguity of the Resolutions in this regard was enormously significant because it meant there was no *obligation* for Member States to contribute to justice and reconciliation efforts.\(^{153}\) Under-resourcing of the serious crimes regime is regarded as one of the most significant impediments to its effective functioning.\(^{154}\)

In addition to their ambiguity, the Security Council and CHR failed to stipulate concrete timelines or benchmarks for state compliance as part of their Resolutions.\(^{155}\) Standards for state compliance were stipulated outside of the Resolutions by means of the more legally tenuous Secretary-General and Security Council President letters of endorsement. Arguably, this oversight contributed to a much more confrontational legislative development process than otherwise should have been necessary. When the Indonesian government subsequently encountered significant delays in establishing the Ad Hoc Court, the UN and human rights advocates had few alternatives other than to continuously resort to the threat of an international criminal tribunal in an attempt to compel Indonesian compliance.

The UN’s failure to stipulate compliance measures as part of its Resolutions also unnecessarily complicated monitoring and assessment of the Ad Hoc Court and serious crimes processes. The UN’s own review of the effective functioning of prosecutorial efforts by Indonesia and UNTAET/East Timor, with a view to recommending future actions by these governments to ensure justice for the East Timorese people, relied on international legal standards stipulated outside of the

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\(^{153}\) See Conflict, Security and Development Group, above n 1, [para 285].  
\(^{154}\) See, eg, Reiger and Wierda, above n 35, 30.  
\(^{155}\) See especially Human Rights Watch, above n 82, [paras Recommendations; Appendix: Minimum Benchmarks] which strongly advocated the need for the UN to establish specific benchmarks and to set a timetable to review the progress of the Indonesian government in providing retributive justice.
Security Council and CHR Resolutions, including the five core achievements identified for the International Criminal Tribunal for the former Yugoslavia.\(^{156}\)

2 A Partial Rather than Comprehensive Framework

The various UN policy directives concerning transitional justice for the Indonesia-East Timor conflict were partial rather than comprehensive in view of their evident omission of any specific requirement for inter-state compensation or state reparation to the victims of state violence. The policy directives also made no mention of state obligations to prevent the recurrence of future violations.

The absence of UN policy direction on inter-state compensation from Indonesia to East Timor is perplexing given previous Security Council and General Assembly practice authorising the payment of state compensation in similar types of conflict circumstances of invasion and occupation.\(^{157}\) The absence of any requirement for state reparation from the UN or the governments of Indonesia or Timor-Leste to the victims of state violence seems an enormous omission particularly when all three fact-finding inquiries recommended some form of victim compensation or reparation. As acknowledged by the International Inquiry:

> The Commission believes it has a special responsibility to speak out on behalf of the victims who may not have easy access to international forums. They must not be forgotten in the rush of events to redefine relations in the region, and their basic human rights to justice, compensation and the truth must be fully respected. This is a responsibility which the United Nations must shoulder both in the short

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\(^{157}\) Sec, eg, paras 16-18, *Resolution Concerning the Restoration of Peace and Security in Iraq and Kuwait*, SC Res 687, 46 UN SCOR (2981st mtg), UN Doc S/RES/687 (3 April 1991) establishing a UN compensation commission to administer claims from a trust fund against Iraq for its illegal invasion and occupation of Kuwait. See also *Resolution on the Importance of the Universal Realization of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights*, GA Res 44/79, 44 UN GAOR (78th plen mtg), UN Doc A/RES/44/79 (8 December 1989) [para 29] demanding that the South African Government pay compensation to Angola for damages caused by its acts of aggression against Angola's 'sovereignty and territorial integrity'.

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and long terms, in particular in its trusteeship relation with the people of East Timor as it administers the territory towards independence (emphasis added). 158

The UN’s failure to recognise state obligations to provide reparation seems attributable to a variety of factors including national and international leadership preferences favoring collective justice over individual reparative justice, as well as the absence of a civil society campaign for compensatory or reparative justice. 159

The absence of any requirements for state reparation to victims of state violence seemed a striking omission for a transitioning society like East Timor where traditional dispute Resolution practices are compensatory-based.

Implementing legislation largely replicated the omission of reparative and preventive requirements from the originating policy directives. The *Human Rights Court Act* and UNTAET Regulation 2000/15 incorporated nominal victim reparation provisions. The provisions also were indirect in the sense that they required the enactment of separate Regulations to give effect to the provisions. The *Human Rights Court Act* included an apparently mandatory requirement for the individualised payment of compensation, restitution, and rehabilitation by perpetrators to victims as part of a court-ordered disposition. 160 Alternatively, UNTAET Regulation 2000/15 provided for the voluntary establishment of a trust fund to benefit victims and their families. Unlike the *Rome Statute* provisions on which it was based, the penalty provisions of Regulation 2000/15 did not empower the Special Panels to order serious crimes perpetrators to pay compensation to their victims as part of a disposition. In practice there is no evidence that the Ad Hoc Court ever ordered compensation, restitution or reparation as part of a disposition or that UNTAET ever established a trust fund for serious crime victims. 161

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158 *International Inquiry Report*, above n 89, [para 146].
159 See, eg, La’o Hamutuk, above n 50.
160 Article 35 of the *Human Rights Court Act* provides: ‘Every victim of a violation of human rights violations, and/or his/her beneficiaries, shall receive compensation, restitution, and rehabilitation’ to be recorded ‘in the ruling of the Human Rights Court (emphasis added)’. See Cohen, above n 103, 71 [Appendix 2: Law 26/2000 Establishing the Ad Hoc Human Rights Court].
The drafters of the CAVR Regulation opted for an individualised, rather than state, reparation scheme for less serious crimes whereby individual deponents involved in a community reconciliation procedure could agree to provide compensation or restitution to their victims as part of an act of reconciliation. In terms of its broader truth seeking function, the CAVR was not expressly mandated to provide or recommend state reparation to victims although it was broadly mandated to 'assist in restoring the dignity of victims' and pursuant to its reporting mandate, could recommend measures that would 'respond to the needs of victims of human rights violations'. These provisions, together with the preventive mandate of the CAVR, seem to have given it the necessary latitude to recommend state reparations.

The CAVR not only assumed responsibility for administering an Urgent Reparations Scheme it also made comparatively sweeping recommendations for state reparation to victims in its final report. These recommendations included seeking financial contributions from Security Council Member States that militarily backed the Indonesian occupation of East Timor; the Governments of Portugal and Indonesia; and from Indonesian businesses that profited from the occupation, including through weapons sales to Indonesia.

Secondly, with the exception of the CAVR Regulation, none of the policy or legislative frameworks authorised preventive measures. The CAVR’s preventive mandate included its authority to identify state and non-state practices and policies that needed to be addressed and to recommend reforms and other ameliorative measures to prevent the recurrence of human rights violations.

162 Ss 3.1(d), (f), 21.2, UNTAET Regulation 2001/10, above n 120.
163 CAVR Final Report, above n 4, [Part II: Recommendations, 1.7, 1.8, 2.3, 10.16, 10.17, 12]. The main CAVR recommendation for state reparations urges the Government of Timor-Leste to implement a reparations programme for the most vulnerable victims. The proposed scheme would provide rehabilitation, collective and symbolic measures to victims of torture, individuals with disabilities resulting from gross violations of human rights, victims of sexual violence, widows and single mothers, and children affected by the conflict.
3 The Relative Neglect of Victim Rights

As a final concern, transitional justice policy and implementing legislation for the East Timor conflict generally did not give equal standing to the substantive, procedural, or participatory rights of victims.

In particular, direct reference to the victims and rights of victims of past political violence were not explicitly part of the language of the UN Resolutions.\textsuperscript{164} Resolutions 1264 and 1272 did express the Security Council’s concern about increasing violence and displacement of the civilian population; the safety of UN personnel; the worsening humanitarian situation for women, children and other vulnerable groups; and the rights of refugees and displaced persons. However, the Security Council and CHR demand for justice was specific to bringing the perpetrators of violence to justice, rather than providing justice to victims or acknowledging the suffering of victims. While not mentioning victims specifically, the Secretary-General’s did acknowledge the importance of ‘bringing justice to the people of East Timor’ in his letter of endorsement.\textsuperscript{165}

Of the three legislative frameworks, the CAVR Regulation incorporated the most wide-ranging victim rights provisions. In terms of substantive rights, the Regulation ensured a victim’s right to truth and did not preclude a victim’s right to justice for serious crimes. The Regulation incorporated an individualised, although not state, reparation scheme. Concerning procedural rights, among other protective and support provisions, the Regulation authorised the CAVR to adopt special measures to accommodate the testimony of special victim groups. The Regulation incorporated fair treatment and privacy provisions. The CAVR was required to take appropriate measures for victim and witness protection. The Regulation also afforded victims some participatory rights, including the right to

\textsuperscript{164} Only the preamble to the CHR Resolution 1999/S-4/1, above n 84, specifically mentioned victims vis-à-vis the principles of the 1949 Geneva Conventions for the protection of war victims.\textsuperscript{165} Identical Letters, above n 90, [para 6].
be heard in community reconciliation proceedings and to receive a copy of a
community reconciliation agreement. Even the CAVR Regulation fell short of a
fully victim-based approach since victim consent was not required for the
initiation of community reconciliation proceedings. The community
reconciliation process was volitional for perpetrators of less serious crimes, but
not for their victims.  

In comparison with the CAVR Regulation, the legislative frameworks for the
serious crimes regime and the Ad Hoc Court incorporated nominal victim
reparation provisions and minimal victim/witness protections. The main serious
crimes Regulation, UNTAET Regulation 2000/15, essentially replicated the Rome
Statute reparation provisions for the voluntary establishment of a trust fund for
serious crime victims. In addition to the trust fund provision, Regulation 2000/15
instructed the Special Panels to ‘... take appropriate measures to protect the
safety, physical and psychological well-being, dignity and privacy of victims and
witnesses’ with procedures to be expanded on by a separate UNTAET directive.

The Regulation did not include the more ambitious Rome Statute article 75
reparation provisions. Nor did it incorporate the comparatively expansive Rome
Statute provisions that enable victims to make representations or have their
interests taken into account in criminal proceedings. The subsequently enacted
transitional rules of criminal procedure did provide much more comprehensive
substantive, procedural and participatory rights for victims; however, these
entitlements were not specific to the serious crimes process.

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166 See especially Kent, above n 145, 8, 33.
167 S 24, UNTAET Regulation 2000/15, above n 107.
168 See generally Johan D Van Der Vyver, ‘National Reconciliation under the Norms of
169 These provisions include equal protection of the rights of victims; representational rights for
victims; provisions for the interests of victims into account; a victim’s right to be informed of, and
request the right to be heard at various stages of criminal proceedings; and measures to protect the
safety, well-being, dignity and privacy of victims. The Regulation also entitles a victim to claim
compensation for damages or losses suffered by means of separate civil proceedings and enabled
the court to order an offender to pay compensation or reparations to a victim as part of a
sentencing disposition, which presumably could have been used for serious crimes. See generally
UNTAET Regulation 2000/30, above n 109.
Like the serious crimes Regulations, the legislative framework for the Ad Hoc Court contained nominal victim provisions. The *Human Rights Court Act* incorporated four provisions that were relevant to victims including requirements for separate Regulations to be enacted for the protection of victims and witnesses and, as noted, to provide compensation, restitution and rehabilitation to victims. Nevertheless, a major criticism of the Ad Hoc Court process was the almost complete inadequacy of these victim/witness provisions in practice.

\[170\] Cohen, above n 103, 65-71 [Appendix 2: *Law 26/2000 Establishing the Ad Hoc Human Rights Court*, arts 19(c), 22(6), 34, 35].

\[171\] Ibid 5, 47-50.

**E A Postscript Concerning Ongoing Demands**

From design through implementation, the first sequence of transitional interventions for the Indonesia-East Timor conflict was relatively expeditious spanning less than six years between September 1999 and May 2005. All three state-sponsored interventions — the Ad Hoc Court, the serious crimes process, and the CAVR — have now discharged their respective mandates.

Like South Africa, the Ad Hoc Court, the serious crimes process, and the CAVR generated much adulation and criticism. Despite the numerous deficiencies identified in the chapter with the process and outcome of transitional justice decision-making, ultimately all three interventions were innovative institutional responses to past violations and contributed in some measure to the development of international law, domestic rule of law capacity, and to justice and accountability for the people of Timor-Leste.
At least initially, there was considerable support within Indonesia for the Ad Hoc Court.\textsuperscript{172} Likewise, there originally was relatively broad-based support within East Timor and among the international community for the serious crimes process and the CAVR.\textsuperscript{173} Yet, as was the case for South Africa, victim and civil society disenchantment with the Ad Hoc Court and the serious crimes process grew over the course of their implementation, especially when it became clear that neither process would produce senior level accountability.

In early 2005, at the request of the Security Council, a UN appointed Commission of Experts (‘Commission of Experts’) reviewed the performance of the Indonesian Ad Hoc Court and serious crimes processes. Although concluding that neither process was wholly satisfactory, the Commission of Experts generally found the serious crimes process to have been more credible than the Ad Hoc Court process and to have achieved ‘... some measure of justice for the victims and their families’.\textsuperscript{174} On the contrary, the Commission of Experts determined that the Ad Hoc Court prosecutorial and judicial processes were ‘manifestly inadequate’ in producing the accountability of those most responsible for committing human rights violations in East Timor or bringing justice to the people of Timor-Leste.\textsuperscript{175} This finding together with their recommendations,\textsuperscript{176} promoted renewed calls for the establishment of an international criminal tribunal for Timor-Leste.\textsuperscript{177}

In mid-2006, the Secretary-General was requested to recommend practically feasible actions to the Security Council so that it could act on the Commission of

\textsuperscript{172} See, eg, Agung Yudhawiranata and Asmara Nababan, above n 81, 4-5.
\textsuperscript{173} See, eg, Reiger and Wierda, above n 135, 32-34.
\textsuperscript{174} Commission of Experts Report, above n 99, 86.
\textsuperscript{175} Ibid 86-88.
\textsuperscript{176} Ibid 96-102. The Commission of Experts recommendations contemplate the establishment of an international criminal tribunal for Timor-Leste by the Security Council exercising its Chapter VII powers should the governments of Timor-Leste and Indonesia fail to strengthen national judicial processes to ensure the accountability of those most responsible for violations committed in East Timor in 1999.
Experts report. It seems the Secretary-General has finally foreclosed the possibility of an international criminal tribunal for Timor-Leste.\textsuperscript{178} The Secretary-General's recommendations to the Council call for voluntary Member State contributions inter alia to, firstly, strengthen national judicial system capacity in Timor-Leste and Indonesia for the prosecution of serious crimes and, secondly, in response to the CAVR recommendations, establish a community restoration programme that would provide collective compensation measures, individual restorative measures, and reconciliatory measures.

Notwithstanding completion of the first sequence of transitional justice interventions for the Indonesia-East Timor conflict, it is apparent that victim and public expectations concerning justice and accountability for violations committed in East Timor between 1975 and 1999 have not been fully satisfied. In particular, there remains a deep level of frustration among East Timorese victims and the public that those who bear the greatest responsibility for the 1999 violations have not yet been held accountable for their actions.\textsuperscript{179} There also is considerable frustration that the serious crimes process has produced a biased and partial accounting of serious violations committed in East Timor in view of its predominant focus on East Timorese perpetrators, 1999 violations, and the offence of murder.\textsuperscript{180} There is some resentment among the most vulnerable victim groups, such as widows and orphans, that their pressing needs for individual and collective reparations have been largely ignored.\textsuperscript{181} Regrettably, it seems quite likely that public/victim discontent will remain in view of the evident lack of both international and national political will in Indonesia or East Timor to pursue further prosecutions or to implement the comparatively sweeping recommendations of the CAVR.

\textsuperscript{178} See Report of the Secretary-General on Justice and Reconciliation for Timor-Leste, above n 131, 1-13 which specifically recommends that the Security Council endorse the findings rather than recommendations of the Commission of Experts.

\textsuperscript{179} See, eg, Commission of Experts Report, above n 99, 21, 96.

\textsuperscript{180} See, eg, Hirst and Varney, above n 119, 16-19.

\textsuperscript{181} See, eg, Kent, above n 145, 25-28, 48.
VI Conclusion

In this chapter, the author presents the main case study findings concerning the practice of effective transitional justice decision-making for East Timor.

From the perspective of the proposed ideal standards, East Timorese political elites were not well situated to develop effective transitional justice policy. Resembling the broader peace process, Indonesia and the UN effectively dominated the process and substantive agenda for transitional justice negotiations to the relative exclusion of the participation and interests of the East Timorese. East Timor’s lack of political independence and its lack of strategic importance at the time of transition seriously compromised the ability of East Timorese political leaders to assert their transitional justice policy preferences.

With the benefit of hindsight, it seems clear the UN and Indonesia were not genuinely committed to pursuing transitional justice for its own sake. In fact, transitional justice policy agreements were unplanned and incidental to achieving more pressing political objectives. In the context of its Chapter VII deliberations to intervene in the conflict, the UN resorted to the threat of an international criminal tribunal to leverage Indonesian compliance on other matters. Yet, the international community lacked the political resolve to act on its threat, deferring instead to Indonesia’s policy preference to nationally investigate and prosecute violations committed in East Timor in 1999. This arrangement served the strategic, pragmatic, and idealistic interests of the international community and Indonesia much more so than the East Timorese. Although divided, East Timorese preferences plainly favored the establishment of an international criminal tribunal and some form of reconciliation.

Political indecision by the UN combined with inadequate strategic planning and management of decision-making contributed to producing diffuse and divided transitional justice policy and legislative frameworks. By default, transitional
justice policy direction was drawn from three UN Resolutions and the Secretary-
General and Security Council President letters of endorsement. These agreements
likely were never intended to be used as the main transitional justice policy
framework for the Indonesia-East Timor conflict but have been used in this way in
the absence of any other cohesive policy agreement.

Among their many deficiencies, the UN Resolutions were extremely ambiguous
and failed to stipulate state compliance or cooperative measures, an apparently
huge omission given Indonesia's past performance in complying with its
commitments to the UN. The language of the Resolutions also contributed to the
establishment of divided and competing implementing arrangements involving
parallel prosecution efforts in Indonesia and East Timor and separate justice and
reconciliation processes in East Timor. From the perspective of international law,
a critical oversight of the policy framework was its failure to recognise state
obligations to provide compensation and/or reparation to victims.

By taking a confrontational approach to negotiations, the UN was able to achieve
some short-term concessions including Indonesia's agreement to implement a
national investigation and prosecution process. The long-term legacy of the UN's
confrontational-indecisive style of negotiations is far more questionable. The UN
has failed to produce the accountability of those most responsible for political
violence in East Timor either by means of a genuine Indonesian prosecution effort
or through Indonesian cooperation with UN investigation and prosecution efforts,
which in turn has generated considerable frustration for the East Timorese
public/victims. In view of the exclusion of East Timorese political leaders and
civil society in decision-making, it is extremely doubtful that the retributive
transitional justice policy and legislative outcomes that were produced will
contribute much to sustainable justice given the lack of domestic ownership of
these agreements and their questionable contextual relevance to the East Timor
conflict.
In addition to the policy issues identified by the South Africa chapter, the case study of transitional justice decision-making for East Timor compels crucial policy questions. Firstly, in view of the extreme variation in UN practice in decision-making vis-à-vis its involvement in other transitioning societies, a critical question is whether there are some transitional contexts like East Timor that are so unfavorable to the design of effective policy and legislative agreements that decision-making should be delayed.

A second equally provocative question is how does one gain the cooperation of a recalcitrant state like Indonesia to confront past violations committed by its own nationals? Timothy McCormack makes a compelling argument about the persuasive effect that threats of international criminal justice can have in inducing reluctant nation-states to try their own nationals.\(^{182}\) While agreeing with this basic premise, a confounding factor for the Indonesia-East Timor conflict was that UN threats to establish an international criminal tribunal were not deliberately directed at confronting past violations but at obtaining other political concessions. It was equally evident the international community lacked the political resolve to follow through on its threats. These policy-oriented questions provide part of the discussion in Chapters Six and Seven.

In the next chapter, the author discusses the main comparative insights the South Africa and East Timor case study findings provide for ‘effective’ transitional justice decision-making and the formulation of well-designed policy and legislative agreements.

\(^{182}\) McCormack, above n 53, 142.
CHAPTER 5
COMPARATIVE INSIGHTS
FROM SOUTH AFRICA AND EAST TIMOR

1 Introduction

As established in the South Africa case study chapter, the decision-making process was relatively cooperative and deliberately politically managed enabling negotiators to formulate a methodically designed and politically purposive transitional justice policy. This case study demonstrates the possibility of achieving these two ideal standards in practice. As documented in the East Timor chapter, the approach to transitional justice decision-making was much more confrontational and relatively unmanaged by both international and domestic political elites. While international intervention in the East Timor context enabled external decision-makers to formulate a primarily retributive policy, the policy fell considerably short of the proposed democratic, methodical, purposive, and legally comprehensive ideals for effective decision-making and policy formulation.

Both case studies revealed major inadequacies in achieving ideal standards for democratically negotiated and legally comprehensive transitional justice policy, particularly in ensuring the balanced integration of victim rights. Past decision-making practice for South Africa and East Timor validated the existence of a widely conjectured state-centric model and perpetrator-oriented model of post-cold war decision-making.

In this chapter, the author summarises and reflects on the main comparative insights the South Africa and East Timor case studies provide concerning the past practice of 'effective' decision-making and policy formulation. Although South Africa and East Timor broadly represented a similar mode of regime transition, the two transitions varied on a number of key dimensions, including being very different kinds of negotiated regime transitions. These points of variation between the two transitions make them profoundly insightful for the comparative study of
past decision-making practice and highlighting best practices that can be used to inform a future effective (victim inclusive and sustainable) model of decision-making, which is the topic of discussion in Chapter Six.

II Negotiated Transitions as a Consistent Frame of Reference

The author chose South Africa and East Timor as case studies to inform the empirical part of the thesis because they are illustrative of contemporary armed conflicts. Both South Africa and East Timor experienced protracted identity-related conflicts that involved internal state repression. Before the emergence of political conflict, both societies were subject to prolonged periods of European colonisation. The combination of extended colonisation and internal conflict has produced deep ethnic divisions in both societies. Even now, South Africa and Timor-Leste continue to exhibit high rates of poverty, inequality, and social exclusion, with a substantial percentage (40 percent or more) of their population below the poverty line.

Protracted identity conflicts are very difficult to resolve because they typically involve extensive civilian casualties along ethnic lines producing a deeply divided and severely traumatised population. This characterisation certainly applied to South Africa and East Timor where the civilian population was subject to widespread and systematic violation of human rights and humanitarian law, with victim selection based primarily on race/ethnicity, as part of the apparatus of state repression. Incoming and outgoing regimes in both societies negotiated some form of official written policy agreement to confront past violations, making their inclusion in the thesis study possible.

Although several years apart, similar types of factors explained the onset of the South Africa (1990-1996) and East Timor (1998-2002) transitions. Both transitions were post-cold war transitions associated with the global decolonisation movement that aimed to replace authoritarian regimes with more democratic forms of governance.\(^2\) The timing of both transitions was prompted by what William Zartman describes as ‘mutually hurting stalemates’ and ‘ripe moments’ between authoritarian and opposition forces.\(^3\) Both transitions were facilitated by the political openings created by intense domestic and international pressure for democratic reform, economic crises and the replacement of political hardliners with more reformist leaders.

The primary reason the author chose South Africa and East Timor as case studies is because they were transplacement transitions where opposing political forces jointly negotiated an end to conflict and repression in exchange for peace and democratisation. The process of political change for both transitioning societies involved two related yet analytically distinct stages of, first, peace negotiations culminating in a formal peace agreement followed by, second, a designated period of interim governance. Relative to the period of interim governance, both transitions involved an actual regime change where an outgoing repressive regime formally ceded power to a new more liberal-democratic regime.

As negotiated transitions, the two case studies reflected a consistent decision-making process or framework to explore similarity and difference in the efficacy of past transitional justice decision-making practice and policy formulation. As explained in Chapter Two, the theoretical significance of negotiated transitions like those of South Africa and East Timor is the expectation they will produce a moderately conciliatory, rather than fully retributive, substantive policy outcome.

because decision-making is the product of compromise between opposing political forces.

In both cases, incoming and outgoing regimes negotiated some form of official policy agreement in a volatile political climate and in relation to other pressing political priorities, including the imperatives to end escalating physical violence and secure a smooth transfer of power between regimes. The fact that the two transitioning societies produced different types of transitional justice policy outcomes, a moderately conciliatory policy in the case of South Africa and a primarily retributive policy in the case of East Timor, is a function of important variations between the two transitions.

III Variation within Negotiated Transitions

Despite being negotiated transitions, the two case studies involved fundamentally different negotiation processes; a domestically owned peace process for South Africa and an internationally mediated peace process for East Timor. The two case studies collectively highlight the enormous influence the specific decision-making process and contextual variants can have in relation to ‘effective’ decision-making practice and policy formulation. The main thematic differences between the case study findings are summarised as ‘cooperative versus confrontational decision-making’ and ‘politically managed versus unmanaged decision-making’.

A Cooperative versus Confrontational Decision-Making

South Africa and East Timor manifestly differed in their sovereignty status, strategic importance, and the nature of their self-determination claims. As a sovereign and influential state exercising an internal self-determination claim, South African political elites were able to control all procedural and substantive aspects of their peace process and this level of control extended to transitional justice decision-making. The peace process was domestically owned, politically
inclusive, and essentially cooperative, which in turn enabled political decision-makers to formulate an arguably more effective, although not retributive, transitional justice policy.

In sharp contrast, East Timor's status as a weak, non-self-governing territory exercising an external self-determination claim against Indonesia, a sovereign and powerful state, produced a vastly internationalised, politically exclusionary, and relatively confrontational peace process. East Timorese political leaders did not control the process or substantive agenda for peace negotiations. Moreover, the Indonesian government's refusal to directly negotiate with national leaders meant that East Timorese political participation in tripartite peace negotiations, and by extension the negotiation of transitional justice policy directives, was indirect. The political negotiation process also was much more confrontational in view of the Security Council's exercise of its Chapter VII powers to intervene in the conflict in response to Indonesia's failure to uphold its security commitments and bring an end to the 1999 campaign of violence against the East Timorese population. For East Timor, international intervention enabled external political elites to formulate a primarily retributive, but arguably less effective, transitional justice policy.

1 South Africa and Cooperative Decision-Making

The South African peace negotiation process, which was domestically owned, politically inclusive, and relatively cooperative, was generally conducive to the design of effective transitional justice policy.

As a sovereign and strategically important state, South African political elites were able to control all aspects of their peace process and consciously chose to negotiate peace and interim governance arrangements domestically with limited international intervention. Presumably because of its sovereignty status, its pivotal strategic importance to the region, and its exercise of an internal self-
determination claim that did not directly involve another government, the international community adopted a hands-off approach and, consistent with its historical Chapter VI approach to the apartheid conflict, did not significantly intervene in the peace process. Commenting on the role of the UN in South Africa vis-à-vis its intervention in other states such as the former Yugoslavia and Somalia at the time, Peter Bouckaert observes '... the United Nations seemed intent on forcing the parties in South Africa to formulate their own solution to the problem'.

Domestic control and limited international intervention enabled domestic political elites to shape what many observers regard as an exemplary peace process. The peace process was politically inclusive in the broadest sense, involving multiple political parties in the main negotiation process. A crucial dynamic of political inclusivity was the release and return of prominent politically imprisoned and exiled resistance leaders ahead of formal negotiations. The multiparty negotiation process and inclusion of South African resistance leaders as equal negotiation partners created a much more symmetrical negotiation environment than was the case for East Timor. Domestic control of the peace process also enabled political elites to develop a lengthy and gradually paced political transition.

Transitional justice negotiations largely followed these broader patterns. South Africans controlled the process and substantive agenda for, and directly participated in the negotiation of, policy and implementing legislative agreements. Transitional justice negotiations were lengthy and gradually paced, which was instrumental to the deliberate political planning and management of this potentially divisive subject. The international community had little to say about South African transitional justice policy and was broadly supportive of the decision to establish a TRC even though this meant that amnesty would be granted for serious international crimes.

The South African claim for internal self-determination exerted a powerful influence over peace and transitional justice negotiations. The fact that South Africa was exercising an internal self-determination claim directed at changing its own political system from an illegitimate racial oligarchy to a united, nonracial constitutional democracy was enormously influential in necessitating a cooperative approach to political negotiations. Political negotiators were constrained by a strong ideological commitment to non-racialism given that the goal of political change was integration or coexistence among ethnically divided groups within a new constitutional dispensation. Consistent with this main political objective, both FW De Klerk and Nelson Mandela placed enormous emphasis on national unity and reconciliation throughout peace negotiations. The principles of national unity and reconciliation were so influential they are the cornerstone of the 1993 Interim Constitution, South Africa's substantive peace agreement, and transitional justice policy, which forms part of this agreement.

Despite escalating political violence and increasing acrimony between FW De Klerk and Nelson Mandela, a generally cooperative approach to peace negotiations, captured by the refrain 'The Roelf and Cyril Show' referring to the chief NP and ANC negotiators, Roelf Meyer and Cyril Ramaphosa,\(^5\) extended to the formulation of transitional justice policy and implementing legislation. Both the NP government and the ANC visibly shifted their original policy positions during peace negotiations. These policy shifts were perhaps most dramatic for the ANC, which, in mid-1992 dropped its original demand to seek the prosecution of apartheid perpetrators and began to publicly advocate a position of conditional amnesty. Even after the 1994 elections, when the ANC won a decisive majority in the GNU, the ANC went out of its way to secure broad-based political support for implementing amnesty/truth commission legislation by offering legislative

concessions to other political parties, including the NP, during the drafting process.

Part of the enduring significance of the South African approach to transitional justice negotiations is that the two main negotiating parties, the NP government and the ANC, volitionally agreed to address past violations by means of an amnesty policy and secured the endorsement of most, although not all, 26 negotiating parties in this endeavor. The fact that domestic political elites negotiated a conciliatory amnesty policy and implementing legislation that were intended to advance national unity and reconciliation was entirely consistent with the main political objective of integration and the establishment of an inclusive nonracial democracy. Thus, transitional justice policy is aptly characterised as being the product of both pragmatic and idealised politics.

2 East Timor and Confrontational Decision-Making

The East Timor peace negotiation process was vastly internationalised, politically exclusionary, and increasingly confrontational; therefore, it was far less conducive to the design of effective transitional justice policy.

As a non-self-governing and geopolitically weak territory exercising an external self-determination claim against its de facto occupying power, the East Timorese peace process was vastly internationalised consisting of UN-mandated talks between Indonesia and Portugal. Not only did East Timorese leaders not control the substantive agenda for these peace talks, they were refused the right to directly participate in tripartite talks, the final phase of which included the negotiation of transitional justice policy directives. The participation of East Timorese resistance leaders in political and transitional justice negotiations was largely indirect taking place through the Office of the Secretary-General and other UN Member States.
The Government of Indonesia also controlled the timetable for peace negotiations, suddenly offering special autonomy and then insisting on a rapid timeframe for conclusion of the 5 May peace agreements and organisation of the popular consultation. The rapidity of the East Timor transition to independence was contrary to the express wishes of several prominent resistance leaders who had long advocated the need for a long and phased transition to allow for national planning and capacity building.

As a sovereign and powerful state, it is inescapable that Indonesia maintained a dominant bargaining position throughout peace negotiations, evidenced by its retention of responsibility for security arrangements under the terms of the 5 May peace agreements. The Indonesian government also had direct political access to the UN forums in which transitional justice policy agreements were brokered and enormous lobbying influence as a powerful UN Member State.

Transitional justice policy negotiations for East Timor generally emulated these broader patterns. Indonesia, the UN, and Portugal — rather than the East Timorese — effectively controlled the process and substantive agenda for, and directly participated in, the negotiation of policy agreements. Like the broader peace process, policy negotiations were abrupt, seriously curtailing opportunities for the UN or East Timorese leaders to properly plan for, or consult with, the East Timorese people about the question of transitional justice. The bargaining position of East Timorese leaders was vastly inequitable vis-à-vis the Indonesian government given that policy agreements were physically negotiated outside of the territory and in UN forums to which East Timorese leaders did not have direct political access.

To complicate matters, unlike South Africa where prominent resistance leaders were released from prison or able to return from exile to participate as equal partners in political negotiations, the Indonesian government refused to release Xanana Gusmão, generally regarded as the East Timorese President-in-waiting,
from house arrest until after the popular consultation had taken place. Indonesia and the UN brokered founding policy agreements before several prominent imprisoned, exiled, and evacuated resistance leaders were able to return to the territory because of the extreme political violence. The physical absence of these leaders from the territory presumably had some bearing on their ability to develop current policy positions on transitional justice since they were unable to directly consult with the people of East Timor.

Even though principal policy agreements were physically negotiated outside of East Timor, the timing of these negotiations was not at all conducive to open or extended national debate about justice and accountability for past violations. The UN and Indonesia negotiated founding policy agreements at the height of political violence in September and October 1999 before the restoration of peace and security in the territory. Despite the presence of INTERFET and the phased withdrawal of Indonesian troops from mid-September onward, Indonesia did not formally relinquish control, including its responsibility for security, until 19 October 1999 and Indonesian troops were not fully withdrawn from the territory until the end of October. Indonesia was still the de facto occupying force in East Timor when the UN Resolutions that incorporate founding transitional justice provisions were so quickly brokered.

The exercise of self-determination for East Timor had the opposite effect than for South Africa where it necessitated cooperative negotiations. Negotiations for East Timor became increasingly confrontational, especially following East Timor’s exercise of self-determination and decision to separate from Indonesia at the end of August 1999. In view of the extreme level of violence and destruction unleashed in the territory by pro-autonomy supporters in September 1999 and Indonesia’s evident failure to uphold its security commitments, the UN was compelled to alter its historical course of action and directly intervene in the conflict. Within the context of these Chapter VII deliberations, the UN used the threat of international criminal accountability to leverage Indonesian consent to,
first, accept a multinational intervention force to restore peace and security in the
territory and to, second, agree to an orderly transfer of administering power for the
territory to the UN. Thereafter, the threat of an international criminal tribunal
became the \textit{sine qua non} of transitional justice negotiations between the UN and
Indonesia.

The confrontational quality of transitional justice negotiations for East Timor had
both positive and negative effects. From a retributivist perspective, Chapter VII
intervention by the UN created opportunities that otherwise would not have
existed for policy formulation. Without UN intervention, it is highly improbable
that the Indonesian government or East Timorese leaders would have volitionally
pursued the national criminal prosecution of those suspected of committing
serious crimes in East Timor because of the associated political costs.\footnote{\textsuperscript{6}}

In order to avoid the establishment of an international criminal tribunal, the
Indonesian government acquiesced to international pressure to prosecute those
responsible for 1999 violations allegedly committed in East Timor. At the same
time, the Indonesian government strategically used the \textit{Rome Statute}'s principle of
complementarity to assert its right to nationally investigate and prosecute
violations, with the pursuit of justice by national means subsequently becoming
the foundation of UN transitional justice policy for the East Timor conflict.\footnote{\textsuperscript{7}}

\footnote{\textsuperscript{6}} See William W Burke-White, \textit{A Community of Courts: Toward a System of International
See also Huntington, above n 2, 147-148. In theory, one would expect secession as was the case
for East Timor, particularly when combined with a Chapter VII intervention, to facilitate the
formulation of a fully retributive transitional justice policy since opposing groups are no longer
required to live together. In actuality, East Timorese leaders seem to have been just as constrained
by the need for coexistence as their South African counterparts in the sense that, even though it
politically separated from Indonesia, East Timor remains heavily dependent on Indonesia for its
political and economic security.

\footnote{\textsuperscript{7}} Preambulatory para 10, Arts 1, 17, \textit{Rome Statute} of the International Criminal Court, opened for
signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002). For details on the Art 17
admissibility provision, see Chapter One particularly at n 72.
A major disadvantage of coercive negotiations is that the Indonesian government was not motivated to nationally investigate and prosecute by a genuine desire to bring justice to the East Timorese people or to ensure Indonesian accountability for serious violations committed in East Timor. Its primary motivation was to avoid international isolation and the humiliation of having Indonesian officials tried before an UN-constituted tribunal. So far, the UN’s coercive approach has been counterproductive to achieving Indonesian cooperation with UN investigation and prosecution efforts. Nor has the coercive style of negotiations yet produced, from the perspective of international legal standards, a credible effort by the Indonesian government to prosecute and adjudicate those most responsible for violations committed in East Timor in 1999. Variation in transitional justice negotiation styles is an important thesis finding and, as noted in the next chapter, there are sharply differing views concerning the potential benefits and limits of a coercive approach.

B Politically Managed versus Unmanaged Decision-Making

A second crucial difference between the two case studies was the approach of political elites to the strategic political planning and management of transitional justice negotiations. On one hand, South African political leaders skillfully planned and managed the problem of transitional justice, while international and national political leaders in the East Timorese context did not. Skillful political management in the South African context contributed to what is arguably a better-designed transitional justice policy and legislative framework.

1 South Africa and Politically Managed Decision-Making

Because it opted to have a domestically controlled peace process, the negotiating environment was a relatively straightforward two-level game primarily requiring an interactive relationship between national political parties and civil society organisations in the formulation of public policy. Although technically a multiparty process, the NP government and the ANC were the two main
negotiating parties and unquestionably had the greatest influence in shaping transitional justice negotiations.

The NP government and the ANC defined the substantive agenda and strategically managed transitional justice negotiations. Throughout peace negotiations and especially in the lead up to the 1994 elections, De Klerk and especially Mandela emphasised the need for national unity and reconciliation foreshadowing the aims for the transitional justice policy and legislative arrangements that would emerge. De Klerk and Mandela’s conciliatory views on transitional justice were strongly mediated not only by their long-term future vision of South Africa as a democratic, racially inclusive state but also by their perceptions of internal balance of power dynamics.

During the latter stages of peace negotiations, there was significant political emphasis on escalating political violence and threats of an impending civil war, particularly by the ANC. Even though internal balance of power dynamics progressively shifted in favour of the ANC, when transitional justice policy was negotiated, the NP government retained de jure and de facto control of state laws and institutions including the security forces. It has been persuasively argued that the NP government would not have ceded power without a constitutional amnesty agreement in place and that state security forces posed a significant threat of violent reprisal should the ANC, which was widely expected to win the elections, had opted to pursue prosecutions. Apparently, the ANC, and in particular Nelson Mandela, believed the pursuit of criminal prosecutions would be politically destabilising and therefore favored a conciliatory policy. It is important to qualify other important variants were at play in relation to ANC support for amnesty and civil service negotiating concessions including significant pressure within the ANC to quickly conclude peace negotiations.

Political leadership views on transitional justice, and especially institutional preferences, were shaped as well by legal continuity between regimes where
applicable state laws and institutions, including the civil service, would be retained for a period of interim governance. Although functioning, the inherited apartheid legal system was widely regarded as illegitimate and perceived to be incapable of immediately coping with apartheid prosecutions. This compelled political negotiators to look outside the existing legal system to address past violations.

In addition to leadership preferences, a less explored but hugely important facet of political leadership was the strategic political management of decision-making. Like peace and democratisation negotiations more generally, South African negotiators skillfully managed the question of transitional justice.

The NP government and the ANC developed their respective positions on transitional justice mid-way through peace negotiations, particularly between May 1992 and August 1993, essentially publicly testing and refining their divergent positions as negotiations progressed. The ANC extensively researched comparative jurisprudence and state practice and used this information in its negotiations with the government. The publicly stated positions of the NP and the ANC on transitional justice remained relatively constant from mid-1992 onward and internal party divisions were not manifested in public. An important attribute of the ANC's approach was that it internally debated and adopted its policy positions before making these positions public. Even if there was dissension within its ranks over the question of transitional justice, the ANC functioned as a collective and seems to have been careful to publicly present political unity on this issue.

By publicising their respective positions mid-way through peace negotiations by means of various communication strategies such as press releases and public lectures, the two main negotiating parties gradually built public momentum for a final position of conditional amnesty based on truth disclosure.
The public record strongly suggests that political elites deliberately managed transitional justice negotiations in other ways as well, including structuring public debate to support specific institutional preferences. Transitional justice options were publicly presented as a finite choice between the polarities of Nuremberg-style trials or collective amnesia. A national truth commission was thus presented as the only reasonable third option, or ‘the South African way’, between these two extremes.

Once the constitutional amnesty deal was brokered, the ANC then expended considerable efforts publicly rationalising the agreement as indispensable to the process of democratic transition, from preventing the country being ‘reduced to ashes’. The political rationalisation of the constitutional amnesty agreement in this way and by resort to other nationalistic means, including through its political association with the traditional African concept of ubuntu, as Richard Wilson infers, essential to ‘manufacturing’ public acceptance of the agreement and neutralising public demands for prosecution.8 Not coincidentally, these various political rationalisations also provided the necessary legal justification to support an amnesty agreement in international law.

While skillful political management was an important dynamic, the willingness of South African political elites to define the substantive agenda and manage decision-making was very much a function of reconstruction demands and national capacity to address these demands as well as a comparatively restrained civil society campaign for transitional justice. As discussed in Chapter Three, South Africa was a relatively stable state with a functioning infrastructure. At the time of its transition, the most immediate reconstruction demand confronting political elites was the reform or replacement of functioning, albeit illegitimate, apartheid institutions, including the existing justice system. South Africa had the

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requisite capacity and resources, or access to resources, to address these reconstruction challenges.

In keeping with the cooperative political negotiation environment, a comparatively restrained national human rights lobby emerged and was generally supportive of the transitional justice policy direction set by national political elites, working within defined political processes to ensure that implementing amnesty/truth commission legislation was as robust as possible.

Much to the advantage of civil society organisations, the domestic political context was a far less complex decision-making environment than East Timor. As a pure transplacement transition and relatively straightforward two-level game, NGOs could pursue their accountability preferences by lobbying the government and opposition movements to ‘adopt favorable policies’.9 There were readily identifiable political parties with stable leadership and publicly stated positions on transitional justice. There also were relatively clear indications suggesting the ANC would almost certainly win a decisive majority in the 1994 elections. Domestic human rights organisations seem to have been able to accurately read these balance of power dynamics and campaigned to ensure that implementing legislation balanced the needs of victims against the rights of perpetrators. Because of their moderate approach, national human rights organisations were successful in obtaining a number of important concessions during the legislative drafting process, particularly in relation to securing greater recognition of victim rights.

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9 Robert Putnam as cited in Burke-White, above n 6, 52.
2 East Timor and Politically Unmanaged Decision-Making

In comparison with South Africa, decision-making for East Timor was a much more politically unplanned and unmanaged process.

A major challenge for the political management of transitional justice was the sheer complexity of the decision-making environment, which involved three separate levels of 'government', each of which asserted divergent policy preferences. Transitional justice negotiations were much more convoluted than was the case for South Africa because talks between Indonesia and East Timor were indirect, mediated primarily through the UN, with the UN itself assuming a dominant or 'power mediation' role in transitional justice negotiations.10 Political leadership arrangements in East Timor and Indonesia were fluid making it exceedingly difficult to know who was responsible for, or whom to lobby in relation to, transitional justice.

It seems likely that the rapid timetable for peace negotiations and the popular consultation militated against strategic planning for transitional justice, especially by the UN and East Timor political leaders. There is little evidence to suggest that the international or national leaders substantially prepared for transitional justice negotiations sufficiently early in the peace or democratic transition process. Even though the UN initiated fact-finding inquiries in late 1999 and early 2000 to document human rights violations committed in 1999, these inquiries were not specific to assessing domestic justice system capacity, victim needs, or the appropriateness of differing transitional justice models to the East Timor political context. The UN’s failure to explicitly mandate the INTERFET or UNTAET missions to address past violations underscored its apparent ambivalence toward, and overall lack of strategic planning for, transitional justice.

Unlike South Africa where political leaders defined the substantive agenda, neither the UN nor East Timor provided decisive political leadership on the question of transitional justice. Nor did the UN and East Timor political leaders develop congruent positions on transitional justice. In fact, political divisions within and between the UN and East Timor leaders were played out in public and almost certainly contributed to strengthening Indonesia’s bargaining position while at the same time intensifying, rather than lessening, an already polarised public debate concerning the preferred means to address past violations.

Despite its threats to establish an international criminal tribunal, the UN was indecisive and evidently willing to defer to the transitional justice preferences of Indonesia while subordinating those of East Timor. The UN’s implicit refusal to establish an international criminal tribunal benefited Indonesian and international interests more so than the East Timorese. East Timorese preferences plainly favored the establishment of an international criminal tribunal and/or some form of reconciliation. The UN seemed willing to subordinate East Timorese preferences. Specifically, Xanana Gusmão’s views opposing prosecution, even by means of an international criminal tribunal, because of the associated political costs with Indonesia whilst favoring national reconciliation and collective justice measures do not seem to have been taken seriously by the UN until comparatively recently. The UN moderated the original CNRT/Gusmão stance on reconciliation by insisting that justice must precede reconciliation and by limiting reconciliation to less serious crimes.

In retrospect, the UN made a series of questionable strategic decisions in its negotiations with Indonesia. The UN’s original threat to seek the criminal accountability of Indonesian military officials for international crimes committed in East Timor in 1999 was not made as a deliberate political commitment to securing individual criminal accountability but to leverage Indonesian compliance on other political matters. The transitional justice provisions of Security Council Resolutions 1264 and 1272 were incidental and contextually specific to ending
post-referendum violence and ensuring East Timor's peaceful transition to democracy. Crucial to Resolutions 1264 and 1272 was the UN's objective of obtaining the Indonesian government's consent to accept a multinational force and the transfer of administering authority for the territory to the UN. The vague and permissive wording of these Resolutions in relation to Indonesian accountability for the 1999 political violence in East Timor was indicative of these other macro-level negotiating dynamics.

In retrospect, the call by Portugal and the UN High Commissioner for Human Rights for theCHR special session on East Timor was likely not the best strategy for formulating robust transitional justice policy. The special session advantaged Indonesia, which was able to secure significant Asian bloc and other UN Member State support against the proposed international inquiry. This support provided Indonesia with the leverage it needed to refuse to cooperate with the UN-backed fact-finding inquiries. It also made clear the political improbability of establishing an international criminal tribunal for East Timor.

The commissioning of more than one fact-finding inquiry served to unnecessarily delay and complicate decision-making, again advantaging the Indonesian government which continued to lobby Member States to support its preference for national investigation and prosecution. While reaching similar conclusions, the Special Rapporteurs and the International Inquiry differed in their recommended future actions, recommendations that the UN subsequently ignored anyway, opting instead to support the Indonesian investigation and prosecution of alleged perpetrators by national means.

In the East Timorese context, a confounding issue for the strategic political management of transitional justice was simply the enormity of the reconstruction challenges faced by East Timor and its almost complete reliance on the international community to meet those demands. The international community was politically unwilling to expend the necessary financial resources to establish
another ad hoc tribunal, opting instead to support national prosecutions as a more cost-effective and politically appealing 'capacity building' measure. The UN's preference for national prosecution and opposition to political amnesty was supported by dramatically strengthened international legal norms requiring the prosecution of serious international crimes but giving primacy to national judicial systems in this task.

For East Timor, the overall lack of deliberate political planning and management of transitional justice undoubtedly contributed to a much more polarised national public debate and relatively maximalist public demands for accountability. Unlike the restraint exercised by South African NGOs, the most vocal international and national civil society campaign for transitional justice was much more fixated on the pursuit of a singular retributive option. The pursuit of retributive justice in the East Timor context was hardly surprising given the overall intensity, proximity, and visibility of Indonesian-supported political violence. It seems likely that the 'CNN factor' played a far greater role in galvanising the international community to demand a retributive response to the perpetrators of the 1999 violence.

The promotion of a singular, retributive policy option was a questionable advocacy strategy to use in the context of a negotiated political transition where fully retributive policy options are rarely endorsed. An unfortunate byproduct of a one-dimensional civil society campaign for an international criminal tribunal was that it so dominated the public agenda that human rights organisations seemed indifferent to comprehensively exploring other transitional justice options or possible ways of strengthening likely policy and legislative outcomes.

C Comparative Policy Outcomes

In any political transition context, there is an expectation that transitional justice decision-making will be imperfect, as it was for both case studies. Neither South Africa nor East Timor fully complied with the proposed ideal standards for
'effective' decision-making. The South Africa case study does demonstrate the possibility of achieving ideal standards in two areas identified as important by this thesis, including that political elites carefully planned for and deliberately managed transitional justice negotiations and, secondly, formulated politically purposive policy and legislative agreements.

1 South Africa and More Effective Policy

A cooperative negotiating environment combined with the strategic political management of decision-making enabled South African political elites to formulate a comparatively well-designed policy outcome.

South African negotiators volitionally negotiated a coherent and cleverly framed national public policy on transitional justice in the context of substantive peace negotiations. The policy constitutionally guaranteed that amnesty would be granted for past political offences. A democratically elected Parliament subsequently gave effect to the agreement by means of a unified legislative framework that provided some level of coordination for otherwise disparate transitional justice interventions of amnesty, truth recovery, and state reparations.

The policy was methodically planned and politically purposive. South African political elites negotiated the policy using indigenous decision-making forums and procedures. At least on the surface, the policy was contextually responsive to the unique apartheid conflict. As the postamble to the Interim Constitution, South Africa’s substantive peace agreement, the policy plainly functioned as a provisional agreement and in relation to much wider reconstruction objectives. As well, the policy expressed the political-legal aims of intervention in terms of advancing relational transformation (national reconciliation) and structural transformation (national reconstruction).
The policy, if read together with implementing legislation, minimally satisfied state obligations in international law to investigate past violations, identify and punish perpetrators through public disclosure, provide state reparations to victims, and adopt ameliorative measures to prevent the future recurrence of violations. The main omission of the policy and implementing legislation vis-à-vis affirmative state obligations was the failure to decisively address the issue of criminal prosecution. Whether intentional or inadvertent on the part of those who drafted the amnesty postamble and Reconciliation Act, this was a vital omission because there was no official state policy or strategy concerning how to proceed with concurrent or post-TRC apartheid prosecutions. It also left the door open to the possibility of further governmental amnesties or pardons.

As discussed in more detail below, the major deficiencies of South African transitional justice policy were its negotiation by essentially non-democratic means and its relative neglect of victim rights.

2 East Timor and Less Effective Policy

In comparison with South Africa, transitional justice policy for East Timor was generally less well designed and less compliant with all four proposed ideal decision-making standards.

A confrontational negotiation environment combined with an overall lack of strategic political management, particularly by the UN, produced an inadvertent and diffuse policy framework. By default, policy direction was drawn from a diverse set of UN policy directives encompassing Security Council Resolutions 1264 and 1272, the CHR special session Resolution, and the letters of endorsement from the Secretary-General and President of the Security Council acting on the International Inquiry recommendations.
The UN policy directives represent international agreements determined primarily by the UN and Indonesia using international decision-making forums to the relative exclusion of East Timorese political leaders and civil society. The policy directives were contrary to the preferences of many East Timorese people who favored the establishment of an international criminal tribunal.

The UN policy directives were politically expedient agreements that served the interests of the UN and Indonesia much more so than the East Timorese; the policy directives provided little indication of the political-legal rationale or aims for transitional justice intervention.

Transitional justice policy directives, if read together with implementing legislation, narrowly complied with state obligations to investigate, prosecute and punish alleged perpetrators of serious violations of human rights and humanitarian law committed in East Timor in 1999. From the point of view of maximal state compliance, the justice and reconciliation provisions of the Security Council and CHR Resolutions and letters of endorsement give pause because they were essentially non-compulsory agreements and provided a partial policy framework in view of their failure to specifically address state reparative and preventive obligations.

As discussed next, like South African policy, the main shortcomings of transitional justice policy for East Timor were its negotiation by essentially non-democratic means and its relative neglect of victim rights. Decision-making practice for the two case studies confirmed the existence of a widely conjectured state-centric model of decision-making.
The main individual and comparative case study findings are summarised in Table A below.

<table>
<thead>
<tr>
<th>South Africa</th>
<th>East Timor</th>
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<tbody>
<tr>
<td><strong>Political Context</strong></td>
<td><strong>Decision-Making Timing</strong></td>
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<tr>
<td>Apartheid repression (1948-1994); 46 years</td>
<td>Indonesian invasion, occupation, annexation (1975-1999); 24 years</td>
</tr>
<tr>
<td>Main legal claim for internal self-determination; goal is integration and establishment of a nonracial constitutional democracy</td>
<td>Main legal claim for external self-determination; goal is secession, independence and establishment of constitutional democracy</td>
</tr>
<tr>
<td>Human rights violations pervasive and proximate to transition but state role in proximate violations obfuscated by horizontal violence</td>
<td>Human rights violations extreme and proximate to transition, with visible direct and indirect state role in commission of proximate violations</td>
</tr>
<tr>
<td>Extended colonisation and repression produce deeply divided society, especially along racial/ethnic lines; long-term consequences of state repression include enduring issues of systemic poverty, inequality and social exclusion</td>
<td>Extended colonisation and occupation produce deeply divided society, especially along racial/ethnic lines; long-term consequences of state repression include enduring issues of systemic poverty, inequality and social exclusion</td>
</tr>
<tr>
<td>Immediate state of disrepair and reconstruction demands involve reform/replacement of functioning, illegitimate apartheid institutions</td>
<td>Immediate state of disrepair and reconstruction demands involve complete reconstruction of devastated and non-functional state laws, institutions and physical infrastructure; pressing humanitarian crisis of displaced civilian population</td>
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<p>| During conflict termination /peace negotiations, before formal transfer of power | During conflict termination/peace negotiations, before formal transfer of power |</p>
<table>
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<tr>
<th>Decision-Making Process</th>
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<tbody>
<tr>
<td>Nationally negotiated (influential sovereign state)</td>
<td>Internationally negotiated (weak non-self-governing territory)</td>
</tr>
<tr>
<td>Cooperative negotiation style (internal self-determination, Chapter VI)</td>
<td>Confrontational negotiation style (external self-determination, Chapter VII)</td>
</tr>
<tr>
<td>Inclusionary, symmetrical multiparty peace negotiations, but transitional justice policy bilaterally negotiated</td>
<td>Exclusionary, asymmetrical tripartite peace and transitional justice policy negotiations</td>
</tr>
<tr>
<td>Cohesive and stable political leadership; decisive and unified party leadership preferences on transitional justice; skilful political planning and management of transitional justice negotiations</td>
<td>Diffuse and unstable political leadership; indecisive and incongruent international and domestic leadership preferences on transitional justice; transitional justice decision-making politically unplanned and unmanaged</td>
</tr>
<tr>
<td>Gradually paced transitional justice policy negotiations, but amnesty policy abruptly finalised</td>
<td>Rapidly paced transitional justice policy negotiations</td>
</tr>
<tr>
<td>Policy endorsed with sufficient consensus; some political opposition to policy</td>
<td>Not consensus producing; unanimous Security Council Resolutions but split CHR vote; polarised political and public debate</td>
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<th>Other Mediating Factors</th>
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<tr>
<td>Strategic calculations concerning internal balance of power (transfer of power, threats of civil war)</td>
<td>Strategic calculations concerning external balance of power (strategic interests of powerful states, friendly relations)</td>
</tr>
<tr>
<td>Legal continuity between regimes including retention of civil service; functioning but illegitimate justice system; strong national preference for domestic rule of law; constitutional issues of retroactivity</td>
<td>Legal rupture between regimes including loss of civil service; no applicable laws and non-functional justice system; international law more persuasive</td>
</tr>
<tr>
<td>Emerging rather than settled international legal norms requiring prosecution, proscribing amnesty for serious international crimes</td>
<td>More settled international legal norms requiring prosecution, proscribing amnesty for serious international crimes; newly introduced principle of complementarity</td>
</tr>
<tr>
<td>Policy Outcome</td>
<td>South Africa</td>
</tr>
<tr>
<td>-------------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Volitional policy agreement; deliberate, cohesive national policy</td>
<td>Coerced policy agreement; diffuse internationally imposed policy directives</td>
</tr>
<tr>
<td>Transitional justice policy integrated as part of substantive peace agreement; predominantly conciliatory</td>
<td>Transitional justice policy not integrated as part of substantive peace agreement or UN peacekeeping mission mandates; series of UN directives, primarily retributive</td>
</tr>
<tr>
<td>Binding; constitutional guarantee of amnesty</td>
<td>Persuasive; ambiguous demands to bring to justice</td>
</tr>
<tr>
<td>Unified and integrated national implementing legislative framework</td>
<td>Divided jurisdiction, diffuse implementing legislative framework through series of national legislative and/or executive enactments</td>
</tr>
<tr>
<td>Policymaking not politically or publicly inclusive; bilateral deal</td>
<td>Policymaking exclusionary of East Timorese political leaders and civil society</td>
</tr>
<tr>
<td>Deliberately planned</td>
<td>Inadvertent, politically expedient</td>
</tr>
<tr>
<td>Politically rationalised, purposive; stated policy and legislative aims</td>
<td>Not politically rationalised or purposive; unstated policy and legislative aims</td>
</tr>
<tr>
<td>Minimally compliant; investigate, punish, repair, prevent but major omission of prosecution strategy</td>
<td>Narrowly compliant; investigate, prosecute, punish but major omission of reparative, preventive state obligations/victim rights</td>
</tr>
<tr>
<td>Perpetrator-oriented; not victim-based</td>
<td>Perpetrator-oriented; not victim-based</td>
</tr>
</tbody>
</table>

Table A: Comparative Policymaking for South Africa and East Timor
IV A Pattern of State-Centric Decision-Making

From the perspective of the proposed ideal standards, decision-making practice for South Africa and East Timor was least effective concerning participatory policymaking and the integration of victim rights in policy agreements, both of which are viewed as central to producing high quality, legitimate, and durable transitional justice outcomes. The case studies evoke significant concerns about the level of public participation in political deliberations concerning founding policy agreements with consequent implications for the integration of a victim perspective and victim rights in the content of those agreements. Policymaking for both societies was politically and publicly exclusionary, exemplifying Richard Wilson's proposition that transitional justice is '... one of the most elitist questions of all the issues is transitional negotiations, and the one in which leaders are most likely to reach a deal over the heads of ordinary people'.

Decision-making practice for South Africa and East Timor involved some form of indirect – representative or consultative – public participation but not in the negotiation of founding policy agreements. As the case studies illustrate, public participation took place comparatively late in the decision-making process and then was limited to the democratic validation of elite-brokered policy agreements through elections and/or some form of politically structured participation in the design of implementing legislation during the democratic transition phase of peacebuilding. The problem with this approach to public participation in decision-making is that it engages civil society in only a very artificial way since members of the public are called on to validate or flesh out the details of political agreements brokered by unelected political elites.

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An equally disconcerting feature of decision-making practice is that both societies evidenced an absence of meaningful public debate about guiding justice principles and the full range of transitional justice options. Public debate was exceedingly narrow even after the restoration of some semblance of internal political stability. The ANC carefully ‘staged’ public debate to support a particular political preference of conditional amnesty based on truth disclosure, effectively suppressing dissenting civil society voices. Public debate in East Timor was polarised yet dominated by the campaign for an international criminal tribunal.

A An Elite Pact-Making Model of Negotiations

The case study findings confirm that transitional justice negotiations replicated a prevailing elite pact-making model of peace negotiations where unelected and therefore unaccountable political elites brokered founding policy agreements on behalf of the affected population in the context of peace negotiations. In the case of South Africa, unidentified, although widely surmised, political NP and ANC negotiators brokered a constitutional amnesty pact that most negotiating parties subsequently endorsed in less than ideal political circumstances. In the case of East Timor, the Security Council, the CHR, the UN Secretary-General, and President of the Security Council effectively determined a broad policy framework for transitional justice, to the relative exclusion of East Timorese leaders.

For both case studies, policymaking was to varying degrees politically and publicly exclusionary and non-transparent. In the case of South Africa, the NP government and the ANC bilaterally and privately negotiated the text of the constitutional amnesty agreement after the negotiating parties had endorsed the main text of the Interim Constitution. In view of the rule of sufficient consensus, the NP and the ANC technically did not need the endorsement of any other

political parties to secure passage of the amnesty agreement, although they did submit the agreement for multi-party endorsement at the last possible moment. It is exceedingly likely that the NP government and the ANC negotiated some aspects of transitional justice policy — including the extremely broad grant of amnesty extinguishing both criminal and civil liability — in private and that these agreements do not form part of the official public record.

In the East Timor context, the UN and Indonesia, and to a lesser extent Portugal, negotiated policy agreements within the context of ongoing tripartite peace negotiations that took place outside of East Timor and that did not include East Timorese political leaders as direct negotiating parties. Although the Security Council and CHR sessions were open meetings, Indonesia lobbied intensely behind the scenes to secure UN Member State support for its right to nationally investigate and prosecute. Neither the South African constitutional amnesty policy nor the CHR special session Resolution for East Timor received unanimous political endorsement.

For both case studies, policy agreements were abruptly finalised or negotiated by political elites at an extremely inopportune time, effectively limiting opportunities for public consultation and debate. Principal policy agreements were finalised at the very end of peace negotiations when political violence was at its peak. As documented in the South Africa case study, even though the NP and the ANC had for some months debated their policy preferences in public, these two parties suddenly negotiated the constitutional amnesty pact in private outside of established multi-party procedures. While the conventional explanation for these unusual procedures is simply that the two parties could not agree on the text of an agreement, it is clear that the last minute negotiation of transitional amnesty policy was strategically advantageous. Last minute negotiation compelled multi-party endorsement of an amnesty concession in order to avert collapse of the entire constitutional package. It also prevented an upsurge of opposition to the agreement.
The UN and Indonesia suddenly negotiated founding policy agreements in the brief interval between September and October 1999. For East Timor, a complicating factor was the physical conduct of policy negotiations outside of East Timor at the Security Council in New York and the CHR in Geneva, which effectively prevented direct East Timorese participation in policy deliberations. Nor was the timing of policy negotiations favorable to open and extended national debate given the extreme level of ongoing physical violence, the fact that Indonesia had not yet formally relinquished its control of the territory, and the physical absence from the territory of the most outspoken national leaders on the question of transitional justice.

Negotiation of transitional justice policy for both case studies fell short of representative, consultative, and direct forms of public participation. Founding policy agreements for South Africa and East Timor represent top-down, macropolitical decisions.

Relative to the two case studies, public participation in decision-making took place after political elites made crucial policy decisions. When public participation in decision-making occurred, it was, in the case of South Africa, limited to the democratic validation of elite pacts through elections and politically structured participation in the design of implementing legislation. For East Timor space for public participation in political decision-making was even more limited relating primarily to the design of some but not all implementing legislation.

The two case studies illustrate that opportunities for broad-based political and public participation in decision-making were greatest during the democratic transition phase of peacebuilding in relation to the design of implementing legislation. A democratically elected South African Parliament extensively

14 Ibid [para Representative, Consultative and Direct Participation].
debated and endorsed implementing amnesty/truth commission legislation and the ANC-led GNU provided opportunities for public consultation during the legislative drafting process. For East Timor, development of implementing truth commission legislation was the most politically and publicly inclusive process of three main state-sponsored interventions. A significantly expanded 33-member National Council debated and endorsed the CAVR Regulation and the legislative drafting process involved a comparatively extensive community consultation and advocacy process. Public consultation in relation to the design of prosecution legislation was much more limited.

A related issue for both societies was the superficial level of public engagement in decision-making. Both societies evidenced narrow public debate centering on the promotion of one particular institutional option. The phrase 'Nuremberg or Nothing' steered the South African debate of transitional justice options while the premise of 'an international criminal tribunal and other options', with other options referring mainly to the proposed establishment of a national truth commission, was the dominant public discourse surrounding the formulation of policy and institutional interventions for East Timor. Neither society evidenced sustained or thorough public debate concerning the guiding principles and aims for intervention or the full range of possible institutional options. The narrowness of public debate is a particularly troublesome finding because it was essentially reproduced in the content of policy and legislative agreements, which were, at best, minimally compliant with international law and did not fully recognise comprehensive victim rights.

For both case studies, systematic assessment of community, including victim, views and expectations about transitional justice and a broadening of public debate about the full range of transitional justice options has tended to occur after

the *implementation* of specific interventions in response to their perceived shortcomings. For instance, it is only comparatively recently in East Timor that there have been more systematic efforts to gauge community views about accountability for past violations and to widen the debate about possible transitional justice options in an effort to move the process forward.16

As the case studies suggest, the problem with this pattern of limited public engagement in decision-making is that it produced state-centric, perpetrator-oriented policy agreements. Founding policy agreements did not integrate the perspective and rights of victims and other politically marginalised groups, such as women, in any meaningful way.

With the benefit of retrospection, it seems clear that policy negotiations served short-term strategic state interests. Political negotiators used transitional justice concessions to achieve other pressing macro-political objectives, confirming Samuel Huntington’s observation that elite pacts about transitional justice are indispensable to a formal transfer of power17 or at least the *expeditious* transfer of power taking place. In both situations, policy agreements seem also to have served political self-interests. In the case of South Africa, the amnesty agreement was mutually beneficial to both the NP government and the ANC given the implication of both sets of opposing forces in past political violence. In the case of East Timor, national prosecution allowed the Indonesian government to avoid the public humiliation of exposing its officials to an UN-constituted criminal tribunal while the international community avoided the expense of mounting such a tribunal and scrutiny of its role in the Indonesia-East Timor conflict.


17 Huntington, above n 2, 116.
B The Marginalisation of Victim Rights

Consistent with a state-centric model of decision-making, victims and other civil society groups did not participate in formulating policy agreements. In view of their exclusion from these deliberations, the perspectives and interests of victims do not figure centrally in the content of policy agreements.

In the case of South Africa, even though some of the ANC political negotiators who are believed to have drafted the amnesty agreement were themselves the direct victims of state repression, their vigorous representation of victim rights, particularly for retributive justice, was questionable in view of the implication of some high-level ANC officials in past political violence and the ANC's previously stated preferences supporting collective accountability measures. The National Unity and Reconciliation postamble contains a singular reference to victims, calling for ubuntu instead of victimisation, and thus essentially eschews victim demands for retributive justice. The Security Council Resolutions on the question of East Timor made no direct reference at all to the victims of past violations. The CHR special session Resolution included one preambular reference to the Geneva Conventions for the protection of war victims as part of the guiding principles for the Resolution.

18 While recognising that a number of international NGOs attended and gave statements at the special session, the CHR Resolution was a political agreement, drafted, debated and voted on by Member State representatives.
20 As observed in Chapter Three, even though the ANC demonstrated its willingness to investigate past violations allegedly committed by its members through its internal inquiries, it apparently was not willing to take action against individual ANC members preferring to accept collective responsibility.
21 This thesis finding seems to be consistent with UN practice. With the exception of para 2, *Resolution on Threats to International Peace and Security Caused by Terrorist Acts*, SC Res 1368, 56 UN SCOR (4370th mtg), UN Doc S/RES/1368 (12 September 2001) condemning the 11 September 2001 terrorist attacks in the United States, wherein the Security Council 'expressed its deepest sympathy and condolences to the victims and their families (emphasis added)', it seems that few Security Council Resolutions expressly acknowledge the victims of past violations or their rights.
Both policy agreements were perpetrator, rather than victim-oriented. The South African postamble agreement legally obliged the state to grant amnesty to alleged perpetrators for past political offences. It did not obligate the state to investigate, punish or repair past violations, or prevent their future recurrence. If the NP and the ANC made agreements concerning the establishment of a truth commission and/or the provision of state reparations to victims, these agreements were either implicit or verbally made and thus non-compulsory. It was only through implementing legislation that the state minimally satisfied its legal obligations to investigate, punish, repair, and prevent violations. Even then, the state was not legally obligated to act on the TRC’s recommendations to provide reparation to victims, to adopt measures to prevent non-repetition, or to prosecute alleged perpetrators of gross violations of human rights who had not sought or been granted amnesty.

The UN Resolutions and letters of endorsement that provided broad policy direction for the East Timor conflict narrowly focused on bringing alleged perpetrators to justice but made no specific mention of the reparative or preventive obligations of states and rights of victims other than acknowledging the importance of reconciliation to the East Timorese people. The extremely ambiguous wording of the UN Resolution provisions on justice and their omission of any timelines or benchmarks for state compliance or legal cooperation strongly suggests these agreements were permissive, rather than obligatory. The most prescriptive policy statements were provided by means of the CTHR special session Resolution and the letters of endorsement, all of which lacked the authoritative force of a Security Council Resolution, particularly one adopted under Chapter VII of the UN Charter. The case studies highlight the problem that the structure and omissions of founding policy agreements were essentially replicated by implementing legislation. The importance of the legal framing and substantive content of founding policy agreements is considered further in the next chapter.
On the other hand, as documented in the case study chapters, because victim and civil society representatives were involved in the legislative drafting process, implementing truth commission legislation incorporated comparatively extensive provisions pertaining to the substantive, procedural, and participatory rights of victims. However, even implementing truth commission legislation fell short of a fully victim-based approach since victim consent was not required for the initiation of amnesty proceedings or the decision to grant or refuse amnesty in South Africa or for the initiation of community reconciliation procedures in East Timor.

As victim and women rights activists involved in lobbying for the Rome Statute and Security Council Resolution 1325 have persuasively argued, the case studies demonstrate a strong, albeit imperfect, correlation between victim and civil society participation in political decision-making and the integration of victim interests in the content of substantive agreements. Like gender, it seems to be easier to omit the perspectives and entitlements of victims from these agreements if victims/victim representatives are not part of the political decision-making process. Measures to strengthen the integration of a victim perspective in transitional policy agreements are considered further in the next chapter.

As noted in Chapter One, there are numerous reasons for the exclusion of victim and civil society representatives from transitional justice negotiations. Richard Wilson suggests there are structural reasons relating to the timing of transitional negotiations at the end of peace negotiations when the influence of civil society organisations is at its weakest. Wilson also identifies the absence of a clear and unified victim position on transitional justice and the lack of a sufficiently well-organised advocacy movement to pressure for particular preferences as reasons for

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22 Wilson, above n 11, 199.
limited participation in political negotiations. Other commentators have identified similar constraints.  

It is equally true that political decision-makers historically have been reluctant to open the matter of transitional justice to public debate because of the divisiveness of the subject matter and its potential to disrupt peace negotiations or otherwise prolong conflict. As Rama Mani encapsulates:

The call for justice arouses charged political and personal sentiments that are aggravated by the nature of the excesses committed during conflict. Perpetrators and their victims are obliged to live within the same borders in most cases. All survivors of conflict within a society rarely share a common conception of justice, and nor do the international actors involved. The process of restoring justice after conflict is, inevitably, contentious, all the more so when the means to restore justice are limited as in developing countries.  

It very likely is not possible to achieve broad social consensus on transitional justice, especially in conflict and post-conflict societies like South Africa and East Timor that are deeply divided along racial, class, gender and political lines at the time of transition and where resources to address past violations are limited. The conventional wisdom has been that providing opportunities for public discourse on accountability may exacerbate, rather than heal, social divisions.

All of these explanations to some extent applied to transitional justice negotiations for South Africa and East Timor. Commensurate with Wilson’s observations, the political negotiation of policy agreements occurred at the end of the conflict cycle when direct physical violence was at its peak and civil society organisations were at their weakest. For East Timor in particular, the UN and Indonesia negotiated policy agreements in the midst of extreme violence and the forced displacement of much of the East Timorese population, a situation that was hardly conducive to the mobilisation of civil society to advocate for transitional justice, let alone open

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and extended public debate. In both societies, national civil society organisations did not develop clear positions sufficiently early in the peace process. Ironically, in both cases, a unified victim rights movement emerged after the implementation of specific transitional justice interventions because of their perceived inadequacies, rather than before the formulation of transitional justice policy.25

For both South Africa and East Timor, an unfortunate consequence of the state-centric approach to transitional justice negotiations is that while it may have produced short-term political stability, it most certainly has not satisfied victim and civil society demands for justice in its broadest sense, which ultimately may jeopardise long-term political stability. Both societies evidence ongoing claims for justice and accountability for past human right violations, which conceivably is partly attributable to exclusionary policymaking.

Table B below summarises the main case study findings in relation to state compliance with the proposed ideal decision-making standards.

<table>
<thead>
<tr>
<th>Decision-Making Standard</th>
<th>South Africa</th>
<th>East Timor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Policy Agreement</td>
<td>Moderate</td>
<td>Weak</td>
</tr>
<tr>
<td>Implementing Legislation</td>
<td>Weak</td>
<td>Moderate</td>
</tr>
<tr>
<td>Democratically Negotiated</td>
<td>Weak</td>
<td>Moderate</td>
</tr>
<tr>
<td>Methodically Designed</td>
<td>Moderate</td>
<td>Strong</td>
</tr>
<tr>
<td>Politically Purposive</td>
<td>Moderate-Strong</td>
<td>Strong</td>
</tr>
<tr>
<td>Legally Comprehensive</td>
<td>Weak</td>
<td>Moderate</td>
</tr>
</tbody>
</table>

Table B: Comparative State Compliance with Proposed Ideal Standards

25 In the case of South Africa, the Khulumani Support Group and in the case of East Timor, the Timor-Leste National Alliance for an International Tribunal.
V Conclusion

In this chapter, the author compared the main findings for South Africa and East Timor and reflected on some of the insights provided by these findings. The author selected the two case studies because they broadly represent negotiated regime transition, and thus provided a uniform decision-making framework in which to explore similarities and difference in 'effective' decision-making practice and policy formulation.

Although negotiated transitions, the case studies varied on a number of key dimensions, which had enormous bearing on the ability of political decision-makers to achieve the ideal standards in practice. South African decision-makers were able to control their peace process extending to the negotiation of transitional justice policy while East Timorese decision-makers were not. A domestically owned and relatively cooperative decision-making process, combined with skillful political management, contributed to the formulation of a comparatively well-designed, transitional justice policy that largely complied with the ideals for methodically planned and politically purposive decision-making. In the case of East Timor, an interventionist and largely confrontational decision-making environment produced a less well-designed transitional justice policy, which generally fell short of complying with all four ideal standards.

Both individually and collectively, the case studies revealed major inadequacies in achieving the ideals for democratically negotiated and legally comprehensive policy, essentially validating the existence of a widely conjectured state-centric and perpetrator-oriented model of post-cold war decision-making. A particularly alarming facet of policy negotiations for East Timor was the political exclusion of national leaders from direct participation and the subordination of East Timorese interests in these deliberations, a situation that stands in sharp contrast to transitional societies like South Africa where national political representatives determined the substantive transitional justice agenda and directly participated in policy negotiations. As discussed in the next chapter, the East Timor case study
compels the question of whether there are some transitional contexts where conditions are so unfavorable to effective decision-making and policy formulation that decision-making should be delayed.

The case studies provide important lessons about the future prospects for moving toward an effective model of decision-making, particularly in relation to issues concerning public participation, strategic planning, political management, and the legal framing and substantive content of transitional justice agreements. These issues are a main focus of discussion in the next two chapters.
PART THREE — FUTURE PRACTICE

Part Three, consisting of Chapters Six and the thesis Conclusion, is future-oriented, and highlights some of the lessons learned from the case studies of South Africa and East Timor concerning the prospects for moving toward an effective, defined by the thesis to mean a victim inclusive and sustainable, valuation model for transitional justice decision-making. Chapter Six considers the main lessons discerned from the South Africa and East Timor experiences about specific conditions and measures that seem to be conducive to effective decision-making.

In the Conclusion, the author returns discussion to the broader question of valuation.

CHAPTER 6
LESSONS FROM SOUTH AFRICA AND EAST TIMOR

I Introduction

As anticipated, the practice of ‘effective’ transitional justice decision-making for South Africa and East Timor was imperfect. The case studies confirm that decision-making originated in a highly volatile peacemaking context where existing political, legal, and resource conditions at the time of transition strongly mediated the ability of political elites to formulate policy agreements that were narrowly compliant with state obligations in international law, let alone the more comprehensive ideal standards advocated by the thesis. Even though transitional justice policy for South Africa was methodically designed and politically purposive, it was not democratically negotiated, nor was it legally comprehensive. Transitional justice policy for East Timor fared less well, generally falling short of all four ideals for democratic, methodical, purposive, and comprehensive decision-making.

The case studies validate the existence of a state-centric model of post-cold war decision-making, which was a subsidiary objective of the thesis study. Decision-making practice for South Africa and East Timor was politically and publicly exclusionary. It was characterised as well by an absence of genuine public consultation and fully informed public debate. As the case studies demonstrate, the problem with this pattern of limited public engagement is that it produced
perpetrator-oriented policy agreements. Founding policy agreements were at best minimally compliant with state obligations in international law and either marginalised, or completely ignored, the interests and entitlements of victims.

To varying degrees, the case study findings illustrate several well-recognised, as well as lesser-known tensions, between the ideal standards and the political realities of decision-making. Some of these tensions include: (1) the ideal of genuine and meaningful public participation versus the reality of artificial and superficial public engagement in the political decision-making process; (2) the political use of victim-oriented language in substantive agreements versus the reality of victim/civil society consultation; (3) the ideal of gradual timeframes versus the reality of abrupt decision-making; (4) the ideal of a victim-oriented perspective versus the primacy of strategic political interests; (5) the ideal of comprehensive transitional justice versus the international community’s relative preoccupation with retributive criminal justice; and (6) the ideal of nationally developed policy and legislative agreements versus the reality of externally imposed solutions.

The case study findings suggest there is a strong but imperfect correlation between public participation in decision-making and the integration of a victim perspective and comprehensive victim rights in substantive agreements. The findings also suggest that public participation in decision-making and informed public debate contribute to greater ownership and legitimacy of substantive outcomes.

The South Africa and East Timor experiences raise provocative questions about future prospects for ‘effective’ decision-making and policy formulation. Are there some transitioning societies like East Timor where it would be prudent to delay decision-making because existing political and legal conditions are completely adversative to a well-designed decision-making process and substantive outcomes? What is the appropriate role for the international community vis-à-vis the affected population in decision-making? Is it possible to have wide-ranging and
informed public debate about policy and institutional choices during the conflict termination stage of peace negotiations? These questions provide the basis for much of the discussion in this chapter.

This chapter is about the lessons the South Africa and East Timor decision-making experiences provide and their implications for moving toward an effective, victim inclusive and sustainable, valuation model for transitional justice decision-making. The chapter is divided into two main sections. In the first half, the author considers the lessons the case study findings provide about specific conditions that seem to be conducive to effective decision-making. This section also considers some of the practical measures the case studies suggest focusing on the vital importance of deliberate political management and strategic human rights advocacy. In the second half of the chapter, the author considers the prospects for strengthening each of the four ideals identified as important for an effective model of decision-making.

II Favorable Conditions

At a macropolitical level, there is emerging recognition that state ability to address past violations is very much a function of collective political will and national capacity. High political will and strong institutional capacity, including the necessary human and financial resources, are generally considered to be more favorable political conditions than low will and weak capacity.¹ The political will/institutional capacity typology was used for the case studies. At the most rudimentary level, it was determined that there was strong collective political will and national capacity to address past violations in South Africa, while both of these essential conditions were lacking for East Timor.

The need for a more nuanced understanding of the specific political and legal

conditions that are likely to contribute to the practice of effective decision-making and policy formulation was anticipated. The thesis tested a range of traditional theoretical variables in relation to past decision-making practice. These contextual variables, summarised in Figure 1, centred on the existing political and legal conditions at the time of transition. The contextual inquiry included consideration of future-oriented peace and democratisation negotiation objectives in relation to which demands for transitional justice typically compete for attention.

A broad range of political and legal conditions influenced policy formulation for South Africa and East Timor. Contrary to the claims made in some of the scholarly literature, the case studies plainly illustrate that the international legal obligations of states figured prominently in the formulation of policy and legislative agreements although to ensure minimal, rather than maximal, legal compliance.

A Sovereignty Status, Strategic Importance and Self-Determination

One of the most crucial variants between the two case studies was their differing sovereignty status, which was profoundly important for domestic control of the transitional justice substantive agenda and negotiation process. A second crucial distinction between South Africa and East Timor was their relative strategic importance and susceptibility to the interests of powerful states during policy negotiations. The case studies suggest that in the case of a sovereign and pivotal state like South Africa, the international community was more deferential to national policy preferences than was the case for East Timor. Thirdly, the case studies illustrate that differing political negotiation objectives — integration as opposed to separation — stemming from dissimilar self-determination claims had significant implications for transitional justice negotiations not only in terms of international intervention in the decision-making process, but also in shaping the

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political leadership style of negotiations.

In retrospect, South African political elites were comparatively well-positioned vis-à-vis existing political, legal, and resource conditions to develop effective policy. As a sovereign and influential state exercising an internal self-determination claim, South African political elites, most particularly the NP and the ANC, were able to control all aspects of transitional justice decision-making. South Africans determined the substantive agenda as well as negotiation procedures – including negotiation participants; symmetry between participants; negotiation timeframes; the form of negotiations; the venue for negotiations; communication strategies; and decision-making rules – deliberately negotiating transitional justice policy and legislative agreements domestically by means of indigenous decision-making forums with limited international intervention.3

In the case of South Africa, national political elites were willing to address past violations and were facilitated in this endeavor by relative political stability, the nature of political reconstruction requirements and strong national capacity to meet those demands, as well as a comparatively restrained human rights advocacy campaign for transitional justice. At the time, international legal norms requiring prosecution and prohibiting amnesty for serious international crimes were evolving, rather than settled. The international community had little to say about transitional justice requirements and was broadly supportive of national political preferences. South African political negotiators were relatively unconstrained in their negotiation of transitional justice policy and implementing legislation.

However, South African leadership preferences for accountability were strongly mediated by the main legal claim for internal self-determination, political perceptions of the internal distribution of power, and legal continuity between

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3 See generally David Bloomfield, Charles Nupen and Peter Harris, ‘Negotiation Processes’ in Peter Harris and Ben Reilly (eds), Democracy and Deep-Rooted Conflict: Options for Negotiators (International Institute for Democracy and Electoral Assistance, 1998) 61, 61-120.
regimes, all of which favored a conciliatory policy approach to past violations. South Africa's exercise of internal self-determination, where the main political objective was to establish a racially inclusive constitutional democracy thus requiring coexistence amongst previously divided racial groups within the same geographic space, compelled national leaders to adopt an essentially cooperative approach to negotiations. Cumulatively these political, legal, and resource conditions coalesced to produce an arguably better designed transitional justice policy than was the case for East Timor.

In sharp contrast, East Timorese political elites were not well-positioned to develop effective transitional justice policy. East Timor's political status as a geopolitically weak, non-self-governing territory exercising an external self-determination claim against Indonesia meant that external political elites directly controlled the substantive agenda and process for transitional justice negotiations. During these negotiations, the UN was in a power mediation position where it advanced its own transitional justice agenda and used inducements and threats to persuade the Indonesian government and East Timorese leaders to ‘embrace compromise’.

In response to East Timor’s decision to separate from Indonesia that provoked such a violent reprisal against the civilian population, negotiations between the UN and Indonesia were increasingly confrontational and this style of negotiations pervaded transitional justice decision-making. The ability of international and domestic political elites to formulate effective policy was further impeded by weak collective political commitment and national capacity to address past violations. East Timorese leaders faced an unprecedented level of devastation in the territory and were almost completely reliant on the international community to address reconstruction demands. In view of Indonesia’s strategic importance, and buttressed by dramatically changed international legal norms effectively limiting state discretion to formulate transitional justice policy, the international

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community was far more deferential to Indonesian preferences and evidently willing to marginalise those of East Timorese leaders in charting transitional justice policy direction.

In the situation of East Timor, UN support for prosecution by national means was not an obvious institutional choice in view of the Indonesian government's previous failure to uphold its commitments to the UN and questionable capacity of the Indonesian justice system to undertake this task. Several factors signaled the likely establishment of an international criminal tribunal or some other international arrangement such as trials in a third state. The East Timorese transition was not only politically violent, but also legally rupturous since Indonesian law no longer applied and there was no functioning criminal justice system; hence, the UN experts recommended against national investigation by means of the East Timor justice system. East Timorese preferences plainly favored national reconciliation and/or the establishment of an international criminal tribunal. For the East Timor conflict, there is little doubt that external intervention and balance of power dynamics were decisive in the formulation of a primarily retributive transitional justice policy.

A lesson from the case studies therefore seems to be that state sovereignty, pivotal strategic importance, and the exercise of internal self-determination are more conducive to effective transitional justice decision-making and policy formulation than the converse.

### B East Timor and the Question of Delay

From the vantage point of the ideal standards, the East Timor case study raises vital questions about, first, the appropriateness of negotiating policy agreements in a non-self-governing and especially externally occupied context, and, second, the appropriate role for the international community in decision-making. Should the UN have delayed policymaking until after UNTAET had assumed sole
administering authority and the Indonesian military was fully withdrawn from the territory? Should policymaking have been delayed altogether until East Timor had achieved political independence and self-governance? Is it ever appropriate for the international community to directly intervene in transitional justice negotiations on behalf of the affected population? Assuming there may at times be compelling reasons for the international community to mediate transitional justice agreements, including in a non-self-governing context, what can it do to better ensure a more ‘level playing field’ between opposing political forces in policy negotiations?5

Virtually every political, legal, and resource indicator militated against political elites being able to formulate effective policy agreements for the Indonesia-East Timor conflict. In particular, because of their differing sovereignty status, the respective bargaining positions of East Timorese and Indonesian political leaders were vastly asymmetrical and the UN effectively exacerbated, rather than alleviated, this inequity. The exclusion of East Timorese leaders as direct participants in decision-making with the UN’s acquiescence; the physical negotiation of transitional justice policy agreements outside of East Timor and by means of UN forums that so obviously advantaged the Indonesian government over East Timorese resistance leaders; the extreme haste and inopportune timing of policy negotiations by the UN and Indonesia that effectively precluded possibilities for consulting the affected population or informed public debate; the UN’s preferencing of international strategic interests ahead of the transitional justice preferences of the affected population; and the UN’s importation of foreign legislative models from other jurisdictions were fundamentally at odds with principles for sustainable intervention that inter alia emphasise participatory decision-making and a level playing field for negotiations.

The UN further exacerbated the already inequitable political position of East Timorese leaders by advancing its own human rights agenda and insisting there

5 Ibid 76-79.
must be justice before reconciliation. Thus, East Timorese leaders were caught between opposing interests, on one hand needing to appease the Indonesian government in order to secure future political and economic stability, and on the other, the relatively maximalist demands asserted by the UN and some members of the human rights community to pursue retributive criminal justice. The suppression of East Timorese voices in the formulation of policy and legislative agreements raises serious doubts about the extent to which these agreements can contribute to lasting peace in view of their questionable national ownership and contextual relevance. Whether intentional or not, it seems deeply ironic that the UN would presume to determine transitional justice policy on behalf of the people of East Timor in a decolonisation context.

A related concern is consistency of UN practice. Presumably because of its political status as a geopolitically weak territory, the approach of the UN to the formulation of policy and implementing legislation for East Timor seems to have been more minimalist than its practice for other jurisdictions. The UN-facilitated 5 May 1999 peace agreements contained no provision for transitional justice. Nor did Security Council Resolutions 1264 or 1272 expressly authorise the UN peacekeeping missions to address past violations or, for that matter, establish specific institutional interventions, with consequent funding implications. The primary Security Council demand was simply ‘that those responsible for violence be brought to justice’ leaving UNTAET to read into its mandate responsibility for transitional justice in order to then establish the serious crimes and CAVR processes by means of its ordinary regulatory authority. Nor did the Security Council or General Assembly authorise state compensation from Indonesia to Portugal/East Timor, as has been the practice for other jurisdictions in similar types of conflict circumstances. Certainly, the amount of time devoted to the policy deliberations and the overall level of consultation and assessment undertaken by the UN in preparation for the serious crimes regime were considerably less than its practice for other jurisdictions where ad hoc international or hybrid courts have subsequently been established.
The East Timor case study suggests at least three important courses of action for the future practice of effective decision-making and policy formulation. First, as discussed in more detail in Part IV below vis-à-vis strategic planning and assessment, effective transitional justice requires proper analysis of the specific political context including readiness for transitional justice decision-making.

Second, in some transitional contexts, particularly in a non-self-governing and external occupation-intervention context like East Timor where existing political, legal, and resource conditions indicate extremely limited prospects for formulating effective policy and legislative agreements, it may be necessary to delay decision-making. It is recognised that delaying transitional justice decision-making is exceedingly complicated in practice. Among other concerns, there are likely to be pressing due process and evidentiary considerations. Due process concerns certainly were a factor in the East Timor context where the INTERFET arrest and detention of serious crimes suspects, and concern about their prolonged detention, was the main reason cited for the UNTAET rush to formulate serious crimes Regulations. Given its potential for misuse, international principles so far only seem to contemplate state discretion to reasonably delay prosecutions, and then in a manner that is balanced against other rights and concerns. Delaying transitional justice decision-making may well be contrary to existing international principles that emphasise state obligations to provide, and victim rights to access, prompt investigation, justice and remedies. Delaying decision-making also could potentially trigger jurisdiction of the ICC in particular and exceptional circumstances. Yet, if the aim is to design sustainable transitional justice interventions, which seems to be the new policy direction of the UN secretariat,\(^6\) then temporarily delaying decision-making until political, legal and resource conditions are more favorable to the design of effective policy and legislative agreements may be necessary in rare circumstances.

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Third, in view of the sustainable peace finding that externally imposed solutions rarely are sustainable, international principles on accountability and victim rights need to be more precise about the expected role of the international community in transitional justice decision-making and implementation.

III Favorable Measures

Notwithstanding the importance of the case study findings concerning the political and legal conditions that seem to be most conducive to effective decision-making and policy formulation, many of those conditions, such as state sovereignty, are relatively fixed. If the aspiration is to develop effective policy, the case study findings underscore that, like peace processes more generally, changes to the political and civic management of the process and substantive outcomes of transitional justice decision-making may offer better avenues for future-oriented change.

A Deliberate Political Management

The two case studies involved fundamentally different approaches to political management and human rights advocacy, highlighting the essential contributions that deliberate political management and strategic human rights advocacy can make to effective decision-making and policy formulation.

Based on the case study findings, a key attribute of effective decision-making was the willingness and ability of international and domestic political elites to decisively manage the substantive agenda and negotiation process. A distinguishing theme for both case studies was the considerable statecraft involved in transitional justice negotiations. Like the broader peace process, transitional justice decision-making was a strategic exercise encompassing complex political choices about the substantive agenda and specific negotiation procedures for policy and legislative deliberations. South African and Indonesian political elites
seem to have been more adept at managing the decision-making process and substantive outcomes than either the UN or Portugal/East Timor.

In the situation of South Africa, the NP and especially the ANC evidently exerted an extraordinary degree of control over the process and substance of transitional justice negotiations. The NP and the ANC determined the substantive agenda for negotiations, openly campaigning for specific institutional preferences and selectively using comparative state practice to support their preferences. The NP and the ANC also seem to have made a series of tactical choices around the process of amnesty negotiations including: (1) the bilateral form of negotiations; (2) the last minute finalisation and negotiation of the amnesty pact in private outside of established multiparty procedures; (3) the careful legal framing of the postamble agreement as a binding, yet open-ended, constitutional commitment; (4) the tight orchestration of public debate around a finite set of options; (5) media and communication strategies that included carefully timed press releases; (6) the political justification of amnesty through nationalistic narratives; (7) the drafting of implementing legislation outside of established departmental procedures; (8) the use of one NGO to channel civil society input in the legislative drafting process; and (9) carefully structured opportunities for public participation in the legislative drafting process.

As noted, the ability of the NP and the ANC to deliberately manage transitional justice negotiations was facilitated by numerous factors. Plainly, the extended length of negotiations was instrumental to the negotiating parties being able to adequately prepare for, then publicly test and refine their divergent positions, gradually building public momentum for a final compromise policy of conditional amnesty. Other contributing factors included the essentially cooperative style of negotiations whereby the NP and the ANC volitionally developed party positions on transitional justice and were willing to work together to formulate a compromise policy agreement. The ANC, first as the government-in-waiting and then as the government-in-power, also enjoyed a relatively cooperative, albeit
arms length, relationship with civil society.

In the situation of South Africa, a positive attribute of deliberate political management is that it produced comparatively well-designed agreements and, in the short-term at least, limited public opposition to amnesty. A limitation of the overtly 'stage-managed' character of deliberations is the image that the entire process was politically manipulated. The manner in which political elites portrayed transitional justice options effectively suppressed meaningful public debate since the expression of alternative — especially retributive — policy preferences would have been seen as 'unreasonable' or 'un-African'. In view of the extended length of amnesty negotiations between the NP and the ANC from mid-1992 until late 1993, one is left to wonder, first, if these deliberations could have been more politically and publicly inclusive and, second, whether fully informed public debate of guiding principles and institutional options was possible. The potential to move beyond an artificial and superficial level of public engagement in transitional justice policymaking is explored further in Part IV below.

In the case of the East Timor conflict, the Indonesian government was equally strategic in its approach to policy negotiations, while the UN and Portugal/East Timor seem to have been less skillful in managing decision-making. Among other factors, the ability of political elites to deliberately manage decision-making was impeded by extreme political instability and the abrupt timeframes for negotiations, which effectively limited opportunities for strategic political planning and public consultation. The decision-making environment also was vastly more complex in view of international intervention and the challenge Indonesia posed as a recalcitrant state.

The UN especially, and to a lesser extent Portugal/East Timor, did not adequately prepare for transitional justice negotiations and provided indecisive and divided political leadership. The UN and Portugal/East Timor also seem to have made a
series of questionable tactical choices in their negotiations with the Indonesian government that advantaged the position and interests of Indonesia while disadvantaging those of East Timor. These choices included: (1) the questionable timing of policymaking at the peak of political violence and when Indonesia was still an occupying force in the territory; (2) the use of the CHR as a venue for policy negotiations when the affected population lacked direct political and physical access to this forum; (3) the commissioning of fact-finding inquiries after founding policy agreements were brokered and then the authorisation of more than one inquiry; (4) the extremely ambiguous wording of founding policy agreements and failure to stipulate timelines and benchmarks for state compliance and legal cooperation as part of these agreements; and (5) the failure to expressly mandate the UN peacekeeping missions to address past violations.

The UN's confrontational-indecisive style of negotiations seems to have been a rather unwieldy decision-making strategy for transitional justice. The UN's open-ended threat to establish an international criminal tribunal was effective in achieving short-term, perfunctory state compliance, but seems to have been far less effective in producing a bona fide prosecution effort by the Indonesian government or Indonesian cooperation with UN investigation and prosecution efforts.\(^7\) While it is convincingly reasoned that threats of international criminal justice can be highly persuasive in encouraging reluctant nation-states to try their own nationals,\(^8\) in the situation of the Indonesia-East Timor conflict this 'power

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\(^7\) In this regard, see especially Christopher Rudolph, 'Constructing an Atrocities Regime: The Politics of War Crimes Tribunals' (2001) 55 *International Organization* 655, 677-678 who identifies the need for cooperation as one of two significant challenges for international law in relation to war-torn societies, noting that the Indonesian government's lack of cooperation prevented the establishment of an international criminal tribunal.

\(^8\) See especially Timothy L. McCormack, "Their Atrocities And Our Misdemeanours: The Relevance to Try a State's Own Nationals" for International Crimes" in Mark Lattimer and Philippe Sands (eds), *Justice for Crimes Against Humanity* (2003) 107, 142. There are differing views concerning the deterrent benefits of publicly identifying and threatening alleged perpetrators of serious violations with prosecution particularly by means of international forums. As scholars such as Timothy McCormack and Geoffrey Robertson, *Crimes Against Humanity. The Struggle for Global Justice* (2000) 433-434 propose such threats can be a powerful tool in encouraging an offending state to take action against its alleged perpetrators. However, as McCormack, 142 acknowledges, the relationship is not a direct one. That is, simply proposing the establishment of an international criminal process does not guarantee the domestic prosecution of crimes.
mediation' strategy seems not to have been particularly effective.

The problem seems not to be that the UN threatened to seek the international criminal accountability of Indonesian military officials but that it originally threatened this action to induce a recalcitrant Indonesian government to accept a multinational force in East Timor and transfer administering power to the UN, rather than as a deliberate commitment to seeking justice and accountability for past violations. Almost as soon as it made the threat, it was clear the UN lacked the political resolve to follow through. Rather than negotiating robust policy agreements that stipulated timelines and benchmarks for state compliance and compelled legal cooperation, the UN evidently adopted the path of least resistance by keeping the matter of an international criminal tribunal open-ended and resurrecting the threat whenever Indonesia seemed not to comply with its international commitments.

A lesson of the case studies therefore seems to be that deliberate political planning and management are more conducive to effective transitional justice decision-making and policy formulation than the converse. The UN's confrontational-indecisive style of negotiations, particularly when compared with the decisive-cooperative style of negotiations in South Africa, raises complex questions about the most effective strategies to use when dealing with a recalcitrant state like Indonesia in order to obtain its genuine cooperation in confronting past violations committed by its own nationals. This finding concerning differing negotiation styles for transitional justice and their relative effectiveness is not resolved by the thesis and merits further investigation and assessment.

2 Strategic Human Rights Advocacy

The case study findings confirm that strategic victim/human rights advocacy is an equally important dynamic of effective decision-making, particularly in ensuring the balanced integration of victim rights in policy and legislative agreements. The
approach of human rights advocates for South Africa and East Timor in pressuring for transitional justice were quite different. The case studies illustrate that the ability of civil society to pressure political decision-makers to adopt favorable policy positions is very much intertwined with the specific political context, including the complexity of the decision-making environment and political willingness to create space for civil society engagement in the decision-making process. As well, the severity of past violations evidently influences the type of campaign civil society organisations embark on to advocate for transitional justice.

South African victim/human rights advocates were comparatively strategic in pressuring for transitional justice and, as a result, were successful in persuading political elites to adopt a number of favorable legislative concessions, particularly in ensuring greater recognition of victim rights. Advocacy strategies that seemed to work well in the South African context include: (1) the advancement of moderate demands for transitional justice that were largely compatible with political preferences; (2) strategic unity among domestic victim/human rights organisations; and (3) willingness to work within politically defined consultation processes. Victim/human rights advocates also seem to have been able to accurately read balance of power dynamics, anticipating that some sort of political amnesty agreement was inevitable and focusing lobby efforts on pressuring to ensure that implementing legislation was as robust as possible. In retrospect, it seems that the decision-making environment, which was far less complex than that for East Timor, facilitated strategic advocacy efforts.

On the other hand, the negotiation environment for East Timor was vastly more complex. The extreme level and visible state role in proximate violence seems to have contributed to a much more polarised public debate and oppositional relationship between civil society and political leaders. Moreover, political indecision on transitional justice essentially created a policy gap that was filled by a maximalist transnational advocacy campaign strongly promoting the
establishment of an international criminal tribunal. Human rights advocacy efforts for East Timor were internationally dominated, polarised, maximalist, inflexible, and inconsistent with the specific political context, and consequently less effective in influencing political decision-making.

As the case studies demonstrate, because transitional justice decision-making in the context of a negotiated regime transition is a highly strategic political exercise, it important that human rights advocacy efforts be equally strategic. The case studies collectively highlight several important lessons for future advocacy efforts. These lessons include the importance of (1) early mobilisation; (2) conflict-specific and flexible advocacy positions, (3) comprehensive advocacy, and (4) strategic unity.

2.1 Early Mobilisation

For both case studies, founding political decisions about transitional justice were made early, in the context of peace negotiation and before there was a formal transfer of power between regimes. Yet, organised and proactive national human rights advocacy efforts tended to emerge after these founding policy agreements were negotiated. The significance of this temporal finding is that if interested members of civil society, including victims, wished to participate in policymaking with a view to influencing political preferences, they needed to formulate and advance their own policy positions very early in the peace process, likely as early as pre-negotiations, if not before.

While early mobilisation of civil society organisations to advocate for transitional justice is obviously essential, it is exceptionally difficult to achieve in practice if, as was the case for South Africa and East Timor, the repressive regime is still in place, direct physical violence is at its peak, and/or the influence of civil society organisations is weak. As David Bloomfield and Ben Reilly wisely advise in relation to peace processes more generally, public participation generally requires
that political parties identify vital constituencies early in the peace process — likely at the pre-negotiation stage — and take steps to 'structure the process so as to maximise their participation'.

Early mobilisation also presumes that victim/civil society organisations have the requisite knowledge, willingness, ability, and resources to participate in policy negotiations when there is likely to be considerable variation in the capacity of victims/civil society organisations to constructively engage in transitional justice processes. As has been the case for public participation in peacemaking more generally, it may be necessary to develop victim/public capacities and provide resources for victim/civil society organisations to participate in transitional justice policymaking. There have been very positive practical developments since the South Africa and East Timor transitions with organisations like the International Human Rights Law Group, the Lawyers Committee for Human Rights and other international NGOs providing early education and preparatory capacity building to facilitate the participation of domestic civil society organisations in transitional justice negotiations.

Early mobilisation also generally requires a symbiotic relationship where political decision-makers are willing to provide political space or forums for public participation. Political elites rarely volunteer this space. The more likely scenario is that members of civil society will have to claim the right to participate through highly organised advocacy networks.

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12. See, eg, Christine Chinkin, 'Human Rights and the Politics of Representation: Is There a Role
2.2 Conflict-Specific and Flexible Advocacy Positions

The case study findings also highlight the immense importance of conflict-specific advocacy. As a transplacement transition, advocacy for an international criminal tribunal for East Timor was to some extent inconsistent with the specific political context where transitional justice agreements are the product of compromise and fully retributive options are rarely endorsed. In this regard, flexible victim/human rights advocacy is essential. A particular shortcoming of advocacy efforts for East Timor was their apparent inflexibility. Even though it was clear by late-September 1999 that Indonesia had sufficient UN Member State support to block the establishment of an international criminal tribunal, transnational advocacy networks seemed incapable of adapting to these shifting power relations. Thus, it is arguable that civil society organisations lost critical opportunities to fully explore other retributive options, such as trials in a third state, and to more vigorously lobby the UN to ensure that any political agreements it made with Indonesia were legally robust in the sense of being compulsory, incorporating timelines and benchmarks for state compliance and requiring legal cooperation with other investigation and prosecution efforts.

The two case studies also suggest civil society organisations are more likely to win political concessions by adopting moderate, reasoned, and well articulated negotiation positions. The historical legacy of human rights advocacy for transitional justice is that maximalist demands rarely promote political cooperation because they often are impossible to implement, especially if they increase the resistance of hardliners who, as was the case for the Indonesian military, typically are the target of the maximalist policy. Like Argentina before it, advocacy efforts for East Timor illustrate the inherent limitations of maximalist positions where essentially a singular retributive option — in the case of East Timor an international criminal tribunal — is promoted by civil society.

for International Law’ in Michael Byers (ed), The Role of Law in International Politics: Essays in International Relations and International Law (2000) 131, 136-140.

2.3 Comprehensive Advocacy

In view of the known complexity and diversity of victim needs, the case studies suggest the pressing need for human rights activists to campaign for comprehensive transitional justice. A major shortcoming of transitional justice advocacy for South Africa and East Timor was the relatively narrow focus of these efforts. For South Africa, human rights advocacy efforts were politically channeled to focus on the establishment of a national truth commission. For East Timor, human rights advocacy focused on the creation of an international criminal tribunal and there was virtually no public pressure for reparative and preventive justice measures. In view of significantly strengthened international legal norms requiring prosecution and prohibiting amnesty for serious international crimes and recognising comprehensive state obligations and victim rights, human rights organisations need to extend their traditional activism beyond campaigning for purely retributive justice options.

2.4 Strategic Unity

The case study findings also demonstrate that strategic unity is effective. The lesson of advocacy efforts in South Africa and in relation to other political negotiation contexts is that civil society organisations are more likely to influence political positions when working cooperatively. Political negotiators have to see civil society transitional justice preferences as central to their own interests, which historically has not been the case. There is strength in numbers. Broad coalitions of civil society organisations working together, although not necessarily advocating the same policy position, appear to be more effective in influencing transitional justice outcomes.\(^\text{14}\)

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Table C below summarises the main conditions and measures the case studies suggest are conducive to effective decision-making and policy formulation.

<table>
<thead>
<tr>
<th>Limited International Intervention</th>
<th>State sovereignty (state versus territory)</th>
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<tr>
<td></td>
<td>Strategic importance (pivotal versus weak)</td>
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<td></td>
<td>Nature of self-determination claim (internal versus external)</td>
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<td>Collective Will</td>
<td>National and international political commitment to address, including by the offending regime</td>
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<td></td>
<td>Strategic interests including leadership perceptions of internal and external power relations</td>
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<td></td>
<td>International legal norms</td>
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<tr>
<td>Relative Stability</td>
<td>Peaceful transition, transfer of power</td>
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<td></td>
<td>Optimum state of disrepair, including justice system capacity; reconstruction demands</td>
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<td></td>
<td>Nature and consequences of human rights violations</td>
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<td></td>
<td>Legal continuity versus rupture</td>
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<tr>
<td>Strong Capacity</td>
<td>Established political parties, stable and influential leadership, readiness to govern</td>
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<td></td>
<td>Strong domestic civil society, readiness to participate</td>
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<td></td>
<td>Knowledge, awareness of transitional justice options</td>
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<td></td>
<td>Human, financial and material resources</td>
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<tr>
<td>Deliberate Management</td>
<td>Straight-forward and stable decision-making environment</td>
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<td></td>
<td>Decisive leadership preferences, party unity</td>
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<td></td>
<td>Cooperative negotiation style, including cooperative relationship with civil society</td>
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<td>Extended and gradually paced negotiations</td>
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<td>Strategic planning and assessment for transitional justice</td>
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<td></td>
<td>Broad public consultation and informed public debate</td>
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<td></td>
<td>Control of the transitional justice substantive agenda and decision-making process</td>
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<tr>
<td>Strategic Human Rights Advocacy</td>
<td>Early mobilisation</td>
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<td></td>
<td>Informed, conflict-specific and flexible positions</td>
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<td>Comprehensive advocacy</td>
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<td>Strategic cooperation</td>
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<td>Moderate, reasoned, and well articulated versus maximalist positions</td>
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<td></td>
<td>Collaborative rather than oppositional relationship with political elites</td>
</tr>
</tbody>
</table>

Table C: Summary of Conditions and Measures Conducive to Effective Decision-Making
IV Prospects for Inclusive and Sustainable Transitional Justice

The author now considers the most important lessons learned from the South Africa and East Timor experiences and prospects for strengthening future compliance with each of the four ideals identified by the thesis, including: (1) public participation in decision-making; (2) strategic political planning and management; (3) clarity of political-legal aims; and (4) the legal framing and substantive content of transitional justice policy agreements with a view to ensuring the balanced integration of victim rights. Since the South Africa and East Timor transitions, there have been encouraging developments in international law and transitional justice practice that support the thematic shift to an effective and sustainable model of transitional justice.

A Participatory Decision-Making

A vital lesson from the South Africa and East Timor case studies is that even limited public participation in decision-making is likely to increase not only the integration of a victim perspective and rights in the content of transitional justice agreements, but also greater public ownership and acceptance of the agreements that are produced.

As the case studies illustrate, while it does not guarantee integration, participatory decision-making is more likely to produce substantive agreements that respond to the interests of victims and other marginalised groups. Thus, the exclusion of victims and civil society representatives in policymaking for South Africa and East Timor was reflected in the substantive agreements produced where victim rights were either marginalised or omitted altogether. Conversely, public participation in the negotiation of implementing truth commission legislation for both societies produced agreements that incorporated comparatively wide-ranging provisions recognising the rights of victims and women.

However, as decision-making practice for the East Timor case study demonstrates,
participatory decision-making does not necessarily guarantee victim-oriented or legally sound outcomes. International and national human rights organisations vigorously lobbied the Indonesian government to strengthen provisions of the draft Human Rights Court Act concerning its compliance with international legal standards, including victim rights, and yet many of their proposals were not incorporated in the final legislation. The serious crimes process, on the other hand, is generally regarded as providing a relatively credible process in implementation even thought the main serious crimes Regulation involved no public participation during legislative drafting and was not an especially well-conceived legal agreement.

Second, in terms of the legitimacy of the agreements produced, a very significant concern for the thesis is that victim and civil society exclusion from founding policy decisions has contributed to ongoing claims for justice and accountability even after the full implementation of state-sponsored transitional justice interventions, which potentially diminishes long-term political stability. In the case of South Africa, victim exclusion from policymaking combined with partial implementation of the TRC recommendations exacerbated, rather than healed, social tensions between victim/human rights advocates and the government. The ANC government has strenuously opposed domestic litigation efforts by apartheid victims/survivors and their relatives seeking clarity of the government's reparation policy and international litigation action seeking compensation in the United States pursuant to the Alien Tort Claims Act against businesses that benefited from apartheid. The situation for East Timor is even more disconcerting where there has been a post-democratic reversion to direct physical violence.

It seems exceedingly likely that victims and their relatives will continue to contest state policy and legislative agreements until victims/civil society representatives play a much more consequential role in the negotiation of such agreements.

Accordingly, the case studies prompt the vital question of whether public
participation in transitional justice decision-making is possible in relation to the formulation of founding policy agreements. Decision-making practice since the South Africa and East Timor transitions seems to suggest that participatory policymaking is indeed achievable in practice. Negotiations for the Rome Statute and Security Council Resolution 1325 reflect this trend whereby civil society representatives actively campaigned for, and indirectly participated in, the negotiation of these multilateral agreements. In view of civil society participation in their creation, the content of these policy agreements provides comparatively extensive integration of victim and gender rights. Likewise, victim/civil society representatives actively and successfully campaigned for specific transitional justice provisions as part of the Lomé Peace Accord for Sierra Leone\(^{15}\) and the Arusha Peace and Reconciliation Agreement for Burundi\(^{16}\) in an effort to offset political amnesty provisions.

In an equally encouraging development, the UN Secretary-General has comparatively recently recognised the need for sustainable transitional justice approaches and, consistent with this policy shift, the UN is placing much greater emphasis on the need for national-led consultation strategies that involve the active participation of national stakeholders in preparing for transitional justice.\(^{17}\) Likewise, the updated impunity principles recognise the need for broad public consultation in the design of specific types of institutional interventions including truth commissions, reparation programmes, and preventive measures.\(^{18}\)

It is essential to acknowledge that victim/public participation in transitional justice decision-making, generally, and policymaking, specifically, is an ideal and may


\(^{17}\) Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, above n 7, 6.

not be possible, or even desirable, in all conflict and post-conflict circumstances. Like all four of the proposed standards, it generally requires a measured approach to decision-making.

B Strategic Planning and Assessment

Another lesson from the South Africa and East Timor decision-making experiences is the vital importance of strategic planning and assessment ideally before the formulation of transitional justice policy. As the case studies demonstrate, strategic planning and assessment are instrumental to producing well-conceived and contextually responsive substantive agreements.

South African political elites were better prepared for transitional justice negotiations than their counterparts for the East Timor conflict seem to have been. The case study findings suggest that South African political elites, at times through civil society, carefully assessed comparative state practice and used this information in policy and legislative negotiations. Yet, aside from the assessment of comparative state practice, decision-making practice for both societies' evidence major deficits concerning comprehensive assessment of the specific political context; domestic rule of law capacity, including traditional forms of justice, and victim needs and expectations before the formulation of transitional justice policy and implementing legislation. Despite political use of the traditional African concept of ubuntu to justify the constitutional amnesty agreement and subsequently the TRC as a restorative form of justice, there appears not to have been any rigorous assessment of whether amnesty and truth recovery were accepted traditional practices.

For East Timor, there is little evidence that international or national political elites substantially planned for transitional justice. In fact, the UN conducted its main fact-finding inquiries in East Timor after it brokered founding policy agreements with Indonesia. Even then, the UN fact-finding inquiries were not specifically
tasked with assessing national justice capacity or victim needs. Equally troublesome, international UNTAET staff evidently hastily wrote the serious crimes Regulations without benefit of expert or community consultation, or first assessing justice capacity or victim needs. The absence of public consultation and assessment was reflected in the substantive provisions of the main Regulation, which provided no explanation of the legislative purpose or aims for intervention, relied heavily on imported provisions from foreign legislative models that were of questionable contextual relevance to the East Timor conflict, and incorporated extremely nominal victim rights provisions. The regime also was contrary to the UN's expert recommendations concerning justice system incapacity to support a sustained investigation process.

In general, the case study findings indicate serious discrepancies between, first, the level of planning for implementing legislation rather than founding policy agreements and, second, comparatively extensive preparations for truth commission but not prosecutorial interventions. For both case studies, in a rather unusual sequencing of interventions, prosecution preceded truth-seeking efforts without benefit of adequate public consultation, needs assessment, or even the formulation of a prosecution strategy. This contrasts sharply with the extensive preparations that both societies invested in designing their truth commissions that included well-designed implementing legislative agreements. For example, the CAVR Regulation, which involved a 12-month legislative drafting and community consultation process: (1) clearly specified the legislative purpose and objectives for intervention; (2) imposed operational time limits; (3) established public selection procedures for commissioners; (4) anticipated preparatory activities; (5) addressed issues of resourcing and coordination; and (6) integrated comparatively extensive victim and gender rights provisions. Both case studies

19 The sequencing of prosecution ahead of truth recovery is unusual in the sense that truth commissions historically were envisioned as a flexible and adaptable intervention that can be quickly established when there is no functioning criminal justice system, as was the case for East Timor, while criminal prosecution was conceived as a longer-term endeavor because it usually involves domestic rule of law capacity building. See especially Naomi Roht-Arriaza, 'Conclusion: Combating Impunity' in Naomi Roht-Arriaza (ed), Impunity and Human Rights in International Law and Practice (1995) 281, 282-283, 286.
suggest the need to extend this extensive level of preparation to the formulation of founding policy agreements and implementing legislation for other institutional interventions, including prosecution.

Since the South Africa and East Timor transitions, there have been significant developments in the importance accorded to the assessment of the specific political context, as well as national needs and capacity before developing transitional justice interventions. Coinciding with these developments, the case study findings support at least four conceptually distinct, yet overlapping, spheres that should be assessed ahead of policy formulation and legislative design. These spheres include: (1) the specific political context; (2) domestic rule of law capacity; (3) victim needs; and (4) comparative state practice. In addition to the nature and severity of past violations, assessment dimensions for these spheres minimally include knowledge, capacity, commitment, and security.

Of the four spheres, the assessment of victim needs arguably is the least developed and most complex to implement in practice. There remains a pressing need to gather baseline data about victim needs and expectations before transitional justice policy and implementing legislation are formulated, which of course requires consultations and dialogue with individual victims/victim groups. There are some encouraging signs that the victim 'assessment gap' is changing with internationally facilitated public opinion surveys recently being conducted in Iraq and Northern Uganda to assess victim/public attitudes about specific types of transitional justice.

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24 See generally Iraqi Voices: Attitudes toward Transitional Justice and Social Reconstruction (International Center for Transitional Justice and Human Rights Center, University of California
of institutional interventions. One of the principal difficulties with the emerging practice of victim attitude surveying remains its comparatively late timing in the peacebuilding cycle after founding policy decisions have been made.\textsuperscript{26}

Like South Africa, many transitioning societies seem to perform rather well in assessing comparative state practice ahead of formulating their own transitional justice policies and implementing legislation. In fact, as was the case for both South Africa and East Timor, there is considerable policy transfer between jurisdictions.\textsuperscript{27} The East Timor case study raises concerns about the role of international actors who apparently sought ‘quick fix’ solutions and simply imported foreign legislative models without benefit of properly assessing the specific political context or justice capacity.\textsuperscript{28} Particularly in a situation like East Timor that involves direct international intervention and a legally rupturous transition, it is clear that systematic assessment of the specific political context and domestic rule of law capacity should be indispensable to formulating contextually relevant and legally sound transitional justice policy and legislative frameworks.

In future, strategic political management and victim/human rights advocacy can make important contributions to ensure there is proper planning and assessment for transitional justice, especially in situations like South Africa and East Timor where there is a need to ensure proper sequencing, resourcing, and coordination of multiple institutional interventions. Still, there are considerable complexities associated with strengthening planning and assessment measures including that

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Berkeley, May 2004).
\textsuperscript{25} See generally Pham Phuong at al, \textit{Forgotten Voices: A Population Based Survey of Attitudes about Peace and Justice in Northern Uganda} (International Center for Transitional Justice and Human Rights Center, University of California Berkeley, July 2005).
\end{flushright}
existing international principles provide limited direction on this matter. The UN itself tends to give mixed signals, on the one hand stressing the need for rapid response, and on the other, sustainable intervention. Opportunities for strategic planning and assessment are linked to other political transition dynamics, most especially extended and gradual timeframes for decision-making.

C Clarity of Political-Legal Aims

One of the main lessons from the South Africa and East Timor decision-making experiences is the importance of a clearly articulated political-legal rationale and aims for transitional justice policy and implementing legislation from the outset. Clearly articulated principles and aims are essential to not only managing public expectations about transitional justice, but also the subsequent monitoring and assessment of interventions once introduced. Decision-makers for South Africa produced more politically purposive agreements than was the case for East Timor.

In the situation of South Africa, political elites were deliberately committed to pursuing transitional justice for its own sake and this commitment was reflected in the articulation of political-legal aims for intervention. The constitutional postamble and the Reconciliation Act were politically purposive agreements clearly expressing that amnesty would be granted in order to advance national unity and reconciliation. The main deficiencies associated with the articulation of political-legal aims for South Africa were the absence of broad-based public dialogue about, and the failure by political elites to define, guiding principles and aims in founding policy and legislative agreements.

Even though the amnesty agreement was politically rationalised as advancing national reconstruction and reconciliation and in relation to the traditional African concept of ubuntu, all of which are laudable social justice aims, these are

ambiguous constructs. South African decision-making practice suggests that political negotiators did not create space during interim constitutional or legislative negotiations for broad public debate about the guiding principles and aims for granting amnesty. Moreover, political elites failed to define guiding concepts like reconciliation in founding policy and legislative agreements for the TRC, leaving these concepts open to interpretation. The absence of public dialogue about the principles and aims for intervention undoubtedly contributed to unmet public expectations because there was no commonly shared understanding about what the TRC was supposed to achieve. It also unnecessarily complicated monitoring and assessment of the TRC since key constructs like national unity and reconciliation were subject to multiple and competing understandings.

The problem of clearly stated political-legal aims was much more acute for East Timor where policy agreements were politically expedient rather than purposive. A lack of deliberate political commitment to transitional justice at all levels — the UN, Indonesia, and East Timor — was reflected in founding policy directives and implementing legislative frameworks for prosecution, which generally failed to articulate the political-legal principles and aims of intervention. A number of scholars and practitioners have retrospectively imputed the possible motives for these prosecution efforts, including the idea that they were intended to contribute to strengthening domestic rule of law capacity. The failure by political elites to articulate the guiding principles and aims for criminal prosecution efforts in Indonesia and East Timor has exacerbated unmet public expectations concerning these interventions and contributed to difficulties in monitoring and assessment.

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30 The TRC facilitated public dialogue about guiding concepts and principles after it commenced operations and certainly attempted to define underlying constructs in its report. See, eg, Truth and Reconciliation Commission of South Africa Report (1999) vol 1, 103-134.


In these ways, the two case studies suggest potential future areas for strengthening transitional justice decision-making, including by ensuring that the principles and aims for intervention are clearly articulated, and ideally defined, in founding policy and legislative agreements. Ideally such guiding principles and aims should be publicly debated to promote a commonly shared understanding. It seems that the drafters of implementing truth commission legislation may have important best practices to share since truth commission legislation involved some degree of public input and specified the legislative purpose and objectives for intervention.

It is recognised that a formidable barrier to the improved articulation of guiding political-legal principles and aims includes exceedingly limited guidance on this topic even by the most recent international principles to counter impunity and on the right to a remedy. On the other hand, there have been encouraging developments outside of these international principles with a number of other UN policy documents now recognising the tremendous importance of effectively communicating the strategic purpose and aims of specific institutional interventions, including prosecution.33

D Legally Binding and Comprehensive Agreements

Another critical lesson from the South Africa and East Timor experiences is the finding that the legal framing and content of founding policy agreements are vital to well-designed implementing legislation and the full and prompt implementation of interventions, particularly in terms of ensuring legally comprehensive transitional justice that gives equitable standing to the rights of victims. Whether advertently or inadvertently formulated, founding policy agreements established the blueprint for the design of implementing legislation and implementation of specific institutional interventions. For both societies, implementing legislation

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largely replicated the structure and omissions of founding policy agreements. The lesson of the case studies is that from the outset, effective transitional justice requires a deliberate, coherent national or international policy that is obligatory and legally comprehensive.

For South Africa, a very positive outcome of decision-making was that political negotiators formulated a cohesive national amnesty policy as part of the Interim Constitution that then enabled parliamentary enactment of an integrated national legislative framework. A primary advantage of the unified legislative framework was that it provided some level of coordination among, and adequate resourcing for, otherwise disparate transitional justice interventions of amnesty, truth recovery and reparations. Yet, an enormous deficit of the constitutional postamble agreement was that only some elements of transitional justice policy were compulsory. The constitutional agreement only compelled the state to grant amnesty. It did not guarantee state obligations and victim rights concerning investigation, prosecution, punishment, reparation or prevention, a significant legal loophole since neither the Interim nor Final Constitution could then be used to compel the state to investigate past violations, criminally prosecute non-amnestied perpetrators, grant reparations to victims, or institute ameliorative reforms.

For the East Timor conflict, political negotiators fared less well in producing a deliberate, cohesive policy agreement. By default, policy direction was drawn from a diffuse set of UN policy directives that were formulated outside of the 5 May peace agreements. The Resolutions that provided part of this policy framework arguably were permissive, rather than compulsory, in view of their ambiguous, non-prescriptive language. Security Council Resolutions 1264 and 1272 simply demanded that those responsible for violence be brought to justice but did not stipulate who was legally responsible to do this or by what means. The CHR special session Resolution, which was non-binding, expressed a preference for justice by national means but did not clarify what this meant or the
role envisaged for the international community in the process. The ambiguity of these Resolutions was compounded by the UN’s failure to stipulate timelines and benchmarks for state compliance or to mandate legal cooperation between parallel prosecution efforts as part of the Resolutions. Moreover, both Security Council Resolution 1272 and the CHR Resolution 1999/S-4/L emphasised reconciliation separately from justice, effectively placing the UN in the role of service provider for serious crimes as opposed to the provision of technical assistance for reconciliation efforts. Consistent with the wording of the Resolutions, Indonesia and UNTAET established separate prosecution and reconciliation interventions by means of diffuse legislative enactments and without benefit of sufficient coordination.

There are differing interpretations about the reasons for the ambiguity of founding policy agreements for South Africa and East Timor. One interpretation is that the ambiguous wording of these founding agreements was strategic on the part of political negotiators. In the case of South Africa, it is argued that ambiguity of the constitutional amnesty agreement enabled negotiators to subsequently develop much more robust amnesty/truth commission legislation than otherwise would have been the case. Presumably in the East Timor context, the Security Council omissions were intentional in view of the uncertainty of the Indonesian and the East Timorese political situations at the time, the political sensitivities around transitional justice, and the financial implications for Member States had the Resolutions been more explicit. The main benefit of the ambiguously framed Resolutions was that it clearly left the door open to the possibility the Security Council might establish an international criminal tribunal for East Timor at some point in the future.

Yet, for both societies, the ambiguity of founding policy agreements created significant problems for legislative design and implementation. For South Africa,

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the Reconciliation Act did not ensure victim entitlements to state reparations or guarantees of non-repetition since it emulated the non-compulsory structure of amnesty policy and the legislative role of the TRC on these matters was purely advisory. The delayed and partial implementation of state reparations in the form of individual reparation grants, which were volitional on the part of the government, arguably were directly attributable to the non-compulsory legal framing of the amnesty postamble and its derivative Reconciliation Act. For East Timor, there is little doubt that many of the subsequent problems experienced with the implementation of transitional justice interventions, including under-resourcing and a lack of cooperation between parallel prosecution efforts, stemmed from the structure and content of founding policy agreements. Indeed, the vaguely worded Resolutions clearly left the door open to non- or partial implementation and, in practice, made it exceedingly difficult to retrospectively assess bona fide state compliance with a view to demanding further corrective actions.

The ambiguity of Security Council Resolution demands for justice is not specific to East Timor and does not appear to be attributable to the fact that the ICC was not yet established. Security Council Resolutions for Iraq in 2003 were equally ambiguous, simply demanding that those responsible for past political violence be brought to justice, while failing to allocate responsibility or stipulate the specific institutional means to accomplish this task. There remains a pressing need for additional comparative research on transitional justice decision-making in other non-self-governing, and especially external occupation and intervention, contexts to analyse more exhaustively consistency of UN practice in similar political-legal circumstances.

In addition to issues around the legal framing of policy agreements, policy agreements for both jurisdictions were not legally comprehensive: in the case of South Africa, failing to address concurrent or post-TRC prosecutions, and for East Timor, state obligations to provide reparations and guarantee non-repetition. Nor did policy agreements expressly acknowledge victims, with South African negotiators in fact presuming to speak on behalf of victims by setting aside their victimisation in favor of *ubuntu* in the text of the postamble agreement.

With the benefit of retrospection, the two case studies raise serious concerns about the legal framing and substantive content of founding policy agreements, which in both instances were legally minimalist and perpetrator-oriented, and point to potential areas where policy and legislative agreements can be strengthened in the future. In particular, the South African experience underscores that, in the interests of equity, future policy and legislative agreements must provide legally enforceable rights for perpetrators and victims. The East Timor experience highlights similar concerns in addition to the pressing need for political negotiators to formulate a coherent originating mandate on transitional justice, preferably one that is integrated as part of a substantive peace agreement and/or a peacekeeping mandate in instances involving international intervention. In these respects, an extremely promising development since the decision-making practices of South Africa and East Timor is the emphasis the UN now accords to comprehensive and integrated transitional justice approaches.

Nevertheless, strengthening the legal framing and substantive content of founding

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36 Relative to East Timor, the Security Council was conspicuously ambiguous about its policy position on interim justice under a peace enforcement mandate and transitional justice under a peacebuilding mandate neglecting to explicitly mandate either the INTERFET or UNTAET mission to pursue past violations, although subsequently endorsing the INTERFET detention process and the UNTAET serious crimes process. In view of the tensions created between the overlapping INTERFET and UNTAET missions with respect to the arrest and detention of serious crimes suspects, the East Timor case study strongly suggests the future need for the UN to be much clearer from the outset about expectations for peacekeeping missions vis-à-vis interim and/or transitional justice.

policy agreements is not likely to be easy because transitional justice policy as an entity that is conceptually distinct from implementing legislation and institutional interventions has not been a main concern of the discipline. To date, an enormous amount of attention has been devoted to the design and implementation of specific institutional interventions, which was evidenced by the two case studies where victim/human rights advocates made important and influential submissions concerning the design of implementing truth commission legislation. Academics and practitioners traditionally have been far less concerned with the founding political agreements from which implementing legislation and institutional interventions are derived.

The recent Commission of Experts review of prosecution processes for East Timor, which only peripherally mentions and fails to critically review the UN Resolutions that established the overall policy direction for these prosecution initiatives, highlights this omission.38 Paradoxically, recent impact assessments of transitional justice interventions for East Timor underscore the crucial importance of founding policy agreements with a number of scholars now identifying the pressing need for a coherent and comprehensive policy or strategy from the outset that can, among other things, ensure the proper resourcing and coordination of diverse institutional interventions.39

As discussed in the thesis Conclusion, it is intended that the thesis findings concerning the importance of founding transitional justice policy agreements for the ensuing pattern of implementing legislation provoke greater interest by the legal and academic community in these primary political decisions.

V Conclusion

This chapter considered the lessons learned that are highlighted by the 'efficacy' of past decision-making practices for South Africa and East Timor. As summarised in Table C above, the case study findings illustrate a number of specific conditions and measures that seem to be conducive to effective decision-making. These findings suggest that limited international intervention, collective political will, relative political stability, strong national capacity, deliberate political management, and strategic human rights advocacy, both individually and collectively, facilitate effective transitional justice decision-making and policy design.

Given the absence of virtually every one of these indicators, and apparently 'minimalist' UN decision-making practice in the East Timor context, the case study findings provoke the policy-oriented question of whether it may be necessary to delay transitional justice decision-making in completely adverse circumstances. In this regard, there remains a pressing need for further research concerning the negotiation of transitional justice agreements in other non-self-governing contexts, especially concerning occupation and intervention.

Attention was then focused on the question of how to move from a state-centric model of decision-making to a future model that is effective vis-à-vis each of the four ideal standards. Since the South Africa and East Timor transitions, there have been encouraging developments in international law and transitional justice practice, all of which support the trend toward more victim-inclusive and sustainable approaches to transitional justice. Nevertheless, a future model of effective decision-making will require critical shifts in practice from exclusionary to inclusionary policymaking and from superficial to broad, sustained and fully informed public debate about transitional justice values and institutional options. At a more macrotheoretical level, it will require a critical shift in focus from a preoccupation with the design and implementation of specific institutional
interventions, to concern about the foundational political decisions that establish the blueprint for implementing legislation and institutional intervention.

In the thesis Conclusion that now follows, the author considers the significance of the main thesis findings for the valuation of transitional justice.
CONCLUSION

The thesis responded to two vital concerns about the valuation of transitional justice, including an apparent reluctance by scholars to prospectively stipulate the anticipated results and beneficiaries of intervention. A related concern was the lack of theoretical integration in existing international guidelines, which tend to define optimal transitional justice decisions in relatively narrow legalistic terms that typically preference retributive over other forms of justice.

With these concerns in mind, the thesis was inspired by a desire to prospectively define optimal transitional justice at an abstract level and in a more theoretically expansive manner. Notwithstanding traditional theoretical divides, the author contends it is possible to begin the process of theory integration and used the thesis as a means to explore the distinguishing political and legal characteristics of optimal transitional justice. Two research objectives were established, one of which was to advance a more theoretically expansive set of standards for the valuation of transitional justice decision-making and the second that sought to test the utility of the proposed ideal standards as a comprehensive valuation framework.

The timing for a discussion of theoretical integration is propitious because there have been immense changes in international law and state practice, particularly since the late 1990s, that are not yet adequately reflected in existing decision-making guidelines. Most vividly, the advent of the Rome Statute symbolises significantly changed international legal norms concerning the discretion of states to freely formulate transitional justice policy and a major repositioning of victim rights in relation to transitional justice processes. Essentially, the frame of reference for transitional justice has changed so fundamentally that it no longer is
a question of whether but how to prosecute. Moreover, in view of its comparatively extensive integration of victim rights, the Rome Statute may well set a new benchmark for the judicial review of national-level transitional justice policy in relation to the ‘interests of victims’. More recently, the UN has evidenced a policy shift toward sustainable transitional justice.

To address these vital developments and define optimal transitional in a more theoretically expansive way, particularly in a way that provides greater balance between state obligations and victim rights, the author utilised the interdisciplinary construct of ‘effective’ transitional justice as a starting point for inquiry. She then looked to existing international principles for decision-making and accepted their measures of success — compliance with international law, additional conditions for policy legitimacy, and articulation of policy objectives — as necessary but insufficient conditions. Next, the author turned to the more process-oriented sustainable peace literature to identify additional conditions that could be used to define effective transitional justice (Chapter One).

Using these stratagems, the author defined effective transitional justice by means of four interrelated process-outcome standards. These ideal standards propose, first, that effective transitional justice requires a democratic decision-making process that is broadly inclusive of the affected population. Second, effective transitional justice requires a methodically planned decision-making process that produces coherent public policy and legislative outcomes that are needs based and contextually responsive. Third, substantive policy and legislative outcomes must clearly articulate the political-legal principles and aims for intervention. Fourth, substantive policy and legislative outcomes must be legally comprehensive or

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maximally compliant with state obligations and give equal standing to the full range of emerging substantive, procedural, and participatory victim rights in international law.

As acknowledged at the beginning of the thesis, the choice of standards reflects a particular value preference for a victim-inclusive and sustainable model of justice. Accordingly, not all scholars are likely to regard them as necessarily the 'right' standards to guide and assess decision-making. Indeed, the standards are highly aspirational and there is potential for conflict between the standards in practice. Nonetheless, the ideal standards were proposed in an effort to challenge conventional one-dimensional valuation measures and achieve a more theoretically comprehensive understanding of optimal transitional justice, especially concerning the sound design of policy and legislative agreements.

For theory integration, the significance of the proposed standards is that they are non-partisan; they do not preference retributive justice over other forms of justice. They also are interdisciplinary requiring optimal decisions to be both politically and legally purposive. Equally, the standards seek to bridge divergent state-centric and victim-based approaches by providing broad and relatively non-prescriptive parameters that structure the decision-making process and substantive outcomes but that simultaneously permit context-specificity.

In order to test their utility as a comprehensive valuation framework, the author presented the ideal standards as part of a more comprehensive diagrammatic model that juxtaposed them against the actual realpolitik environment in which transitional justice decision-making takes place (Chapter Two). Together, the standards and model provided the main analytical lens for the thesis (Figure 1). They were used to systematically investigate, compare, and draw conclusions about the efficacy of past decision-making practice.
The author tested the utility of the proposed standards and model as a comprehensive valuation framework by using them to retrospectively assess transitional justice decision-making practice for South Africa and East Timor (Chapters Three through Five). A subsidiary objective of the case studies was to discern lessons learned that can be used to inform the shift toward an effective model of decision-making (Chapter Six). South Africa and East Timor were used as case studies because they broadly represented negotiated regime transitions and thus provided a consistent decision-making process to explore similarity and difference in decision-making practice.

Application of the proposed interdisciplinary standards and model to the decision-making practices of South Africa and East Timor permitted exploration of not only state compliance with the ideal standards, but also basic questions about the decision-making process and mediating environment and their respective influence on the achievement of the ideal standards in practice. Because the standards and model built on existing theory and practice, the author was able to test, refine and expand on a range of theories about decision-making.

As anticipated, the practice of transitional justice decision-making for South Africa and East Timor was imperfect. The case studies confirmed that decision-making originated in a highly volatile peacemaking context where existing political, legal and resource conditions strongly mediated the ability of political elites to formulate policy and legislative agreements that were narrowly compliant with state obligations in international law let alone the more comprehensive standards advocated by the thesis. Even though South African negotiators formulated a comparatively well-designed national policy, both case study findings revealed serious deficiencies in decision-making practice across all four ideal standards.

The case studies validated the existence of a state-centric model of decision-making that preferred the short-term strategic interests of states over the rights
of victims and only artificially and superficially engaged the affected population in the decision-making process. Policymaking for South Africa and East Timor was politically and publicly exclusionary. It was characterised as well by an absence of broad consultation and fully informed public debate. When public participation occurred, it took place comparatively late in the decision-making process in relation to the formulation of implementing legislation rather than founding policy agreements. As the case studies so tellingly demonstrate, the problem with this pattern of limited public engagement in decision-making is that it produced policy agreements that were, at best, minimally compliant with state obligations in international law and that either marginalised or completely ignored the victim rights. Indeed, the case studies revealed many of the known tensions between state interests and victim rights in decision-making and the considerable complexities that are likely to be associated with moving from a state-centric to an effective decision-making model.

Overall, the thesis approach and findings contribute to the advancement of transitional justice theory and practice in several important ways.

First, the proposed standards permitted systematic assessment of both the process and substantive outcome of decision-making. This analytical distinction is a significant contribution to the existing literature because it enables a reorientation from a previously substantive to a process-substantive approach to the valuation of transitional justice. Indeed, application of the standards and model to the two case studies revealed important lessons about the process of decision-making including that the participation of victim/civil society representatives is essential to the integration of a 'victim perspective' in substantive outcomes. This finding is consistent with broader transnational advocacy efforts that promote the participation of women in peacemaking to ensure the integration of a gender perspective in peace agreements.
Second, the thesis findings illustrated the immense value of exploring variation within broadly similar types of regime transition and the importance of refining existing transitional justice typologies. While technically similar, the South African and East Timorese negotiation processes were fundamentally at variance and these differences, particularly in the level of international intervention, exerted an enormous influence on the ability of political decision-makers to negotiate effective policy and legislative agreements. In this regard, the thesis findings make a valuable contribution to the growing body of literature on state willingness and ability to address past violations by highlighting some the main conditions and measures that evidently are conducive to effective decision-making. In particular, the case studies demonstrate that less-known variables such as the nature of legal self-determination claims and style of political negotiations can be enormously influential in facilitating or impeding effective decision-making and policy formulation. In view of their potential significance for effective decision-making, differing self-determination claims and political leadership styles, which have not been a main transitional justice concern, clearly merit further research consideration.

Third, the thesis findings demonstrated that transitional justice decision-making is a progressive process comprised of multiple decisions that are made over time. Given that transitional justice negotiations may follow or depart from the broader pattern of peace negotiations of which they are part, the case studies affirmed the value of considering peace negotiations and transitional justice negotiations as related yet conceptually distinct processes. Moreover, application of the standards and model to the two case studies illustrated the vital importance of founding policy agreements on transitional justice. The legal framing and content of these initial agreements established the blueprint for implementing legislation, which largely replicated the flaws of originating policy agreements. Yet, transitional justice policy as an entity that is conceptually distinct from institutional interventions has received scant attention. This relative neglect is exemplified by the recent Commission of Expert’s evident failure to sufficiently consider Security
Council resolutions as part of their review of prosecution efforts for East Timor. Likewise, even the latest international guidelines for transitional justice decision-making are focused at an institutional rather than policy level. It is hoped that the thesis findings concerning the importance of original policy agreements for the ensuing pattern of legislative and institutional intervention will provoke a broader interest by the legal and academic community concerning those aspects of decision-making practice it selects for management and evaluation.

Fourth, the case studies illustrated the cross-cutting importance of timeframes for the practical achievement of all four ideals proposed by the thesis. For both case studies, principal policy agreements were quickly finalised at an extremely inopportune time during the conflict termination stage of peacemaking when direct physical violence was at its peak and before there was a formal transfer of power. In fact, the political timing of policy negotiations for East Timor was so adversative to effective decision-making that it prompted the question of whether political decision-makers should delay policymaking in similarly unfavorable circumstances. The possibility of delaying decision-making accords with the policy recommendation made by some leading scholars advocating the adoption of cautious timeframes for the design and implementation of sustainable transitional justice interventions. Indeed, as the two case studies demonstrate, extended and gradually paced political negotiations were instrumental to political elites being able to properly plan for and manage transitional justice.

Ultimately, like negotiation processes more generally, the strategic choices that political elites make about the process of how transitional justice decision-making is designed and managed may offer the greatest potential for policy-oriented change in comparison with the relatively fixed qualities of many of the political,

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legal and resource conditions traditionally envisaged as shaping policy and institutional choices. In this regard, the case studies revealed the profoundly important contributions that deliberate political management and strategic human rights advocacy can make to effective decision-making and policy design.

Since the South Africa and East Timor transitions there have been encouraging developments that support the thematic shift toward effective transitional justice. In 2004, the UN Secretary-General endorsed the need for effective and sustainable transitional justice approaches. In 2005, there was significant progress in updating the Principles to Combat Impunity and, after more than a decade of deliberations, the General Assembly endorsed the Basic Principles on the Right to a Remedy, which inter alia acknowledge the Rome Statute provisions concerning the reparative, procedural, and participatory rights of victims. In 2006, the office of the UN High Commissioner for Human Rights published a series of operational guidelines to develop rule of law instruments for post-conflict societies, which include process and design-related issues in relation to specific institutional measures such as truth commissions, prosecution, and vetting. Collectively these instruments stress not only the importance of comprehensive justice approaches but also provide some guidance on structuring the process of decision-making in relation to matters such as national public consultation and needs assessment.

Despite these encouraging developments, there continue to be significant gaps in even these most recent policy instruments and a critical need to broaden valuation standards either by vetting and revising existing international principles or by developing more theoretically comprehensive principles. As the South Africa and East Timor case studies suggest, a model of effective — victim-inclusive and sustainable — decision-making will require critical shifts from exclusionary to inclusionary policymaking and from superficial to broad, sustained and fully informed public debate about transitional justice values and options. At a more macrotheoretical level, it will require a vital shift from a preoccupation with the
design and implementation of specific institutional interventions to concern about the foundational political decisions that establish the blueprint for intervention.
Appendix A:
Summary of Hypotheses and Indicators

1. Political Context

1.1 Severity and Consequences of Repression

Traditional Hypothesis

Long repression and severe, proximate, and visible human rights violations will produce a more retributive or maximalist transitional justice policy.

Indicators

- Type of repression, its genesis, duration; counter-insurgency strategy of the authoritarian regime
- Magnitude and quality of human rights violations, the type, scope and intensity of violations; patterns/quality of victimisation; perpetrator characteristics; level of societal complicity, and passage of time
- Vertical versus horizontal state violence
- Implication of both state and opposing forces in violations
- ‘Otherness’ of perpetrators

1.2 Mode of Political Transition

Traditional Hypothesis

A replacement or intervention transition, particularly if abrupt, will produce a more retributive or maximalist policy, whereas a transformative or transplacement transition, especially if gradual, will produce a more conciliatory or minimalist policy.

Indicators

- Precipitating factors for regime transition
- Mode of transition: replacement, intervention, transplacement, transformation
- Legal continuity between regimes
- Velocity of regime change
- Length of transition
1.3 Balance of Power

Hypothesis

If elements of the former repressive regime and their supporters retain power in the new dispensation, the incoming or new regime will be constrained in its policy and institutional choices, which are more likely to be conciliatory and/or minimalist. Whether threats of destabilisation from members of the old regime are real or perceived, transitional regimes will err on the side of caution in policy choice.

Indicators

- Distribution of power between the former repressive regime and the new transitional regime
- Threats of destabilisation by former repressive regime/military
- Strategic interests of third states, including issues of territorial/regional stability
- Legal status of opposition movements
- Method of interim or transitional governance

1.4 Political Leadership

Traditional Hypothesis

Political leadership and advisory preferences including risk assessment, quality of political leadership, and political management of the transitional justice problem will positively or negatively influence the incoming or new regime's ability to develop a retributive or maximalist policy.

Indicators

- Leadership and advisory preferences in terms of the personal beliefs, ideology, political priorities and available resources
- Strategic calculation of the risks and benefits associated with pursuing particular policy options
- Political management of the transitional justice problem in terms of how the issue is politically framed and presented; how well planned
- Quality of political leadership, including issues of political party unity/division and personal credibility of leaders
- Influence of international actors, especially peace negotiators
1.5 Public Pressure

**Traditional Hypothesis**

Widespread public demand will influence incoming / new regime policy choices especially if human rights / civil society organisations are well organized and vocal and their demands are compatible with leadership preferences and priorities. Maximalist public demands for particular policies or strategies may have an inverse effect if such demands are not consistent with elite preferences.

**Indicators**

- The role of civil society in documenting and labeling violations, and advocating for particular solutions
- Public demand can be assessed as strong or weak based on indicators such as human rights reports, policy or position papers, petitions, newspaper articles, books or other media (documentaries), public rallies and demonstrations, and public opinion polls

1.6 Contagion Effect

**Traditional Hypothesis**

Societies undergoing transition will carefully scrutinise the experience of other countries to see how successfully transitional justice policy and institutional mechanisms were implemented elsewhere. If a particular policy or intervention has been successfully implemented elsewhere, it is more likely to be considered as a possible model.

**Indicators**

- Experience of other countries, especially if proximate or similar, in designing and implementing transitional justice policy and interventions
- International support for particular models
2. Legal Environment

2.1 International Legal Obligations

Exploratory Question
Do international legal obligations influence incoming / new regime choice of transitional justice policy and institutional preferences?

Indicators
- Influence of affirmative and emerging international legal obligations on policymakers
- Influence of international due process standards on policymakers

2.2 Domestic Rule of Law

Exploratory Question
Do domestic rule of law considerations influence incoming / new regime choice of policy preferences?

Indicators
- Constitutional limitations
- Procedural justice/due process concerns, including principle of legality, non-retroactivity, statute of limitations, derogation
- Competence and institutional capacity of existing justice system
- Extradition, physical custody; loss/destruction of evidence, preservation of testimony
2.3 Domestic Legal Traditions

Exploratory Question

Do domestic legal traditions influence the policy choices of incoming/new regimes?

Indicators

- Fear, distrust of existing legal system
- Prevailing conceptions of justice: including but not limited to restorative and retributive theories of justice; competing and especially indigenous methods of dispute resolution
- Historical antecedents or previous in-country experience with specific institutional models to address past violations

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Appendix B:
Interview Schedule

A. TRANSITIONAL JUSTICE POLICY

1. Could you tell me about yourself/your organisation?

2. Could you tell me about your role/the role of your organisation in the peace negotiations process and/or in seeking redress for the humanitarian and human rights law violations that occurred during Apartheid/armed confrontation?

3. In your opinion, what factors do you think were most influential in the choice for South Africa/Guatemala to establish a truth commission?

(Focus on political and institutional factors influencing transitional justice policy options - for example, type/process of political transition, political leadership, level of executive commitment, role of oppositional forces, political and legal culture, role of human rights organisations and special interest groups, role of religious organisations, role of private sector, role of the media, role of donor community, public opinion/debate, other social and/or cultural influences)

4. In your opinion, what do you think were the primary aims of the South African/Guatemalan truth commission?

4.1. What do you think the truth commission has achieved?

4.2. What challenges/obstacles do you think the truth commission faced?
5. In your opinion, has the truth commission provided effective redress for humanitarian and human rights violations?

5.1. If yes, in what ways?

5.2. If no, in what ways has the truth commission failed to provide effective redress?

5.3. If no, what other forms of redress are being/should be sought?

6. What do you think are the lessons learned from the South African/Guatemalan truth commission experience for other societies that may be facing circumstances of serious humanitarian and human rights law violations?

7. Are there any other individuals/organisations you think I should speak with?

8. Are there any other comments or observations you would like to add?
B. BACKGROUND INFORMATION

Organisation:

Name of Interviewee: ____________

Job Title:

Interviewee

Selection Criteria:

dd/mm/year:

Place of Interview:

Length of Interview: ____________ minutes

Supervisory Letter: Yes □ No □

Disclosure Statement: Yes □ No □

Informed Consent: Yes □ No □

Request for Anonymity: Yes □ No □

Interview Audio taped: Yes □ No □

Transcript Requested: Yes □ No □

Follow-up Action Required: Yes □ No □

Type of Action:

SURNAME/First Name

suburb/city/country:
Appendix C:
South Africa National Unity and Reconciliation Postamble¹

This Constitution provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of color, race, class, belief or sex.

The pursuit of national unity, the well being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt, and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not retaliation, a need for ubuntu but not for victimization.

In order to advance reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offenses associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 [October] 1990 and before 6 [December] 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

Appendix D:  
Summary of Policy Directives for East Timor (1999-2006)

Explanatory Notes

Resolution establishing UNAMET; preamble acknowledges the importance of political reconciliation and operational paragraph 11 condemns and calls for an immediate end to violence.

Excerpted Transitional Justice Provisions
[preamble] 'Taking note of the pressing need for reconciliation between the various competing factions within East Timor'.

[para 11] 'Condenms all acts of violence from whatever quarter and calls for an end to such acts and the laying down of arms by all armed groups in East Timor ...'.

Explanatory Notes

Security Council presidential statement

Statement concerning possible postponement of the popular consultation; conveys Security Council demand for individual criminal responsibility for attack on UNAMET office in Maliana.

Excerpted Transitional Justice Provisions
[preamble] 'In this regard, it expresses grave concern at the attack on the UNAMET office in Maliana, East Timor, on 29 June 1999. The Council demands that the incident be thoroughly investigated and the perpetrators be brought to justice'.

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Explanatory Notes

Resolution extending UNAMET mandate; operational paragraph 1 stresses the role of UNAMET in promoting reconciliation.

Excerpted Transitional Justice Provisions
[para 1] 'Decides to extend the mandate of UNAMET until 30 November 1999, and endorses the proposal of the Secretary-General that in the interim phase UNAMET should incorporate the following components: (c) a military liaison component of up to 300 personnel ... to continue to be involved in the work of the East Timorese bodies established to promote peace, stability and reconciliation .... (e) a public information component to ... disseminate a message promoting reconciliation, confidence, peace and stability' (emphasis added).


Explanatory Notes

Report of the Security Council Mission to Jakarta and Dili, 8 to 12 September 1999

Report assessing the post-consultation Situation and pressuring the Indonesian Government to accept a multinational force; report recommends the Security Council take action to investigate violations of international humanitarian law.

Report includes an UNAMET Annex documenting the commission of crimes against humanity as part of a scorched earth policy with evident linkages between the militias and Indonesian military.

Excerpted Transitional Justice Provisions
[Part VI. Recommendation 27 (vii)] 'The Security Council should institute action for the investigation of apparent abuses of international humanitarian law on the ground in East and West Timor since 4 September' (emphasis added).
Policy Directive S/RES/1264 (15 September 1999)

Explanatory Notes


Using its Chapter VII powers, the Security Council establishes a multinational force in East Timor; the preamble to the Resolution sets the overall direction for individual criminal responsibility. Operational paragraph 1 of the Resolution demands that those responsible for acts of violence be brought to justice.

Although not expressly mandating INTERFET to address past violations, INTERFET assumes responsibility to arrest and detain serious crimes suspects in East Timor based on its generic mandate.

The Resolution does not explicitly acknowledge victims, but expresses concern at (1) continuing violence and the relocation of a large segment of the civilian population; (2) the worsening humanitarian Situation ‘particularly as it affects women, children and other vulnerable groups’; and (3) reaffirms the rights of refugees and displaced persons.

Excerpted Transitional Justice Provisions

[preamble] ‘Expressing its concern at reports indicating that systematic, widespread and flagrant violations of international humanitarian and human rights law have been committed in East Timor, and stressing that persons committing such violations bear individual responsibility’.

[para 1] ‘Condemns all acts of violence in East Timor, calls for their immediate end and demands that those responsible for such acts be brought to justice’.


Explanatory Notes

(Fourth) Special Session of the Commission on Human Rights on the Situation in East Timor, Geneva, 23-27 September 1999

The special session was convened at the request of Portugal in an effort to end ongoing violence; para 4 of the Resolution demands that those responsible for flagrant and systematic violations of human rights and humanitarian law be brought to justice giving priority to national justice systems in this task and specifically calling on the Indonesian Government to ensure that the persons responsible are brought to justice. Paras 6 and 7(a) of the Resolution mandate a specially established international commission of inquiry and the special rapporteurs within their regular thematic mandates to document past violations. Para 7(c) of the Resolution authorises the UN provision of technical assistance for reconciliation.
The Resolution does not explicitly acknowledge victims, although it is
guided by the principles embodied inter alia in the Geneva Conventions
of 12 August 1949 for the protection of war victims and the Additional
Protocols thereto of 1977. The Resolution also acknowledges the
seriousness of the humanitarian Situation ‘particularly as it affects
children and other vulnerable groups’.

Excerpted Transitional Justice Provisions
[preamble] ‘Deeply concerned by the human rights Situation in East
Timor, and in particular reports indicating that systematic, widespread
and flagrant violations of human rights and international humanitarian
law have been committed in East Timor, as well as the Situation of
displaced persons in East and West Timor and elsewhere in the
region’.

[para 1] ‘Welcomes: (b) ... the expressed commitment of the
Government of Indonesia to cooperate with the international
community; (g) The establishment on 22 September 1999 of the
independent Fact-Finding Commission for Post-Ballot Human Rights
Violations in East Timor by the Indonesian National Commission on
Human Rights, and looks forward to the concrete results of its work in
close cooperation with international bodies’.

[para 2] ‘Condemns: (a) The widespread, systematic and gross
violations of human rights and international humanitarian law in East
Timor; (b) The widespread violations and abuses of the right to life,
personal security, physical integrity and the right to property; (c) The
activities of the militias in terrorizing the population’.

[para 4] ‘Affirms that all persons who commit or authorize violations of
human rights or international humanitarian law are individually
responsible and accountable for those violations and that the
international community will exert every effort to ensure that those
responsible are brought to justice, while affirming that the primary
responsibility for bringing perpetrators to justice rests with national
judicial systems’.

[para 5] ‘Calls upon the Government of Indonesia: (a) To ensure, in
cooperation with the Indonesian National Commission on Human
Rights, that the persons responsible for acts of violence and flagrant
and systematic violations of human rights are brought to justice; (g) To
cooperate fully with the United Nations High Commissioner for Human
Rights and with the special procedures of the Commission and to
continue to cooperate with the Office of the United Nations High
Commissioner for Human Rights in Jakarta’.

[para 6] ‘Calls upon the Secretary-General to establish an international
commission of inquiry, with adequate representation of Asian experts,
in order, in cooperation with the Indonesian National Commission on
Human Rights and thematic rapporteurs, to gather and compile
systematically information on possible violations of human rights and
acts which may constitute breaches of international humanitarian law

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committed in East Timor since the announcement in January 1999 of
the vote and to provide the Secretary-General with its conclusions with
a view to enabling him to make recommendations on future actions,
and to make the report of the international commission of inquiry
available to the Security Council, the General Assembly and the
Commission at its fifty-sixth session'.

[para 7] 'Decides: (a) To request the Special Rapporteur on
extrajudicial, summary or arbitrary executions, the Representative of
the Secretary-General on internally displaced persons, the Special
Rapporteur on the question of torture, the Special Rapporteur on
violence against women, its causes and consequences, and the
Working Group on Enforced or Involuntary Disappearances to carry out
missions to East Timor and report on their findings to the Commission
at its fifty-sixth session and, on an interim basis, to the General
Assembly at its fifty-fourth session; (c) To request the High
Commissioner to prepare a comprehensive programme of *technical
cooperation* in the field of human rights, in cooperation with other
United Nations activities, focusing especially on capacity-building and
reconciliation with a view to a durable solution to the problems in East
Timor' (emphasis added).


**Explanatory Notes**

**Security Council Resolution 1272 (1999) on the Situation in East Timor**

Using its Chapter VII powers, the Security Council establishes a UN
transitional administration in East Timor; the Resolution gives
preambular recognition to the importance of reconciliation to the East
Timorese people. The preamble also emphasises individual criminal
responsibility for widespread and flagrant violations of international
human rights and humanitarian law and calls for cooperation in the
investigation of these reports. Operational paragraph 16 of the
Resolution demands that those responsible for violence be brought to
justice.

The Resolution does not expressly mandate UNTAET to address past
violations but UNTAET assumes responsibility to enact serious crimes
regulations and the CAVR regulation based on its generic mandate.

The Resolution does not explicitly acknowledge victims, but expresses
concern about violence and the large-scale displacement of the East
Timorese civilian population, including women and children in addition
to acknowledging the rights of refugees and other displaced persons.
Excerpted Transitional Justice Provisions

[preamble] 'Stressing the importance of reconciliation among the East Timorese people'.

[preamble] 'Expressing its concern at reports indicating that systematic, widespread and flagrant violations of international humanitarian and human rights law have been committed in East Timor, stressing that persons committing such violations bear individual responsibility, and calling on all parties to cooperate with investigations into these reports'.

[para 16] 'Condemns all violence and acts in support of violence in East Timor, calls for their immediate end, and demands that those responsible for such violence be brought to justice'.


Explanatory Notes

Identical letters dated 31 January 2000 from the Secretary-General addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights

Letter from the UN Secretary-General transmitting the international commission of inquiry report. 'Acting on' the inquiry recommendations, the Secretary-General accepts the Indonesian Government's commitment to investigate and prosecute perpetrators through its national judicial process; indicates the UN's intention to strengthen the capacity of UNTAET to conduct further investigations of 1999 violations, with a view to bringing alleged perpetrators to justice; and emphasises the special responsibility of the UN to the East Timorese people in relation to investigation, establishing responsibility, punishing those responsible and promoting reconciliation.

The letter establishes minimal benchmarks for monitoring state compliance by virtue of the Secretary-General's commitment to 'closely monitor progress towards a credible response in accordance with international human rights principles'.

Excerpted Transitional Justice Provisions

[para 4] 'The Commission stated that the evidence gathered clearly demonstrated a pattern of serious violations in East Timor of fundamental human rights and humanitarian law. As the report indicates, the actions violating human rights and international humanitarian law were directed against a decision of the Security Council and were contrary to the agreements reached by Indonesia with the United Nations to carry out the decision of the Security Council.'
Council. This fact reinforces the need to hold the perpetrators accountable for their actions. The commission of inquiry has recommended ways of responding to this need.

[para 5] 'In facing this challenge, I am encouraged by the commitment shown by President Abdurrahman Wahid to uphold the law and to fully support the investigation and prosecution of the perpetrators through the national investigation process under way in Indonesia. I have also been strongly assured by Foreign Minister Alwi Shihab of the Government's determination that there will be no impunity for those responsible.'

[para 6] 'As the report indicates, there is a need for conducting further systematic investigations of the violations that took place in East Timor during the period from January 1999. With a view to bringing justice to the people of East Timor, I intend to pursue various avenues to ensure that this task is accomplished adequately, inter alia, by strengthening the capacity of UNTAET to conduct such investigations and enhancing collaboration between UNTAET and the Indonesian Commission of Inquiry into Human Rights Violations in East Timor (KPP-HAM).'

[para 7] 'The International Commission of Inquiry found that the United Nations and the international community had a particular responsibility to the people of East Timor in connection with investigating the violations, establishing responsibilities, punishing those responsible and promoting reconciliation. I believe the United Nations has an important role to play in this process in order to help safeguard the rights of the people of East Timor, promote reconciliation, ensure future social and political stability and protect the integrity of Security Council actions.'

[para 8] 'The recommendations of the International Commission of Inquiry on East Timor merit careful consideration. The Security Council, the General Assembly and the Commission on Human Rights may wish to consider the further steps which should be taken. I wish to assure Member States of my firm commitment to cooperate with the intergovernmental process in this important matter. I will closely monitor progress towards a credible response in accordance with international human rights principles.'
Explanatory Notes

Letter dated 18 February 2000 from the President of the Security Council addressed to the Secretary-General

On behalf of the Security Council, the President acknowledges that grave violations of international humanitarian and human rights law were committed and that those responsible should be brought to justice as soon as possible; endorses the Indonesian Government’s intention to bring those responsible to justice within its national judicial system; and acknowledges the role of the UN in relation to safeguarding the rights of the East Timorese people and promoting reconciliation.

The letter establishes benchmarks for Indonesia to ‘institute a swift, comprehensive, effective and transparent legal process, in conformity with international standards of justice and due process of law’.

Excerpted Transitional Justice Provisions

[para 1] ‘Grave violations of international humanitarian and human rights law have been committed; those responsible for these violations should be brought to justice as soon as possible’.

[para 2] ‘The members of the Security Council welcome the commitment of the Government of Indonesia, as set out in the letter to you dated 26 January 2000 from the Minister for Foreign Affairs of Indonesia, Alwi Shihab (A/54/727-S/2000/65, annex), to bring those responsible to justice through Indonesia’s national judicial system. To that end, they encourage Indonesia to institute a swift, comprehensive, effective and transparent legal process, in conformity with international standards of justice and due process of law. In this context, Council members recognize that the accountability of those responsible for the aforementioned violations would be a key factor in ensuring reconciliation and stability in East Timor. They are particularly conscious that early and effective action by the Government of Indonesia would contribute to improved relations between the peoples of Indonesia and East Timor’.

[para 3] ‘The members of the Security Council share your belief that the United Nations has its role to play in this process in order to help safeguard the rights of the people of East Timor, promote reconciliation and ensure future social and political stability. The members of the Council welcome your intention to assist in this effort. In this regard, they encourage you to consult with the Government of Indonesia on any assistance it may need from the United Nations in taking this process forward’.
Explanatory Notes


Resolution responding to the ongoing refugee crisis in West Timor and the killing of UN staff, stressing that those responsible for attacks on UN personnel should be brought to justice.

Excerpted Transitional Justice Provisions

[Para 2] 'Stresses that those responsible for the attacks on international personnel in West and East Timor must be brought to justice'.

[Para 3] 'Recalls in this regard the letter of 18 February 2000 from the President of the Security Council to the Secretary-General (S/2000/137) in which it was noted that grave violations of international humanitarian and human rights law have been committed and that those responsible for these violations should be brought to justice, and reiterates its belief that the United Nations has a role to play in the process in order to safeguard the rights of the people of East Timor'.


Explanatory Notes

Report of the Security Council Mission to East Timor and Indonesia, 9-17 November 2000

Mission report reviewing the implementation of Resolutions 1272 and 1319. The report acknowledges the difficulties faced by UNTAET in bringing those responsible for serious violations committed in 1999 to justice and encourages UNTAET to consider all means of attracting the necessary resources to support the serious crimes process. The report endorses national reconciliation efforts but stresses that such efforts need to be balanced against demands for justice vis-à-vis those who committed serious crimes in East Timor.

Excerpted Transitional Justice Provisions

[Para 8] '... Moreover, UNTAET is facing significant difficulties in bringing to justice those responsible for the serious violations of human rights that occurred in East Timor in 1999. In these circumstances, it is particularly important for UNTAET to consider all available ways of attracting the necessary resources and that decisions on handling serious crimes investigations should, to the extent possible, reflect East Timorese expectations'.

[Para 29] 'The Mission has noted shortcomings in the implementation of justice in East Timor (see above), given the absence of any capacity in this field when UNTAET started up. It urged that measures be
undertaken to address this problem in order to respond sufficiently to the expectation of East Timorese for justice. Failure to cope with this challenge could have a negative impact on the country’s ability to promote reconciliation and embrace a national political culture based on respect for human rights and accountability'.

[para 32] 'In meetings in Dili with the National Council of Timorese Resistance (CNRT) leadership, as well as community leaders engaged in an effort to establish a national reconciliation mechanism, the Mission was assured of their readiness to reconcile with those on the other side of the political divide while insisting that persons who might have committed serious crimes in East Timor should be brought to justice. The Mission urges East Timorese political and community leaders to continue their efforts to reassess pro-integration East Timorese of their readiness to reconcile'.


Explanatory Notes

Security Council Resolution 1338 (2001) on the Situation in East Timor Resolution extending the UNTAET mandate, expressly recognises the need to address shortcomings of the administration of justice and affirms the need to bring to justice those responsible for serious crimes in 1999.

Excerpted Transitional Justice Provisions

[para 8] 'Emphasizes the need, in the light of the recommendations in the report of the Security Council Mission, for measures to address shortcomings in the administration of justice in East Timor, particularly with a view to bringing to justice those responsible for serious crimes in 1999 ....'.

Resolution establishing UNMISET explicitly mandates UNMISET to address serious crimes committed in 1999.

Excerpted Transitional Justice Provisions

[para 3] 'Decides that UNMISET will be headed by a Special Representative of the Secretary-General and will consist of: (a) ... a Serious Crimes Unit and a Human Rights Unit'.

[para 12] 'Welcomes the progress made in resolving pending bilateral issues between Indonesia and East Timor, and stresses the critical importance of cooperation between these two Governments, as well as cooperation with UNMISET, in all aspects, including in implementation of the relevant elements of this and other Resolutions ... by ensuring that those responsible for serious crimes committed in 1999 are brought to justice ....' (emphasis added).


Resolution extending the UNMISET mandate gives preambular recognition for the governments of Indonesia and Timor-Leste to bring those responsible for serious crimes in 1999 to justice.

Excerpted Transitional Justice Provisions

[preamble] 'Welcoming the continuing progress in developing a positive bilateral relationship between the Governments of Timor-Leste and Indonesia which is crucial for the future stability of Timor-Leste ... and to bring to justice those responsible for serious crimes committed in 1999'.

Explanatory Notes


Resolution extending UNMISET mandate by six months with possibility of one final six-month extension. The Resolution endorses the Serious Crimes Unit prosecution strategy for serious crimes of 10 priority cases. The Resolution establishes a deadline for completion of serious crimes investigations and trials.

Excerpted Transitional Justice Provisions

[preamble] 'Welcoming the excellent communication and goodwill that have characterized relations between Timor-Leste and Indonesia and encouraging continued cooperation between both Governments and cooperation with UNMISET towards further progress in resolving pending bilateral issues, including those relating to the demarcation and management of the border and to the provision of justice for those responsible for serious crimes committed in 1999'.

[para 3] 'Decides accordingly that the mandate of UNMISET shall consist of the following elements, as outlined in the report of the Secretary-General of 29 April 2004: (i) support for the public administration and justice system of Timor-Leste and for justice in the area of serious crimes'.

[para 8] 'Reaffirms the need to fight against impunity and the importance for the international community to lend its support in this regard and emphasizes that the S/RES/1543 (2004) Serious Crime Unit should complete all investigations by November 2004, and should conclude trials and other activities as soon as possible and no later than 20 May 2005'.


Explanatory Notes


Resolution extending the UNMISET mandate for a final period of six months until May 2005. The Resolution affirms the previous deadline for completion of the serious crimes process by May 2005.
Excerpted Transitional Justice Provisions

[preamble] 'Commending the Serious Crimes Unit for the efforts it has undertaken in order to complete its investigations by November 2004, and any further trials and other activities no later than 20 May 2005'.

[preamble] 'Noting with concern that it may not be possible for the Serious Crimes Unit to fully respond to the desire for justice of those affected by the violence in 1999 bearing in mind the limited time and resources that remain available'.

[para 6] 'Reaffirms the need to fight against impunity and, in this regard, takes note of the Secretary-General's intention to continue to explore possible ways to address this issue with a view to making proposals as appropriate'.

Explanatory Notes


Resolution establishing UNOTIL as a special political follow-on mission with a one-year mandate until May 2006 and provides for UNOTIL to preserve serious crimes records.

Excerpted Transitional Justice Provisions

[preamble] 'Acknowledging the Secretary-General's decision outlined in his letter to the Security Council dated 11 January 2005 (S/2005/96) to send a Commission of Experts to Timor-Leste and Indonesia to review the serious crimes accountability processes, and recommend further measures as appropriate'.

[para 9] 'Reaffirms the need for credible accountability for the serious human rights violations committed in East Timor in 1999, and, in this regard, underlines the need for the United Nations Secretariat, in agreement with Timor-Leste authorities, to preserve a complete copy of all the records compiled by the Serious Crimes Unit, calls on all parties to cooperate fully with the work of the Secretary-General's Commission of Experts, and looks forward to the Commission's upcoming report exploring possible ways to address this issue, including ways of assisting the Truth and Friendship Commission, which Indonesia and Timor-Leste have agreed to establish'.

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Explanatory Notes

Report of the Secretary-General on Justice and Reconciliation for Timor-Leste

Follow-up to Commission of Experts report and recommendations; essentially forecloses possibility of international criminal tribunal for Timor-Leste.

Excerpted Transitional Justice Provisions

[para 39(c)] recommends establishment of voluntary UN fund to support community restoration and justice programme in Timor-Leste consisting of collective restorative measures, individual restorative measures, reconciliatory measures, and a justice programme.
Appendix E:
List of Implementing Agreements for East Timor (1999-2006)

September 1999 to August 2001

Implementing Agreement and Mandate

Indonesian Government legislative/executive agreements establishing the Ad Hoc Human Rights Court for East Timor

- Act 39/1999 on Basic Human Rights (art 89, para 3) and Government Regulation (PERPU) 1999/1 (art 10, paras 1 and 11) providing for the Komnas/HAM Inquiry
- Presidential Decree 53/2001 (23 April 2001) establishing and limiting the jurisdiction of the Ad Hoc Human Rights Court for East Timor
- Presidential Decree 96/2001 (August 2001) establishing and limiting the jurisdiction of the Ad Hoc Human Rights Court for East Timor

Mandated to investigate, prosecute and try gross violations of human rights, defined as crimes against humanity and genocide, with jurisdiction limited to crimes committed in Liquiça, Dili and Suai in April and September 1999.

Explanatory Notes on Victim Provisions

The Human Rights Court Act includes four provisions relevant to the rights of victims, including: (1) Article 19(c) enabling the National Commission on Human Rights to hear the statements of victims; (2) Article 22(6) enabling victims and/or their families to contest the termination of an investigation by the Attorney General; (3) Article 34 concerning the protection of victims and witnesses through separately enacted regulatory procedures; and (4) Article 35 providing that every victim shall receive compensation, restitution and rehabilitation, although again requiring separate regulatory provisions to give effect to this provision.
March to June 2000

Implementing Agreement and Mandate

UNTAET regulatory regime establishing a serious crimes process in East Timor

- UNTAET Regulation 2000/11 (6 March 2000) establishing a system of courts gives the Dili District Court exclusive jurisdiction over serious crimes and anticipates the establishment of special panels (s 10)
- Memorandum of Understanding Regarding Cooperation in Legal, Judicial and Human Rights Related Matters (6 April 2000) between Indonesia and UNTAET provides for mutual legal cooperation inter alia in surrendering suspects
- UNTAET Regulation 2000/15 (6 June 2000) creating special panels of mixed international and East Timorese judges with exclusive jurisdiction to try serious crimes
- UNTAET Regulation 2000/16 (6 June 2000) establishing a public prosecution service incorporates provisions for the establishment of a deputy general prosecutor for serious crimes
- UNTAET Regulation 2000/30 (25 September 2000) establishing transitional rules of criminal procedure

Serious Crimes Unit and Special Panels for Serious Crimes mandated to investigate and prosecute serious crimes; defined as murder and sexual offences committed between 1 January 1999 and 25 October 1999 and with universal jurisdiction over genocide, war crimes, crimes against humanity, and torture.

Explanatory Notes on Victim Provisions

UNTAET Regulation 2000/15 incorporates nominal victim provisions essentially replicating the Rome Statute reparation provisions by providing for the establishment of a trust fund for victims (s 25) and instructing the Special Panels to '... take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses' with procedures to be expanded on by a separate UNTAET directive (s 24).

Although not specific to serious crimes offences, the subsequently promulgated transitional rules for criminal procedure contain fairly expansive victim provisions, including but not limited to the right of victim’s to be informed of, and to be heard/request to be heard at various stages of criminal proceedings (ss 12.3, 12.5, 12.6, 12.8, 14.3, 19.8, 44.5(c)) as well as the right to request the review of a case if
dismissed (s 25). The transitional rules of criminal procedure include a number of gender sensitive provisions for victims' of sexual violence offences (ss 14.3(c), 34.3) and enable the prosecutor/court to take the interests of victims' into account in the prosecution and trial of cases (ss 7.3, 29A.4). The Regulation incorporates a number of protective/privacy measures for victims (ss 35.1, 36.8). The Regulation enables victim's to claim compensation by filing a civil claim and additionally empowers the court to order compensation as part of a disposition (s 49).

July 2001 to January 2006

Implementing Agreement and Mandate

UNTAET Regulation establishing a CAVR

- UNTAET Regulation 2001/10 establishing the Commission on Reception, Truth and Reconciliation (CAVR) (July 2001)

Mandated to operate for period of 24 months, extendable up to six months, the CAVR was empowered to serve three principal functions including truth seeking; a community reconciliation process; reporting of findings and recommendations in relation to violations committed in the context of political conflicts between 25 April 1974 and 25 October 1999


Explanatory Notes on Victim Provisions

In terms of substantive rights, the CAVR Regulation incorporates a comparatively expansive definition of victim, ensures a victim’s right to truth, and does not preclude a victim’s right to justice for serious crimes. The CAVR Regulation provides for an individualised reparation scheme whereby less serious criminal offenders could agree to provide reparation as part of a community reconciliation agreement (s 27.7). In terms of its broader truth seeking function, the CAVR was not expressly authorised to provide or recommend state reparation, although it could, in its reporting mandate, recommend measures that would ‘respond to the needs of victims of human rights violations’ (s 21.2).

The Regulation affords a number of procedural protections to victims’ vis-à-vis public hearings, authorising the Commission to use in camera proceedings and adopt special measures to accommodate the testimony of special victim groups (ss 16.2, 16.4). The Regulation incorporates fair treatment and privacy provisions (ss 35.1, 16.3) and required the Commission to adopt appropriate measures for victim and witness protection (s 36). The Regulation affords victims some
participatory rights, including the right of 'any victim with an interest in the proceedings' to be present at in camera hearings (s 16.2(b)). It also affords victims the right to be heard in community reconciliation proceedings (s 27.1) and to receive a copy of a community reconciliation agreement (s 29.1).

March 2002

Implementing Agreement and Mandate

UNTAET policy on justice and return:

- UNTAET Policy Paper/Statement on Justice and Return Procedures in East Timor

Clarified return and arrest procedures for lesser and serious crime.

Explanatory Notes on Victim Provisions

The policy on justice and return addresses victims only insofar as affirming existing CAVR community reconciliation procedures for lesser crimes.

May 2002

Implementing Agreement and Mandate

Constitution of the RDTL (20 May 2002)

- Part VII, final and transitional provisions of the 2002 Constitution of the Democratic Republic of Timor-Leste include serious crimes (S 160) and reconciliation provisions (S 162)

Transfers authority to the Government of Timor-Leste and provisionally continues the serious crimes and CAVR processes.

Explanatory Notes on Victim Provisions

The preamble recognises the resistance and pays tribute to 'all martyrs of the Motherland' but otherwise provides no express provisions for the protection of victim rights.
February to May 2005

Implementing Agreement and Mandate

UN Commission of Experts

Appointed by the Secretary-General and mandated to review the prosecution of serious violations of human rights committed in East Timor in 1999 including the Ad Hoc Human Rights Court for East Timor and the serious crimes regime in East Timor and recommend practical future measures.

Explanatory Notes on Victim Provisions

The Commission of Experts utilised ‘bringing justice to victims and giving victim’s a voice’ as part of their assessment criteria. In their recommendations, whilst recognising the right of victims to reparations, the Commission of Experts preference collective over individualised reparations.

August 2005 to July 2006

Implementing Agreement and Mandate

Bilateral Agreement (Indonesia-Timor Leste) establishing a Commission of Truth and Friendship (CTF)

Mandated to establish an historical record in relation to human rights violations committed up to and after the 1999 popular consultation.

Explanatory Notes on Victim Provisions

The CTF is not mandated to recommend reparation, although it can recommend measures to heal the wounds of the past and rehabilitate and restore human dignity.
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